

**THE ‘RIGHT TO REGULATE’ IN THE PUBLIC INTEREST
AND THE ‘POLICE POWER’ IN INTERNATIONAL
INVESTMENT LAW**



DPhil Thesis

Faculty of Law, University of Oxford

Candidate: Kate Mitchell, St Peter's College

Supervisor: Professor Dapo Akande

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ABSTRACT

This thesis examines the extent to which States can rely on their ‘right to regulate’ in the public interest or ‘police power’ in defence of the lawfulness of public interest regulation against claims of indirect expropriation and unfair and inequitable treatment. After examining the historical treatment of public interest regulation and the arguments advanced by States when defending such regulation, this thesis argues that customary international law recognises the police powers doctrine. In the case of indirect expropriation claims, proportionate or reasonable non-discriminatory regulation that is enacted in good faith for a public purpose falls within the State’s police power and will not constitute an indirect expropriation. The police powers doctrine is therefore relevant to determining whether a measure constitutes an indirect expropriation, and operates as a limitation on the scope a State’s obligation.

Further, this thesis argues that the language of ‘right to regulate’ is not particularly helpful (and is somewhat misleading) and States cannot rely on the right to regulate to defend the lawfulness of public interest regulation against claims of indirect expropriation and unfair and inequitable treatment. However, it is argued that the police powers doctrine is not limited in its application to expropriation, but rather it can also apply more broadly to the FET standard. Finally, the thesis proposes using the principles of treaty interpretation in the

Vienna Convention on the Law of Treaties to accommodate the police powers doctrine when interpreting expropriation and fair and equitable treatment provisions in international investment treaties.

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TABLE OF ABBREVIATIONS

The following abbreviations have been used frequently throughout the thesis:

1929 Conference	1929, League of Nations convened the International Conference on the Treatment of Foreigners
1929 Harvard Draft Convention	1929 Draft Convention on the International Responsibility for States for Injuries to Aliens contained in Edwin Borchard, 'Part II: Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners' (1929) 23 <i>Special Supplement to the American Journal of International Law</i> 133
1930 Conference	1930 League of Nations Conference on the Codification of International Law
1961 Harvard Draft Convention	1961 Draft Convention on Responsibility of States for Injuries to the Economic Interests of Aliens contained in Louis B Sohn and RR Baxter, 'Responsibility of States for Injuries to the Economic Interests of Aliens' (1961) 55 <i>American Journal of International Law</i> 545
BIT	Bilateral Investment Treaty
CAFTA-DR	<i>Dominican Republic – Central America – United States Free Trade Agreement</i> (signed 5 August 2004, entered into force 1 March 2006)
COMESA CIAA	<i>Common Market for Eastern and Southern Africa Common Investment Area Agreement</i> (signed 23 May 2007, not yet in force)
Draft Convention	1929 Draft Convention on the Treatment of Foreigners
ECHR	<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
ECtHR	European Court of Human Rights
EU-Canada	<i>EU-Canada Comprehensive Economic and Trade Agreement</i>

CETA	(signed 30 October 2016, not yet in force)
FCN Treaty	Friendship Commerce and Navigation Treaty
FET	Fair and Equitable Treatment
GATS	<i>General Agreement on Trade in Services</i> , 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Texts- Results of the Uruguay Round of Multilateral Trade Negotiations 284 (1999) 1869 UNTS 183
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
ICCPR	<i>International Covenant on Civil and Political Rights</i> (adopted by the General Assembly on 16 December 1966, entered into force 23 March 1976) 999 UNTS 171
ICESCR	<i>International Covenant on Economic, Social and Cultural Rights</i> (adopted by the General Assembly on 16 December 1966, entered into force 3 January 1976) 993 UNTS 3
ICJ	International Court of Justice
ICJ Statute	<i>Statute of the International Court of Justice</i>
IIT	International Investment Treaty
ILC	International Law Commission
MAI	OECD's Multilateral Agreement on Investment
MIGA Convention	<i>Convention Establishing the Multilateral Investment Guarantee Agency</i> (MIGA Convention) (opened for signature 11 October 1985, entered into force 12 April 1988) 1508 UNTS 90
NAFTA	<i>North American Free Trade Agreement</i> (signed 17 December 1992, entered into force 1 January 1994) (1994) 32 ILM 605
OECD	Organisation for Economic Co-Operation and Development

OPIC	United States Overseas Private Investment Corporation
PCIJ	Permanent Court of International Justice
<i>Restatement</i>	American Law Institute, <i>Third Restatement of the Law, the Foreign Relations Law of the United States</i> (American Law Institute Publishers 1987)
UDHR	<i>Universal Declaration of Human Rights</i> , UNGA Res 217 A(III), UN Doc. A/Res/217(III) (10 December 1948)
UK	United Kingdom
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
VCLT	<i>Vienna Convention on the Law of Treaties</i> (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331
WTO	World Trade Organisation

Cases cited in text have been referred to in full for the first use, but abbreviated thereafter. BITs that are only referred to in footnotes have been cited in full for first use and abbreviated thereafter but have not been reproduced in this table.

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CHAPTER ONE

INTRODUCTION

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.¹

International law has generally understood that regulatory activity understood under the so-called ‘police powers’ of the State is not compensable.²

In order to determine whether frustration of the foreign investor’s expectations was justified and reasonable, the host State’s right subsequently to regulate domestic matters in the public interest must be taken into consideration as well.³

But it will be borne in mind that there may be a broad difference between a right to exercise a power and the rightful exercise of that power.⁴

I. BACKGROUND TO THE RESEARCH QUESTION

The protection of foreign investment against abuse of State power is a central objective of international investment law. A key mechanism through which this objective has been realised is through international investment treaties (‘IITs’),

¹ Emer 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 1, Ch XX, 115.

² *Quiborax SA v Plurinational State of Bolivia*, ICSID Case No.Arb/06/2, Award, 16 September 2015, [202].

³ *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, [305].

⁴ *Boffolo Case* (Italian-Venezuelan Claims Commission) (1903) reprinted in (1960) 10 RIAA 528, 532; Guy S Goodwin-Gill, ‘The Limits of the Power of Expulsion in Public International Law’ (1976) 47 *British Yearbook of International Law* 55, 98.

pursuant to which States must observe certain standards of treatment to protect foreign investment and under which States agree to arbitrate disputes arising thereunder ('investor-State arbitration'). In broad terms, IITs aim to provide for a degree of stability, transparency and protection against arbitrary and excessive State conduct. Similarly, IITs in part ensure that States do not place too high a burden on foreign investors to contribute, without the payment of compensation, to the accomplishment of policy objectives for the benefit of a national community of which the investor is not a member.⁵ Prior to the proliferation of IITs and investor-State arbitration, the protection of foreign investment was addressed through the heavily contested customary international law rules concerning the treatment of foreigners (or aliens).⁶ This proliferation has shifted scholarly and judicial attention away from customary international law.

In recent years, there has been increasing criticism that IITs and investor-State arbitration, far beyond protecting against the *abuse* of State power, have increasingly encroached upon the *use* of State power. A considerable body of scholarship has explored this so-called 'legitimacy crisis'⁷ in and consequent

⁵ *Quasar de Valores SICAV SA v Russian Federation*, SCC No.24/2007, Award, 20 July 2012, [23].

⁶ See *Case Concerning Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3, Separate Opinion of Judge Jessup 161, 164-166.

⁷ See, for example, Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 *Fordham Law Review* 1521. For a critical view on the concept of 'legitimacy', see Christopher A Thomas, 'The Uses and Abuses of Legitimacy in International Law' (2014) 34 *Oxford Journal of Legal Studies* 729.

‘backlash’⁸ against international investment law. A variety of solutions have been proposed. These include suggesting that investor-State arbitration tribunals be more faithful to the international law rules on treaty interpretation,⁹ re-envisaging international investment law as a system governed by comparative or global public law,¹⁰ the adoption of standards of review by tribunals,¹¹ reform of IITs,¹² and

⁸ Michael Waibel and others (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010).

⁹ Andrea Saldarriaga, ‘Investment Awards and the Rules of Interpretation of the Vienna Convention: Making Room for Improvement’ (2013) 28 *ICSID Review* 197; Michael Waibel, ‘International Investment Law and Treaty Interpretation’ in Rainer Hofmann and Christian J Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Nomos 2011).

¹⁰ Andreas Kulick, *Global Public Interest in International Investment Law* (Cambridge University Press 2012); Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Bloomsbury Publishing 2009) 4; Stephan Schill, ‘Public Law Concepts to Balance Investors’ Rights with State Regulatory Actions in the Public Interest - the Concept of Proportionality’ in Stephan Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010); Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007).

¹¹ 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, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (Cambridge University Press 2015); Rahim Moloo 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); 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).

¹² Barnali Choudhury, ‘Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements’ (2010) 49 *Columbia Journal of Transnational Law* 670; Joshua Paine, ‘The Project of System-Internal Reform in International Investment Law: An Appraisal’ (2015) 6 *Journal of International Dispute Settlement* 332, 348–350; 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.

advocating State disengagement from investor-State arbitration altogether.¹³ It has also been at the forefront of State negotiations of recent multilateral regional trade and investment treaties,¹⁴ and has led to policy proposals from States and international organisations for greater safeguards for States to be able to enact measures in the public interest without attracting liability under an IIT.¹⁵

These concerns have been amplified by the types of disputes arising under IITs before investor-State arbitration tribunals and the multiple and varied types of State conduct that have been scrutinised by such tribunals. Tribunals have been required to assess the lawfulness of regulatory measures purportedly enacted for public interest objectives, including affirmative action policies,¹⁶ public health measures restricting the advertising of tobacco products,¹⁷ the phase-out of

¹³ 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, 'Public Statement on the International Investment Regime' (2010) <<http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/>> accessed 13 January 2015.

¹⁴ For example, Australia's negotiating position in the negotiations for the Trans-Pacific Partnership: Department of Foreign Affairs and Trade, 'Trans-Pacific Partnership Agreement. Outcomes: Investment' (*Department of Foreign Affairs and Trade*) <<http://dfat.gov.au/trade/agreements/tpp/outcomes-documents/Pages/outcomes-investment.aspx>> accessed 25 June 2016 which provides that "The [proposed investor-State arbitration] mechanism contains explicit safeguards protecting the Australian Government's right to regulate in the public interest".

¹⁵ For example, 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.

¹⁶ *Foresti et al v Republic of South Africa*, ICSID Case No. Arb(AF)/07/1, Award, 4 August 2010.

¹⁷ *Philip Morris Asia Limited v Commonwealth of Australia*, PCA Case No.2012-12, Award on Jurisdiction and Admissibility, 17 December 2015; *Philip Morris Brands Sàrl v Oriental Republic of Uruguay*, ICSID Case No. Arb/10/7, Award, 8 July 2016.

nuclear energy,¹⁸ environmental regulations,¹⁹ and the protection of cultural heritage.²⁰

Investor-State arbitration tribunals are thus adjudicating disputes ‘that bear directly on profound questions of the allocation of power and authority’.²¹ In doing so, many tribunals have considered the extent to which public interest regulation can constitute a violation of an IIT, and the rights or powers of States to enact such regulation without attracting liability (‘regulatory powers’). Two concepts in particular are raised when considering States’ regulatory powers: the ‘police power’ of States and States’ ‘right to regulate’ in the public interest.

An oft-cited example of such consideration is the decision of the Tribunal in *Methanex v United States of America*, where it was stated that:

As a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and which affects, *inter alios*, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments have been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.

¹⁸ *Vattenfall AB and Others v Federal Republic of Germany*, ICSID Case No. Arb/12/12.

¹⁹ *Ethyl Corporation v Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1998; *SD Myers v Government of Canada*, UNCITRAL, Partial Award, 13 November 2000.

²⁰ *Glamis Gold Ltd v United States of America*, UNCITRAL, Award, 8 June 2009.

²¹ Vaughan Lowe, ‘Regulation or Expropriation?’ [2002] *Current Legal Problems* 448, 466; see also Paul Barker, ‘Legitimate Regulatory Interests: Case Law and Developments in IIA Practice’ in Andreas Kulick (ed) *Reassertion of Control over the Investment Treaty Regime* (Cambridge University Press 2017) 230.

...From the standpoint of international law, the [regulation]...was a lawful regulation and not an expropriation.²²

The principle espoused by the *Methanex* Tribunal in the passage above is often referred to as the ‘police powers doctrine’.²³

Similarly, in *Un glaube v Costa Rica*, the Tribunal stated in the context of a fair and equitable treatment (‘FET’) claim:

...[T]o prove a breach of the [FET] standard a claimant must show more than mere legal error. Instead... the evidence must establish actions or decisions which are “manifestly inconsistent, non-transparent, [or] unreasonable (*i.e.* unrelated to some rational policy)”...Where, however, a valid public policy *does* exist, especially where the action or decision taken relates to the State’s responsibility “for the protection of public health, safety, morals or welfare, as well as other functions related to taxation and police powers of states”, such measures are accorded a considerable measure of deference in recognition of the right of domestic authorities to regulate matters within their borders.²⁴

The foregoing passages can be construed in various ways. On one construction, whether a measure is lawful regulation enacted pursuant to a State’s police power or right to regulate is irrelevant, as the inquiry is directed towards whether a State has respected its obligations under an IIT.²⁵ Pursuant this approach, the issue is whether the measure breaches the IIT on the basis that it

²² *Methanex Corporation v United States of America*, UNCITRAL, Final Award, 3 August 2005, Part IV, Chapter D, [7], [15].

²³ See further Chapter Four.

²⁴ *Marion Un glaube and Reinhard Un glaube v Republic of Costa Rica*, ICSID Case No.Arb/08/1 and ICSID Case No.Arb/09/20, Award, 16 May 2012, [246] quoting *Saluka* (n 3) [309]; *SD Myers* (n 19) [263]; and American Law Institute, *Third Restatement of the Law, the Foreign Relations Law of the United States* (American Law Institute Publishers 1987).

²⁵ *Quiborax* (n 2) [89]; *Achmea BV v Slovak Republic*, PCA Case No.2008-13, Final Award, 17 December 2012, [294].

constitutes, for example, an expropriation or violates the principle of FET. The fact that the measure is cast in the form of public interest regulation or is enacted pursuant to a particular right or power is not relevant. This approach focuses on the obligation under the IIT and the investor's rights. Such an approach is an obvious starting point in analysing whether a measure constitutes a breach of an IIT; the focus of a decision-maker considering the dispute is necessarily framed around the treaty provision that is allegedly violated, particularly as States often invoke their right to regulate or police power as a justification for conduct that is alleged to have violated an IIT.

The other construction, as the passage in *Methanex* quoted above indicates, is that the question of what constitutes indirect expropriation is answered by stating that the measure is, instead, lawful regulation. Therefore, to focus on whether something is indirect expropriation brings one back to question of whether it is lawful regulation, as if the two concepts are viewed as opposite sides of the same coin. Similarly in *Un glaube*, the exercise of a domestic authority's right to regulate through the enactment of regulation achieving (or aiming to achieve) a public policy objective was considered to be something to which tribunals should accord deference. Thus, the characterisation of a measure as being enacted pursuant to a right to regulate or police power is often significant in determining whether public interest regulation is a breach of a State's obligations under an IIT. This approach focuses on the nature of a State's rights under general international law.

II. THE RESEARCH QUESTION

This thesis answers the following question: to what extent can States rely on their right to regulate in the public interest or police power in defence of the lawfulness of public interest regulation against claims of indirect expropriation and unfair and inequitable treatment?

This thesis will explore four inquiries that underlie this research question. The first of these involves a critical analysis of the concepts of ‘police power’ and ‘right to regulate’ to determine whether States possess a right to regulate in the public interest or police power under international law. The second and related inquiry is the extent to which the right to regulate and police power are synonymous concepts and whether the distinction between the concepts is justified. The third inquiry is how the right to regulate and police power operates (and should operate) in the resolution of claims under IITs. The fourth and subsequent inquiry is to examine how the police power and right to regulate can be applied with greater consistency and clarity to the resolution of IIT claims by investor-State arbitration tribunals. In doing so, this thesis does not examine whether international investment law, as a matter of *fact*, hinders or limits the ability of States to regulate (this is often referred to as ‘regulatory chill’).²⁶ Rather,

²⁶

For examinations of the concept of regulatory chill from a law and economics and political science perspective, see Olivier De Schutter, Johan Swinnen and Jan Wouters (eds), *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements* (Routledge 2013); Kyla Tienhaara, ‘Regulatory Chill and the Threat of Arbitration: A View from Political Science’ in Kate Miles and Chester

this thesis seeks to ‘determine whether a concept is known to a system of law...and whether, within that system, a particular meaning attaches to it’.²⁷

III. JUSTIFICATION FOR RESEARCH

There are several justifications for these inquiries. First, shifting focus toward States’ rights and the limits of these rights may provide greater clarity to tribunals seeking to resolve disputes concerning alleged breaches of IITs, and allow for more consistent reasoning. Vaughan Lowe echoed this view when he stated:

The question might be viewed as a matter of the limits of investors’ *rights*, and of the correlative duties of the host State. Alternatively, it might be seen as a matter of the limitations upon the exercise of governmental *powers*. The difference in perspective is unlikely to lead to any significant differences in the actual outcome of cases; but it may, in some cases, make it easier to engage in principled reasoning towards the outcome.²⁸

The second justification is that the plethora of scholarship and case law that has considered the right to regulate and the police power has used different language to describe the same or similar issues, and greater consistency of language is desirable. Reference is made in scholarship to the ‘right to regulate’²⁹

Brown (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011).

²⁷ *Fisheries Jurisdiction Case (Spain v Canada)* [1998] ICJ Rep 432, [68].

²⁸ Lowe (n 21) 457-458.

²⁹ 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; National Board of Trade of Sweden, ‘*The Right to Regulate*’ in the Trade Agreement between the EU and Canada - and Its Implications for the Agreement with the USA (National Board of Trade 2015); Jan Paulsson, ‘Indirect Expropriation: Is the Right to Regulate at Risk?’ (2006) 3 *Transnational Dispute Management*; Brigitte Stern, ‘The Future of International Investment Law: A Balance

and ‘police power’³⁰ but also to ‘regulatory autonomy’,³¹ ‘policy space’,³² and ‘sovereignty’.³³ Thus, notwithstanding that the right to regulate and police power (or similar phrases) are often articulated as being axiomatic or self-evident,³⁴ the expressions are rarely explored in depth. This is not a new phenomenon. In 1925, writing on the then-topical subject of ‘domestic jurisdiction’, JL Brierly wrote of

Between the Protection of Investors and the States’ Capacity to Regulate’ in José Alvarez and others (eds), *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford University Press 2011); Joel P Trachtman, *The International Economic Law Revolution and the Right to Regulate* (Cameron May 2006); Catharine Titi, *The Right to Regulate in International Investment Law* (Nomos 2014); Katia Yannaca-Small, ‘Indirect Expropriation and the Right to Regulate: How to Draw the Line?’ in Katia Yannaca-Small, *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2010).

³⁰ Alain Pellet, ‘Police Powers and State’s Right to Regulate’ in Meg N Kinnear and Geraldine Fischer (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International 2015); Jeffrey Waincymer, ‘Investor-State Arbitration: Finding the Elusive Balance between Investor Protection and State Police Powers’ (2014) 17 *International Trade and Business Law Review* 261.

³¹ Stephanie Bijlmakers, ‘Effects of Foreign Direct Investment Arbitration on a State’s Regulatory Autonomy Involving the Public Interest’ (2012) 23 *American Review of International Arbitration* 245; Jürgen Kurtz, ‘National Treatment, Foreign Investment and Regulatory Autonomy: The Search for Protectionism or Something More?’ in Thomas Wälde and Philippe Kahn (eds), *New Aspects of International Investment Law* (Martinus Nijhoff 2007).

³² Jan Kleinheisterkamp, ‘European Policy Space in International Investment Law’ (2012) 27 *ICSID Review* 416; Spears (n 12).

³³ Julia Huecknel, ‘Rebalancing Legitimacy and Sovereignty in International Investment Agreements’ (2012) 61 *Emory Law Journal* 601; Joachim Karl, ‘International Investment Arbitration: A Threat to State Sovereignty?’ in Wenhua Shan, Penelope Simons and Salvinder Singh (eds), *Redefining Sovereignty in International Economic Law* (Hart Publishing 2008); Jorge Viñuales, ‘Sovereignty in Foreign Investment Law’ in Zachary Douglas, Joost Pauwelyn and Jorge Viñuales (eds), *The Foundations of International Investment Law* (Oxford University Press 2014).

³⁴ Frederick Sherwood Dunn, ‘International Law and Private Property Rights’ (1928) 28 *Columbia Law Review* 166, 171; Pedro J Martinez-Fraga and C Ryan Reetz, *Public Purpose in International Law: Rethinking Regulatory Sovereignty in the Global Era* (Cambridge University Press 2015).

the challenges presented by ‘catchwords’ in international law ‘about which little seems to be generally known except [their] extreme sanctity’.³⁵ He continued:

Unfortunately, international law, doubtless because it attempts to regulate interests which engage the emotions and the prejudices of masses of men, has always been peculiarly susceptible to the tyranny of phrases...³⁶

The diversity of language used to describe the right to regulate and police power suggests that Brierly’s concern about the ‘tyranny of phrases’ applies with equal force to the topic explored in this thesis. Consistent with Brierly’s approach of ‘elucidat[ing] the meaning of this formidable newcomer, and then...estimat[ing] the significance of its arrival for the future of the subject’,³⁷ this thesis aims to distil and clarify some of this diverse language.

Thirdly, there are conflicting analyses of whether the right to regulate or police power of States can be invoked as exceptions to IIT claims,³⁸ as a principle to which tribunals must defer in their decision making,³⁹ or as a relevant factor in

³⁵ James-Leslie Brierly, ‘Matters of Domestic Jurisdiction’ (1925) 6 *British Yearbook of International Law* 8.

³⁶ *ibid* 8.

³⁷ *ibid*.

³⁸ For example, Pellet (n 30) who refers to the police powers ‘exception’. See further Chapter Four, Part III(4) below.

³⁹ Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (n 11); 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).

determining the scope of an obligation.⁴⁰ Further, while the existence of the right to regulate and police power are very rarely questioned, there has been limited discussion as to the legal basis of any such right or power from a rules-based, sources of law perspective. The police powers doctrine, for instance, is often asserted to reflect customary international law, but there is limited analysis as to the State practice and *opinio juris* supporting any such customary principle and, further, how a customary principle would apply to a treaty dispute.⁴¹ This has led some scholars, such as Jürgen Kurtz, to conclude that such concepts have only been explored through ‘poor and selective methodological and doctrinal claims’ of tribunals, and that further analysis is warranted to establish ‘a normative proposition’ as to the customary international law.⁴² Frank Berman similarly noted the ‘heavy burden to be borne’ in establishing customary international law norms that protect the public interest.⁴³ There has been a perception that customary law rules that ‘push crudely in favour of respondent states’⁴⁴ may be used by States to avoid obligations entered into under IITs, and that the police power or right to

⁴⁰ Viñuales, ‘Sovereignty in Foreign Investment Law’ (n 33) 336-339.

⁴¹ The exception to this is Viñuales, who has argued that the police powers doctrine has a basis in customary international law and that the doctrine in principle applies more broadly than expropriation Viñuales, ‘Sovereignty in Foreign Investment Law’ (n 33) 329. See further Chapter Four, Part III and Chapter Seven below.

⁴² Jürgen Kurtz, ‘Building Legitimacy Through Interpretation in Investor-State Arbitration: On Consistency, Coherence and Identification of Applicable Law’ in Zachary Douglas, Joost Pauwelyn and Jorge Viñuales (eds), *The Foundations of International Investment Law* (Oxford University Press 2014) 295.

⁴³ Frank Berman, ‘Evolution or Revolution?’ in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 664.

⁴⁴ Kurtz (n 42) 295.

regulate could be a shorthand for absolute power or discretion.⁴⁵ This thesis seeks to overcome these criticisms by considering whether the concepts are reflected in customary international law and, if so, how they operate.

IV. DEFINING 'PUBLIC INTEREST REGULATION'

The concepts of 'regulation', 'public interest', and 'public interest regulation' are broad concepts. 'Regulation' in this thesis is defined as 'the process of influencing, controlling and guiding economic or other private activities with impacts on others through various governmental policies and measures'.⁴⁶ In this sense, 'regulation' could include a wide variety of State conduct.⁴⁷ Of particular relevance in this thesis is regulation that purports to fulfil a public interest objective (such as public health or protection of the environment) and has an impact on a foreign investment that falls short of directly confiscating title to the property. In such a case, the primary objective of the regulation may be non-economic (for instance, the protection of public health), but the regulation may, in its effect, impact economic interests of foreign investors.

There are two types of regulation that have been challenged by foreign investors pursuant to IITs that implicate the right to regulate and police power.

⁴⁵ Dunn (n 34) 171.

⁴⁶ Markus Krajewski, *National Regulation and Trade Liberalization in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (Kluwer Law International 2003) 4.

⁴⁷ Céline Lévesque, 'Les Fondements de La Distinction Entre L'expropriation et La Réglementation En Droit International' (2003) 33 *Revue Général de Droit* 39, 41.

The first concerns legislation, which has long been described as one of ‘the most obvious exercises of sovereign power’.⁴⁸ The tobacco control legislation introduced by the Australian and Uruguayan governments respectively are examples of this category of regulation. Both States were respondents to claims by the Philip Morris group of companies in separate proceedings. In the Australian case, the Australian Government introduced ‘plain packaging’ legislation in 2011,⁴⁹ the objective of which was to prohibit the display on tobacco products and their packaging of all tobacco company logos and images, so as to protect the public health of Australia’s population.⁵⁰ In its claim, Philip Morris asserted that the plain packaging laws ‘fundamentally contradict[ed]’ the aims of the Bilateral Investment Treaty (‘BIT’) between Australia and Hong Kong to create favourable conditions for investment and further contravened various provisions of the BIT, including the expropriation and FET provisions.⁵¹ Australia disputed this assertion, submitting that the measures constituted ‘a legitimate exercise of the Australian Government’s regulatory powers to protect the health of its citizens’.⁵² The case

⁴⁸ *Legal Status of Eastern Greenland (Denmark v Norway)* (1933) PCIJ Rep Series A/B No.53, 48; FA Mann, ‘The Doctrine of Jurisdiction in International Law’ (1964) 111 *Recueil des Cours* 1, 13; Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press 2007) 4.

⁴⁹ See the *Tobacco Plain Packaging Act 2011* (Cth). The legislation has survived constitutional challenge before Australian courts: *JT International SA v Commonwealth of Australia* [2012] HCA 43 (5 October 2012).

⁵⁰ See *Philip Morris Asia Limited v Commonwealth of Australia*, Australia’s Response to the Notice of Arbitration, 21 December 2011.

⁵¹ *Philip Morris Asia Limited v Commonwealth of Australia*, Notice of Arbitration, 21 November 2011, [7.1], [28].

⁵² *Philip Morris v Australia*, Australia’s Response to Notice of Arbitration (n 50) [3], [38].

was dismissed at the jurisdictional stage as an abuse of process.⁵³ The Uruguayan government successfully defended legislation that mandated 80% of the front and back of cigarette packaging must contain a health warning and legislation that banned the display of brand variants.⁵⁴

Disputes concerning this first type of public interest regulation form only a small proportion of the overall number of investor-State arbitrations. One study concluded that less than 7% of concluded investment disputes (as at September 2013) concerned decisions of legislative branches.⁵⁵ This relatively small figure has led some scholars to conclude that the criticisms of investor-State arbitration as encroaching upon sovereignty are exaggerated.⁵⁶ However, it could equally be argued that *any* challenges by investors to this ‘obvious [exercise] of sovereign power’ are sufficient to raise concerns about the impact of investment law on the right to regulate, insofar as an international tribunal is called upon to decide significant questions connected to the exercise of domestic public authority. Furthermore, the small proportion of claims of this type within the overall system also should not be seen as being equivalent to a small impact on the particular host State tasked with responding to such claims. For instance, the Australian

⁵³ *Philip Morris v Australia* (n 17).

⁵⁴ *Philip Morris v Uruguay* (n 17). This case will be discussed in greater depth in Chapters Four, Five and Six.

⁵⁵ Jeremy Caddel and Nathan Jensen, ‘Which Host Country Government Actors Are Most Involved in Disputes with Foreign Investors?’ (2014) 120 *Columbia FDI Perspectives* 2.

⁵⁶ *ibid*; Ursula Kriebaum, ‘Investment Tribunals and Human Rights’ (Lauterpacht Centre Friday Lecture, University of Cambridge, 1 May 2015) 10.

plain packaging dispute reportedly cost the Australian government in excess of AUD\$50 million in defence costs even before the commencement of the hearing.⁵⁷ It has also fuelled a parliamentary inquiry investigating the feasibility and legitimacy of Australia's inclusion of investor-State arbitration mechanisms within its IITs,⁵⁸ and precipitated continuing shifts in government policy.⁵⁹

The second type of regulation is more individualised than the first, and concerns specific measures enacted pursuant to general legislation or a regulatory framework that impact the administrative operation of the investment. Whereas the first type of measure generally stems from the legislative branch of government, this second type of measure can be characterised as administrative, stemming primarily from the executive branch of government.⁶⁰ This would include, for example, the cancellation or denial of a licence or permit on

⁵⁷ '\$50 Million Goes up in Smoke Defending Plain Packaging' (*The Sydney Morning Herald*, 28 July 2015) <<http://www.smh.com.au/federal-politics/political-news/australia-faces-50m-legal-bill-in-cigarette-plain-packaging-fight-with-philip-morris-20150728-gim4xo.html>> accessed 6 August 2015.

⁵⁸ Senate Standing Committee on Foreign Affairs Defence and Trade, 'Inquiry into the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014' (Commonwealth of Australia 2014) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Trade_and_Foreign_Investment_Protecting_the_Public_Interest_Bill_2014/Report> accessed 25 August 2015..

⁵⁹ Compare: Minister for Trade, 'Gillard Government Reforms Australia's Trade Policy' (12 April 2011) <http://trademinister.gov.au/releases/2011/ce_mr_110412.html> accessed 25 August 2015; with Department of Foreign Affairs and Trade, 'Investor-State Dispute Settlement' (2015) <<http://dfat.gov.au/trade/topics/pages/isds.aspx>> accessed 25 August 2015.

⁶⁰ Caddel and Jensen (n 55).

environmental grounds,⁶¹ or an executive ban on the use, importation or export of a particular chemical on public health grounds.⁶² Again, the focus lies on those measures that do not amount to outright confiscation of title. Administrative regulation tends to be enacted pursuant to a broader policy objective (such as environmental protection) and in this regard apply to foreign investors and domestic businesses alike, although their impact is individualised. Measures of this type intend to target the business environment, rather than the investment itself.⁶³ Administrative public interest regulation disputes involving the executive branch of a government comprise 48% of completed ICSID disputes,⁶⁴ and thus are far more common than disputes relating to legislative public interest regulation.

A reference to ‘public interest regulation’ in thesis should be read as a reference to these two types of regulation. In scholarship and case law, reference to ‘regulatory measures’ is also used interchangeably with ‘regulation’, and therefore the language of ‘regulatory measures’ also appears throughout this thesis and should be read as having the same meaning as ‘public interest regulation’.

⁶¹ *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v Government of Canada*, UNCITRAL, Award on Jurisdiction and Liability, 17 March 2015.

⁶² *Chemtura Corporation v Government of Canada*, UNCITRAL, Award, 2 August 2010.

⁶³ *Mamidoil Jetoil Greek Petroleum Products Societe SA v Republic of Albania*, ICSID Case No.Arb/11/24, Award, 30 March 2015, [727].

⁶⁴ Caddel and Jensen (n 55).

V. THE EXISTING SCHOLARSHIP

As noted earlier, there has been a proliferation of scholarship that has highlighted different aspects of, and offered different solutions to the impact of international investment law on States' regulatory powers. This section will situate the thesis within this recent international law scholarship. Further historical writings of eminent publicists and learned societies will be discussed in Chapters Two and Three.

1. 'Right to Regulate' Scholarship

The expression 'right to regulate' is frequently cited in the scholarship.⁶⁵ However, within this scholarship, the expression is very rarely defined or, where it is defined, it is defined in a way that is conceptually different to its meaning in this thesis.

Catharine Titi's *The Right to Regulate in International Investment Law* describes the right to regulate as a relatively new phenomenon⁶⁶ that has its 'primary manifestation'⁶⁷ in the text of an IIT. Titi defines the right to regulate as follows:

...the right to regulate denotes the legal right exceptionally permitting the host state to regulate in derogation of international

⁶⁵ See above n 29.

⁶⁶ Catharine Titi, 'Le "Droit de Réglementer" et Les Nouveaux Accords de l'Union Européenne Sur l'Investissement' [2015] *Journal du Droit International* 39, 43.

⁶⁷ Titi (n 29).

commitments it has undertaken by means of an investment agreement without incurring a duty to compensate.⁶⁸

One of the primary conclusions Titi draws is:

...despite the fact that arbitral tribunals have not always been deaf and blind to host states' legitimate interests, in the absence of an express right to regulate, the wide cast of existing interpretations does not permit the deduction that tribunals accommodate host state policy space.⁶⁹

The approach in this thesis differs from Titi's work in several important respects. First, whereas Titi's work characterises the right to regulate as one that is 'exceptional'⁷⁰ and which 'derogates from international commitments',⁷¹ this thesis questions the language and concept of the right to regulate and, to the extent States' regulatory powers are acknowledged in international law, concludes that those powers are not an *exception* to international investment obligations. Secondly, whereas Titi considers that the right to regulate finds support in the text of treaties, this thesis focuses on States' regulatory powers under customary international law, and how such powers may interact with IITs.

Lone Mouyal's *International Investment Law and the Right to Regulate, a Human Rights Perspective* focuses on the 'collision of two legal regimes of international law, the international investment law regime and the human rights regime' and also considers the 'determination of the nature and scope of the right

⁶⁸ *ibid* 33.

⁶⁹ *ibid* 289.

⁷⁰ *ibid* 33.

⁷¹ *ibid*.

to regulate'.⁷² Mouyal defines the right to regulate as 'the authority of states to adopt regulation, i.e. to make deliberate changes' which is an 'affirmation of the sovereign right for states to choose their political, social and economic priorities'.⁷³ Mouyal further defines the police power as equating to 'public policy space of host states', that is, the scope to which States may regulate without violating international law.⁷⁴ In Mouyal's view, it is inadequate to view international investment law through the lens of traditional international law.⁷⁵ Mouyal instead considers instead that IITs should be interpreted in accordance with her 'theory of gravitational pull', which provides that treaties should be interpreted in a harmonising manner with human rights obligations based on a positive presumption that general principles of law apply and a negative presumption against inconsistency.⁷⁶ The theory also proposes taking into account the particular context of the case, including avoidance of 'catastrophic consequences for the host state and its population'.⁷⁷

This thesis also differs from Mouyal's analysis in several respects. This thesis argues that public international law principles (such as the principles governing the formation of customary international law and the principles of

⁷² Lone Wandahl Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective* (Routledge 2016) 21.

⁷³ *ibid* 30.

⁷⁴ *ibid*.

⁷⁵ *ibid* 333-334.

⁷⁶ *ibid* 103-105, 339.

⁷⁷ *ibid*.

treaty interpretation) are a sufficient prism through which to conceptualise States' regulatory powers in international investment law.⁷⁸ In particular, while the development of international human rights law has impacted the development of international investment law,⁷⁹ this thesis considers that the principles of treaty interpretation under the *Vienna Convention on the Law of Treaties* ('VCLT')⁸⁰ allow for sufficient accommodation of public interest concerns.⁸¹ Further, whereas Mouyal's analysis uses only the law of expropriation as a case study of how international investment law considers the right to regulate, this thesis additionally examines the FET standard.

Alain Pellet has defined the right to regulate by adopting Catherine Titi's definition,⁸² and includes the police power within that definition. He argues that 'it was not until the eve of the 21st century, that the police powers doctrine was recognised in a number of investment cases',⁸³ characterises the effect of the doctrine as 'ruling out a claim for compensation in case of expropriation',⁸⁴ rejects

⁷⁸ As to the relevance of public international law generally to international investment law, see Martins Paparinskis, 'Masters and Guardians of International Investment Law: How to Play the Game of Reassertion' in Andreas Kulick (ed) *Reassertion of Control over the Investment Treaty Regime* (Cambridge University Press 2017) 30-33.

⁷⁹ See Chapter Three, Part III.

⁸⁰ *Vienna Convention on the Law of Treaties* (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 ('VCLT').

⁸¹ See Chapter Seven.

⁸² Pellet (n 30).

⁸³ *ibid* 451.

⁸⁴ *ibid* 461.

its application outside of the context of expropriation,⁸⁵ and advocates the use of a proportionality test to introduce greater predictability in the application of the doctrine. Pellet's analysis is relevant to Chapter Four of this thesis, in the context of expropriation, and Chapter Six in the context of the general applicability of the police powers doctrine. However, this thesis draws different conclusions from the cases discussed by Pellet.

Joel Trachtman has explored the right to regulate in the context of international economic law.⁸⁶ His selected articles focus on 'the degree to which international law purports to reach into the domestic legal system – the *domaine réservé* – to restrict the regulatory authority of states'.⁸⁷ His analysis assumes that the right to regulate cannot be unrestrained in an international economic law context.⁸⁸ Thus, since 'the purpose of all international law is to constrain the sovereign authority of states',⁸⁹ the focus of Trachtman's analysis is on the 'scope of the constraint'.⁹⁰ However, his analysis does not ultimately draw general conclusions about the scope of the constraint on the right to regulate, and what such constraints may say about the right to regulate.

⁸⁵ *ibid* 456.

⁸⁶ Trachtman (n 29); Joel P Trachtman, 'International Legal Control of Domestic Administrative Action' (2014) 17 *Journal of International Economic Law* 753.

⁸⁷ Trachtman (n 29) 11.

⁸⁸ *ibid*.

⁸⁹ *ibid*.

⁹⁰ *ibid*.

Through examination of the substantive standards of protection of expropriation and FET, this thesis undertakes a similar analysis in Chapters Four and Five to that envisaged by Trachtman in exploring ‘the scope of the constraint’, although the context of application is international investment law, rather than international trade law. However, this thesis goes further in its examination of the right to regulate by seeking to define the concept and determine its relevance to IIT claims.

2. International Investment Law, Public Law and Standards of Review

The approach in this thesis also differs from the approach that has become increasingly popular in investment law scholarship, which is to focus on public law principles and their potential role in international investment law.⁹¹

Andreas Kulick’s *‘Global Public Interest in International Investment Law’* describes the ‘public interest challenge’, which he defines as the need for including public interest concerns (such as human rights, corruption, and the environment) ‘within the realm of international investment law’.⁹² According to Kulick, ‘[t]he present legal framework offers the host State only very limited options to pursue

⁹¹ Foster (n 11); Moloo and Jacinto (n 11); Roberts, ‘The Next Battleground: Standards of Review in Investment Treaty Arbitration’ (n 11); Schill, ‘Public Law Concepts to Balance Investors’ Rights with State Regulatory Actions in the Public Interest - the Concept of Proportionality’ (n 10); Stephan Schill, ‘Deference in Investment Treaty Arbitration: Re-Conceptualizing the Standard of Review’ (2012) 3 *Journal of International Dispute Settlement* 577; Esmé Shirlow, ‘Deference and Indirect Expropriation Analysis in International Investment Law Observations on Current Approaches and Frameworks for Future Analysis’ (2014) 29 *ICSID Review* 595; Van Harten (n 10); Gus Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (Oxford University Press 2013).

⁹² Kulick (n 10) 2.

[public] interests'.⁹³ This is because, according to Kulick, investor rights serve as 'trump cards' and enjoy 'primacy and supremacy over domestic law'.⁹⁴

Kulick argues that to counter this alleged imbalance, the way in which public interest concerns will 'play out doctrinally is through defences the host State may raise against investor rights infringements claimed by the investor'.⁹⁵ Kulick further argues that international investment law has an inherently public law character, the specific nature of which cannot be explained by classical public international law. He advocates proportionality analysis as the tool to use to balance the public interest with the interests of the investor.⁹⁶ Kulick does not seek to describe what the 'global public interest' is but rather 'how to legally translate it and reconcile it with competing investor rights'.⁹⁷

Caroline Henckels explores the role of proportionality and deference in investor-State arbitration when questions of States' 'regulatory autonomy' are at stake. She considers that 'decisions of investment tribunals can significantly affect the regulatory autonomy of States'.⁹⁸ She further argues that investor-State

⁹³ *ibid* 1; Andreas Kulick, 'Sneaking Through the Backdoor - Reflections on Public Interest in International Investment Arbitration' (2013) 29 *Arbitration International* 435, 435.

⁹⁴ *Kulick* (n 10) 2.

⁹⁵ *ibid* 3.

⁹⁶ *ibid* 4.

⁹⁷ *ibid* 3.

⁹⁸ Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (n 11) 1.

arbitration tribunals should exercise deference when considering questions related to States' regulatory autonomy:

Provided that a measure does not pursue a discriminatory, protectionist or otherwise impermissible objective, this rationale for deference suggests that investment tribunals should display restraint and refrain from second-guessing the importance of the objective or the desired level of protection or achievement of it.⁹⁹

Santiago Montt's '*State Liability in Investment Treaty Arbitration*' similarly presents international investment law as 'a form of public law adjudication'.¹⁰⁰ He argues that 'general international law has hitherto not had to deal with questions related to control of the regulatory state, and thus lacks a coherent doctrinal basis for consistent and rational decision making'.¹⁰¹ He characterises international investment law as different to traditional public international law, as the former gives private actors the right to sue sovereign States whereas the latter deals with more traditional inter-State disputes. As a consequence, reliance cannot be placed 'on rules and principles created by public international law',¹⁰² leaving tribunals with 'no other alternative than having recourse to comparative law'.¹⁰³

⁹⁹ Caroline Henckels, 'The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration' in Lukasz Gruszczynski and Wouter Werner (eds), *Deference in International Courts and Tribunals* (Oxford University Press 2014) 125; See further Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (n 11).

¹⁰⁰ Montt (n 10) 4.

¹⁰¹ *ibid* 299–300, 343.

¹⁰² *ibid* 343.

¹⁰³ *ibid* 344.

The scholarship discussing the incorporation of standards of review from domestic public law systems has been extensive, but it has not achieved much attention in case law. While some tribunals have noted the deference with which they must treat the States' right to regulate,¹⁰⁴ others have considered that notions of deference are present within the standards of investment protection as stated without the need for an additional deferential approach.¹⁰⁵ This thesis builds on this latter point, exploring whether the standards of investment protection themselves incorporate respect for States' regulatory powers. Thus, in contrast to Kulick's approach, this thesis does not proceed on the basis of assumed competition of public interests and investor interests. In contrast to Montt, this thesis does not consider that resort to comparative law approaches is necessary to resolve issues between States and foreign investors. Rather, it will be argued in Chapter Seven that principles of treaty interpretation in the VCLT can assist in balancing investor interests and public interests without having to import notions from comparative public law to resolve the debate.

3. Investment Tribunals and Procedural Issues

While investor-State arbitration pursuant to IITs concerns the interpretation and application of public international law instruments (treaties), the procedural rules and enforcement mechanisms of arbitration derive from international commercial

¹⁰⁴ *Un glaube* (n 24) [246]; *Philip Morris v Uruguay* (n 17) [399].

¹⁰⁵ *Glamis Gold* (n 20) [617].

arbitration, a private system.¹⁰⁶ It is thus described as having ‘hybrid’ foundations.¹⁰⁷

As a consequence of these hybrid foundations, there is also scholarship devoted to the structure and procedures of investor-State arbitration, and to whether such structures and procedures are appropriately equipped to deal with investor-State disputes concerning public interest regulation.¹⁰⁸ For instance, there is scholarship devoted to the incorporation of *amicus curiae* submissions and procedural reforms, such as public hearings, so that tribunals have broader scope to consider public interest issues and that stakeholders have broader access to proceedings.¹⁰⁹ This thesis primarily focuses on the substantive obligations to protect investment, rather than structural or procedural issues.

¹⁰⁶ Anthea Roberts, ‘Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System’ (2013) 107 *American Journal of International Law* 45.

¹⁰⁷ Zachary Douglas, ‘The Hybrid Foundations of Investment Treaty Arbitration’ (2003) 74 *British Yearbook of International Law* 151.

¹⁰⁸ Eric De Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (Cambridge University Press 2014); Nicolas Hachez and Jan Wouters, ‘International Investment Dispute Settlement in the Twenty-First Century: Does the Preservation of the Public Interest Require an Alternative to the Arbitral Model?’ in Freya Baetens (ed), *International Investment Law within International Law: Integrationist Perspectives* (Cambridge University Press 2013) 424–425; Stephan Schill, ‘Public or Private Dispute Settlement? The Culture Clash in Investment Treaty Arbitration and Its Impact on the Role of the Arbitrator’ in Todd Weiler and Freya Baetens (eds), *New Directions in International Economic Law* (Martinus Nijhoff 2011); Thomas Wälde, ‘Procedural Challenges in Investment Arbitration under the Shadow of the Dual Role of the State’ (2010) 26 *Arbitration International* 3.

¹⁰⁹ De Brabandere (n 108) Chapter Five; James Harrison, ‘Human Rights Arguments in Amicus Curiae Submissions: Promoting Social Justice?’ in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009); Sarah Schadendorf,

4. Customary International Law in International Investment Law

There is a growing body of scholarship addressing the impact that IITs may have on the formation of customary international law,¹¹⁰ and some discussion of the continued role and relevance of customary international law in investment treaty disputes.¹¹¹ Martins Paparinskis' work on the relevance of customary international law to the interpretation of IITs using the VCLT framework is relied upon in Chapter Seven when examining how the police powers doctrine can be accommodated when interpreting expropriation and FET provisions.¹¹²

Patrick Dumberry's recent work has examined the formation and identification of rules of customary international law in the context of international investment law.¹¹³ His work focuses on three purported rules of

'Human Rights Arguments in Amicus Curiae Submissions: Analysis of ICSID and NAFTA Investor-State Arbitrations' (2013) 10 *Transnational Dispute Management* 1.

¹¹⁰ See, for example: Jean D'Aspremont, 'International Customary Investment Law: Story of a Paradox' in Tarcisio Gazzini and Eric De Brabandere (eds), *International Investment Law: The Sources of Rights and Obligations* (Brill 2012) 5; 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.

¹¹¹ Gazzini (n 110); Martins 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 33).

¹¹² Paparinskis, 'Investment Treaty Interpretation and Customary International Law: Preliminary Remarks' (n 111); Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press 2014) Chapter Five.

¹¹³ Patrick Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (Cambridge University Press 2016).

customary international law in the international investment law context: the minimum standard of treatment, FET, and compensation for expropriation. While this thesis also examines customary international law, the focus is on the police power and right to regulate (two topics not explored by Dumberry) and also how provisions in IITs can be interpreted in light of customary international law (a topic Dumberry only explores briefly).¹¹⁴

There has been recent scholarship on the interaction between customary international law and international investment law specifically in the context of States' regulatory powers. Jorge Viñuales has argued that sovereignty is an agglomeration of 'more specific (actionable) legal concepts' that 'express the special position enjoyed by the State as a historical unit of social organisation'.¹¹⁵ One such legal concept, which Viñuales argues has its roots in customary international law, is the police powers doctrine. According to Viñuales, the police powers doctrine is an 'actionable legal concept concerning specifically governmental regulations that encroach on individual economic interests'.¹¹⁶ Viñuales argues that, as a principle of customary international law, the police powers doctrine need not be explicitly provided for in a treaty to have an effect in an investment dispute.¹¹⁷

¹¹⁴ *ibid* 45.

¹¹⁵ Viñuales, 'Sovereignty in Foreign Investment Law' (n 33) 317–318.

¹¹⁶ *ibid* 327.

¹¹⁷ *ibid* 329.

Viñuales identifies that customary international law principles have been overlooked in international investment law scholarship to date:

[C]ommentators and practitioners have paid too much attention to treaties and contracts, disregarding the fact that, originally, these instruments were themselves but a narrow exception to the general customary international rule...[of] permanent sovereignty over natural resources. Treaties...are, from this perspective, an exception that has grown out of proportion.¹¹⁸

While Viñuales argues that the police powers doctrine applies generally (that is, outside of the context of expropriation), his analysis of how the doctrine would interact with other standards of investment protection, such as FET, is more limited. This thesis will revisit and critically examine Viñuales' propositions in Chapters Four, Six and Seven.

Pedro J Martinez-Fraga and C Ryan Reetz have written on the 'public purpose doctrine in customary and conventional international law' which, according to the authors, plays a critical role in resolving the 'tension between a State's legitimate right to regulate and its equally genuine and binding obligations concerning foreign investment protection'.¹¹⁹ The 'public purpose doctrine' is expressed as an 'application of an intuitive, self-evident truth',¹²⁰ but one which remains elusive and largely undefined in customary or conventional law.¹²¹

Martinez-Fraga and Reetz seek to identify the role and status of their 'public

¹¹⁸ *ibid* 318; Jorge Viñuales, 'Customary Law in Investment Regulation' (2014) 23 *Italian Yearbook of International Law* 23.

¹¹⁹ Martinez-Fraga and Reetz (n 34) 1.

¹²⁰ *ibid* 5.

¹²¹ *ibid* 6.

purpose doctrine’ in customary international law.¹²² Their analysis of custom primarily focuses on the instruments of UNCTAD, the South African Development Community Model Bilateral Treaty Template, World Trade Organisation (‘WTO’) documents, the language of BITs, and domestic legislation concerning the protection of investment. The authors argue that these documents are selected because ‘of the probative value they have in tending to demonstrate State practice’,¹²³ but also query the uncertainties in ascertaining State practice more broadly. Ultimately, Martinez-Fraga and Reetz argue that the ‘public purpose doctrine’ is poorly conceived in customary international law, and constitutes a ‘self-judging, content-free and all-encompassing subjective conception’.¹²⁴ The authors make a number of tentative suggestions as to how the doctrine can be better articulated, particularly in the form a harmonisation of domestic foreign investment protection statutes (which the authors argue have better considered public purpose issues) and IITs.¹²⁵

This thesis adopts a similar approach to Martinez-Fraga and Reetz insofar as it agrees that the various ways in which the States’ regulatory power is expressed in international investment law makes the search for a coherent principle a difficult task, and that the self-evident and axiomatic expression of

¹²² *ibid* Chapter Two.

¹²³ *ibid* 124.

¹²⁴ Josef Ostřanský, ‘Opening the International Law’s Black Box: Pedro J. Martinez-Fraga, C. Ryan Reetz: Public Purpose in International Law: Rethinking Regulatory Sovereignty in the Global Era - Review’ [2015] *Transnational Dispute Management* 3.

¹²⁵ Martinez-Fraga and Reetz (n 34) Chapter Six.

States' regulatory powers is problematic. However, the customary international law analysis undertaken by Martinez-Fraga and Reetz is, with respect, susceptible to criticism. For instance, the authors rely on reports of 'credible, legitimate nongovernmental organisations'¹²⁶ as evidence of customary international law. However, these are not evidence of *State* practice for the purpose of the formation of customary international law. Further, considering international instruments as the starting point for their analysis of custom has the consequence that Martinez-Fraga and Reetz's analysis falls squarely into the criticism highlighted by Viñuales, noted above, that the analysis treats investment treaties as the rule, and 'public purpose' as the exception.

Further, Martinez-Fraga and Reetz do not extensively consider how 'public purpose' has been considered in investment jurisprudence, beyond an analysis of jurisprudence of tribunals resolving disputes under the *North American Free Trade Agreement* ('NAFTA')¹²⁷ (which the authors consider as 'a microcosm of customary and conventional international law'¹²⁸) concerning indirect expropriation. This thesis goes much further than Martinez-Fraga and Reetz in this respect.

5. 'Investment Law and...' Scholarship

There have also been a number of scholarly contributions that focus on the interaction between international investment law and other areas of law, similar

¹²⁶ *ibid* 429.

¹²⁷ *North American Free Trade Agreement* (signed 17 December 1992, entered into force 1 January 1994) (1994) 32 ILM 605 ('NAFTA').

¹²⁸ *ibid* 4-5.

to earlier scholarship in the international trade law context.¹²⁹ There have been analyses of the interaction between international investment law and human rights law,¹³⁰ environmental law,¹³¹ public health,¹³² and sustainable development.¹³³

¹²⁹ For example, see Adelle Blackett, 'Whither Social Clause - Human Rights, Trade Theory and Treaty Interpretation' (1999) 31 *Columbia Human Rights Law Review* 1; George Hoberg, 'Trade, Harmonization, and Domestic Autonomy in Environmental Policy' (2001) 3 *Journal of Comparative Policy Analysis: Research and Practice* 191; Robert Howse, 'Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate, The Symposium: Trade, Sustainability and Global Governance' (2002) 27 *Columbia Journal of Environmental Law* 491; Sarah Joseph, *Blame It on the WTO? A Human Rights Critique* (Oxford University Press 2011).

¹³⁰ Abdullah Al Faruque, 'Mapping the Relationship between Investment Protection and Human Rights' (2010) 11 *Journal of World Investment & Trade* 539; Filip Balcerzak, 'Jurisdiction of Tribunals in Investor-State Arbitration and the Issue of Human Rights' (2014) 29 *ICSID Review* 216; Lorenzo Cotula, 'Property in a Shrinking Planet: Fault Lines in International Human Rights and Investment Law' (2015) 11 *International Journal of Law in Context* 113; Olivier De Schutter and others, 'Foreign Direct Investment, Human Development and Human Rights: Framing the Issues' (2009) 3 *Human Rights and International Legal Discourse* 137; Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni, *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009); Moshe Hirsch, 'Human Rights & Investment Tribunals Jurisprudence along the Private/Public Divide' in Todd Weiler and Freya Baetens (eds), *New Directions in International Economic Law* (Martinus Nijhoff 2011); Kriebaum, 'Investment Tribunals and Human Rights' (n 56); Jorge Daniel Taillant and Jonathan Bonnitcha, 'International Investment Law and Human Rights' in Marie-Claire Cordonier Segger, Markus W Gehring and Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2011).

¹³¹ Lorenzo Cotula, 'Expropriation Clauses and Environmental Regulation: Diffusion of Law in the Era of Investment Treaties' (2015) 24 *Review of European, Comparative & International Environmental Law* 278; Saverio Di Benedetto, *International Investment Law and the Environment* (Edward Elgar Publishing 2013); Pierre-Marie Dupuy and Jorge Viñuales (eds), *Harnessing Foreign Investment to Promote Environmental Protection* (Cambridge University Press 2013); Rahim Moloo and Justin Jacinto, 'Environmental and Health Regulation: Assessing Liability Under Investment Treaties' (2011) 29 *Berkeley Journal of International Law* 1; Jorge Viñuales, 'Foreign Investment and the Environment in International Law: An Ambiguous Relationship' (2010) 80 *British Yearbook of International Law* 244; Jorge Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press 2012).

¹³² Marcos A Orellana, 'Science, Risk and Uncertainty: Public Health Measures and Investment Disciplines' in Philippe Kahn and Thomas Wälde (eds), *New Aspects of International Investment Law* (Martinus Nijhoff 2007); Valentina Vadi, *Public Health in International Investment Law and Arbitration* (Routledge 2012); Tania Voon and others

Within these analyses, there has been consideration of States' regulatory powers, albeit as applied to the particular public interest under consideration (such as public health). This thesis builds on these analyses and seeks to consider the issue of 'public interest' more broadly, rather than confining the analyses to a particular type of public interest. Further, as much of this scholarship is confined to treaty-based issues (such as the conflict between environmental treaties and IITs), the analysis in this thesis differs insofar as its analysis is directed toward customary international law and treaty interpretation.

VI. STRUCTURE OF THE THESIS

The thesis is divided into eight chapters (including the introduction and conclusion).

Chapters Two and Three consider the lawfulness of public interest regulation and any right or power to enact such regulation in historical context. These Chapters examine diplomatic correspondence, States' negotiation of and entry into treaties concerning property protection and foreign investment, States' pleadings before international courts and tribunals, the decisions of international

(eds), *Public Health and the Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar Publishing 2012).

¹³³

Anne van Aaken, 'Smart Flexibility Clauses in International Investment Treaties and Sustainable Development' (2014) 15 *Journal of World Investment & Trade* 827; Martins 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); Andrew Newcombe, 'Sustainable Development and Investment Treaty Law' (2007) 8 *Journal of World Investment & Trade* 357; Kenneth Vandeveld, 'Sustainable Liberalism and the International Investment Regime' (1997) 19 *Michigan Journal of International Law* 373.

courts and tribunals and the writings of eminent publicists and learned societies. Chapter Two examines the period commencing in approximately the mid-nineteenth century to 1945, and Chapter Three examines the period of 1945 to the early 2000s. The justification for this chronological division of Chapters Two and Three is that prior to 1945, the nature of the debate focused more on the treatment of foreigners generally (rather than the treatment of foreign property specifically) and claims were resolved primarily through inter-State mechanisms, namely diplomatic correspondence and *ad hoc* State-State arbitration. Following 1945, the language of the debate shifted toward *individual* rights (including the rights of investors) as against the State¹³⁴ and the period was also marked by several attempts at a multilateral level to establish an international legal framework for the protection of foreign investment. The development of the law from the early 2000s will be addressed in Chapters Four and Five when the issue of States' regulatory powers became commonplace in expropriation and FET disputes. What is apparent throughout the periods of time examined in Chapters Two and Three is that for many years, States have sought to justify public interest regulation by appealing to their right or power to enact such regulation.

Chapter Four examines how investor-State arbitration tribunals have treated public interest regulation in the context of indirect expropriation claims pursuant to IITs. In particular, the Chapter seeks to critically examine reasoning in

¹³⁴

See Theodor Meron, *The Humanization of International Law* (Martinus Nijhoff 2006) especially Chapter Five.

the case law that has applied the police powers doctrine. It will be argued that collectively, the historical and contemporary State practice and accompanying *opinio juris*, as confirmed by judicial decisions and writings of eminent publicists and learned societies, confirms that the police powers doctrine is reflected in customary international law. This means that proportionate or reasonable non-discriminatory regulation that is enacted in good faith for a public purpose falls within a State's police power and will not constitute an expropriation. Chapter Four also examines how the police powers doctrine operates, namely whether the purported power is one that limits the scope of the investment obligation, or whether it operates as an exception, and the consequential implications for any burden of proof. The conclusion of Chapter Four is that the police powers doctrine is a basis on which States may defend their enactment of public interest regulation against a claim of indirect expropriation.

Chapter Five examines how investor-State arbitration tribunals have treated public interest regulation in the context of FET claims pursuant to IITs, and the relevance of the right to regulate in that analysis. It will be shown that there is very limited consistency or coherence in the treatment of public interest regulation and the application of the right to regulate in FET disputes. In Chapters Four and Five, the cases examined are current as at 30 June 2016, save for the inclusion of the highly relevant case of *Philip Morris v Uruguay* which was decided on 8 July 2016.

Chapter Six draws together the analysis in the preceding chapters to seek to define the right to regulate and to articulate an expanded role for the police powers doctrine. It will be argued that the right to regulate is a concept capable of many meanings and, to the extent that the concept overlaps with the police powers doctrine, the latter should be adopted. It will also be argued that to the extent that the right to regulate refers to a catch-all phrase encompassing States' rights that are inherent in sovereignty, this concept provides limited assistance to the resolution of claims concerning breaches of expropriation and FET. Rather, it will be argued that the police powers doctrine can and does have broader relevance beyond the context of expropriation and should apply more generally.

Chapter Seven considers the extent to which the customary international law police powers doctrine may interact with, and be accommodated within, IITs using the principles of treaty interpretation. The purpose of this Chapter is to offer a more consistent and clear approach to the interpretation of obligations under IITs where it is alleged that public interest regulation violates an indirect expropriation of FET provision of an IIT.

Chapter Eight concludes the thesis. Overall, the thesis argues that the language of 'right to regulate' is not particularly helpful (and is somewhat misleading) and States cannot rely on the right to regulate to defend the lawfulness of public interest regulation against claims of indirect expropriation and unfair and inequitable treatment. However, customary international law recognises that public interest regulation is lawful through the police powers

doctrine. As a principle that is relevant when determining whether a measure constitutes an indirect expropriation or unfair or inequitable treatment, the police powers doctrine operates as a limitation on the scope of those obligations, and can be accommodated within IITs using the principles of treaty interpretation.

CHAPTER TWO

PUBLIC INTEREST REGULATION AND FOREIGN INVESTMENT IN CONTEXT: PRE- 1945

I. INTRODUCTION

1. Overview of Chapter

Concerns regarding the impact of international investment law on States' regulatory powers are often described as relatively new issues. For example, in 2013 the Institut de Droit International noted that '[a] trend in favo[u]r of differentiat[ing] regulatory measures from indirect or creeping expropriations started around 2004'.¹³⁵ This Chapter, together with Chapter Three, seeks to demonstrate that the lawfulness of public interest regulation (and any purported right or power to enact such regulation) in the context of the treatment of foreign property, and the treatment of foreigners more broadly, has been the subject of debate for many years and that these historical debates are relevant to the contemporary discussion of this issue.

This Chapter examines diplomatic correspondence, the negotiation of and entry into treaties, States' pleadings before international courts and tribunals, the decisions of international courts and tribunals and the writings of eminent publicists and learned societies. Many of the sources examined constitute State

¹³⁵ Institut de Droit International, 'Legal Aspects of Recourse to Arbitration by an Investor Against the Authorities of the Host State under Inter-State Treaties' [2013] *Annuaire de l'Institut de droit international - Session de Tokyo - Travaux préparatoires* 5, [142].

practice and *opinio juris* for the purposes of the formation of customary international law,¹³⁶ and in this respect the analysis undertaken in this Chapter and Chapter Three lays the foundation for Chapter Four (when examining the police powers doctrine under customary international law) and Chapter Six (when examining the general applicability of the police powers doctrine). As noted in Chapter One, the time-period covered is from the mid-nineteenth century until shortly prior to the Second World War.

This Chapter is divided into two substantive parts, reflecting the two main bases upon which States defended the legality of interferences (purportedly in the form of public interest regulation) with the rights of foreigners: first, States broadly appealed to sovereignty; and secondly, States contended that their conduct fell within their police power. Both of these bases were cited as supporting a proposition that public interest regulation was inherently lawful and would not constitute a breach of international law.

2. General introduction to the sources relied upon in this Chapter

During the time period examined in this Chapter, the lawfulness of public interest regulation was considered in the context of the international legal rules governing the treatment of foreigners (or aliens). In this regard, Robert Jennings has warned of the difficulties of invoking examples of the treatment of aliens from centuries past 'to yield principles apposite to sophisticated legal programmes of

¹³⁶ See further Chapter Four, Part III.

international investment'.¹³⁷ However, with all due caution, insofar as contemporary international investment law is criticised for limiting States' regulatory powers, the ways in which international law has traditionally dealt with this issue is instructive in informing the contemporary debates.

Diplomatic protection emerged in the late 18th century as a means through which States would protect their nationals who were situated abroad, replacing the earlier practice of issuing letters of reprisal.¹³⁸ Such protection occurred through diplomatic channels, as well as (later) through the establishment of claims commissions and arbitration mechanisms that would resolve specific disputes on an *ad hoc* basis or pursuant to a special agreement. These claims commissions were inter-State claims brought on the basis of diplomatic protection, rather than claims of the individual being brought against the State.¹³⁹ In the early part of the twentieth century, such claims were espoused through several disputes in the Permanent Court of International Justice ('PCIJ'). States also negotiated and entered into treaties to provide protection for foreigners and their property during this period.

During this period, the international legal obligations owed by States were

¹³⁷ Robert Jennings, 'General Course on Principles of International Law' (1967) 121 *Recueil des Cours* 323, 473. See also *Barcelona Traction* Separate Opinion of Judge Jessup (n 6) 165.

¹³⁸ Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge University Press 2011) 48; Richard B Lillich, *The Human Rights of Aliens in Contemporary International Law* (Manchester University Press 1984) 8.

¹³⁹ Parlett (n 138) 52-54; JHW Verzijl, *International Law in Historical Perspective*, vol 8 (AW Sijthoff 1968) 222-249.

often expressed in terms of the international minimum standard, which was focused less on foreign investment and property protection during times of peace and more on the administration (and denial) of justice to foreigners.¹⁴⁰ This international minimum standard sat in tension with the view that international law did not require any greater protection to individuals than that which was provided to a State's own nationals. The protection of property outside of the context of war was not heavily discussed, although there were numerous diplomatic disputes concerning seizures and property damage during wars, such as the seizure of ships.¹⁴¹ Such disputes are of less relevance to this thesis insofar as they often concerned outright seizures of title and, in any event, liability was often agreed and the dispute related to quantum of damage.¹⁴² However, as will be seen, notwithstanding the predominant focus on property protection during wartime and administrative justice to foreigners, there are still a number of examples of State practice, as well as judicial and scholarly attention concerning the protection of foreigners and their property in circumstances amounting to 'less than' outright seizure, and the rights obligations of States in this regard.

Finally, for the purposes of this Chapter, most State practice examined emanates from the United States ('US'), the United Kingdom ('UK'), France and Europe more broadly and relates to disputes between those States with each other

¹⁴⁰ Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (n 112) 43.

¹⁴¹ JHW Verzijl, *International Law in Historical Perspective*, vol 6 (AW Sijthoff 1968) 657.

¹⁴² *ibid.*

and between those States and Latin American States. Disputes relating to the treatment of property within colonial territories tended to be dealt with largely by colonial authorities within the domestic court systems, and thus in this regard international law was largely located outside of the former colonial context.¹⁴³

II. BROAD APPEALS TO SOVEREIGNTY

This part explores the broadest justification invoked by States, in which States considered that their sovereignty provided a basis, and a justification, for introducing laws that impacted the rights of foreigners, in the same way in which States had jurisdiction over their own nationals.

1. Diplomatic Correspondence Concerning Monopolies

Diplomatic disputes relating to the creation of monopolies in the nineteenth and early twentieth centuries exemplify how States appealed to their sovereignty when purportedly regulating in the public interest. Such cases are cited as early examples of indirect expropriation, insofar as monopolies did not constitute an outright taking of physical assets of a foreign business, but rather had the effect of destroying the foreign business through indirect means.¹⁴⁴

In the *Sicilian Sulphur* dispute, the Sicilian Government proposed to contract with a French company to give the company the exclusive right of

¹⁴³ Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press 2013) 55.

¹⁴⁴ *ibid* 63–69; Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (n 112) 219–220.

purchasing sulphur produced in Sicily.¹⁴⁵ The Sicilian government also proposed to impose an export duty on all sulphur exported from Sicily payable by all companies, save for the French company. The purpose of the measures, as articulated by Sicily in its diplomatic correspondence, was purportedly to remedy the 'great evil' caused by the fall in the price of sulphur and 'to employ a great part of the profit which the well-regulated commerce of sulphur might bring' towards projects considered beneficial to Sicily, including opening new roads, reducing taxes on citizens, and paying debts.¹⁴⁶ The British government protested the measure on behalf of British merchants on the basis that it amounted to a monopoly, contrary to a Treaty of Commerce of 1816 that provided for most-favoured nation treatment as well as for the right of British subjects within Sicily to dispose of their personal property 'without the least obstacle or impediment'.¹⁴⁷

The Sicilian government resisted the diplomatic complaint, arguing *inter alia* that the measures were non-discriminatory and that the British government could not expect treatment greater than that expected by Sicilian subjects.¹⁴⁸ The Sicilian government further argued that the measures were consistent with the government's 'right of sovereignty' to make laws for the common good over its

¹⁴⁵ *Sicilian Sulphur Dispute* (1838) 28 British and Foreign State Papers 1163.

¹⁴⁶ *ibid* 1195.

¹⁴⁷ *Convention of Commerce and Navigation between Great Britain and the Two Sicilies* (signed at London, 26 September 1816) reprinted in (1837) 5 British and Foreign State Papers 587.

¹⁴⁸ *Sicilian Sulphur* (n 145) 1167.

subjects and property.¹⁴⁹ The Sicilian government cited several examples of laws that originated from this right:

...the laws called sumptuary, those which prohibit games of hazard, or give a guardian to those who waste their property, fix a limit to the power of disposing of private property, regulate the cutting of woods, and the cultivation and trade of tobacco, the tillage of grounds in certain places; and finally, those laws whose object is to prevent a person from wasting his property...¹⁵⁰

In addition to this specific right to exercise power over property in this way, the Sicilian government argued more broadly that ‘every government is the master of its own actions, so far as they do not offend the rights particular and perfect of another state’.¹⁵¹ The Sicilian government denied the applicability of the Treaty of Commerce.¹⁵²

In response, the British government considered that ‘if it were a Government measure to raise a revenue from necessity, it would be less unjustifiable’,¹⁵³ but the measure could not be characterised as such because the measure was ‘obnoxious in principle’ and contained ‘a direct and arbitrary interference with private property, although under specious and ingenious arguments’.¹⁵⁴ Further, the British government considered that the measure did not even have ‘the excuse of being generally beneficial to the country from which

¹⁴⁹ *ibid* 1187-1188.

¹⁵⁰ *ibid* 1188.

¹⁵¹ *ibid*.

¹⁵² *ibid* 1189.

¹⁵³ *ibid* 1194.

¹⁵⁴ *ibid* 1194 .

it emanates'.¹⁵⁵ Following extensive correspondence, the Sicilian government eventually agreed to set aside the contract¹⁵⁶ and appoint a mixed claims commission to liquidate the claims of British subjects against the Sicilian government for losses sustained by them.¹⁵⁷

In contrast, other diplomatic disputes concerning monopolies during the same period were not considered to be capable of diplomatic protest. For instance, when the Peruvian government enacted a monopoly in the sale of nitrate of soda in 1873, the British government considered that English firms in Peru would have no claim to compensation on the basis that:

The only matter of law arising in this question is the right of the Peruvian government to regulate the manufacture and export of produce within and from Peruvian territory, and we are of the opinion that the Peruvian government have the right to make such regulations, and that manufacturers settling for the purpose of trade and manufacture in Peru must be subject to the laws of Peru, whether they be natives or foreigners.¹⁵⁸

Similarly, the US government expressed reluctance in its diplomatic correspondence to protest monopolies in the absence of specific treaty obligations, so as to avoid interfering 'with the sovereign right of a country to regulate its own export and import trade'.¹⁵⁹

¹⁵⁵ *ibid.*

¹⁵⁶ *ibid* 1240-1242.

¹⁵⁷ *Sicilian Sulphur Mixed Claims Commission Correspondence* (1840) 30 *British and Foreign State Papers* 111, 111-120.

¹⁵⁸ *Peruvian Monopoly* (1873) 6 *Parry's British Digest of International Law* 349, 349.

¹⁵⁹ Mr Foster, Secretary of State, to Messrs McKesson & Robbins (12 November 1892) 2 *Moore's Digest of International Law* §185, 77.

However, by the early twentieth century, several other diplomatic disputes concerning monopolies had arisen which followed the approach of the British government in *Sicilian Sulphur*. For instance, a monopoly imposed on life insurance businesses in Uruguay was the subject of successful diplomatic protest.¹⁶⁰ Similarly, a monopoly on life insurance businesses imposed by the Italian government was the subject of diplomatic complaint by the Austro-Hungarian, British, French, German and US governments.¹⁶¹ The Italian government argued that the laws were an assertion of the sovereign right of legislation belonging to all States, a right which was limited only by the obligation to treat nationals and foreigners equally.¹⁶² As to this argument, the British government responded by noting that:

The perfect liberty of legislation and the freedom to create monopolies by the State has never for a moment been called into question, but it is maintained that, as a principle of elementary morality, expropriation is universally recognized by legislation as constituting a title to compensation.¹⁶³

In the end result, the Italian government proposed a transition period for existing companies to enable them to liquidate their businesses and negotiated

¹⁶⁰ *Uruguay Life Insurance Monopoly* (1911) 5 Hackworth's Digest of International Law 588; Alexander P Fachiri, 'Expropriation and International Law' (1925) 6 British Yearbook of International Law 159.

¹⁶¹ *Italian Life Insurance Monopoly* (1912) 5 Hackworth's Digest of International Law 588; Eugène Audinet, 'Le Monopole Des Assurances Sur La Vie En Italie et Le Droit Des Étrangers' [1913] *Revue Générale de Droit International Public* 5; Fachiri 1925 (n 160) 166-167.

¹⁶² Italy's diplomatic correspondence was detailed in the United Kingdom's written submissions in the *Oscar Chinn Case* (UK v Belgium) [1934] PCIJ Rep Series C No.75, 47-48.

¹⁶³ Correspondence from the British Ambassador quoted in *ibid*, 49.

settlements with individual companies to buy out their businesses.¹⁶⁴

In *Oscar Chinn*, the British Government pleaded that the Italian and Uruguayan life insurance disputes and *Sicilian Sulphur* demonstrated an international law rule that ‘vested rights of foreigners must not be confiscated as a result of establishing a monopoly’,¹⁶⁵ but the PCIJ ultimately left the question open because it concluded there were no vested rights capable of protection. The pleadings in *Oscar Chinn* and other international law disputes during this period will be discussed further below.

2. Appeals to sovereignty in *ad hoc* inter-State arbitration claims

Diplomatic protection claims that were submitted to inter-State arbitration contain similar references to ‘sovereign rights’ or ‘plenary rights’ to legislate. For example, in *Jesse Lewis*, the US brought proceedings against the UK on account of the seizure of a vessel in Canada, purportedly in violation of Canadian legislation that had been enacted pursuant to a treaty concerning rights of American fisherman in Canadian waters.¹⁶⁶ The Tribunal acknowledged the entitlement of Great Britain ‘to enact such legislative provisions as they considered necessary and expedient to secure observance of the...Treaty...so far as they are not inconsistent with the said Treaty’ and that such legislative provisions were acts ‘in

¹⁶⁴ *Italian Life Insurance Monopoly* (n 161); Fachiri 1925 (n 160) 167.

¹⁶⁵ *Oscar Chinn* Pleadings (n 162) 50.

¹⁶⁶ *Jesse Lewis* (US v Great Britain) (9 December 1921) reprinted in (1952) 6 RIAA 85-93; see also Fred K Nielsen, *American and British Claims Arbitration under the Special Agreement Concluded between the United States and Great Britain August 18, 1910* (Washington, 1926) 524.

the full exercise of their sovereignty'.¹⁶⁷ The only circumstance under which the Tribunal would interfere was in the case of a denial of justice.¹⁶⁸ Such language was common in French diplomatic disputes to justify legislation and regulation of areas said to be within the exclusive competence of the State, including the admission and expulsion of foreigners and the levying of taxes.¹⁶⁹

Similarly, the *Canadian Claims for Refund of Duties* case concerned claims for refunds of duties imposed by American customs authorities imported from Canada into the US, which the UK considered to be excessive.¹⁷⁰ A domestic procedure had been established for the duties to be set aside, but the Canadian importers had failed to avail themselves of this option within the time prescribed by the statute. Following US domestic proceedings, the Canadian importers had sought to obtain refunds before an arbitral tribunal, arguing that the duties paid were in excess of those imposed by the law. The US submitted to the Tribunal that:

¹⁶⁷ *Jesse Lewis* (n 166), 89.

¹⁶⁸ *ibid* 89-90.

¹⁶⁹ Institut de Droit International, 'La Détermination Du Domaine Réserve et Ses Effets' (1954) 45 *Annuaire de l'Institut de droit international* 299; Alexandre-Charles Kiss, 'Le Domaine Réserve a La Compétence Exclusive de L'état', *Répertoire de la Pratique Française en Matière de Droit International Public*, vol II (1966); Alexandre-Charles Kiss, 'La Condition Des Étrangers', *Répertoire de la Pratique Française en Matière de Droit International Public*, vol IV (1962); JHW Verzijl, *International Law in Historical Perspective*, vol 1 (AW Sijthoff 1968) 272; Nicolas Politis, 'Le Problème Des Limitations de La Souveraineté et La Théorie de L'abus Des Droits Dans Les Rapports Internationaux' (1925) 6 *Recueil des Cours* 1.

¹⁷⁰ *Canadian Claims for Refund of Duties* (UK v US)(29 March 1925) reprinted in Nielsen (n 166) 347.

It is the principle of international law that recognises the unquestioned plenary sovereign right of a nation with respect to customs matters. There is no limitation on that right. Subject to restrictions contained in treaties, the United States can impose any condition on the entry of or with respect to charges upon commodities imported into this country.¹⁷¹

The US submitted that it could not be argued that the enforcement of statutory provisions (which the US ‘had an indisputable sovereign right to impose’¹⁷²) pertaining the customs violated any treaty rights of Canadian citizens or any principle of international law.¹⁷³ It was, according the US, ‘obviously not a wrong against international law to give effect to such legislation’.¹⁷⁴

The Tribunal dismissed the claim, noting *inter alia* that the procedures available domestically were ‘not only reasonable and fair but more or less common to the customs laws of all civilised countries’.¹⁷⁵ The Tribunal continued:

It is of course conceivable that a statutory procedure might be so unreasonable as effectually to deny the right of protest and appeal, but we do not find any such condition here; even if a case of unreasonable and arbitrary statutory procedure were presented, provided it applied equally to the nationals of the government concerned and to foreigners, we should entertain grave doubt as to whether it could be said to operate as a denial of justice so as to lay the foundation for an international claim.¹⁷⁶

Ultimately, the Tribunal concluded that that importers ‘must be presumed

¹⁷¹ ibid 351.

¹⁷² ibid 354.

¹⁷³ ibid 353.

¹⁷⁴ ibid 355.

¹⁷⁵ ibid 368.

¹⁷⁶ ibid.

to know and are bound by the customs laws of the countries with which they are dealing'.¹⁷⁷

Similarly, in *Frederick J Peters*, the US-Turkish Claims Commission held:

...And it is of course particularly pertinent to bear in mind, in dealing with a case of this kind, the general principle of international law that recognizes the unquestioned plenary sovereign right of a nation with respect to customs matters. Subject to restrictions contained in treaties, a government is privileged to impose any conditions with respect to imports or exports, including, of course, regulations as to charges upon commodities exported or imported...

These matters come within the field of so-called "domestic questions". The term is used in referring to subjects in relation to which international law recognizes that a nation has such plenary rights that no action taken with respect to them can violate that law. Of course an alien should be accorded rights with respect to person and property to which he is entitled under domestic law.¹⁷⁸

As is apparent in these disputes, the *right* of States to enact legislative measures was very rarely questioned. Instead, the focus was on the consequence of the exercise of such a right. As the Tribunal in the *Shufeldt claim* recognised:

...it is perfectly competent for the Government ... to enact any decree they like and for any reasons they see fit, and such reasons are no concern of this Tribunal. But this Tribunal is only concerned where such a decree, passed even on the best of grounds, works injustice to an alien subject, in which case the Government ought to make compensation for injury inflicted and cannot invoke any municipal law to justify their refusal to do so.¹⁷⁹

¹⁷⁷ *ibid* 370.

¹⁷⁸ *Frederick J Peters* (US v Turkey)(undated) reprinted in Fred K Nielsen, *The American-Turkish Claims Settlement under the Agreement of December 24, 1923, and Supplemental Agreements* (Government Printing Office 1937) 447.

¹⁷⁹ *Shufeldt Claim* (US v Guatemala) (24 July 1930) reprinted in (1949) 2 RIAA 1079, 1095; see also the arguments of the US which characterised the claim as an exercise of eminent domain for which compensation was required: Department of State, *Claim of the United*

Several observations can be made about the nature of the arguments presented by States in their diplomatic correspondence and the practice of international tribunals. First, it was common for States to appeal to their sovereign right to legislate as a justification for imposing legislation. Secondly, this sovereign right to legislate was not questioned by States challenging the legislation, but it was rarely accepted as a basis that would exclude liability for expropriation or arbitrary deprivation of property. Thirdly, beyond the reliance on the sovereign right to legislate *generally*, specific arguments about the sovereign right to legislate *for particular public purposes* (or the ‘common good’ in *Sicilian Sulphur*) were also made to justify the lawfulness of legislation. In *Sicilian Sulphur*, this more specific right was not rejected by the UK, but was considered to not be applicable in the case because the measures could not be considered one of the ‘less unjustifiable’ types of legislation. This latter type of argument is consistent with the police power of States, discussed further below.

States of America on Behalf of P. W. Shufeldt v the Republic of Guatemala (Government Printing Office 1932) 73–81.

III. THE POLICE POWER OF STATES

In diplomatic correspondence throughout the nineteenth and early twentieth century, the lawfulness of certain types of regulation was expressed as falling within the ‘police power’ of States.

1. Historical meaning of police power

The word ‘police’ in this context refers to ‘policy’ or ‘polity’.¹⁸⁰ The reference to ‘police’ used in this way originated from Greek (‘politeia’) and was used in France in the late fifteenth century,¹⁸¹ 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’.¹⁸² The expression ‘police power’ came to be used in the eighteenth century to describe the regulatory power vested in the ruler to promote public welfare.¹⁸³

For instance, in lectures given 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’.¹⁸⁴ In 1781, Jeremy Bentham

¹⁸⁰ Santiago Legarre, ‘The Historical Background of the Police Power’ (2006) 9 *University of Pennsylvania Journal of Constitutional Law* 745, 761.

¹⁸¹ 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) xii.

¹⁸² 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.

¹⁸³ Loughlin (n 181) 423.

¹⁸⁴ Adam Smith, *Lectures on Jurisprudence* (RL Meek ed, Clarendon Press 1978) 6; See also Dubber (n 181) 65; Loughlin (n 181) 423-424; Viñuales, ‘Sovereignty in Foreign Investment Law’ (n 33) 326.

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’.¹⁸⁵ Similarly, in his *Commentaries on the Laws of England*, William Blackstone uses the expression ‘police’ alongside ‘œconomy’¹⁸⁶ to connote the sovereign’s prerogative to regulate domestic policy,¹⁸⁷ in a similar manner to the way in which a master manages his household.¹⁸⁸

Emer de Vattel also spoke of ‘police’,¹⁸⁹ 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, tranquility and concord among the citizens...¹⁹⁰

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

¹⁸⁵ Jeremy Bentham, *Theory of Legislation* (Etienne Dumont and Richard Hildreth trs, 2nd ed., Trübner & Co 1871) 242; Dubber (n 181) 68–69.

¹⁸⁶ 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.

¹⁸⁷ William Blackstone, *Commentaries on the Laws of England*, vol 1 (First Edition, Clarendon Press 1765 - 1769) 264.

¹⁸⁸ Dubber (n 181) 49, 58; Loughlin (n 181) 423.

¹⁸⁹ 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 180) 754.

¹⁹⁰ Vattel (n 1) Book I, Ch XIII, 76-77; See also Legarre (n 180) 754; Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (n 112) 222; Viñuales, ‘Sovereignty in Foreign Investment Law’ (n 33) 327.

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.¹⁹¹

The police power was particularly prominent in US law. As it was originally conceived, the police power in US law described the ‘residuary sovereignty’ of states within the federal system, being an expression ‘employed to mark off the sphere of [s]tate authority from that of the [g]eneral [g]overnment’.¹⁹² However, the expression has more commonly been used in the US to connote the more specific concept of the power to regulate for the promotion of particular public welfare objectives, notably public health, safety, and morals,¹⁹³ and more generally power to regulate ‘for the general or common good’.¹⁹⁴ The police power continues to play a role in contemporary US law.¹⁹⁵

¹⁹¹ Vattel (n 1) Book 1, Ch XX, 115; see Viñuales, ‘Sovereignty in Foreign Investment Law’ (n 33) 327.

¹⁹² Westel Woodbury Willoughby, *The Constitutional Law of the United States* (Second Edition, Baker, Voorhis 1929) 1766; Legarre (n 180) 785–786. See *Gibbons v Ogden*, 22 US (9 Wheaton) 1 (1824) 208; *Brown v Maryland*, 23 US (12 Wheaton) 419 (1827) 442–43; *Mayor Aldermen, and Commonality of the City of New York, Plaintiffs v George Miln*, 36 US (11 Peters) 102 (1837) 139.

¹⁹³ Legarre (n 180) 748.

¹⁹⁴ *Western Turf Association v Greenberg*, 204 US 359, 363 (1907).

¹⁹⁵ The police power in the US applies across a variety of contexts, including the ability to regulate the practice of medicine (*Gonzales v Oregon*, 546 US 243, 270 (2006)), the suppression of crime (*United States v Morrison*, 529 US 598, 618 (2000)), and firearms regulation (*McDonald v Chicago*, 561 US 742, 836 (2010)). Similarly under US law, a distinction is drawn between an exercise of ‘police power’ and that the right of the government to take property (‘eminent domain’): *Commonwealth v Alger*, 61 Mass. (7 Cush) 53, 85 (1851); quoted in 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) 830. See also *Mugler v Kansas* 123 US 623, 663(1887); *Pennsylvania Coal Company v Mahon*, 260 US 393, 415 - 416 (1922); *Penn Central Transport Corporation v New York City*, 43 US 104 (1977); *Lingle v Chevron USA Inc*, 544 US 528 (2005). See further, Legarre (n 180).

The police power is not a uniquely American concept. 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*; although these must not conflict with the Constitution or with the laws passed by the Parliament.¹⁹⁶

French administrative law similarly has long recognised the police power (*pouvoir de police*). For instance, in *Compagnie générale française de tramways*, the Conseil d'État considered that the government's entry into a concession agreement did not mean the State abandoned its police power, including its ability to change the terms of the concession if its execution would be harmful to public security.¹⁹⁷ However, the Conseil noted that the police power was a vague and indeterminate concept.¹⁹⁸

2. Police power in diplomatic correspondence

Initially, the exercise of police power was considered against the background of the international minimum standard. For instance, in 1858 the US Secretary of State acknowledged the 'police and administrative powers' exercised by European

¹⁹⁶ Constitution of the Kingdom of Norway, §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 Bjorge and Mads Andenæs for alerting me to the Norwegian law.

¹⁹⁷ *Compagnie Générale Française des Tramways Case No. 16178* (Conseil d'État, 11 March 1910) reprinted in (1910) 17 *Revue du Droit Public* 270, 274-275. On the facts of the case, the police power did not ultimately need to be invoked because the terms of the agreement gave the government the regulatory power it needed to change the concession. I am indebted to Eirik Bjorge for alerting me to this French case.

¹⁹⁸ *ibid* 275.

States to exert authority over foreigners, pursuant to which US citizens could be subject, even if that police regulation was arbitrary.¹⁹⁹ In that same communication he noted that '[e]very independent state has the right to regulate its internal concerns in its own way, taking care to avoid giving just cause of offense to other nations'.²⁰⁰ However, entering into treaties was perceived as a relinquishing of a State's inherent right to exercise jurisdiction over persons within its territory.²⁰¹ This articulation of the police power fits with the broad invocation of sovereignty discussed in the Part II of this Chapter above, such that States have the right to regulate within their territories to the extent they have not agreed to do otherwise.

However, contemporaneous diplomatic correspondence also shows that the police power was used in a narrower sense. 'Police regulations' were those regulations made for the purpose of promoting public health and safety.²⁰² For these diplomatic disputes, the police power was a positive right to regulate in a certain way notwithstanding agreements entered into. For instance, regulating immigration for the purpose of protecting public health and sanitation was

¹⁹⁹ Mr Cass, Secretary of State, to Mr Wright, (10 December 1858) 4 Moore's Digest of International Law §537, 12.

²⁰⁰ *ibid.*

²⁰¹ Mr Seward, Secretary of State, to Mr Burton (27 September 1866) 4 Moore's Digest of International Law §537, 13; Mr Blaine, Secretary of State, to Mr O'Connor (25 November 1881) 4 Moore's Digest of International Law §537, 13.

²⁰² Mr Rives, Assistant Secretary of State, to Mr Childs (21 June 1888) 4 Moore's Digest of International Law §669, 679; John Bassett Moore, 'Police Regulations' (1906) 4 Moore's Digest of International Law §669, 678–679.

considered an exercise of police power,²⁰³ as was enacting quarantine restrictions on the importation of animals to prevent the outbreak of disease.²⁰⁴

Police regulations were considered to be inherently lawful and did not entail a duty of compensation, even when the interference with foreign property was substantial. 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, concluding that the sanitary measures were justified in the circumstances.²⁰⁵ Similarly, the Brazilian government refused to entertain a complaint regarding damage sustained by a French ship in the course of enforcing quarantine restrictions that had been imposed to prevent the outbreak of disease.²⁰⁶ Losses suffered by Mexican businesses as a result of US alcohol prohibition laws were similarly not compensable because the laws were considered to be within the police powers of the State.²⁰⁷ However, quarantine

²⁰³ Mr Foster, Secretary of State, to the President (7 January 1893) 4 Moore's Digest of International Law §561, 153–158; Mr Frelinghuysen, Secretary of State, to Mr Stillman (3 August 1882) 4 Moore's Digest of International Law §550, 76.

²⁰⁴ Mr Adee, Acting Secretary of State, to Dr Vogel, Swiss Legislature (13 August 1896) 2 Moore's Digest of International Law §191, 152–153.

²⁰⁵ *Brazilian Watermelons* (1897) 6 Moore's Digest of International Law §1003, 751–752; see 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.

²⁰⁶ Mr Trail, Chargé at Rio de Janeiro to Mr Bayard, Secretary of State (21 January 1887) 2 Moore's Digest of International Law §191, 144

²⁰⁷ Note of 1 March 1926 (1926) II Foreign Relations of the United States 633.

laws that had been applied in a manner that could better be categorised as an ‘exaggerated embargo upon commerce’ amounting to ‘preventive detention at the will of authorities’, rather than ‘reasonable enforcement’ of quarantine rules were capable of diplomatic protest.²⁰⁸

While the language of ‘police power’ was not used, there is UK diplomatic practice from the nineteenth century that supports the proposition that States could enact laws and regulations that would substantially interfere with property or economic interests of foreigners, and such actions were lawful.²⁰⁹ Certainly, where property was ‘taken’ or expropriated, compensation would be required for the action to be lawful.²¹⁰ But the State could nonetheless substantially interfere in property rights of foreigners without an accompanying duty to compensate, including through regulation, such as bans on exports of corn,²¹¹ laws affecting the

²⁰⁸ Mr Foster, Secretary of State, to Señor Don Enrique Dupuy de Lome, Spanish Ministry (1 October 1892) 2 Moore’s Digest of International Law §191, 145.

²⁰⁹ This position is also reflected in the domestic law of the UK and all common law systems: See, for example, *Gallagher v Lynn* [1937] AC 863, 870; *Shannon v Lower Mainland Dairy Products Board* [1938] AC 708 (Privy Council); *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).

²¹⁰ *Mr Finlay’s Case* (1846) 6 Parry’s British Digest of International Law 341, 342; see also Miles (n 143) 59.

²¹¹ *Export of Corn from Italy* (1847) 6 Parry’s British Digest of International Law 348.

tenure of mining properties,²¹² orders for the destruction of property said to be infected with the plague,²¹³ suspension of publication of newsletters which resulted in losses to foreign publishers,²¹⁴ laws restricting the rights of foreigners engaging in certain trades,²¹⁵ and land reforms limiting the amount of land people could hold.²¹⁶

These diplomatic exchanges reveal that this power of regulation was not unlimited, and would be capable of protest where the regulation was discriminatory,²¹⁷ unnecessary,²¹⁸ or not undertaken in favour of national interests.²¹⁹ For example, the improper action of an agent of the Ottoman Government was the subject of diplomatic complaint when a ship suffered pecuniary loss as a result of being refused entry to a harbour by the agent for reasons ‘not prompted by any...considerations for the direct benefit of the Ottoman Government’, and which were recognised by the Ottoman Government

²¹² *Exchequer Mining Co Case* (1874) 6 Parry’s British Digest of International Law 337 -338.

²¹³ *Destruction of Property During Plague (Turkey)* (1875) 6 Parry’s British Digest of International Law 350.

²¹⁴ *The Levant Herald* (1867) 6 Parry’s British Digest of International Law 355.

²¹⁵ Sir H Jenner to Viscount Palmerston (30 May 1834) 6 Parry’s British Digest of International Law 328; Sir J Harding to the Earl of Malmesbury (3 July 1852) 6 Parry’s British Digest of International Law 328; Sir J Harding to Earl Russell (19 September 1861) 6 Parry’s British Digest of International Law 329.

²¹⁶ *Mr Gerald Potter’s Case* (1884) 6 Parry’s British Digest of International Law 338.

²¹⁷ *Destruction of Property During Plague* (n 213); Sir H Jenner to Viscount Palmerston (n 215); *Mr Gerald Potter’s Case* (n 216).

²¹⁸ *Export of Corn from Italy* (n 211).

²¹⁹ *Exchequer Mining Co Case* (n 212).

as being insufficient.²²⁰ Similarly, ‘unreasonable and oppressive’ and indiscriminate application of quarantine laws were also capable of diplomatic protest.²²¹

The UK practice during this period reveals a variety of purposes for which the legislation could be enacted which were seen as lawful, including health emergencies,²²² public morals²²³ and, more broadly, in the national interest.²²⁴ However, the practice also revealed that legislation purportedly enacted in the public interest was not shielded from diplomatic complaint if that public interest was a guise for unlawful activity. For example, in 1832, the British government protested North Carolina legislation that had introduced quarantine regulations on ships in consequence of having ‘coloured sailors’ on board. The regulations were purportedly enacted on health grounds, but were considered to be ‘a most arbitrary and oppressive measure’ by the British government that was enacted ‘for purposes not connected with the preservation of health’.²²⁵ Rather, the British government argued, the legislation attempted ‘to accomplish by indirect means...the misapplication of the laws of quarantine to purposes altogether

²²⁰ *The “Trojan”* (8 January 1892) 2 McNair’s International Law Opinions 214; see also *The “Dolores”* (1875) 6 Parry’s British Digest of International Law 294, 294–295.

²²¹ *The “Azorian”* (1861) 6 Parry’s British Digest of International Law 291, 291–293; *Lavarello* (Italy v Portugal) (1893) 5 Moore’s International Arbitration 5021.

²²² *Destruction of Property During Plague (Turkey)* (n 213).

²²³ *The Levant Herald* (n 214).

²²⁴ *Exchequer Mining Co Case* (n 212).

²²⁵ Herbert Jenner to Viscount Palmerston (23 March 1832) 2 McNair International Law Opinions 220, 220–221.

inconsistent with the principles upon which these laws are framed'.²²⁶

In areas of fiscal policy, US and UK diplomatic practice acknowledged the lawfulness of fiscal measures of general, non-discriminatory application. In the US, taxation policies of other States were not capable of protest where 'the tax [was] uniform in its operation and [could] be fairly deemed a tax and not a confiscation or unfair imposition'.²²⁷ In the UK, measures by the Austrian government to devalue currency were incapable of protest because 'the [r]eduction of the [v]alue of the [p]aper [m]oney in question appears to have been a general measure, applicable without distinction to all [p]ersons...'.²²⁸ The good faith of the government enacting the measure was also relevant.²²⁹ In contrast, fiscal measures that were so extreme (or 'obnoxious') so as to amount to abuse would be capable of protest.²³⁰

From this survey of diplomatic correspondence, it is apparent that States were given a broad authority to regulate within their territory for a variety of

²²⁶ *ibid.*

²²⁷ Mr Fish, Secretary of State, to Mr Davies, Minister to Germany (21 November 1874) 2 Moore's Digest of International Law §183, 58–60; Mr Fish, Secretary of State, to Mr Cushing, Minister to Spain (12 January 1876) 4 Moore's Digest of International Law §540, 21; Mr Bayard, Secretary of State, to Mr Cox, Minister to Turkey (11 November 1885) 4 Moore's Digest of International Law §540, 23.

²²⁸ Sir J Dodson to Viscount Palmerston (6 February 1850) 6 Parry's British Digest of International Law 350.

²²⁹ *ibid.*

²³⁰ Foreign Office to Mr Dickson at Bogota (14 September 1905) 6 Parry's British Digest of International Law 350; Mr Fish, Secretary of State, to Mr Mantilla (11 January 1876) 4 Moore's Digest of International Law §540, 21.

purposes and using a variety of methods (including export bans²³¹ and taxation²³²). These measures were seen as inherently lawful and not capable of diplomatic protest. Except in areas of fiscal policy, the limitations on the police or regulatory power were couched in terms of non-discrimination, necessity, national interest, and improper exercise of power. In the area of fiscal policy, it was accepted that measures of general application that were too extreme could be characterised as confiscation, giving rise to an obligation to compensate.

3. Friendship, Commerce and Navigation treaties

The language of ‘police’ and police power also appeared in Friendship, Commerce and Navigation (‘FCN’) Treaties during this period. FCN treaties, entered into by the US as early as the eighteenth century, were precursors to modern IITs.²³³ Of those FCNs that were enacted and in force throughout the time period examined in this Chapter, many did not contain dispute settlement mechanisms and those that did were advanced as inter-State diplomatic protection claims in which the applicable law was ‘justice, equity and the law of nations’.²³⁴

²³¹ *Export of Corn from Italy* (n 211).

²³² Mr Fish to Mr Davies (n 227).

²³³ K Scott Gudgeon, ‘United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards’ (1986) 4 *International Tax & Business Lawyer* 105, 108.

²³⁴ For example, For example, Article XXI of the Treaty of Friendship, Limits, and Navigation between Spain and the United States (signed 27 October 1795, proclaimed 2 August 1796) reprinted in WM Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers 1776-1909*, vol II (Government Printing Office 1910) 1640; John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, vol II (Government Printing Office 1898) 991. See also the Treaty of Amity, Commerce and

Several of these FCNs acknowledged the ‘sovereign right’ of States to enact ‘police regulations’. For example, in the 1859 *Treaty of Friendship, Commerce and Navigation* between the US and Panama,²³⁵ Article II provides:

The Republic of Paraguay, in the exercise of the sovereign right which pertains to her, concedes to the merchant flag of the citizens of the United States of America the free navigation of the river Paraguay as far as the dominions of the Empire of Brazil, and of the right side of the Paraná throughout all its course belonging to the Republic, subject to police and fiscal regulations of the Supreme Government of the Republic, in conformity with its concessions to the commerce of friendly nations...²³⁶

These agreements equally provided for protection of persons and their property.²³⁷

Similarly, the 1902 *Treaty of Friendship and General Relations* between the US and Spain provided that the liberty of commerce and navigation between the two States was subject to the proviso that:

Navigation between the United States and Great Britain (the Jay Treaty) (signed 19 November 1794, proclaimed 29 February 1796) reprinted in WM Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers 1776-1909*, vol I (Government Printing Office 1910) 590; John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, vol I (Government Printing Office 1898) 271; Parlett (n 138).

²³⁵ 1859 Treaty of Friendship, Commerce and Navigation (US-Panama) (concluded 4 February 1859, proclaimed 12 March 1860) reprinted in Malloy, *Treaties*, Vol II (n 234) 1364.

²³⁶ *ibid* Article II; see also 1858 Treaty of Peace, Friendship, Commerce and Navigation (US-Bolivia and Peru) (concluded 13 May 1858, proclaimed 8 January 1863) Article III reprinted in Malloy, *Treaties*, Vol II (n 234) 114; Treaty of Friendship, Commerce and Navigation (US-Peru) (concluded 6 September 1870, proclaimed 27 July 1874) reprinted in Malloy, *Treaties*, Vol II (n 234) Article II.

²³⁷ For example, Treaty of Friendship, Commerce and Navigation (US-Panama) (concluded 4 February 1859, proclaimed 12 March 1860) reprinted in Malloy, *Treaties*, Vol II (n 234) 1364, Article IX.

It is, however, understood that these provisions are not intended to annul or prevent, or constitute any exception from the laws, ordinances and special regulations respecting taxation, commerce, health, police, and public security, in force or hereafter made in the respective countries and applying to foreigners in general.²³⁸

These agreements, therefore, appear to consider that the ability of States to enact 'police regulations' would be maintained notwithstanding other obligations in the treaty (and therefore would not be limited by the treaty), and that liability for such regulations was outside of the scope of the treaty.

4. Inter-State Dispute Settlement of Diplomatic Protection Claims

(a) *The Venezuelan Claims Commissions: 1903-1905*

In the early twentieth century, eleven parallel commissions were instituted to adjudicate claims against Venezuela relating to damages sustained by foreigners during the Venezuelan debt crisis of 1902-3.²³⁹ The applicable law of these claims commissions was that of 'justice and the provisions of [the] convention...upon a basis of absolute equity, without regard to objections of a technical nature, or of

²³⁸ Treaty of Friendship and General Relations (US-Spain)(concluded 3 July 1902, proclaimed 20 April 1903) Article II reprinted in Malloy, *Treaties*, Vol II (n 234) 1701; see also Treaty of Commerce and Navigation (US-Two Sicilies) (concluded 1 December 1845, proclaimed 24 July 1846) Article VI reprinted in Malloy, *Treaties*, Vol II (n 234) 1806.

²³⁹ Jackson H Ralston and WT Sherman Doyle (eds), *Venezuelan Arbitrations of 1903* (Government Printing Office 1904); Kevin M Anderson, 'The Venezuelan Claims Controversy at the Hague, 1903' (1995) 57 *The Historian* 525. See: *Venezuela-US, Belgium, Great Britain* (1903-1905) reprinted in (1959) 9 RIAA 111-533; *Venezuela- France Claims Commission* (1903-1905) reprinted in (1960) 10 RIAA 1-356; *Germany -Venezuela Claims Commission* (1903-1905) reprinted in (1960) 10 RIAA 357-476; *Italy-Venezuela Claims Commission* (1903-1905) reprinted in (1960) 10 RIAA 477-692; *Mexico-Venezuela Claims Commission* (1903-1905) reprinted in (1960) 10 RIAA 693-706; *Netherlands-Venezuela Claims Commission* (1903-1905) reprinted in (1960) 10 RIAA 707-734; *Spain-Venezuela Claims Commission* (1903-1905) reprinted in (1960) 10 RIAA 735-760; *Sweden and Norway - Venezuela Claims Commission* (1903-1905) reprinted in (1960) 10 RIAA 761-770.

the provisions of local legislation'.²⁴⁰

In several of these claims commissions, the police power of States was cited as a basis upon which States could lawfully interfere with property. In 1903, in the *Bischoff Case* before the Germany-Venezuela Claims Commission,²⁴¹ the Claimant had his 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. The Commission held that the carriage had been taken 'in the proper exercise of discretion' and 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'.²⁴² Similarly, in the *Poggioli* before the Italy-Venezuela Claims Commission, the Commission rejected a claim for damages arising from the closure of a port (which had caused consequential injury to the Claimant's business) and held, in the absence of a contract existing between the Claimant and the government, '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

²⁴⁰ Protocol of the American-Venezuelan Mixed Claims Commission (17 February 1903) Article I.

²⁴¹ *Bischoff Case* (Germany-Venezuela Claims Commission)(1903) reprinted in (1960) 10 RIAA 420, 420.

²⁴² *ibid.* The tribunal awarded damages in this case, but this was because it was considered there was an unreasonable delay in returning the carriage to the Claimant.

for its exercise beyond question'.²⁴³

In the *Paquet* case before the Belgium-Venezuela Claims Commission, it was accepted that States have the right to expel foreigners from, or prohibit their entrance into, national territory if the persons are considered prejudicial to public order or for considerations of high political character.²⁴⁴ Similarly, the *Maal* case before the Netherlands-Venezuela Claims Commission held that every government had the right to exclude or expel foreigners from its territory if they were prejudicial to the welfare of the State.²⁴⁵ The right of expulsion was said in the *Boffolo* case before the Italian-Venezuelan commission to be a right 'fully held by every State and is deduced from its very sovereignty',²⁴⁶ however the right must be exercised with caution and provide reasons for the expulsion.²⁴⁷ However, these cases also noted that the right could only be exercised to that end and that governments must give explanations to the person expelled if requested, and if such explanations are refused, the act of expulsion is to be considered as arbitrary and indemnity must be paid.²⁴⁸

²⁴³ *Poggioli Case* (Italy-Venezuela Claims Commission)(1903) reprinted in (1960) 10 RIAA 669, 691. The case was upheld in the claimant's favour in other claims.

²⁴⁴ *Paquet Case* (Belgium- Venezuela Claims Commission) (1903) reprinted in (1959) 9 RIAA 323; Ralston and Doyle (n 239) 265.

²⁴⁵ *Maal Case* (Netherlands-Venezuelan Claims Commission) (1903) reprinted in Ralston and Doyle (n 239) 265.

²⁴⁶ *Boffolo* (n 4) 528.

²⁴⁷ Goodwin-Gill (n 4) 98.

²⁴⁸ *Paquet* (n 244); *Olivia Case* (Italian-Venezuelan Claims Commission) (1903) reprinted in Ralston and Doyle (n 239) 771; *Boffolo* (n 4).

These awards of the Venezuelan Claims Commission appear to conceptualise the police power as connected to State sovereignty. This existence of the police power was not questioned by claimants or Commissioners alike, and provided a basis upon which States could lawfully interfere with property. However, the power was evidently not without limits, with the language of ‘reasonableness’²⁴⁹ and ‘arbitrariness’²⁵⁰ tempering the otherwise broad State discretion.

(b) *The North Atlantic Coast Fisheries Case*

The newly established Permanent Court of Arbitration at the turn of the twentieth century was seised of several cases which discussed both the treatment of foreigners and also the corresponding rights and obligations of States.²⁵¹

The *North Atlantic Coast Fisheries Case* concerned an 1818 Treaty between the US and the UK in which US nationals were given liberty to take fish from the (then) British coast of the North American Continent in common with British nationals.²⁵² The UK argued that this liberty of US citizens to take fish was subject to the UK’s right ‘to reasonable regulation in the form of municipal laws, ordinances or rules’²⁵³ over matters such as seasons in which fish may be taken,

²⁴⁹ *Bischoff* (n 241).

²⁵⁰ *Paquet* (n 244).

²⁵¹ Verzijl, *International Law in Historical Perspective*, Vol 8 (n 139) 237–238.

²⁵² *North Atlantic Coast Fisheries Case* (US v UK) (7 September 1910) reprinted in (1961) 11 RIAA 167.

²⁵³ *ibid*, 174.

the method in which fish could be taken, and other reasonable measures of a similar character, including:

[regulations that were] (a) Appropriate or necessary for the protection and preservation of such fisheries...;(b) desirable on grounds of public order and morals; (c) equitable and fair as between local fisherman and the inhabitants of the United States exercising the said treaty liberty, and not so framed as to give unfairly an advantage to the former over the latter class.²⁵⁴

According to the UK, this right of reasonable regulation was an attribute of sovereignty, which was unaffected by the provisions of the Treaty.²⁵⁵ In its oral submissions, UK referred to US authorities concerning the police power in support of its argument as to the parameters of the 'exercise [of] the sovereign power with a view to the public welfare', namely, that such 'police regulations' must be necessary (or 'have reference to') the safety, comfort and well-being of society, and not be inconsistent with treaty provisions but must be:

so imperatively required by the public necessity as to lead to the rational and satisfactory conclusion that the framers...could not...have intended to prohibit their exercise in the particular case, notwithstanding the language of the prohibition would otherwise include it.²⁵⁶

The US did not dispute this right of reasonable regulation, but qualified the right further by arguing that such limitations could only be imposed on the US if

²⁵⁴ Ibid.

²⁵⁵ *ibid*; *Proceedings in the North Atlantic Coast Fisheries Arbitration*, vol IV (Government Printing Office 1912) 19–49 (United Kingdom).

²⁵⁶ *North Atlantic Coast Fisheries Arbitration at the Hague: Oral Argument before the Tribunal Constituted under an Agreement Signed at Washington on the 27th Day of January, 1909, between His Britannic Majesty and the United States of America* (Harrison and Sons 1910) 870–871 (Mr Ewart KC for the United Kingdom); Mr Ewart quoted, *inter alia*, Cooley and Lane (n 195) 575.

their ‘appropriateness, necessity, reasonableness and fairness be determined by the United States and Great Britain by common accord and the United States concurs in their enforcement’.²⁵⁷

The Tribunal noted that the applicable treaty contained ‘no explicit disposition in regard to the right of regulation, reasonable or otherwise: it neither reserves that right in express terms, nor refers to it in any way’.²⁵⁸ Accordingly, it was incumbent on the Tribunal to resolve the dispute by interpreting the general terms of the treaty.²⁵⁹ Ultimately, the Tribunal held that the UK had the right to make ‘reasonable regulations’ that were *bona fide* and not in violation of the treaty, and that consent was not required from the US to make such regulations.²⁶⁰

The Tribunal concluded that:

Regulations which are (1) appropriate or necessary for the protection and preservation of such fisheries, or (2) desirable or necessary on grounds of public order and morals without unnecessarily interfering with the fishery itself, and in both cases equitable and fair as between local and American fisherman, and not so framed as to give unfairly an advantage to the former over the latter class, are not inconsistent with the obligation to execute the Treaty in good faith, and are therefore reasonable and not in violation of the Treaty.²⁶¹

The Tribunal’s conclusion, while not concerning investment protection²⁶²

²⁵⁷ *North Atlantic Coast Fisheries Case* (n 252) 179-180.

²⁵⁸ *ibid* 180.

²⁵⁹ *ibid* 180.

²⁶⁰ *ibid* 187-188.

²⁶¹ *ibid* 187-188.

²⁶² However, States have relied on the case in the context of concessions disputes; see further Chapter Three, Part V(1)(b).

and not expressed using the language of ‘police regulation’ or ‘police power’ that used in the UK’s submissions, demonstrates that it was accepted that States possess a right of ‘reasonable regulation’, which gives States the right to regulate the enjoyment by another State of rights derived from a treaty, but not in such a way as to destroy the effective enjoyment of those rights.²⁶³ The examples of ‘reasonable regulation’ cited in *North Atlantic Coast Fisheries*, including regulations ‘appropriate or necessary for the protection and preservation of such fisheries’ and regulations ‘desirable or necessary on grounds of public order and morals’ are similar to, and consistent with, the types of measures said to fall within the meaning of ‘police regulations’. Further, it is apparent that this right of reasonable regulation exists alongside treaty obligations and is a right that is expressed in positive terms, as opposed to being a right that is residual or ‘leftover’ once treaty obligations are taken into account.

(c) Mixed Arbitration Tribunals in the Inter-War Period

Other mixed arbitration tribunals²⁶⁴ considered a number of claims concerning damage to individuals and their property resulting from legislative action. In *Parson’s Case*, stocks of liquor destroyed under the authority of the military governor-general during an insurrection were considered by the Great Britain-US Arbitral Tribunal ‘to be a matter of police entirely within the powers of the

²⁶³ Lord McNair, ‘Treaties and Sovereignty’, *Symbolae Verzijl* (Martinus Nijhoff 1958) 234.

²⁶⁴ A ‘mixed’ arbitration tribunal refers to tribunals established pursuant to an agreement between two States where individuals (and occasionally States) were permitted to bring claims directly against a State in an international forum, in contrast to the normal rules governing diplomatic protection and nationality that were dominant during this period: see Parlett (n 138) 47.

military government and quite justified by the circumstances'.²⁶⁵ Similarly, while the language of 'police power' was not used, the same idea was conveyed in in *George W Cook (USA) v United Mexican States*, where the revocation of a tax exemption did not give rise to a claim before the US-Mexico General Claims Commission:

It may be added as a corollary that the liberality of a State in granting an exemption is essentially revocable for the reason that it creates no vested rights in him who enjoys it. It is well established that an exemption granted merely for reasons of policy, where the state and the citizen have no agreement to their mutual advantage, must be regarded only as an expression of the pleasure of the said state and of the citizen; and the law which grants it, as all general laws, is subject to amendment or repeal at the option of the legislature, and it is immaterial whether during the time it has been in force the parties in interest have acted in reliance thereon.²⁶⁶

In other areas of fiscal policy considered by the US-Mexico General Claims Commission, zoning restrictions within which there were limits placed on imports and exports 'to protect revenue...[of] customs houses and on its frontiers' was considered to be one of 'such rules as it ...deem[ed] convenient' which Mexico could promulgate.²⁶⁷

The difficulty in drawing the line between the exercise of States' regulatory

²⁶⁵ *J Parsons (UK v US)*(Great Britain – United States Arbitral Tribunal)(30 November 1925) reprinted in (1955) 6 RIAA 165, 165-166.

²⁶⁶ *George W Cook (US v Mexico)*(US-Mexico General Claims Commission)(8 October 1930) reprinted in (1951) 4 RIAA 593, 596; AR Albrecht, 'The Taxation of Aliens under International Law' (1952) 29 *British Yearbook of International Law* 145, 147.

²⁶⁷ While the 'zone of vigilance' established by Mexico was within its powers as a sovereign State, Mexico was required to pay damages to the claimant on other bases concerning unlawful detention: *Louis Chazen (US v Mexico)*(US-Mexico General Claims Commission)(8 October 1930) reprinted in (1951) 4 RIAA 564, 567-568.

power and a violation of international law was also acknowledged during this period. In *Neer*, for instance, the US-Mexico General Claims Commission acknowledged the ‘difficulty of devising a general formula for determining the boundary between an international delinquency...and an unsatisfactory use of power included in national sovereignty.’²⁶⁸ This was echoed in the Separate Opinion of Commissioner Neilson, who acknowledged ‘the clear recognition in international law of the scope of sovereign rights relating to matters that are the subject of domestic regulation’.²⁶⁹ This same point was acknowledged in the context of an expropriation claim before the US-Turkish Claims Commission, which noted ‘it may at times be difficult to make a distinction between a taking of property requiring the payment of compensation and the frustration of enterprise entailing no responsibility to make payment for incidental losses’.²⁷⁰

In the *de Sabla* case,²⁷¹ before the US-Panama Claims Commission, the Panama government had granted cultivation licenses to Panama citizens over land as part of its system of public land administration. The licences were granted

²⁶⁸ *LFH Neer and Pauline Neer* (US v Mexico)(US-Mexico General Claims Commission)(15 October 1926) reprinted in (1951) 4 RIAA 60, 61.

²⁶⁹ *ibid* at 64.

²⁷⁰ *MacAndrews and Forbes Co* (US v Turkey)(US-Turkish Claims Settlement)(undated) reprinted in Nielsen (n 168) 87, 109. In that case, the Commission further noted that there had been judicial condemnation of the theory that authorities could destroy the value of property without making compensation because in a narrow sense of the word it was not taken. However, the loss was sustained in that part of the claim (relating to the transportation of licorice root) was considered to be incidental (“unhappy incidents of war”) which did not impose liability of Turkey: at 109. Compensation was awarded for other aspects of the claim.

²⁷¹ *Marguerite de Joly de Sabla* (US v Panama) (US-Panama Claims Commission)(29 June 1933) reprinted in (1934) 28 AJIL 602.

pursuant to an adjudication process that automatically granted the licences to applicants unless an opposition had been filed. However, in enacting the system, the Panama government had granted licences over land that was privately owned by the (American) Claimant. While the Claimant retained the title to the property, the extent of cultivation (resulting in ‘deforestation and denudation of soil’) by the licence grantees, coupled with the adjudication process that automatically granted the licences, constituted wrongful acts for which the Panama government was responsible.²⁷² In reaching its conclusion, the Commission emphasised that ‘no imputation of bad faith or discrimination’ was made against Panama, and that the measures were designed to ‘to bring order out of a chaotic system of public land administration’.²⁷³ The *process* of implementing their *bona fide* measures resulted in ‘loss of the private property’ of the Claimant, which had to be compensated.²⁷⁴ The Panama government had negligently treated private land as though it were public land,²⁷⁵ depriving the Claimant of her ability to use the property.

(d) Vested Rights Cases before the Upper Silesia Arbitral Tribunal and the Permanent Court of International Justice

Several courts and tribunals convened prior to the Second World War considered public interest regulation through the lens of respect for ‘vested’ or ‘acquired’

²⁷² *ibid* 611.

²⁷³ *de Sabla* (n 271) 611.

²⁷⁴ *ibid* 611-612; see Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (n 112) 220–221.

²⁷⁵ *de Sabla* (n 271) 607.

rights of foreigners.²⁷⁶ Cases concerning vested or acquired rights primarily arose in the context of State succession, with claimants alleging that international law required successor States to respect rights that had been acquired (or vested) prior to succession.²⁷⁷ Much of the jurisprudence during this period concerned disputes resulting from territorial changes made between Germany and Poland in the Upper Silesia region in the interwar years, which resulted in significant numbers of persons of German origin in the Polish region of Upper Silesia, and similarly large numbers of persons of Polish origin in German Upper Silesia.²⁷⁸ The Upper Silesian Arbitral Tribunal (1922-1937) had jurisdiction to determine the amount of compensation for ‘suppression or diminution’ of vested rights by application of general laws.²⁷⁹ Categories of vested rights that were protected were enumerated in the treaty establishing the Tribunal.²⁸⁰ The President of the Upper Silesian Tribunal, Georges Kaeckenbeeck, noted that cases ‘comparable to those at the root of the...distinction between “police power” and the “power of eminent domain” were often at work’²⁸¹ when the Tribunal addressed cases that touched upon ‘social, financial, health, police or other considerations of general import for

²⁷⁶ Georges Kaeckenbeeck, ‘The Protection of Vested Rights in International Law’ (1936) 17 *British Yearbook of International Law* 1.

²⁷⁷ Ko Swan Sik, ‘The Concept of Acquired Rights in International Law: A Survey’ (1977) 24 *Netherlands International Law Review* 120.

²⁷⁸ Parlett (n 138) 74-75.

²⁷⁹ *ibid*; *Convention between Germany and Poland relating to Upper Silesia* (signed 15 May 1922, entered into force 14 May 1922) 9 LNTS 465, Article 5.

²⁸⁰ *Convention between Germany and Poland relating to Upper Silesia* (n 279) Article 4(2).

²⁸¹ Georges Kaeckenbeeck, *The International Experiment of Upper Silesia: A Study in the Working of the Upper Silesian Settlement 1922-1937* (Oxford University Press 1942) 61.

community life'.²⁸²

In *Niederstrasser v Poland*, the Upper Silesian Tribunal acknowledged that the treaty provisions providing compensation for cases involving mere *interference* with (as opposed to expropriation of) vested rights by way of general legislative measures were beyond the accepted principles of international law at the time.²⁸³ However, in terms of general international law, the President of the Tribunal considered that the applicable treaty and the Tribunal 'never protected the rentability of...business, or its form nor extent against social, financial, health, police or other considerations of general import for community life'.²⁸⁴ The 'normal process of legislation'²⁸⁵ was thus not affected.²⁸⁶ So, for instance, in *Kügele v Poland*, an increase of a tax was not regarded as 'taking away or impairment of the right to engage in a trade'.²⁸⁷

The PCIJ also considered vested rights in *Certain German Interests in Polish Upper Silesia*.²⁸⁸ The PCIJ affirmed the principle of respect for vested rights.²⁸⁹

²⁸² *ibid.*

²⁸³ *Niederstrasser v Poland* (Upper Silesian Arbitral Tribunal) (1931) 6 ILR 66, 68; the same point was made by Kaeckenbeeck, 'The Protection of Vested Rights in International Law' (n 276) 14.

²⁸⁴ Kaeckenbeeck, *The International Experiment of Upper Silesia* (n 281) 61.

²⁸⁵ Described in another case as 'rights of a public nature touching the organisation of the State': *Hausen v Poland* (Upper Silesian Arbitral Tribunal) (1934) 7 ILR 102.

²⁸⁶ Kaeckenbeeck, *The International Experiment of Upper Silesia* (n 281) 67.

²⁸⁷ *Kügele v Poland* (Upper Silesian Arbitral Tribunal) (1932) 6 ILR 69. See further Georges Kaeckenbeeck, 'La Protection Internationale Des Droits Acquis' (1937) 59 *Recueil des Cours* 316, 404.

²⁸⁸ *Certain German Interests in Polish Upper Silesia (Germany v Poland)* (Merits) [1926] PCIJ Rep Series A No.7, 22.

In doing so, however, the PCIJ distinguished between vested rights protected under the applicable treaty (in that case, the right to indemnity for liquidation) and ‘measures...which generally accepted international law does not sanction in respect of foreigners; expropriation for reasons of public utility, judicial liquidation and similar measures’.²⁹⁰ The acknowledgment of ‘judicial liquidation and similar measures’ highlights the acceptance by the PCIJ of certain types of interferences with property rights that are distinct from (and do not constitute) expropriation, and that such ‘similar measures’ were not forbidden by international law.²⁹¹

In the PCIJ’s *Oscar Chinn Case*,²⁹² the parties made extensive pleadings regarding the lawfulness of certain types of government regulation that would not breach the international legal rules regarding respect for vested rights. In the oral hearings, Belgium argued that there were certain types of legislative measures enacted in furtherance of a general or social interest to which private rights would be subordinate, and which were not to be considered as vested rights the subject of protection, and would not require compensation.²⁹³ This included legislation

²⁸⁹ *ibid* 22.

²⁹⁰ *ibid* .

²⁹¹ Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (n 112) 223–224; Viñuales, ‘Sovereignty in Foreign Investment Law’ (n 33) 327–328.

²⁹² *Oscar Chinn Case (Great Britain v Belgium)* [1934] PCIJ Rep Series A/B No.63.

²⁹³ *Oscar Chinn Pleadings* (n 162) 288–289, 292–295, 440 (de Ruelle for Belgium) (author translation of ‘l’intérêt des individus doit être subordonné à l’intérêt général; il n’y a de société possible qu’à ce prix’ and ‘Il arrive fréquemment que certaines législations interdisent le commerce de marchandises, de produits, d’articles que l’intérêt général commande de réglementer’).

limiting the sale and trade of alcohol, drugs and arms,²⁹⁴ and considerations of wellbeing and hygiene.²⁹⁵ In support of this authority, Belgium cited *inter alia* the 1930 annual report of the Institut International de Droit Public that echoed the same idea, noting that individual liberties were limited by social considerations, and that the State was entitled to limit individual rights through administrative regulations.²⁹⁶

Acknowledging the Belgian argument, the UK agreed that ‘the enormous mass of legislation in so many different countries showed that the international principle of respect for acquired rights could not cover every type of case where an individual’s interest might be adversely affected by legislative measures’ and that it was difficult to show ‘exactly where the line should be drawn’.²⁹⁷ The UK doubted whether it was possible ‘to find any single criterion applicable to all possible types of case’,²⁹⁸ but noted that the cases that had concluded that legislative interferences with private rights were lawful (citing laws relating to slum property and rent restrictions) were not equivalent to (and, implicitly, not as severe as)

²⁹⁴ *ibid* 288 (author translation of ‘dans chacun de nos pays, dans les pays dont la constitution offre le plus de garanties, qu’un État doit réglementer, par exemple, certaines professions: le débit de l’alcool et des boissons alcooliques dans certains établissements, le commerce des produits stupéfiants, le commerce des armes’).

²⁹⁵ *ibid* 292-295 (author translation of: ‘des considérations d’intérêt social, des considérations tirées des nécessités du bien-être, de l’hygiène, etc.’).

²⁹⁶ Gascón y Marin, ‘Le droit de propriété selon la Déclaration des droits de 1789 et le droit public contemporain’ [1930] *Annuaire de l’Institut international de droit public* 228, 278.

²⁹⁷ *Oscar Chinn Pleadings* (n 162) 308-309 (Mr Beckett for the United Kingdom).

²⁹⁸ *ibid*.

‘making it impossible for a man to carry on an established business’.²⁹⁹ The UK submitted that making it impossible for the claimant to carry on his business profitably ‘constituted a breach of the principles of international law, and in particular of respect for vested rights.’³⁰⁰ The PCIJ did not explicitly consider Belgium’s arguments, but rejected the UK’s claim on the basis that the changes in Mr Chinn’s financial position were not vested rights, and therefore not the subject of protection.

The vested rights cases examined here support the proposition that, during the time period examined in this Chapter, the interference with vested rights through general legislative measures enacted for police reasons was not considered to be contrary to international law.

5. The police power and treatment of Foreigners and Foreign Property in the League of Nations

The language of ‘police’ and of the lawfulness of legislation enacted for public purposes was also raised in the codification efforts of the League of Nations.

Initially, there was limited discussion of the protection of property of foreigners outside of protection during times of war.³⁰¹ In 1926, the League of Nations Committee of Experts for the Progressive Codification of International Law considered ‘whether and, if so, in what cases a State may be held responsible

²⁹⁹ *ibid.*

³⁰⁰ *Oscar Chinn Case* (n 292) 82, 86.

³⁰¹ Martins Paparinskis, ‘Investment Arbitration and the Law of Countermeasures’ (2009) 79 *British Yearbook of International Law* 264, 320–321.

for damage done in its territory to the person or property of foreigners'.³⁰² The Special Rapporteur of the Committee observed that '[w]hether in peace, in war or in times of revolution, the State should be foremost in respecting and protecting the property of foreigners',³⁰³ but specified that State responsibility only would arise (and compensation would only be required) to be paid for property seized or confiscated in times of war or revolution.³⁰⁴

In the replies of States to the Committee's report and questionnaire, several States expressed reservations about the conclusions of the Rapporteur,³⁰⁵ although the majority nonetheless considered the topic was ripe for codification.³⁰⁶ During these discussions, some States noted that it would be desirable for the League to consider expropriation 'in the widest sense of the term' with a particular

³⁰² Committee of Experts for the Progressive Codification of International Law, 'Questionnaire No.4: Responsibility of States for Damage Done in Their Territories to the Person or Property of Foreigners' (1926) reprinted in Shabtai Rosenne (ed), *League of Nations Committee of Experts for the Progressive Codification of International Law [1925]-[1928]*, vol 2 (Oceana Publications 1972) 117.

³⁰³ Gustavo Guerrero, 'Annex to Questionnaire 4: Report of the Sub-Committee' in Shabtai Rosenne (ed), *League of Nations Committee of Experts for the Progressive Codification of International Law [1925]-[1928]*, vol 2 (Oceana Publications 1972) 128.

³⁰⁴ *ibid* 130-131.

³⁰⁵ 'Annex II: Replies by Governments to the Questionnaires Nos. 1 to 7' reprinted in Rosenne, *League of Nations Committee of Experts for the Progressive Codification of International Law [1925]-[1928]* (n 302) 164 (Austria), 171 (Great Britain), 172 (Chile), 177 (Denmark), 191 (France), 203 (Norway), 227 (Roumania), 281 (Venezuela).

³⁰⁶ Gustavo Guerrero, 'Analysis of Replies Submitted by M Guerrero' in Shabtai Rosenne (ed), *League of Nations Committee of Experts for the Progressive Codification of International Law [1925]-[1928]*, vol 2 (Oceana Publications 1972) 293.

emphasis on compensation for damage caused by legislative acts.³⁰⁷ Other States objected to further discussion of the topic on the basis it too closely affected the ‘internal or external policy of States, their social life and the stability of their institutions’.³⁰⁸

In subsequent codification efforts by the League of Nations, there was reference to the police power in the context of the treatment of foreigners generally and, later, in the context of treatment of concessions contracts purportedly interfered with through general legislation. In 1929, the League of Nations convened the International Conference on the Treatment of Foreigners (‘1929 Conference’) to discuss the Draft Convention on the Treatment of Foreigners (‘Draft Convention’).³⁰⁹ That Draft Convention contained two references to ‘police’. First, the draft article concerning freedom of travel, sojourn and establishment of foreign nationals was ‘without prejudice to the *police regulations* concerning foreigners’.³¹⁰ In the commentary to that draft provision, the League of Nations Economic Committee noted that ‘police regulations’ concerning foreigners included ‘those [regulations] intended to safeguard public security or national defence’.³¹¹ Secondly, there was also a proposed general

³⁰⁷ ‘Annex II: Replies by Governments to the Questionnaires Nos. 1 to 7’ reprinted in Rosenne, *League of Nations Committee of Experts for the Progressive Codification of International Law [1925]-[1928]* (n 302) 189 (Finland), 186 (Denmark).

³⁰⁸ *ibid* 191 (France).

³⁰⁹ League of Nations Economic Committee, ‘Draft Convention on the Treatment of Foreigners’ [1928] League of Nations Document No. C.174.M.53 1928 II.

³¹⁰ *ibid* Article 6.

reservation provision in the Draft Convention that stated:

The provisions of the present Convention shall in no way affect the freedom of the High Contracting Parties as regards the admission of foreigners or the police measures which parties may take in regard to them.³¹²

The commentary to this provision noted that ‘police measures’ included matters of national security or public order.³¹³ The Economic Committee further noted that ‘in police matters [the Economic Committee] has recognised the complete sovereignty of the contracting States, provided always they only employ their police rights in the ordinary way...’.³¹⁴ The 1929 Conference failed to reach a consensus on the Draft Convention, with States dividing on the question of national treatment.³¹⁵

Notwithstanding the disagreement regarding national treatment, there did not appear to be any disagreement regarding the right of States to take police measures (or regulations) in the negotiations for the Draft Convention. Several delegates believed that the expression ‘police’ should be supplemented to

³¹¹ *ibid* 23–24.

³¹² *ibid* Article 29.

³¹³ *ibid* 37.

³¹⁴ League of Nations, ‘International Conference on the Treatment of Foreigners, Geneva, March 5th, 1929, Preparatory Documents’ [1929] League of Nations Document No. C.36.M.21 1929 III, 33 (concerning the scope of the right of expulsion of foreigners and whether it was within the scope of Article 6).

³¹⁵ Montt (n 10) 52; John Ward Cutler, ‘The Treatment of Foreigners’ (1933) 27 *American Journal of International Law* 225.

include measures adopted to protect and regulate the home labour market,³¹⁶ and others considered the term should be more clearly defined to state whether ‘police regulation’ covered ‘general administrative measures or whether it refer[red] exclusively to measures of public security’.³¹⁷ It was therefore always understood at the time of drafting the Draft Convention that police regulations (howsoever described) would fall outside of the scope of the Draft Convention, and that the right to enact police measures would remain intact regardless of other provisions limiting the regulatory power of States. However, while there was agreement on the existence of such a principle, there was a disagreement, or at least a lack of clarity, on precisely what ‘police regulations’ entailed.

At the 1930 League of Nations Conference on the Codification of International Law (‘1930 Conference’), which aimed to codify the international law of ‘Responsibility of States for Damage Caused in Their Territory to the Person or Property of Foreigners’, delegates were similarly unable to reach a consensus.³¹⁸ Unlike the 1929 Conference, there was limited explicit reference to the police power, although similar language was used. There were references to the ability of States to enact general legislative measures in the public interest that interfered with private rights when discussing the question of vested rights and whether

³¹⁶ League of Nations, ‘Proceedings of the International Conference on Treatment of Foreigners, First Session, Paris (5 November – 5 December 1929)’ [1930] League of Nations Document No. C.97.M.23 1930 II, 419 (Rapporteur M Politis), 492 (France).

³¹⁷ *ibid* 494 (Yugoslavia), 500 (Poland).

³¹⁸ Edwin Borchard, ‘The Law of Responsibility of States for Damage Done on Their Territory to the Person or Property of Foreigners’ (1929) 23 *American Journal of International Law*. Supplement: Codification of International Law 133.

States could be responsible under international law for enacting general legislation contrary to concession contracts.³¹⁹ The US submitted prior to the 1930 Conference that State responsibility for conduct (in the form of legislation or other measures) that infringed the rights of foreigners was subject to the principle that States may enact legislation in the exercise of their police power.³²⁰ Other States raised similar views. For instance, Belgium referred to ‘restrictions of rights which are necessitated on the groups of public security and which apply alike to nationals and to foreigners’,³²¹ and Czechoslovakia noted:

[A]ll persons, foreigners included, are bound to submit to the exercise of public authority within the limits of the law, even if that authority takes the form of interference with their private rights.³²²

The view advanced in the ‘Bases for Discussion’ document prepared by the League of Nations prior to the 1930 Conference considered that State responsibility for enacting general legislative measures contrary to concession contracts would ‘depend on the circumstances’,³²³ but the matter was subsequently not discussed at the Conference.³²⁴

³¹⁹ ‘Bases of Discussion Drawn Up for the Conference by the Preparatory Committee’ reprinted in Shabtai Rosenne, *Conference for the Codification of International Law (1930)*, vol I (Oceana Publications 1975); FA Mann, ‘State Contracts and State Responsibility’ (1960) 54 *American Journal of International Law* 572, 589.

³²⁰ ‘Bases of Discussion Drawn Up for the Conference by the Preparatory Committee’ reprinted in Rosenne (n 319) 684 (Comments by the US) (‘The right of a nation to exercise its police power remains unimpaired’).

³²¹ *ibid* 456.

³²² *ibid* 436.

³²³ *ibid* 455.

³²⁴ Mann, ‘State Contracts and State Responsibility’ (n 319) 589.

6. The police power in writings of eminent publicists and learned societies

Early twentieth century writings of eminent publicists and learned societies acknowledged the existence of the police power, although there was some uncertainty as to its scope, its applicability in international law, and its relationship with the developing international law of expropriation.

Writing in 1925, Alexander Fachiri observed that ‘the full scope is allowed under international law to the internal organization of the state for the purpose of securing its progress and well being’ and that extended to measures that were prejudicial to foreigners.³²⁵ He considered that this principle was difficult to reconcile with the concept of expropriation, and that the distinction was ‘a question of degree’.³²⁶ He maintained this position in later writings, expressing reluctance at articulating a positive law doctrine of police power like that found in US law, but noted that it did not form an essential part of his analysis of the law of expropriation because police power regulations ordinarily fell short of expropriation. Where, however, a purported exercise of police power went so far as to amount to a taking, Fachiri considered that compensation was required.³²⁷

Responding to Fachiri in 1928, John Fischer Williams also considered the police power as a concept of municipal (and specifically, US) law.³²⁸ He expressed

³²⁵ Fachiri 1925 (n 160) 170.

³²⁶ *ibid.*

³²⁷ Alexander P Fachiri, ‘International Law and the Property of Aliens’ (1929) 10 *British Yearbook of International Law* 32, 52.

³²⁸ John Fischer Williams, ‘International Law and the Property of Aliens’ (1928) 9 *British Yearbook of International Law* 1, 23.

doubts as to whether the exercise of police power should be judged solely based on the purpose of the measure, or distinguished on the basis of acquisition (which would be compensable) and other measures (such as prohibition, which would be non-compensable).³²⁹ He cited the existence of the police power as reason for doubting an international legal rule requiring compensation for expropriation, as the reconciliation between the two doctrines was ‘a problem for which legal theory as yet found no satisfactory solution’.³³⁰

Similarly, in 1928, Frederick S Dunn expressed uncertainty as to whether there existed a power to institute broad reaching social reform without the need to compensate, suggesting that the law should develop in such a way but expressing doubt as to whether it would do so.³³¹ He cautioned against an idea of absolute territorial sovereignty, noting that if the principle existed ‘in the absolute form in which it [was] commonly advanced...there would be very little scope for the development for any system of international law at all’.³³² He advocated for a rule that would exempt from liability *bona fide* social or economic reform that was ‘genuinely aimed to benefit the nation as a whole’ and was not discriminatory ‘nor liable to disturb to any substantial extent the existing methods of carrying on intercourse between nations’.³³³

³²⁹ *ibid* 25–26.

³³⁰ *ibid* 27.

³³¹ Dunn (n 34) 171,180.

³³² *ibid* 171.

³³³ *ibid* 180.

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.³³⁴ At that roundtable, Phillip C Jessup noted the US constitutional law jurisprudence on the police powers doctrine and concluded that States ‘may perform acts which affect property rights of individuals which do not constitute illegal confiscation under international law even though no compensation is paid.’³³⁵ 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.³³⁶

In the same year, John P Bullington noted that the ‘protection of the public interests under the police power...necessarily curtails to some extent private rights’,³³⁷ but did note that despite its widespread acceptance, there was little agreement on the limits of the police power.³³⁸

In anticipation of the League of Nations codification efforts discussed

³³⁴ 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.

³³⁵ Philip C Jessup, ‘Confiscation’ (1927) 21 American Society of International Law Proceedings 38, 39.

³³⁶ *ibid* 40.

³³⁷ John P Bullington, ‘Problems of International Law in the Mexican Constitution of 1917’ (1927) 21 American Journal of International Law 685, 701.

³³⁸ *ibid*.

earlier in this Chapter, Edwin Borchard at Harvard Law School prepared the 1929 Draft Convention on International Responsibility of States for Injuries to Aliens (the '1929 Harvard Draft Convention').³³⁹ Kurtz notes that the 1929 Harvard Draft Convention made no reference to the police power, unlike its 1961 counterpart (which will be discussed later in Chapter Three).³⁴⁰ It is true the language of 'police power' is not used, as Kurtz correctly identifies. However, the Commentary to the 1929 Harvard Draft Convention does acknowledge 'the State's power to modify property rights without violating rights protected by international law',³⁴¹ and further notes that the circumstances under which such legislation 'exceeds the proper bounds' of State power was 'an extremely difficult matter to determine'.³⁴² Therefore, it isn't so much an example of the police power not being acknowledged, as Kurtz attests – it could be seen as acknowledged using different language – rather, it serves as authority that the limits of the police power were difficult to determine.

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. A committee on the protection of private property discussed circumstances under which State regulation of particular businesses would breach

³³⁹ Edwin Borchard, 'Part II: Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners' (1929) 23 *Special Supplement to the American Journal of International Law* 133.

³⁴⁰ Kurtz (n 42) 294. See Chapter III, Part VI nn 526 - 528.

³⁴¹ Borchard (n 339) 161.

³⁴² *ibid.*

international law. The Rapporteur considered that the prohibition of businesses or commerce for police reasons (identifying ‘public health and public order’ as examples of such reasons) would not require compensation.³⁴³ The report concluded:

[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.³⁴⁴

The final resolution of the Conference also acknowledged that States could prohibit business or industries ‘for reasons of police’.³⁴⁵

Contemporaneous writings agreed with this proposition, although it was also acknowledged that ‘a nice balance’ had not yet been struck ‘between the inviolability of private property and the state’s undoubted power to legislate upon internal matters and to control local property’.³⁴⁶ Writing in 1936, Kaeckenbeeck 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

³⁴³ JC Witenberg, ‘Report by Dr J.C. Witenberg to the Protection of Private Property Committee’ (1930) 36 *International Law Association Reports of Conferences* 301, 351.

³⁴⁴ 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.

³⁴⁵ Witenberg (n 343) 362.

³⁴⁶ Cutler (n 315) 240.

according to the international standard'.³⁴⁷ Kaeckenbeeck further noted that no rule that would limit the ability of States to legislate in a way that would interfere with vested rights had been shown to exist.³⁴⁸ However, he later noted:

The rule laid down does not, however, prejudge the question what else may involve the liability of the state. Nor does it answer the question what is sound or unsound, responsible or irresponsible legislation.³⁴⁹

Hersch Lauterpacht echoed the same sentiment in 1937 when he noted the non-compensatory nature of some measures (including taxation and destruction of property for reasons of public health and safety), noting that their non-compensable nature stemmed from the right of States to regulate their social and political life, and that requiring compensation for such measures could invalidate proposed reforms.³⁵⁰

In 1941, John H. Herz considered that it was a principle of international law that there was a distinction between 'measures of police and expropriation for

³⁴⁷ Kaeckenbeeck, 'The Protection of Vested Rights in International Law' (n 276) 16; See also James-Leslie Brierly, 'Règles Générales Du Droit de La Paix' (1936) 58 *Recueil des Cours* 145, 171.

³⁴⁸ Kaeckenbeeck, 'The Protection of Vested Rights in International Law' (n 276) 14.

³⁴⁹ *ibid* 15.

³⁵⁰ Hersch Lauterpacht, 'Règles Générales Du Droit de La Paix' (1937) 62 *Recueil des Cours* 95, 346 (author paraphrasing and translation of: 'L'imposition ordinaire, les droits de succession, la destruction de la propriété pour raisons de santé ou de sécurité publique, la dévaluation de la monnaie, sont autant d'exemples de confiscation de biens sans indemnité. ... Soutenir ceci serait essayer d'imposer aux Etats l'interdiction de régler leur vie sociale et politique comme ils ont le droit de le faire, en vertu de leur indépendance et de leur autonomie, reconnues par le droit international. Car l'obligation d'une compensation intégrale pourrait, en fait, rendre nulle la réforme projetée').

public utility'.³⁵¹ 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.³⁵²

IV. CONCLUSION

During the time period examined in this Chapter, States made appeals to sovereignty and to their police power to defend claims. In both cases, neither State sovereignty nor the existence of the police power was questioned. However, the invocation of sovereignty, or an articulation of the police power that equated with sovereignty, was rarely (if ever) accepted as a basis on which to prevent a State being liable for breaching international law.

With respect to the police power, the examination of materials in this Chapter reveals the position in international law prior to 1945 can be summarised as follows:

³⁵¹ John H Herz, 'Expropriation of Foreign Property' (1941) 35 *American Journal of International Law* 243, 252 citing, *inter alia*, Kaeckenbeeck, 'The Protection of Vested Rights in International Law' (n 276); Brierly (n 347); Jessup (n 335); *International Law Association* (n 344); Josef L Kunz, 'The Mexican Expropriations' (1940) 17 *New York University Law Quarterly Review* 327, 350.

³⁵² Herz (n 351) 251-252.

1. The 'police power' referred to the power of States to regulate matters of public welfare (including health, well-being, public morals, public order, national security and the national interest). The concept was never exhaustively defined.
2. Even where the language of 'police power' was not used, there appeared to be a general consensus that non-discriminatory measures of general application enacted for public welfare objectives were lawful.
3. This power was to be exercised reasonably, and not arbitrarily.
4. The line between an exercise of police power and a breach of international law was difficult to determine.
5. The police power applied to circumstances beyond expropriation and extended to the treatment of foreigners more broadly, notably with respect to denial of justice, vested rights, FCN treaties and the interpretation of treaty obligations.
6. The police power was often raised alongside (but was not necessarily equated with) the sovereignty of States.

CHAPTER THREE

PUBLIC INTEREST REGULATION AND FOREIGN INVESTMENT IN CONTEXT II: 1945- EARLY 2000s

I. INTRODUCTION

This Chapter continues from the previous Chapter and examines the lawfulness of public interest regulation and any purported right to enact such regulation in its historical context, focussing on the period following 1945 to the early 2000s. This analysis is undertaken in light of diplomatic correspondence, the negotiation of and entry into treaties, States' pleadings before international courts and tribunals, the decisions of international courts and tribunals and the writings of eminent publicists and learned societies.

The time period examined in this Chapter has several distinguishing features from the period addressed in the previous Chapter. First, throughout the mid-twentieth century, there was extensive debate between developed (capital exporting) and developing (capital importing) States as to the content of any international legal framework governing foreign direct investment, including the extent to which foreign investment should be protected in treaties.³⁵³ Against that background, the desire for international consensus was fuelled by a number of

³⁵³

Kenneth Vandeveld, 'A Brief History of International Investment Agreements' in Karl P Sauvart and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Domestic Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press 2009); Dumberry (n 113) 151–155.

expropriations carried out by developing States: between 1960 and 1974, 875 expropriations occurred in 62 countries, two-thirds of which were undertaken by ten developing countries.³⁵⁴ During this period, the issue that dominated scholarly attention was whether and to what extent compensation was required in the event of expropriation, rather than the antecedent question of whether an expropriation had occurred in the first place. Similarly (and perhaps for the same reason), during this period there was limited focus on the international minimum standard of treatment.³⁵⁵

As a result, the sources relied upon in this Chapter are more varied than in Chapter Two and consequently use a wider variety of language to discuss the same or similar issues relating to States' regulatory powers. For this reason, this Chapter is structured by source rather than under thematic headings. However, while the language used was more varied, it will be argued that substantively States articulated positions consistent with those examined in the previous Chapter. While issues concerning the lawfulness of public interest regulation (and the right to enact such regulation) were not at the forefront during this period, there are numerous of examples that will be examined in this Chapter of what Vaughan

³⁵⁴ The ten States were: Algeria, Chile, Egypt, India, Indonesia, Sri Lanka, Sudan, Uganda and Tanzania: *Permanent Sovereignty Over Natural Resources Report of the Secretary General*, UN Doc. A/9716 (1974); O Thomas Johnson and Jonathan Gimblett, 'From Gunboats to BITs: The Evolution of Modern International Investment Law' in Karl P Sauvant (ed), *Yearbook on International Investment Law and Policy 2010-2011* (Oxford University Press 2011) 675.

³⁵⁵ Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (n 112) Chapter 3.I.

Lowé describes as the ‘persistence of regulatory powers’ of States in the context of the treatment of foreign property.³⁵⁶

Secondly, during the time period examined in this Chapter the rights of individuals, nationals and foreigners alike, were acknowledged and became a more prominent means through which property protection claims were espoused, in contrast to the earlier model of inter-State claims pursuant to diplomatic protection. These rights were enshrined in various international and regional human rights instruments. As a consequence, the *travaux préparatoires* for international and regional human rights instruments, which either enshrined a right to property or debated the inclusion of such a right, are examined in this Chapter. While international investment law and human rights law are conceptually distinct, both areas of law serve similar functions insofar that both regimes provide protection for individuals, and both regimes have grappled with limitations on State power in cases concerning the protection of property.³⁵⁷ Given these functional and substantive similarities, State practice in the negotiation of and entry into international and regional human rights treaties is instructive.

³⁵⁶ Lowe (n 21) 450. See also 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).

³⁵⁷ Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (n 112) 74–83; Eric De Brabandere, ‘Yukos Universal Limited (Isle of Man) v The Russian Federation Complementarity or Conflict? Contrasting the Yukos Case before the European Court of Human Rights and Investment Tribunals’ (2015) 30 ICSID Review 345, 346.

II. THE PROTECTION OF PUBLIC INTEREST REGULATION IN NEGOTIATIONS FOR MULTILATERAL INVESTMENT AND TRADE TREATIES

Throughout the time period examined in this Chapter, there was continued debate between States as to the content of any international legal framework governing foreign direct investment, including the extent to which foreign investment should be protected in treaties.³⁵⁸ By the early 1990s, BITs had become the primary instrument used by States to protect foreign investment and had become ‘a standard feature of the framework of international economic relations’.³⁵⁹ These instruments were largely silent on the lawfulness of public interest regulation and the right of States to enact such regulation. However, as will be discussed further in Chapters Four and Five, the absence of such language has not prevented investor-State arbitration tribunals from considering these issues.

Alongside the entry into BITs during this period were several multilateral attempts to establish treaty-based protections of foreign investment. In doing so, States extensively discussed the interaction between these treaty-based protections and States’ regulatory powers.

1. Negotiations for Multilateral Investment Treaties

The 1963 and 1967, the Organisation for Economic Co-operation and Development (‘OECD’) presented Draft Conventions on Protection of Foreign Property, both of which also set out a series of provisions relating to investment protection,

³⁵⁸ Vandevelde, ‘A Brief History of International Investment Agreements’ (n 353).

³⁵⁹ Giorgio Sacerdoti, ‘Bilateral Treaties and Multilateral Instruments on Investment Protection’ (1997) 269 *Recueil des Cours* 251, 264.

including expropriation (both direct and indirect), FET and protection against wrongful interference with the use of property by unreasonable or discriminatory measures.³⁶⁰ There was no mention of police power in the text of either draft, although States' power to regulate was explicitly acknowledged.³⁶¹ However, it was made clear that the fact a measure was taken 'in the exercise of its sovereign powers' would not, of itself, preclude such a measure from being in violation of the prohibition against unreasonable measures or FET. The commentary to the provision on 'unreasonable measures' noted:

The measure in issue may have been taken by or on behalf of the party concerned in the exercise of its sovereign powers. The fact that it has thus been undertaken will undoubtedly carry weight in the determination of the question whether it is lawful. However, though the power by virtue of which the measure is taken may not be contested, the latter may be unlawful in view of the *manner or circumstance* in which the power has been exercised. In many cases such a measure will also violate the standard of fair and equitable treatment.³⁶²

The commentary to the 1963 and 1967 Drafts noted that 'a right must be exercised in accordance with standards of what is normal, having in view the social purpose of the law' and further that 'the abuse or misuse of a right would endow an act otherwise lawful with the character of a breach of the treaty'.³⁶³ Thus, it was not suggested that *all* governmental action with a purported public

³⁶⁰ OECD, '1963 Draft Convention on the Protection of Foreign Property: Text with Notes and Comments' (1963) 2 ILM 241; OECD, '1967 Draft Convention on the Protection of Foreign Property: Text with Notes and Comments' (1968) 7 ILM 117, 119.

³⁶¹ OECD, '1963 Draft Convention' (n 360) 249; OECD, '1967 Draft Convention' (n 360) 125.

³⁶² OECD, '1963 Draft Convention' (n 360) 245; OECD, '1967 Draft Convention' (n 360) 121.

³⁶³ OECD, '1963 Draft Convention' (n 360) 245; OECD, '1967 Draft Convention' (n 360) 121.

interest would be automatically lawful. The conduct would have to be ‘normal’ so as to be lawful, with the onus on the person alleging unreasonableness having to prove the measure was unreasonable.³⁶⁴

The lawfulness of ‘normal governmental processes’ was further supported in the commentary to the 1963 and 1967 Drafts when discussing permissible derogations, where 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 Convention. 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. The imposition of taxation of a general and non-confiscatory character; the forfeiture of goods smuggled through customs; the confiscation of obscene literature or dangerous drugs; the payment of fines upon conviction for crime; the enforcement of court judgments – 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.³⁶⁵

Neither the 1963 or 1967 Draft Conventions were adopted as a multilateral convention but instead the 1967 Draft was commended to member States as a model for investment protection in drafting bilateral agreements.³⁶⁶

Similarly, in the negotiations for the OECD’s Multilateral Agreement on Investment (‘MAI’), the negotiators³⁶⁷ proposed an interpretive note to the draft

³⁶⁴ OECD, ‘1967 Draft Convention’ (n 360) 122.

³⁶⁵ OECD, ‘1963 Draft Convention’ (n 360) 255; OECD, ‘1967 Draft Convention’ (n 360) 131.

³⁶⁶ United Nations Centre on Transnational Corporations, *Bilateral Investment Treaties* (United Nations 1988) 7.

provisions on FET (which fell under the provision regarding ‘General Treatment’) and expropriation that read:

This Article on General Treatment, and the Article on Expropriation and Compensation, are intended to incorporate into the MAI existing international norms. The reference in [the] Article -- 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. Nor would such normal and non-discriminatory government activity contravene the standards of this Article.³⁶⁸

Thus, from the standpoint of the negotiators of the MAI, normal and non-discriminatory government activity in the public interest would not contravene the proposed provisions concerning FET and expropriation. The OECD Council of Ministers confirmed this view in a declaration, stating that the ‘MAI would

³⁶⁷ 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*, 1998) <<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.

³⁶⁸ 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) 13, 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’, *International Investment Law: A Changing Landscape* (OECD Publishing 2005) 9.

establish mutually beneficial international rules which would not inhibit the normal non-discriminatory exercise of regulatory powers by governments'.³⁶⁹ These interpretive notes were accompanied by a substantive provision in the MAI that affirmed the 'right to regulate':

A Contracting Party may adopt, maintain or enforce any measure that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns, provided such measures are consistent with this agreement.³⁷⁰

While neither of the OECD's Draft Conventions nor the MAI were ever finalised, the view articulated in those draft agreements that non-discriminatory regulation in the public interest was lawful was reflected in other multilateral 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 and 'similar measures'),³⁷¹ explicitly excludes from the definition of expropriation and similar measures (an insurable event under the Convention) 'non-discriminatory measures of general application

³⁶⁹ 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 367) 100–101. Whereas the interpretive note related to both expropriation and fair and equitable treatment, the Council of Ministers did not comment on the fair and equitable treatment provision.

³⁷⁰ OECD, 'The Multilateral Agreement on Investment (Report by the Chairman of the Negotiating Group)' (n 368) Article 3.

³⁷¹ Antonio R Parra, *The History of ICSID* (Oxford University Press 2012) 6.

which governments normally take for the purpose of regulating economic activity in their territories'.³⁷² The commentary to MIGA Convention notes that:

Measures normally taken by governments to regulate their economic activities such as taxation, environmental and labour legislation as well as normal measures for the maintenance of public safety, are not intended to be covered by this provision unless they discriminate against the holder of the guarantee.³⁷³

2. The Right to Regulate in Proposed Multilateral Trade and Investment Treaties

The present structure of the WTO only addresses investment incidentally through certain trade aspects of foreign investment.³⁷⁴ However, investment-related issues have arisen on many occasions throughout the WTO's history, during which there was discussion of the relationship between foreign investment and the right to regulate.

The 1947 Havana Charter of the International Trade Organisation,³⁷⁵ which never entered into force, provided for the establishment of an International Trade Organisation (which served as a precursor to the WTO) and included generally

³⁷² *Convention Establishing the Multilateral Investment Guarantee Agency* (MIGA Convention) (opened for signature 11 October 1985, entered into force 12 April 1988) 1508 UNTS 90, Article 11(a)(ii). There are 181 States parties to the MIGA Convention, see: 'MIGA Member Countries' (*Multilateral Investment Guarantee Agency* 2017) <<https://www.miga.org/who-we-are/member-countries>> accessed 20 March 2017.

³⁷³ *Multilateral Investment Guarantee Agency, Commentary on the Convention Establishing the Multilateral Investment Guarantee Agency* (World Bank 2010) 8.

³⁷⁴ World Trade Organisation, 'Trade and Investment: From Bilaterals to a Multilateral Agreement?' (*Cancún WTO Ministerial 2003: Briefing Notes*, 2003) <https://www.wto.org/english/thewto_e/minist_e/mino3_e/brief_e/briefo7_e.htm> accessed 25 May 2015.

³⁷⁵ *Havana Charter for an International Trade Organization* (adopted on 24 March 1948, not in force) UN Doc E/Conf.2/78.

worded provisions regarding investment protection. The provisions regarding investment protection were watered down versions of earlier drafts that had included provisions concerning compensation for expropriation.³⁷⁶ The provisions were subject to the right of members 'to take any appropriate safeguards necessary to ensure that foreign investment is not used as a basis for interference in its internal affairs or national policies',³⁷⁷ recommending that States enter into bilateral or multilateral agreements if they wished to limit their rights further.³⁷⁸

In 1996, a WTO Working Group was established to examine the relationship between trade and investment.³⁷⁹ At the WTO 2001 Doha Ministerial Conference, the Ministers recognised 'the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment' and expanded the mandate of the Working Group to consider a number of issues relating to such a framework, with the aim of negotiating an investment agreement at the Fifth Session of the Ministerial Conference in 2003.³⁸⁰ As part of that mandate, the Ministers noted that any framework should 'take due account of the development policies and

³⁷⁶ Clair Wilcox, *A Charter for World Trade* (Macmillan 1949); Sebastián López Escarcena, *Indirect Expropriation in International Law* (Edward Elgar Publishing 2014) 149.

³⁷⁷ *Havana Charter* (n 375) Article 12(1)(c)(ii).

³⁷⁸ *Havana Charter* (n 375) Article 12(1)(d).

³⁷⁹ *Singapore Ministerial Declaration* (13 December 1996) WT/MIN(96)/DEC, [20].

³⁸⁰ *Doha 4th Ministerial Declaration* (14 November 2001) WT/MIN(01)/DEC/1, [20].

objectives of host governments as well as their right to regulate in the public interest'.³⁸¹

During discussions of the Working Group, the need for host States to retain 'policy space' for the purpose of regulating in the public interest was often raised as an important issue that should be reflected in any investment agreement.³⁸² Several States proposed that the best way for the right to regulate to be protected in any multilateral investment agreement would be through inserting a 'general exceptions' provision similar to that in the General Agreement on Tariffs and Trade ('GATT') and General Agreement on Trade in Services ('GATS'),³⁸³ however other States expressed caution about being 'too rigid in terms of Members' right to regulate' through exceptions provisions.³⁸⁴

One aspect that was flagged by developing countries was the ambiguity surrounding the right to regulate. For instance, the delegate for Thailand submitted:

³⁸¹ *ibid* [22].

³⁸² See for example *Report on the Meeting Held on 18 and 19 April 2002: Note by the Secretariat* (31 May 2002) WT/WGTI/M/17, Part C, [4] (Comments of Canada), [23] (Comments of India), [48] (Comments of Indonesia); *Report on the Meeting of 24 September 1999: Note by the Secretariat* (14 October 1999) WT/WGTI/M/10, [10] (Comments of Brazil); *Report on the Meeting of 8 June 2000: Note by the Secretariat* (24 July 2000) WT/WGTI/M/11, [51] (Comments of Australia); *Communication from the European Community and its Member States: Concept Paper on Policy Space for Development* (7 April 2003) WT/WGTI/W/154.

³⁸³ See, for example, *Report on the Meeting held on 16-18 September 2002: Note by the Secretariat* (3 December 2002) WT/WGTI/M/19, [37] (Comments of Mexico), [38] (Comments of Norway), [46]-[47] (Comments of the European Communities); see also *Exceptions and Balance-of-Payments Safeguards: Note by the Secretariat* (26 August 2002), WT/WGTI/W/137.

³⁸⁴ *Report on the Meeting held on 16-18 September 2002: Note by the Secretariat* (3 December 2002) WT/WGTI/M/19, [58]-[59] (Comments of Brazil).

The “right to regulate” was mentioned everywhere by the proponents as if this were the final answer to any concerns about the unintended consequences of accepting binding investment rules. But if a country undertook specific commitments with regard to market access or national treatment in a multilateral investment agreement, it seemed clear that the country must be prepared to forego some flexibility regarding its right to regulate. Binding rules would not automatically allow a country to take discriminatory measures if the need arose in emergency situations. Nor did a positive list approach to scheduling commitments - which Thailand favoured - alter this fundamental reality. Her basic point was that before agreeing to binding commitments in an investment agreement, developing countries needed to know exactly what this would mean in terms of making policy and employing discriminatory measures. She was not saying that Thailand would set out intentionally to discriminate against foreign investors; but at the same time, no country could see into the future, and occasions might well arise when extraordinary measures were necessary to attract foreign investors or to adjust domestic economic structures. The Working Group did not do justice to developing countries by glossing over key issues such as the right to regulate.³⁸⁵

Thus, the debate among States’ delegates in the WTO Working Group did not challenge the proposition that States had the right to regulate or ‘policy space’ to regulate matters of public interest, but the ambiguous scope of the concept was a cause for concern for some States.

In the end, the Working Group stalled prior to negotiations for a multilateral agreement being formally conducted. Many States contended that negotiations for a multilateral agreement were ready to commence,³⁸⁶ but several

³⁸⁵ *Report on the Meeting Held on 10 and 11 June 2003: Note by the Secretariat* (17 July 2003) WT/WTGI/M/22, Part C, [25], see also [54]-[55] (Comments of Argentina).

³⁸⁶ *Communication from Canada, Costa Rica and Korea: Negotiating a Multilateral Framework on Investment in the WTO* (5 June 2003) WT/WGTI/W/162. See also the *Report on the Meeting Held on 10 and 11 June 2003: Note by the Secretariat* (17 July 2003) WT/WTGI/M/22, Part C, [1]-[5] (Comments of Canada), [6]-[9] (Comments of Korea), [10]-[11] (Comments of Costa Rica), [13] (Comments of the United States of America), [19]

other States considered that the Working Group should undertake further analysis (including delineating the scope of the right to regulate) before negotiations commenced.³⁸⁷ Since consensus was required to proceed, in 2004 the General Council of the WTO decided to remove the subject from the agenda.³⁸⁸

In summary, the various efforts to create multilateral frameworks for investment protection were undoubtedly marked by a lack of consensus in key areas of investment protection.³⁸⁹ However, several conclusions can be drawn. First, the multilateral negotiations during this period reveal a shift away from the language of ‘police power’ that had previously been more prevalent, in favour of the right to regulate. Secondly, the principle that States had the right to regulate in the public interest was never questioned, although its scope was uncertain. Indeed, the failure to agree on rules of investment protection at a multilateral level is evidence of the importance placed on ‘regulatory leeway’ and the right to regulate.³⁹⁰

(Comments of Japan), [26] (Comments of Chile), [29]-[30] (Comments of Hungary), [31] (Comments of Norway), [36] (Comments of Chinese Taipei), [37]-[38] (Comments by Switzerland), [46] (Comments of Australia), [47]-[50] (Comments of the European Community).

³⁸⁷ *Report on the Meeting Held on 10 and 11 June 2003: Note by the Secretariat* (17 July 2003) WT/WTGI/M/22, Part C, [20] (Comments of Cuba), [34]-[35] (Comments of China), [39]-[43] (Comments of India), [50]-[51] (Comments of Kenya), [52] (Comments of Malaysia), [53]-[54] (Comments of Argentina).

³⁸⁸ *Doha Work Programme: Decision Adopted by the General Council* (1 August 2004) WT/L/579, [1(g)].

³⁸⁹ Stephan Schill, *The Multilateralization of International Investment Law* (Cambridge University Press 2009) 23-58.

³⁹⁰ *ibid* 58.

The multilateral negotiations explored in section 1 above and the work of the WTO working group highlight that concern was not directed to the existence of any right to regulate as such, but rather on the consequences of its exercise. Regulation that would not be shielded from scrutiny included measures that were discriminatory,³⁹¹ unnecessary,³⁹² or unreasonable.³⁹³ As to the *purpose* of regulation, while the earlier multilateral negotiations before the OECD did not identify any purpose (beyond the national or public interest), more recent efforts have been more prescriptive, identifying certain types of regulation for particular purposes, notably health,³⁹⁴ environmental,³⁹⁵ public safety,³⁹⁶ and labour.³⁹⁷ However, such purposes have not been exhaustively categorised.

³⁹¹ OECD, '1963 Draft Convention' (n 360) 245; OECD, '1967 Draft Convention' (n 360) 121; OECD, 'Ministerial Statement on the Multilateral Agreement on Investment (MAI)' (n 369); Multilateral Investment Guarantee Agency, *Commentary* (n 373) 8. But see the comments of Thailand quoted at n 385 above, which appeared to consider that discriminatory measures in exceptional circumstances would fall within States' right to regulate.

³⁹² *Havana Charter* (n 375) Article 12(1)(c)(ii).

³⁹³ OECD, '1963 Draft Convention' (n 360) 245; OECD, '1967 Draft Convention' (n 360) 121.

³⁹⁴ OECD, 'The Multilateral Agreement on Investment (Report by the Chairman of the Negotiating Group)' (n 368) Article 3; Multilateral Investment Guarantee Agency, *Commentary* (n 373).

³⁹⁵ OECD, 'The Multilateral Agreement on Investment (Report by the Chairman of the Negotiating Group)' (n 368); Multilateral Investment Guarantee Agency, *Commentary* (n 373).

³⁹⁶ OECD, 'The Multilateral Agreement on Investment (Report by the Chairman of the Negotiating Group)' (n 368); Multilateral Investment Guarantee Agency, *Commentary* (n 373).

³⁹⁷ Multilateral Investment Guarantee Agency, *Commentary* (n 373).

III. THE PROTECTION OF THE 'GENERAL INTEREST' IN INTERNATIONAL AND REGIONAL HUMAN RIGHTS LAW

1. The Universal Declaration of Human Rights

Immediately following the Second World War, in the debates concerning the development of binding international agreements for the protection of human rights, the protection of property from State interference was considered to be a human rights issue.³⁹⁸ Article 17 of the *Universal Declaration of Human Rights* (1948) ('UDHR') provides that 'nobody shall be arbitrarily deprived of his property'.³⁹⁹ That right, like all rights in the UDHR, is subject to Article 29(2), which provides:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Early proposals for the provision that would become Article 17 included reference to the ability of States to determine 'by general laws the limitations which may be placed upon the ownership of property, looking to the maintenance of social justice and to the promotion of the common interest of the community' and to the right of States to impose 'limitations...in the interest of maintaining the

³⁹⁸ William A Schabas, 'The Omission of the Right to Property in the International Covenants' (1991) 4 *Hague Yearbook of International Law* 135, 136.

³⁹⁹ *Universal Declaration of Human Rights*, UNGA Res 217 A(III), UN Doc. A/Res/217(111) (10 December 1948) Article 17(2).

family patrimony'.⁴⁰⁰ Similarly, early drafts noted that 'the State may regulate the acquisition and use of private property...'.⁴⁰¹ Several delegates proposed that the UDHR should provide that the right to property should be exercised within the limits of the public interest.⁴⁰² Such proposals emphasised the 'social function' of property.⁴⁰³ However, it was later considered that such limitations within the property protection provision itself were unnecessary, as the general limitations in Article 29 sufficiently limited the right to property.⁴⁰⁴

2. International Covenants

Notwithstanding the inclusion of the right to property in Article 17 of the UDHR, the same right was not reflected in either the *International Covenant on Civil and Political Rights*⁴⁰⁵ ('ICCPR') or the *International Covenant on Economic, Social and*

⁴⁰⁰ Inter-American Juridical Committee, 'Drafting Committee on an International Bill of Human Rights International Bill of Rights Documented Outline' (11 June 1947) UN Doc E/CN.4/AC.1.3/Add.1 in William A Schabas (ed), *The Universal Declaration of Human Rights: The Travaux Préparatoires* (Cambridge University Press 2013) 486.

⁴⁰¹ Commission on Human Rights Drafting Committee, 'Draft Outline of International Bill of Rights' (4 June 1947) UN Doc E/CN.4/AC.1/3, 8.

⁴⁰² See, for example, UNGA, 'Hundred and Twenty-Sixth Meeting' (8 November 1948) UN Doc.A/C.3/SR.126, 5 (proposal of Haiti); UNGA, Draft International Declaration of Human Rights: Compromise Amendment to Article 15 of the Draft Declaration' (8 November 1948) UN Doc.A/C.3/325 (proposal by Belgium).

⁴⁰³ Justino Jiménez de Aréchaga, 'The Background to Article 17 of the Universal Declaration' (1967) 8 *Journal of the International Commission of Jurists* 34, 39.

⁴⁰⁴ 'Hundred and Twenty-Sixth Meeting' (n 402) 382 (Sweden) 384 (Australia, Uruguay) 388 (United Kingdom, Philippines, China); see further Schabas (n 398) 146; Jiménez de Aréchaga (n 403) 39.

⁴⁰⁵ *International Covenant on Civil and Political Rights* (adopted by the General Assembly on 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

*Cultural Rights*⁴⁰⁶ ('ICESCR') (collectively, the 'International Covenants'). As noted by William Schabas, the right to property in the UDHR 'has the distinction of being the only article in the Universal Declaration with no counterpart in the multilateral treaties [i.e. the International Covenants] which were intended to give it binding effect'.⁴⁰⁷

In the early stages of drafting of the ICCPR, the right to property was omitted.⁴⁰⁸ As negotiations progressed, the US proposed a right to property provision in similar language to Article 17 of the UDHR.⁴⁰⁹ Debate ensued, particularly concerning the assessment of compensation for expropriation and the right to own property.⁴¹⁰ Delegates expressed concern that a provision that was identical to Article 17 would be of limited effect in the absence of more precise indication of what constituted 'arbitrary' deprivation, but acknowledged that efforts to formulate a more precise provision were unlikely to reach consensus.⁴¹¹ In light of this, it was decided by the delegates negotiating the ICCPR not to include a right to property in the ICCPR.⁴¹²

⁴⁰⁶ *International Covenant on Economic, Social and Cultural Rights* (adopted by the General Assembly on 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

⁴⁰⁷ Schabas (n 398) 136.

⁴⁰⁸ *ibid* 148.

⁴⁰⁹ Commission on Human Rights, 'Summary Record of the Two Hundred and Thirtieth Meeting' (20 June 1951) UN Doc E/CN.4/SR.230, 17.

⁴¹⁰ Schabas (n 398) 149–150.

⁴¹¹ Commission on Human Rights, 'Summary Record of the Two Hundred and Thirtieth Meeting' (n 409) 18,21 (Denmark).

⁴¹² *ibid* 17.

When the topic was revisited in the drafting of the ICESCR, consensus similarly could not be reached.⁴⁴³ However, when the matter was raised during the negotiations for the ICESCR, there was widespread support for the proposition that States could limit property rights in the public interest in ways falling short of expropriation and that such measures were lawful.⁴⁴⁴ For instance, the Philippines noted limitations on property in the form of housing and urban planning, public health, morals and safety, wartime requisitioning, criminal sentencing and taxation were restrictions that did not entail compensation.⁴⁴⁵ Similarly, Chile and Uruguay proposed that the right of property provision be ‘subject to such limitations as the public interest and social progress required’.⁴⁴⁶ As Schabas noted:

[t]he *travaux préparatoires* of the Covenants indicate a consensus on the right of the state to limit property, in the public interest, as well as to expropriate, but not on the right to compensation.⁴⁴⁷

3. The UN Declaration on the Human Rights of Non-Citizens

As noted in the introduction to this Chapter, the lawfulness of public interest regulation and any purported right to enact such regulation did not feature as heavily during this period. This is exemplified in the preparation and General Assembly’s adoption on 13 December 1985 (without a vote) of Resolution 40/144,

⁴⁴³ Commission on Human Rights, ‘Report of the Tenth Session, 23 February – 16 April 1954, Economic and Social Council’ (April 1954) UN Doc E/CN.4/705, 9.

⁴⁴⁴ Schabas (n 398) 169–170.

⁴⁴⁵ ‘Report of the Tenth Session, 23 February – 16 April 1954, Economic and Social Council’ (n 413) 8.

⁴⁴⁶ *ibid.*

⁴⁴⁷ Schabas (n 398) 170.

which annexed to it the *Declaration on the human rights of individuals who are not nationals of the country in which they live*, also known as the *Declaration on the Human Rights of Non-Citizens*.⁴¹⁸ The Declaration on the Human Rights of Non-Citizens stemmed from a concern that the existing international human rights instruments did not adequately protect the rights of aliens.⁴¹⁹ Article 9 of that Declaration provides that ‘no alien shall be arbitrarily deprived of his or her lawful assets’.

The Declaration on the Human Rights of Non-Citizens emerged from a draft prepared in 1974 by Special Rapporteur Baroness Elles, following a request from the Economic and Social Council’s Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1973.⁴²⁰ The initial draft of Article 9 referred to “arbitrary confiscation” (as opposed to “arbitrary deprivation”) of lawful assets and provided a further subparagraph that stated “Any non-citizen whose assets are expropriated in whole or in part in accordance with national laws in force shall have the right to just compensation”.⁴²¹ However, the wording was subsequently altered as several States rejected the inclusion of a provision

⁴¹⁸ *Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live*, G.A. Res. 40/144, annex, 40 U.N. GAOR Supp. (No. 53) at 252, U.N. Doc. A/40/53 (1985).

⁴¹⁹ Lillich (n 138) 52.

⁴²⁰ Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *International Provisions Protecting the Human Rights of Non-Citizens* (1980) UN Doc E/CN.4/Sub.2/392/Rev.1.

⁴²¹ *ibid* 54.

requiring the payment of compensation,⁴²² others considered that protection against arbitrary confiscation was already given by the UDHR,⁴²³ or that account must also be taken of international assistance and cooperation necessary to guarantee such rights.⁴²⁴

The lawfulness of public interest regulation and any right or power to enact such regulation did not feature in the discussions surrounding the UN Declaration on the Human Rights of Non-Citizens. However, that is not to suggest that any such right in the context of the treatment of aliens was considered not to exist. Rather, the absence of any discussion of the issue can be explained, in part, because the debates focussed on the question of compensation for expropriation, rather than the antecedent question of whether an expropriation had occurred.

⁴²² ‘Question on the International Legal Protection of the Human Rights of Individuals who are not Citizens of the Country in which they live, Comments received from Governments pursuant to Economic and Social Council decision 1979/36’ (2 November 1979) UN Doc E/CN.4/1354, 25 (Seychelles), 13 (Morocco); see also Antonio Cassese (Rapporteur), Report of the Sub-Commission on Prevention of Discrimination and the Protection of Minorities on its Thirtieth Session, Geneva, 15 August – 2 September 1977, 10 October 1977, E/CN.4/Sub.2/399, 22.

⁴²³ ‘Question on the International Legal Protection of the Human Rights of Individuals who are not Citizens of the Country in which they live, Comments received from Governments pursuant to Economic and Social Council decision 1979/36’ (n 422) 19 (Norway).

⁴²⁴ *ibid* 17 (Netherlands)

4. The European Convention on Human Rights and other Regional Human Rights Instruments

Article 1 of Protocol 1 to the *European Convention on Human Rights* ('ECHR')⁴²⁵

provides for a human rights-based protection of property:

- (1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
- (2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Like the debates surrounding the International Covenants, there were early disagreements as to the scope of protection for property rights, and specifically whether such a provision should cover only freedom of arbitrary deprivation of property or whether it should go further to include a right to own property.⁴²⁶ As a consequence of this early lack of consensus, the right to property was not included in the main text of the ECHR.⁴²⁷

⁴²⁵ *European Convention for the Protection of Human Rights and Fundamental Freedoms* (signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

⁴²⁶ The question was discussed extensively in the Eighteenth sitting of the First Session of the Consultative Assembly from 5 to 8 September 1949, see 'Official Report of the Sitting, First Session of the Consultative Assembly held in Strasbourg, 10 August to 8 September 1949' in Council of Europe (ed), *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights: Consultative Assembly, Second Session of the Committee of Ministers, Standing Committee of the Assembly (10 August - 18 November 1949)*, vol II (Martinus Nijhoff 1975) 14-274.

⁴²⁷ Ali Riza Çoban, *Protection of Property Rights Within the European Convention on Human Rights* (Ashgate 2004) 127.

There was little disagreement, however, that property rights could be limited in the public interest. Early proposals for what would eventually be Article 1 of Protocol 1 to the ECHR acknowledged the right of States ‘to enact such laws as may be necessary to ensure the use of this property for the public good’.⁴²⁸ In discussing the proposed provision, the delegate from Italy characterised that part of the proposed provision as follows:

No one today contests the social function of property. This function provides that the utilization of property, in accordance with the general interest, can be sanctioned by the law...and each State may decide, through its legislative power, in what form and to what extent the right of the individual should be conformable to the general interest...⁴²⁹

At a later stage, the language of ‘public good’ in the proposed provision was changed to ‘general interest’,⁴³⁰ although no explanation for this change is provided in the preparatory materials and reference was still made to the power to

⁴²⁸ ‘Supplementary Report of 8th August 1950 on the Draft Convention for the Protection of Human Rights and Fundamental Freedoms Presented on Behalf of the Committee by M. P.H. Teitgen’ in Council of Europe (ed), *Collected Edition of the ‘Travaux Préparatoires’ of the European Convention on Human Rights: Legal Committee, Ad Hoc Joint Committee, Committee of Ministers, Consultative Assembly (23 June - 28 August 1950)*, vol V (Martinus Nijhoff 1979) 206, 208.

⁴²⁹ ‘Report of the sitting: General Debate on the Draft Convention for the Protection of Human Rights and Fundamental Freedoms. Sitting of the Consultative Committee, held from 11 to 16 August 1950’ in *ibid* 244-246.

⁴³⁰ ‘Draft Motion submitted by M. Teitgen, sitting of the Committee on Legal and Administrative Questions 17-23 August 1950’ in Council of Europe (ed), *Collected Edition of the ‘Travaux Préparatoires’ of the European Convention on Human Rights: Consultative Assembly*, vol VI (Martinus Nijhoff 1985) 6, 48, 52; See also ‘Report of 24 August 1950 on the Draft Convention for the Protection of Human Rights and Fundamental Freedoms Presented, on Behalf of the Committee on Legal and Administrative Questions by Sir David Maxwell-Fyfe’ in *ibid* 60,62.

limit property rights by ‘regular legislation for the public good’.⁴³¹ Delegates appeared to treat ‘public good’ and ‘general interest’ interchangeably.

When discussing the provision that would ultimately become Article 1(2) of Protocol 1 to the ECHR, delegates confirmed that the proposed provision ‘expressly reserved to each State the right to safeguard the social purpose of the property by appropriate legislative enactments’ and that such enactments were distinct from arbitrary confiscation.⁴³² In response to an assurance sought by the delegate from the UK that the second part of the proposed provision would protect ‘the right of any State to undertake schemes of nationalisation and for the taxation of wealth necessary to carry out its social policy’,⁴³³ the Rapporteur confirmed that ‘legislation the object of which [was] to carry out a social policy in the general interest’ would be shielded under the proposed provision, unless the policy amounted to arbitrary confiscation.⁴³⁴

⁴³¹ ‘Report of the Committee on Legal and Administrative Questions’ in Council of Europe, *Collected Edition of the ‘Travaux Préparatoires’ of the European Convention on Human Rights: Consultative Assembly*, Vol VI (n 430) 48; see also ‘Report of the Sixteenth Sitting of the Second Session of the Consultative Assembly (24-25 August 1950)’ in *ibid* 74-76.

⁴³² ‘Report of the Sixteenth Sitting of the Second Session of the Consultative Assembly (24-25 August 1950)’ in Council of Europe, *Collected Edition of the ‘Travaux Préparatoires’ of the European Convention on Human Rights: Consultative Assembly*, Vol VI (n 430) 116 (Mr Bastid of France).

⁴³³ ‘Report of the Sixteenth Sitting of the Second Session of the Consultative Assembly (24-25 August 1950)’ in *ibid* 138 (Miss Bacon of the United Kingdom).

⁴³⁴ *ibid* 138-140 (Sir David Maxwell-Fyfe, Rapporteur).

In the final text of Article 1 of Protocol 1 to the ECHR,⁴³⁵ cited above, the Article makes reference to the right of individuals not to be deprived of their possessions ‘except in the public interest’, subject to the limitation that the provision would not impair the right of a State to control the use of the property in accordance with the ‘general interest’. When the Belgian government introduced the provision that would become the first part of Article 1 (referring to the ‘public interest’),⁴³⁶ there was no discussion of the meaning of the words ‘public interest’ or ‘general interest’ nor the similarities or differences between the two expressions, save for the comments by the delegate from Ireland:

Everyone who has had anything to do with legislation in the last few years knows that every month private property is being confiscated, or taken over under compulsory powers, in the public interest...I presume that this phrase is used because anything more precise would be unworkable, and I admit that this is so; but we must remember that not merely democratic Governments but even

⁴³⁵ The text of the draft was approved on 3 August 1951: ‘Text of the Draft Protocol Approved by the Committee of Ministers on 3 August 1951’ in Council of Europe (ed), *Collected Edition of the ‘Travaux Préparatoires’ of the European Convention on Human Rights: Standing Committee of the Consultative Assembly, Consultative Assembly, Committee of Experts, Committee of Ministers, Legal Committee (3 November 1950 - 15 May 1951)*, vol VII (Martinus Nijhoff 1985) 338.

⁴³⁶ The Belgian government proposed:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest, in such cases and by such procedure as may be established by law and subject to fair compensation which shall be fixed in advance. The penalty of total confiscation shall not be permitted.

The present measures shall not however infringe in any way the right possessed by States to pass legislation to *control the use of property* in accordance with the general interest or to impose taxes or other contributions.’ (emphasis in the original)

‘Proposals of the Belgian Government of 19 February 1951, Meeting of the Committee of Experts on Human Rights held at Paris from 21st to 24th February 1951’ in *ibid* 192.

dictatorships have always insisted that they were acting in the public interest, and we must be on guard against such vague phrases...⁴³⁷

The European Court of Human Rights ('ECtHR') has treated 'public interest' and 'general interest' as having the same meaning, giving the State a wide margin of appreciation in determining what constitutes a 'public' or 'general' interest. For instance, in *James v United Kingdom*, the ECtHR rejected argument advanced by the UK that the use of 'general interest' as distinct from 'public interest' meant that it should be assumed that the parties intended to refer to different concepts. The ECtHR rejected this argument, noting

even if there could be differences between the concepts of "public interest" and "general interest" in Article 1 (P1-1), on the point under consideration no fundamental distinction of the kind contended for by the applicants can be drawn between them.⁴³⁸

The ECtHR has considered various types of regulation to fall within the meaning 'control [of] the use of property in accordance with the general interest', including revocation of permits on environmental grounds,⁴³⁹ rent control pursuant to housing policy,⁴⁴⁰ and temporary seizure of aircraft to prevent illegal

⁴³⁷ 'Report of the Thirty-Fifth Sitting of the Third Session of the Consultative Assembly held 8 December 1951' in Council of Europe (ed), *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights: Consultative Assembly, Committee of Experts, Committee of Ministers, Legal Committee, Advisers to the Ministers (1 October 1951 - 20 March 1952)*, vol VIII (Martinus Nijhoff 1985) 122 (Mr Stanford of Ireland).

⁴³⁸ *James v United Kingdom* (1986) 8 EHRR 123, [43]; Laurent Sermet, *The European Convention on Human Rights and Property Rights* (Council of Europe 1999) 33; Çoban (n 427) 194.

⁴³⁹ *Fredin v Sweden* (1991) 13 EHRR 784.

⁴⁴⁰ *Mellacher v Austria* (1989) 12 EHRR 391.

drug trafficking.⁴⁴¹ However, this right to control the use of property in accordance with the general interest is not absolute, and measures that imposed a ‘disproportionate burden’ on property holders which ‘upset...the fair balance to be struck between protection of the right of property and the requirements of the general interest’ would violate the second paragraph of Article 1 of Protocol 1.⁴⁴²

The right of States to limit the enjoyment of property in the public interest as distinct from the concept of expropriation is also reflected in Article 21 of the American Convention on Human Rights.⁴⁴³ The African Charter on Human and Peoples’ Rights notes that States may only ‘encroach upon’ property rights ‘in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws’.⁴⁴⁴ The latter does not mention expropriation explicitly, nor does it make provision for compensation.⁴⁴⁵

⁴⁴¹ *Air Canada v United Kingdom* (1995) 20 EHRR 150.

⁴⁴² *Chassagnou and Ors v France* (2000) 29 EHRR 615, [85]. In that case, legislation to regulate hunting was found to be in the general interest, but the measures were nonetheless considered to be disproportionate. See also *Hutten-Czapska v Poland* (2007) 45 EHRR 4, [223] where the Court noted that the discretion afforded to the State to control the use of property was considerable but not unlimited, and ‘its exercise, even in the context of the most complex reform of the State, cannot entail consequences at variance with the Convention standards’.

⁴⁴³ *American Convention on Human Rights* (ACHR) (signed 22 November 1969, entered into force 18 July 1978) 144 UNTS 123, Article 21(1) (‘...the law may subordinate...[the] use and enjoyment [of property] to the interest of society’); Pedro Nikken, ‘Balancing of Human Rights and Investment Law in the Inter-American System of Human Rights’ in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds) *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009); Escarcena (n 376).

⁴⁴⁴ *African Charter on Human and Peoples’ Rights* (signed 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, Article 14.

⁴⁴⁵ Escarcena (n 376) 56.

From this examination of the preparatory materials of international and regional human rights instruments and associated case law, it is evident that these materials follow the same trend as the State practice in the area of protection of foreigners more broadly examined in the previous Chapter. While there was disagreement as to the question of compensation for expropriation, there was little disagreement that State measures enacted in the public interest (or general interest) that limited property rights (falling short of expropriation and which were not disproportionate) were lawful.

IV. UNITED NATIONS RESOLUTIONS

There are several UN resolutions that acknowledged States' regulatory powers in the context of the treatment of property.⁴⁴⁶ These resolutions are also evidence of State practice and *opinio juris*.⁴⁴⁷ The 1962 *Declaration on Permanent Sovereignty over Natural Resources* acknowledged 'the right of all States freely to dispose of their natural wealth and resources in accordance with their national interests' as well as the 'inalienable sovereignty of States over their natural wealth and

⁴⁴⁶ See Lowe (n 21) 450; See also Lowe (n 356).

⁴⁴⁷ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, [70]; *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': Michael Wood, 'Second Report on Identification of Customary International Law, A/CN.4/672 (22 May 2014)' (International Law Commission 2014) 66

resources'.⁴⁴⁸ However, this inalienable right did not reach so far as to allow States to take any form of action in the name of sovereignty without consequence, as the Declaration also acknowledged the obligation to provide compensation for expropriation and the obligation to observe foreign investment agreements in good faith.⁴⁴⁹ Thus, while the right of States to exercise sovereignty over their natural resources was acknowledged in the Declaration, as Ian Brownlie noted: 'the key formulations in the resolutions are not very helpful in indicating the precise corollaries of the concept of permanent sovereignty'.⁴⁵⁰

The *Charter of Economic Rights and Duties of States*,⁴⁵¹ adopted by the General Assembly in 1974, 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.⁴⁵²

As Lowe notes, notwithstanding the other aspects of the Charter that cannot be said to reflect customary international law,⁴⁵³ the statement of principle

⁴⁴⁸ *Permanent Sovereignty over Natural Resources*, UNGA Res 1803 (XVII) (14 December 1962), Preamble.

⁴⁴⁹ *ibid*, Arts 4 and 8; see Official Records of the Seventeenth Session of the General Assembly, *Permanent Sovereignty over Natural Resources*, 1193rd Plenary Meeting, 14 December 1962, UN Doc. A/PV.1193-1194, [72] (comments of the United States of America).

⁴⁵⁰ Ian Brownlie, 'Legal Status of Natural Resources in International Law (Some Aspects)' (1979) 162 *Recueil des Cours* 162, 270.

⁴⁵¹ *Charter of Economic Rights and Duties of States*, UNGA Res 3281 (XXIX) (12 December 1974).

⁴⁵² *ibid* Article 2(2).

⁴⁵³ In particular, the statement in the Charter of 'appropriate' compensation following an expropriation being a matter of domestic and not international law was heavily contested

in the Charter quoted above ‘read with the understanding that the State’s rights are necessarily circumscribed by its duties under international law’⁴⁵⁴ was generally accepted.

As to the protection of property more broadly, in 1990 the General Assembly adopted a resolution concerning the right to own property, which reaffirmed ‘the right of States...to choose and develop their political, social, economic and cultural systems and to determine their laws and regulations’ and that individual property rights may be limited in narrow circumstances, including ‘for the purpose...of meeting the just requirements of morality, public order and the general welfare in a democratic society’.⁴⁵⁵ This resolution also affirmed respect for the right not to be arbitrarily deprived of property in accordance with Article 17 of the UDHR.⁴⁵⁶

V. STATES’ REGULATORY POWERS IN INTERNATIONAL DISPUTE SETTLEMENT CONCERNING THE TREATMENT OF FOREIGNERS AND THEIR PROPERTY

1. Disputes Pursuant to International Contracts

Throughout the middle part of the twentieth century, there were numerous disputes settled by *ad hoc* arbitration pursuant to international contracts. Such

and not considered to be consistent 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.

⁴⁵⁴ Lowe (n 21) 450–451.

⁴⁵⁵ Respect for the right of everyone to own property alone as well as in association with others and its contribution to the economic and social development of Member States (14 December 1990) UNGA Res A/Res/45/98, preamble.

⁴⁵⁶ *ibid*, Article 3.

cases primarily related to ‘concession’ agreements in which States granted foreigners the right to undertake certain public functions, such as the exploitation of natural resources or the construction of railways.⁴⁵⁷ These concessions agreements were a form of ‘internationalised contract’ and thus governed by international law.⁴⁵⁸ Several of these disputes considered the lawfulness of public interest regulation and States’ rights to enact such regulation, as well as broader arguments of the relevance of ‘sovereignty’ in international disputes relating to the treatment of foreign property.

(a) Arbitration awards pursuant to political risk insurance contracts

The first category of cases related to disputes resolved by arbitration under the auspices of the United States Overseas Private Investment Corporation (‘OPIC’). OPIC is a US government corporation that provides foreign investment insurance for US investors abroad.⁴⁵⁹ The awards rendered by OPIC are not concerned with a State’s liability under international law, and thus are not of direct relevance to the inquiry in this thesis. Rather, the awards determine whether a compensable event

⁴⁵⁷ For an early example see *Delegoa Bay Railway (United States v Portugal)* (1898) 2 Moore’s International Arbitration 1865; Miles (n 143) 79–80; J Gillis Wetter and Stephen M Schwebel, ‘Some Little-Known Cases on Concessions’ (1964) 40 British Yearbook of International Law 183.

⁴⁵⁸ Robert Jennings, ‘State Contracts in International Law’ (1961) 37 British Yearbook of International Law 156; Mann, ‘State Contracts and State Responsibility’ (n 319); Lord McNair, ‘The General Principles of Law Recognized by Civilized Nations’ (1957) 33 British Yearbook of International Law 1. See also *Anglo-Iranian Oil Co (United Kingdom v Iran)* Memorial Submitted by the Government of the United Kingdom of Great Britain and Northern Ireland 83 (UK submitting rights acquired by foreign nationals by virtue of concessionary contracts were property rights and as such were entitled to protection under international law).

⁴⁵⁹ Jeswald Salacuse, *The Three Laws of International Investment* (Oxford University Press 2013) 249–250.

under an insurance contract has occurred.⁴⁶⁰ However, two awards rendered by OPIC have been subsequently cited by scholars and in case law as illustrative examples of the treatment of public interest regulation in the context of expropriation,⁴⁶¹ and thus it is necessary to consider them further.

In *International Bank of Washington v Overseas Private Investment Corporation*, the Tribunal considered whether an investor had suffered losses resulting from expropriatory actions of the Dominican Republic within the meaning of OPIC's contract of guarantee.⁴⁶² The Dominican Republic had enacted a series of decrees directed towards the conservation of forests within the territory, which was alleged to have impacted the investor's lumber mill operation in the State. Notwithstanding the decrees, the investor's lumber mill was granted a number of exemptions so as to be able to continue operating provided it complied with forestry rules and regulations.

The Tribunal concluded that the actions of the Dominican Republic were not 'expropriatory actions' within the meaning of the contract of guarantee, for two reasons. First, the tribunal considered that the actions were 'police regulations' that were not expropriatory action as they were reasonably related to constitutionally sanctioned government objectives, were not arbitrary, were based

⁴⁶⁰ Rosalyn Higgins, 'The Taking of Property and the State: Recent Developments' (1982) 176 *Recueil des Cours* 263, 335.

⁴⁶¹ For example, *Methanex* (n 22) Part IV, Chapter D, [8].

⁴⁶² *International Bank of Washington v Overseas Private Investment Corporation* (1972) 11 ILM 1216.

upon a reasonable classification of entities to which they applied, and did not violate generally accepted international law principles.⁴⁶³ The Tribunal continued:

We, of course, do not feel that any series of police regulations or bureaucratic delays...would necessarily be reasonable, or not amount to a 'taking' of property, but only that the particular regulations promulgated by the Dominican Government and administratively applied in this case were, under all of the circumstances of the case, not arbitrary, unreasonable, in violation of international law or a 'taking' of property requiring payment of compensation under the relevant international law standard. From the record in this case such regulations were aimed at a genuine concern with forestry conservation, were not discriminatory in application...⁴⁶⁴

The Tribunal also considered that the measures did not prevent the investor from exercising effective control over the use or disposition of the property or from operating the property.⁴⁶⁵

Another OPIC case, *Revere Copper & Brass v Overseas Private Investment Corporation*, considered whether States would be liable for breach of commitments it had made in an international contract to refrain from exercising certain regulatory powers that 'would otherwise be considered normal appurtenances of government' – so called 'stabilisation clauses'.⁴⁶⁶ The case concerned taxation measures enacted by the Jamaican government, which were considered to amount to a repudiation of Jamaica's commitments to the Claimant and to be measures which prevented the Claimant from exercising effective

⁴⁶³ *ibid*, 1224- 1225.

⁴⁶⁴ *ibid*, 1227-1228.

⁴⁶⁵ *ibid*.

⁴⁶⁶ Higgins, 'The Taking of Property and the State: Recent Developments' (n 460) 331.

control over the use or disposition of its property.⁴⁶⁷ The taxation measures had been enacted contrary to an express tax stabilisation clause in the concession agreement.⁴⁶⁸ The Tribunal considered it significant that the Jamaican government had taken action:

[which was] contrary to and damaging to the economic interests of aliens...in conflict with undertakings and assurances given in good faith to such aliens as an inducement to their making the investments affected by the action.⁴⁶⁹

In *Revere Copper*, the Tribunal did not consider that the taxation measures were confiscatory in themselves, but rather that the measures constituted a breach of the international contract.⁴⁷⁰ The Tribunal also emphasised that the Jamaican government had the right to 'legislate with respect to taxes and thus override contracts with private parties'.⁴⁷¹ However, in enacting legislation contrary to the contractual provisions, the contract had been breached and compensation was required.⁴⁷² Thus, *Revere Copper* stands as authority for the proposition that States may limit their power to regulate in circumstances where they have explicitly promised not to do so by virtue of a 'stabilisation clause' in an international contract.

⁴⁶⁷ *Revere Copper and Brass, Inc. v Overseas Private Investment Corporation* (1978) 56 ILR 258, 291-292.

⁴⁶⁸ *ibid.*

⁴⁶⁹ *ibid.*

⁴⁷⁰ *ibid* 285.

⁴⁷¹ *ibid* 286.

⁴⁷² *ibid.*

(b) Concessions arbitrations

In several concessions disputes, States sought to raise broad arguments of sovereignty to frame the scope of the obligations owed by the State to the company that was the beneficiary of the concession. The facts of these disputes were broadly similar, concerning the nationalisation of oil concessions in the Middle East. As the cases concerned outright nationalisations (i.e. seizure of title) they did not concern public interest regulation as defined in this thesis, however the appeals to sovereignty by the States in the context of the treatment of foreign property are nonetheless instructive insofar as they have been raised in response to an expropriation claim.

Saudi Arabia v Aramco concerned a concession agreement relating to oil exploitation that was allegedly breached when Saudi Arabia concluded an agreement with a competitor that gave the competitor a right of priority.⁴⁷³ Saudi Arabia raised its right of ‘reasonable regulation’, relying on *North Atlantic Coast Fisheries Case* discussed in Chapter Two, to determine liability under the applicable treaty. In particular, Saudi Arabia argued that:

...if a State is entitled under international law to exercise its regulatory power concerning rights which it has granted by international treaty to the citizens of a co-contracting State, it is entitled, *a fortiori*, to do so with regard to a contract with a mere private corporation. Consequently, Saudi Arabia contends that, by virtue of its sovereignty, it has the right to decide, by regulations, the

⁴⁷³

Saudi Arabia v Arabian American Oil Company (Aramco), Award of the Arbitral Tribunal, 23 August 1958 (1958) 27 ILR 117; Rudolf Dolzer, ‘Aramco Arbitration’, *Encyclopedia of Public International Law: Decisions of International Courts and Tribunals and International Arbitrations* (North-Holland Publishing Company 1981) 20–22.

manner in which oil transport may be effected from its ports to foreign countries...⁴⁷⁴

The Tribunal rejected this approach. Relevantly, the Tribunal did not dispute (nor did the Claimant otherwise allege) that Saudi Arabia had the right to make reasonable regulations, but considered that this regulatory power of the State was not unlimited:

Lastly, in the *North Atlantic Coast Fisheries Case* the arbitrators stated that Great Britain's regulatory power could not be exercised at discretion, but was limited by the spirit of the Treaty, whereas the regulation which the government purports to impose on Aramco does not aim at determining the conditions most appropriate for the exercise of the Company's activity. On the contrary, it aims at creating new conditions limiting and hindering Aramco's freedom of movement by the grant of a priority right to tankers of a third party.⁴⁷⁵

In *Texaco v Libya*, Libya argued that its action in nationalising certain oil companies did not breach obligations under concessions contracts because it was an act of sovereignty.⁴⁷⁶ The Tribunal did not dispute that sovereignty conferred upon States 'an exclusive competence to organise as it wishes the economic structures of its territory and to introduce therein any reforms which may seem to be desirable to it',⁴⁷⁷ including a right to nationalise. However, where a State had concluded an international agreement under which it agreed to guarantee a

⁴⁷⁴ *Aramco* (n 473) 261.

⁴⁷⁵ *ibid* 216.

⁴⁷⁶ *Texaco Overseas Petroleum Company v Government of the Libyan Arab Republic*, Award on the Merits, 19 January 1977 (1977) 53 ILR 389.

⁴⁷⁷ *ibid* 469.

certain legal and economic status over a period of time, the State's rights were more limited. The Tribunal concluded:

The result is that a State cannot invoke its sovereignty to disregard commitments freely undertaken through the exercise of this same sovereignty and cannot, through measures belonging to its internal order, make null and void the rights of the contracting party which has performed its various obligations under the same contract.⁴⁷⁸

A similar point was made by the UK in its pleadings before the International Court of Justice ('ICJ') in the *Anglo-Iranian Oil* case when it observed the 'elementary point' that 'the sovereignty of a State is not absolute, but is limited both by international customary law and by obligations of a treaty or contractual character entered into by that State'.⁴⁷⁹

Texaco and *Aramco* are consistent with the inter-State jurisprudence discussed in the previous Chapter, such that entering into a treaty does not freeze the ability of a State to regulate, but that right is curtailed by the terms of the agreement and must be exercised in a reasonable manner. The exercise of the right of regulation (and sovereignty more broadly) in a manner that extinguished rights under the agreement would breach that international agreement. Similarly, these concessions disputes highlight, consistently with Chapter Two, that while States appealed to their sovereignty so as to justify the enactment of far-reaching laws,

⁴⁷⁸ *ibid* 475. See further Christopher Greenwood, 'State Contracts in International Law—The Libyan Oil Arbitrations' (1983) 53 *British Yearbook of International Law* 27.

⁴⁷⁹ *Anglo-Iranian Oil Co Memorial Submitted by the Government of the United Kingdom* (n 458) 80 .

sovereignty did not in and of itself provide a basis or justification for violating international legal obligations.

Contemporaneous scholarship considered that concession agreements were still subject to the police power of States, and interferences with concessions or contracts pursuant to the police power would not result in liability. For instance, FA Mann considered that States would be responsible for injuries caused to foreigners by non-performance of the State's obligations in a contract or concession, but not 'where the law so enacted is required for the protection of public safety, health, morality or welfare in general'.⁴⁸⁰ He noted:

...those measures...namely, general legislation or executive provisions put into force for the benefit of the community at large, do not involve the taking of property even if they affect the rights of the owner or the value of his property.⁴⁸¹

Similarly, Wortley noted:

...bona fide legislation in the public interest, for example, for public health and safety, may properly and lawfully cause loss of goodwill and indirectly diminish the value of the concession in the same way as it may diminish any other form of property – that is, as a side-blow from action directed not against the concessionary, but directed towards public well-being...⁴⁸²

⁴⁸⁰ Mann, 'State Contracts and State Responsibility' (n 319) 583.

⁴⁸¹ *ibid.*

⁴⁸² Ben Atkinson Wortley, *Expropriation in Public International Law* (Cambridge University Press 1959) 56,111.

2. Inter-State Arbitrations, States' pleadings before and decisions of the International Court of Justice

Throughout the time period examined in this Chapter, there were also a number of inter-State disputes which did not concern investment protection but which broadly concerned the rights of foreigners and their property as against the State. In several of these cases, States raised and relied upon arguments relating to their regulatory powers to justify their treatment of foreigners.

In *La Bretagne*, the French government challenged Canadian regulations that refused to grant a French trawler vessel a license for fishing and for the use of on-board fish filleting equipment.⁴⁸³ Pursuant to a treaty between France and Canada, a special arrangement had been made between the two States over certain French islands off the coast of Canada. The French government argued that this agreement prevented Canada from prohibiting the filleting of fish in the area. The Canadian government argued that, notwithstanding the agreement, it retained a right to prohibit (through fishery regulations) certain practices in the area by virtue of 'an inherent right to manage the biological resources of its exclusive fishing zone'.⁴⁸⁴ While the Tribunal acknowledged that the agreement must be interpreted with regard to Canada's responsibility for conservation, protection and management of living resources in its fishing zone, the agreement did not entitle Canada to forbid French trawlers from filleting their catch on-

⁴⁸³ *Dispute Concerning Filleting within the Gulf of St Lawrence ("La Bretagne")* (Canada/France) (1986) 82 ILR 590.

⁴⁸⁴ *ibid* 612, 618.

board.⁴⁸⁵ The Tribunal acknowledged and agreed with the conclusion in *North Atlantic Coast Fisheries*, concluding that ‘like the exercise of any authority, the exercise of a regulatory authority is always subject to the rule of reasonableness’⁴⁸⁶ which required Canada’s behaviour ‘to be proportional to the aim legally pursued, with due regard to the rights and freedoms granted to another State’.⁴⁸⁷

The Tribunal concluded:

...Canada can only use its regulatory authority concerning the French trawlers...in a reasonable manner, i.e. without subjecting the exercise of the right to fish enjoyed by such trawlers under the Agreement to requirements which in effect make that exercise impossible.⁴⁸⁸

Before the ICJ in *Case Concerning Rights of Nationals of the United States of America in Morocco*, part of the dispute related to the applicability of French laws and regulations to US citizens in the French zone of Morocco, including the right of France to levy taxes on US nationals in Morocco, as well as appropriate customs control and valuation on goods imported from the US into Morocco.⁴⁸⁹ With respect to the interpretation of the Moroccan importation law, France relied on the *North Atlantic Coast Fisheries Case*, discussed in the previous Chapter, as

⁴⁸⁵ *ibid* 638.

⁴⁸⁶ *ibid* 631.

⁴⁸⁷ *ibid*.

⁴⁸⁸ *ibid*.

⁴⁸⁹ *Case Concerning Rights of Nationals of the United States of America in Morocco (France v United States)* (Judgment) [1952] ICJ Rep 176; Jochen Herbst, ‘United States Nationals in Morocco Case’, *Max Planck Encyclopedia of Public International Law* (2009) <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e230>> accessed 16 July 2016.

authority for the proposition that the regulation was an expression of the competence of the government to legislate on matters affecting economic life within its territory, and that territorial sovereignty prevailed.⁴⁹⁰ The ICJ concluded that the legislation was discriminatory in favour of imports from France, and as such it was not required 'to consider and decide the general question of the extent of the control over importation that may be exercised by Moroccan authorities'.⁴⁹¹ At a later point in the judgment, the ICJ noted the power to make customs valuations was a power that rested with Moroccan authorities but that it was a power 'which must be exercised reasonably and in good faith'.⁴⁹²

More broadly, the ICJ recognised that the fact a particular measure was cast in the form of 'legislation' was not, of itself, sufficient to shield a measure from being in violation of international law. Hersch Lauterpacht stated this principle in his separate opinion in *Certain Norwegian Loans*:

⁴⁹⁰ *Case Concerning Rights of Nationals of the United States of America in Morocco (France v United States)* ICJ Pleadings, Volume I, 68 (author translation and paraphrasing of 'Ainsi l'application aux ressortissants américains de la Réglementation du 30 décembre 1948 sur les importations sans paiement, qui constitue le problème posé à la Cour, dépendrait, si la prétention du Gouvernement des États-Unis pouvait être reconnue, du bon vouloir d'un État étranger. Cette réglementation du 30 décembre 1948 est l'expression de la compétence de l'État local de légiférer sur les matières qui intéressent la vie économique sur son territoire. La primauté de la souveraineté territoriale est en effet un principe général du droit des gens, fréquemment rappelé par la jurisprudence internationale. C'est la souveraineté qui constitue la règle et non l'exception. ... La réglementation des importations sans devises, liée à la réglementation du change, appartient aux autorités chérifiennes seules').

⁴⁹¹ *Case Concerning Rights of Nationals of the United States of America in Morocco* (n 489), 186.

⁴⁹² *ibid*, 212.

National legislation - including currency legislation - may be contrary, in its intention or effects, to the international obligations of the State. The question of conformity of national legislation with international law is a matter of international law. The notion that if a matter is governed by national law it is for that reason at the same time outside the sphere of international law is both novel and, if accepted, subversive of international law. It is not enough for a State to bring a matter under the protective umbrella of its legislation, possibly of a predatory character, in order to shelter it effectively from any control by international law.⁴⁹³

Similarly, in *Barcelona Traction* when discussing abuse of rights of the State when enacting exchange control regulations for ulterior purposes, Belgium in its oral submissions did not dispute the right to enact legislation, but rather considered that international law could examine and determine the international lawfulness of the exercise of that right when enacting and managing the legislation.⁴⁹⁴

The *ELSI* case concerned a diplomatic protection claim brought by the United States against Italy on behalf of a US-owned company, ELSI, alleging violations, *inter alia*, of expropriation and arbitrary and discriminatory treatment provisions of the Italy-US FCN Treaty.⁴⁹⁵ The US argued that the requisition of ELSI's plant constituted an indirect expropriation of its property, and further argued that the requisition was an arbitrary government action in part because the

⁴⁹³ *Certain Norwegian Loans (France v Norway)* [1957] ICJ Rep 9, Separate Opinion of Sir Hersch Lauterpacht 34, 37.

⁴⁹⁴ *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Second Phase) Vol VIII, Oral Proceedings, 58-59 (Mr Mann for Belgium). In the end result the point was not decided as Belgium lacked standing.

⁴⁹⁵ *Elettronica Sicula SpA (ELSI)(United States of America v Italy)* (Judgment) [1989] ICJ Rep 15.

measures were ‘use of police power for a goal other than public security, peace or well-being’ and amounted to an abuse of the ‘legitimate exercise of discretion’.⁴⁹⁶ The ICJ rejected the arbitrariness claim, considering that arbitrariness connoted ‘wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety’ and was not synonymous with mere domestic unlawfulness.⁴⁹⁷ It was ultimately not necessary for the Court to determine the expropriation claim on the basis it was not possible to determine that the ultimate result (the requisition of the company’s plant and subsequent bankruptcy) was the consequence of acts or omissions by Italy.⁴⁹⁸

The positions taken by States in these disputes⁴⁹⁹ and the decisions of the ICJ and inter-State arbitration tribunals are consistent with the conclusions drawn in the previous Chapter. It was not uncommon for States to appeal to their regulatory powers in defence of their treatment of foreigners when regulating. The language used to describe these regulatory powers was broad: these powers were variously described as an ‘inherent right’,⁵⁰⁰ ‘regulatory authority’,⁵⁰¹ and

⁴⁹⁶ *Elettronica Sicula SpA (ELSI)*(*United States of America v Italy*), Memorial of the United States of America, 76-78.

⁴⁹⁷ *ELSI* (n 495), 74-76.

⁴⁹⁸ *ibid*, 71.

⁴⁹⁹ Which constitutes evidence of State practice and, to the extent that the States identify a principle as customary international law, also constitute *opinio juris*: Wood, ‘Second Report on Identification of Customary International Law’ (n 447) 23. See further Chapter Four, Part III.

⁵⁰⁰ *La Bretagne* (n 483) 612.

⁵⁰¹ *ibid* 631.

‘competence...to legislate’.⁵⁰² Howsoever described, these powers were not frozen by the entry into international agreements.⁵⁰³ However, States were required to exercise their powers in manner that was reasonable and in good faith.⁵⁰⁴

3. The Police Power in the Jurisprudence of the Iran-US Claims Tribunal

The Iran-US Claims Tribunal was convened to hear and adjudicate claims between the US and Iran, between US nationals against Iran and between Iranian nationals against the US, relating to *inter alia* ‘expropriations or other measures affecting property rights’ arising from conduct of Iran towards US nationals during the Iranian revolution from mid-1978 to 1981, as well US sanctions placed on Iran during that period.⁵⁰⁵ US nationals, whose businesses were compelled to suspend activities in Iran during the revolution, made the majority of the claims regarding expropriation.⁵⁰⁶

There are several decisions of the Tribunal that suggest that the purpose of a government’s measure has no bearing (or limited bearing) in determining

⁵⁰² *Case Concerning Rights of Nationals of the United States of America in Morocco* Pleadings (n 490) 68.

⁵⁰³ *La Bretagne* (n 483) 632.

⁵⁰⁴ *La Bretagne* (n 483) 631; *Case Concerning Rights of Nationals of the United States of America in Morocco* (n 489) 212; McNair, ‘Treaties and Sovereignty’ (n 263) 234.

⁵⁰⁵ *Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran*, 19 January 1981, reprinted in (1981) 1 Iran-US Claims Tribunal Reports 13.

⁵⁰⁶ George H Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Clarendon Press 1996) 3-4.

whether an expropriation has occurred. For instance, in *Tippetts v TAMS-AFFA*, the Tribunal held:

A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected.

...The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.⁵⁰⁷

There are two aspects of this quote that warrant further consideration. The first concerns the proposition that ‘interference by a state in the use of...property or with the enjoyment of its benefits’ could constitute a taking, and the second concerns the emphasis on the effects of the measure rather than the intent of the government. If such an approach were applied to government regulation in the form of general legislation enacted for public interest purposes that incidentally interfered with property rights, such regulation could constitute an expropriation.

However, the approach in *Tippetts* was applied in cases where management of the property was transferred to the government, in which the State effectively took control over the company. In cases where the conduct under challenge was general legislation or an administrative regulation, the Tribunal’s approach differed. In these categories of cases, the Tribunal drew a distinction between

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Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA (1984) 6 Iran-US Claims Tribunal Reports 219, 225-226; see also *Starret Housing Corporation v Iran* (1983) 3 Iran-US Claims Tribunal Reports 122, 154.

expropriation and ‘permissible... regulation’,⁵⁰⁸ the latter of which would not result in liability. In *Sedco, Inc v National Iranian Oil Co*, the Tribunal noted 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’.⁵⁰⁹ In that case, an Iranian law authorising the Iranian government to take control of companies whose bank debts exceeded their net assets was held to constitute an expropriation, not a lawful regulation, because the regulation resulted in ‘an outright transfer of title rather than incidental economic injury’.⁵¹⁰ In contrast, in *Too v Greater Modesto Insurances Associates*, the seizure of a liquor licence to recover overdue taxes was held to be a ‘lawful levy for overdue taxes’ for which there was ‘no State responsibility’.⁵¹¹

Similarly, there were several cases in which claimants argued that legislative measures constituted expropriation, in which the Tribunal rejected the expropriation claim but held the State liable under the lesser claim of liability for ‘measures affecting property rights’. In *Mohtadi v Iran*, the Claimant argued that land-reform legislation (which provided for the cancellation of certain types of

⁵⁰⁸ M Pellonpää and M Fitzmaurice, ‘Taking of Property in the Practice of the Iran-United States Claims Tribunal’ (1988) 19 *Netherlands Yearbook of International Law* 53, 91; Aldrich (n 506) 208–210.

⁵⁰⁹ *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.

⁵¹⁰ *Sedco* (n 509) 275.

⁵¹¹ *Emmanuel Too v Greater Modesto Insurance Associates and United States of America* (1989) 23 *Iran-US Claims Tribunal Reports* 378, 387-388.

title deeds subject to a governmental determination process), in and of itself, constituted a 'legislative taking' of property.⁵¹² The Tribunal disagreed and held that absent a governmental determination to actually cancel the title deeds, the legislation in and of itself was not an expropriation (or 'legislative taking'). However, the risk of cancellation was held to constitute 'other measures affecting property rights' for which Iran was liable.⁵¹³

Thus, the practice of the Iran - US Claims Tribunal supports the proposition that an interference with property rights by way of legislative measures was generally not an expropriation,⁵¹⁴ either because the effect on the property was not significant enough (*Mohtadi*) or because of the police powers doctrine (*Sedco, Too*).⁵¹⁵

VI. WRITINGS OF PUBLICISTS AND LEARNED SOCIETIES

As noted in the introduction to this Chapter, during this period the focus in scholarship of publicists and learned societies in the area of investment and property protection was on whether or not compensation was required for expropriation. However, within this scholarship there were several references to

⁵¹² *Mohtadi v Iran* (1996) 32 Iran-US Claims Tribunal Reports 124, [23].

⁵¹³ *ibid* [68]-[69]. The same legislation was considered (and similar conclusions were drawn) in *Karubian v Iran* (1996) 32 Iran - US Claims Tribunal Reports 3.

⁵¹⁴ Maurizio Brunetti, 'The Iran-United States Claims Tribunal, NAFTA Chapter 11, and the Doctrine of Indirect Expropriation' (2001) 2 *Chicago Journal of International Law* 203, 210-211; Romesh Weeramantry, 'The Law of Indirect Expropriation and the Iran-United States Claims Tribunal's Role in Its Development' in Leon Trakman and Nicola Ranieri (eds), *Regionalism in International Investment Law* (Oxford University Press 2013) 340.

⁵¹⁵ Aldrich (n 506); Pellonpää and Fitzmaurice (n 508).

‘police measures’ or exercises of police power that were consistent with the views expressed by scholars in the previous Chapter.

Debates concerning expropriation before the Grotius Society shortly after the Second World War revealed support for the idea that certain types of interference with property would not entail State responsibility, including interferences connected with taxation, police measures, measures of public health and the administration of public utilities.⁵¹⁶ Similarly, in 1959 BA Wortley also acknowledged that ‘indirect loss resulting from reasonable and general restrictions imposed in the social interest’ would not constitute an expropriation,⁵¹⁷ although he acknowledged that the line was not easy to draw.⁵¹⁸ He identified taxation, property reforms and health and planning legislation as examples of such general restrictions, concluding:

Bona fide reforms...may cause loss to foreign owners, but will not usually be a matter of complaint: indeed, most States from time to time pass such legislation. General limitations on the use of property will not, usually, amount to expropriation...Whatever may be the remedy of foreigners caught by general changes in the law, if those changes do not in fact dispossess them but merely lessen the value of their holdings or expectations, in the general interest, then bona fide changes in the public interest will not be confiscations, since the owners are left in possession of their property...⁵¹⁹

⁵¹⁶ Ben Atkinson Wortley and others, ‘Expropriation in International Law’ (1947) 33 Transactions of the Grotius Society 25, 44 (Dr Erwin H Loewenfeld).

⁵¹⁷ Wortley (n 482) 51.

⁵¹⁸ *ibid.*

⁵¹⁹ *ibid* 50.

According to Wortley, ‘orderly social life’ represented ‘the price paid for incidental losses’.⁵²⁰ Rudolf Bindschedler expressed a similar view, noting that police regulations did not require compensation but that the police power could not be used as a mere pretext for confiscation.⁵²¹ GC Christie similarly acknowledged States’ police powers, however he also noted that ‘a State’s mere assertion that the police power is involved is obviously not conclusive’, particularly where the State’s conduct is ‘exorbitant, or at least somehow unreasonable’.⁵²²

In the early stages of the International Law Commission’s (‘ILC’) examination on State Responsibility, the ILC considered the international law rules relating to the treatment of aliens. 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’.⁵²³ 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.’⁵²⁴ However, he did note later in this report that the distinction between acts of the State which fall

⁵²⁰ *ibid* 52.

⁵²¹ Rudolf Bindschedler, ‘La protection de la propriété privée en droit international public’ (1956) 90 *Recueil des Cours* 173, 212, 217.

⁵²² GC Christie, ‘What Constitutes a Taking of Property under International Law?’ (1962) 38 *British Yearbook of International Law* 307, 335–336.

⁵²³ 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

⁵²⁴ *ibid* 11–12.

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'.⁵²⁵

The police power was also cited in the 1961 'Harvard Draft' Convention on Responsibility of States for Injuries to the Economic Interests of Aliens,⁵²⁶ which built upon the earlier draft of 1929.⁵²⁷ 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, provided:

- (a) it is not a clear and discriminatory violation of the law of the State concerned;
- (b) it is not the result of a violation of any provision of Articles 6 to 8 of this Convention [concerning denial of justice]'
- (c) it is not an unreasonable departure from the principles of justice recognized by the principal legal systems of the world; and
- (d) it is not an abuse of the powers specified in this paragraph for the purpose of depriving an alien of his property.⁵²⁸

⁵²⁵ *ibid* 12.

⁵²⁶ 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.

⁵²⁷ See Chapter Two, Part III(6) at n 339 - 342.

⁵²⁸ Sohn and Baxter (n 526) 553-554.

This approach applies equally in contemporary US foreign relations law, as highlighted by the *Restatement (Third) of Foreign Relations Law of the United States* ('*Restatement*'):

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.⁵²⁹

However, the acceptance of the police power was not universal in this period. In 1984, Rosalyn Higgins questioned whether the distinction between public interest regulation enacted pursuant to the police power (which would be non-compensable) and regulation that constituted an expropriation (which would be compensable) was 'intellectually viable':

Is not the State in both cases (that is, either by a taking for a public purpose, or by regulating) purporting to act in the common good? And in each case has the owner of the property not suffered loss? Under international law standards, a regulation that amounted (by virtue of its scope and effect) to a taking, would need to be 'for a public purpose' (in the sense of in the general, rather than for a private, interest). And just compensation would be due.⁵³⁰

Thus, according to Higgins, 'international law standards' provided that whether regulation could constitute expropriation depended on the regulation's scope and effect, and the purpose of the measure is irrelevant. This has been described as the 'sole effects' approach to expropriation.⁵³¹ The 'sole effects'

⁵²⁹ American Law Institute, *Restatement* (n 24) §712, Comment (g), 201.

⁵³⁰ Higgins, 'The Taking of Property and the State: Recent Developments' (n 460) 331.

⁵³¹ Rudolf Dolzer, 'Indirect Expropriations: New Developments' (2002) 11 *New York University Environmental Law Journal* 64.

approach to indirect expropriation provides that the sole criterion for determining whether a measure (regulatory or otherwise) constitutes an expropriation is the effect that the measure has on the investment.⁵³² Importantly for the enquiry in this thesis, under a ‘sole effects’ approach, the purpose of a measure or its character as public interest regulation, is not relevant to the expropriation enquiry. Thus, the application of a ‘sole effects’ approach to public interest regulation would see ‘no conceptual difference between unreasonable effect on property by regulation and losses caused by direct and express State conduct.’⁵³³

Collectively, this scholarship is consistent with the scholarship discussed in Chapter Two: there was a widespread (but not universal) acceptance of the police power, but there was uncertainty as to its scope and its interaction with the law of expropriation.

VII. CONCLUSION

Notwithstanding the general lack of consensus of the international law rules concerning foreign investment throughout this period, and the more varied ways in which States referred to their regulatory powers, there is nonetheless a considerable degree of consistency between this Chapter and the previous Chapter in the practice of States, the decisions of international courts and tribunals and the writings of eminent publicists and learned societies relating to States’

⁵³² *ibid* 79.

⁵³³ Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (n 112) 219.

regulatory powers. Where the language of ‘police power’ was used, it appeared to take the same meaning as that explained in Chapter Two, that is, as a concept referring to States’ powers to regulate matters of public welfare (including health, well-being, public morals, public order, national security and the national interest). Non-discriminatory measures of general application enacted for a public welfare objective were considered non-compensable provided such measures were not unreasonable. Unlike the previous Chapter, reference to the right to regulate was also more common during this period, however there was a lack of consensus as to its meaning and effect.

CHAPTER FOUR

INDIRECT EXPROPRIATION AND THE 'POLICE POWER' OF STATES

I. INTRODUCTION

Protection against unlawful expropriation is a standard of treatment common to almost all IITs. For an expropriation to be lawful, it must have been undertaken for a public purpose, in accordance with due process, and be accompanied by compensation. States may expropriate an investment *directly* through, for example, compulsory transfers of title or an outright seizure of property by the State.⁵³⁴ Where a State directly expropriates property, compensation must be paid even if the expropriation was in pursuit of public interest objectives.⁵³⁵ However, an expropriation can also occur *indirectly*, where the property is not transferred or seized but the measures interfere with the property to such an extent that the measure (or series of measures) can be deemed to have had the same effect as if the property had been expropriated directly.⁵³⁶ Where an expropriation occurs indirectly, compensation must be paid.

⁵³⁴ 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, 297.

⁵³⁵ *Compañía del Desarrollo de Santa Elena, SA v Republic of Costa Rica*, ICSID Case No.Arb/96/1, Final Award, 17 February 2000, [71]-[72].

⁵³⁶ *Starrett Housing Corp v Iran* (1983) 16 Iran-US CTR 112, 154; Brigitte Stern, 'In Search of the Frontiers of Indirect Expropriation' in Arthur W Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2007* (Brill 2008) 35.

In recent years, investors have made claims alleging that public interest regulation constitutes indirect expropriation, including challenges to public health measures⁵³⁷ and affirmative action laws.⁵³⁸ States have responded to such claims by arguing that the measures were not indirect expropriation, but rather were lawful, non-compensable regulation enacted pursuant to the police power of States. In such circumstances, the question of compensation for expropriation does not arise, because no expropriation has occurred in the first place. For example, in response to the challenge by Philip Morris to Australia's 'plain packaging' legislation,⁵³⁹ Australia argued that the measures were not an indirect expropriation because they were 'non-discriminatory regulatory actions of general application designed and adopted...to achieve the most fundamental public welfare objective- the protection of public health'.⁵⁴⁰ An investor-State arbitration tribunal therefore must resolve two apparently mutually exclusive concepts: is the measure (or series of measures) lawful public interest regulation? Or does the measure breach the State's obligation under an IIT not to expropriate an investment without payment of compensation? Can it be both?

The rise in claims that have impugned public interest regulation has re-enlivened the scholarly and judicial debate that was prominent in the early-mid

⁵³⁷ For example, *Philip Morris v Uruguay* (n 17).

⁵³⁸ *Foresti* (n 16).

⁵³⁹ See above Chapter One, Part IV, nn 49 - 53.

⁵⁴⁰ *Philip Morris v Australia*, Australia's Response to Notice of Arbitration (n 50) [46].

twentieth century, explored in Chapter Two,⁵⁴¹ about the relevance of a State's police power. In *Philip Morris v Uruguay*, the Tribunal noted:

A consistent trend in favo[u]r of differentiating the exercise of police powers from indirect expropriation emerged after 2000. During this latter period a range of investment decisions have contributed to develop the scope, content and conditions of the State's police powers doctrine, anchoring it in international law.⁵⁴²

The purpose of this Chapter is to demonstrate the extent to which States may rely on their police power in defence of the lawfulness of public interest regulation against claims of indirect expropriation. To do so, the Chapter is divided into two parts. The first part examines the decisions of investor-State arbitration tribunals that have determined indirect expropriation claims where the impugned measure was public interest regulation. In particular, the first part examines the extent to which tribunals have considered the respondent State's liability in light of the police powers doctrine.

Part III of this Chapter draws together these cases and the analysis undertaken in Chapters Two and Three to articulate the source, content and operation of the police powers doctrine in international law. Following an examination of State practice and *opinio juris*, this part advances the proposition that the police powers doctrine is reflected in customary international law. Part III also identifies the content of the police powers doctrine, that is, what constitutes a valid exercise of police power. Finally, Part III of this Chapter

⁵⁴¹ Chapter Two, Part III(6).

⁵⁴² *Philip Morris v Uruguay* (n 17) [295].

examines how the police powers doctrine operates as a principle relevant to determining whether an indirect expropriation has occurred, as well as how the doctrine interacts with the test for lawful expropriation.

II. THE TREATMENT OF PUBLIC INTEREST REGULATION IN INDIRECT EXPROPRIATION CLAIMS

This first part is divided into two sections, the first of which explores the indirect expropriation cases where no reference has been made to the police power or similar language conveying the same idea (the ‘effects-based approach’). The second section examines the various ways in which the police power has been defined and applied in indirect expropriation claims, of which there are three discernable approaches.

1. Effects-based approach

There have been a number of indirect expropriation claims in which States’ right or power to enact public interest regulation has not been considered in the determination of the claim, and it is solely the effect of the measure that is relevant to determining whether that measure constitutes an ‘expropriation’. This approach is described in scholarship as the ‘effects-based’ or ‘sole effect’ approach. In these cases, the fact that the interference with property occurred by way of public interest regulation is not relevant in determining the legality of the measure.

(a) Santa Elena and Metalclad

Before examining the effects-based approaches in depth, it is necessary to first

address the cases of *Santa Elena v Costa Rica*⁵⁴³ and *Metalclad v Mexico*,⁵⁴⁴ as these cases are often raised when discussing effects-based approaches. For the reasons that follow, their relevance to determining the applicability of the police powers doctrine and the lawfulness of public interest regulation in an indirect expropriation claim may be somewhat overstated.

Several scholars have suggested that *Santa Elena* provides a clear articulation of the ‘sole effects’ approach to determining an expropriation.⁵⁴⁵ *Santa Elena* concerned an expropriation decree issued by the Costa Rican government, in which title to land was taken from investors purportedly for environmental purposes. In *Santa Elena*, the Tribunal held:

Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state’s obligation to pay compensation remains.⁵⁴⁶

⁵⁴³ *Santa Elena* (n 535).

⁵⁴⁴ *Metalclad Corporation v United Mexican States*, ICSID Case No.Arb(AF)/97/1, Award, 30 August 2000.

⁵⁴⁵ Dan Sarooshi, ‘Investment Treaty Arbitration and the World Trade Organization: What Role for Systemic Values in the Resolution of International Economic Disputes?’ (2014) 49 *Texas International Law Journal* 445, 452–453; See also 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, 793–794; Escarcena (n 376) 126; Stephen Olynyk, ‘A Balanced Approach to Distinguishing between Legitimate Regulation and Indirect Expropriation in Investor-State Arbitration’ (2012) 15 *International Trade and Business Law Review* 254, 274; Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press 2015) 233.

⁵⁴⁶ *Santa Elena* (n 535) [72].

In *Santa Elena*, both parties were in agreement that an expropriation had occurred, and the question for the Tribunal to determine was the amount of compensation.⁵⁴⁷ This is apparent in the above quotation, where the Tribunal makes reference to *expropriatory* environmental measures. Indeed, *Santa Elena* concerned direct expropriation, not indirect expropriation. There has been some criticism of the *Santa Elena* Tribunal's approach to determining the measure of compensation for the expropriation,⁵⁴⁸ but the question of *compensation* for expropriation is separate to the antecedent question of whether an expropriation has occurred. Thus, *Santa Elena* is of limited assistance to the inquiry in this thesis.

The dispute in *Metalclad* centred on several regulatory measures enacted by a provincial government in Mexico, which Metalclad alleged had interfered with and precluded its operation of a hazardous waste landfill. Two regulatory measures were in issue. First, the provincial government had denied Metalclad a permit to construct and operate the landfill, citing environmental grounds. Secondly, the provincial government also issued an 'Ecological Decree' that declared an area including the landfill site as an 'ecological preserve'.

In concluding that an expropriation had occurred, the Tribunal defined indirect expropriation as follows:

⁵⁴⁷ *ibid* [56].

⁵⁴⁸ Insofar as the Tribunal did not address the arguments made by Costa Rica that the amount of compensation should take into account Costa Rica's treaty obligations under international law to protect the environment: see Philippe Sands, *Lawless World: Making and Breaking Global Rules* (Penguin Books 2006) 132–133; Di Benedetto (n 131) 138–139.

...expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host state, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.⁵⁴⁹

As to the denial of the permit, the Tribunal concluded that denying Metalclad the right to operate the landfill on purported environmental grounds was outside of the power of the municipal authorities. Rather, it was the federal authorities that held exclusive authority for permitting (or denying) hazardous waste landfills.⁵⁵⁰ The federal authorities had approved the landfill and were satisfied the project was consistent with, and sensitive to, environmental concerns.⁵⁵¹ The Tribunal concluded:

By permitting or tolerating the conduct ... in relation to Metalclad which the Tribunal has already held amounts to unfair and inequitable treatment breaching Article 1105 and by participating or acquiescing in the denial to Metalclad of the right to operate the landfill, notwithstanding the fact that the project was fully approved and endorsed by the federal government, Mexico must be held to have taken a measure tantamount to expropriation in violation of NAFTA Article 1110(1).⁵⁵²

The Tribunal had earlier concluded that the same actions constituted a breach of the FET provision under Article 1105 NAFTA. In reaching that conclusion, the Tribunal also cited representations by the federal government that

⁵⁴⁹ *Metalclad* (n 544) [103].

⁵⁵⁰ *ibid* [81]-[86].

⁵⁵¹ *ibid* [98].

⁵⁵² *ibid* [104].

the construction of the landfill would be allowed to continue.⁵⁵³ The Tribunal further concluded that the ‘Ecological Decree’ issued by the municipal government that declared an area including the landfill site as an ‘ecological preserve’ had the effect of ‘barring forever the operation of the landfill’.⁵⁵⁴ This was also considered to be expropriatory ‘in and of itself’, and the Tribunal need not consider the environmental motivation or intent of the ecological decree in reaching this conclusion.⁵⁵⁵

Metalclad has been criticised as articulating a very broad view of expropriation.⁵⁵⁶ There are three lines of criticism. First, the Tribunal conflated the FET standard under Article 1105 NAFTA when the Tribunal did not examine whether the particular requirements of expropriation had been satisfied, but rather restated the findings in respect of FET and applied them to its expropriation analysis.⁵⁵⁷ In proceedings before the Supreme Court of British Columbia to set aside the *Metalclad* award, the Supreme Court concluded that the Tribunal’s analysis of Article 1105 was beyond the scope of the submission to arbitration and this aspect of the decision was set aside.⁵⁵⁸ Since the Tribunal had effectively transplanted its reasoning concerning the FET standard into its expropriation

⁵⁵³ *ibid* [88], [107].

⁵⁵⁴ *ibid* [109].

⁵⁵⁵ *ibid* [111].

⁵⁵⁶ See, for example, *Lowe* (n 21) 542–543.

⁵⁵⁷ *ibid* [104].

⁵⁵⁸ *United Mexican States v Metalclad Corporation*, 2001 BCSC 664, reprinted in (2001) 5 ICSID Reports 236, [78].

analysis regarding the denial of permits, this aspect of the indirect expropriation analysis was also set aside.⁵⁵⁹ The Tribunal's conflation of FET and expropriation has also been criticised by a subsequent investor-State arbitration tribunal.⁵⁶⁰

The second line of criticism to *Metalclad* is that the reference to the 'reasonably-to-be-expected economic benefit of property' in the passage quoted above could, taken in isolation, stand for the proposition that mere loss of value could constitute an expropriation. Certainly, investor claimants in their pleadings have interpreted *Metalclad* to mean that a loss of value in the absence of any deprivation of use may constitute expropriation.⁵⁶¹ However, a closer analysis reveals that this is not a correct proposition, as that statement is prefaced by the requirement that the measure be a 'covert or incidental interference with the use of property' which has the effect of depriving the owner of reasonably-to-be-expected economic benefits of property. Thus, the loss of the economic benefit is a result of a deprivation of use of the investment.⁵⁶² It does not stand for the proposition that a mere deprivation of an economic benefit, *in and of itself*, could constitute an expropriation. In any event, as will be discussed further below, it has

⁵⁵⁹ *ibid* [79].

⁵⁶⁰ *Accession Mezzanine Capital LP and Danubius Kereskedohaz Vagyonkezeló Zrt v Hungary*, ICSID Case No.Arb/12/3, Award, 17 April 2015, [176].

⁵⁶¹ For example, see the summaries of the Claimant's arguments in *El Paso Energy International Company v Argentine Republic*, ICSID Case No.Arb/03/15, Award, 31 October 2011, [114], [250]-[253].

⁵⁶² *ibid* [252]; Francisco Orrego Vicuña, 'Carlos Calvo, Honorary NAFTA Citizen' (2002) 11 *New York University Environmental Law Journal* 19, 28.

come to be widely accepted that a mere loss of value does not constitute expropriation.

The third and final line of critique to *Metalclad* concerned the Tribunal's broad definition of indirect expropriation. As noted earlier, the Tribunal had considered that the motivation or intention for the Environmental Decree was not relevant in determining whether the measure was expropriatory. In the proceedings before the Supreme Court of British Columbia, Justice Tysoe noted that the *Metalclad* definition of expropriation would be 'sufficiently broad...to include legitimate rezoning of property by a municipality or other rezoning authority',⁵⁶³ but that finding was not 'patently unreasonable'.⁵⁶⁴ This emphasis on the *effect* of the measure being central to the determination has been criticised as denying the relevance of the purpose of the measure in determining whether a measure was expropriatory.⁵⁶⁵ It is this aspect of the award that has been characterised as an 'undeniable pronouncement' and application of the 'sole effects' test.⁵⁶⁶ Philippe Sands, for instance, observed:

The ruling is based on the unstated assumption that property rights trump all other rights...it contains no language which would leave much room for legitimate governmental measures to promote other

⁵⁶³ *United Mexican States v Metalclad Corporation* (n 558) [100].

⁵⁶⁴ *ibid* [104].

⁵⁶⁵ For example, Dolzer, 'Indirect Expropriations' (n 531) 72; Moloo and Jacinto (n 131) 13; Alain Prujiner, 'L'expropriation, l'ALENA et L'affaire Metalclad' (2003) 5 *International Law FORUM du droit international* 205, 211–212.

⁵⁶⁶ Fortier and Drymer (n 534) 313.

social values, such as health and environmental protection, or human rights.⁵⁶⁷

However, notwithstanding the Tribunal disclaiming the relevance of purpose in its analysis, it is significant that in *Metalclad* the entirety of the Claimant's investment was declared to fall within the ecological preserve, which permanently prevented the use of the landfill. As will be seen in the next section, *Metalclad* is an extreme example and most cases involving public interest regulation do not reach this severe threshold.

(b) Public interest regulation would rarely constitute expropriation, due to lack of severity

There are several cases that have found that the public interest regulation under scrutiny did not constitute indirect expropriation due to lack of severity. These cases were determined without reference to the police power of States (or similar language conveying the same idea).

In *AES Summit v Hungary*, the Claimant challenged Hungary's reintroduction of administrative pricing pursuant to two price decrees in the energy sector.⁵⁶⁸ These did not constitute indirect expropriation because there had been no interference with the Claimant's ownership or use of property. The Tribunal held:

...many State's acts or measures can affect investments and a modification to an existing law or regulation is probably one of the most common of such acts or measures. Nevertheless, a State's act

⁵⁶⁷ Sands (n 548) 136.

⁵⁶⁸ *AES Summit Generation Limited Aes-Tisza Eromu Kft v Hungary*, ICSID Case No.Arb/07/22, Award, 23 September 2010.

that has a negative effect on an investment cannot automatically be considered an expropriation. For an expropriation to occur, it is necessary for the investor to be deprived, in whole or significant part, of the property in or effective control of its investment: or for its investment to be deprived, in whole or significant part, of its value.⁵⁶⁹

Similar findings were made in *Plama v Bulgaria*.⁵⁷⁰ In that case, the Claimant challenged, *inter alia*, amendments to Bulgaria's environmental laws that excluded State liability for past environmental damage, which was alleged to effectively make the Claimant liable. The Tribunal held that the 'decisive elements' of finding an expropriation were '(i) substantially complete deprivation of economic use and enjoyment of rights to investment (i.e. approaching total impairment) (ii) irreversibility and permanence and (ii) extent of loss of economic value'.⁵⁷¹ The Tribunal considered that there was no proof of harm or loss to the Claimant's investment, nor was there any limitation on the Claimant's right to use or enjoy its investment, with the result that it was 'impossible to see how the claim concerning expropriation could be successful'.⁵⁷²

In *Mamidoil v Albania*, the Tribunal noted that regulations that 'reduce[d] the profitability of an investment but [did] not shut it down completely' and which left the investor in control would not generally qualify as indirect

⁵⁶⁹ *ibid* [14.3.1].

⁵⁷⁰ *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No.Arb/03/24, Award, 27 August 2008.

⁵⁷¹ *ibid* [193].

⁵⁷² *ibid* [226].

expropriations.⁵⁷³ In that case, re-zoning of a port and changes to land use plans impacting the Claimant's construction and operation of an oil container were held not to constitute an expropriation because the policy measures, while making it impossible to earn profits, did not suffice to 'elevate Albania's conduct into a sphere of loss of the investment'.⁵⁷⁴ The Tribunal continued:

The definition of expropriation has developed over time and gone beyond the formalistic concentration on title. It encompasses the substance of property and protects the property even if title is not taken. However, a further extension into the sphere of damages, loss of value and profitability, without regard to the substance and attributes of property, could deprive the claim of its distinct nature and amalgamate it with other claims. Thus, a mere loss of value or a loss of benefits that is connected to and caused by the dissolution of at least one attribute of property, does not constitute indirect expropriation. The contrary approach would not only contradict the literal meaning of the term 'ex-propriation' but would also be inconsistent with the clear intention of State parties when they entered into the BIT and the ECT and provide for separate standards of protection.⁵⁷⁵

These cases suggests that a measure (in the form of public interest regulation or otherwise) will constitute indirect expropriation if the measure 'substantially deprives' a claimant of its investment, such that a claimant has been deprived 'in whole or significant part'⁵⁷⁶ of the use, enjoyment of or control over the investment. A mere loss of profits is not sufficient. In practice, the reasoning of these tribunals would rule out most public interest regulation (as defined in this

⁵⁷³ *Mamidoil* (n 63) [561]-[570].

⁵⁷⁴ *ibid* [561].

⁵⁷⁵ *Mamidoil* (n 63)[570].

⁵⁷⁶ *AES Summit* (n 568) [14.3.1].

thesis) from being considered expropriatory. This is because public interest regulation typically involves a lesser interference that could (incidentally or otherwise) interfere with, for instance, the profitability of an investment, but the investor would retain control of its investment.⁵⁷⁷

Further, cases that have focussed on the effect of a regulation without reference to concepts such as the police powers doctrine primarily fall within the category ‘administrative’ public interest regulation – that is, cases where the alleged expropriatory act was targeted specifically at the foreign investment through, for instance, the cancellation of a licence or non-renewal of a permit on purported public interest grounds.⁵⁷⁸ The exception to this is where public interest legislative measures have had the effect of *totally* depriving of the investor of the use of their investment, such as the ecological decree in *Metalclad*.⁵⁷⁹

The small numbers of tribunals that have concluded that ‘administrative’ public interest regulation has constituted indirect expropriation have concluded in circumstances where the purported public interest being pursued was found not

⁵⁷⁷ A similar point was in *SD Myers* (n 19) [282], cited with approval *El Paso* (n 561) [244].

⁵⁷⁸ Charles N Brower and Sadie Blanchard, ‘What’s in a Meme - The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States’ (2013) 52 *Columbia Journal of Transnational Law* 689, 729.

⁵⁷⁹ *Metalclad* (n 544). See also *Middle East Cement v Egypt*, where a decree prohibiting the importation of certain types of cement destroyed the investor’s ability to use and benefit from its investment (amounting to a total loss of control over the investment), even though it retained nominal ownership of the rights of the investment: *Middle East Cement Shipping and Handling Co. SA v Arab Republic of Egypt*, ICSID Case No.Arb/99/6, Award, 12 April 2002, [107].

to be genuine,⁵⁸⁰ and where ‘the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision [were] neutralised or destroyed’.⁵⁸¹ Even in the latter case, at least one Tribunal foreshadowed that a measure of such significant effect could be considered not to be an indirect expropriation if the purpose of the measure was proportionate to the effect.⁵⁸²

2. A distinction between lawful regulation pursuant to the police powers doctrine and indirect expropriation

In *Feldman v Mexico*, when discussing the meaning of ‘expropriation’ under Article 1110 NAFTA, 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 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.⁵⁸³

Regulation of this type is said to fall within the police power of the State. As was explored in Chapters Two and Three, reference to the police power has a long history. However, it has been in indirect expropriation claims pursuant to IITs that

⁵⁸⁰ *Metalclad* (n 544) (where authorities had concluded that the operation of the landfill was ‘consistent with, and sensitive to...environmental concerns’); *Técnicas Medioambientales TECMED S.A. v United Mexican States*, ICSID Case No. Arb(AF)/00/2, Award, 29 May 2003 (where there was no evidence of any risk to health or the environment, and the measures were held by the Tribunal to have been taken in response to political pressure).

⁵⁸¹ *Tecmed* (n 580) [116].

⁵⁸² *ibid* [122]-[132].

⁵⁸³ *Marvin Feldman v Mexico*, ICSID Case No. Arb(AF)/99/1, Award, 16 December 2002, [102]-[105], citing

the concept has received considerable attention, which this section will explore. As will be seen, the reasoning of tribunals is inconsistent (even if the ultimate outcome is similar), and different tribunals have focussed on different factors. From an examination of the case law, three approaches can be discerned: cases that consider indirect expropriation and regulation pursuant to the police power as being different in kind, cases that consider the distinction as one of degree, and cases that look first to whether there is a ‘substantial deprivation’ of property before determining whether the police powers doctrine applies. Each of these approaches will be discussed in turn.

(a) Distinction between lawful regulation pursuant to the police powers doctrine and indirect expropriation as a distinction of kind

The first approach discernable from the case law is that some tribunals have considered public interest regulation enacted pursuant to the police power of the State is different in kind from indirect expropriation, when certain features are present.

Saluka v Czech Republic is an example of this approach. *Saluka* concerned a decision by the Czech government to place the Claimant’s bank under forced administration due to alleged mismanagement.⁵⁸⁴ The Claimant argued that it had been deprived of the value of its shares by the government intervention, and that this constituted a ‘deprivation’⁵⁸⁵ contrary to the applicable IIT. The Tribunal considered that the use of the word ‘deprivation’ in the applicable IIT ‘import[ed]

⁵⁸⁴ *Saluka* (n 3).

⁵⁸⁵ The equivalent of the expropriation provision in the IIT.

into the Treaty the customary international law notion of that a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order',⁵⁸⁶ and that such regulation fell 'within the police power of States'.⁵⁸⁷ The Tribunal further stated that:

It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulatory actions that are aimed at the general welfare.⁵⁸⁸

The Tribunal continued by noting that international law 'was yet to identify in a comprehensive and definitive fashion precisely what regulations are considered "permissible" and "commonly accepted" as falling within the police or regulatory power of States' and that international law had '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'.⁵⁸⁹ The Tribunal ultimately concluded that the regulatory measure (imposing a forced administration) was 'valid and permissible as within [the Czech Republic's] regulatory powers'.⁵⁹⁰ This was notwithstanding that 'the measure had the effect of eviscerating Saluka's investment'.⁵⁹¹ This interpretation of the same IIT was confirmed and applied in *Invesmart v*

⁵⁸⁶ *Saluka* (n 3) [254].

⁵⁸⁷ *ibid* [262].

⁵⁸⁸ *ibid* [255].

⁵⁸⁹ *Saluka* (n 3) [263].

⁵⁹⁰ *ibid* [276].

⁵⁹¹ *ibid*.

Czech Republic,⁵⁹² when a Tribunal held that a decision to revoke a banking licence pursuant to a general statute fell ‘clearly on the *bona fide* regulation side of the regulation/expropriation divide’.⁵⁹³

While the *Saluka* Tribunal acknowledged that there was a line to be drawn between regulation and an expropriation, the Tribunal did not examine whether the measures in fact had ‘the effect of depriving foreign investors of their investment’. Indeed, the conclusion that the investment had been ‘eviscerated’ suggests that the effect of the measures on the investment was significant, but that effect did not change the characterisation of the regulation as being within the police power of the State.

The proposition in *Saluka* that *bona fide* regulation would not constitute an expropriation has been widely cited with approval by subsequent investor-State arbitration tribunals.⁵⁹⁴ However, where *Saluka* has been cited with approval, most tribunals have additionally considered whether the measures display any of the characteristics of expropriation. In particular, *Methanex v US* concerned legislative measures to phase out the use and sale of a gasoline additive.⁵⁹⁵ The justification for the measures was the threat posed by the additive to the environment and

⁵⁹² *Invesmart, BV v Czech Republic*, UNCITRAL, Award, 26 June 2009, [496]-[504].

⁵⁹³ *ibid* [520].

⁵⁹⁴ For example, *Fireman’s Fund Insurance Company v United Mexican States*, ICSID Case No.Arb(AF)/02/1, Award, 17 July 2006, fn 162; *SAUR International SA v Argentine Republic*, ICSID Case No.Arb/04/4, Decision on Jurisdiction and Liability, 6 June 2012, [401]; *Occidental Petroleum and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No.Arb/06/11, Award, 5 October 2012, fn 65.

⁵⁹⁵ *Methanex* (n 22).

public health. The Claimant, a marketer and distributor of one of the ingredients used to manufacture the additive, alleged the laws constituted an expropriation and violated the provisions relating to FET. The Tribunal concluded that ‘from the standpoint of international law, the...ban was a lawful regulation and not an expropriation’.⁵⁹⁶ In so concluding, the Tribunal described the test of ‘lawful regulation’ as follows:

As a matter of general international law, non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alios*, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments have been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.⁵⁹⁷

The Tribunal further concluded that the measures also did not ‘manifest... any of the features associated with expropriation’, as the loss of a customer base, goodwill and market share was not sufficient to constitute an expropriation.⁵⁹⁸ This suggests the Tribunal gave consideration of the effect of the regulation, albeit as an apparent alternative argument for determining the indirect expropriation claim.

Methanex appears to present two parallel lines of reasoning to reach the conclusion that the State had not expropriated the Claimant's investment: *either* it could be seen as lawful regulation pursuant to a valid exercise of the State's police

⁵⁹⁶ *ibid*, Part IV Chapter D, [15].

⁵⁹⁷ *ibid*, Part IV, Chapter D, [7].

⁵⁹⁸ *Methanex* (n 22) Part IV Chapter D, [16].

power, or in any event the measure was not severe enough to constitute an indirect expropriation. In *Methanex*, the Claimant's argument was rejected on both grounds: it was a lawful regulation and therefore not an indirect expropriation, and there wasn't a substantial deprivation and thus there is not an indirect expropriation. *Methanex* does not provide assistance with determining what would occur if, for instance, there had been a 'substantial deprivation' of the Claimant's investment, and whether such a finding could also preclude a finding that the measures were lawful regulation.

(b) Distinction between lawful regulation pursuant to the police powers doctrine and indirect expropriation as one of degree

The next category of cases considers that public interest regulation pursuant to the police power does not rise to the level of indirect expropriation; that is, the distinction between an exercise of police power and indirect expropriation is one of degree. These cases present a middle ground between the 'effects-based' approach discussed in Part II(1) of this Chapter above and those cases that solely look at the police power of States to resolve the claim, such that both the issues of 'substantial deprivation' and police power are examined and, to a certain extent, blended together.

In *El Paso v Argentina*, the Tribunal summarised this approach as follows:

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.⁵⁹⁹

The *El Paso* Tribunal accepted the proposition in *Saluka* when it concluded that ‘general non-discriminatory regulatory measures, adopted in accordance with the rules of good faith and due process, do not entail a duty of compensation’.⁶⁰⁰

The Tribunal then continued:

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.⁶⁰¹

For the *El Paso* Tribunal, ‘at least one of the essential components of the property rights must have disappeared for an expropriation to have occurred’.⁶⁰² This would occur where there was ‘loss of control’ of the foreign investment (absent a physical taking), such that the enjoyment of the property had effectively been neutralised.⁶⁰³ A ‘mere loss in value of the investment’ would not constitute

⁵⁹⁹ *El Paso* (n 561) [233].

⁶⁰⁰ *ibid* [240].

⁶⁰¹ *ibid* [241].

⁶⁰² *ibid* [245].

⁶⁰³ *ibid* [245]-[248].

an indirect expropriation if control or use of the investment remained intact.⁶⁰⁴ Applying those principles to the facts of the case, the *El Paso* Tribunal concluded that the measures under challenge (a public emergency law abolishing parity of the US dollar to the Argentinian peso) were not severe enough to constitute an expropriation, as there was not a sufficient interference.⁶⁰⁵ Further, certain taxation duties and export duties on oil and gas that were introduced also did not constitute expropriations as they were held to be reasonable regulation within the context of the crisis, and had only a limited impact on the investment.⁶⁰⁶

Les Laboratoires Servier v Poland concerned Poland's denial of marketing authorisations for the sale of the Claimant's pharmaceuticals in Poland.⁶⁰⁷ The marketing authorisations were denied following the harmonisation of Poland's regulatory framework for pharmaceuticals with EU law.⁶⁰⁸ The Claimant argued that Poland's conduct constituted a 'divestment'⁶⁰⁹ contrary to the applicable IIT. The Parties agreed,⁶¹⁰ and the Tribunal accepted⁶¹¹ that a State would not be liable for divestment if its actions 'were a valid exercise of regulatory,

⁶⁰⁴ *ibid* [249].

⁶⁰⁵ *ibid* [249]-[256].

⁶⁰⁶ *ibid* [297]-[299].

⁶⁰⁷ *Les Laboratoires Servier v Republic of Poland*, UNCITRAL, Final Award, 14 February 2012.

⁶⁰⁸ 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 559, 559.

⁶⁰⁹ The equivalent of the expropriation provision in the IIT.

⁶¹⁰ *Servier* (n 607) [276].

⁶¹¹ *ibid* [569].

or “police”, powers’.⁶¹² For the Tribunal, this meant that the host State’s regulatory actions must be taken ‘(i) in good faith, (ii) for a public purpose, (iii) in a way proportional to that purpose, and (iv) in a non-discriminatory manner’.⁶¹³ Further, the Tribunal held:

Stated from a somewhat different perspective, 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.⁶¹⁴

Finally, the Tribunal further noted that ‘indirect expropriation...implicates a State’s *substantial interference* with an investor’s rights. Such interference must be significant, even if not complete, in the sense of depriving the investor of its ability to benefit from the relevant asset’.⁶¹⁵

The same approach was also evident in *SD Myers v Canada*.⁶¹⁶ In that case, the NAFTA Tribunal held that the ‘general body of precedent usually does not treat regulatory action as amounting to expropriation’.⁶¹⁷ The Tribunal continued:

Expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference. The distinction between expropriation and regulation screens out most potential cases of complaints concerning economic intervention by a state that reduces

⁶¹² *ibid* [276].

⁶¹³ *ibid* [569].

⁶¹⁴ *ibid* [570].

⁶¹⁵ *ibid* [576].

⁶¹⁶ *SD Myers* (n 19).

⁶¹⁷ *ibid* [281].

the risk that governments will be subject to claims as they go about their business of managing public affairs.⁶¹⁸

Merrill & Ring Forestry v Canada echoed similar sentiments when it noted that ‘not every regulatory interference will result in some form of taking under customary international law’, but those measures ‘that unreasonably interfere[d] with the effective enjoyment of the property...can result in...expropriation’.⁶¹⁹

One of the ways in which this approach differs from the approach in *Methanex* is the emphasis placed on the *proportionality* and *reasonableness* of the measures in determining whether the measures are a valid exercise of the police power. Proportionality was also emphasised in *Tecmed v United Mexican States* where, when determining the meaning of the expropriation provision under the applicable IIT, 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.⁶²⁰ In doing so, the Tribunal noted the ‘due deference owing to the State when defining the issues that affect its public policy’⁶²¹ but that there must be a ‘reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realised by any expropriatory measure’, citing jurisprudence

⁶¹⁸ *ibid* [282].

⁶¹⁹ *Merrill & Ring Forestry v Government of Canada*, UNCITRAL, Award, 31 March 2010, [125]; a similar approach (using the language of ‘substantial deprivation’) can be found in *Valeri Belokon v Kyrgyz Republic*, UNCITRAL, Award, 24 October 2014, [198]-[199],[205]-[210].

⁶²⁰ *Tecmed* (n 580)[119].

⁶²¹ *ibid* [122].

of the European Court of Human Rights.⁶²² Similarly in *LG&E v Argentina*, the Tribunal noted that State regulatory measures that have a social or general welfare purpose ‘must be accepted without any imposition of liability, except in cases where the State’s action is obviously disproportionate to the need being addressed’.⁶²³

Whereas *Methanex* appears to present the analysis in terms of alternatives (regulation or indirect expropriation), *El Paso*, *Servier*, *SD Myers*, *Merrill & Ring* and *Tecmed* appear to consider the issue as a spectrum (whether regulation rises to the level of indirect expropriation). However, like *Methanex*, these cases also highlight the principle that public interest regulation enacted pursuant to the police power is not ordinarily considered indirect expropriation, and this analysis was considered prior to determining whether there had been a ‘substantial deprivation’.

(c) The police powers doctrine and the ‘threshold question’ of substantial deprivation of property

The final category of case also combines the ‘effects-based’ approach explored in the first section (that is, looking to whether there has been a ‘substantial deprivation’) and the approach of determining whether the measure is a valid exercise of police power. However, these cases case adopt a methodology in reverse order to that advanced in *El Paso* discussed in the previous subsection,

⁶²² *ibid* [122].

⁶²³ *LG&E., 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].

such that tribunals first consider whether there has been a ‘substantial deprivation’ and then determine whether the measure is a valid exercise of the State’s police power.

In *Glamis Gold v US*, the Tribunal cited with approval the statement in *Methanex* that a State would not be responsible for ‘loss of property or for other economic disadvantage resulting from *bona fide*...regulation...if it is not discriminatory’.⁶²⁴ However, the Tribunal also considered that there was ‘for all expropriations...*the foundational threshold inquiry* of whether the property or property right was in fact taken’.⁶²⁵ The Tribunal held that a breach of the expropriation provision of the NAFTA would only occur if there had been a substantial impairment of the investor’s economic rights, such that the ownership, use, enjoyment or management of the business was rendered ‘useless’.⁶²⁶ ‘Mere restrictions’ would not constitute an indirect expropriation.⁶²⁷ After concluding that there had been no substantial deprivation,⁶²⁸ the Tribunal did not make *obiter* comments about whether the police powers doctrine had in any event been satisfied.

Chemtura v Canada adopted the same approach but also made findings as to the applicability of the police powers doctrine. In *Chemtura*, the Claimant

⁶²⁴ *Glamis Gold* (n 20) [354].

⁶²⁵ *ibid* [356].

⁶²⁶ *ibid* [357].

⁶²⁷ *ibid* [357].

⁶²⁸ *ibid* [357].

challenged a phase-out of a crop pesticide that had been enacted by the Canadian government on environmental and health grounds. The Tribunal first considered that for the regulation to constitute an indirect expropriation there must have been a ‘substantial deprivation’ of the Claimant’s investment. The pesticide that was the subject of the phase-out was ‘a relatively small part of the overall sales’ of the Claimant at the relevant times, and the Claimant ‘remained at all relevant times in control of its investment’.⁶²⁹ As such, the interference could not be deemed ‘substantial’.⁶³⁰ After concluding that there had not been a substantial deprivation, the Tribunal then considered ‘in any event’ that the measures fell within the scope of the Respondent’s police powers.⁶³¹ The Tribunal held that:

...[The regulatory body] 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.⁶³²

More recently, in *Philip Morris v Uruguay*, the Tribunal considered that two legislative measures did not constitute an indirect expropriation, firstly because the measures did not constitute a severe enough interference with the property and secondly because the measures were ‘a valid exercise of the State’s police powers, with the consequence of defeating the claim for expropriation’ under the

⁶²⁹ *Chemtura* (n 62) [263]-[264].

⁶³⁰ *ibid* [263]-[264].

⁶³¹ *ibid* [265]-[266].

⁶³² *ibid* [266].

applicable IIT.⁶³³ This case, and its consideration of the police powers doctrine, will be discussed in greater depth in Part III of this Chapter below when examining the police powers doctrine under customary international law.

This approach of considering the ‘threshold question’ of whether there was a substantial deprivation before considering the police powers doctrine has been applied in the disputes arising from Argentina’s response to its economic crisis in 2001. In *Suez v Argentina*,⁶³⁴ the failure of the Argentine government to pay agreed adjustments to tariff calculations during its financial crisis was held not to constitute an expropriation. The Tribunal noted that, in ‘evaluating a claim of expropriation it is important to recognise a State’s legitimate right to regulate and to exercise its police power in the interests of public welfare and not to confuse measures of that nature with expropriation’.⁶³⁵ The *Suez* Tribunal considered that the measures taken ‘did not constitute a permanent and substantial deprivation of the Claimant’s investment’ and, having so concluded, it did not need to apply the police powers doctrine.⁶³⁶

⁶³³ *Philip Morris v Uruguay* (n 17) [287]; Kate Mitchell, ‘Philip Morris v Uruguay: An Affirmation of “Police Powers” and “Regulatory Power in the Public Interest” in International Investment Law’ (*EJIL: Talk!*, 28 July 2016) <<http://www.ejiltalk.org/philip-morris-v-uruguay-an-affirmation-of-police-powers-and-regulatory-power-in-the-public-interest-in-international-investment-law/>> accessed 31 July 2016.

⁶³⁴ *Suez, Sociedad General de Aguas de Barcelona SA and InterAguas Servicios Integrales del Agua SA v The Argentine Republic*, ICSID Case No. Arb/03/17, Decision on Liability, 30 July 2010.

⁶³⁵ *ibid* [128].

⁶³⁶ *ibid* [129], [147].

In *Total SA v Argentina*, the Tribunal first considered whether the measures under challenge constituted a substantial deprivation.⁶³⁷ After concluding that there was no substantial deprivation, the Tribunal addressed more specifically the ‘pesification’ measures (measures converting foreign currencies to peso denominations) and whether such measures amounted to an indirect expropriation:

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. The Tribunal shares the dominant approach followed by international tribunals, that is to take into account also the purpose and the causes of the measures taken by a State (together with their adverse effects on the foreign investment).⁶³⁸

The *Total* Tribunal concluded that the pesification measures 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’.⁶³⁹

BG Group v Argentina also appeared to adopt this approach when it held:

The Tribunal notes that a State may exercise its sovereign power in issuing regulatory measures affecting private property for the benefit

⁶³⁷ *Total SA v Argentine Republic*, ICSID Case No.Arb/04/1, Decision on Liability, 27 December 2010, [195]-[196].

⁶³⁸ *ibid* fn 232.

⁶³⁹ *ibid* [197].

of the public welfare. Compensation for expropriation is required if the measure adopted by the State is “irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way that”...any form of exploitation thereof...has disappeared.” Conversely, a measure does not qualify as equivalent to expropriation if the “investment continues to operate, even if profits are diminished”.⁶⁴⁰

These cases that address both the ‘effects-based’ approach of considering if there has been a substantial deprivation and whether the measure is a valid exercise of police power could be read in one of two ways. First, these cases could consider the police power of States alongside the ‘threshold question’ of substantial deprivation as an alternative means of finding liability, similar to the Tribunal’s approach in *Methanex*. The approaches in *Chemtura* and *Philip Morris v Uruguay* appear to support this view when the tribunals considered the test of substantial deprivation and then went on to consider ‘in any event’ that the measures were a legitimate exercise of police power (in the case of *Chemtura*)⁶⁴¹ and the police powers conclusion was ‘an additional reason in support’ of the conclusion the measures were not expropriatory (in *Philip Morris v Uruguay*).⁶⁴²

Alternatively, these cases could be read such that consideration of the police power would only occur if the ‘threshold question’ was met; that is, there was a ‘substantial deprivation’. The approaches in *Glamis Gold* and *Suez* seemed to take this approach. This would see the police power as an *exception* to the

⁶⁴⁰ *BG Group PLC v Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, [268] (footnotes omitted). In that case, there was no substantial deprivation of the Claimant’s investment.

⁶⁴¹ *Chemtura* (n 62) [265]-[266].

⁶⁴² *Philip Morris v Uruguay* (n 17) [287].

requirement that there be a substantial deprivation. These issues as to the whether the police power is an 'exception' will be discussed further in Part III(4) of this Chapter below.

3. Conclusion

While instances of public interest regulation constituting indirect expropriation are rare, the case law examined in this section reveals several different approaches for considering public interest regulation in the context of indirect expropriation claims. There is a line of cases that do not consider the police power at all in determining an indirect expropriation claim, with the inquiry instead focussing on whether the claimant was substantially deprived of its' investment. However, a considerable number of the cases examined consider such claims in light of the police power of States (or police powers doctrine), although there are different approaches evident in the reasoning of tribunals as to how the police power interacts with the requirement of substantial deprivation, if at all.

III. THE POLICE POWERS DOCTRINE UNDER CUSTOMARY INTERNATIONAL LAW

Having analysed the various ways in which investor-State arbitration tribunals have considered public interest regulation in indirect expropriation claims, this part draws together the preceding analysis with the historical analysis undertaken in Chapters Two and Three and more recent State practice and *opinio juris* to demonstrate that the police powers doctrine is a principle of customary international law. After considering the customary international law source of the

doctrine, this part will also examine the content of the police powers doctrine and how the doctrine operates as a principle that is relevant to determining whether an indirect expropriation has occurred.

The recent decision of the *ad hoc* Tribunal in *Philip Morris v Uruguay* will be used as the starting point and provide the framework for this analysis. The justification for this approach is two-fold. First, as is apparent from the analysis of the case law above, the reasoning adopted by tribunals in considering the police power differs between cases. To an extent, such differences are to be expected in circumstances where the disputes are resolved on an *ad hoc* basis and pursuant to different (albeit similarly-worded) treaty provisions. However, such explanations are less explicable for the different approaches to the police power of States in circumstances where the concept is allegedly reflected in customary international law.⁶⁴³ *Philip Morris v Uruguay*, being a recent decision in which this issue was addressed at length, offers a useful starting point and a structure within which the State practice and *opinio juris* can be considered.

Secondly, the *Philip Morris v Uruguay* case addresses many of the difficult issues that surround the police powers doctrine that this Chapter seeks to resolve: namely, the doctrine's source in customary international law, its scope and limits, its relationship with the 'effects-based' or 'sole effect' test for determining indirect expropriation and with the test for lawful expropriation, and whether the doctrine is an exception to the law of expropriation or has a different character. The

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See further below, Part III(2).

consideration of these issues by the parties to the dispute and the Tribunal is thus instructive and, again, provides a useful starting point and structure for the consideration of these issues below.

1. *Philip Morris v Uruguay*

As noted in Chapter One,⁶⁴⁴ *Philip Morris v Uruguay* concerned a challenge to tobacco laws introduced by the Uruguayan government. There were two measures in issue: first, legislation that prohibited different packaging or brand variants of cigarettes (the ‘single presentation requirement’) and secondly, legislation that increased the size of graphic health warnings on cigarette packaging from 50 to 80% of each of the main side of the packaging (the ‘80/80 regulation’).⁶⁴⁵

The Claimants argued that the measures constituted indirect expropriation of their brand assets contrary to the expropriation provision in the applicable IIT. The Claimants argued that the single presentation requirement ‘expropriated [the brand variants], including the goodwill and the legal rights deriving from the associated intellectual property’⁶⁴⁶ and the 80/80 regulation ‘destroyed the brand equity of the...remaining variants’ with the result that two brands were discontinued, as well as having a ‘substantial’ effect on the Claimants’ profits and revenues.⁶⁴⁷

⁶⁴⁴ See Chapter One, Part III, nn 54.

⁶⁴⁵ Mitchell (n 633).

⁶⁴⁶ *Philip Morris v Uruguay* (n 17) [193].

⁶⁴⁷ *ibid* [194].

In response to the ‘defense’⁶⁴⁸ raised by Uruguay that the measures constituted a valid exercise of its police power, the Claimants first emphasised the lack of ‘any provision in the BIT providing for “carve outs-exceptions or saving presumptions for public health or other regulatory actions”’.⁶⁴⁹ The Claimants continued:

... the police powers doctrine does not excuse the Respondent from liability for expropriating the Claimants’ investment. According to the Claimants, “under customary international law, the scope of the implicit exception for police powers is limited to State powers related to protection and security such as enforcement of the law, maintenance of the public order, and defense of the State.” State police power does not constitute a defense against expropriation.

Furthermore, a State cannot remove a measure from the scope of the BIT’s expropriation provision by invoking its general authority under domestic law to adopt regulatory measures. State’s regulatory measures must be subject to limitations. But, in any event, the Challenged Measures were expropriatory, even if enacted in pursuit of public health, because they were unreasonable.

Claimants further consider that in any case the SPR [single presentation requirement] and 80/80 Regulation do not fall within the police powers doctrine on the basis that:

- The government actions were not in fact “designed and applied to achieve” reduced tobacco consumption.
- Even the tribunals that would recognize an implied expropriation exception for regulatory actions would find that the exception is inapplicable where the government’s actions conflict with specific commitments to investors.
- In contrast with the facts in the *Chemtura* and *Methanex* cases, in this case Respondent has not conducted a “serious, objective and scientific” assessment of whether the Challenged Measures are justified. Moreover, the measures

⁶⁴⁸ *ibid* [196].

⁶⁴⁹ *ibid* [184].

have been ineffective in practice and are “not proportional to the public interest the Respondent alleges they serve given the severe harm they inflict”.⁶⁵⁰

In contrast, Uruguay submitted that even if the measures could be considered expropriatory (which it denied), the effect of the measures did not amount to an expropriation because the ‘value of the business [had] not been so reduced so as to effectively deprive it of its character of an investment’.⁶⁵¹ Uruguay’s primary submission was that the measures were a valid exercise of its police power to protect public health and therefore did not constitute an expropriation. In particular, Uruguay submitted:

The Respondent alleges that a bona fide, non-discriminatory exercise of a State’s sovereign police power to protect health or welfare does not constitute an expropriation as a matter of law. Nor is the State liable to pay compensation for any damages arising from its exercise of such a power. The Respondent relies inter alia on *Chemtura* for this proposition.

Uruguay sees no merit on the Claimant’s assertion that the BIT does not contain a particular carve-out or exception. For the Respondent, the police powers doctrine is a fundamental rule of customary international law and as such, it must be applied to interpret Article 5 [i.e., the expropriation provision in the IIT], in accordance with Article 31 of the Vienna Convention on the Law of Treaties (“VCLT”). Moreover, Article 2(1) of the BIT explicitly recognizes the special plane on which police power exists by allowing the contracting States to refuse to admit investments “for reasons of public security and order, public health or morality.” This power cannot be limited to the point of admission of investments but must be considered a permanent part of the State’s regulatory authority.

Uruguay does not suggest that the police powers of the State are absolute. To the contrary, they are limited to governmental action

⁶⁵⁰ ibid [197]-[199] (footnotes omitted).

⁶⁵¹ ibid [210] (footnotes omitted).

that is not discriminatory or taken in bad faith, but is taken in exercise of “the inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health morality and justice.” Other categories of State action, even when taken for some public purpose, are not covered.⁶⁵²

As earlier noted in Part II.2(c) of this Chapter, the Tribunal rejected the Claimants’ claims and considered that the measures did not expropriate the Claimants’ investment. The Tribunal first considered that there was not even a *prima facie* case of indirect expropriation by the 80/80 regulation, as the Claimants’ brand and other elements continued to appear on the packaging and a ‘limitation to 20% of the space available to such purpose could not have a substantial effect on the Claimants’ business since it consisted only in a limitation imposed by the law on the modalities of the use of the relevant trademarks’.⁶⁵³ Further, the effects of the single presentation requirement ‘were far from depriving’ the Claimants of the value of its business ‘or even causing a “substantial deprivation” of the value, use or enjoyment of the Claimants’ investments’.⁶⁵⁴ The partial loss of profits the investment would have yielded absent the measure ‘does not confer an expropriatory character on the measure’.⁶⁵⁵

Relevantly, the Tribunal continued:

The Tribunal’s analysis might end here, leading to the dismissal of the Claimants’ claim of expropriation for the above reasons. There is however an additional reason in support of the same conclusion that

⁶⁵² *ibid* [216]-[216] (footnotes omitted).

⁶⁵³ *ibid* [276].

⁶⁵⁴ *ibid* [284].

⁶⁵⁵ *ibid* [286].

should also be addressed in view of the Parties' extensive debate in that regard. In the Tribunal's view, the adoption of the Challenged Measures by Uruguay was a valid exercise of the State's police powers, with the consequence of defeating the claim for expropriation under Article 5(1) of the BIT.⁶⁵⁶

The Tribunal then proceeded to consider whether the measures were a valid exercise of Uruguay's police powers. First, it rejected the Claimants' submission that the State's exercise of police powers did not constitute a defence to expropriation, concluding that the principles of treaty interpretation in the VCLT directed 'the Tribunal to refer to the rules of customary international law as they have evolved'.⁶⁵⁷

The Tribunal continued by noting that '[p]rotecting public health has long since been recognized as an essential manifestation of the State's police power'⁶⁵⁸ and traced the history of doctrine, citing in particular the 1961 Harvard Draft Convention, the *Restatement*, a report of the OECD and several investor-State arbitration decisions including *Tecmed*, *Saluka*, *Methanex* and *Chemtura*, as well as the *Bischoff* case.⁶⁵⁹ The Tribunal also noted that the 'police powers doctrine has found confirmation' in recent IITs where interpretive annexures have been included clarifying that non-discriminatory measures designed and applied to

⁶⁵⁶ *ibid* [287].

⁶⁵⁷ *ibid* [289]-[290]. The use of the VCLT to incorporate the police powers doctrine will be considered further in Chapter Seven.

⁶⁵⁸ *ibid* [291].

⁶⁵⁹ *ibid* [292]-[299].

protect public welfare objectives do not constitute indirect expropriation.⁶⁶⁰ The Tribunal noted that those provisions ‘whether or not introduced *ex abundanti cautela* [i.e. out of an abundance of caution], reflect the position under general international law’.⁶⁶¹

The Tribunal proceeded to examine the challenged measures themselves, noting that the measures were adopted in fulfilment of Uruguay’s national and international legal obligations for the protection of public health.⁶⁶² The Tribunal stated:

As indicated by earlier investment treaty decisions, in order for a State’s action in exercise of regulatory powers not to constitute indirect expropriation, the action has to comply with certain conditions. Among those most commonly mentioned are that the action must be taken bona fide for the purpose of protecting the public welfare, must be non-discriminatory and proportionate. In the Tribunal’s view, the SPR [single presentation requirement] and the 80/80 Regulation satisfy these conditions.

The Challenged Measures were taken by Uruguay with a view to protect public health in fulfilment of its national and international obligations...in the Tribunal’s view the Challenged Measures were both adopted in good faith and were nondiscriminatory. They were proportionate to the objective they meant to achieve, quite apart from their limited adverse impact... Contrary to the Claimants’ contention, the Challenged Measures were not “arbitrary and unnecessary” but rather were potentially “effective means to protecting public health,”... In the Tribunal’s view, that is sufficient for the purposes of defeating a claim under Article 5(1) of the BIT.⁶⁶³

⁶⁶⁰ *ibid* [300].

⁶⁶¹ *ibid* [301].

⁶⁶² *ibid* [302]-[305].

⁶⁶³ *ibid* [305]-[306].

The Tribunal concluded that the challenged measures were a ‘valid exercise by Uruguay of its police powers for the protection of public health’ and as such ‘they cannot constitute an expropriation of the Claimants’ investment’.⁶⁶⁴ The Tribunal concluded that ‘for this reason also’ the expropriation claim was rejected, noting that the conclusion as to police powers provided ‘an additional reason in support of the...conclusion’ that the measures did not constitute an indirect expropriation.⁶⁶⁵

There are three propositions stemming from the *Philip Morris v Uruguay* decision that will be discussed in greater depth in the sections that follow, in light of analysis in Part II of this Chapter and the historical analysis undertaken in Chapters Two and Three, as well as recent State practice and *opinio juris*. These are that:

- First, the source of the police powers doctrine lies in customary international law.
- Secondly, the police powers doctrine under customary international law provides that a State’s *bona fide* exercise of police powers excludes compensation even when it causes economic damage to an investor and that the measures taken for that purpose should not be considered as expropriatory, provided the measures are non-discriminatory and proportionate.

⁶⁶⁴ *ibid* [307].

⁶⁶⁵ *ibid*[287],[307].

- Thirdly, the police powers doctrine is a defence to a claim of indirect expropriation in the sense that a valid exercise of the police power ‘cannot constitute an expropriation’. It is not an exception to the requirement of paying compensation for expropriation, because no expropriation will have occurred in the first place.

As noted earlier,⁶⁶⁶ the part of the decision concerning the incorporation of the police powers doctrine using the VCLT will be examined in Chapter Seven.

2. The source of the police powers doctrine in customary international law

As noted, the *Philip Morris v Uruguay* Tribunal considered the police power as being reflected in customary international law. It also described the doctrine using the language of ‘general international law’.⁶⁶⁷ This is similar to the language used by other tribunals, which have described the distinction between lawful regulation pursuant to the police power (or similar language), on the one hand, and indirect expropriation, on the other, as ‘undisputable’,⁶⁶⁸ ‘form[ing] part of customary international law today’,⁶⁶⁹ and a ‘matter of general international law’.⁶⁷⁰

(a) Preliminary: ‘General international law’, ‘general principles of law’ and ‘customary international law’

⁶⁶⁶ See n 657 above.

⁶⁶⁷ *Philip Morris v Uruguay* (n 17) [301].

⁶⁶⁸ *Tecmed* (n 580).

⁶⁶⁹ *Saluka* (n 3) [262]; *Suez* (n 634) [139]; *Feldman* (n 583) [103]-[105]; *El Paso* (n 561) [238]-[239]; *Philip Morris v Uruguay* (n 17) [297], fn 392.

⁶⁷⁰ *Methanex* (n 22) [7]; *Glamis Gold* (n 20) [354].

Given the language of ‘customary international law’ and ‘general international law’ appears to be used interchangeably in *Philip Morris v Uruguay*, it is necessary to briefly explain the distinction between the two concepts.

The expression ‘general international law’ is widely referred to and used in international legal scholarship and practice, but has ‘a degree of imprecision’.⁶⁷¹ The expression has been used as a synonym for customary international law,⁶⁷² a reference to all international law sources that do not derive from treaties,⁶⁷³ and as an expression denoting norms binding *erga omnes* as opposed to norms binding *inter partes*.⁶⁷⁴ The expression has been most widely used to connote rules of international law that apply to all States.⁶⁷⁵ This would include customary international law and general principles of law within the meaning of Article 38 of

⁶⁷¹ Michael Wood, ‘The International Tribunal for the Law of the Sea and General International Law’ (2007) 22 *The International Journal of Marine and Coastal Law* 351, 354; Anastasios Gourgourinis, ‘General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System’ (2011) 22 *European Journal of International Law* 993, 1011.

⁶⁷² See Grigorii Ivanovich Tunkin, ‘Is General International Law Customary Law Only?’ (1993) 4 *European Journal of International Law* 534; Luigi Condorelli, ‘Customary International Law: The Yesterday, Today, and Tomorrow of General International Law’ in Antonio Cassese (ed), *Realizing Utopia* (Oxford University Press 2012) 148; Wood, ‘The International Tribunal for the Law of the Sea and General International Law’ (n 671) 354.

⁶⁷³ 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) 101, 254ff.

⁶⁷⁴ Gourgourinis, ‘General/Particular International Law and Primary/Secondary Rules’ (n 671) 1012.

⁶⁷⁵ Christian Tomuschat, *What Is General International Law* (United Nations Audiovisual Library of International Law 2011); Wood, ‘The International Tribunal for the Law of the Sea and General International Law’ (n 671) 355.

the *Statute of the International Court of Justice* ('ICJ Statute').⁶⁷⁶ Thus, while acknowledging that the expressions 'general international law' and 'customary international law' are not synonymous, this Chapter will proceed on the basis that the principles governing the police powers doctrine are to be found in customary international law, being the more specific concept that is grounded in Article 38 of the ICJ Statute rather than the broader concept of 'general international law'.

Further, while this was not in issue in the *Philip Morris v Uruguay* decision, it is necessary also to address 'general principles of law', as some early scholarship sought to categorise the police power as a general principle of law. For instance, in 1986, Rudolf Dolzer considered that 'various domestic orders' uniformly indicated that there was a police power, and considered the police powers doctrine to be a general principle of law within the meaning of Article 38(1)(c) of the ICJ Statute.⁶⁷⁷ It is also true that the distinction between 'regulation' and 'expropriation' (and the lawfulness and non-compensability of the former) is present in a large number and variety of domestic legal systems.⁶⁷⁸

⁶⁷⁶ Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press 1963) 1; Wood, 'The International Tribunal for the Law of the Sea and General International Law' (n 671) 354-355; Gourgourinis, 'General/Particular International Law and Primary/Secondary Rules' (n 671).

⁶⁷⁷ Rudolf Dolzer, 'Indirect Expropriation of Alien Property' (1986) 1 ICSID Review 41, 58-59; See also Newcombe (n 205); 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).

⁶⁷⁸ See Chapter Two, especially fn 195, fn 196, fn 197 and fn 209.

The line of demarcation between customary international law and general principles can be somewhat unclear.⁶⁷⁹ 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.⁶⁸⁰

However, Article 38 of the ICJ Statute 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*.⁶⁸¹ 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.⁶⁸² This element of consent or acceptance of a practice as law is lacking for general principles.⁶⁸³ Further, general principles of law have typically operated as a gap-filling mechanism in international law where the law is silent or absent.⁶⁸⁴

⁶⁷⁹ Michael Wood, 'First Report on Formation and Evidence of Customary International Law, A/CN.4/663 (17 May 2014)' (International Law Commission 2013) 17; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press 1994) 23-24.

⁶⁸⁰ Hugh Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, vol 1 (Oxford University Press 2013) 236.

⁶⁸¹ *Statute of the International Court of Justice*, Article 38(1)(b).

⁶⁸² Cheng (n 679) 23-24.

⁶⁸³ Wood, 'First Report on the Formation and Evidence of Customary International Law' (n 679) 13; see also Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans, Green and co, ltd 1927).

⁶⁸⁴ Permanent Court of International Justice Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee, June 16th-July 24th 1920, with Annexes* (League of Nations

Notwithstanding the occasional support for the doctrine being a general principle of law, in this thesis, the police powers doctrine will be explored and articulated as a principle of customary international law. As will be elaborated upon below, there are also numerous examples in State practice, together with accompanying *opinio juris*, which suggest that the source of the police powers doctrine is customary international law. This suggests there is no need to resort to general principles of law to fill gaps. Further, this decision is made 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.⁶⁸⁵

(b) Establishing the customary international law principle

To establish the police powers doctrine as a principle of customary international law, it is necessary to identify whether there is a general practice of States (State practice) that is accepted as law (*opinio juris*).⁶⁸⁶ The relevant practice must be sufficiently widespread and representative, as well as consistent.⁶⁸⁷

1920) 48 (Comments of Baron Descamps), Annex I; Neha Jain, 'General Principles of Law as Gap-Fillers' <www.iilj.org/wp-content/uploads/2016/09/JainIILJColloq2014.pdf> accessed 10 March 2017.

⁶⁸⁵ Hugh Thirlway, *The Sources of International Law* (Oxford University Press 2014) 98,100-102.

⁶⁸⁶ *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Judgment)* [2012] ICJ Rep 99, [55]; *North Sea Continental Shelf Case (Germany v Denmark) (Merits)* [1969] ICJ Rep 150, [77]; International Law Commission, 'Identification of Customary International Law: Text of the draft conclusions provisionally adopted by the Drafting Committee' A/CN.4/L.872 (30 May 2016) (International Law Commission 2017) 2-3.

⁶⁸⁷ International Law Commission, 'Identification of Customary International Law: Text of the draft conclusions provisionally adopted by the Drafting Committee' (n 686) 2-3.

i) Tribunals' efforts to locate the source of the police powers doctrine in customary international law

As noted above, the Tribunal in *Philip Morris v Uruguay* sought to locate the police powers doctrine in customary international law through the citation of various sources.⁶⁸⁸

While many tribunals have accepted that the police powers doctrine is reflected in customary international law,⁶⁸⁹ only a small number of tribunals have undertaken an analysis of the State practice and *opinio juris* that establishes the customary international law character of police powers doctrine. For instance, *Saluka* cited three sources in support of its proposition that there were 'permissible – that is, non-compensable - regulatory actions' that would not constitute expropriation under customary international law. Like the decision in *Philip Morris v Uruguay*, the first source cited by the *Saluka* Tribunal was the 1961 Harvard Draft Convention, which recognised certain categories of non-compensable takings.⁶⁹⁰ The second source was an accompanying note to the 1967 OECD Draft Convention, also discussed in the Chapter Three, that provided that measures taken in the pursuit of a State's 'political, social or economic ends' would not constitute expropriation.⁶⁹¹ The final source was the *Restatement*, which similarly acknowledges that action commonly accepted within the police power of

⁶⁸⁸ *Philip Morris v Uruguay* (n 17) [292]-[301].

⁶⁸⁹ See above nn 667 - 670.

⁶⁹⁰ *Saluka* (n 3) [256]-[258]. See Chapter Three, Section VI.

⁶⁹¹ *ibid* [259].

States would not constitute a taking.⁶⁹² Other tribunals suggesting the police powers doctrine reflects customary international law have confined their analysis to the *Restatement*,⁶⁹³ have cross-referenced to previous arbitration decisions,⁶⁹⁴ cited eminent publicists,⁶⁹⁵ or have applied a combination of each of these sources.

The authorities cited by these tribunals do not convincingly demonstrate the State practice or *opinio juris* required to support a customary international law principle. Previous arbitral awards, the 1961 Harvard Draft and views of publicists are not State practice or *opinio juris*. Thus, while such authorities could assist a tribunal in confirming a customary principle, they cannot, in and of themselves, establish such a principle. Similarly, the citation of the *Restatement* is an example of a publication of eminent publicists in the US, not State practice. The position taken by States in drafting the 1967 OECD Draft Convention is an example of State practice, but this source has featured minimally, both in *Saluka*, *Philip Morris v Uruguay* and subsequently. As noted by Jürgen Kurtz, the ‘poor and selective methodological and doctrinal claims offered by these tribunals’ do not convincingly establish customary international law.⁶⁹⁶

⁶⁹² *ibid* [260].

⁶⁹³ *Suez* (n 634) [128]; *Feldman* (n 583) [104]-[106]; *Quiborax* (n 2) [202]-[203]; *El Paso* (n 561) [238]; *Merrill & Ring* (n 619) [125].

⁶⁹⁴ *Invesmart* (n 592) [498]-[499]; *El Paso* (n 561) [239]; *Chemtura* (n 62) [266]; *Fireman’s Fund* (n 594) [176(j)]; *Occidental 2012 Award* (n 594) [529]-[530], especially fn 65.

⁶⁹⁵ *Glamis Gold* (n 20) [354]; *El Paso* (n 561) [238]; *Fireman’s Fund* (n 594) [176(j)].

⁶⁹⁶ Kurtz (n 42) 295.

That is not to say that such a customary principle cannot be found. Rather, it has not been sufficiently located in the jurisprudence to date.

ii) State Practice and *Opinio Juris* from the historical materials in Chapters Two and Three

Chapters Two and Three provide numerous examples in State practice and accompanying *opinio juris* that suggest a customary principle can be established. First, there is considerable diplomatic correspondence in which the police power was advanced as a basis upon which States could interfere with the rights of foreigners without attracting liability.⁶⁹⁷ Such correspondence is evidence of State practice.⁶⁹⁸ Several of these diplomatic exchanges also indicated the State's view of the law and to this extent may also afford evidence of the acceptance of a practice as law for *opinio juris* purposes.⁶⁹⁹ For example, in *The Levant Herald*, the diplomatic correspondence from the UK Government revealed that it would not intervene or demand compensation on the basis that 'it is clearly competent to every independent State...either to refuse entirely, or permit under special circumstances, the publication of a journal within its dominions' in light of public morals,⁷⁰⁰ clearly expressing an opinion as to the existence of a legal rule.

⁶⁹⁷ See Chapter Two, Part III(2).

⁶⁹⁸ Wood, 'Second Report on Identification of Customary International Law' (n 447) 23–24.

⁶⁹⁹ *ibid* 60; IC MacGibbon, 'Customary International Law and Acquiescence' (1957) 33 *British Yearbook of International Law* 115, 124.

⁷⁰⁰ *The Levant Herald* (n 214) 356.

There is also reliance on the police power in practice of States at the League of Nations⁷⁰¹ and State practice in the form of negotiating, concluding and entering into treaties relating to foreign investment⁷⁰² and international and regional human rights.⁷⁰³ *Opinio juris* is also demonstrated alongside several of these instances of State practice. For example, as noted in Chapter Three, States' delegates negotiating the MAI noted that the provision on expropriation and FET was intended 'to incorporate into the MAI existing international legal norms' such that 'normal and non-discriminatory government activity' would not contravene the expropriation or FET provisions.⁷⁰⁴ The acknowledgment of 'existing legal norms' suggests an acceptance of the principle as law outside the treaty.⁷⁰⁵

The proposition is also supported by decisions of international courts and tribunals,⁷⁰⁶ and writings of eminent publicists and learned societies.⁷⁰⁷ While such pronouncements are not State practice or *opinio juris*, they may be

⁷⁰¹ See Chapter Two, Part III(5); Wood, 'Second Report on Identification of Customary International Law' (n 447) 23-24, 35.

⁷⁰² See Chapter Three, Part II; Wood, 'Second Report on Identification of Customary International Law' (n 447) 23-24; Mark E Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (Kluwer Law International 1997) 50.

⁷⁰³ See Chapter Three, Part III; Wood, 'Second Report on Identification of Customary International Law' (n 447) 23-24.

⁷⁰⁴ See OECD, 'The Multilateral Agreement on Investment (Report by the Chairman of the Negotiating Group)' (n 368) 13,15.

⁷⁰⁵ Wood, 'Second Report on Identification of Customary International Law' (n 447) 62.

⁷⁰⁶ See Chapter Two, Part III(4); Chapter Three, Part IV.

⁷⁰⁷ See Chapter Two, Part III(6); Chapter Three, Part VI.

considered ‘as subsidiary means for determining the existence or otherwise of a principle of customary international law’.⁷⁰⁸

It is accepted that not all of these examples of State practice and *opinio juris* describe the purportedly lawful regulation as being ‘within the police powers of a State’, with language of the right of the State to limit property ‘in accordance with the general interest’,⁷⁰⁹ ‘normal governmental processes’,⁷¹⁰ ‘normal activity in the public interest’,⁷¹¹ and ‘non-discriminatory measures of general application which governments normally take’⁷¹² also being used in the same context. However, notwithstanding these labels attached to the principle, these authorities all suggest that public interest regulation may interfere with property rights and economic interests of foreigners to a considerable degree without constituting indirect expropriation.

iii) State Practice and *Opinio Juris* in States’ pleadings in investor-State arbitrations

The historical support for the customary international law status of the police powers doctrine is reinforced by States’ pleadings in investor-State arbitrations where public interest regulation has been challenged. To the extent that States

⁷⁰⁸ Wood, ‘Second Report on Identification of Customary International Law’ (n 447) 30; Hugh Thirlway, ‘Law and Procedure, Part Two’ (1990) 61 *British Yearbook of International Law* 1, 59–60.

⁷⁰⁹ ECHR (n 425) Protocol 1, Article 1(2).

⁷¹⁰ OECD, ‘1963 Draft Convention’ (n 360) 255; OECD, ‘1967 Draft Convention’ (n 360) 131.

⁷¹¹ OECD, ‘The Multilateral Agreement on Investment (Report by the Chairman of the Negotiating Group)’ (n 368) 13, 15; OECD, “Indirect Expropriation” and the “Right to Regulate” in International Investment Law’ (n 368) 9

⁷¹² MIGA Convention (n 372), Article 11(a)(ii).

rely on the lawfulness of their regulation in international disputes, the position taken by States in these disputes is also evidence of State practice and *opinio juris*.⁷¹³

The proposition that non-discriminatory regulation for a public purpose enacted in good faith does not constitute indirect expropriation has been relied on by a wide variety of States in IIT disputes, including Albania,⁷¹⁴ Argentina,⁷¹⁵ Australia⁷¹⁶ Bolivia,⁷¹⁷ Canada,⁷¹⁸ the Czech Republic,⁷¹⁹ Ecuador,⁷²⁰ El Salvador,⁷²¹

⁷¹³ 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 *American Journal of International Law* 179, 218–219; Thirlway, *The Sources of International Law* (n 685) 67; Wood, 'Second Report on Identification of Customary International Law' (n 447) 23. It is acknowledged, however, that tribunals would need to exercise caution when attributing weight to State pleadings 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, 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 Frank Berman) [9].

⁷¹⁴ *Mamidoil* (n 63) [527]-[529].

⁷¹⁵ *Suez* (n 634) [146]-[150].

⁷¹⁶ *Philip Morris v Australia*, Australia's Response to Notice of Arbitration (n 50) [3], [46].

⁷¹⁷ *Quiborax* (n 2) [201].

⁷¹⁸ *Ethyl Corporation v Government of Canada*, UNCITRAL, Respondent Statement of Defence, 27 November 1997, [95]; *SD Myers, Inc v Canada*, UNCITRAL, Respondent Counter-Memorial, 5 October 1999, [423]-[429]; *Chemtura v Canada*, UNCITRAL, Counter-Memorial of Canada, 20 October 2008, [565]-[566]; *Vito G Gallo v Canada*, PCA Case No.55798, Counter-Memorial of Canada, 29 June 2010, Part D, [374]; *Windstream Energy LLC v Canada*, UNCITRAL, Respondent Counter-Memorial, 20 January 2015, [495]-[496]; *Lone Pine Resources Inc. v Canada*, UNCITRAL, Counter-Memorial, 24 July 2015, [492]-[500].

⁷¹⁹ *Ronald S Lauder v Czech Republic*, UNCITRAL, Final Award, 3 September 2001, [198]; *CME Czech Republic BV v Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, [320]-[321]; *Invesmart* (n 592) [479]-[480]; *InterTrade Holding GmbH v Czech Republic*, UNCITRAL, PCA Case No.2009-12, Final Award, 29 May 2012, [253]; *ECE*

Guatemala,⁷²² Kazakhstan,⁷²³ the Kyrgyz Republic,⁷²⁴ Moldova,⁷²⁵ Oman,⁷²⁶ Peru,⁷²⁷ Poland,⁷²⁸ Romania,⁷²⁹ South Africa,⁷³⁰ the Slovak Republic,⁷³¹ Sri Lanka,⁷³² the US,⁷³³ and Uruguay.⁷³⁴ Most of these States confined their reliance on the principle

Projektmanagement International GMBH et al v Czech Republic, PCA Case No.2010-5, Award, 19 September 2013, [4.363]-[4.364].

⁷²⁰ *Perenco Ecuador Limited v Republic of Ecuador*, ICSID Case No.Arb/08/6, Decision on Remaining Issues of Jurisdiction and Liability, 12 September 2014, [241].

⁷²¹ *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No.Arb.09/12, Republic of El Salvador's Counter-Memorial on the Merits, 10 January 2014, [327]-[331].

⁷²² *Railroad Development Corporation v Republic of Guatemala*, ICSID Case No.Arb.07/23, Respondent's Counter-Memorial on the Merits, 5 October 2010, [297]-[298].

⁷²³ *Anatolie Stati et al v Republic of Kazakhstan*, SCC Arbitration V (116/2010), Award, 19 December 2013, [1162]-[1167].

⁷²⁴ *Belokon* (n 619) [188],[192].

⁷²⁵ *Franck Charles Arif v Republic of Moldova*, ICSID Case No.Arb/11/23, Award, 8 April 2013, [307].

⁷²⁶ *Adel A Hamadi al Tamimi v Sultanate of Oman*, ICSID Case No.Arb/11/33, Award, 3 November 2015, [177].

⁷²⁷ *Renée Rose Levy de Levi v Republic of Peru*, ICSID Case No.Arb/10/17, Award, 26 February 2014, [267]; *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No.Arb/14/21, Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction, 6 October 2015, [224], [227]-[237].

⁷²⁸ *Servier* (n 607) [276], [288].

⁷²⁹ *EDF (Services) Limited v Romania*, ICSID Case No.Arb/05/13, Award, 8 October 2009, [180]; *Spyridon Roussalis v Romania*, ICSID Case No.Arb/06/1, Award, 7 December 2011, [663], [719].

⁷³⁰ *Foresti* (n 16) [75].

⁷³¹ *Eurogas Inc. & Belmont Resources Inc. v The Slovak Republic*, ICSID Case No.Arb/14/14, Respondent's Counter-Memorial, 30 June 2015, [352]-[353].

⁷³² *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No.Arb.09/02, Award, 31 October 2012, [501].

⁷³³ *Methanex Corporation v United States of America*, UNCITRAL, Statement of Defence of Respondent United States of America, 10 August 2000, [152],[157]; *Glamis Gold, Ltd v United States of America*, UNCITRAL, Counter-Memorial of Respondent United States of America, 19 September 2006, 197 – 200; *Grand River Enterprises Six Nations, Ltd v United States of America*, UNCITRAL, Respondent Counter-Memorial, 22 December 2008, 159-

to indirect expropriation claims, although several States pleaded that the principle applies more generally.⁷³⁵ This latter point will be revisited in Chapter Six.

Further, this State practice is also evidence of States' acceptance of customary international law for *opinio juris* purposes. States either explicitly articulated that they considered the principle to be one of customary international law,⁷³⁶ or such a view can be inferred through their reliance and quotation of other authorities (such as *Saluka*) which had expressed the principle as customary international law.⁷³⁷ Other States cited the police powers doctrine as existing 'under international law' but relied on other primary and secondary materials that have also been cited in support of a customary principle, such as the 1961 Harvard

161; *Spence International Investments et al v Republic of Costa Rica*, ICSID Case No.UNCT/13/2, United States Article 10.20(2) Submission, 17 April 2015, [27].

⁷³⁴ *Philip Morris Brands SARL v Oriental Republic of Uruguay*, ICSID Case No.Arb/10/7, Uruguay's Memorial on Jurisdiction, 24 September 2011, [102].

⁷³⁵ Albania: *Mamidoil* (n 63) [592]-[592]; Argentina: *Suez* (n 634) [146]-[150]; Ecuador: *Perenco* (n 720) [238]-242]; Romania: *Roussalis* (n 729) [719]; Slovak Republic: *Eurogas* Counter-Memorial (n 731) [358].

⁷³⁶ Bolivia: *Quiborax* (n 2) [201]-[202]; Canada: *Lone Pine Resources* (n 718) [494]; Ecuador: *Perenco* (n 720) [241]; Guatemala: *Railroad Development Corporation* Counter Memorial (n 722) [297]-[299]; Peru: *Bear Creek Mining* Counter Memorial (n 727) [227]-[237]; Romania: *Roussalis* (n 729) [663]; United States of America: *Methanex* Statement of Defence (n 733) [152].

⁷³⁷ Albania: *Mamidoil* (n 63) [527]-[529],[592]-[593] (citing *Saluka* and *Feldman*); Canada: *Windstream* Respondent Counter-Memorial (n 718) [494]o-[497] (citing *Saluka* and *Feldman*); Czech Republic: *Invesmart* (n 592) [479]-[480] (citing *Saluka*); El Salvador: *Pac Rim Cayman* Counter-Memorial (n 721) [327]-[329] (citing, *inter alia*, *Saluka*); Kyrgyz Republic: *Belokon* (n 619) [192] (citing *Methanex*, *Feldman* and *Saluka*); Slovak Republic: *Eurogas* Counter-Memorial (n 731) [358].

Draft, the Restatement, the MIGA Convention, the ECHR, and scholarly authorities.⁷³⁸

In States' pleadings, most States used the language 'police power',⁷³⁹ although other States articulated the same idea using slightly different language such as 'regulatory power',⁷⁴⁰ 'lawful exercise of powers of government',⁷⁴¹ 'valid state regulation',⁷⁴² 'inherent power to regulate for the protection of...public welfare and order',⁷⁴³ 'non-discriminatory regulation to promote legitimate public welfare objectives',⁷⁴⁴ and 'right to regulate in the public interest'.⁷⁴⁵ Many States

⁷³⁸ Argentina: *Suez* (n 634) [146] (citing 1961 Harvard Draft); Canada: *SD Myers* Respondent Counter Memorial (n 718) (citing Brownlie, Wortley and Christie, and the Restatement); Czech Republic: *CME* (n 719) (citing scholarly authorities and the MIGA Convention); Kazakhstan: *Stati* (n 723) [1162]-[1167] (citing MIGA Convention, ECHR and numerous publicists).

⁷³⁹ Albania: *Mamidoil* (n 63) [527]-[529],[592]-[593]; Argentina: *Suez* (n 634) [146]; Bolivia: *Quiborax* (n 2) [201]-[202]; Canada: *Ethyl Corporation* Statement of Defence (n 718) [95]; *SD Myers* Respondent Counter Memorial (n 718) [423]-[429]; *Chemtura* Counter-Memorial (n 718) [565]-[575]; *Windstream* Respondent Counter-Memorial (n 718) [495]-[497]; Czech Republic: *Lauder* (n 719) [198]; *Invesmart* (n 592) [479]-[480]; *Intertrade Holding* (n 719) [253]; *ECE Projektmanagement* (n 719) [4,363]; Ecuador: *Perenco* (n 720) [241]; El Salvador: *Pac Rim Cayman* Counter-Memorial (n 721) [328]; Guatemala: *Railroad Development Corporation* Counter Memorial (n 722) [291]-[299]; Kazakhstan: *Stati* (n 723) [1163]; Kyrgyz Republic: *Belokon* (n 619) [188]; Moldova: *Arif* (n 725) [307]; Peru: *Bear Creek Mining* Counter Memorial (n 727) [224],[227]-[233]; Poland: *Servier* (n 607) [276]; Romania: *EDF* (n 729) [180]; *Roussalis* (n 729) [663], [719]; Slovak Republic: *Eurogas* Counter-Memorial (n 731) [352]-[358]; Sri Lanka: *Deutsche Bank* (n 732) [501];

⁷⁴⁰ *Philip Morris v Australia*, Australia's Response to Notice of Arbitration (n 50) [3].

⁷⁴¹ Czech Republic: *CME* (n 719) [320].

⁷⁴² Kazakhstan: *Stati* (n 723) [1162].

⁷⁴³ Peru: *Levy de Levi* (n 727) [270].

⁷⁴⁴ United States: *Glamis Gold* Counter-Memorial (n 733) 197-200; *Grand River* Counter-Memorial (n 733) 159-161; *Methanex* Statement of Defence (n 733) [152].

⁷⁴⁵ Uruguay: *Philip Morris v Uruguay* Memorial on Jurisdiction (n 734) [102]. Note however, as discussed earlier and will be discussed further in Chapter Six, that Uruguay also invoked the police powers doctrine at the merits phase of the proceeding.

used the language of ‘police power’ and concepts such as ‘regulatory power’ and ‘right to regulate in the public interest’ interchangeably.⁷⁴⁶

iv) Evidence of State Practice and *Opinio Juris* in recent IITs

In addition to the support found in States’ pleadings in investor-State arbitration disputes, there are recent instances of State practice and *opinio juris* post-dating the time periods examined in Chapters Two and Three which reinforce the customary international law proposition.

There has been an increase in States affirming in the text of IITs that non-discriminatory regulation designed and applied to protect public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.⁷⁴⁷ Of course, the provisions of treaties in and of themselves do not constitute customary international law.⁷⁴⁸ Indeed, as the ICJ noted in the *Diallo* case, the widespread practice of States entering into IITs could equally argue against the development of customary international law,⁷⁴⁹ as it may indicate that States perceive their right or obligation as only existing pursuant to

⁷⁴⁶ Albania: *Mamidoil* (n 63) [527]-[529],[592]-[593]; Canada: *Ethyl Corporation* Statement of Defence (n 718) [95] ; El Salvador: *Pac Rim Cayman* Counter-Memorial (n 721) [328]; Guatemala: *Railroad Development Corporation* Counter Memorial (n 722) [297]; Kazakhstan: *Stati* (n 723) [1162], [1163]; Poland: *Servier* (n 607) [276]-[277]; Slovak Republic: *Eurogas* Counter-Memorial (n 731) [352]-[358]; Uruguay: *Philip Morris v Uruguay* Memorial on Jurisdiction (n 734) [102].

⁷⁴⁷ Spears (n 12).

⁷⁴⁸ Michael Wood, ‘Third Report on the Identification of Customary International Law, A/CN.4/682 (27 March 2015)’ (International Law Commission 2015) 17.

⁷⁴⁹ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Preliminary Objections) [2007] ICJ Rep 614, [90].

the treaty and not outside of it.⁷⁵⁰ However, where States have specified explicitly in the treaty that a provision reflects customary international law, that explicit statement is evidence of State practice and *opinio juris*.⁷⁵¹

Since 2004, the US Model BIT has included an annexure that provides a clarification of the meaning of ‘expropriation’, which is said to reflect customary international law:

Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute expropriations.⁷⁵²

The US Congress has indicated it intended the Model BIT to reflect customary international law, highlighting the US’ acceptance of the provision as custom.⁷⁵³ Similarly worded annexures have been included in recent bilateral and multilateral IITs entered into by the US⁷⁵⁴ and other States.⁷⁵⁵ A recent study by

⁷⁵⁰ Wood, ‘Second Report on Identification of Customary International Law’ (n 447) 62.

⁷⁵¹ Wood, ‘Third Report on the Identification of Customary International Law’ (n 748) 16-30.

⁷⁵² US Model BIT (2012) Annex B(4).

⁷⁵³ 1992 *Senate Committee on Foreign Relations*, 102d Cong 2d session 61,63.

⁷⁵⁴ *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) Annex B (‘US-Uruguay BIT (2005)’); *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) Annex B (‘US-Rwanda BIT (2008)’); *Free Trade Agreement between the Government of the United States of America and the Government of the Republic of Chile* (signed 6 June 2003, entered into force 1 January 2004) Annex 10-D (‘US-Chile FTA (2003)’); *Dominican Republic – Central America – United States Free Trade Agreement* (signed 5 August 2004, entered into force 1 March 2006) Annex 10-C; (‘CAFTA-DR (2004)’); *Morocco – United States Free Trade Agreement* (signed 15 June 2004, entered into force 1 January 2006) Annex 10-B (‘Morocco-US FTA (2004)’); *Agreement between the Government of the United States of America and*

UNCTAD of 61 IITs entered into between 2012 and 2014 concluded that 52% of IITs entered into during that period contained a provision that clarified that ‘normal regulatory activities’ did not constitute indirect expropriation, compared to 15% of IITs prior to 2011.⁷⁵⁶ Some of these IITs shed some light on the expression ‘rare circumstances’, with the provisions explicitly noting that ‘rare circumstances’ 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’.⁷⁵⁷ The ASEAN Comprehensive Investment Agreement excludes the words ‘except in rare circumstances’ in its formulation.⁷⁵⁸

Many of the annexures specify that the expropriation provisions of the IIT (including the interpretive annexure) are intended to reflect customary

the Government of the Sultanate of Oman on the Establishment of a Free Trade Area (signed 19 January 2006, entered into force 1 January 2009) Annex 10-B (‘Oman-US FTA (2006)’); *United States – Panama Trade Promotion Agreement* (signed 28 June 2007, entered into force 31 October 2012) Annex 10-B (‘Panama-US TPA (2007)’); *Free Trade Agreement Between the United States of America and the Republic of Korea* (signed 30 June 2007, entered into force 15 March 2012) Annex 11-B (‘US-Korea FTA (2007)’); *United States-Peru Trade Promotion Agreement* (signed 12 April 2006, entered into force 1 February 2009) Annex 10-B (‘US-Peru TPA (2006)’)

⁷⁵⁵ For example, *Comprehensive Economic Cooperation Agreement Between the Republic of India and the Republic of Singapore* (signed on 29 June 2005, entered into force 1 August 2005) Annex 3 (‘India-Singapore CEPA (2005)’); *Comprehensive Economic Partnership Agreement between Japan and the Republic of India* (adopted 16 February 2011, entered into force 1 August 2011) Annex 10 (‘India-Japan CEPA (2011)’).

⁷⁵⁶ UNCTAD, *Policy Options for IIA Reform: Treaty Examples and Data. Supplementary Material to World Investment Report 2015* (UNCTAD 2015) 13.

⁷⁵⁷ Canadian Model Foreign Investment Protection and Promotion Agreement (2004) Annex B.13(1)(c).

⁷⁵⁸ 2009 ASEAN Comprehensive Investment Agreement (adopted 26 February 2009, entered into force 29 March 2012) Annex 2(4) (‘ASEAN CIA (2009)’).

international law, demonstrating acceptance as law for *opinio juris* purposes.⁷⁵⁹ This ‘shared understanding’ of customary international law has been included in IITs with the US and Australia,⁷⁶⁰ Chile,⁷⁶¹ Korea,⁷⁶² Oman,⁷⁶³ Panama,⁷⁶⁴ Rwanda,⁷⁶⁵ Singapore,⁷⁶⁶ and Uruguay.⁷⁶⁷ The annexure to the *Dominican Republic – Central America – United States Free Trade Agreement* (‘CAFTA-DR’) also includes this acknowledgment of customary international law,⁷⁶⁸ as does the IIT between India and Latvia.⁷⁶⁹ The *Common Market for Eastern and Southern Africa Common Investment Area Agreement* (‘COMESA CIAA’) (2007) expresses the provisions on indirect expropriation in light of the right to regulate and ‘customary international law principles on police powers’:

⁷⁵⁹ Wood, ‘Second Report on Identification of Customary International Law’ (n 447) 62-65.

⁷⁶⁰ *Australia- United States Free Trade Agreement* (signed 18 May 2004, entered into force 1 January 2005) [2005] ATSI, Annex 11-B(1).

⁷⁶¹ US-Chile FTA (2003) (n 754) Annex 10-D(1).

⁷⁶² The US-Korea FTA (2007) (n 754) notes that the expropriation provision is to be interpreted in accordance with customary international law (in Article 11.6 (footnote 2) and Annex 11-A), but Annex 11-B does not explicitly reference customary international law.

⁷⁶³ Oman-US FTA (2006) (n 754) Annex 10-B(1).

⁷⁶⁴ Panama-US TPA (2007) (n 754) Annex 10-B(1).

⁷⁶⁵ US-Rwanda BIT (2008) (n 754) Annex B(1).

⁷⁶⁶ *United States-Singapore Free Trade Agreement* (signed 6 May 2003, entered into force 1 January 2004) Side Letter Exchange on Expropriation.

⁷⁶⁷ US-Uruguay BIT (2005) (n 754) Annex B(1).

⁷⁶⁸ CAFTA-DR (2004) (n 754) Annex 10-C(1).

⁷⁶⁹ *Protocol to the Agreement Between the Government of the Republic of India and the Government of the Republic of Latvia on the Promotion and Protection of Investments* (signed 18 February 2010, entered into force 27 November 2010) Ad Article 5(1) (‘Protocol to the India-Latvia BIT (2010)’).

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, safety and the environment, shall not constitute an indirect expropriation under this Article.⁷⁷⁰

v) Conclusion: the source of the police powers doctrine in customary international law

Collectively, the above analysis reveals consistent, extensive and widespread State practice, together with accompanying *opinio juris*, in support of the proposition that the police powers doctrine is reflected in customary international law.

3. The content of the police powers doctrine

Having established the source of the doctrine in customary international law, it is necessary also to clarify and confirm the content of the police powers doctrine. It will be recalled that in *Philip Morris v Uruguay*, the Tribunal articulated the police powers doctrine under customary international law as ‘[t]he principle that the State’s *bona fide* exercise of “police powers” in such matters as the maintenance of public order, health or morality, excludes compensation even when it causes economic damage to an investor and... measures taken for that purpose should not be considered as expropriatory’,⁷⁷¹ subject to the condition that the ‘action must be taken *bona fide* for the purpose of protecting public welfare, must be non-discriminatory and proportionate’.⁷⁷² This section will examine these constituent

⁷⁷⁰ *Common Market for Eastern and Southern Africa Common Investment Area Agreement* (signed 223 May 2007, not yet in force) Article 20(8) (‘COMESA CIA (2007)’).

⁷⁷¹ *Philip Morris v Uruguay* (n 17) [295].

⁷⁷² *ibid* [305].

elements of the police powers doctrine in greater depth, and will also address the relevance of ‘specific representations’ to the police powers doctrine.

(a) The importance of the public purpose

i) Is there a taxonomy of regulatory purposes?

For a regulation to fall within the scope of the police power, it must be a regulation enacted for a public purpose or interest. The expressions ‘public purpose’ and ‘public interest’ are often used interchangeably with the ‘common good’,⁷⁷³ ‘public welfare’,⁷⁷⁴ ‘general welfare’⁷⁷⁵, ‘national interest’⁷⁷⁶ or ‘general interest’.⁷⁷⁷

Two complex issues arise from the requirement that regulation must be for a public purpose. The first is whether the ‘public purpose’ is a general, non-technical term that covers many situations, or whether the concept is one that is more prescriptive and certain public purposes fall within the police power but others do not such that there is a taxonomy of regulatory purposes. As noted earlier, in *Philip Morris v Uruguay*, Uruguay submitted that the police power referred to the power to ‘make all laws necessary and proper to preserve the public

⁷⁷³ *Sicilian Sulphur* (n 145) 1187-1188.

⁷⁷⁴ Jessup (n 335); Herz (n 351) 251-252.

⁷⁷⁵ *Saluka* (n 3) [255]; *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No.Arb/08/5, Decision on Liability, 14 December 2012, [471]; Respect for the right of everyone to own property alone as well as in association with others and its contribution to the economic and social development of Member States (n 455) .

⁷⁷⁶ *Exchequer Mining Co Case* (n 212) 348.

⁷⁷⁷ Particularly in French articulations of the doctrine: *Oscar Chinn* Pleadings (n 162) 288-289, 292-295, 440; *SAUR International SA v Argentine Republic*, ICSID Case No.Arb/04/4, Decision on Jurisdiction and Liability, 6 June 2012, [401]; Saïda El Boudouhi, ‘L’Intérêt Général et Les Règles Substantielles de Protection Des Investissements’ (2005) 51 *Annuaire Français de Droit International* 542.

security, order, health, morality and justice’, and that ‘[o]ther categories of State action, even when taken for some public purpose, are not covered’.⁷⁷⁸ Uruguay therefore appears to consider that the types of public purposes falling within the police power are limited. This is similar to Canada’s pleadings in *Chemtura v Canada*, where Canada pleaded that the police power did not cover all ‘public purposes’ but only applied to measures to protect the environment as well as ‘public health, morals, order and security’.⁷⁷⁹ Similarly, the US in its pleadings in *ELSI* appeared to indicate that the purposes which could be regulated pursuant to the police power were limited when it referred to use of the police power ‘for a goal other than public security, peace or well-being’ as part of its case that Italy had undertaken an abuse of the ‘legitimate exercise of discretion’.⁷⁸⁰

Chapters Two and Three reveal that the purposes for which States could regulate within their territory in a manner that interfered with property rights and the rights of foreigners generally pursuant to the police power included health,⁷⁸¹ public morals,⁷⁸² environmental conservation,⁷⁸³ national security and public

⁷⁷⁸ *Philip Morris v Uruguay* (n 17) [219].

⁷⁷⁹ *Chemtura* Counter-Memorial (n 718) [565]-[566]; *Chemtura v Canada*, UNCITRAL, Rejoinder Memorial of Canada, 10 July 2009, 284.

⁷⁸⁰ *ELSI* Memorial of the United States of America (n 496) 76-78.

⁷⁸¹ *Oscar Chinn* Pleadings (n 162) 288-289, 292-295, 440 (de Ruelle for Belgium); *Bischoff* (n 241); *Destruction of Property During Plague* (n 213).

⁷⁸² *The Levant Herald* (n 214); *North Atlantic Coast Fisheries* (n 252); Mann, ‘State Contracts and State Responsibility’ (n 319).

⁷⁸³ *International Bank of Washington v OPIC* (n 462) 1227-1228; *La Bretagne* (483) 638.

order,⁷⁸⁴ and more broadly, the national interest.⁷⁸⁵ Multilateral efforts in the mid-late twentieth century to protect investment were also more specific about the types of public purposes that would be considered legitimate, with health,⁷⁸⁶ the environment,⁷⁸⁷ public safety,⁷⁸⁸ and labour⁷⁸⁹ being emphasised the most. However, in these multilateral negotiations, while more detail was included as to the types of purposes could be pursued, the purposes for which States could regulate were not exhaustively defined. For example, the MIGA Convention refers to measures ‘normally taken by governments’ and in the Commentary notes that this includes measures ‘*such as*’ environmental and labour legislation, suggesting the categories are not exhaustive.⁷⁹⁰

The specific identification of a ‘taxonomy of regulatory purposes’⁷⁹¹ is less common in recent-treaty making practice of States which, as noted in the previous

⁷⁸⁴ League of Nations Economic Committee (n 309) 23-24,37.

⁷⁸⁵ *Exchequer Mining Co Case* (n 212).

⁷⁸⁶ OECD, ‘The Multilateral Agreement on Investment (Report by the Chairman of the Negotiating Group)’ (n 368) Article 3; Multilateral Investment Guarantee Agency, *Commentary* (n 373) 8.

⁷⁸⁷ OECD, ‘The Multilateral Agreement on Investment (Report by the Chairman of the Negotiating Group)’ (n 368); Multilateral Investment Guarantee Agency, *Commentary* (n 373) 8.

⁷⁸⁸ OECD, ‘The Multilateral Agreement on Investment (Report by the Chairman of the Negotiating Group)’ (n 368); Multilateral Investment Guarantee Agency, *Commentary* (n 373) 8.

⁷⁸⁹ Multilateral Investment Guarantee Agency, *Commentary* (n 373) 8.

⁷⁹⁰ MIGA Convention, Article 11(a)(ii); Multilateral Investment Guarantee Agency, *Commentary* (n 373) 8.

⁷⁹¹ Allen S Weiner, ‘Indirect Expropriations: The Need for a Taxonomy of “Legitimate” Regulatory Purposes’ (2003) 5 *International Law FORUM du droit international* 166.

section, frequently refer to the police powers doctrine as a principle of customary international law. In particular, recent treaty-making practice of States has defined ‘legitimate public welfare objectives’ non-exhaustively, either explicitly in the text of the treaty itself,⁷⁹² or inferentially by using inclusive language like ‘such as’ to preface listed public interest objectives.⁷⁹³ Further, contrary to the position taken by Uruguay in *Philip Morris v Uruguay*, other States in their pleadings before investor-State arbitration tribunals have used broader and non-exhaustive language, invoking their police power to justify regulation enacted for a variety of purposes under the banner of ‘public purpose’, ‘public interest’, ‘public welfare’ or similar language, including health,⁷⁹⁴ the environment,⁷⁹⁵ cultural heritage,⁷⁹⁶ banking regulation,⁷⁹⁷ addressing windfall profits,⁷⁹⁸ combating corruption,⁷⁹⁹

⁷⁹² For example, *Korea-Australia Free Trade Agreement* (signed 8 April 2014, entered into force 12 December 2014) Annex 11-B(5) and accompanying footnote 54, which states that “[f]or greater certainty, the list of “legitimate public welfare objectives” in paragraph 5 is not exhaustive”.

⁷⁹³ US Model BIT (2012) Annex B(4); US-Uruguay BIT (2005) (n 754) Annex B; US-Rwanda BIT (2008) (n 754) Annex B; US-Chile FTA (2003) (n 754) Annex 10-D; CAFTA-DR (2004) (n 754) Annex 10-C; Morocco-US FTA (2004) (n 754) Annex 10-B; Oman-US FTA (2006) (n 754) Annex 10-B; Panama-US TPA (2007) (n 754) Annex 10-B; US-Peru TPA (2006) (n 754) Annex 10-B; COMESA CIA (2007) (n 770) Article 20(8); India-Singapore CEPA (2005) (n 755) Annex 3; India-Japan CEPA (2011) (n 755) Annex 10.

⁷⁹⁴ *Philip Morris v Australia*, Australia’s Response to Notice of Arbitration (n 50); *Philip Morris v Uruguay* Memorial on Jurisdiction (n 734).

⁷⁹⁵ For example, *Windstream* Respondent Counter-Memorial (n 718); *Pac Rim Cayman* Counter-Memorial (n 721).

⁷⁹⁶ *Glamis Gold* (n 20).

⁷⁹⁷ *Invesmart* (n 592) [498]; *Saluka* (n 3).

⁷⁹⁸ *Perenco* (n 720).

⁷⁹⁹ *EDF* (n 729).

protection of natural resources,⁸⁰⁰ and affirmative action.⁸⁰¹ Similarly, the protection of property under international human rights law is less prescriptive, where the right of States to limit property rights must meet the requirements of the general welfare⁸⁰² or the general interest.⁸⁰³ This broad array of public purposes has led the United Nations Conference on Trade and Development ('UNCTAD') to propose that the police power should cover the full regulatory dimension,⁸⁰⁴ a characterisation that has also been adopted one State's pleadings before an investor-State arbitration tribunal.⁸⁰⁵

There is thus a mix of practice, with a recent trend in favour of the public purposes that may fall within the police power being described in a non-exhaustive manner. At a minimum, there is consistent and near universal support that public health, public morals, public order and national security are public purposes covered by the police power. The widespread acceptance of regulation for the protection or conservation of the environment as falling within the police power is more recent.⁸⁰⁶ However, the conclusion in the *North Atlantic Coast*

⁸⁰⁰ *Bear Creek Mining Counter-Memorial* (n 727).

⁸⁰¹ *Foresti* (n 16).

⁸⁰² UDHR (n 399) Article 17(2); Respect for the right of everyone to own property alone as well as in association with others and its contribution to the economic and social development of Member States (n 455).

⁸⁰³ ECHR (n 425) Protocol 1, Article 1(2); *African Charter on Human and Peoples' Rights* (n 444) Article 14.

⁸⁰⁴ UNCTAD, *Expropriation* (United Nations 2012).

⁸⁰⁵ *Mamidoil* (n 63) [529].

⁸⁰⁶ The first explicit reference of environmental measures falling within the police power appears to be in 1972 in *International Bank of Washington v OPIC* (n 462) 1227-1228.

Fisheries Case that the right of ‘reasonable regulation’ (the articulation of which drew on the police power as explained in Chapter Two) includes the right to make regulations ‘appropriate or necessary for the protection and preservation of...fisheries’⁸⁰⁷ suggests that conservation measures had a longstanding relevance to the police power.

ii) Is the identification of a public purpose within the police power dispositive of a claim?

The second issue that arises is whether the identification of a public purpose or public interest objective is dispositive of claim. If the identification of a public purpose objective were dispositive, it would give the most expansive role for public interest regulation in an indirect expropriation claim. Ursula Kriebaum describes this as the ‘radical police powers’ approach.⁸⁰⁸ The approach has also been described by Pellet as the ‘absolute conception’ of police powers,⁸⁰⁹ where regulation would not constitute indirect expropriation regardless of the effect of the regulation on the investment, if the measure were enacted in for a public purpose.⁸¹⁰ In disclaiming the relevance of the effect of the measure, this approach differs from the approaches explored above in Part II(1)(b), (2)(b) and (c) of this Chapter.

⁸⁰⁷ *North Atlantic Coast Fisheries Case* (n 252) 187- 188.

⁸⁰⁸ Ursula Kriebaum, ‘FET and Expropriation in the (Invisible) EU Model BIT’ (2014) 15 *Journal of World Investment & Trade* 454, 460; Ursula Kriebaum, ‘Regulatory Takings: Balancing the Interests of the Investor and the State’ (2008) 8 *Journal of World Investment & Trade* 717, 725.

⁸⁰⁹ Pellet (n 30) 457.

⁸¹⁰ Paparinskis, ‘Regulatory Expropriation and Sustainable Development’ (n 133) 311-312; Weiner (n 791) 170; Fortier and Drymer (n 534) 313,317-318.

This approach emphasising the purpose of the regulation over any other aspect has been supported in scholarship. Sornarajah, for instance, argues that it is ultimately ‘the quality of the public purpose that makes the distinction between a regulatory taking and a compensable taking’.⁸¹¹ He identifies the maintenance of public order, national security, public health and morality, environmental protection and protection of indigenous peoples as examples of legitimate public purposes.⁸¹² Allen Weiner similarly argues that indirect expropriation jurisprudence increasingly ‘focuses heavily on the purpose or intent of the regulating state’.⁸¹³ The Institut du Droit International considered that the issue ‘remain[ed] open for debate’.⁸¹⁴

Notwithstanding these positions taken in scholarship, a closer examination reveals that the ‘purpose’ of the measure *alone* is not the decisive criterion in determining whether a measure is a valid exercise of the police power and therefore not an indirect expropriation.⁸¹⁵ Indeed, this articulation of the police powers doctrine has been explicitly rejected in *Vivendi v Argentina*, where the Tribunal noted:

⁸¹¹ Sornarajah (n 545) 254–255.

⁸¹² *ibid.*

⁸¹³ Weiner (n 791) 170.

⁸¹⁴ Institut de Droit International, ‘Legal Aspects of Recourse to Arbitration by an Investor Against the Authorities of the Host State under Inter-State Treaties’ (n 135) 65.

⁸¹⁵ Higgins, ‘The Taking of Property and the State: Recent Developments’ (n 460) 331; Yannick Radi, ‘Balancing the Public and the Private in International Investment Law’ in Horatia Muir Watt and Diego P Fernández Arroyo (eds), *Private International Law and Global Governance* (Oxford University Press 2014) fn 61 (‘the difference between expropriation and regulation based on public purpose is hardly viable intellectually’).

If public purpose automatically immunises the measure from being found to be expropriatory, then there would never be a compensable taking for a public purpose.⁸¹⁶

Further, as the statements in *Methanex*, *El Paso* and the other cases examined in Part II of this Chapter suggest, the public purpose of the regulation is one of several features examined by a decision maker in determining whether the regulation falls within the police power of the State. For instance, as will be discussed further below, tribunals have often looked to the reasonableness and proportionality of the measure relative to the public interest being pursued. This focus on reasonableness and proportionality does not make the purpose of the measure irrelevant, but rather that it is one of many factors relevant to determining whether the measure falls within the scope of a State's police power.

Similarly, decision makers have been deferential to States' purposes for regulating, but have not allowed States to claim the measure was enacted in the public interest free from any scrutiny. This has been a trend historically⁸¹⁷ and more recently.⁸¹⁸ Thus the fact that the government purports to act in the public

⁸¹⁶ *Compañía de Aguas Del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No. Arb/97/3, Award, 20 August 2007, [7.5.21].

⁸¹⁷ See Letter of Mr Foster to Señor Don Enrique Dupuy de Lome (n 208) 2; Letter from Herbert Jenner to Viscount Palmerston (n 225) 220-221; *The "Trojan"* (n 220); *The Dolores* (n 220); *Certain Norwegian Loans*, Separate Opinion of Sir Hersch Lauterpacht (n 493) 37; *ELSI Memorial of the United States of America* (n 496) 76-78; OECD, '1963 Draft Convention' (n 360) 245; OECD, '1967 Draft Convention' (n 360) 121; Report of the Thirty-Fifth Sitting of the Third Session in Council of Europe, *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights: Consultative Assembly, Committee of Experts, Committee of Ministers, Legal Committee, Advisers to the Ministers (1 October 1951 - 20 March 1952)* (n 437) 122; Sohn and Baxter (n 526) 553-554.

⁸¹⁸ For example, *Metalclad* (n 544); *Tecmed* (n 580) [122], [130].

interest is not the sole or decisive criterion for determining whether a measure constitutes a valid exercise of the police power.

(b) *The importance of the characterisation of the measure as ‘regulation’*

In Chapter One, ‘public interest regulation’ was defined as included two types of regulation: first, general legislation (such as the laws in issue in *Philip Morris v Uruguay*) and secondly, administrative regulations (such as the denial of a permit or license by an executive branch of government). In light of preceding analysis it is apparent that both types of public interest regulation fall within the police power of States.

In *Philip Morris v Uruguay*, the Tribunal cited with approval the proposition in *Saluka* that measures adopted ‘in the normal exercise of their regulatory powers’ would fall within the police powers doctrine.⁸¹⁹ This is consistent with other State practice, case law and scholarship, where reference is frequently made to the lawfulness of regulation that is part of the ‘normal’ or ‘ordinary’ governmental processes that would fall within the police power of States.⁸²⁰ Indeed, the language in the State practice and case law seems broad enough that

⁸¹⁹ *Philip Morris v Uruguay* (n 17) [297] quoting *Saluka* (n 3) [255],[260],[262].

⁸²⁰ League of Nations, ‘International Conference on the Treatment of Foreigners, Geneva, March 5th, 1929, Preparatory Documents’ (n 314); Kaeckenbeeck, *The International Experiment of Upper Silesia* (n 281); OECD, ‘1967 Draft Convention’ (n 360); Sohn and Baxter (n 526); OECD, ‘The Multilateral Agreement on Investment (Report by the Chairman of the Negotiating Group)’ (n 368); Multilateral Investment Guarantee Agency, *Commentary* (n 373) 8.

any regulatory or legislative measures of general application could fall within the parameters of ‘normal government processes’.⁸²¹

The importance of keeping the types of regulation that could be lawful and non-compensatory broadly defined was emphasised by Special Rapporteur Garcia-Amador in his Fourth Report on State Responsibility when he noted that his survey did not ‘in any way exhaust the various means whereby the State may “affect” the patrimonial rights of private individuals.’⁸²² Regulation including taxation,⁸²³ the approval of licences or refusal to grant permits,⁸²⁴ to general legislation,⁸²⁵ has been considered to fall within the police power of the State.

However, the fact that the measure is cast in the form of ‘regulation’ (be it legislative or administrative) is not, in and of itself, enough to shield a measure of scrutiny. Hersch Lauterpacht’s opinion in *Certain Norwegian Loans* (quoted in full in Chapter Three) that it was not sufficient for a State to ‘bring a matter under the protective umbrella of its legislation’⁸²⁶ to shelter predatory legislation from scrutiny under international law has been equally applicable in modern

⁸²¹ Letter from Sir J Dodson to Viscount Palmerston (n 228) 350; *George W Cook* (n 266); OECD, ‘1967 Draft Convention’ (n 360); MIGA Convention (n 372) Article 11(a)(ii); Multilateral Investment Guarantee Agency, *Commentary* (n 373) 8.

⁸²² Garcia-Amador (n 523) [45].

⁸²³ *George W Cook* (n 266); Albrecht (n 266); American Law Institute, *Restatement* (n 24).

⁸²⁴ *Kügele* (n 287); *SD Myers* Respondent Counter Memorial (n 718) [432]-[433]; Christie (n 522).

⁸²⁵ *Philip Morris v Uruguay* (n 17).

⁸²⁶ *Certain Norwegian Loans*, Separate Opinion of Sir Hersch Lauterpacht (n 493) 37.

investment protection cases. For instance, in *Pope & Talbot v Canada*, the Tribunal held:

Canada appears to claim that, because the measures considered are cast in the form of regulations, they constitute an exercise of ‘police powers’, which, if non-discriminatory, are supposedly beyond the reach of the NAFTA rules regarding expropriations. While the exercise of police powers must be analysed with special care, the Tribunal believes that Canada’s formulation goes too far. Regulations can indeed be exercised in a way that would constitute creeping expropriation...a blanket exception for regulatory measures would create a gaping loophole in international protections against expropriation.⁸²⁷

(c) Limitations on the police power: discrimination, good faith and due process

Philip Morris v Uruguay also noted that ‘in order for a State’s action in the exercise of regulatory powers not to constitute indirect expropriation, the action has to comply with certain conditions’.⁸²⁸

One condition recognised was that the regulation must be non-discriminatory.⁸²⁹ This condition has been recognised consistently and universally.⁸³⁰ The requirement that the regulation be enacted in good faith (or ‘*bona fide* for the purpose of protecting a public interest’⁸³¹) also seems beyond

⁸²⁷ *Pope & Talbot, Inc v Canada*, UNCITRAL, Interim Award, 26 June 2000, [99].

⁸²⁸ *Philip Morris v Uruguay* (n 17) [305].

⁸²⁹ *ibid.*

⁸³⁰ For example, *Sicilian Sulphur* (n 145) 1167; Letter from Sir J Dodson to Viscount Palmerston (n 228) 350; *Destruction of Property During Plague* (n 213); MIGA Convention (n 372), Article 11(a)(ii); OECD, ‘1967 Draft Convention’ (n 360); OECD, ‘The Multilateral Agreement on Investment (Report by the Chairman of the Negotiating Group)’ (n 368); American Law Institute, *Restatement* (n 24); *Saluka* (n 3) [262]; *El Paso* (n 561) [240] – [241]; *Methanex* (n 22) Part IV Chapter D, [7].

⁸³¹ *Philip Morris v Uruguay* (n 17) [305].

question,⁸³² and is consistent with the earlier State practice and *opinio juris* in which using the ‘public interest’ as a guise for unlawful activity was not accepted as permissible.⁸³³

While not raised in *Philip Morris v Uruguay*, recent authorities also have considered that regulatory measures must be enacted and in accordance with due process.⁸³⁴ This is broadly similar with earlier decisions of mixed claims commissions,⁸³⁵ but does not have a strong grounding in the State practice. It is thus not clear whether, at this stage, the requirement of ‘due process’ is a condition to the exercise of the police power.

If a regulation does not satisfy these conditions, the ‘presumptive veil of legitimacy’⁸³⁶ would be lifted and the measure would not fall within what customary international law traditionally acknowledged as falling within the police power of the State.

⁸³² Letter from Sir J Dodson to Viscount Palmerston (n 228) 350; *Sedco* (n 509) 275-276; *Saluka* (n 3) [255]; *Servier* (n 607) [569]; *SAUR* (n 777) [401]; *El Paso* (n 561) [240].

⁸³³ Herbert Jenner to Viscount Palmerston (n 225) 220-221; Report of the Thirty-Fifth Sitting of the Third Session in Council of Europe, *Collected Edition of the ‘Travaux Préparatoires’ of the European Convention on Human Rights: Consultative Assembly, Committee of Experts, Committee of Ministers, Legal Committee, Advisers to the Ministers (1 October 1951 - 20 March 1952)* (n 437) 122.

⁸³⁴ *Methanex* (n 22) Part IV, Chapter D, [7]; *Chemtura* (n 62) [266]; OECD, ‘1967 Draft Convention’ (n 360).

⁸³⁵ *Paquet* (n 244); *Olivia Case* (Italian-Venezuelan Claims Commission) (1903) reprinted in Ralston and Doyle (n 239) 771; *Boffolo* (n 4).

⁸³⁶ Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (n 112) 224.

(d) The effect of the measure on the validity of the exercise of police power

The Tribunal in *Philip Morris v Uruguay* also held that a measure would be a valid exercise of police power ‘even when it causes economic damage to an investor’.⁸³⁷ However, the Tribunal also noted that one of the conditions that must be satisfied for a measure to be a valid exercise of police power was that it must be ‘proportionate’.⁸³⁸

As noted earlier in Part II(2)(c) of this Chapter above, a number of tribunals have made reference to the concept of proportionality, such that for a State’s regulation to constitute a valid exercise of police power, the effect of the regulation must be ‘proportionate’ to the public interest being pursued.⁸³⁹ This language of proportionality draws upon the jurisprudence of the ECtHR.⁸⁴⁰

From these cases, it is apparent that regulations that have a disproportionate or too severe an effect would not be a valid exercise of police power, regardless of the public interest at stake. For example, in *Philip Morris v Uruguay*, when considering the proportionality of the measure the Tribunal had regard to several factors, including that the impugned measures were taken with a view to protect public health in fulfilment of national and international obligations, were effective means of protecting public health and reducing

⁸³⁷ *Philip Morris v Uruguay* (n 17) [295].

⁸³⁸ *ibid* [305].

⁸³⁹ *Tecmed* (n 580)[122]; *LG&E* (n 623) [195]; *Servier* (n 607) [569]; *El Paso* (n 561) [241]; *Total* (n 637) fn 232.

⁸⁴⁰ *Chassagnou* (n 442); see Chapter Three, Part III(4).

smoking rates smoking rates and were proportionate to these objectives ‘quite apart from their limited adverse impact on [the Claimants’] business’.⁸⁴¹ In contrast, in *Tecmed*, the absence of any ‘present or imminent risk to the ecological balance or to people’s health’ coupled with the ‘neutralization of the investment’s economic and business value’ as a result of the measures led to the conclusion that the impugned measures were not proportionate.⁸⁴²

Other tribunals have used the language of *unreasonableness* instead of or alongside proportionality, such that *unreasonable* measures would not be characterised as valid exercises of police power.⁸⁴³ For example, in *El Paso*, the Tribunal described proportionality as a subset of reasonableness when it considered that regulations that were ‘unreasonable, i.e. ... disproportionate or otherwise unfair’ would fall outside the scope of the police power.⁸⁴⁴ In contrast, in *Total v Argentina* used the concepts side-by-side, referring to the assessment of ‘proportionality and reasonableness in respect of the purpose which is legitimately pursued by the host State’.⁸⁴⁵

The language of ‘proportionality’ is not found in the historical materials explored in Chapters Two and Three. However, these materials indicate that measures that are too severe would not fall within the police power, regardless of

⁸⁴¹ *Philip Morris v Uruguay* (n 17) [306].

⁸⁴² *Tecmed* (n 580) [149].

⁸⁴³ *Feldman* (n 583) [103]-[105]; *El Paso* (n 561) [241].

⁸⁴⁴ *El Paso* (n 561) [241].

⁸⁴⁵ *Total* (n 637) fn 232.

the purpose of the measures. For instance, measures that were extreme (or ‘obnoxious’) were capable of diplomatic protest.⁸⁴⁶ So too was regulation that was unnecessary.⁸⁴⁷ While some mixed claims commission disputes expressed caution as to whether an unreasonable measure would ‘lay a foundation for an international claim’ if such a measure was non-discriminatory,⁸⁴⁸ the language of ‘reasonableness’ as a limit on the regulatory power of States appeared in both oral argument and the Tribunal’s reasons in the *North Atlantic Coast Fisheries Case*,⁸⁴⁹ with ‘reasonableness’ connoting appropriateness and necessity for protecting a public purpose and conduct not inconsistent with the obligations under the treaty.⁸⁵⁰ This defining of reasonableness by reference to appropriateness and necessity is similar to that used in the international and regional human rights instruments, explored in Chapter Three, which referred to measures taken in accordance with the general interest that were ‘necessary to control the use of property’.⁸⁵¹ The language of ‘reasonableness’ as a limitation on the police power was also used in the context of the Venezuelan mixed claims commissions,⁸⁵²

⁸⁴⁶ Foreign Office to Mr Dickson (n 230); Mr Fish to Mr Mantilla (n 230); *The “Azorian”* (n 221); *Laverello* (n 221).

⁸⁴⁷ *Export of Corn from Italy* (n 211) 348; *Brazilian Watermelons* (n 205); *Parson’s Case* (n 265).

⁸⁴⁸ *Canadian Claims for Refund of Duties* (n 170) 368.

⁸⁴⁹ *North Atlantic Coast Fisheries Case* (n 252) 179-180, 187-188; *North Atlantic Coast Fisheries Arbitration at the Hague: Oral Argument before the Tribunal Constituted under an Agreement Signed at Washington on the 27th Day of January, 1909, between His Britannic Majesty and the United States of America* (n 256) 19-49 (United Kingdom).

⁸⁵⁰ *North Atlantic Coast Fisheries Case* (n 252) 187-188.

⁸⁵¹ ECHR (n 425) Protocol 1, Article 1(2).

⁸⁵² *Bischoff* (n 241) 420.

negotiations for multilateral treaties to protect investment,⁸⁵³ as well as disputes pursuant to OPIC,⁸⁵⁴ inter-State arbitrations,⁸⁵⁵ and in the ICJ.⁸⁵⁶ Even where there was no explicit limitation on the police power mentioned, the acknowledgment of the difficulties in determining the boundary or line between the exercise of police power and a taking of property is evidence that there is a point at which an otherwise valid regulation may ‘cross the line’ and no longer fall within the police power, albeit that that line is difficult to identify with precision.⁸⁵⁷

In their pleadings before investor-State arbitration tribunals, a number of States that have pleaded the police powers doctrine have stated that the exercise of the police power must be proportionate.⁸⁵⁸ Other States have stated that exercises of police power must be a ‘normal exercise’ of police power,⁸⁵⁹ and must not be unreasonable,⁸⁶⁰ or excessive,⁸⁶¹ or ‘extraordinary’.⁸⁶²

⁸⁵³ OECD, ‘1963 Draft Convention’ (n 360); OECD, ‘1967 Draft Convention’ (n 360).

⁸⁵⁴ *International Bank of Washington v OPIC* (n 462) 1227-1228.

⁸⁵⁵ *La Bretagne* (n 483) 631.

⁸⁵⁶ *Case Concerning Rights of Nationals of the United States of America in Morocco* (n 491) 212.

⁸⁵⁷ See, for example, the comments of the UK in their pleadings in *Oscar Chinn Pleadings* (162) 308-309 (Mr Beckett for the United Kingdom); *Neer* (n 268) 61; *MacAndrews and Forbes Co* (n 270) 109.

⁸⁵⁸ Bolivia: *Quiborax* (n 2) [201]; Kazakhstan: *Stati* (n 723) [1167]; Poland: *Servier* (n 607) [277]; South Africa: *Foresti* (n 16) [75].

⁸⁵⁹ Albania: *Mamidoil* (n 63) [529].

⁸⁶⁰ Albania: *Mamidoil* (n 63) [529]; Argentina: *Suez* (n 634) [146].

⁸⁶¹ Canada: *Chemtura* Counter-Memorial (n 718) [594],[623].

⁸⁶² US: *Methanex* Statement of Defence (n 733) [152].

Thus, while the law appears to be unsettled as to whether the test is one of ‘proportionality’ or ‘reasonableness’ (or a combination of both), regardless of whether the language of ‘reasonableness’ or ‘proportionality’ is used it is apparent that, in substance, it has long been accepted that the exercise of the police power is not without limits, and measures that are too severe would not be a valid exercise of police power.

(e) The relevance of specific commitments and investor expectations

Finally, while the Tribunal in *Philip Morris v Uruguay* did not address this point, the Claimant in that case pleaded that the police powers doctrine was inapplicable in that case because Uruguay’s actions conflicted with specific commitments made to investors.⁸⁶³ This is consistent with the view of some tribunals that have considered that regulation would not be protected by the police power if the regulation were contrary to commitments made by the State. For instance, in *Methanex*, the Tribunal considered that lawful regulation would not constitute indirect expropriation ‘unless specific commitments have been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation’.⁸⁶⁴ A similar finding was made in *Occidental v Ecuador* in the context of an investment agreement, where the Tribunal acknowledged that lawful regulation was not expropriatory but considered that ‘the situation is different where, as in the

⁸⁶³ *Philip Morris v Uruguay* (n 17) [199].

⁸⁶⁴ *Methanex* (n 22) Part IV Ch D, [7].

present case, the State is bound by the terms of a contract which it has entered into with the investor' because '[t]he contract fetters the State's exercise of its regulatory powers'.⁸⁶⁵

The basis on which the *Methanex* and *Occidental* Tribunals invoked the relevance of 'specific commitments' was thinly reasoned. No authority was cited for the proposition in *Occidental*. Of the cases cited by the *Methanex* tribunal to support the proposition, one related to FET⁸⁶⁶ and the other to the breach of a stabilisation clause in an investment contract.⁸⁶⁷ From the analysis undertaken in Chapter Two and Three, it is not apparent that the police power of the State may be limited by a State's specific commitments, except insofar as it may fall within the concept of 'reasonableness'.

Similarly, it is not clear how a condition of 'specific commitments' as a limitation on the police powers doctrine interacts (if at all) with recent treaty practice in which States have clarified that one of the factors that is relevant in determining whether a measure constitutes an indirect expropriation is 'the extent to which the government action interferes with distinct, reasonable investment-backed expectations'.⁸⁶⁸ This requirement is separate to the part of the annexures

⁸⁶⁵ *Occidental* 2012 Award (n 594) [530] fn 65.

⁸⁶⁶ *Waste Management, Inc v United Mexican States*, ICSID Case No.Arb(AF)/00/3, Award, 30 April 2004, [98]. This was notwithstanding that the Tribunal in *Waste Management II* directly addressed the issue of expectations in the expropriation context, see below.

⁸⁶⁷ *Revere Copper* (n 467).

⁸⁶⁸ US Model BIT (2012) Annex B(4); US-Uruguay BIT (2005) (n 754) Annex B; US-Rwanda BIT (2008) (n 754) Annex B; US-Chile FTA (2003) (n 754) Annex 10-D; CAFTA-DR (2004)

that address the police power, which suggests that the requirement is not necessary to determining whether there has been a valid exercise of police power.

In any event, when the question of investors' expectations has arisen in indirect expropriation claims to date, the overall trend appears to be that expectations of investors have limited impact on an indirect expropriation claim in the absence of a substantial deprivation of an investment.⁸⁶⁹ For instance, in *Waste Management v Mexico II*, the Tribunal held that 'the loss of...expectations is not a sufficient criterion for an expropriation'.⁸⁷⁰ Similarly, in *El Paso*, the Tribunal considered that the violation of expectations was better protected under the FET standard, rather than indirect expropriation.⁸⁷¹

4. The operation of the police powers doctrine

(a) Is the police powers doctrine an exception to the requirement that there be a substantial deprivation?

As noted in Part II, Section 2(b) and (c) above, some tribunals (including *Philip Morris v Uruguay*) treat the police powers doctrine as an alternative basis upon which to dismiss an indirect expropriation claim, such that the police powers doctrine provides 'an additional reason in support of the...conclusion' that the measures 'cannot constitute' an indirect expropriation of the Claimants'

(n 754) Annex 10-C; Morocco-US FTA (2004) (n 754) Annex 10-B; Oman-US FTA (2006) (n 754) Annex 10-B; Panama-US TPA (2007) (n 754) Annex 10-B; US-Peru TPA (2006) (n 754) Annex 10-B; COMESA CIA (2007) (n 770) Article 20(8); India-Singapore CEPA (2005) (n 755) Annex 3; India-Japan CEPA (2011) (n 755) Annex 10.

⁸⁶⁹ Stephen Fietta, 'Expropriation and the "Fair and Equitable" Standard: The Developing Role of Investors' "Expectations" in International Investment Arbitration' (2006) 23 *Journal of International Arbitration* 375, 383-384.

⁸⁷⁰ *Waste Management II* (n 866) [159].

⁸⁷¹ *El Paso* (n 561) [227].

investment.⁸⁷² Other tribunals appear to treat the doctrine as one that only arises if it has been concluded that there has been a substantial deprivation. If it is accepted that a measure that amounts to a ‘substantial deprivation’ would ordinarily constitute an indirect expropriation, the effect of the second approach is that the police powers doctrine would operate as an exception to the requirement that a State compensate an investor when an indirect expropriation has occurred.

On the one hand, some diplomatic correspondence appeared to excuse deprivations of property on the basis of the police powers doctrine.⁸⁷³ Similarly, scholarly authorities such as the 1961 Harvard Draft Convention refer to ‘uncompensated *takings of property*’ not being considered wrongful if they are valid exercises of police power, which suggest that the doctrine is relevant after having determined a taking has occurred.⁸⁷⁴

Against this, scholarly consensus during the time period examined in Chapter Two appeared to assume that exercises of police power were a lesser interference than an expropriation, albeit acknowledging that it was a difficult matter to determine.⁸⁷⁵ The 1963 and 1967 OECD Draft Conventions characterised ‘cases of State action...as part of normal governmental processes’ were measures that States were entitled to take and the legality of such measures was not

⁸⁷² *Philip Morris v Uruguay* (n 17) [287],[307].

⁸⁷³ *Brazilian Watermelons* (n 205).

⁸⁷⁴ Sohn and Baxter (n 526) 553-554.

⁸⁷⁵ Jessup (n 335); Herz (n 351) 251-252; Fachiri 1929 (n 327) 52; Borchard (n 339) 161.

dependent on the invocation of any derogation clause,⁸⁷⁶ suggesting such measures were not exceptions to the provisions of the treaty (including provisions concerning expropriation). This is consistent with the approach taken pursuant to the ECtHR, where proportionality is used to distinguish lawful control of use in the general interest from the concept of deprivation.⁸⁷⁷

Where this issue has been squarely addressed in States' pleadings before investor-State arbitration tribunals, most States approach the test in the same way as the *Philip Morris v Uruguay* Tribunal, namely that the police powers doctrine is a 'further' reason for determining a measure is not an indirect expropriation, separate to and distinct from the analysis as to whether there has been a substantial deprivation.⁸⁷⁸ These examples of State practice proceed on the basis that exercises of police power are less than substantial deprivations, and the doctrine does not operate as an exception to the requirement that compensation be paid for an indirect expropriation. This is consistent with the more recent treaty practice of States that do not see exercises of police power as constituting an

⁸⁷⁶ OECD, '1963 Draft Convention' (n 360) 255; OECD, '1967 Draft Convention' (n 360) 131.

⁸⁷⁷ *Chassagnou* (n 442) [85].

⁸⁷⁸ Australia: *Philip Morris v Australia*, Australia's Response to Notice of Arbitration (n 50) [45]-[46]; Bolivia: *Quiborax* (n 2) [201]; Czech Republic: *Invesmart* (n 592) [479]; El Salvador: *Pac Rim Cayman* Counter-Memorial (n 721) [318]; Guatemala: *Railroad Development Corporation* Counter Memorial (n 722) [297]-[298]; Kazakhstan: *Stati* (n 723) [1165]; Kyrgyz Republic: *Belokon* (n 619) [192]; Moldova: *Arif* (n 725) [307]; Oman: *Al Tamimi* (n 726) [177]; Peru: *Bear Creek Mining* Counter Memorial (n 727) [227], : *Levy de Levi* (n 727) [267]; Romania: *EDF* (n 729) [180]; South Africa: *Foresti* (n 16) [75]; Slovak Republic: *Eurogas* Counter-Memorial (n 731) [352]; Sri Lanka: *Deutsche Bank* (n 732) [501]; US: *Methanex* Statement of Defence (n 733) [151], *Glamis Gold* Counter-Memorial (n 733) 199.

indirect expropriation. In contrast, of the publicly available pleadings (or summaries of pleadings made by tribunals in publicly available awards), only Albania, Argentina and Canada pleaded that the police powers doctrine applied as an ‘affirmative defence’,⁸⁷⁹ ‘even if rights had been taken’⁸⁸⁰ and ‘even if...there has been a substantial deprivation’.⁸⁸¹ However, Canada has more recently pleaded, consistently with its recent treaty practice, that it would only be in ‘rare circumstances’, namely, where the impact of the regulation is so severe in light of its purpose that it cannot be reasonably viewed as having been adopted in good faith, which suggests that exercises of police power are of lesser severity than expropriations.⁸⁸²

On balance, the trend is that the police powers doctrine operates either alongside, or alternatively to, the requirement that a measure ‘substantially deprive’ an investor of their investment to constitute an indirect expropriation. This is consistent with the approach of the Tribunal in *Philip Morris v Uruguay*. However, that is not to say that it is possible that a measure could both substantially deprive an investor of their investment *and* be a valid exercise of police power. There has not been a single case before an investor-State arbitration tribunal where this has occurred and it is unlikely, given that exercises of police power must be proportionate or reasonable, that such an outcome would occur.

⁸⁷⁹ Argentina: *Suez* (n 634) [146].

⁸⁸⁰ Albania: *Mamidoil* (n 63) [527].

⁸⁸¹ Canada: *Chemtura* Counter-Memorial (n 718) [565].

⁸⁸² *Windstream* Respondent Counter-Memorial (n 718) [495].

As noted by the Tribunal in *El Paso*, ‘disproportionate general regulations have the potential to be considered as expropriatory if there is a sufficient interference with the investor’s rights’.⁸⁸³ A substantial deprivation would likely be disproportionate or unreasonable.

Ultimately, the methodology of the *El Paso* tribunal, quoted above, presents the correct way of analysing the police powers doctrine in an indirect expropriation claim.⁸⁸⁴ The starting point is that exercises of police power, as a matter of principle, do not constitute indirect expropriations. However, disproportionate (or unreasonable, or too severe) exercises of police power will not fall within the police powers doctrine, nor will exercises of the police power that are discriminatory or not undertaken *bona fide*. If the measure is not a valid exercise of police power, it may constitute an indirect expropriation, if the measure amounts to a ‘substantial deprivation’ of the investment. In such circumstances, compensation would be due.

The consequence of this analysis is that, even though States invoke the police powers by way of defence to an indirect expropriation claim, it is not an ‘exception’ in the sense that an expropriation is excused or justified because it is an exercise of police power. Indeed, the historical language surrounding the invocation of the police power is notable for ‘non-exceptional’ language, covering

⁸⁸³ *El Paso* (n 561) [243].

⁸⁸⁴ See *El Paso* (n 561) [233], quoted above at n 599.

regulation that is ‘normal’ or ‘ordinary’⁸⁸⁵ and ‘reasonable’.⁸⁸⁶ The better view is that the police powers doctrine operates as a principle that is relevant to determining whether a measure constitutes an indirect expropriation, and that valid exercises of police power cannot constitute indirect expropriations. In this way, the police powers doctrine operates as a limitation on the scope of a State’s obligation with respect to indirect expropriation.⁸⁸⁷

This construction is important, as characterising a doctrine as an exception may shape how the area of law develops and is understood normatively.⁸⁸⁸ An exception evokes a notion of derogation,⁸⁸⁹ and framing the police powers doctrine as an exception may suggest (contrary to the practice of States) that an indirect expropriation has occurred, but there is a ‘police powers exception’ that

⁸⁸⁵ For example, League of Nations, ‘International Conference on the Treatment of Foreigners, Geneva, March 5th, 1929, Preparatory Documents’ (n 314); Letter from Sir J Dodson to Viscount Parmlerston (n 228) 350; *George W Cook* (n 266); Kaeckenbeeck, *The International Experiment of Upper Silesia* (n 281); OECD, ‘1967 Draft Convention’ (n 360); Sohn and Baxter (n 526) 553–554; OECD, ‘The Multilateral Agreement on Investment (Report by the Chairman of the Negotiating Group)’ (n 368); Multilateral Investment Guarantee Agency, *Commentary* (n 373).

⁸⁸⁶ See Part III(3)(d) of this Chapter above.

⁸⁸⁷ See Caroline Henckels, ‘When the ‘Exception’ is an Element of the Rule: The Structural Status of Investment Treat Exception Clauses’ in Lorand Bartels and Federica Paddeu, *Exceptions in International Law* (forthcoming Oxford University Press, 2017) 2.

⁸⁸⁸ 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.

⁸⁸⁹ 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.

justifies the violation.⁸⁹⁰ In contrast, characterising the police powers doctrine as a limitation on the scope of the obligation correctly suggests that the police powers doctrine is the starting point for the expropriation inquiry, as the starting point is whether the measure constitutes an indirect expropriation. The way in which the police powers doctrine can be applied to limit the concept of indirect expropriation using the principles of treaty interpretation will be examined in Chapter Seven.

(b) Burden of Proof

It has also been argued by Viñuales that a further issue that would arise if the police powers doctrine is characterised as an exception is that such a characterisation may have implications for the burden of proof: if the police powers doctrine is a principle relevant to determining whether an indirect expropriation has occurred, the burden would fall on a Claimant, whereas if it is an exception it would fall upon a respondent.⁸⁹¹

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 Poland bore the burden of proof for showing that their justification for adopting the measures complied with the standard.⁸⁹² Poland disputed this, arguing that the burden of proof for showing that the measures in dispute did not

⁸⁹⁰ Bradly J Condon, ‘Treaty Structure and Public Interest Regulation in International Economic Law’ (2014) 17 *Journal of International Economic Law* 333, 335.

⁸⁹¹ Viñuales, ‘Sovereignty in Foreign Investment Law’ (n 33) 336.

⁸⁹² *Servier* (n 607) [280].

constitute a valid exercise of police power fell on the Claimant.⁸⁹³ Poland argued that it was only required to ‘show that there [was] a reasonable connection between its actions and a legitimate policy objective’.⁸⁹⁴

The Tribunal noted that Poland had presented *prima facie* justifications for its measures and that, in light of this, it would not require Poland to ‘prove the negative’ in the sense of demonstrating an absence of bad faith and discrimination, or the lack of disproportionateness in the measures’.⁸⁹⁵ Poland 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.⁸⁹⁶

As the police powers doctrine is not an exception, 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 indirect expropriation does not alter the burden of proof in this regard.⁸⁹⁷

⁸⁹³ *ibid* [281].

⁸⁹⁴ *ibid* [580].

⁸⁹⁵ *ibid* [583].

⁸⁹⁶ *ibid* [584].

⁸⁹⁷ 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), *Oxford Handbook of International Trade Law* (Oxford University Press 2009) 358–359; Condon (n 890).

(c) Further comment on the relationship between the police powers doctrine and the test for 'lawful expropriation'

Before concluding, in light of the preceding analysis it is necessary to address the overlap between some of the constituent elements of the police powers doctrine and the test for determining whether an expropriation is lawful under international law.

As noted in the introduction to this Chapter, the legality of an expropriation is conditioned by several requirements.⁸⁹⁸ 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.⁸⁹⁹ As is apparent, these requirements that condition the legality of an expropriation contain language that overlaps with what constitutes a valid 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'.⁹⁰⁰

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

⁸⁹⁸ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd Edition, Oxford University Press 2012) 98–99.

⁸⁹⁹ Dolzer and Schreuer (n 898) 99–100.

⁹⁰⁰ Kurtz (n 42) 291; see also Higgins, 'The Taking of Property and the State: Recent Developments' (n 460).

doctrine, for two 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 indirect expropriation. If it is a valid exercise of police power then it will not be an indirect 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.⁹⁰¹ 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, as this Chapter has demonstrated, the constituent elements of the police powers doctrine are found in historical and contemporary State practice and *opinio juris*, and are grounded in customary international law. The overlap between the two concepts, rather than demonstrating a convenient means through which States can avoid compensating investors, instead highlights that the police powers doctrine is more general in its application and not limited to indirect expropriation cases. This point will be examined in Chapter Six.

IV. CONCLUSION

This Chapter has demonstrated the extent to which States may rely on their police power in defence of the lawfulness of public interest regulation against claims of

⁹⁰¹ Dolzer and Schreuer (n 898) 99.

indirect expropriation. The police powers doctrine, reflected in customary international law, provides that States may enact reasonable (or proportionate) and non-discriminatory regulation made in the public interest and adopted in accordance with good faith, and that such measures will not constitute an indirect expropriation. This principle is therefore relevant to determining whether a measure constitutes an indirect expropriation, and operates as a limitation on the scope of a State's obligation.

CHAPTER FIVE

FAIR AND EQUITABLE TREATMENT AND THE ‘RIGHT TO REGULATE’

I. INTRODUCTION

The FET standard is one of the most frequently invoked standards in IIT disputes.⁹⁰² Its prominence has been explained, in part, because the broad wording of many FET provisions allow the provision to operate through ‘gap filling’⁹⁰³ in circumstances where other standards of investment protection (such as expropriation) may not be appropriate.⁹⁰⁴ In practice, FET disputes frequently concern non-expropriatory interferences with investments by States, including interferences arising from purported public interest regulation, such as regulation justified on environmental grounds,⁹⁰⁵ health regulation,⁹⁰⁶ preservation of historic sites,⁹⁰⁷ taxation,⁹⁰⁸ and public broadcasting,⁹⁰⁹ among others.

⁹⁰² Rudolf Dolzer, ‘Fair and Equitable Treatment: Today’s Contours’ (2013) 12 Santa Clara Journal of International Law 7.

⁹⁰³ Salacuse, *The Three Laws of International Investment* (n 459) 387.

⁹⁰⁴ *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey*, ICSID Case No.Arb/02/5, Award, 19 January 2007, [238]; Dolzer, ‘Fair and Equitable Treatment: Today’s Contours’ (n 902) 11.

⁹⁰⁵ *Bilcon* (n 61) (rejection of a project on purported environmental grounds).

⁹⁰⁶ *Achmea* (n 25) (regulation of the health insurance market); *Philip Morris v Uruguay* (n 17) (tobacco packaging regulation).

⁹⁰⁷ *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No.Arb/05/8, Award, 11 September 2007 (regulation designed to control traffic and protect the integrity of the City’s old historic town).

⁹⁰⁸ *Perenco* (n 720) (‘windfall tax’ on profits from natural resources).

FET disputes frequently arise in circumstances where there has been a regulatory change that has altered the investment environment in which the foreign investor operates, purportedly to their detriment.⁹¹⁰ This has led scholars, such as Zachary Douglas, to characterise the FET standard as being an obligation ‘directed to the *regularity* of state actions’.⁹¹¹ As will be explained below and in Chapter Six, in FET disputes the language of ‘right to regulate’ is used frequently and the language of ‘police power’ is more limited.

This Chapter examines the treatment of public interest regulation in FET claims made pursuant to IITs and the relevance of States’ right to regulate in that analysis. It will be argued that in the FET context there is an inconsistency in tribunals’ treatment of public interest regulation and the right to regulate at two levels. First, there are inconsistent interpretations given to the FET standard, which in turn has different consequences for the treatment of public interest regulation. This will be addressed in Part II of this Chapter. Secondly, Part III will demonstrate that the right to regulate is used in two different ways in the FET context: as a principle that forms part of the FET standard either as the starting point for the analysis or as a factor that must be balanced with investors’ legitimate expectations, and secondly, as a concept to which Tribunals must defer

⁹⁰⁹ *Joseph Charles Lemire v Ukraine*, ICSID Case No.Arb/06/18, Decision on Jurisdiction and Liability, 14 January 2010 (regulation on the distribution of radio frequencies).

⁹¹⁰ Salacuse, *The Three Laws of International Investment* (n 459) 138.

⁹¹¹ Zachary Douglas, ‘Property, Investment, and the Scope of Investment Protection Obligations’ in Zachary Douglas, Joost Pauwelyn and Jorge Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press 2014) 400.

when determining a FET claim. As a consequence of this lack of clarity and consistency, it is difficult to determine on the current state of the law the extent to which the right to regulate may provide a basis on which States can defend themselves in a FET dispute where the challenge concerns public interest regulation. This Chapter therefore lays the foundation for ascertaining the preferable definition of the right to regulate in Chapter Six.

II. THE TREATMENT OF PUBLIC INTEREST REGULATION IN FET DISPUTES

This section will examine the ways in which investor-State arbitration tribunals have analysed public interest regulation within FET claims. As will be seen, the differing views on the content of the FET standard have significant implications for how public interest regulation is treated.

1. Public Interest Regulation, the FET standard and the international minimum standard

Examining the treatment of public interest regulation in FET disputes is more complex than the equivalent enquiry in an indirect expropriation context. Whereas it is broadly accepted that ‘expropriation’ under IITs draws upon customary international law,⁹¹² in the FET context there is a longstanding debate concerning the relationship between the FET standard and customary international law.

In broad terms, the arguments can be divided as follows. At one end of the spectrum, the FET standard is an ‘autonomous’ provision, separate to and distinct

⁹¹² See further Chapter Four and Chapter Seven.

from the customary ‘international minimum standard’ of treatment, and one which imposes obligations on States beyond that contemplated under customary international law.⁹¹³ At the other end of the spectrum, a FET provision in an IIT is taken to be a reference to the customary international minimum standard of treatment.⁹¹⁴ In between these views are those that consider the distinction to make very little material difference in practice.⁹¹⁵

A final resolution to this question is outside of the scope of this thesis and has been undertaken elsewhere.⁹¹⁶ The more pressing issue for the purposes of this thesis is whether the nature and content of the FET standard (whether as one linked to customary international law or one that is ‘autonomous’) influences how public interest regulation is treated in a FET claim before an investor-State arbitration tribunal, and the implications that may have on any purported right to regulate. Thus, this Chapter will identify where the interpretation of the FET standard as linked to customary international law or otherwise has implications for public interest regulation and any right to enact such regulation.

⁹¹³ FA Mann, ‘British Treaties for the Promotion and Protection of Investments’ (1982) 52 *British Yearbook of International Law* 241, 244; Gazzini (n 110) 699; Salacuse, *The Three Laws of International Investment* (n 459) 386–387.

⁹¹⁴ Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (n 112) xlviii, 5.

⁹¹⁵ *Occidental Exploration and Production Company v Republic of Ecuador*, LCIA Case No.UN 3467, Final Award, 1 July 2004, [189]-[192]; Jonathan Ketcheson, ‘Book Review: The International Minimum Standard and Fair and Equitable Treatment. By Martins Paparinskis.’ (2013) 83 *British Yearbook of International Law* 185, 186.

⁹¹⁶ See, in particular, Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (n 112).

The predominant view is that FET provisions that are linked to the customary international law international minimum standard provide greater protection to States' right to regulate. As Caroline Henckels notes:

The dominant view is that investment treaties that stipulate the customary international law standard require a greater level of mistreatment in order to establish a breach—and provide a correspondingly greater scope for governments to act in the ordinary course of governance without risking liability than other types of fair and equitable treatment clause.⁹¹⁷

Where the FET standard is taken to be a reference to the international minimum standard, there is an additional question as to what is the *content* of the international minimum standard. In *Glamis Gold*, the Tribunal considered that, at a minimum, the FET standard under the NAFTA (which incorporated customary international law) was that articulated by the US-Mexico Claims Tribunal in *Neer*.⁹¹⁸ This international minimum standard served as a floor, 'below which conduct is not accepted by the international community'.⁹¹⁹ The Tribunal concluded that:

... to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards and constitute a breach of Article 1105(1). Such a breach may be exhibited by a 'gross

⁹¹⁷ Caroline Henckels, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP' (2016) 19 *Journal of International Economic Law* 27, 33.

⁹¹⁸ *Glamis Gold* (n 20) [612]. For a discussion of *Neer*, see Chapter Two at n 268.

⁹¹⁹ *ibid* [615].

denial of justice or manifest arbitrariness falling below acceptable international standards;’ or the creation by the State of objective expectations in order to induce investment and the subsequent repudiation of those expectations.⁹²⁰

Applying this standard, the Tribunal concluded that the impugned conduct did not violate the FET standard. Stephan Schill observed that the consequence of the approach in *Glamis Gold* is that ‘the fair and equitable treatment standard [does not] offer protection against state measures that, in pursuing a legitimate government interest, merely make use, enjoyment, and exploitation of property more costly, but not impossible’.⁹²¹ Thus, as discussed in Chapter Two, while even *Neer* itself acknowledged the difficulty between ascertaining the ‘boundary between an international delinquency... and an unsatisfactory use of power included in national sovereignty’,⁹²² it is evident that the consequence of this approach is that public interest regulation would unlikely amount to a breach of the FET standard.

However, in other disputes that have linked the FET standard to customary international law, tribunals have accepted that the customary standard is not ‘frozen in time’⁹²³ and has evolved since *Neer*.⁹²⁴ Other tribunals and scholars have

⁹²⁰ *ibid* [22], [616], [627].

⁹²¹ Stephan Schill, ‘*Glamis Gold, Ltd. v. United States*’ (2010) 104 *American Journal of International Law* 253, 257.

⁹²² *Neer* (n 268).

⁹²³ *ADF Group Inc v United States of America*, ICSID Case No.Arb(AF)/00/1, Award, 9 January 2003, [113].

⁹²⁴ *Cargill, Inc. v United Mexican States*, ICSID Case No.Arb(AF)/05/2, Award, 18 September 2009, [272]; *Merrill & Ring* (n 619) [211]-[213]; *Bilcon* (n 61) [435]; *Mesa Power Group, LLC v Government of Canada*, PCA Case No.2012-7, Award, 24 March 2016 [496]-[500].

queried the relevance of *Neer* at all in disputes concerning the protection of foreign investment, when the case concerned the ‘physical security of an alien’.⁹²⁵

2. Public Interest Regulation and the *Waste Management II* standard: Arbitrariness, Discrimination, Transparency and Due Process

In *Waste Management v Mexico* (*‘Waste Management II’*), the Tribunal concluded that the FET standard is breached if the State acts in a way that is:

...arbitrary, grossly unfair or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.⁹²⁶

The standard as articulated in *Waste Management II* has been favoured in several investment disputes where the FET standard in the applicable treaty is linked to customary international law.⁹²⁷ Even in cases where the FET standard is not linked to customary international law, the test in *Waste Management II* has been accepted.⁹²⁸ In *Perenco v Ecuador*, for instance, the Tribunal noted that there

⁹²⁵ *Mondev v United States of America*, ICSID Case No.Arb(AF)/99/2, Award, 11 October 2002, [115]-[117]; *Gold Reserve Inc. v Bolivarian Republic of Venezuela*, ICSID Case No.Arb/09/1, Award, 22 September 2014, [567]; Jan Paulsson and Georgios Petrochilos, ‘*Neer-Ly Mised?*’ (2007) 22 ICSID Review 242, 243; Judge Stephen M Schwebel, ‘*Is Neer Far from Fair and Equitable?*’ (2011) 27 Arbitration International 555, 559.

⁹²⁶ *Waste Management II* (n 866) [98].

⁹²⁷ *Teco Guatemala Holdings LLC v Republic of Guatemala*, ICSID Case No.Arb/10/17, Award, 19 December 2013, [454]; *Railroad Development Corporation v Republic of Guatemala*, ICSID Case No. Arb/07/23, Award, 29 June 2012, [219]; *Glamis Gold* (n 20) [627]; *Bilcon* (n 61) [442]-[443]; *Mobil Investments Canada Inc. & Murphy Oil Corporation v Canada*, ICSID Case No.Arb(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, [141]; *Cargill* (n 924) [284]-[285]; *Mesa* (n 924) [501].

⁹²⁸ *HOCHTIEF Aktiengesellschaft v Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability, 29 December 2014, [219]; *Gold Reserve* (n 925) [573]; *Perenco* (n 720) [558]; *Ioan Micula, Viorel Micula & ors v Romania*, ICSID Case No.Arb/05/20, Award, 11

was ‘much to be said for the general approach stated by the Tribunal in *Waste Management II*’.⁹²⁹ The Tribunal continued that the search was:

...for ‘the “something more” that distinguishes an act in violation of international law from the perceived unfairness occasioned by many governmental actions that do not rise to a breach of international law. The challenge is to discern between the two.’⁹³⁰

In *Mobil v Canada*, the Tribunal also approved the *Waste Management II* approach.⁹³¹ The Tribunal also made several comments about the way in which the standard under Article 1105 interacts with States’ regulatory powers. The Tribunal held:

Article 1105 may protect an investor from changes that give rise to an unstable legal and business environment, but only if those changes may be characterised as arbitrary or grossly unfair or discriminatory, or otherwise inconsistent with the customary international law standard. In a complex international and domestic environment, there is nothing in Article 1105 to prevent a public authority from changing the regulatory environment to take account of new policies and needs, even if some of those changes may have far-reaching consequences and effects, and even if they impose significant additional burdens on the investor. Article 1105 is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement that an investor is entitled to expect no

December 2013, [522]; *Bosh International, Inc and B&P, Ltd Foreign Investments Enterprise v Ukraine*, ICSID Case No. Arb/08/11, Award, 25 October 2012, [210]-[212]; *Total* (n 637) [110]; *Frontier Petroleum Services Ltd v Czech Republic*, UNCITRAL, Final Award, 12 November 2010, [290], [328]; *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan*, ICSID Case No. Arb/07/14, Excerpts of Award, 22 June 2010, [285]; *Invesmart* (n 592) [200]-[201]; *Jan de Nul and Dredging International NV v Arab Republic of Egypt*, ICSID Case No. Arb/04/13, Award, 6 November 2008, [187]; *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, ICSID Case No. Arb/05/22, Award, 24 July 2008, [597], [601]-[602].

⁹²⁹ *Perenco* (n 720) [557]-[558].

⁹³⁰ *ibid* [559].

⁹³¹ *Mobil v Canada* (n 927) [1]. The Claimant’s also made a successful claim concerning performance requirements under Article 1106 of NAFTA.

material changes to the regulatory framework within which an investment is made. Governments change, policies change and rules change. These are facts of life with which investors and all legal and natural persons have to live with...⁹³²

The consequence of this approach is similar to that which was concluded with respect to indirect expropriation: public interest regulation which is non-discriminatory, enacted in accordance with due process and in good faith and which is not 'grossly unfair' is unlikely to be the subject of a successful complaint before an investor-State arbitration tribunal in a FET dispute. As Paparinskis notes, the approach in *Waste Management II* and the cases that follow it is that 'the international minimum standard [and, by extension, the FET standard] ... focus[ses] on the arbitrariness of form and procedure rather than the policy choices of the State and the expectations of the investors'.⁹³³ The standard, while not as exacting as that articulated in *Neer*, remains a high standard for a claimant to satisfy.

3. Public interest regulation and legitimate expectations

The concept of 'legitimate expectations' has been considered by several scholars as providing a way of resolving problems about the limits of regulatory powers in FET disputes.⁹³⁴ The concept has more broadly been acknowledged in case law and

⁹³² *ibid* [153].

⁹³³ Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (n 112) 217–218.

⁹³⁴ See, in particular Francisco Orrego Vicuña, 'Regulatory Authority and Legitimate Expectations: Balancing the Rights of the State and the Individual under International Law in a Global Society' (2003) 5 *International Law FORUM du droit international* 188; Francisco Orrego Vicuña, 'From Preston to Prescott: Globalizing Legitimate Expectations' in Steve Charnovitz (ed), *Law in the Service of Human Dignity: Essays in Honour of*

scholarship as one of the most important features of the FET standard.⁹³⁵

The importance of legitimate expectations within FET disputes is reflected in the frequency with which it is invoked by claimants: of 15 publicly available awards where breach of a FET provision was claimed in 2014, 12 cases concerned claims for breach of the FET standard on the basis of undermining legitimate expectations.⁹³⁶

In scholarship, there has been considerable debate as to the source, role and scope of legitimate expectations in international investment law. Criticisms have been raised as to the failure of tribunals to identify the source of international law which supports the concept of legitimate expectations, with

Florentino Feliciano (Cambridge University Press 2005); Francisco Orrego Vicuña, 'Of Contracts and Treaties in the Global Market' (2004) 8 Max Planck Yearbook of United Nations Law 341, 353-356.

⁹³⁵ *Electrabel SA v Republic of Hungary*, ICSID Case No.Arb/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012; *International Thunderbird Gaming Corporation v United Mexican States*, UNCITRAL, Separate Opinion of Arbitrator Thomas Wälde, 26 January 2006, [37]; Dolzer, 'Fair and Equitable Treatment: Today's Contours' (n 902); Michele Potestà, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept' (2013) 28 ICSID Review 88.

⁹³⁶ *Guaracachi America Inc and Rurelec PLC v Plurinational State of Bolivia*, PCA Case No.2011-17, Award, 31 January 2014, [213],[302],[254]; *Renée Rose Levy de Levi v Republic of Peru*, ICSID Case No.Arb/10/17, Award, 26 February 2014, [169],[186],[319],[324]-[342]; *Tulip Real Estate Investment and Development Netherlands BV v Republic of Turkey*, ICSID Case No.Arb/11/28, Award 10 March 2014, [371], [374]; *David Minotte and Robert Lewis v Republic of Poland*, ICSID Case No.Arb(AF)/10/1, Award, 16 May 2014, [193]; *Hulley Enterprises Limited (Cyprus) v Russian Federation*, UNCITRAL, Final Award, 18 July 2014, [1493]; *Veteran Petroleum Limited (Cyprus) v Russian Federation*, PCA Case No.AA 228, Final Award, 18 July 2014, [1493]; *Yukos Universal Limited (Isle of Man) v Russian Federation*, PCA Case No.AA 227, Final Award, 18 July 2014, [1493]; *Perenco* (n 720) [537],[560]; *Gold Reserve* (n 925) [576]ff; *Mobil Corporation et al v Bolivarian Republic of Venezuela*, ICSID Case No.ARB/07/27, Award, 9 October 2014, [129],[157], [256]; *British Caribbean Bank Limited v Government of Belize*, UNCITRAL, Award, 19 December 2014, [270],[283]; *Hochtief AG v Argentine Republic*, ICSID Case No.Arb/07/31, Decision on Liability, 29 December 2014, [217].

some tribunals linking the concept to general principles of law,⁹³⁷ comparative law,⁹³⁸ the doctrine of unilateral acts of States,⁹³⁹ and others basing the reasoning on previous arbitral awards, if at all.⁹⁴⁰ While NAFTA Tribunals have considered legitimate expectations to be a ‘relevant factor’ in determining a breach of Article 1105 under customary international law,⁹⁴¹ to date no NAFTA Tribunal has undertaken a comprehensive analysis of State practice and *opinio juris* to determine the customary nature of legitimate expectations within the FET standard.⁹⁴² It has been described, in short, as an ‘arbitral innovation’⁹⁴³ and a concept which lacks foundation in the sources of international law.⁹⁴⁴

⁹³⁷ *Total* (n 637) [128].

⁹³⁸ *Gold Reserve* (n 925).

⁹³⁹ *Total* (n 637) [131]-[134]; see also Chester Brown, ‘The Protection of Legitimate Expectations As A ‘General Principle of Law’: Some Preliminary Thoughts’ (2009) 6 *Transnational Dispute Management*; Elizabeth Snodgrass, ‘Protecting Investors’ Legitimate Expectations - Recognizing and Delimiting a General Principle’ (2006) 21 *ICSID Review* 1.

⁹⁴⁰ *Potestà* (n 935) 90; *Sornarajah* (n 545) 274-287.

⁹⁴¹ *Mobil v Canada* (n 926) [152(3)]; *Waste Management II* (n 866) [98]-[99]; *International Thunderbird Gaming Corporation v United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006, [147]; *Glamis Gold* (n 20) [621], [627]; *Bilcon* (n 61) [445]; *Mesa* (n 924) [502].

⁹⁴² As at 30 June 2016. Patrick Dumberry, ‘The Protection of Investors’ Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105’ (2014) 31 *Journal of International Arbitration* 47, 60; Ian A Laird and others, ‘International Investment Law and Arbitration: 2012 in Review’ in Andrea Bjorklund (ed), *Yearbook on International Investment Law and Policy 2012-2013* (Oxford University Press 2014) 156-158.

⁹⁴³ Christopher Campbell, ‘House of Cards: The Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law’ (2013) 30 *Journal of International Arbitration* 361, 361; *Potestà* (n 935) 92.

⁹⁴⁴ Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (n 112) 252-256; Dumberry (n 942); Katia Yannaca-Small, ‘Fair and Equitable Treatment Standard: Recent Developments’ in August Reinisch (ed), *Standards of Investment Protection* (Oxford University Press 2008); Teerawat Wongkaew, ‘The Transplantation of Legitimate Expectations in Investment Treaty Arbitration: A Critique’ in Rodrigo Polanco

In investor-State disputes, there are three different approaches to the role of legitimate expectations that have been identified. Each of these offers differing treatment of public interest regulation, which will be discussed in turn.

(a) Legitimate expectations, contractual commitments and stabilisation clauses

The first type of case is where an investor's expectations result from contractual commitments entered into between the State and the investor directly. Where a State modifies such contractual undertakings, several tribunals have held that such measures deserve scrutiny 'since they generate as a rule legal rights and therefore expectations of compliance'.⁹⁴⁵ For instance, in *Total v Argentina*, the Tribunal noted:

The expectation of the investor is undoubtedly 'legitimate', and hence subject to protection under the fair and equitable treatment clause, if the host State has explicitly assumed a specific legal obligation for the future, such as by contracts, concessions or stabilisation clauses on which the investor is therefore entitled to rely as a matter of law.⁹⁴⁶

However, in this first type of case, tribunals have been careful not to conflate the breach of a contract (a matter of domestic law) with a breach of the FET provision under international law.⁹⁴⁷ For instance, in *Parkerings v Lithuania*,

Lazo and Shaheez Lalani (eds), *The Role of the State in Investor-State Arbitration* (Brill 2014).

⁹⁴⁵ *Continental Casualty Company v Argentine Republic*, ICSID Case No.Arb/03/9, Award, 5 September 2008, [261]. See also *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile*, ICSID Case No.Arb/017, Award, 25 May 2004; *Metalpar SA and Buen Aire SA v Argentine Republic*, ICSID Case No.Arb/03/5, Award on the Merits, 6 June 2008, [185].

⁹⁴⁶ *Total* (n 637) [117].

⁹⁴⁷ James Crawford, 'Treaty and Contract in Investment Arbitration' (2008) 24 *Arbitration International* 351, 373; Potestà (n 935) 101-102.

the Tribunal noted that ‘the expectation a party to an agreement may have of the regular fulfilment of the obligation by the other party is not necessarily an expectation protected by international law’.⁹⁴⁸ If the situation were otherwise, the FET standard could become conflated with an umbrella clause,⁹⁴⁹ and undermine the principle that a breach of contract by a State does not entail a breach of international law without something more, such as denial of justice or discrimination.⁹⁵⁰ In such cases where ‘something more’ is present, such as denial of justice, it is those additional elements that constitute the basis of the State’s international responsibility, not legitimate expectations based on breach of contractual obligations.⁹⁵¹

In several disputes, tribunals have made *obiter* comments that breach of a ‘stabilisation clause’ in an agreement entered into by the State may undermine an investor’s legitimate expectations and therefore breach the FET standard. A ‘stabilisation clause’ (also called a ‘stability clause’) is a clause within a contract between a State and a foreign investor ‘with the intended effect of freezing a specific host State’s legal framework at a certain date, such that the adoption of

⁹⁴⁸ *Parkerings* (n 907) [344].

⁹⁴⁹ *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No.Arb/07/24, Award, 18 June 2010, [336]-[337]; *Impregilo SpA v Argentine Republic*, ICSID Case No.Arb/07/17, Award, 21 June 2011, [292];

⁹⁵⁰ *Parkerings* (n 907) [344]; *Glamis Gold* (n 20) [620]. See International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries. Report of the International Law Commission, 53rd Session* (United Nations Publications 2008) Article 4.

⁹⁵¹ Robert Jennings and Arthur Watts (eds), *Oppenheim’s International Law*, vol 1 (9th Edition, Longman 1996) 927; Wongkaew (n 944) 86.

any changes in the legal regulatory framework of the investment...would be illegal'.⁹⁵²

As explored in Chapter Three, stabilisation clauses have played a role in ensuring that investors receive compensation for measures (such as nationalisation or expropriation) undertaken contrary to stabilisation clauses within an investment contract.⁹⁵³ In those cases, it was generally considered that a State could not 'invoke its sovereignty to disregard commitments freely undertaken', particularly as entering into an investment contract was, in itself, also an exercise of sovereignty.⁹⁵⁴ However, the compensation owed in those cases was pursuant to a breach of the 'internationalized contract',⁹⁵⁵ rather than a breach of

⁹⁵² *Total* (n 637) [101]. See Antony Crockett, 'Stabilisation Clauses and Sustainable Development: Drafting for the Future', *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011); Audley Sheppard and Antony Crockett, 'Are Stabilisation Clauses a Threat to Sustainable Development?' in Marie-Claire Cordonier Segger, Andrew Newcombe and Markus W Gehring (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2010); Lorenzo Cotula, 'Stabilization Clauses and the Evolution of Environmental Standards in Foreign Investment Contracts' (2007) 17 *Yearbook of International Environmental Law* 111; Viñuales, 'Sovereignty in Foreign Investment Law' (n 33); Paolo Bertoli and Zeno Crespi Reghizzi, 'Regulatory Measures, Standards of Treatment and the Law Applicable to Investment Disputes' in Tullio Treves, Francesco Seatzu and Seline Trevisanut (eds), *Foreign Investment, International Law and Common Concerns* (Routledge 2014).

⁹⁵³ For example, *Texaco* (n 476); *Revere Copper* (n 467); *Duke Energy International Peru Investments No.1, Ltd v Republic of Peru*, ICSID Case No.Arb/03/28, Award, 18 August 2008. See also Jennings (n 458); Mann, 'State Contracts and State Responsibility' (n 319); Wetter and Schwebel (n 457).

⁹⁵⁴ *Texaco* (n 476) 475.

⁹⁵⁵ *ibid* 474.

a treaty. Indeed, in those cases stabilisation clauses in contracts were explicitly distinguished from treaty commitments.⁹⁵⁶

Some tribunals have suggested, albeit in *obiter* comments, that stabilisation clauses in contracts may give rise to protection under the FET standard via the concept of legitimate expectations. For instance, in *Toto Costruzioni*, the Tribunal outlined how a stabilisation clause could interact with the FET standard (in negative terms) as follows:

*In the absence of a stabilisation clause or similar commitment...changes in the regulatory framework would be considered as breaches of the... fair and equitable treatment only in the case of drastic or discriminatory change in the essential features of the transaction.*⁹⁵⁷

(Emphasis added.)

This statement raises several issues. First, it does not explain why a stabilisation clause in a contract can give rise to legitimate expectations (the frustration of which may breach the FET standard), while other contractual commitments are treated with more caution. No authority was cited for the proposition that stabilisation clauses may form the foundation of a breach of the FET standard. The authorities cited above regarding investment contracts are not

⁹⁵⁶ *ibid* 473-474.

⁹⁵⁷ *Toto Costruzioni v Republic of Lebanon*, ICSID Case No.Arb/07/12, Award, 7 June 2012, [244]; see also *Parkerings* (n 907) [331]; *EDF* (n 729) [217]; *Ulysseas, Inc v Republic of Ecuador*, UNCITRAL, Final Award, 12 June 2012, [249]; *AES* (n 568) [9.3.29].

on point, precisely because those findings in those cases concern the assessment of a breach of an international contract, not an international treaty.⁹⁵⁸

On the one hand, if a stabilisation clause in a contract can give rise to legitimate expectations that could lay the foundation for a breach of the FET standard, then that could conflate a breach of contract with a breach of a treaty.⁹⁵⁹ However, as Jonathan Bonnitcha notes, there is some doctrinal incoherence if a stabilisation clause in a contract cannot form the basis of legitimate expectations but an oral representation by a State can, as it could result in a situation where ‘a legally binding agreement with a host State [under domestic law]...reduces the degree of protection which the FET standard provides from changes to these arrangements’.⁹⁶⁰ The law in this area is thus unsettled and is not entirely coherent.

In FET disputes concerning public interest regulation, the case law to date suggests that contractual commitments, particularly stabilisation clauses, could give rise to legitimate expectations that a State would refrain from regulating in a manner contrary to its contractual commitments. In *Perenco v Ecuador*,⁹⁶¹ regulations targeting extra-ordinary profits of oil companies in Ecuador were

⁹⁵⁸ Viñuales, ‘Sovereignty in Foreign Investment Law’ (n 33) 340.

⁹⁵⁹ Crawford, ‘Treaty and Contract in Investment Arbitration’ (n 947).

⁹⁶⁰ Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press 2014) 183.

⁹⁶¹ *Perenco* (n 720).

challenged as violating the FET standard under the applicable IIT.⁹⁶² The Tribunal noted in disputes where a contract exists between the investor and the host State, ‘the terms of the contract and the State’s legislation in relation thereto, assume particular significance in the analysis’.⁹⁶³ The Tribunal noted that where a State enacts a legislative or regulatory policy, future government decisions taken thereafter must ‘maintain fidelity to that policy framework’ during the lifetime of contractual arrangements.⁹⁶⁴ However, the Tribunal qualified this statement by noting that it was not stating that ‘the policy framework [was] frozen and [could not be] changed’ in the absence of an express stabilisation clause but rather that, even in the absence of any stabilisation clause, ‘any change to the policy framework must still be made mindful of the State’s contractual commitments’.⁹⁶⁵

The Tribunal concluded:

Particularly after changes in government occur, States must seek to act consistently with, and governments cannot wilfully repudiate, long-term commercial relationships with foreign investors concluded by their predecessors. New governments must bear in mind why the State engaged in such relationships in the first place...Such investments must be able to withstand deviations in governmental policy that could undermine their contractual framework.⁹⁶⁶

⁹⁶² There were also claims under the applicable investment contract as well as the expropriation provisions of the IIT.

⁹⁶³ *ibid* [561].

⁹⁶⁴ *ibid* [562].

⁹⁶⁵ *ibid* [562].

⁹⁶⁶ *ibid* [564].

(b) Legitimate expectations and (non-contractual) representations or commitments

The second type of case is where legitimate expectations are based on representations or commitments not of a contractual nature made by the State, upon which a claimant relies when making its investment. In *El Paso v Argentina*, the Tribunal noted that a ‘reasonable general regulation can be considered a violation of the FET standard if it violates a specific commitment towards the investor’.⁹⁶⁷ While noting the difficulty in defining ‘specific commitments’, the Tribunal identified examples as to what might constitute such a commitment, including a letter of intent, and specific promises in person-to-person business meetings.⁹⁶⁸ Other Tribunals have noted that where specific representations are made precisely to induce the investment, an investor may legitimately expect behaviour consistent with that representation.⁹⁶⁹

However, representations falling within this second type of case generally must constitute promises specifically to the investor, rather than general investment promotion policies or statements by politicians.⁹⁷⁰ Tribunals have tended to afford protection to representations that were ‘specifically formal assurances that display visibly an official character’⁹⁷¹ rather than ‘ambiguous and

⁹⁶⁷ *El Paso* (n 561) [375].

⁹⁶⁸ *ibid* [375]-[376].

⁹⁶⁹ *Glamis Gold* (n 20) [799]; *Mobil v Canada* (n 926) [162(3)].

⁹⁷⁰ *El Paso* (n 561) [399]; *PSEG* (n 904) [241]-[243].

⁹⁷¹ *International Thunderbird*, Separate Opinion of Arbitrator Thomas Wälde (n 935)[32].

informal⁹⁷² or vague and general⁹⁷³ representations. Finally, tribunals that have considered this type of specific representation have found that the representations must be made and reasonably taken into account by an investor at the time of making the investment.⁹⁷⁴

A successful invocation of legitimate expectations based on representations occurred in *Bilcon v Canada*.⁹⁷⁵ *Bilcon* concerned a decision by Canadian authorities to deny permits and authorisations for a proposed quarry and marine terminal development, which the Claimant alleged violated Article 1105 NAFTA. The permits were denied on purportedly environmental grounds, following an environmental assessment. The Tribunal considered that a ‘high threshold’ must be satisfied for Article 1105 to be violated, and that ‘reasonable relied-on expectations’ were a relevant factor in determining a breach.⁹⁷⁶ The majority of the Tribunal found a breach of Article 1105, and that conclusion was drawn primarily from representations by Canada and the Claimants’ expectations. The Tribunal concluded that the investors had an expectation that the project ‘would be assessed on the merits of its environmental soundness in accordance with the

⁹⁷² *Feldman* (n 583) [149].

⁹⁷³ *White Industries Australia Limited v Republic of India*, UNCITRAL, Final Award, 30 November 2011, [10.3.17].

⁹⁷⁴ *Parkerings* (n 907) [331]; *Mamidoil* (n 63) [695]; *AES* (n 568) [9.3.8]; *Duke Energy* (n 953) [340].

⁹⁷⁵ *Bilcon* (n 61).

⁹⁷⁶ *ibid* [436]-[441],[444]-[445].

same legal standards applied to applicants generally’,⁹⁷⁷ and the approach taken by Canada was a ‘unique approach’ for which the investors received no reasonable notice, and of which the investors had no real prospects of success.⁹⁷⁸ Further, Canada had made specific representations upon which the Claimants relied that encouraged the Claimants to invest and pursue the project in the particular area only to ‘have other officials effectively determine that the area was a “no go” zone for this kind of development rather than [carry] out the lawfully prescribed evaluation of its individual environmental merits’.⁹⁷⁹

The Tribunal emphasised that the trigger for international responsibility arose only in extreme cases, and this was one such extreme case.⁹⁸⁰ The imprudent exercise of discretion, even outright mistakes, would not generally lead to a breach of the international minimum standard.⁹⁸¹ It further noted that each NAFTA State is free ‘to adopt laws that are as demanding as they choose in exercising their sovereign authority’ and the Tribunal’s concern is not with the policies themselves, but how they were carried out.⁹⁸² Conversely, the dissenting arbitrator considered that while the majority correctly interpreted the minimum standard, its application of that standard to the facts of the case was erroneous, as it was

⁹⁷⁷ *Bilcon* (n 61) [447],[455]-[487].

⁹⁷⁸ *ibid* [450],[451],[502]-[547].

⁹⁷⁹ *ibid* [592].

⁹⁸⁰ *ibid* [738].

⁹⁸¹ *ibid* [437].

⁹⁸² *ibid* [598].

applied in such a way that a mere breach of Canadian law was sufficient to bring about international responsibility.⁹⁸³ He considered that the case amounted to a ‘remarkable step backwards in environmental protection’.⁹⁸⁴

A similar interpretation of the international minimum standard, but with a different result, occurred in *Mobil Investments Canada v Canada*.⁹⁸⁵ The dispute related to two offshore petroleum development projects that the Claimant argued were subjected to a changed regulatory framework requiring the Claimant to undertake certain minimum research and development expenditures for research and development in Canadian province.⁹⁸⁶ The Tribunal ultimately concluded that there was no evidence that Canada had made clear and explicit representations in relation to any future change to the regulatory framework, and in the absence of any representation giving rise to a legitimate expectation, there could be no violation of Article 1105.⁹⁸⁷

Similarly, in *Parkerings v Lithuania*,⁹⁸⁸ a dispute arose from an agreement to design and operate a parking system that aimed to control traffic and protect the

⁹⁸³ *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton & Bilcon of Delaware, Inc. v Government of Canada*, PCA Case No.2009-04, Dissenting Opinion of Professor Donald McRae, 10 March 2015, [2].

⁹⁸⁴ *ibid* [51].

⁹⁸⁵ *Mobil v Canada* (n 926).

⁹⁸⁶ *ibid* [1].

⁹⁸⁷ *ibid* [170]-[171].

⁹⁸⁸ *Parkerings* (n 907).

integrity of the City's historic Old Town.⁹⁸⁹ As part of that agreement, the Claimant had the right to collect parking fees and clamping fees. However, subsequent legislation was introduced that limited the ability of the Claimant to collect these fees, and the agreement was ultimately terminated. The Claimant argued that it had a 'legitimate expectation that [Lithuania] would respect and protect the legal integrity of the Agreement'.⁹⁹⁰ The Tribunal noted that an expectation would be legitimate only if the investor received an explicit promise from the host State, or if an assurance or representation could be implied, and that such assurances or representations were taken into account when making the investment.⁹⁹¹ Ultimately, the Tribunal rejected the Claimant's argument, noting that Lithuania had not given any explicit or implicit promise that the legal framework of the agreement would remain unchanged.⁹⁹² In fact, Lithuania's unstable political environment prevailing at the time of making the investment (being a State in transition from being part of the Soviet Union to a candidate for European Union membership) led the Tribunal to conclude that legislative changes were to be regarded as likely.⁹⁹³ As to the interaction between the

⁹⁸⁹ *ibid* [51].

⁹⁹⁰ *ibid* [321].

⁹⁹¹ *ibid* [330].

⁹⁹² *ibid* [334].

⁹⁹³ *ibid* [335]. Other cases have similarly concluded that political instability at the time of the investment may have a bearing on what can be regarded as a legitimate expectation: *Toto Costruzioni* (n 957) [425] (investment in areas that are post-civil war); *Mamidoil* (n 63) [624]-[626], [722]-[723] (investment in areas with limited infrastructure or democratic institutions).

legitimate expectation and the right to regulate in the public interest, the Tribunal in *Parkerings* held:

It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a *stabilisation* clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power.⁹⁹⁴

Therefore, for this second type of case, States' ability to enact public interest regulation without attracting liability under the FET standard is only constrained insofar as the State has made explicit promises that it would (or would not) regulate in a certain way. The threshold for breach remains high.

(c) Legitimate expectations based on the regulatory framework

The final type of case is where a claimant rests its legitimate expectations on the regulatory framework as it existed at the time of making the investment, without a specific representation or promise from the host State. In this scenario, the expectations of the investor are founded upon 'regulation of a normative and administrative nature that is not specifically addressed to the relevant investor'.⁹⁹⁵ In this third type of case, tribunals have considered whether investors have a legitimate expectation of a stable business framework or regulatory environment,

⁹⁹⁴ *ibid* [332] (emphasis in the original).

⁹⁹⁵ *Total* (n 637) [122].

and whether subsequent changes to that regulatory environment violate the FET standard.⁹⁹⁶

Tecmed is illustrative of this third type of case. In *Tecmed*, the Tribunal stated:

The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its regulations with the foreign investor, so that it may well know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations...⁹⁹⁷

This aspect of the reasoning in *Tecmed* has been heavily criticised. Zachary Douglas criticised the award as providing ‘a description of perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain’.⁹⁹⁸ Others have raised similar concerns, noting the lack of authority cited by the Tribunal when reaching its conclusion.⁹⁹⁹ One Tribunal has acknowledged Douglas’ comments as ‘valid criticism’ and cast doubt over the ‘potentially very broad’ *Tecmed* standard.¹⁰⁰⁰ Another tribunal noted that it agreed with the ‘general thrust’ of the statements in *Tecmed*, but that the propositions in

⁹⁹⁶ Viñuales, *Foreign Investment and the Environment in International Law* (n 131) 350; Roland Kläger, *Fair and Equitable Treatment in International Investment Law* (Cambridge University Press 2011) 117.

⁹⁹⁷ *Tecmed* (n 580) [154].

⁹⁹⁸ Zachary Douglas, ‘Nothing If Not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex’ (2006) 22 *Arbitration International* 27, 27–28.

⁹⁹⁹ Campbell (n 943); Potestà (n 935) 99–100.

¹⁰⁰⁰ *White Industries* (n 973) [10.3.5]–[10.3.6]; see also *Saluka* (n 3) [304].

that case ‘must be considered in the proper context’ and not too literally.¹⁰⁰¹ However, the criticism has not been universal. Indeed, the Tribunal in *Arif v Moldova* appeared to take the proposition further, noting that an investor could expect that a State would ‘ameliorate the effects of the change of policy on the investor’.¹⁰⁰²

In *El Paso*, the Tribunal contrasted specific commitments (of which the ‘precise object was to give a real guarantee of stability to the investor’)¹⁰⁰³ with general statements in treaties and legislation, because in the latter case there can be no guarantee that treaties and legislation will not evolve.¹⁰⁰⁴ Another Tribunal noted that general investment encouragement policies that are not aimed specifically at the investor are not promises that are specific enough to support a claim for legitimate expectations.¹⁰⁰⁵ Similarly, in *EDF v Romania*, the Tribunal noted that:

The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation... ...[an investor] may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State’s

¹⁰⁰¹ *Micula* (n 928) [533] citing *Saluka* (n 3).

¹⁰⁰² *Arif* (n 725) [537]; Michele Potestà, ‘Case Comment: Mr. Franck Charles Arif v. Republic of Moldova’ (2014) 15 *Journal of World Investment & Trade* 1013.

¹⁰⁰³ *El Paso* (n 561) [377].

¹⁰⁰⁴ *ibid* [367],[371],[376]-[377].

¹⁰⁰⁵ *PSEG* (n 904) [241] – [243].

legal and economic framework. Such expectation would be neither legitimate nor reasonable.¹⁰⁰⁶

The cases in which stability of the business or legal framework has successfully formed the basis of legitimate expectations have been very limited. For instance, while statements in early cases arising from the Argentine economic crisis emphasised stability of the legal framework as an element of the FET standard,¹⁰⁰⁷ those cases were, as Paparinskis noted, ‘atypical on many levels’.¹⁰⁰⁸ Notably, in those cases, Argentina entirely dismantled ‘the very legal framework constructed to attract investors’.¹⁰⁰⁹ The alteration to the legal framework had been ‘total’.¹⁰¹⁰ Further, the changes to the regulatory framework were accompanied by something more serious and targeted towards the investment itself, such as the revocation of licences by the host State upon which the investors had been invited.¹⁰¹¹ Outside of the Argentine cases, the claim for legitimate expectations on this basis has not been invoked successfully. Tribunals have recognised that the regulatory frameworks of host States are ‘inherently

¹⁰⁰⁶ *EDF* (n 729). This approach was followed in *Ulysseas* (n 957) [249]; see also *Mamidoil* (n 63) [731].

¹⁰⁰⁷ For example, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, LP v Argentine Republic*, ICSID Case No.Arb/01/3, Award, 22 May 2007, [260] (a ‘key element of fair and equitable treatment is the requirement of a stable framework for investment’); *LG&E* (n 623) [131] (‘the obligation to grant and maintain a stable and predictable legal framework necessary to fulfil the justified expectations of the foreign investor’).

¹⁰⁰⁸ Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (n 112) 257.

¹⁰⁰⁹ *LG&E* (n 623) [125].

¹⁰¹⁰ *El Paso* (n 561) [374].

¹⁰¹¹ *Mamidoil* (n 63) [139]; Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (n 112) 257.

dynamic¹⁰¹² and subject to change, potentially to the disadvantage of the investor,¹⁰¹³ and it is not legitimate for an investor that to expect that that framework would be frozen in time and never change.¹⁰¹⁴

For example, in *Philip Morris v Uruguay*, the Claimants argued that the introduction of the single presentation requirement undermined the Claimant's legitimate expectations, in particular the expectation that the Claimants would be 'permitted to use their valuable brand assets'.¹⁰¹⁵ These expectations were based on general statements (namely, Uruguay's foreign investment laws) and alleged specific assurances.¹⁰¹⁶ The Tribunal considered that it 'clearly emerges' from the FET standard as analysed by previous Tribunals that:

...legitimate expectations depend on *specific* undertakings and representations made by the host State to induce investors to make an investment. Provisions of *general* legislation applicable to a plurality of persons or of category of persons, do not create legitimate expectations that there will be no change in the law.¹⁰¹⁷ (emphasis in the original)

The Tribunal further noted that the Claimants had provided no evidence of specific undertakings or representations made to them by Uruguay at the time of

¹⁰¹² Moshe Hirsch, 'Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law' (2011) 12 *Journal of World Investment & Trade* 784, 801; Wongkaew (n 944) 94-95.

¹⁰¹³ *EnCana Corporation v Republic of Ecuador*, LCIA Case No.UN 3481, Award, 3 February 2006, [173].

¹⁰¹⁴ *Saluka* (n 3) [302]; *Micula* (n 928) [673].

¹⁰¹⁵ *Philip Morris v Uruguay* (n 17) [309].

¹⁰¹⁶ *ibid* [342]

¹⁰¹⁷ *ibid* [426]

their investment, or subsequently.¹⁰¹⁸ Indeed, the Tribunal noted that in light of the increasing awareness of the harmful effects of tobacco, ‘the expectation could only have been of progressively more stringent regulation’.¹⁰¹⁹ In any event, it could not be said that the measures were arbitrary or that the regulations modified the legal framework beyond an acceptable margin of change in light of the limited impact on the Claimant’s business.¹⁰²⁰

Therefore, the concerns raised about the far-reaching reasoning in *Tecmed* may be more apparent than real as it has not been widely accepted in practice and has been limited to circumstances in which the changes to the legal framework have been accompanied by something more serious and targeted towards the investment itself.

4. Public interest regulation and regulatory stability

As noted in the previous subsection, one line of jurisprudence has characterised the obligation of States to protect the stability of the legal and business framework as a component of the obligation to protect an investor’s legitimate expectations.¹⁰²¹ Other tribunals have noted that the requirement of legitimate expectations was ‘closely related’¹⁰²² or ‘closely tied’¹⁰²³ to stability.

¹⁰¹⁸ *ibid* [429]

¹⁰¹⁹ *ibid* [430]

¹⁰²⁰ *Philip Morris v Uruguay* (n 17) [433]

¹⁰²¹ Viñuales, *Foreign Investment and the Environment in International Law* (n 131) 350; Kläger (n 996) 117.

¹⁰²² *Jan Oostergetel and Theodora Laurentius v Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, [222].

However, another line of jurisprudence has considered stability of the legal framework as a standalone component of the FET standard as has considered stability separate to legitimate expectations.

For instance, in *Plama v Bulgaria*, the Tribunal noted that the parties were in agreement that the FET standard included ‘to a certain extent the protection of the investor’s legitimate expectations and the provision of a stable legal framework’.¹⁰²⁴ The Tribunal then analysed the concepts separately, noting that the stability of the legal framework was an ‘emerging standard’ of FET.¹⁰²⁵ The Tribunal considered the right to regulate in the context of stability of the legal framework, noting that the right to regulate was maintained notwithstanding the requirement of stability within the FET standard, and that the right to regulate should be considered when assessing compliance with the FET standard.¹⁰²⁶

Similarly, in *LG&E v Argentina*, the Tribunal noted that ‘in addition to the State’s obligation to provide a stable legal and business environment, the FET analysis involves consideration of the investor’s expectations when making its investment in reliance on the protections granted by the host State’.¹⁰²⁷ In *Occidental v Ecuador*, the Tribunal looked to the preamble of the applicable IIT, which referred to the maintenance of a stable framework for investment, to

¹⁰²³ *Lemire* (n 909) [264].

¹⁰²⁴ *Plama* (n 570) [175].

¹⁰²⁵ *ibid* [176]-[177] quoting *LG&E* (n 623) [125].

¹⁰²⁶ *Plama* (n 570) [177].

¹⁰²⁷ *LG&E* (n 623) [127]; this approach followed in *Micula* (n 928) [528].

conclude that the ‘stability of the legal and business framework...[was] an essential element of FET’.¹⁰²⁸ The Tribunal in *Philip Morris v Uruguay* did consider the stability requirement to be part of the FET standard, but considered it alongside the protection of legitimate expectations and did not accept that the FET standard was breached for largely the same reasons as rejecting the legitimate expectations claim.¹⁰²⁹

However, several tribunals have rejected the idea that the ‘stability of the legal framework’ constitutes part of the FET standard as a standalone requirement. In *El Paso*, the Tribunal noted that if the ‘stability of the legal framework’ was an essential component of the FET standard, it could stifle the ability of States to regulate:

Such a standard of behaviour, if strictly applied, is not realistic, nor is it the BIT’s purpose that States guarantee that the economic and legal conditions in which investments take place will remain unaltered *ad infinitum*.¹⁰³⁰

Recent NAFTA Tribunals considering the ‘minimum standard of treatment’ under customary international law have similarly rejected that ‘stability of the legal framework’ forms part of the standard.¹⁰³¹

Even in cases where the IIT itself provides some textual basis for concluding that there is a separate requirement of stability, such as Article 10(1) of

¹⁰²⁸ *Occidental 2004 Award* (n 915) [183].

¹⁰²⁹ *Philip Morris v Uruguay* (n 17) [421]- [434].

¹⁰³⁰ *El Paso* (n 561) [350].

¹⁰³¹ *Bilcon* (n 61) [427]-[455]; *Cargill* (n 924) [290]; *Mobil v Canada* (n 926) [153].

the *Energy Charter Treaty*,¹⁰³² tribunals applying such provisions have noted that such provisions are not the same thing and cannot be equated with a stabilisation clause.¹⁰³³ In *AES v Hungary*, for instance, the Tribunal noted that the ‘legal framework is by definition subject to change as it adapts to new circumstances day by day and a state has the sovereign right to exercise its powers which include legislative acts’.¹⁰³⁴ As such, there could be no breach of FET based solely on the alleged failure to provide stable legal and business framework.

In light of this scholarship and investor-State arbitration jurisprudence, it can be concluded that a self-standing requirement of stability of the legal framework has not received widespread acceptance, although there is a degree of inconsistency in the case law. However, if the far-reaching view of stability were to be accepted, public interest regulation could constitute a breach of the FET standard if the regulation is considered by a tribunal to upset the stability of the investment environment.

5. Conclusion: Public Interest Regulation and FET disputes

From the analysis above, there are several challenges to determining whether (and to what extent) public interest regulation violates the IIT standard. There are inconsistent articulations of the source and content of the FET standard. If the approach of *Waste Management II* were followed, that is taking the requirements

¹⁰³² *Energy Charter Treaty* (signed 17 December 1994, entered into force 16 April 1998) (‘ECT (1994)’) Article 10(1) provides that ‘each contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable...conditions for investors ...’

¹⁰³³ *AES* (n 568) [9.3.29].

¹⁰³⁴ *ibid* [9.3.29].

of arbitrariness, discrimination, transparency and due process as the starting point for the analysis of the FET standard, then it would seem that the FET standard would not significantly constrain the ability of States' to enact public interest regulation without attracting liability under an IIT. This assessment applies equally to cases where the FET provision is considered to be an autonomous provision or one linked to customary international law, as the *Waste Management II* articulation of the FET standard has applied to both types of case. On this view, public interest regulation would rarely constitute a violation of the FET standard.

In contrast, there are several ways in which public interest regulation could breach the FET standard if the concept of 'legitimate expectations' is embraced as part of the FET standard. These issues arise regardless of whether the FET standard is construed as one linked to customary international law or as an autonomous standard, as legitimate expectations have arisen in both types of case. As noted by the Tribunal in *El Paso*, 'reasonable general regulation can be considered a violation of the FET standard if it violates a specific commitment towards the investor'.¹⁰³⁵ While the law surrounding contractual commitments (including stabilisation clauses) remains uncertain, the trend in investor-State arbitration jurisprudence is that specific non-contractual representations to investors that were aimed at inducing the investor to invest may form the basis of legitimate expectations which, if frustrated, could violate the FET standard. In this

¹⁰³⁵ *El Paso* (n 561) [375].

way, public interest regulation could breach the FET standard to the extent that the regulation breaches a specific commitment to the investor.

III. THE RIGHT TO REGULATE AND THE FET STANDARD

The preceding analysis has highlighted that the interpretation of the FET standard may impact the extent to which public interest regulation enacted by States will be considered to be in breach of the standard. This section will examine how tribunals have articulated any right of States to enact such regulation when analysing the FET standard.

In contrast to the analysis in Chapter Four relating to indirect expropriation, where the police powers doctrine was found to have a definitive role to play in determining whether a measure constitutes an indirect expropriation, the same cannot be said in the equivalent context with respect to the FET standard. The language used in FET analysis is more varied. The language of ‘right to regulate’ is invoked frequently, however similar language is also used such as ‘sovereign prerogative...to regulate’,¹⁰³⁶ ‘[a State’s] sovereign right to exercise its powers’,¹⁰³⁷ ‘regulatory power’,¹⁰³⁸ or ‘sovereign legislative power’.¹⁰³⁹ For example, of 15 publicly available final awards rendered in 2014 where a

¹⁰³⁶ *Achmea* (n 25) [244].

¹⁰³⁷ *AES* (n 568) [9.3.29].

¹⁰³⁸ *Total* (n 637) [115]; *Perenco* (n 720) [560]; *Teco* (n 927) [490].

¹⁰³⁹ *Parkerings* (n 907) [332].

claimant alleged a violation of a FET provision,¹⁰⁴⁰ nine awards referred to the right to regulate (or similar language) either in the respondent's submissions to the Tribunal¹⁰⁴¹ or Tribunal's reasoning itself.¹⁰⁴² As will be examined further in Chapter Six, the police powers doctrine is less common in FET disputes.

The differing language used raises several issues and makes any attempt to define the right to regulate within the confines of this Chapter difficult. For this reason, the analysis and attempt to define the right to regulate will be addressed in Chapter Six. For the balance of this Chapter, this Chapter lays the foundation for the analysis in Chapter Six through exploring how Tribunals have applied the right

¹⁰⁴⁰ In chronological order: *Guaracachi* (n 936); *Renée Rose Levy de Levi* (n 936); *Tulip Real Estate* (n 936); *Minotte* (n 936); *Hulley* (n 936); *Veteran Petroleum* (n 936); *Yukos* (n 936); *Apotex Holdings Inc and Apotex Inc v United States of America*, ICSID Case No.Arb(AF)/12/1, Award, 25 August 2014; *Perenco* (n 720); *Gold Reserve* (n 925); *Mobil v Venezuela* (n 936); *Fraport AG Frankfurt Airport Services Worldwide v Republic of Philippines*, ICSID Case No.Arb/11/12, Award, 10 December 2014; *Hesham Talaat M. Al-Warrq v Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014; *British Caribbean Bank* (n 936); *Hochtief* (n 936).

¹⁰⁴¹ *Levy de Levi* (n 936) [199] ('States parties to a BIT do not relinquish their traditional regulatory authority or forgo their ability to amend and adapt legislation over time'); *Tulip Real Estate* (n 936) [394] ('in effecting zoning changes, TOKI was entitled to, and did, exercise its legitimate State planning powers, acting in the public interest'); *Hulley* (n 936) [1525] ('the measures relating to the imposition and enforcement of taxes were well within the range of generally accepted regulatory powers'); *Veteran Petroleum* (n 936) [1525]; *Yukos* (n 936) [1525]; *Gold Reserve* (n 925) [556] ('a finding of such breach must be made in the light of the high level of deference that international law generally extends to the host State's right to regulate matters within its borders'); *British Caribbean Bank* (n 936) [276] ('international law accords a significant degree of deference to State action').

¹⁰⁴² *Apotex* (n 1040) Part IX, [9.37]-[9.39] ('these other decisions indicate the need for international tribunals to exercise caution in cases involving a state regulator's exercise of discretion, particularly in sensitive areas involving protection of public health and the well-being of patients'); *Perenco* (n 720) [560], [562] ('The search is for a balanced approach between the investor's reasonable expectations and the exercise of the host State's regulatory and other powers'); *British Caribbean Bank* (n 936) [283] ('...an investor can at least legitimately expect that legislation to assume outright ownership of his or her investment will not be adopted except in the service of a public purpose').

to regulate and draws some tentative conclusions as to the relevance of the right to regulate in the FET analysis.

1. Consideration of the right to regulate as part of the FET standard

A number of tribunals that have considered and applied the right to regulate (or equivalent language) in FET disputes have done so in a manner that appears to treat the acknowledgment of the right to regulate as forming part of the FET standard itself. There are two ways in which this has been undertaken that are discernable from the case law.

First, in some cases, the respondent State's right to regulate is the starting point for any FET analysis, and any other elements of the FET standard, such as legitimate expectations and stability, are 'subject to' this right.¹⁰⁴³ The Tribunal in *Micula v Romania* articulated this view when it held:

In the Tribunal's view, the correct position is that *the state may always change its legislation*, being aware and thus taking into consideration that: (i) an investor's legitimate expectations must be protected; (ii) the state's conduct must be substantively proper (e.g., not arbitrary or discriminatory) and (iii) the state's conduct must be procedurally proper (e.g., in compliance with due process and fair administration)...¹⁰⁴⁴

Other cases appear to have adopted a similar approach.¹⁰⁴⁵ For instance, in *Bilcon*, the Tribunal stated:

¹⁰⁴³ *Ulysseas* (n 957) [248].

¹⁰⁴⁴ *Micula* (n 928) [259].

¹⁰⁴⁵ *Toto Costruzioni* (n 957) [244]; see also *Parkerings* (n 907) [331]; *EDF* (n 729) [217]; *Ulysseas* (n 957) [249].

NAFTA cases...express a cautious approach about using investor expectations to stifle legislative or policy changes by state entities that have the authority to revise the law or policy. As lessons of experience are learned, as new policy ideas are advanced, as governments change in response to democratic choice, state authorities with the power to change law or policy must have reasonable freedom to proceed without being tasked with having breached the minimum standard under international law. That freedom is not absolute; breaches of the international minimum standard might arise in some special circumstances- such as changes in a legal or policy framework that have retroactive effect, are not preceded by reasonable notice, are aimed or applied in a discriminatory basis or are contrary to earlier specific assurances by state authorities that the regulatory framework would not be altered to the detriment of the investor.¹⁰⁴⁶

Secondly and more commonly, many cases that have considered the right to regulate have considered the right as one that is a relevant factor that must be *balanced* with the legitimate expectations of a foreign investor.¹⁰⁴⁷ For instance, in *Lemire v Ukraine*, the Tribunal characterised its balancing test as follows:

...the evaluation of the State's action cannot be performed in the abstract and only with a view of protecting investor's rights. The Tribunal must also balance other legally relevant interests, and take into consideration a number of countervailing factors, before it can establish that a violation of the FET standard, which merits compensation, has actually occurred:

- the State's sovereign right to pass legislation and to adopt decisions for the protection of its public interests, especially if they do not provoke a disproportionate impact on investors;

¹⁰⁴⁶ *Bilcon* (n 61) [572].

¹⁰⁴⁷ For instance, *El Paso* (n 561); *Total* (n 637) [123]; *Perenco* (n 720) [560]; *Lemire* (n 909) [285]; *Oostergetal* (n 1022) [224]; *Mamidoil* (n 63) [703]; *EDF* (n 729) [219]. In *Plama* (n 570), the Tribunal made a similar point about balancing but in the context of stability of the legal framework: at [177].

- the legitimate expectations of the investor, at the time he made his investment...¹⁰⁴⁸

Other Tribunals have similarly affirmed that a determination of a breach of a FET provision requires a tribunal to weigh ‘the Claimant’s legitimate and reasonable expectations on the one hand and the Respondent’s legitimate regulatory interests on the other’.¹⁰⁴⁹

In such cases, precisely how this exercise of balancing or using the right to regulate as the starting point plays out appears to depend heavily on the circumstances of the case and, in particular, the nature of the expectations of the investor that have allegedly been undermined. In some cases, the policy choices and context in which measures are enacted with are dealt with in considerable detail and given great weight. This appears to particularly be so in cases where the alleged legitimate expectations argument is founded upon changes to the policy framework (without any specific representation by the State). For example, in *Mamidoil*, the Tribunal gave weight to the ‘legitimate interest of the Albanian Government to modernize the infrastructure in the general interest’ and examined its policy choices in depth, concluding:

The Tribunal finds that the Albanian policy, supported by the international donor community and expert advice, is consistent and beneficial for investors and consumers in the long run. It had and has the objective of leaving the communist heritage of maritime transport infrastructure behind, rehabilitating and modernizing the port facilities of Durres with respect to environmental protection and

¹⁰⁴⁸ *Lemire* (n 909) [285].

¹⁰⁴⁹ *Saluka* (n 3) [305]-[306].

in view of increased passenger and merchandise operations, and building modern petroleum-handling facilities in Porto Romano.

The implementation of this policy, which includes the closure of the port of Durres in 2009, does not offend a sense of propriety. In a different context, the Tribunal has already expressed its view that the fact that this decision accommodated the interests of competitors that had been barred from Durres from the beginning does not change this appreciation.

Even if Claimant did not expect this development to happen, it is not legitimate to insist that the old structures be perpetuated. When balancing both Parties' interests, *Respondent's right to conduct a public policy of consistent modernization prevails*. In any event, as explained above, Claimant was given repeated warnings about the change in Albania's policy.¹⁰⁵⁰

(Emphasis added)

In contrast, the two awards delivered in *Electrabel v Hungary* exemplify how balancing occurs between the investor's expectations and the State's right to regulate in a way that may shape how the expectations of the investor are framed.¹⁰⁵¹ In the first Award delivered in 2012, the Tribunal held:

While the investor is promised protection against unfair changes, it is well established that the host State is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances in the public interest. Consequently, the requirement of fairness must not be understood as the immutability of the legal framework, but as implying that subsequent changes should be made fairly, consistently and predictably, taking into account the circumstances of the investment.

Fairness and consistency must be assessed against the background of information that the investor knew and should reasonably have known at the time of the investment and of the conduct of the host

¹⁰⁵⁰ *Mamidoil* (n 63) [732]-[734].

¹⁰⁵¹ *Electrabel* 2012 Award (n 935); *Electrabel SA v Republic of Hungary*, ICSID Case No.Arb/07/19, Award, 25 November 2015, [165]. The cases were bifurcated by consent between the parties.

State. While specific assurances given by the host State may reinforce the investor's expectations, such an assurance is not always indispensable.¹⁰⁵²

In the second *Electrabel* award, delivered in 2015, the Tribunal was more explicit about balancing. The Tribunal held:

... the Tribunal considers that the application of the ECT's FET standard allows for a balancing exercise by the host State in appropriate circumstances. The host State is not required to elevate unconditionally the interests of the foreign investor above all other considerations in every circumstance. ... an FET standard may legitimately involve a balancing or weighing exercise by the host State.¹⁰⁵³

In the *Electrabel* awards, the Tribunal appears to have used the right to regulate to inform the 'reasonableness' or 'legitimacy' of the expectations.

For instance, in the *Electrabel* 2012 award, the Tribunal held:

In other words, even assuming that Electrabel had an expectation that it would be awarded the maximum compensation for stranded costs permitted under EU law, once weighed against Hungary's legitimate right to regulate in the public interest, such an expectation does not appear reasonable or legitimate.¹⁰⁵⁴

While expressed differently, the approaches in *Micula*, *Bilcon*, *Lemire*, *Mamidoil* and *Electrabel* appear to consider the right to regulate as implicitly part of the standard of FET itself. The Tribunal in *Mamidoil* affirmed this when it held that:

The standard has developed to protect an investor against unpredictable, unfair and unreasonable policy measures. At the

¹⁰⁵² *Electrabel* 2012 Award (n 935) [7.75]-[7.78].

¹⁰⁵³ *Electrabel* 2015 Award (n 1051) [165].

¹⁰⁵⁴ *Electrabel* 2015 Award (n 1051) [166].

outset, *this impliedly recognizes a State's legitimate interest and right to change conditions reasonably for public policy purposes*. Both aspects have to be balanced when establishing the right point in time during a long and complex process from when a State is restricted in the use of its sovereign power and the investor is protected.¹⁰⁵⁵ (Emphasis added)

However, in cases where there has been a specific commitment entered into by the State, while not necessarily decisive,¹⁰⁵⁶ the discussion of States' right to regulate has been more cursory. For example, in *BG Group v Argentina*, the Tribunal acknowledged that 'in order to adapt to changing economic, political and legal circumstances the State's regulatory power still remains in place...the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well'.¹⁰⁵⁷ However, in that case, the modification to the regulatory framework had been 'fundamental' and 'radical' and had reversed commitments made precisely to encourage investment. Apart from the acknowledgment of Argentina's regulatory power, the emphasis of the award was on the legitimate expectations and their undermining by Argentina.

In contrast to the decisions in *Mamidoil* and *Electrabel*, in *BG Group v Argentina* it is not clear how the 'legitimate right subsequently to regulate domestic matters in the public interest' was 'taken into consideration' by the Tribunal, beyond acknowledging that such a right exists. The invocation of the right to regulate in that case appears to be similar to the concessions disputes

¹⁰⁵⁵ *Mamidoil* (n 63) [703].

¹⁰⁵⁶ *Electrabel* 2012 Award (n 935).

¹⁰⁵⁷ *BG Group v Argentina* (n 640) [298] (quoting *Saluka*).

discussed in Chapter Three where States (unsuccessfully) invoked ‘sovereignty’ as a broad justification for their conduct.¹⁰⁵⁸ This topic will be revisited in Chapter Six when seeking to define the right to regulate.

2. A deferential ‘standard of review’

In several investment disputes, investor-State arbitration tribunals have articulated the right to regulate as something to which investment tribunals must defer when making their decision. In this context, deference concerns an investment tribunal ‘exercising restraint in adjudicating’ through ‘attach[ing] weight to the reasons given by the primary decision-maker for its decision and...refrain[ing] from making or from acting on the adjudicator’s own assessment of the matter’.¹⁰⁵⁹

In *SD Myers*, for instance, the NAFTA Tribunal noted the ‘high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders’¹⁰⁶⁰ and that the FET standard did not create an ‘open-ended mandate to second-guess government

¹⁰⁵⁸ See Chapter Three, Part V(1)(b).

¹⁰⁵⁹ Henckels, ‘The Role of the Standard of Review and the Importance of Deference in Investor–State Arbitration’ (n 99) 115–116; Viñuales, *Foreign Investment and the Environment in International Law* (n 131) 379.

¹⁰⁶⁰ *SD Myers* (n 19) [263]. See also *Lemire* (n 909) [505]; *Glamis Gold* (n 20) [617]; *Gemplus SA, SLP SA and Gemplus Industrial SA de CV v United Mexican States*, ICSID Case No.ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010, Pt VI, [26]; *Invesmart* (n 592) [501].

decision making'.¹⁰⁶¹ In *Unglaube v Costa Rica*, the Tribunal referred to the police power of States but in the context of deference:

...to prove a breach of the standard, a claimant must show more than mere legal error. Where...a valid public policy does exist, and especially where the action or decision taken relates to the State's responsibility "or the protection of public health, safety, morals or welfare, as well as other functions related to the taxation and police power of states", *such measures are accorded a considerable measure of deference* in recognition of the right of domestic authorities to regulate matters within their borders.¹⁰⁶²

The Tribunal continued by noting that this deference is not unlimited, and that the important public purpose behind a regulatory measure would not shield a State from being liable for breach of the FET standard if their action is arbitrary or discriminatory.¹⁰⁶³

Similarly, in *Teco v Guatemala*, the Tribunal agreed with the oft-cited passage in *Methanex* that accepted the police powers doctrine in an expropriation context¹⁰⁶⁴ when discussing an alleged breach of the FET standard under the CAFTA-DR.¹⁰⁶⁵ However, it prefaced its statement of approval of *Methanex* by noting that it was 'mindful of the deference that international tribunals should pay to a sovereign State's regulatory powers'.¹⁰⁶⁶ This deference to a State's regulatory

¹⁰⁶¹ *ibid* [261]. See also *Saluka* (n 3) [284]; *Gemplus* (n 1060) Pt VI, [26]; *Invesmart* (n 592) [501]; *Levy de Levi* (n 936) [161].

¹⁰⁶² *ibid* [246] (emphasis added), citing

¹⁰⁶³ *Unglaube* (n 24) [247].

¹⁰⁶⁴ *Methanex* (n 22) Part IV, Chapter D, [7].

¹⁰⁶⁵ *Teco* (n 927) [491].

¹⁰⁶⁶ *ibid* [490].

powers, however, could not ‘amount to condoning behaviours that are manifestly arbitrary, idiosyncratic, or show a complete lack of candour in the conduction of the regulatory process’.¹⁰⁶⁷ In the Tribunal’s view, its task was ‘not to second-guess or to review decisions that have been made genuinely and in good faith by a sovereign in the normal exercise of its powers’¹⁰⁶⁸ but rather to determine whether the State’s conduct amounted to an abuse of power that was arbitrary, or taken ‘in manifest disregard of the applicable legal rules and in breach of due process in regulatory matters’.¹⁰⁶⁹

Articulating the right to regulate as something to which tribunals must defer is different to balancing the right to regulate with legitimate expectations within the FET standard. Deference involves questions of a tribunal’s competence to consider an issue, rather than questions of the State’s liability. Under the deference approach, tribunals proceed on the basis that ‘national authorities should be the main determinant of the public interest in situations of normative uncertainty’.¹⁰⁷⁰ In particular, tribunals should ‘display restraint and refrain from second-guessing the importance of the objective [of the State] or the desired level of protection or achievement of it’.¹⁰⁷¹

¹⁰⁶⁷ *ibid* [492].

¹⁰⁶⁸ *ibid* [493].

¹⁰⁶⁹ *ibid*.

¹⁰⁷⁰ Henckels, ‘The Role of the Standard of Review and the Importance of Deference in Investor–State Arbitration’ (n 99) 123.

¹⁰⁷¹ *ibid* 125.

In contrast with the ‘starting point’ and ‘balancing’ approaches, it is not entirely clear whether tribunals invoking deference consider this deference to be part of the FET standard itself, or whether it is something that is additional to it. In *Glamis*, the Tribunal emphasised that deference was impliedly part of the standard rather than something additional to it:

Respondent argues below that, in reviewing State agency or departmental decisions and actions, international tribunals as well as domestic judiciaries favour deference to the agency so as not to second guess the primary decision-makers or become “science courts.” ... In the present case, the Tribunal finds the standard of deference to already be present in the standard as stated, rather than being additive to that standard. The idea of deference is found in the modifiers “manifest” and “gross” that make this standard a stringent one; it is found in the idea that a breach requires something greater than mere arbitrariness, something that is surprising, shocking, or exhibits a manifest lack of reasoning.¹⁰⁷²

In contrast, the reference in *SD Myers* and other cases to the ‘high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders’¹⁰⁷³ suggests that deference is applied in ‘international law’ more generally, rather than something that is part of the FET standard.

IV. CONCLUSION

As is apparent from the case law examined in this Chapter, the treatment of public interest regulation and the articulation of any right to enact such regulation in the

¹⁰⁷² *Glamis Gold* (n 20) [617].

¹⁰⁷³ *SD Myers* (n 19) [263]. See also *Lemire* (n 909) [505]; *Glamis Gold* (n 20) [617]; *Gemplus* (n 1060) [26]; *Invesmart* (n 592) [501].

FET context are not consistent or clear. The lack of clarity arises at two levels, namely, divergent approaches to defining the FET standard (which in turn has different implications for the lawfulness of public interest regulation), and divergent approaches to role that the right to regulate plays in the FET analysis. In particular, there is frequent reference to the right to regulate or similar language but not a clear exposition of how that right applies to the resolution of a FET claim. This makes it difficult to determine the extent to which the right to regulate may provide a basis upon which States can defend themselves in a FET dispute.

CHAPTER SIX

DEFINING THE RIGHT TO REGULATE AND EXPANDING THE POLICE POWERS DOCTRINE

I. INTRODUCTION

The preceding two chapters have highlighted three conclusions. First, in investor-State disputes pursuant to IITs concerning challenges to public interest regulation, States have appealed to their police power (in an indirect expropriation context) and their right to regulate (in a FET context) when defending their enactment of public interest regulation, and tribunals have considered and applied these concepts. Secondly, the police powers doctrine is a principle of customary international law, the effect of which is that exercises of police power will not constitute an indirect expropriation. Thirdly, the language of ‘right to regulate’ is common in FET disputes, but it is a concept that is not applied consistently and the effect of the right to regulate on a claim is not clear. One concept (the police powers doctrine) is therefore well established, and another concept (the right to regulate) is frequently cited but neither clearly articulated nor applied.

The purpose of this Chapter is to determine the preferable meaning and effect of the right to regulate and, to the extent that the concept overlaps with the police powers doctrine, whether that distinction is justified. It will be argued in Part II of this Chapter that the right to regulate is a concept that is capable of many meanings, two of which are particularly apparent in case law and

scholarship. First, the right to regulate could be articulated as a contemporary articulation of the longstanding principle that inherent in State sovereignty is the right of States to choose and implement their own political, economic and legal systems, including through the enactment of public interest regulation. Secondly and alternatively, the right to regulate could be seen as essentially fulfilling the same role and bearing the same meaning as the police power. With respect to the first articulation of the right, it will be argued that such an articulation is not necessarily incorrect, but it does not assist in the resolution of a dispute concerning public interest regulation and provides no basis upon which States can defend their conduct in the face of competing treaty obligations. However, in line with the second articulation, it will be argued that the distinction between the right to regulate and police power is not justified, and the latter should be preferred. Finally, it will be argued that the police powers doctrine can and should be applied in circumstances outside of the law of indirect expropriation.

II. DEFINING THE RIGHT TO REGULATE

In Chapter One, reference was made to the quote by JL Brierly as to the challenges presented by ‘catchwords’ in international law ‘about which little seems to be generally known [except] their extreme sanctity’ and that international law has always been susceptible to the ‘tyranny of phrases’.¹⁰⁷⁴ Taking into account the

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Brierly (n 35) 8.

various ways in which it has been described and invoked in FET disputes, the right to regulate may aptly be regarded as one of these catchwords.

This Part will seek to determine the meaning of the right to regulate. In doing so, the Part is divided into three sections. First, several possible constructions of the right to regulate will be eliminated, thus narrowing the scope of the inquiry. The second part will then explore and critically examine the proposition that the right to regulate can be taken to be a reference to a catch-all phrase that encapsulates States' powers that are inherent in, and are an attribute of, State sovereignty. Finally, the third part examines the alternative proposition that the right to regulate is substantively the same as the police powers doctrine.

1. The 'Tyranny of Phrases' and the right to regulate: narrowing the inquiry

As was explored in Part III of Chapter Five, tribunals determining FET disputes have considered that States' right to regulate is something that must be balanced alongside investors' expectations, and also that the tribunals must defer to the right to regulate when making a decision. The language used to describe the right is variable, from being a 'prerogative...to regulate',¹⁰⁷⁵ a State's 'right to exercise its powers',¹⁰⁷⁶ 'regulatory power',¹⁰⁷⁷ or 'legislative power',¹⁰⁷⁸ among others. The invocation of this language and its role in resolving FET disputes therefore suggests that the right to regulate has some role to play and some special

¹⁰⁷⁵ *Achmea* (n 25) [244].

¹⁰⁷⁶ *AES* (n 568) [9.3.29].

¹⁰⁷⁷ *Total* (n 637) [115]; *Perenco* (n 720) [560]; *Teco* (n 927) [490].

¹⁰⁷⁸ *Parkerings* (n 907) [332].

character. However, the case law to date has not consistently, or satisfactorily, explained this.

Given the various ways in which the right to regulate has been expressed, before examining in detail how the right to regulate should be understood it is helpful to narrow the scope of the inquiry by explaining ways in which the right should *not* be understood. This section will examine four different ways in which the right to regulate could at first glance be understood, and then explain why such conceptualisations are inapposite. The first three concepts (jurisdiction, fundamental rights and duties of States, and *domaine réservé*) bear a resemblance to the language the surrounds the contemporary references to the right to regulate in scholarship and case law. The fourth concept provides that the ‘right’ to regulate would only exist from what is left over once the scope of the obligation to protect investment has been defined. In examining these concepts, the meaning of the right to regulate can be narrowed down, and certain conceptualisations of the right can be eliminated.

(a) Jurisdiction

An international law principle that may, at first glance, provide a lens through which the right to regulate may be understood is that of prescriptive jurisdiction. States have *jurisdiction* to prescribe rules of law within their territory.¹⁰⁷⁹

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DW Bowett, ‘Jurisdiction: Changing Patterns of Authority over Activities and Resources’ (1982) 53 *British Yearbook of International Law* 1; Alex Mills, ‘Rethinking Jurisdiction in International Law’ (2014) 84 *British Yearbook of International Law* 187, 196; Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, Oxford University Press 2015) 8.

The connection between jurisdiction and States' regulatory powers has long been recognised. FA Mann, for instance, describes this 'prescriptive jurisdiction' in the following terms:

Jurisdiction is concerned with the State's *right of regulation* or, in the incomparably pithy language of Mr. Justice Holmes, with the right "to apply the law to the acts of men". It does not matter whether it is exercised by legislative, executive or judicial measures...¹⁰⁸⁰

(emphasis added.)

However, the concept of jurisdiction to prescribe or legislate only relates to the *competence* of the States to regulate, and not the legal consequences of regulating in a particular way or for a particular purpose.¹⁰⁸¹ That is, prescriptive jurisdiction lacks substantive content. At its highest, prescriptive jurisdiction acknowledges that States *can* regulate in the public interest, insofar as States can regulate generally, but does not provide assistance in ascertaining liability when States *do* regulate in the public interest.

There are several additional reasons that the right to regulate is unlikely to be synonymous with States' prescriptive jurisdiction. First, regardless of the different usage, the right to regulate is often mentioned alongside the words 'in the public interest', which suggests that the concept applies to regulation for a

¹⁰⁸⁰ Mann, 'The Doctrine of Jurisdiction in International Law' (n 48) 13, quoting Holmes J in *Wedding v Meyler* 192 US 573, 584 (1904) and *Central Railroad v Jersey City* 209 US 473, 479 (1908); See also Robert Jennings and FA Mann, 'The International Jurisdiction of States', *Report of the Fifty-Second Conference held at Helsinki, August 14th to August 20th 1966* (International Law Association 1966) 109.

¹⁰⁸¹ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press 1995) 56.

particular purpose using particular methods and goes further than a broad acknowledgement of prescriptive jurisdiction. Further, as was explored in Chapter Five, the fact that States can regulate ‘in the public interest’ is often cited to frame the scope of FET obligations in IITs: if it is a factor that must be balanced alongside legitimate expectations, it appears to be relevant in determining the scope of the obligation. Unlike prescriptive jurisdiction, the right to regulate is often used in a way that suggests it has substantive content. This suggests that the right to regulate goes further than simply referring to States’ competence to regulate.

(b) Fundamental Rights and Duties of States

The articulation of the right to regulate as a ‘plenary right’ or ‘sovereign right’,¹⁰⁸² suggests that the right has some special character. To this extent, it is worth examining whether the right to regulate could be understood through the prism of ‘fundamental rights of States’.

The doctrine of ‘fundamental rights of States’ explores whether certain rights of States are of a ‘special, more fundamental character, in the same way as certain rights of individuals allegedly are’.¹⁰⁸³ In other words:

¹⁰⁸² For example, *Sicilian Sulphur* (n 145) 1187-1188; Mr Foster, Secretary of State, to Messrs McKesson & Robbins (n 159) 77; *Peruvian Monopoly* (n 158) 349; *Jesse Lewis* (n 166) 89; *Canadian Claims for Refund of Duties* (n 170); see further Chapter Two, Part II; see also *Revere Copper* (n 467) 286.

¹⁰⁸³ Dan Joyner and Marco Roscini, ‘Is There Any Room for the Doctrine of Fundamental Rights of States in Today’ (2015) 4 *Cambridge Journal of International and Comparative Law* 467, 467-468; Ricardo J Alfaro, ‘The rights and duties of states’ (1959) 97 *Recueil des Cours* 91.

Being the most prominent among the different subjects of international law, a State is by definition endowed with the capability of bearing rights and duties under international law. Whilst these may derive from a variety of sources of international law, including treaties and customary international law, the question arises as to the existence of rights and duties inherently linked to the creation and the essence itself of a State and, thus, independent of other sources of legal obligation of a voluntary or customary, particular or general character...¹⁰⁸⁴

The doctrine of fundamental rights and duties of States received considerable attention in the earlier part of the twentieth century.¹⁰⁸⁵ However, there was not a general acceptance of 'rights' that were to be characterised as 'fundamental',¹⁰⁸⁶ nor was there agreement as to whether such rights derived from existence of the State itself or from positive sources of international law (such as customary international law),¹⁰⁸⁷ nor was the effect of such 'rights' on an international claim against the State clearly articulated.

Notwithstanding the diverging views on the status and scope of fundamental rights and duties of States, four rights were frequently cited as having 'fundamental' status: that of independence, sovereignty, equality, and self-preservation.¹⁰⁸⁸ The notion that States' had the right to choose their own political,

¹⁰⁸⁴ Sergio Carbone and Schiano di Pepe, 'States, Fundamental Rights and Duties', *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2009).

¹⁰⁸⁵ Alfaro (n 1083); Stephen Neff, 'The Democracy, Rise and Decline of Fundamental Liberties of States' (2015) 4 *Cambridge Journal of International and Comparative Law* 482.

¹⁰⁸⁶ Arthur Watts, 'Report of the International Law Commission on the Work of the 51st Session' (International Law Commission 1999) UN Doc A/54/10 1645.

¹⁰⁸⁷ Joyner and Roscini (n 1083); Alfaro (n 1083); Hans Kelsen, 'The Draft Declaration on Rights and Duties of States' (1950) 44 *The American Journal of International Law* 259.

¹⁰⁸⁸ Alfaro (n 1083).

economic and social and cultural systems, and to legislate upon such interests, fell within the concepts of independence and sovereignty.¹⁰⁸⁹

However, fundamental *rights* of States are limited by States' *duties*, including the duty to fulfil in good faith obligations assumed under international agreements.¹⁰⁹⁰ Thus, that States possess a right to exercise jurisdiction within their territory (including through enacting public interest regulation) would not overcome any duty owed by the State that it has freely entered into. The concept of fundamental rights of States, therefore, is also not a helpful prism through which the right to regulate could be understood. In particular, if the right to regulate were to be considered a 'fundamental' right (to the extent such fundamental rights exist), it is not clear how that right would interact with obligations entered into, including the obligation to treat investors fairly and equitably and the obligation not to expropriate without the payment of compensation.

(c) Domaine réservé

Some scholars have suggested that the issues surrounding the right to regulate in international investment law 'mirror...the perennial tension in the interplay of

¹⁰⁸⁹ For example, Convention on the Rights of Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19, Article III; Elihu Root, 'The Declaration of the Rights and Duties of Nations Adopted by the American Institute of International Law', *Proceedings of the American Society of International Law at Its Annual Meeting (1907-1917)*, vol 10 (1916); 'Draft Declaration on Rights and Duties of States with Commentaries' [1949] Yearbook of the International Law Commission 287.

¹⁰⁹⁰ 'Draft Declaration on Rights and Duties of States with Commentaries' (n 1089). See also Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (adopted 24 October 1970) UNGA Res 2725 (XXV).

international law and the *domaine réservé*.¹⁰⁹¹ This language can be found in some of the earlier diplomatic and inter-State disputes referred to in Chapter Two. For instance, the *Frederick J Peters* case referred to ‘domestic questions’ of States. The language of *domaine réservé* was particularly common in French diplomatic disputes.¹⁰⁹²

The *domaine réservé* – the reserved domain - refers to:

Matters of legislative regulation or of administrative activity which...public international law itself, as a matter of principle, leaves to the discretion of sovereign States, to be dealt with freely in accordance with their national ideas.¹⁰⁹³

The *domaine réservé* could be seen as a reference to ‘the entire domain of matters which are not (yet) regulated by positive international law’, suggesting the term ‘has a purely negative content without much real value’.¹⁰⁹⁴ Or, it could have a more positive character, identifying those matters on which international law deliberately remains silent and does not govern ‘because [international law]

¹⁰⁹¹ Diane Desierto, *Public Policy in International Economic Law: The ICESCR in Trade, Finance, and Investment* (Oxford University Press 2015) 167; for a discussion in a trade context, see Trachtman (n 29) 11.

¹⁰⁹² Kiss, ‘Le Domaine Réservé a La Compétence Exclusive de L’état’ (n 169); Kiss, ‘La Condition Des Étrangers’ (n 169); Verzijl, *International Law in Historical Perspective*, Vol 1 (n 169) 272; Politis (n 169); Institut de Droit International, ‘La Détermination Du Domaine Réservé et Ses Effets’ (n 169) 99.

¹⁰⁹³ Verzijl, *International Law in Historical Perspective*, Vol 1 (n 169) 272; Katja Ziegler, ‘Domaine Réservé’, *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012); Politis (n 169) 43–60; Institut de Droit International, ‘La Détermination Du Domaine Réservé et Ses Effets’ (n 169).

¹⁰⁹⁴ Verzijl, *International Law in Historical Perspective*, Vol 1 (n 169) 273; CHM Waldock, ‘The Plea of Domestic Jurisdiction before International Legal Tribunals’ (1954) 31 *British Yearbook of International Law* 96, 97.

wishes to leave to the sovereign States an independent sphere of activity'.¹⁰⁹⁵ This latter description of the *domaine réservé* has also been described as matters 'within the domestic jurisdiction of the State'.¹⁰⁹⁶ The concept thus has a 'dual character as a doctrine concerned both with the boundary between international and State jurisdiction and with the substantive rights and obligations of States under international law'.¹⁰⁹⁷

The development of international law mechanisms to resolve questions of individual rights (such as human rights law and investment law) largely post-dated the discussions of *domaine réservé* in international law scholarship. However, the criticisms of the concept of 'domestic jurisdiction' and of *domaine réservé* that were prominent in the early part of the twentieth century¹⁰⁹⁸ echo some of the contemporary criticisms of international investment law. Brierly noted an 'inconvenient truth' about the concept of 'domestic jurisdiction':

That truth is simply that on any interpretation of the phrase, the great majority of really dangerous international disputes arise out of matters which indisputably fall within the category of domestic jurisdiction, and the problem of how to deal with them is the most

¹⁰⁹⁵ Verzijl, *International Law in Historical Perspective*, Vol 1 (n 169) 274; Waldock (n 1094) 97.

¹⁰⁹⁶ *Nationality Decrees Issued in Tunis and Morocco (French Zone) on November 8th, 1921 (Great Britain v France)* (Advisory Opinion) [1923] PCIJ Rep Series B No.4, 23-24.

¹⁰⁹⁷ Waldock (n 1094) 98.

¹⁰⁹⁸ For example Brierly (n 35); Politis (n 169); DJ Llewelyn Davies, 'Domestic Jurisdiction: A Limitation on International Law' (1946) 32 *Transactions of the Grotius Society* 60; Lawrence Preuss, 'Article 2, Paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction' (1949) 74 *Recueil des Cours* 547; Waldock (n 1094).

crucial, and unfortunately also the most intractable, of all international problems.¹⁰⁹⁹

In particular, Brierly noted that while it was undisputable that there were some areas that were domestic concerns – citing a State’s choice of constitution, the right to regulate immigration, tariffs, and naturalisation as examples – there were ways in which these domestic questions could ‘shade off into other...[questions] of a more contentious kind’.¹¹⁰⁰ Brierly cited several examples of ‘shades’ of domestic issues which could raise contentious international questions, including treatment of minorities, ‘misgovernment producing repercussions in other states,...[and] unfair preferences in matters of tariffs or customs’.¹¹⁰¹ Moreover, delineating legal obligations into those the subject of international law and those that sit within the *domaine réservé* was perceived as a relative question,¹¹⁰² depending on and varying according to the development of international law.¹¹⁰³ Conceptualising the right to regulate by reference to the *domaine réservé* would thus risk undermining the long-accepted view that a State may not rely on its own internal law to evade obligations under international

¹⁰⁹⁹ Brierly (n 35) 13.

¹¹⁰⁰ *ibid* 14.

¹¹⁰¹ Brierly (n 35). See also the separate opinion of Sir Hersch Lauterpacht in *Certain Norwegian Loans*, Separate Opinion of Sir Hersch Lauterpacht (n 493) 51-52.

¹¹⁰² *Nationality Decrees Issued in Tunis and Morocco* (n 1096) 24.

¹¹⁰³ Institut de Droit International, ‘La Détermination Du Domaine Réservé et Ses Effets’ (n 169) Article 1, paragraph 2; Ziegler (n 1093). Michael Akehurst, ‘Jurisdiction in International Law’ (1972) 46 *British Yearbook of International Law* 145, 188.

law.¹¹⁰⁴ Thus, the concepts of *domaine réservé* also takes the matter no further, and may serve as a caution against construing any right to regulate too broadly.

(d) *The right to regulate as the rights left over once the scope of the obligation is ascertained*

Chapter Two cited several examples in early diplomatic practice (particularly emanating from the US) that perceived of the police power as connoting the residuary sovereignty of States; that is, States' authority to regulate what is left over after other international legal obligations are taken into account. This reflects an approach to international law whereby all State conduct is lawful (including public interest regulation) in the absence of a specific international legal rule that limits that authority.¹¹⁰⁵ That is, 'that which is not prohibited is permitted'.¹¹⁰⁶ The approach was summarised by the PCIJ in *SS Lotus*:

Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect with a wide measure of discretion which is limited only in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

¹¹⁰⁴ *Georges Pinson Case (French-Mexican Mixed Claims Commission)* (1927) 4 ILR 9, 11. See also *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* (Advisory Opinion) [1932] PCIJ Rep Series A/B No.44, 24; *Free Zones of Upper Savoy and the District of Gex (France v Switzerland)* [1929] PCIJ Rep Series A/B No.46, 167; *Greco-Bulgarian Communities* (Advisory Opinion) [1930] PCIJ Rep Series B No.17, 32.

¹¹⁰⁵ Hans Kelsen, *Principles of International Law* (Rinehart & Company 1952) 306; Helen Quane, 'Silence in International Law' (2014) 84 *British Yearbook of International Law* 240, 253-260. *SS Lotus (France v Turkey)* [1927] PCIJ Rep Series A No.10; *Nicaragua* (n 447) [269]; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ 226, 291 (Separate Opinion of Judge Guillaume).

¹¹⁰⁶ Quane (n 1105) 253.

...

In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.¹¹⁰⁷

Under this approach, once the content of the obligation is identified, what is left over is the scope of States' right to regulate in the public interest. For example, a State may regulate in the public interest provided that regulation does not constitute an indirect expropriation or violate the principles of FET. However, this approach would ultimately negate the need for identifying any 'right to regulate in the public interest' at all, residual or otherwise. If the enactment of public interest regulation is not a breach of the FET standard, then it is lawful and not in violation of international law. Public interest regulation would be lawful because it is not in violation of international law, not because of any positive right to regulate. That is, '[i]n the absence of a prohibition, a state is free to act as it sees fit without the need for a specific basis that permits its action'.¹¹⁰⁸

This approach echoes the ICJ's conclusion in the *Kosovo Advisory Opinion* that 'it is entirely possible for a particular act...not to be in violation of international law without necessarily constituting the exercise of a right conferred by it'.¹¹⁰⁹ As Judge Simma noted in his separate opinion in the *Kosovo Advisory*

¹¹⁰⁷ *SS Lotus* (n 1105) 19.

¹¹⁰⁸ An Hertogen, 'Letting Lotus Bloom' (2015) 26 *European Journal of International Law* 901, 902.

¹¹⁰⁹ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403, [56].

Opinion, such an approach recognises that ‘everything which is not expressly prohibited carries with it the same colour of legality’.¹¹¹⁰ Judge Simma was critical of such an approach, describing it as ‘redolent of nineteenth-century positivism’.¹¹¹¹

As noted in Chapter Two, some of the early articulations of the police power (particularly in US domestic law articulations of the doctrine) would support such an approach. The line of indirect expropriation cases that focus solely on the effect of the measure without considering the police power at all could also be construed as supporting this approach. It is consistent with the view that a tribunal’s task is to determine solely ‘those commitments...[the State] in its sovereign power chose to undertaken...are respected in accordance with the rule of law’.¹¹¹²

However, there are several reasons why articulating any right to regulate as one that only exists from what is left over once the scope of the obligation is ascertained is problematic. First, such an approach is inconsistent with State practice and the reasoning of tribunals, which has been to articulate the right to regulate in positive terms. For instance, in diplomatic disputes, while States’ broad sovereign authority to regulate was limited by international treaty obligations to

¹¹¹⁰ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 478, [8] (Declaration of Judge Simma).

¹¹¹¹ *ibid.*

¹¹¹² *Quiborax* (n 2) [89].

which State had committed itself,¹¹¹³ States frequently asserted their right to legislate for particular purposes (such as health and the ‘common good’) in a manner that interfered with property to justify breach or shape the scope of the obligation.¹¹¹⁴ Within international human rights law, the ability of States to regulate the use of property ‘in the general interest’ was considered as part of the right to property.¹¹¹⁵ The discussions of the States’ entitlement to enact measures ‘as part of normal governmental processes’ during the negotiations of the 1963 and 1967 Draft Conventions were similarly cast in positive terms (‘these are measures which Parties are entitled to take’) rather than residual terms.¹¹¹⁶ The negotiations for the MAI also revealed that ‘normal and non-discriminatory activity’ was not considered to contravene the proposed expropriation or FET provisions, again casting the States right to undertake such activity in positive terms.¹¹¹⁷ Similarly, States’ pleadings in inter-State disputes advanced the proposition that obligations under treaties did not prevent ‘reasonable regulation’, and Tribunals interpreted treaties in a manner that acknowledged this.¹¹¹⁸

¹¹¹³ For example, *Italian Life Insurance Monopoly* (n 161). See the discussion of the monopolies diplomatic disputes in Chapter Two, Part II.

¹¹¹⁴ For example, the arguments of the Sicilian government in *Sicilian Sulphur* (n 145) 1187-1188. See Chapter Two, Part II.

¹¹¹⁵ See ECHR (n 425) Protocol 1, Article 1(2); ACHR (n 443) Article 21(1); ACHPR, Article 14. See Chapter Three, Part III.

¹¹¹⁶ OECD, ‘1963 Draft Convention’ (n 360) 131. See Chapter Three Section II.1.

¹¹¹⁷ OECD, ‘The Multilateral Agreement on Investment (Report by the Chairman of the Negotiating Group)’ (n 368) 13, 15; OECD, “Indirect Expropriation” and the “Right to Regulate” in International Investment Law’ (n 368) 9.

¹¹¹⁸ *North Atlantic Coast Fisheries* (n 252) 189. See Chapter Two, Part III(4)(b).

Further, investment tribunals have defined the scope of the obligation itself by reference to the right to regulate in the public interest, rather than considering such rights only after the obligation is interpreted. In a FET context, the *Suez* Tribunal noted that if a Tribunal found a violation of the FET standard ‘it must of necessity have determined that...[the] State exceeded its reasonable right to regulate’.¹¹¹⁹ Similarly, in *Mamidoil* the Tribunal noted that the FET standard ‘impliedly recognizes a State’s legitimate interest and right to change conditions reasonably for public policy purposes’.¹¹²⁰ Cases in which the right to regulate was considered as a factor that must be balanced with legitimate expectations of a foreign investor also reflect this approach.¹¹²¹ The right of States to regulate in the public interest therefore appears to be considered from ‘within’ the obligation, not as something left over once the scope of the obligation is ascertained.

2. The right to regulate as a reflection of State sovereignty

There is language in investor-State arbitration awards and historical State practice and *opinio juris* which suggests that the references to the right to regulate could be conceptualised as relating to State sovereignty. For instance, in the FET analysis undertaken by the Tribunal in *Philip Morris v Uruguay*, the Tribunal noted that investors’ legitimate expectations and right to legal stability did not affect ‘State’s rights to exercise its *sovereign authority* to legislate and to adapt its legal system to

¹¹¹⁹ *Suez* (n 634) [148].

¹¹²⁰ *Mamidoil* (n 63) [703].

¹¹²¹ *Lemire* (n 909) [285];

changing circumstances'.¹¹²² Similarly, as noted in Chapter Two, early international disputes concerning the treatment of foreigners and their property invoked language of the sovereignty and 'sovereign right' or 'plenary right' to regulate, which further suggests that the right to regulate and 'sovereignty' are related.¹¹²³

In this way, the right to regulate could be taken to refer to States' rights 'to choose and implement [their] own political, economic and social systems'¹¹²⁴ or, put another way, 'the right to exercise...the functions of a State'¹¹²⁵ as an inherent element of sovereignty. Pursuant to this right, States may regulate their political, economic and social affairs and adopt laws to protect matters of public interest.¹¹²⁶ It is not disputed that such a right exists. Indeed, such a right has long been acknowledged as an 'essential prerogative'¹¹²⁷ of State sovereignty. The enactment of legislation, for instance, has long been recognised as one of the most 'obvious exercise[s] of sovereign power'.¹¹²⁸

However, with respect to the research question in this thesis, it is unclear how this conceptualisation of the right to regulate would assist States when

¹¹²² *Philip Morris v Uruguay* (n 17) [422] (emphasis added);

¹¹²³ For example, *Sicilian Sulphur* (n 145) 1187-1188; Mr Foster, Secretary of State, to Messrs McKesson & Robbins (n 159) 77; *Peruvian Monopoly* (n 158) 349; *Jesse Lewis* (n 166) 89; *Canadian Claims for Refund of Duties* (n 170); see further Chapter Two Section II; see also *Revere Copper* (n 467) 286.

¹¹²⁴ *Nicaragua* (n 447) [233]; *Texaco* (n 476) [59].

¹¹²⁵ *Island of Palmas Case (Netherlands, USA)* (1928) reprinted in (1949) 2 RIAA 829, 838.

¹¹²⁶ *Lemire* (n 909) 505; *Nicaragua* (n 447) [233]; *Moloo and Jacinto* (n 11) 550.

¹¹²⁷ *Texaco* (n 476) 469.

¹¹²⁸ *Legal Status of Eastern Greenland* (n 48) 48

defending the lawfulness of public interest regulation in an IIT dispute, beyond pleading that it be acknowledged, and possibly deferred to, by a Tribunal. This is because, as was explored in Chapters Two and Three, while States have appealed to their sovereignty or 'sovereign rights' so as to justify the enactment of regulation, sovereignty does not in and of itself provide a basis or justification for violating international legal norms.

While sovereignty gives States this right to regulate, sovereignty also empowers States to limit this right through entering into international agreements.¹¹²⁹ As a result, it cannot be argued that this right to regulate could greatly assist in determining breaches of international agreements freely entered into between States (including IITs), as 'a State cannot invoke its sovereignty to disregard commitments freely undertaken through the exercise of this same sovereignty'.¹¹³⁰ This proposition has long been recognised by eminent publicists, including Lord McNair, who noted in 1958:

When a State admits or excludes aliens or certain classes of aliens, when it surrenders or declines to surrender to another State persons alleged to be criminals or political refugees, when it imposes a tariff on certain foreign imports, and so forth, it is exercising rights of sovereignty. But no court would entertain for a moment the plea that because a State is sovereign it can at its discretion violate a treaty concerning the admission of aliens, an extradition treaty or a treaty

¹¹²⁹ *Case of the SS 'Wimbledon' (United Kingdom, France, Italy and Japan v Germany)* [1923] PCIJ Rep Series A No.1 (August 17) 25; McNair, 'Treaties and Sovereignty' (n 263) 222–223; Jan Paulsson, 'The Power of States to Make Meaningful Promises to Foreigners' (2010) 1 *Journal of International Dispute Settlement* 341, 343.

¹¹³⁰ *Texaco* (n 476) 475; see also *Aramco* (n 473) 216; *Anglo-Iranian Oil Co Memorial Submitted by the Government of the United Kingdom* (n 479) 80 .

regulating commercial intercourse, or validly take any action, legislative or executive, which is inconsistent with any such treaty.¹¹³¹

At its highest, this broad conceptualisation of right to regulate where ‘right’ refers to States’ powers that are an attribute sovereignty can be used in the terms described by Vaughan Lowe: a useful expression for ‘identifying a framework for inquiry’,¹¹³² but not much more. In this sense, the right to regulate may be more rhetorical than substantive.¹¹³³ Elihu Lauterpacht echoed this sentiment when he described the invocation of ‘sovereignty’ in international law as ‘fall[ing] back on a word which has emotive quality lacking meaningful specific content’.¹¹³⁴ That is not to say that such a right does not exist. However, the existence of the right alone does not provide assistance in determine the consequence its exercise. This articulation of the right to regulate would not produce any concrete legal effect on the scope of a State’s obligation.

3. The right to regulate as a concept that has the same meaning as the police power

This section argues that many invocations of the right to regulate in FET disputes may be better characterised, in substance, as invocations of the police powers doctrine. It will then be argued that the right to regulate can best be understood

¹¹³¹ McNair, 'Treaties and Sovereignty' (n 263) 229.

¹¹³² Lowe (n 356) 83–84.

¹¹³³ For a critical discussion of transforming rhetoric into rights in a human rights context, see Philip Alston, ‘Conjuring up New Human Rights: A Proposal for Quality Control’ (1984) 78 *American Journal of International Law* 607, 608.

¹¹³⁴ Eli Lauterpacht, ‘Sovereignty--Myth or Reality?’ (1997) 73 *International Affairs* 137, 141.

as being synonymous with the police powers doctrine if it is to have any meaning of consequence in the resolution of an investment dispute.

(a) Distinction between police power and right to regulate in FET jurisprudence

There is difference in opinion among tribunals as to whether the police power is a synonymous concept with the right to regulate.

Several tribunals have treated the right to regulate in FET disputes as something different from the police power. The most explicit example of this is in *Suez v Argentina*.¹¹³⁵ In that case, the Claimant argued that Argentina's legislative and regulatory measures in response to an economic crisis (including failure to respect the Claimant's tariffs in accordance with a concession agreement for the supply of water and wastewater services, as well as forced renegotiation and eventual termination of a concession contract) amounted to a violation of the FET standard under the Spain - Argentina BIT and the France- Argentina BIT. Argentina argued that in light of the circumstances of the case, Argentina 'acted in a reasonable, responsible, non discriminatory and proportionate manner in the light of its responsibility to the population', and that such measures 'were within its police powers as a sovereign State'.¹¹³⁶

¹¹³⁵ *Suez* (n 634).

¹¹³⁶ *ibid* [189].

When considering the FET standard, the Tribunal noted that it ‘must ...bear in mind that the Concession by its term was subject to the regulatory authority of the Province, which had a reasonable right to regulate’.¹¹³⁷ The Tribunal continued:

Thus, in interpreting the meaning of ‘just’ or ‘fair and equitable treatment’ to be accorded to investors, the Tribunal must balance the legitimate and reasonable expectations of the Claimants with Argentina’s and particularly the Province’s right to regulate the provision of a vital public service...¹¹³⁸

The Tribunal further noted that the Claimants had a legitimate expectation that Argentina ‘would exercise that regulatory authority and discretion within the rules of the detailed legal framework that the Province had established for the Concession’.¹¹³⁹ The Tribunal ultimately concluded that Argentina’s actions ‘were outside the scope of Santa Fe’s legitimate right to regulate and in effect constituted an abuse of regulatory discretion’, and therefore violated its commitments under the applicable treaties to treat the Claimants’ investments fairly and equitably.¹¹⁴⁰

The Tribunal emphasised that the consideration of the right to regulate in a FET context was substantively different from consideration of police powers in an indirect expropriation context. The Tribunal acknowledged that States ‘have a legitimate right to exercise their police powers to protect the public interest’,¹¹⁴¹

¹¹³⁷ *ibid* [216].

¹¹³⁸ *ibid* [216].

¹¹³⁹ *ibid* [217].

¹¹⁴⁰ *ibid* [217].

¹¹⁴¹ *ibid* [147].

and that the police powers doctrine, in an indirect expropriation context, recognises that ‘States have a reasonable right to regulate foreign investments in their territories even if such regulation affects investor property rights’.¹¹⁴²

However, the Tribunal then held:

... [T]he 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 ... 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 ..., 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.¹¹⁴³

While *Suez* appears to be an isolated case in explicitly distinguishing the police power and right to regulate, *Philip Morris v Uruguay* appears to distinguish between the concepts implicitly. In particular, it will be recalled that one of the bases on which the investors’ claim of indirect expropriation was dismissed was on the basis that the police powers doctrine applied.¹¹⁴⁴ However, when analysing the FET standard, the Tribunal referred to ‘the State’s rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances’.¹¹⁴⁵

The majority of the Tribunal noted that whether particular treatment is fair and

¹¹⁴² *ibid* [148].

¹¹⁴³ *ibid* [148].

¹¹⁴⁴ *Philip Morris v Uruguay* (n 17).

¹¹⁴⁵ *Philip Morris v Uruguay* (n 17) [422].

equitable will depend on the circumstances of a particular case, and focussed its analysis on the principles of arbitrariness, legitimate expectations, and stability. In rejecting the argument that the challenged measures were arbitrary, the majority of the Tribunal instead concluded the measures were reasonable, not discriminatory or disproportionate and were enacted in good faith. In doing so, the majority of the Tribunal considered that changes to general legislation were not prevented by the FET standard if they did not ‘exceed the exercise of the host State’s normal regulatory power in pursuance of a public interest’ and did not modify the legal framework relied upon by an investor outside of ‘an acceptable margin of change’.¹¹⁴⁶

Notably, the Tribunal did not use the language of the ‘police power’ in the FET analysis, notwithstanding that much of the conclusion that underpinned the police power analysis in the indirect expropriation context (that the measures were non-discriminatory, proportionate and in pursuit of a public welfare objective) also underpinned the finding that the measures were ‘reasonable’ for the purposes of the FET analysis.¹¹⁴⁷ This is also notwithstanding that Uruguay relied on the argument that the measures were *bona fide* measures enacted in a non-discriminatory manner that were logically connected to the objective of protecting public health for both the indirect expropriation and the FET aspects of

¹¹⁴⁶ *ibid* [423].

¹¹⁴⁷ I have previously written on this aspect of the decision, from which this section of the thesis draws extensively: Mitchell (n 633).

the claim.¹¹⁴⁸ Thus, given the attention devoted to the ‘police powers doctrine’ in the indirect expropriation context, and the absence of such language in the FET context, it is implicit that the Tribunal perceived the police powers doctrine as applying solely to indirect expropriation.

(b) Is the distinction between the right to regulate and police power justified?

The foregoing analysis should not result in a conclusion that the police power and right to regulate are necessarily different concepts, for two reasons which will be discussed below in turn. First, the distinction between the concepts as drawn in *Suez* is, with respect, incorrect. Secondly, tribunals themselves have engaged in considerable cross-referencing between the two concepts, in which one concept is explained by reference to the other, suggesting the concepts have the same substantive meaning.

i) A critical analysis of the distinction in *Suez v Argentina*

In light of the analysis undertaken in the previous Chapters and the earlier discussion in this Chapter as to the meaning of the right to regulate, the basis upon which the police power and right to regulate are distinguished in *Suez* cannot stand. This is because, in light of the discussion in Chapter Four, it is apparent that the *Suez* Tribunal’s description of the police powers doctrine as an ‘explicit, affirmative defence to treaty claims’¹¹⁴⁹ in the sense of being an exception to requirement to pay compensation is, with respect, incorrect. As discussed in

¹¹⁴⁸ See Uruguay’s submission with respect to the FET claim at *Philip Morris v Uruguay* (n 17) [355], and the equivalent argument for the indirect expropriation claim at [217].

¹¹⁴⁹ *Suez* (n 634) [148].

Chapter Four, the police powers doctrine has applied as a principle that is relevant to determining whether an indirect expropriation has occurred, not an exception that justifies an expropriation once it has been found to occur.¹¹⁵⁰ Thus, the conceptual difficulty that tribunals appear to have had in applying the police powers doctrine outside of the indirect expropriation context appears to be connected with a misapprehension of the role and content of the police powers doctrine. This latter point will be revisited below in Part III of this Chapter.

The articulation of the police power explored in Chapter Four is more similar to the *Suez* Tribunal's articulation of the right to regulate in a FET context. Just as a finding of a breach of the FET standard 'must of necessity have determined that...[the] State has exceeded its reasonable right to regulate',¹¹⁵¹ a finding of indirect expropriation must have determined that the State did not validly exercise its police power. Seen in this way, the distinction drawn by the *Suez* Tribunal between the right to regulate and the police power appears to be a distinction without a difference. It is similarly evident that many tribunals that have considered the right to regulate as part of the FET standard (explored above in Part III(1) of Chapter Five) appear to see the right as operating more akin to the police power, rather than being a broad assertion of sovereignty. For instance, the finding of the Tribunal in *Mamidoil* that the FET standard impliedly recognises

¹¹⁵⁰ Viñuales, 'Sovereignty in Foreign Investment Law' (n 33) 336–339.

¹¹⁵¹ *Suez* (n 634) [148].

States' rights 'to change conditions *reasonably for public policy purposes*'¹¹⁵² and the finding of the Tribunal in *Lemire* that States' rights to 'adopt decisions for the protection of its public interests' must not 'provoke a disproportionate impact of investors'¹¹⁵³ all appear to give the right to regulate some substantive content and some work to do on shaping the scope of the obligation, similar to the role of the police power.

Secondly, even if it is assumed that the right to regulate is a distinct concept from the police power, the articulation of the right to regulate by the *Suez* tribunal appears to give the concept more significance in the resolution of a claim than it can permissibly have. That is, if the right to regulate is taken to have the meaning discussed above, namely that the concept is an articulation of States' powers or rights inherent in sovereignty, that sovereignty cannot be invoked to justify breaches of an international agreement the entry into which is, in itself, an exercise of sovereignty.

Moreover, insofar as the *Suez* Tribunal has tied the exercise of the right to regulate to the concept of reasonableness, it is unclear where this limitation on the exercise comes from if it does not derive from the police power. The articulations of the right to regulate discussed in Part II(1) and (2) of this Chapter above do not appear to be limited by reasonableness, nor could they be when such concepts at their highest go to the *existence* of a right rather than the consequence of its

¹¹⁵² *Mamidoil* (n 63) [703].

¹¹⁵³ *Lemire* (n 909) [285].

exercise. Where the language of ‘reasonableness’ has been connected to the right to regulate in the State practice and decisions of international courts and tribunals explored in Chapters Two and Three, the source of the language of reasonableness has derived from the police power. For instance, as noted in Chapter Two, in the *North Atlantic Coast Fisheries Case*, the UK’s pleadings defined the right of ‘reasonable regulation’ in relation to treaty obligations by reference to the jurisprudence concerning the limitations to the police power of States, which was in turn accepted by the Tribunal.¹¹⁵⁴

ii) Cross-referencing between the police power and right to regulate in Tribunal awards

Further, contrary to the proposition by the Tribunal in *Suez* that the two concepts are distinct, there is considerable cross-referencing between the police power in an indirect expropriation context and ‘right to regulate in the public interest’ in a FET context, in which one concept is supported by authority that refers to the other. This suggests that, while tribunals may appear to use different language across the two standards of protection, the same idea underlies both.

For example, in *BG Group v Argentina*, when determining the meaning of the applicable FET provision, the Tribunal noted that States’ ‘legitimate right to regulate domestic matters in the public interest must be taken into

¹¹⁵⁴

North Atlantic Coast Fisheries Arbitration at the Hague: Oral Argument before the Tribunal Constituted under an Agreement Signed at Washington on the 27th Day of January, 1909, between His Britannic Majesty and the United States of America (n 256); *North Atlantic Coast Fisheries* (n 252), 187-188.

consideration’,¹¹⁵⁵ citing as authority the proposition in *Feldman v Mexico* that not all government regulatory activity constituted compensable expropriation.¹¹⁵⁶ In *Total v Argentina*, the Tribunal cited a statement by Brownlie (that articulated the police powers doctrine in an expropriation context) to support the proposition that the measures under challenge were a ‘legitimate exercise of the host State’s governmental powers’ in a FET context.¹¹⁵⁷ In the same case, the conclusion that the measures were ‘bona fide regulatory measures of general application’ in the FET claim was also cited as a reason to deny the expropriation claim concerning the same measures.¹¹⁵⁸

Similarly, in *Invesmart v Czech Republic*, a Tribunal cited the findings of the *SD Myers* Tribunal in a FET context to support the conclusions that non-discriminatory regulation aimed at the general welfare would not constitute indirect expropriation and that it was not open to tribunals to second-guess government decision making.¹¹⁵⁹ In *EDF (Services) v Romania*, the Tribunal considered that a measure was not in violation of the applicable FET standard because it was ‘a measure falling within the police power of the State, taken in the public interest’.¹¹⁶⁰ The Tribunal in *Teco v Guatemala*, a dispute concerning the

¹¹⁵⁵ *BG Group v Argentina* (n 640) [298].

¹¹⁵⁶ *ibid*, quoting *Feldman* (n 583) [102].

¹¹⁵⁷ *Total* (n 637) [163]-[165].

¹¹⁵⁸ *ibid* [197].

¹¹⁵⁹ *Invesmart* (n 592) [497]-[501]. The Tribunal also expressly adopted the ‘police power’ test as put forward by *Saluka* (n 3).

¹¹⁶⁰ *EDF* (n 729) [292]-[294].

violation of a FET provision, endorsed the statement of the *Methanex* Tribunal concerning the lawfulness and non-expropriatory nature of regulation as a preface to its FET analysis.¹¹⁶¹ In *Un glaube v Costa Rica*, the Tribunal noted that measures within the police power of States would be accorded ‘a considerable measure of deference in recognition of the right of domestic authorities to regulate matters within their borders’ when determining a violation of the FET standard.¹¹⁶² Further, as will be discussed below, States have similarly relied in their pleadings on the police power in both FET and indirect expropriation contexts, further highlighting the overlap between the concepts.

This cross-referencing undertaken by tribunals demonstrates that the police power and right to regulate could be said to have the same substantive meaning, with the former being more prominent (although not exclusively) applied in an indirect expropriation context, and the latter in a FET context. From this analysis, it is apparent that there are many instances where the right to regulate and police power appear to be used substantively synonymously. Where the right to regulate is applied in this way, the distinction between the right to regulate and the police power is not justified. It is only if the right to regulate is taken to have the broader meaning espoused in Part II(2) of this Chapter above that the distinction may be justified, however in such circumstances the concept is of limited assistance for the reasons earlier stated.

¹¹⁶¹ *Teco* (n 927) [490]-[493].

¹¹⁶² *Un glaube* (n 24) [246]-[247].

4. Is there any other basis upon which the right to regulate can be said to exist in customary international law?

For completeness, a review of the State practice and accompanying *opinio juris* that was examined in Chapters Two and Three, together with more recent practice and case law, did not reveal any other bases upon which the right to regulate could be articulated that would produce any effect on a claim. With particular regard to States' pleadings in investor-State arbitration, there was no other basis on which the right to regulate could be said to exist apart from where the right was tied to the police power (discussed above and further in Part III(2) of this Chapter below) or expressed as a short-hand for the rights inherent in State sovereignty to which tribunals must defer.

5. Conclusion

The different ways in which the right to regulate can be conceptualised (and misused) suggests caution in embracing the right to regulate as a principle that States may rely upon when defending claims of indirect expropriation or unfair and inequitable treatment. States, broadly speaking, have a 'right' to regulate insofar as they have the right to adopt laws and regulations within their territory as an inherent aspect of State sovereignty. But that right does not limit the obligations States would otherwise be taken to have. To the extent the right to regulate is meant to convey something more and produce a concrete legal effect on a claim, there is no basis on which the right to regulate can be said to exist unless it is taken to have the same meaning as the police power.

III. THE BROADER APPLICABILITY OF THE POLICE POWERS DOCTRINE

The above analysis also highlights that tribunals, and some States, proceed on the assumption that the police powers doctrine does not apply outside of the context of indirect expropriation. As will be examined further below, this is not a correct assumption. This part will argue that the police powers doctrine can and does apply generally, rather than being a standard limited in its application to the law of expropriation.

1. Historically broad application of the police powers doctrine

The historical analysis conducted in Chapters Two and Three revealed frequent acknowledgment of the lawfulness of public interest regulation using the police powers doctrine (or substantively similar language) in contexts outside of indirect expropriation. Indeed, as noted in Chapter Two, early reference to the police power in diplomatic correspondence arose in the context of the international minimum standard.¹¹⁶³ So too did early scholarship,¹¹⁶⁴ with the expression ‘police power’ coming into wide use in the eighteenth century to describe the regulatory power vested in the ruler to promote public welfare.¹¹⁶⁵ As noted earlier, in the *North Atlantic Coast Fisheries Case*, the jurisprudence concerning the limitations to the police power of States was used by the UK to define its right of ‘reasonable

¹¹⁶³ See, for example, Mr Cass, Secretary of State, to Mr Wright (n 199) 12; Mr Foster, Secretary of State, to the President (n 203) 152–158; Mr Frelinghuysen, Secretary of State, to Mr Stillman (n 203) 76; Mr Adee, Acting Secretary of State to Dr Vogel (n 204) 152–153. See further Chapter Two, II.2.

¹¹⁶⁴ Brierly (n 347) 171; Kaeckenbeeck, ‘The Protection of Vested Rights in International Law’ (n 276) 16; Kaeckenbeeck, ‘La Protection Internationale Des Droits Acquis’ (n 287).

¹¹⁶⁵ Loughlin (n 181) 423. See Chapter Two, III.1.

regulation’ in relation to treaty obligations broadly, which was in turn accepted by the Tribunal.¹¹⁶⁶ Similarly, the League of Nations discussed ‘police regulations’ in the context of the treatment of foreigners in broad terms prior to its (unsuccessful) discussions in the context of the treatment of foreign property, with the Economic Committee recognising ‘the complete sovereignty’ of States over police matters ‘provided always [States] only employ their police rights in the ordinary way’.¹¹⁶⁷

Further examples can be found in the authorities explored in Chapter Three. Regional human rights law instruments allowed for regulation in the ‘general interest’ in expropriatory and non-expropriatory interferences with property.¹¹⁶⁸ In the negotiations for the MAI, the interpretive note considered that ‘normal activity in the public interest undertaken by governments’ through regulation would not contravene the expropriation or the ‘General Treatment’ (including FET) provisions of the proposed Agreement.¹¹⁶⁹ Non-discriminatory measures of general application that governments normally take for the purposes

¹¹⁶⁶ *North Atlantic Coast Fisheries Arbitration at the Hague: Oral Argument before the Tribunal Constituted under an Agreement Signed at Washington on the 27th Day of January, 1909, between His Britannic Majesty and the United States of America* (n 256); *North Atlantic Coast Fisheries* (n 252), 187-188.

¹¹⁶⁷ League of Nations, ‘International Conference on the Treatment of Foreigners, Geneva, March 5th, 1929, Preparatory Documents’ (n 314) 33 ; League of Nations Economic Committee (n 309).

¹¹⁶⁸ ECHR (n 425) Protocol 1, Article 1(2); ACHR (n 443) Article 21(1); *African Charter on Human and Peoples’ Rights* (n 444) Article 14.

¹¹⁶⁹ OECD, ‘The Multilateral Agreement on Investment (Report by the Chairman of the Negotiating Group)’ (n 368) 13, 15; OECD, “Indirect Expropriation” and the “Right to Regulate” in International Investment Law’ (n 368) 9.

of regulating economic activity within their territories are excluded from the definition of ‘expropriation and similar measures’ under the MIGA Convention.¹¹⁷⁰ Other negotiations for multilateral trade and investment treaties indicated that ‘normal governmental processes’ would not fall foul of the proposed agreements (including FET and expropriation), however such regulation that would not be shielded from scrutiny included measures that were discriminatory,¹¹⁷¹ unnecessary,¹¹⁷² or unreasonable.¹¹⁷³

Such examples demonstrate that the police power was not historically linked to the law of expropriation, but rather was used in the protection of foreigners and their property more broadly. In particular, the historical application of the police powers doctrine to the international minimum standard supports the proposition that the doctrine is not confined to the law of expropriation.

2. States relying on the police powers doctrine in their pleadings in non-expropriation claims

In their pleadings before international tribunals, several States have relied on the police powers doctrine in both expropriation and non-expropriation disputes. The States’ pleadings in this regard constitute State practice and *opinio juris* for the

¹¹⁷⁰ MIGA Convention (n 372) Article 11(a)(ii);

¹¹⁷¹ OECD, ‘1963 Draft Convention’ (n 360) 245; OECD, ‘1967 Draft Convention’ (n 360) 121; OECD, ‘Ministerial Statement on the Multilateral Agreement on Investment (MAI)’ (n 357); Multilateral Investment Guarantee Agency, *Commentary* (n 373) 8.

¹¹⁷² *Havana Charter* (n 375) Article 12(1)(c)(ii).

¹¹⁷³ OECD, ‘1963 Draft Convention’ (n 360) 245; OECD, ‘1967 Draft Convention’ (n 360) 121.

purposes of developing customary international law.¹¹⁷⁴ It is true, as noted in Chapter Four, the majority of publicly available pleadings (or summaries of States' pleadings contained in tribunal awards) rely on the customary international law authority of the police powers doctrine in defending an indirect expropriation claim. However, several States have pleaded that that the doctrine applies more generally to non-expropriation claims. For instance, in a dispute between the Slovak Republic and the US company Eurogas, the Slovak Republic stated in its counter-memorial that the 'police powers doctrine applies to Claimants' expropriation and non-expropriation claims alike'.¹¹⁷⁵ Similarly, in *Mamidoil* Albania relied on *Saluka* in the context of its defence to a FET claim to support the proposition that:

“[i]t is an uncontroversial and well established principle of international law that States are not liable to pay compensation for bona fide, nondiscriminatory measures that are taken in the interest of the general welfare”. No State can be prevented from adjusting the body of its laws and regulations, institutions and infrastructure to meet evolving economic, political and social conditions and necessities, as long as the measures are not arbitrary or discriminatory.¹¹⁷⁶

As earlier stated, Argentina relied on the police powers doctrine in defence of both its expropriation and FET claims in *Suez v Argentina*.¹¹⁷⁷ So too did Ecuador

¹¹⁷⁴ Brownlie (n 713) 24; Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (n 713) 218–219; Thirlway, *The Sources of International Law* (n 685) 67; Wood, 'Second Report on Identification of Customary International Law' (n 447) 23.

¹¹⁷⁵ *Eurogas* Respondent's Counter-Memorial, [358]; see also *Eurogas Inc. and Belmont Resources Inc. v Slovak Republic*, Respondent's Rejoinder, 29 December 2016, [468]–[489].

¹¹⁷⁶ *Mamidoil* (n 63) [592]–[593], citing *Saluka*.

¹¹⁷⁷ Argentina: *Suez* (n 634) [146]–[150]

in *Perenco v Ecuador*.¹¹⁷⁸ As noted earlier, in *Philip Morris v Uruguay*, Uruguay relied on the argument that the measures were *bona fide* measures enacted in a non-discriminatory manner that were logically connected to the objective of protecting public health for both the expropriation and the FET aspects of the claim.¹¹⁷⁹

The position taken by States in these disputes reinforces that the police powers doctrine, properly construed, can apply more generally.

3. Example of the application of the police powers doctrine to the non-impairment standard

The application of the police powers doctrine in the context of determining violations of ‘non-impairment’ standard is further illustrative of how the doctrine can operate in a non-expropriation context, and also confirms that the doctrine extends beyond the law of expropriation.

A number of IITs contain provisions that provide that States must not impair, by arbitrary or discriminatory measures, an investor’s operation, management, maintenance, use, enjoyment or disposal of its investment.¹¹⁸⁰

¹¹⁷⁸ Ecuador: *Perenco* (n 720) [238]-242].

¹¹⁷⁹ See Uruguay’s submission with respect to the FET claim at *Philip Morris v Uruguay* (n 17) [355], and the equivalent argument for the indirect expropriation claim at [217].

¹¹⁸⁰ For example, *Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment* (signed 14 November 1991, entered into force 20 October 1994) Article 11(2)(b); *Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment* (signed 27 August 1993, entered into force 11 May 1997) Article II(3)(b).

Numerous IITs use the language of ‘unreasonable’¹¹⁸¹ or ‘unjustified’¹¹⁸² in place of ‘arbitrary’. The language of most of the provisions is disjunctive, in that an investor need only establish a measure is arbitrary/unreasonable or discriminatory and not both.¹¹⁸³ Some Tribunals have described this provision as the ‘non-impairment’ standard.¹¹⁸⁴

In practice, investors rarely rely upon the non-impairment standard as the principal or sole basis of their claim.¹¹⁸⁵ As such, analysis of in both scholarship and case law is limited.¹¹⁸⁶ Indeed, several tribunals have concluded that the standard overlaps with the FET standard to such an extent that the discussion of this provision is often subsumed within the FET analysis.¹¹⁸⁷ Other tribunals, however,

¹¹⁸¹ For example, ECT (1994) Article 10(1); *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Romania for the Promotion and Reciprocal Protection of Investments* (signed 13 July 1995, entered into force 10 January 1996) Article 2(2).

¹¹⁸² For example, *Agreement between the Government of Australia and the Government of the Argentine Republic on the Promotion and Protection of Investments, and Protocol* (signed 23 August 1995, entered into force 11 January 1997) Article 4.

¹¹⁸³ *Azurix Corp. v Argentine Republic*, ICSID Case No.Arb/01/12, Award, 14 July 2006 [391]. Subsequent annulment proceedings against this (and other) aspect of the award was dismissed: *Azurix Corp v Argentine Republic*, ICSID Case No.Arb/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009, [172]-[177]; Christoph Schreuer, ‘Protection against Arbitrary or Discriminatory Measures’ in Catherine A Rogers and Roger P Alford (eds), *The Future of Investment Arbitration* (Oxford University Press 2009) 184.

¹¹⁸⁴ *Saluka* (n 3) [458].

¹¹⁸⁵ Veijo Heiskanen, ‘Arbitrary and Unreasonable Measures’ in August Reinisch (ed), *Standards of Investment Protection* (Oxford University Press 2008) 90.

¹¹⁸⁶ Scholarly analysis of the non-impairment provisions can be found in Dolzer and Schreuer (n 898) 191–198; Heiskanen (n 1185); Ursula Kriebaum, ‘Arbitrary/Unreasonable or Discriminatory Measures’ in M Bungenberg and others (eds), *International Investment Law* (Nomos 2013); Schreuer (n 1183).

¹¹⁸⁷ For example, *Stati* (n 723); *MTD Equity* (n 945)[196].

have recognised that while the concepts of arbitrariness and discrimination may have the same meaning as (or a ‘strong correlation’¹¹⁸⁸) with those same concepts in a FET context, the ‘non-impairment standard’ is a separate standard of protection, and is thus dealt with separately.¹¹⁸⁹ However, insofar as the concepts of ‘arbitrariness’ and ‘discrimination’ have the same meaning as the concepts in the FET context (and therefore fall within the analysis in Chapter Five), this section focuses on the ‘unreasonable’ measures element.

In *Saluka*, the Tribunal considered that ‘impairment’ meant any negative impact or effect caused by measures of the Respondent, and that the right to profits and income therefrom formed part of the investors’ ‘enjoyment’ of the investment.¹¹⁹⁰ The Tribunal held that police powers doctrine applied equally to the ‘impairment’ claim:

Since in the context of Article 5, the ‘deprivation’ of Saluka’s investment by the imposition of forced administration...was justified on reasonable regulatory grounds, the same applies *a majore ad minus* to the ‘impairment’ of Saluka’s investment in the context of Article 3.1. In other words: to the extent that the concepts of ‘deprivation’ and ‘impairment’ overlap, because a ‘deprivation’ is just one variety of possible ‘impairments’, the regulatory power exception (or ‘police power exception’) explained in the previous Chapter of this award applies to both.¹¹⁹¹

Similarly, in *EDF (Services) v Romania*, legislation regulating duty-free

¹¹⁸⁸ *Plama* (n 570) [183].

¹¹⁸⁹ *Invesmart* (n 592) [441].

¹¹⁹⁰ *Saluka* (n 3) [458],[463].

¹¹⁹¹ *ibid* [470]. The Tribunal considered that by violating the FET standard the Respondent also violated the non-impairment obligation but this was on the basis of discrimination, not reasonableness: at [465]-[467].

businesses within airports as a measure to fight corruption was also considered to not violate the non-impairment standard. In that case, the Tribunal considered that the legislation in question was a ‘measure falling within the police power of the State, taken in the public interest’¹¹⁹² and that there was a ‘reasonable relationship of proportionality’ in that there was no excessive burden placed on the investor.¹¹⁹³ As the legislation was ‘justified by the exercise of the State’s police power in the public interest’ there was accordingly no finding of unreasonableness.¹¹⁹⁴

4. The overlap between the police powers doctrine and the FET standard

Examining the police powers doctrine as articulated in *Methanex* and the FET standard in *Waste Management II* (which itself reflects the international minimum standard) side by side reveals a considerable degree of overlap between the two concepts. It will be recalled that the FET standard as articulated in *Waste Management II* provides as follows:

...the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of

¹¹⁹² *EDF* (n 729) [292].

¹¹⁹³ *ibid* [293].

¹¹⁹⁴ *ibid* [305].[306].

representations made by the host State which were reasonably relied on by the claimant.¹¹⁹⁵

In contrast, the police powers doctrine as articulated in *Methanex*:

As a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and which affects, *inter alios*, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments have been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.¹¹⁹⁶

The requirement stated in *Waste Management II* that States do not act in a way that is ‘arbitrary, grossly unfair, or idiosyncratic’, in a discriminatory fashion or in a way in which involves a lack of due process or complete lack of transparency, overlaps with the requirements of non-discrimination and due process in the police powers doctrine as articulated in *Methanex*, albeit that the *Waste Management II* test is expressed in negative terms. Both tests equally acknowledge the relevance of any specific representations made by the State. While the *Waste Management II* test does not mention the relevance of the public interest purpose of the alleged contravening conduct, the absence of a public purpose or an improper purpose could fall within the concepts of arbitrariness or conduct that is ‘grossly unfair, unjust and idiosyncratic’. The police powers doctrine articulates what States can do in positive terms, whereas the *Waste Management II* standard is articulated in negative terms, but there is nonetheless a considerable degree of overlap.

¹¹⁹⁵ *Waste Management II* (n 866) [98].

¹¹⁹⁶ *Methanex* (n 22) Part IV, Chapter D, [7].

Seen in this way, a State acting consistently with police powers doctrine will be unlikely to be found in violation of the FET standard and, to this extent, consideration of whether a State has validly exercised its police powers (that is, whether the regulation is non-discriminatory, proportionate or reasonable, enacted in good faith and for a public purpose) can assist in identifying whether a State is in violation of the FET standard. That is not to say that the successful application provides a complete answer to the FET query: as noted in Chapter Four, it is not clear that a State's representations to an investor are relevant for the purposes of the police powers doctrine (contrary to the statement in *Methanex*). To this extent, the police powers doctrine provides only a partial answer, assuming that the protection of legitimate expectations forms part of the FET standard.

The basis and suggested approach to applying the police powers doctrine to the FET standard will be further explored in Chapter Seven. However, for the present purposes, it is evident that the challenge of discerning between the 'perceived unfairness occasioned by...governmental actions that do not rise to a breach of international law'¹¹⁹⁷ and conduct that violates the FET standard is overcome in part if the police powers doctrine is seen as relevant to the FET standard. At the very least, the partial answer that the police powers doctrine gives provides greater substantive assistance to the resolution of a dispute concerning public interest regulation than the invocation of the broadly asserted right to regulate.

¹¹⁹⁷ *Perenco* (n 720) [559]; see also *Neer* (n 268)

5. Distinguishing *Von Pezold v Zimbabwe*

In *Von Pezold v Zimbabwe*,¹¹⁹⁸ Zimbabwe unsuccessfully raised its' regulatory powers as a defence to all claims brought against it pursuant to two BITs, including alleged violations of expropriation and FET provisions. However, for the reasons that follow, the case can be distinguished from the arguments advanced in this thesis on several bases.

The case concerned a land reform programme and foreign exchange policy in Zimbabwe, purportedly to redress historical inequities in land ownership. Zimbabwe argued that the land reform programme (in which title to property was seized and other properties were rendered worthless as a result) and foreign exchange policy were non-discriminatory and non-arbitrary regulations, applied in good faith, and proportionally, and argued that those measures there could not give rise to wrongful conduct.¹¹⁹⁹ The Tribunal noted that the argument appeared to be raised 'both as defences which could preclude a finding of liability for its allegedly wrongful conduct and as a lens through which the Tribunal is invited to consider the alleged wrongful conduct'.¹²⁰⁰

The Court found that Zimbabwe had not fully developed the 'regulatory powers' argument in its pleadings and that the claim was more appropriately

¹¹⁹⁸ *Bernhard Friedrich Arnd Rudiger Von Pezold et al v Republic of Zimbabwe*, ICSID Case No.Arb/10/15, Award, 18 July 2015.

¹¹⁹⁹ *ibid* [451].

¹²⁰⁰ *ibid* [452].

addressed when considering the “necessity” defence raised by Zimbabwe.

The Court held:

As the tribunal in *Saluka* ... observed, it inevitably falls to the adjudicator to determine whether particular conduct by a State “crosses the line” that separates valid regulatory activity from expropriation... Here, the Respondent has done little more than allege a regulatory powers defence, without clothing that allegation in any substance which would allow this Tribunal to determine whether the line has been crossed. Accordingly, this argument, too, is dismissed.¹²⁰¹

The Court went on to find breaches of the applicable BITs. For some of the properties, it was not ‘seriously contested’ that the properties were directly expropriated, as the transfer of legal title was sufficient to establish expropriation.¹²⁰² For other properties, the properties were rendered worthless without the other properties that had been directly expropriated, which the Tribunal concluded amounted to an indirect expropriation.¹²⁰³ The Court also found violations of the FET standard.¹²⁰⁴ The Tribunal did not revisit the ‘regulatory powers defence’ when examining the expropriation or FET standards.

The arguments raised in *Von Pezold* can be distinguished from the arguments advanced in this thesis. First, the ‘regulatory powers defence’ was raised in response to (among other things) a claim of direct expropriations. Here, it is not suggested in this thesis that the police powers doctrine applies to

¹²⁰¹ *ibid* [464].

¹²⁰² *ibid* [494].

¹²⁰³ *ibid* [504].

¹²⁰⁴ *ibid* [561].

direct expropriation, insofar as such cases concern outright takings of title (which, as noted in Chapter One, do not fall within the definition of public interest regulation used in this thesis). Secondly and significantly, the claim was insufficiently articulated by the Respondent and was apparently framed as a circumstance precluding wrongfulness (such as necessity) or exception rather than a principle that was relevant to determining whether an expropriation occurred or whether the conduct was fair and equitable.

In any event, in acknowledging that there was a line that separated ‘valid regulatory activity’ from expropriation,¹²⁰⁵ the Tribunal evidently did not rule out the proposition that some State measures could constitute ‘valid regulatory activity’. As such, *Von Pezold* is an example of a poorly articulated defence of regulatory powers, rather than a case that undermines the proposition as to the general applicability of the police powers doctrine. The ‘regulatory powers defence’ raised appears to be more akin to the unsuccessful arguments raised by States in concessions disputes discussed in Chapter Three¹²⁰⁶ or as attempt to impermissibly adopt a ‘blanket exception for regulatory measures’,¹²⁰⁷ rather than a properly articulated argument that a measure falls within a State’s police power.

However, the case does highlight the importance of ensuring that claims surrounding States’ regulatory powers are not used to undermine international

¹²⁰⁵ *ibid* [464].

¹²⁰⁶ See Chapter Three, Part V(1)(b)

¹²⁰⁷ *El Paso* (n 561) [234]-[236]; *Pope & Talbot* (n 827) [99].

commitments entered into, and the importance of identifying the scope of States' regulatory powers and how such powers interact with the standards of investment protection with more precision. In this thesis, this is achieved in Chapter Four, which has identified the source, content and operation of the police powers doctrine, and will be further addressed in Chapter Seven when using the principles of treaty interpretation to more clearly and consistently articulate how States' police powers interact with the expropriation and FET provisions in IITs.

6. Normative argument

Finally, there are several normative arguments that can be made to support the proposition that the police powers doctrine applies generally and is not limited to indirect expropriation. Viñuales, for example, argues that the police powers doctrine should be an autonomous concept of general application.¹²⁰⁸ He notes that 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'.¹²⁰⁹

Similarly, as FET typically does not require such significant interference with property rights as expropriation,¹²¹⁰ and many contemporary disputes raise

¹²⁰⁸ Viñuales, 'Sovereignty in Foreign Investment Law' (n 33) 331.

¹²⁰⁹ *ibid* 332.

¹²¹⁰ Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (n 112) 227.

multiple violations of IITs against the same set of facts,¹²¹¹ there is an 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.¹²¹²

Further, the invocation of different principles to describe the same or similar concepts could also suggest that the concepts themselves are somewhat hollow, or at least that the concepts are not clearly understood. Therefore, a clear and consistent articulation of the basis on which States may appeal to their police powers when regulating in the public interest may help overcome criticism that the concepts are somewhat hollow and ‘push crudely in favour of respondent States’.¹²¹³ Similarly, it is only when a proposition is consistently articulated that it can be consistently applied, and thus this Chapter lays the foundation for the next Chapter.

IV. CONCLUSION

This Chapter has demonstrated that the right to regulate is a concept that is susceptible to many different meanings. To the extent that the right to regulate is a narrow concept that provides that States may regulate in the public interest subject to certain conditions (such as proportionality and non-discrimination),

¹²¹¹ Salacuse, *The Three Laws of International Investment* (n 459) 387; Rudolf Dolzer, ‘Fair and Equitable Treatment: A Key Standard in Investment Treaties’ (2005) 39 *International Lawyer* 87.

¹²¹² Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (n 112) 227–228.

¹²¹³ Kurtz (n 42) 295.

that concept is the same as the police powers doctrine and the distinction between the two concepts is not justified. Moreover, to the extent that the right to regulate is a contemporary articulation of the longstanding principle that inherent in State sovereignty is the right of States to choose and implement their own political, economic and legal systems within their territory, that broad articulation of the right to regulate does not provide considerable assistance to the resolution of an IIT claim concerning public interest regulation. Rather, the better approach is that the police powers doctrine can and does apply more generally to other standards of investment protection, including FET.

CHAPTER SEVEN

USING TREATY INTERPRETATION TO ACCOMMODATE THE POLICE POWERS DOCTRINE

I. INTRODUCTION

Having established that the police powers doctrine is a principle of customary international law that provides a basis upon which States can defend their enactment of public interest regulation against claims of indirect expropriation and unfair and inequitable treatment, this Chapter examines how the police powers doctrine can be properly accommodated in the resolution of those claims. The principal argument in this Chapter is that the principles of treaty of interpretation allow the police powers doctrine to be accommodated within IIT disputes, with the consequence that the police powers doctrine can be articulated with greater consistency and clarity.

Part II of this Chapter outlines the principles relevant to interpreting treaties in light of customary international law and, in doing so, distinguishes between the 'interpretation' of a treaty in light of customary international law and the substitution of customary international law in place of the treaty. Part II also addresses and responds to the scholarship that calls for the use of interpretive presumptions to better protect public interest regulation in investment disputes, concluding that such presumptions offer little assistance. Parts III and IV will then apply the principles of treaty interpretation so as to accommodate the police

powers doctrine within the expropriation and FET standards respectively, and will contrast this approach with the approach taken by Tribunals that have decided disputes pursuant to more recent IITs that explicitly acknowledge the lawfulness of public interest regulation in the treaty text. Part V will conclude by outlining the benefits of the proposed approach to treaty interpretation adopted in this thesis.

The arguments advanced in this Chapter are made whilst being cautious of making ‘general postulates’¹²¹⁴ about the meaning of treaty provisions in IITs. It is evident that each case will turn upon its own facts and the wording of the applicable IIT. However, with all due caution, the similarity of language between IITs and their apparent shared rationale allows for several general issues of interpretation to be discussed.

II. THE ACCOMMODATION OF CUSTOMARY INTERNATIONAL LAW INTO AN INVESTMENT

TREATY DISPUTE USING TREATY INTERPRETATION

1. Relevant Principles

While several recent IITs acknowledge public interest regulatory aims in the text of the IIT,¹²¹⁵ the majority of the approximately 3,000 IITs currently in existence are silent on this issue and do not explicitly refer to the police powers doctrine.¹²¹⁶

¹²¹⁴ Berman, ‘Evolution or Revolution?’ (n 43) 668.

¹²¹⁵ For example, India-Singapore CEPA (2005) Annex 3; India-Japan CEPA (2011) Annex 10; ASEAN CIA (2009) Annex 2(4); Spears (n 11). See Chapter Four, Part III(2)(b)(iv).

¹²¹⁶ Stephan Schill and Marc Jacob, ‘Trends in International Investment Agreements, 2010-2011: The Increasing Complexity of International Investment Law’ in Karl P Sauvant (ed),

However, the previous Chapters have shown that the police powers doctrine has been frequently cited and applied by tribunals notwithstanding the lack of explicit reference in the treaty text. As Chapter Four demonstrated, the source of the police powers doctrine is customary international law. In circumstances where the treaty is silent on the customary international law principle but the principle is nonetheless applied, the question to be resolved is, what is the basis on which tribunals can invoke the police powers doctrine to the resolution of a an expropriation or FET claim?

Treaty and custom may interact in various ways; the two sources of law have been described as ‘entangled’.¹²¹⁷ With the exception of *jus cogens* norms, States may depart from customary international law through the conclusion of treaties.¹²¹⁸ In such circumstances, the relevant treaty rule would operate to displace the customary rule.¹²¹⁹ In addition to deviating from custom, treaties may

Yearbook on International Investment Law and Policy 2011-2012 (Oxford University Press 2013).

¹²¹⁷ 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); Michael Wood, ‘First Report on Formation and Evidence of Customary International Law, A/CN.4/663 (17 May 2013)’ (International Law Commission 2013) 15.

¹²¹⁸ 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.

¹²¹⁹ *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 110) 7–8; Papparinskis, ‘Investment Treaty Interpretation and Customary International Law: Preliminary Remarks’ (n 111) 75; James Crawford, ‘Jurisdiction and Applicable Law’ (2012) 25 *Leiden Journal of International Law* 471, 476.

also codify or reflect custom, and play a role in the emergence of customary international law.¹²²⁰ Customary international law may also play a role in the interpretation of treaties,¹²²¹ that is, making sense and giving meaning to the treaty.¹²²² It is the application of customary international law through treaty interpretation that is the focus this Chapter.

The task of considering whether there has been a violation of a provision in an IIT necessarily involves an exercise of treaty interpretation.¹²²³ As such, the principles of treaty interpretation set out in the VCLT are relevant. These principles reflect customary international law,¹²²⁴ and thus are applicable in disputes where the parties to the treaty are not parties to the VCLT as well as to

¹²²⁰ Wood, 'First Report on Formation and Evidence of Customary International Law, A/CN.4/663 (17 May 2013)' (n 1217) 15.

¹²²¹ Giorgio Gaja, 'The Protection of General Interests in the International Community' (2014) 364 *Recueil des Cours* 9, 62–65; Paparinskis, 'Investment Treaty Interpretation and Customary International Law: Preliminary Remarks' (n 111); International Law Commission, 'Fragmentation of International Law' (n 673) .

¹²²² *Case Concerning the 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.

¹²²³ Waibel (n 8).

¹²²⁴ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia) (Preliminary Objections)* (Judgment of 17 March 2016), [35]; *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 (n 1138) 6; Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (n 112) 111.

treaties concluded prior to the entry into force of the VCLT.¹²²⁵ The VCLT principles therefore set out a useful analytical framework for evaluating how customary international law interacts with the standards of investment protection in IITs.¹²²⁶

Article 31 VCLT provides two pathways of introducing customary international law into the interpretation of IITs: first, the ordinary meaning of the 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)).¹²²⁷ Article 31 *as a whole* is the ‘general rule of interpretation’ in the VCLT, and ‘the singular nature of the rule indicates the holistic and comprehensive approach that is demanded of interpreters when applying Article 31.’¹²²⁸ That is, the rules are not mutually exclusive, but are rather two aspects of the same general rule.¹²²⁹

However, as will be seen below, the effect of the rules may differ slightly

¹²²⁵ *MTD Equity Sdn Bhv and MTD Chile SA v Chile*, ICSID Case No.Arb/01/07, Decision on Annulment, 21 March 2007, fn 69; International Law Commission, ‘Fragmentation of International Law’ (n 673) 6–7.

¹²²⁶ Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (n 112) 111; See also Paparinskis, ‘Investment Treaty Interpretation and Customary International Law: Preliminary Remarks’ (n 111).

¹²²⁷ Campbell McLachlan, ‘Investment Treaties and General International Law’ (2008) 57 *International and Comparative Law Quarterly* 361; Paparinskis, ‘Investment Treaty Interpretation and Customary International Law: Preliminary Remarks’ (n 111).

¹²²⁸ Duncan French, ‘Treaty Interpretation And The Incorporation Of Extraneous Legal Rules’ (2006) 55 *International and Comparative Law Quarterly* 301; James Crawford, *Brownlie’s Principles of Public International Law* (Oxford University Press 2012) 381; Georg Nolte, ‘First Report on Subsequent Agreements and Subsequence Practice in Relation to Treaty Interpretation’ A/CN/4660 (19 March 2013) 6.

¹²²⁹ French (n 1228) 302.

(particularly if one takes a narrower view of Article 31(3)(c)), and it is for this reason that the rules will be considered separately.

The starting point for any analysis on the meaning to be given to a treaty provision is Article 31(1).¹²³⁰ 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 to the overriding duty of good faith.¹²³¹ As to the ordinary meaning, customary international law may be relevant to determining the meaning of a particular treaty provision where the treaty provision expressly refers to or defines a concept by reference to customary international law, in which case the ordinary meaning of the treaty provision would have the same meaning as the meaning under customary international law.¹²³² Further, a treaty may not define a term but that term may be known and understood in customary international law, in which case customary international law carries considerable interpretive weight in determining the ordinary

¹²³⁰ 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, Article.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.

¹²³¹ Frank Berman, 'Treaty Interpretation in a Judicial Context' (2004) 29 *Yale Journal of International Law* 315, 321; 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 Frank Berman) [8].

¹²³² Paparinskis, 'Investment Treaty Interpretation and Customary International Law: Preliminary Remarks' (n 111) 78; McLachlan (n 1227) 371.

meaning.¹²³³ The ordinary meaning therefore is not just a dictionary meaning, but also the meaning in terms of how it is known and used in law, including customary international law.

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 integration’.¹²³⁴ 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’.¹²³⁵ Campbell McLachlan explained the foundation of the principle of systemic integration as follows:

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.¹²³⁶

¹²³³ *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 11) 79, 86, 87.

¹²³⁴ See 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 (n 1227); International Law Commission, ‘Fragmentation of International Law’ (n 673) ; 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); Philippe Sands, ‘Treaty, Custom and the Cross-Fertilization of International Law’ (1998) 1 *Yale Human Rights and Development Law Journal* 85.

¹²³⁵ VCLT, Article 31(3)(c).

¹²³⁶ McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention’ (n 1234) 280.

In recent years, much has been written on systemic integration following the express use of Article 31(3)(c) by the ICJ in *Oil Platforms*¹²³⁷ and consideration of the topic by the International Law Commission.¹²³⁸ It has been described in various terms, from operating ‘like a “master key” to the house of international law’,¹²³⁹ to being ‘potentially damaging’¹²⁴⁰ to international law. The role and effect of Article 31(3)(c) on treaty interpretation is not yet fully known,¹²⁴¹ however it has been suggested that it may have a role to play as an ‘effective litigation tool by States for reasserting their sovereignty and control in investment arbitration’.¹²⁴²

Looking to the language of Article 31(3)(c) itself, it is clear that systemic integration occurs in several steps.¹²⁴³ 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

¹²³⁷ *Oil Platforms (Iran v United States)* (Judgment) [2003] ICJ Rep 161; 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) 470.

¹²³⁸ International Law Commission, ‘Fragmentation of International Law’ (n 673) .

¹²³⁹ *ibid* 211.

¹²⁴⁰ 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.

¹²⁴¹ 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); Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008) 366.

¹²⁴² Rumiana Yotova, ‘Systemic Integration: An Instrument for Reasserting the State’s Control in Investment Arbitration?’ in Andreas Kulick (ed) *Reassertion of Control over the Investment Treaty Regime* (Cambridge University Press 2017) 182, 207.

¹²⁴³ Paparinskis, ‘Investment Treaty Interpretation and Customary International Law: Preliminary Remarks’ (n 111); Orakhelashvili (n 1241) 366.

‘relevant’ and that rule must be ‘applicable in the relations between the parties’.¹²⁴⁴

It is not controversial to suggest that customary international law would constitute rules applicable between the parties.¹²⁴⁵ 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.¹²⁴⁶ A broader view would allow ‘almost any rule of international law [to be] relevant’.¹²⁴⁷

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.¹²⁴⁸ Therefore, under Article 31(3)(c), customary international law plays a contextualising role, as opposed to being directly applicable as part of the ordinary meaning of the treaty provision. In this respect, the use of Article 31(3)(c) ‘together

¹²⁴⁴ *Ambiente Ufficio SPA v Argentine Republic*, ICSID Case No.Arb/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, [601]; Sands, ‘Treaty, Custom and the Cross-Fertilization of International Law’ (n 1234) 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 Schreuer* (Oxford University Press 2009) 690.

¹²⁴⁵ *Ambiente* (n 1244) [600]-[601]; Richard Gardiner, *Treaty Interpretation* (Oxford University Press 2010) 262–263; Gaja (n 1221) 69; Mark E Villiger, ‘The 1969 Vienna Convention on the Law of Treaties: 40 Years After’ (2009) 344 *Recueil des Cours* 123; Panos Merkouris, ‘Debating the Ouroboros of International Law: The Drafting History of Article 31(3)(c)’ (2007) 9 *International Community Law Review* 1, 30.

¹²⁴⁶ Gardiner (n 1246) 260; Villiger (n 1246) 123.

¹²⁴⁷ Simma and Kill (n 1244) 696.

¹²⁴⁸ Paparinskis, ‘Investment Treaty Interpretation and Customary International Law: Preliminary Remarks’ (n 111) 73; Sorel and Boré Eveno (n 1150) 825–826.

with the context' highlights that Article 31(3)(c) 'is not a provision that should be interpreted completely free of internal constraints'.¹²⁴⁹ Article 31(3)(c) cannot be used to displace the provisions of the Treaty or the applicable law.¹²⁵⁰ 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.¹²⁵¹

Considering customary international law at the treaty interpretation stage is, in a sense, an internal process. The question at the interpretation stage is 'what does the treaty mean?' Using Article 31 VCLT, customary international law has relevance in determining the meaning of the treaty provision under consideration. In this way, the police powers doctrine 'applies' to the resolution of the IIT dispute insofar as it is relevant to the meaning of the treaty provision under consideration (such as 'expropriation' and 'fair and equitable treatment'). It is application through interpretation.

Part III will explore Article 31(1) and 31(3)(c) in greater depth and examine how these principles can be applied so as to allow the police powers doctrine to be accommodated when interpreting the meaning of 'expropriation' and 'fair and

¹²⁴⁹ French (n 1228) 305.

¹²⁵⁰ *Oil Platforms* (n 1237) (Separate Opinion of Judge Higgins) [46]; Berman, 'Treaty Interpretation in a Judicial Context' (n 1231) 320; Simma and Kill (n 1244) 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 1228) 383.

¹²⁵¹ Sands, 'Treaty, Custom and the Cross-Fertilization of International Law' (n 1234) 102-103; see also Orakhelashvili (n 1241) 366.

equitable treatment' in IITs. However, before doing so, it is necessary to address two issues that frequently arise in the discussion of the application of the police powers doctrine: first, whether the doctrine is applied in a way that impermissibly substitutes customary international law in place of the treaty and secondly, whether the invocation of the police powers doctrine would be assisted by certain interpretive presumptions.

2. Distinguishing between using customary international law to interpret a treaty and substituting customary international law in place of the treaty

It is important to distinguish between the task being undertaken in this thesis (treaty interpretation using customary international law) and impermissibly substituting or applying customary international law in place of the treaty. The distinction is an important one and is one that is occasionally blurred in practice.¹²⁵²

For example, in *Methanex*, the Tribunal considered whether the regulation under scrutiny was lawful regulation when determining whether the Claimant had established if the regulation was tantamount to expropriation within the meaning of Article 1110 NAFTA. As noted in Chapter Four, the Tribunal noted that non-discriminatory regulation for a public purpose, enacted in accordance with due process would 'not [be] deemed expropriatory and compensable'.¹²⁵³ The Tribunal later noted that the central claim of expropriation failed, as 'from the standpoint

¹²⁵² See Anastasios Gourgourinis, 'The Distinction between Interpretation and Application of Norms in International Adjudication' (2011) 2 *Journal of International Dispute Settlement* 31.

¹²⁵³ *Methanex* (n 22) [7].

of international law, the [measure] was a lawful regulation and not an expropriation'.¹²⁵⁴ On the one hand, this could be considered an 'interpretive' approach, to the extent that the Tribunal considered the lawfulness of the public interest regulation when determining whether the measure was an expropriation. However, it could also be argued that the Tribunal was directly applying customary international law to the resolution of the dispute in a way that in effect ignored or did not apply 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'.¹²⁵⁵ 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 customary international law.¹²⁵⁶

The Permanent Court of Arbitration in the Partial Award in *Indus Waters Kishenganga Arbitration (Pakistan v India)* also recently considered this issue. The Permanent Court noted that it was required to 'interpret and apply' the relevant treaty 'in light of the customary international law principles for the

¹²⁵⁴ *ibid* [15].

¹²⁵⁵ Kurtz (n 42) 294.

¹²⁵⁶ 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). The notable exception to this is *Saluka*, which placed reliance on Article 31(3)(c), which will be discussed further below.

protection of the environment in force today'.¹²⁵⁷ 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'.¹²⁵⁸ The Permanent Court also noted that Article 31(3)(c) VCLT 'required that the Court take account of relevant customary international law...when interpreting the Treaty'.¹²⁵⁹ In the Final Award, the Permanent 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'.¹²⁶⁰ Importantly, the Permanent 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.¹²⁶¹ (Emphasis in the original)

A tribunal's jurisdiction is circumscribed by the terms of the treaty. The applicability of customary international law in an IIT dispute (as distinct from the meaning given to the terms of the treaty) will depend on the jurisdiction of the tribunal and the applicable law of the tribunal contained within the IIT. 'Applicable law' in this context refers to the law to be applied by the tribunal to

¹²⁵⁷ *Indus Waters Kishenganga Arbitration* (Pakistan v India), Partial Award (2013) 154 ILR 1, [452].

¹²⁵⁸ *ibid* [447].

¹²⁵⁹ *ibid* fn 654.

¹²⁶⁰ *Indus Waters Kishenganga Arbitration* (Pakistan v India), Final Award (2013) 157 ILR 362, [111].

¹²⁶¹ *ibid* [112].

decide the issues within its jurisdiction.¹²⁶² An example of an applicable law clause is Article 42(1) of the ICSID Convention, which provides:

(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) *and such rules of international law as may be applicable.*¹²⁶³

(emphasis added).

While such a formulation gives primacy to the choice of law agreed between the parties,¹²⁶⁴ there is potential for customary international law to be applicable if it is a rule of law agreed between the parties or, in the absence of such agreement, as a ‘rule of international law as may be applicable’.¹²⁶⁵ This is largely a question of the scope of authority conferred on the Tribunal, rather than one of treaty interpretation.¹²⁶⁶ The applicability of customary international law as part of

¹²⁶² See Kate Parlett, ‘Claims under Customary International Law in ICSID Arbitration’ (2016) 31 ICSID Review 434, 437–438; Lorand Bartels, ‘Jurisdiction and Applicable Law Clauses: Where Does a Tribunal Find the Principled Norms Applicable to the Case before It’ in Tomer Broude and Yuval Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Bloomsbury Publishing 2011) 119.

¹²⁶³ See also, for example, ECT (1994) Article 26(6); NAFTA Article 1103.

¹²⁶⁴ Emmanuel Gaillard and Yas Banifatemi, ‘The Meaning of “and” in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process’ (2003) 18 ICSID Review 375, 376.

¹²⁶⁵ *ibid* 376–377.

¹²⁶⁶ In this regard, it is acknowledged that there is an overlap of language that blurs the conceptual distinction between the interpretation of a treaty in light of customary international and the direct application of customary international law to a dispute. 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

the applicable law of the tribunal would, in turn, raise several additional issues including whether a treaty provision displaces or modifies the customary international law (or vice versa), and conflict of norms between the treaty and custom.¹²⁶⁷ The absence of a reference to customary international law in an applicable law clause would preclude a tribunal from applying it to the dispute.

It is in this respect that this thesis takes issue with the position taken by Viñuales that because the police powers doctrine exists under customary international law, it applies ‘distinctly and autonomously’ to the resolution of a dispute,¹²⁶⁸ referring to this as the ‘supplementary function of customary law’.¹²⁶⁹

He states:

....there is no need for actual ‘incorporation’ [of the customary rule into the treaty]. Customary international law applies distinctly and autonomously, *at least to interpret the investment disciplines provided for in the treaty.*¹²⁷⁰

(emphasis added.)

In support of the proposition that custom applies ‘distinctly and autonomously’, he cites the following passage from *Nicaragua v US*:

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.

¹²⁶⁷ See the International Law Commission, ‘Fragmentation of International Law’ (n 673) .

¹²⁶⁸ Viñuales, ‘Sovereignty in Foreign Investment Law’ (n 33); Viñuales, ‘Customary Law in Investment Regulation’ (n 118) 32.

¹²⁶⁹ Viñuales, ‘Customary Law in Investment Regulation’ (n 118) 32.

¹²⁷⁰ Viñuales, ‘Sovereignty in Foreign Investment Law’ (n 33) 331.

Even if the customary norm and the treaty norm were to have exactly the same content, this would not be a reason for the Court to hold that the incorporation of the customary norm into the treaty-law must deprive the customary norm of its applicability as distinct from that of the treaty norm... There are a number of reasons for considering that, even if the two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence. This is so from the standpoint of their applicability...A state may accept a rule contained in a treaty not simply because it favours the application of the rule itself, but also because the treaty establishes what that State regards as desirable institutions or mechanisms to ensure implementation of the rule...It will therefore be clear that customary international law continues to exist and apply, separately from international treaty law, even where the two categories of law have an identical content.¹²⁷¹

There are several difficulties with Viñuales' proposition that the police power applies 'distinctly and autonomously'. First, in suggesting that the police power would apply 'at least' in interpreting the treaty, it suggests that there are other further (but unexplained) mechanisms through which customary international law would apply, but no reference is made to the issues discussed above with respect to applicable law. It is unclear the basis upon which customary international law could apply to a dispute in the absence of a jurisdiction or applicable law clause that would permit a Tribunal to engage in such a task. Further, describing the task of treaty interpretation as part of the 'distinct and autonomous' application risks conflating the task of interpretation of the treaty and the application of custom in place of the treaty. To an extent, Viñuales acknowledges this when he states that there would be a question as to whether the

¹²⁷¹

Nicaragua (n 447) [177]-[179].

treaty implicitly or explicitly excluded the customary international law,¹²⁷² but he does not examine the point further.

Further, the proposition in *Nicaragua* is inapposite. The cited passage concerned the establishment of the ICJ's jurisdiction. In *Nicaragua*, the question before the ICJ was whether it had jurisdiction to determine a violation of the use of force in circumstances where one State party had made a reservation to a treaty, the effect of which was that the ICJ could not determine violations of the UN Charter. The ICJ concluded it had no jurisdiction over the claim insofar as it pertained to the alleged violation of the UN Charter, but also held that this did not preclude the ICJ determining the claim under customary international law. The ICJ further concluded that the content of the customary international law and of the law pursuant to the UN Charter was the same. Thus, it was a question of jurisdiction and not of the law applicable to the resolution of the dispute, although scholars such as Crawford have noted that the ICJ appeared to conflate the two concepts in its reasoning.¹²⁷³ It is true, of course, that treaty and custom coexist in parallel,¹²⁷⁴ but that is a separate question to whether a tribunal can apply custom to the resolution of a treaty dispute.

In any event, even at the time *Nicaragua* was decided, the passage cited above was not without criticism. Indeed, it was subject to dissenting opinions by

¹²⁷² Viñuales, 'Sovereignty in Foreign Investment Law' (n 33) 330.

¹²⁷³ Crawford, 'Jurisdiction and Applicable Law' (n 1219) 477.

¹²⁷⁴ James Crawford, 'Chance, Order, Change: The Course of International Law' (2013) 365 *Recueil des Cours* 9, 110.

Judges Mosler, Oda, Schwebel, Ago and Jennings. Judge Robert Jennings noted that he could not apply customary international law ‘as it were in lieu of the recourse to the relevant multilateral treaties’.¹²⁷⁵ Further, in Judge Jennings’ view, the ICJ did not provide ‘even a scintilla of relevant practice’ to evidence that the customary international law existed in the same terms as the UN Charter or that States applied the law (of self-defence) as customary law and not pursuant to the UN Charter.¹²⁷⁶ Judge Jennings noted that the ICJ’s analysis ‘must raise a suspicion that it is in reality the treaty itself that is being applied under another name’.¹²⁷⁷

Thus, while acknowledging that there may be other avenues through which principles of customary international law may apply to the resolution of the dispute (such as through Article 42(1) of the ICSID convention), the focus of this Chapter will remain on treaty interpretation. Arguably, if the task of treaty interpretation accommodates the police powers doctrine, the inquiry of the extent to which customary international law norms such as the police power otherwise apply to the resolution of the investment treaty dispute are of less significance.

3. Is there any need for presumptions or restrictive interpretations in favour of sovereignty?

It is also necessary to address a related issue that has been raised in scholarship concerning the role of sovereignty and interpretive presumptions in the interpretation of IITs. It has been suggested in some scholarship that one of the

¹²⁷⁵ *Nicaragua* (n 447) (Separate Opinion of Judge Sir Robert Jennings) 529.

¹²⁷⁶ *ibid*, 531.

¹²⁷⁷ *ibid* 532.

means through which customary international law rules that protect public interest regulation can be better integrated into international investment law is through the application of certain presumptions or interpretive maxims that favour State sovereignty. For instance, Viñuales identifies the principle that ‘restrictions to sovereignty are not to be presumed’ as an ‘applicable interpretation rule’ that could assist in tackling ‘difficult questions relating to the balancing of public and private interests’.¹²⁷⁸ As authority for this proposition, Viñuales cites several PCIJ decisions.¹²⁷⁹ In particular, the PCIJ in *The SS Lotus* held:

International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between those co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of states therefore cannot be presumed.¹²⁸⁰

The consequence of invoking such a presumption as an ‘applicable interpretation rule’ is that the treaty will be interpreted in such a way that restricts the obligations assumed by the State, a so-called ‘restrictive interpretation’¹²⁸¹ or an interpretation in favour of State sovereignty.¹²⁸² Gus Van Harten has similarly

¹²⁷⁸ Viñuales, ‘Sovereignty in Foreign Investment Law’ (n 33) 320, 361–362.

¹²⁷⁹ *SS Wimbledon* (n 1129) 24-5; *SS Lotus* (n 1105) 18; *Free Zones of Upper Savoy* (n 1104) 167.

¹²⁸⁰ *SS Lotus* (n 1105) 18.

¹²⁸¹ Thomas Wälde, ‘Interpreting Investment Treaties: Experiences and Examples’ in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 733. 733.

¹²⁸² Humphrey Waldock, ‘General Course on Public International Law’ (1962) 106 *Recueil des Cours* 161.

advocated for tribunals to adopt restrictive interpretations so as to favour the right of States to regulate in the public interest.¹²⁸³ Similarly, States raised arguments in favour of restrictive interpretation in early investor-State arbitration cases convened pursuant to arbitration clauses within contracts,¹²⁸⁴ and it has also been raised by State respondents in the context of the interpretation of jurisdictional provisions.¹²⁸⁵ In one dispute, the principle of restrictiveness has received express support from a tribunal in the context of determining a tribunal's jurisdiction.¹²⁸⁶

Notwithstanding the occasional support for the principle outlined in the paragraph above, the principle of restrictive interpretation has not been widely accepted as a principle of treaty interpretation.¹²⁸⁷ Hersch Lauterpacht, for instance, noted in 1927 that a principle of restrictiveness could seriously jeopardise the task of interpretation.¹²⁸⁸ Courts and tribunals in a number of inter-State

¹²⁸³ Van Harten (n 10) 52.

¹²⁸⁴ *Holiday Inns v Morocco*, ICSID Case No.Arb/72/1, Decision on Jurisdiction, 12 May 1974; Pierre Lalive, 'The First "World Bank" Arbitration (Holiday Inns v. Morocco)—Some Legal Problems' (1981) 51 *British Yearbook of International Law* 123.

¹²⁸⁵ *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No.Arb/01/13, Decision on Jurisdiction, 6 August 2003, [171] citing *Loewen Group, Inc v United States of America*, ICSID Case No.Arb(AF)/98/3, Award, 26 June 2003, [160]-[164] and Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)* WT/DS26/AB/R; WT/DS48/AB/R, 16 January 1998, [165].

¹²⁸⁶ *SGS v Pakistan* (n 1285) [171].

¹²⁸⁷ *Dispute Regarding Navigational and Related Rights* (n 1224), [48]; Hersch Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 *British Yearbook of International Law* 48; Luigi Crema, 'Disappearance and New Sightings of Restrictive Interpretation(s)' (2010) 21 *European Journal of International Law* 681, 687.

¹²⁸⁸ Lauterpacht, *Private Law Sources and Analogies of International Law* (n 683) 179–180; Eirik Bjorge, 'Convergence of Methods of Treaty Interpretation' in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation* (Cambridge University Press 2015) 521.

disputes have also rejected the principle of restrictiveness.¹²⁸⁹ For instance, in *Dispute Regarding Navigational and Related Rights*, the ICJ noted how presumptions in favour of sovereignty offer limited assistance in interpreting a treaty:

While it is certainly true that limitations of the sovereignty of a State over its territory are not to be presumed, this does not mean that the treaty provisions establishing such limitations...should for this reason be interpreted *a priori* in a restrictive way. A treaty provision which has the purpose of limiting the sovereign powers of a State must be interpreted like any other provision of a treaty, i.e. in accordance with the intentions of its authors as reflected by the text of the treaty and the other relevant factors in terms of interpretation.¹²⁹⁰

As noted by Crawford, presumptions in favour of sovereignty are inappropriate in contemporary international law in light of the acknowledgment that 'sovereignty does not mean freedom from law but freedom within the law (including freedom to seek to change the law)'.¹²⁹¹ Similarly, the principles of treaty interpretation in the VCLT mandate that treaties are interpreted 'so as to give effect to the object and purpose of the treaty in its context',¹²⁹² rather than on the basis of any presumption. While not concerning the invocation of a presumption in favour of sovereignty, the correct approach to treaty interpretation in accordance with the VCLT was recently summarised by the Tribunal in *Ping An Life Insurance Company of China v Belgium*:

¹²⁸⁹ *Lax Lanoux Arbitration* (1957) 24 ILR 101, 119-20; *Award in the Arbitration regarding the Iron Rhine (Belgium v Netherlands)* (2005) 27 RIAA 35, 64-5.

¹²⁹⁰ *Dispute Regarding Navigational and Related Rights* (n 1224) [48].

¹²⁹¹ James Crawford, 'Sovereignty as a Legal Value' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012).

¹²⁹² *ibid.*

The starting point is clear. The question is one of interpretation of the two BITs. The general principle is that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context (including preamble and annexures) and in light of its object and purpose (Vienna Convention, Article 31(1),(2)) and also the circumstances of its conclusion (Article 32).

Article 31 of the Vienna Convention reflects the primacy of the text as the basis for the interpretation of a treaty, while also giving a role to extrinsic evidence of the circumstances of its conclusion and to the objects and purposes of a treaty as a means of interpretation. It is based on the view that the text is presumed to be the authentic expression of the intentions of the parties, and that in consequence the starting point of interpretation is the elucidation of the meaning of the text by reference to the intention of the drafters: International Law Commission, Yb ILC, 1966, vol II, pp 218, 220.¹²⁹³

It is therefore neither correct nor necessary to have reference to any presumptions in favour of State sovereignty that would result in a restrictive interpretation of the treaty. Rather, the appropriate starting point is the rules in the VCLT.

III. INTERPRETING INDIRECT EXPROPRIATION IN LIGHT OF THE POLICE POWERS DOCTRINE

1. The police powers doctrine and the ordinary meaning of indirect expropriation – Article 31(1) VCLT

Most IITs do not define expropriation. As a consequence, tribunals have relied upon on the customary international law meaning of that term.¹²⁹⁴ While it did not

¹²⁹³ *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v Belgium*, ICSID Case No.Arb/12/29, Award, 30 April 2015, [164]-[165].

¹²⁹⁴ Jeswald Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010) 166; Salacuse, *The Three Laws of International Investment* (n 459) 314-318.

explicitly invoke the VCLT framework, the Tribunal in *Accession Mezzanine v Hungary* captured this idea:

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....¹²⁹⁵

Many tribunals that have considered the customary international law police powers doctrine have done so at the point of determining the meaning of ‘expropriation’ under the IIT. For instance, in *Fireman’s Fund*, the Tribunal noted that Article 1110 NAFTA did not give a definition for the word ‘expropriation’, acknowledging cases had defined it differently.¹²⁹⁶ 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.¹²⁹⁷

¹²⁹⁵ *Accession Mezzanine* (n 560) [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].

¹²⁹⁶ *Fireman’s Fund* (n 594) [176].

¹²⁹⁷ *ibid* [176(j)].

Similarly, in *Glamis Gold*, the Tribunal noted that ‘the term “expropriation” incorporates by reference the customary international law regarding that subject’.¹²⁹⁸ 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”.¹²⁹⁹

In *El Paso*, the Tribunal sought to ‘clarify the concept’ of expropriation before proceeding to analyse whether Argentina’s conduct amounted to an expropriation. In doing so, as quoted in full in Chapter Four,¹³⁰⁰ the Tribunal summarised its view that as a matter of general principle, general regulations do not amount to indirect expropriation, but by exception unreasonable general regulations can amount to indirect expropriation if there has been a substantial deprivation.¹³⁰¹ These cases stand for the proposition that the ordinary meaning of expropriation, in effect, excludes exercises of the police power.

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

¹²⁹⁸ *Glamis Gold* (n 20) [354].

¹²⁹⁹ *ibid* [354].

¹³⁰⁰ *El Paso* (n 561) [233].

¹³⁰¹ *El Paso* (n 561) [233] quoted above at n 599.

that it 'is not possible to apply a treaty except on the basis of some interpretation of it',¹³⁰² 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*, 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.¹³⁰³

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 valid 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.¹³⁰⁴

(emphasis added)

¹³⁰² *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 (Separate Opinion Judge Shahabuddeen) [11]. See also Bjorge (n 1222) 16; 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). Of course, this is subject to the caveats discussed above.

¹³⁰³ *Chemtura* (n 62) [242].

¹³⁰⁴ *ibid* [266].

Again, the police powers doctrine arose at the point of ascertaining what constituted (or did not constitute) indirect expropriation, and because the measure was found to be a valid exercise of police power, it was not an expropriation. The same approach occurred in *Feldman v Mexico*, another NAFTA case, which noted that in resolving the ‘key issue’ of whether the Respondent’s actions constituted an indirect expropriation, ‘the essential determination is whether the actions of the...[Respondent] constitute an expropriation...or are valid governmental activity’.¹³⁰⁵

Non-NAFTA tribunals have adopted a similar approach. In *Servier v Poland*, 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).¹³⁰⁶ 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.¹³⁰⁷

These approaches are broadly consistent with the interpretive approach required by Article 31(1) VCLT, as all consider the police powers doctrine at the

¹³⁰⁵ *Feldman* (n 583) [97]-[98].

¹³⁰⁶ *Servier* (n 607) [563]-[566].

¹³⁰⁷ *ibid* [570].

point of determining what is included and excluded from the definition of expropriation. 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 customary international law 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 international law. This is consistent with the conclusion in Chapter Four that the police powers doctrine operates as a limitation on the scope of the obligation insofar as the doctrine is relevant to determining whether a measure constitutes an indirect expropriation.

However, while the operation of Article 31(1) VCLT is conceptually neat, it does not resolve the inquiry altogether and is not without difficulty. For example, applying the customary international law as part of the ordinary meaning of expropriation may tie the police power and indirect expropriation together in a way that could limit its applicability to other standards of protection, such as FET. This would be inconsistent with the argument advanced in Chapter Six that the police power applies outside of the context of indirect expropriation.

Further, the Tribunal in *Tecmed* concluded that, having considered the ordinary meaning of an expropriation provision in accordance with Article 31(1), it could ‘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'.¹³⁰⁸ This did not preclude the Tribunal in that case from considering the police powers doctrine,¹³⁰⁹ and the passage appears to have been subsequently adopted by tribunals as support for the view that the police power of States is not absolute and does not constitute a 'blanket exception for regulatory measures',¹³¹⁰ rather than as a definitive statement as to the ordinary meaning of expropriation. However, as this casts some doubt as to whether the police power can apply as part of the ordinary meaning of expropriation it is necessary to address whether there is some other basis in Article 31 that allows the police powers doctrine to be accommodated.

2. Police Powers and Article 31(3)(c) VCLT

If the ordinary meaning of expropriation excludes valid exercises of police power, then Article 31(3)(c) arguably has a limited role to play. That is, a tribunal would be introducing customary international law into the interpretive process because it is directly referred to as part of the ordinary meaning, rather than because it is a relevant rule of international law applicable between the parties.¹³¹¹

However, if a tribunal were to conclude that the ordinary meaning of expropriation under the IIT did not *per se* exclude the exercise of police power,¹³¹² a tribunal may then identify the police powers doctrine as a 'relevant' rule of

¹³⁰⁸ *Tecmed* (n 580) [121].

¹³⁰⁹ *ibid* at [122].

¹³¹⁰ *El Paso* (n 561) [234]-[236]; *Pope & Talbot* (n 827) [99].

¹³¹¹ Paparinskis, 'Investment Treaty Interpretation and Customary International Law: Preliminary Remarks' (n 111)

¹³¹² As occurred in *Tecmed* (n 580) [121].

customary international law that is applicable between the parties, using Article 31(3)(c) VCLT. Several tribunals have adopted this approach. As noted in Chapter Four, in *Saluka*, the Tribunal considered that the concept of ‘expropriation’ excluded the valid exercise of police power.¹³¹³ The Tribunal cited Article 31(3)(c) as authority for the following proposition:

...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.¹³¹⁴

Similarly, in *Philip Morris v Uruguay*, the Tribunal held when applying the police powers doctrine to the resolution of the indirect expropriation claim that:

As pointed out by the Respondent, Article 5(1) of the BIT must be interpreted in accordance with Article 31(3)(c) of the VCLT requiring that treaty provisions be interpreted in light of “[a]ny relevant rules of international law applicable to the relations between the parties” a reference “which includes...customary international law”. This directs the Tribunal to refer to the rules of customary international law as they have evolved.¹³¹⁵

The ‘principle that the State’s reasonable *bona fide* exercise of police powers in such matters as the maintenance of public order, health or morality, excludes compensation even when it causes economic damage to an investor and that measures taken for that purpose should not be considered expropriatory’,¹³¹⁶ subject to the proviso that such measures must be non-discriminatory and

¹³¹³ *Saluka* (n 3).

¹³¹⁴ *ibid* [254].

¹³¹⁵ *Philip Morris v Uruguay* (n 17) [290].

¹³¹⁶ *ibid* [295].

proportionate,¹³¹⁷ was considered to be a relevant rule of customary international law applicable to the relations between the parties for the purposes of Article 31(3)(c). As the Tribunal found that the impugned measures were a ‘valid exercise by Uruguay of its police powers for the protection of public health’, they could not constitute an expropriation of the Claimant’s investment.¹³¹⁸ In incorporating the police powers doctrine this way, the Tribunal in *Philip Morris v Uruguay* rejected the argument advanced by the Claimant that ‘there is no room under Article 5(1) [the expropriation provision in the applicable treaty] or otherwise in the BIT for carving out an exemption base on the police powers of the State’.¹³¹⁹

As is evident from the analysis in *Philip Morris v Uruguay* and *Saluka*, it seems unlikely that the police powers doctrine could be considered as anything other than relevant to the meaning of expropriation, given that the doctrine operates in such a way that valid exercises of police power do not constitute expropriation. Being a principle of customary international law, it is therefore a relevant rule of international law applicable to the relations between the parties.¹³²⁰

As a relevant rule of international law applicable in the relations between the parties, the customary international law could then be used to define the contours of the expropriation provision. An example of this approach, in a slightly

¹³¹⁷ *ibid* [305].

¹³¹⁸ *ibid* [307].

¹³¹⁹ *ibid* [289].

¹³²⁰ With the ‘parties’ being the States parties to the treaty.

different context, is *Burlington Resources v Ecuador*.¹³²¹ 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 exercises of police power, taxation is generally non-compensable and not considered an expropriation.¹³²² 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 an essential prerogative of State sovereignty’¹³²³ and that, in 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 ...has held includes relevant rules of general customary international law.”¹³²⁴

¹³²¹ *Burlington* (n 775).

¹³²² Indeed, taxation is a result of State’s police powers: *ibid* [391].

¹³²³ *ibid* [391].

¹³²⁴ *ibid* [392].

The Tribunal 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’.¹³²⁵ 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.¹³²⁶

The Tribunal then discussed the requirement of ‘substantial deprivation’ for an indirect expropriation. After considering the facts, the Tribunal concluded that the relevant measure did not amount to a substantial deprivation of the value of the Claimant’s investment.¹³²⁷

The Tribunal also proceeded to consider the police powers doctrine in the context of other measures that the Claimant alleged amounted to an indirect 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]’.¹³²⁸ 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

¹³²⁵ *ibid* [394].

¹³²⁶ *ibid* [395].

¹³²⁷ *ibid* [430] and [456]-[457].

¹³²⁸ *ibid* [471].

deprivation of the value of the Claimant's investment, on a permanent basis, and found no justification in the police powers doctrine.¹³²⁹

Just as taxation under customary international law circumscribes the test applicable to expropriation under the relevant IIT in *Burlington Resources*,¹³³⁰ so too could the police powers doctrine.

3. Comparison with approaches of tribunals where the treaty expressly refers to the police powers doctrine

As noted earlier, the majority of IITs currently in existence do not refer to the police powers doctrine. 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.¹³³¹ In particular, as noted in Chapter Four when discussing the customary international law nature of the police powers doctrine, many of these treaties include interpretive annexures that define indirect expropriation in such a way that it excludes 'non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives' except in

¹³²⁹ *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].

¹³³⁰ *ibid* [400].

¹³³¹ Schill and Jacob (n 1216).

rare circumstances.¹³³² As noted by the Tribunal in *Philip Morris v Uruguay*, such language reflects the police powers doctrine under customary international law.¹³³³ Given the similarity between the interpretive annexures and the position under customary international law, the interpretation of the annexures offers a useful comparison between circumstances where customary international law is not expressly articulated in the text of the treaties and those where it is.

To date, there has been limited consideration of these annexures in investor-State arbitration. However, the interpretive annexure under the CAFTA-DR (which is in the terms quoted in the previous paragraph) has been considered recently in *Railroad Development v Guatemala*, the first decision on the merits handed down under the CAFTA-DR.¹³³⁴ 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'.¹³³⁵ The Respondent submitted that the annexure of CAFTA-DR 'codifies the extensive deference customary international law accords to a State's exercise of its police powers',¹³³⁶ and further argued that the provision accepted 'the customary international law standard' of

¹³³² US-Uruguay BIT (2005) (n 754) Annex B; US-Rwanda BIT (2008) (n 754) Annex B; US-Chile FTA (2003) (n 754) Annex 10-D; CAFTA-DR (2004) Annex 10-C; Morocco-US FTA (2004) (n 754) Annex 10-B; Oman-US FTA (2006) (n 754) Annex 10-B; Panama-US TPA (2007) (n 754) Annex 10-B; US-Peru TPA (2006) (n 754) Annex 10-B. See Chapter Four, Part III(2)(b)(iv).

¹³³³ *Philip Morris v Uruguay* (n 17) [301].

¹³³⁴ *Railroad Development* (n 927).

¹³³⁵ *Railroad Development Corporation* Counter Memorial (n 722) [297].

¹³³⁶ *ibid* [298].

police powers.¹³³⁷ 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’.¹³³⁸

In *Al Tamimi v Oman*, the Tribunal considered the interpretive annexure contained in Annex 10-B(4) of the US-Oman FTA, which is also in the same terms as the interpretive annexure quoted above. The Respondent submitted that this annexure underscored ‘Oman’s right to exercise police power’ and that the impugned measures in that case (a challenge to the application of environmental laws) lay ‘at the core of a State’s police power, and that any application of those [environmental laws] that leads to the loss of property constitutes a non-compensable regulatory action as opposed to a compensable taking’.¹³³⁹ The case was dismissed as the Claimant’s loss of investment rights was a consequence of its own conduct and, in *obiter*, the Tribunal appeared to suggest that the measures were a valid exercise of police power when it noted that even the Claimant had not ‘confront[ed] the express stipulation...of the US-Oman FTA that non-discriminatory regulatory actions by a State designed and applied to protect

¹³³⁷ *ibid.*

¹³³⁸ *Railroad Development* (n 927) [152].

¹³³⁹ *Al Tamimi* (n 726) [178]-[178].

legitimate public welfare objectives, including protection of the environment ... do not constitute indirect expropriations'.¹³⁴⁰

It is noteworthy that many investor-State arbitration tribunals, such as the *Chemtura* Tribunal, went further than the *Railroad Development* Tribunal and considered and ruled upon the police powers doctrine, notwithstanding the absence of an interpretive annexure in the applicable treaty. 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. Further, as the recent CAFTA-DR jurisprudence highlights, the inclusion of the annexures does not 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. The annexures do allow for some certainty that an expropriation provision would be interpreted by reference to the police powers doctrine. While the full effect of the annexures remains to be seen, it is not apparent that the annexures offer any greater certainty than a proper application of the VCLT principles of treaty interpretation.

IV. INTERPRETING FAIR AND EQUITABLE TREATMENT IN LIGHT OF THE POLICE POWERS

DOCTRINE

The task of interpreting the FET standard is more complex than interpreting indirect expropriation. As noted in Chapter Five, there is debate as to whether the

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ibid [386].

FET standard is one that is linked to customary international law or one that is 'autonomous'.¹³⁴¹ Also in Chapter Five, several different formulations of the FET standard were advanced based on the existing case law, each of which treated public interest regulation differently. However, it will be recalled that in Chapter Six it was concluded that the police powers doctrine in principle applies to other standards of investment protection, including FET. This Part will apply the relevant principles in Article 31 discussed above¹³⁴² to these different formulations of the FET standard and highlight how the police powers doctrine could give greater clarity and consistency to the FET analysis.

In doing so, it is acknowledged that the approach below is a novel approach insofar as a tribunal to date has not explicitly adopted it. However, as the *Neer* Tribunal acknowledged, it is a difficult task identifying the boundary between an international delinquency...and an unsatisfactory use of power included in national sovereignty'.¹³⁴³ By more clearly articulating the 'power included in national sovereignty' that is considered to be lawful, the approach advanced below may make that boundary easier to identify.

1. The police power and the ordinary meaning of fair and equitable treatment – Article 31(1)

The relevance of the police power to the ordinary meaning of FET can be briefly stated. Whether the police powers doctrine is part of the ordinary meaning of FET

¹³⁴¹ See Chapter Five, Part II.

¹³⁴² See earlier in this Chapter in Part II(1).

¹³⁴³ *Neer* (n 268).

will depend on two factors: first, whether the FET standard under scrutiny is linked to the customary international law minimum standard of treatment, and secondly, whether the police powers doctrine is part of the customary international minimum standard in the same way that the doctrine is part of the customary international law of expropriation.

Dealing with the second factor first, it is likely that the police powers doctrine could apply to the customary international minimum standard, whether the content of that standard reflects *Neer* or has developed since then. This is because, as noted in Chapter Two and Six, the police powers doctrine itself originated in jurisprudence concerning the international minimum standard.¹³⁴⁴ Further, as Paparinskis notes, as the minimum standard has evolved to concern the treatment of property, it has drawn upon the historical customary international law of expropriation and therefore implicitly incorporates the police powers doctrine.¹³⁴⁵ As such, a valid exercise of police power will not constitute a violation of the international minimum standard. If it is not a valid exercise of police power (for example, because it is discriminatory), that would not necessarily result in a violation of the international minimum standard unless it meets the additional threshold required by the international minimum standard of a 'gross denial of justice or manifest arbitrariness falling below acceptable

¹³⁴⁴ Chapter Two, Part III(2), Chapter Six, Part III(2)(a).

¹³⁴⁵ For a discussion of how the customary international law of expropriation is reflected in the international minimum standard, see: Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (n 112) Chapter 9, especially 222-227.

international standards’ (if the *Neer* standard is accepted as the customary standard) or is ‘grossly unfair or idiosyncratic’ (if the *Waste Management II* is the customary standard).

Returning to the first factor, as discussed Part II of Chapter Five, there is an ongoing debate as to whether the FET standard is linked to the customary international minimum standard. If it were accepted that the FET standard is linked to custom, then content of the international minimum standard would form the ordinary meaning of FET in accordance with Article 31(1) VCLT. This is because, consistent with Article 31(1), FET would either be taken to be an explicit reference to custom or at least be a reference to a concept that has customary international law significance.¹³⁴⁶ As valid exercises of police power would not fall within the international minimum standard, so too would exercises of police power not fall within the concept of fair and equitable treatment.

2. The police power, Article 31(3)(c) and the FET standard

(a) Greater coherence and consistency in the application of the FET standard

If the standard is seen as one that is ‘autonomous’, arguably Article 31(3)(c) has a role to play such that the police powers doctrine can inform the interpretation of the FET standard.

As was noted by the Tribunal in *Perenco v Ecuador*, the challenge for any tribunal is to discern between an act that violates international law from ‘the perceived unfairness occasioned by many governmental actions that do not rise to

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See earlier in this Chapter in Part II(1).

a breach of international law'.¹³⁴⁷ Most often, tribunals (understandably) only state rhetorically that there is a sphere of government behaviour which interferes with investment that does not violate international law, but focus their analysis solely on whether the State conduct under scrutiny is unfair or inequitable, often by reference to investors' expectations. This is not an incorrect approach, but it does result in some circular reasoning and, as is apparent from Chapter Five, in different articulations of the FET standard. The search in the thesis is for some more tangible criteria that can provide more certainty, and if the analysis were supplemented by examining what the State is entitled to do in positive terms (rather than negatively), it may provide more coherence and consistency. Deploying the police powers doctrine in interpreting the FET standard therefore may assist in giving clarity and some structure to the FET inquiry, and may preclude the possibility of overly broad interpretations of the standard.

Applying Article 31(3)(c), the relevant rule of international law that is applicable in the relations between the parties is the police powers doctrine. As a principle of customary international law that has applied to interferences with property outside of the context of expropriation, it is a relevant rule. That rule must then be taken into account 'together with the context' so as to inform the meaning of FET. The approach of the Tribunal in *Burlington v Ecuador*, discussed above respect to confiscatory taxation and expropriation using Article 31(3)(c), would be equally applicable in the context of FET.

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Perenco (n 720) [559].

The Tribunal *Invesmart v Czech Republic* adopted this interpretive approach by implication. First, the Tribunal cited the findings of the *SD Myers* tribunal in a FET context to support the conclusions that non-discriminatory regulation aimed at the general welfare would not constitute expropriation and that it was not open to tribunals to second-guess government decision making.¹³⁴⁸ The Tribunal also cited with approval the *Saluka* Tribunal's invocation of the police powers doctrine in an expropriation context to support its conclusion with respect to FET.¹³⁴⁹ It could be argued that while the *Invesmart* Tribunal did not quote the specific part of *Saluka* that relied on Article 31(3)(c), it is implicit in relying on the *Saluka* expropriation analysis that the *Invesmart* Tribunal was using this principle of interpretation to inform its interpretation of the FET standard. As such, the police power is relevant to the interpretation of the FET standard, via Article 31(3)(c).

In the absence of other authority, the effectiveness of the approach can be illustrated by example. It will be recalled that the *Suez* Tribunal considered that it was unnecessary to apply the 'explicit, affirmative defence' of the police powers doctrine to claims other than expropriation on the basis that, 'if a tribunal finds that a State has violated treaty standards of FET...it must of necessity have determined that such State has exceeded its reasonable right to regulate'.¹³⁵⁰

¹³⁴⁸ *Invesmart* (n 592) [497]-[501].

¹³⁴⁹ *ibid.*

¹³⁵⁰ *Suez* (n 634) [147].

While this test incorrectly characterises the police powers doctrine as an exception,¹³⁵¹ and its invocation of the right to regulate can be criticised for the reasons discussed in Chapters Six, the way in which the *Suez* Tribunal expressed the operation of the right to regulate is instructive and not dissimilar to how the police power (properly construed) would apply using Article 31(3)(c). That is, when determining whether a violation of the FET standard has occurred, the Tribunal must take into account whether the State has acted within its police power. A finding of that a State has violated the FET standard of necessity involves a determination a State has exceeded its police power.

(b) Legitimate expectations, stability, the police power and Art 31(3)(c)

The accommodation of the police powers doctrine when interpreting the FET standard may be particularly helpful in articulating the proper scope of the concepts of ‘legitimate expectations’ and ‘stability’, to the extent that such concepts are relevant.

As to legitimate expectations, it will be recalled from Chapter Six that the Tribunal in *Saluka* had applied the police powers doctrine to the expropriation standard and the non-impairment standard, using Art 31(3)(c).¹³⁵² The Tribunal did not explain why the police power applied to the expropriation and non-impairment standards and not to the FET standard. This approach is regrettable

¹³⁵¹ See Chapter Four, Part III(4).

¹³⁵² See Chapter Six, Part III(3).

and could lead to confusion, particularly when the Tribunal noted that the standard of non-impairment and FET were similar when it held:

Insofar as the standard of conduct is concerned, a violation of the non-impairment requirement does not therefore differ substantially from a violation of the “fair and equitable treatment” standard. The non-impairment requirement merely identifies more specific effects of any such violation, namely with regard to the operation, management, maintenance, use, enjoyment or disposal of the investment by the investor.¹³⁵³

The *Saluka* Tribunal noted the importance of applying the principles of treaty interpretation under the VCLT when it sought to identify the ordinary meaning of the FET standard.¹³⁵⁴ However, while it considered the ordinary meaning, context and object and purpose of the FET standard, it did not consider Article 31(3)(c) in its analysis. Had it done so, it may have identified that many of the ways in which the Tribunal framed ‘legitimate expectations’ overlapped with the police powers doctrine and the *Waste Management II* standard (which had expressed similar principles but from the perspective of the State’s obligation, rather than the investor’s expectations). In particular, the Tribunal noted at [309] that:

The Czech Republic, without undermining its legitimate right to take measures for the protection of the public interest, has therefore assumed an obligation to treat a foreign investor’s investment in a way that does not frustrate the investor’s underlying legitimate and reasonable expectations. *A foreign investor whose interests are protected under the Treaty is entitled to expect that the Czech Republic will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (i.e. unrelated to some rational policy), or*

¹³⁵³ *Saluka* (n 3) [461].

¹³⁵⁴ *ibid*, [292].

discriminatory (i.e. based on unjustifiable distinctions). In applying this standard, the Tribunal will have due regard to all relevant circumstances.¹³⁵⁵

(emphasis added)

What the 'legitimate right to take measures for the protection of the public interest' entailed was unexplained, and appears to be more rhetorical than substantive. Rather than expressing the standard from the perspective of what the investor expects, States' rights and obligation could be framed differently. Applying the police powers doctrine to the concept of the FET, it could be said that a State is entitled and will be acting within its police power (that is, lawfully) if it interferes with the rights of foreign investors provided it acts in a way that is consistent, transparent, reasonable and non-discriminatory and for a public purpose. The undermining or inconsistent behaviour with specific commitments would be relevant factors in determining whether the behaviour was 'transparent' or 'reasonable'. Failure to act in this way, according to *Waste Management II*, would violate the States' obligation to afford FET to investors, regardless of any expectations the investor may have. The use of the police powers doctrine also has a more concrete meaning than the passing reference to States' right to regulate.

As to stability, the application of the police powers doctrine to any stability requirement would necessarily preclude the outcome that a change to the general policy framework of the State could breach the FET standard, if that change

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ibid [309].

occurred in a non-discriminatory manner, in good faith, and was for a public purpose and was proportionate or reasonable.

3. Comparison with recent FET treaty provisions that explicitly acknowledge public interest regulatory aims

There have been a number of more recent IITs that have affirmed that the FET standard is linked to (and does not go beyond) the customary international law minimum standard of treatment.¹³⁵⁶ To the extent that the police powers doctrine is reflected in the customary international law minimum standard of treatment, and the ordinary meaning of FET will be the customary international law meaning given to the international minimum standard, the police powers doctrine will be accommodated within the FET standard.¹³⁵⁷

Apart from tying the FET standard to customary international law, there has not been the same trend of including interpretive annexures or other provisions in IITs that clarify the meaning of FET by reference to States' regulatory powers. However, this trend may be changing: the recent EU-Canada Comprehensive Economic and Trade Agreement ('EU-Canada CETA') sets out a closed list of conduct that would breach the FET obligation as follows:

1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their

¹³⁵⁶ For example, *Agreement Between the Government of Australia and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments* (signed 23 August 2005, entered into force 21 July 2007) Article 4(1),(2); *Agreement Between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments* (signed 5 May 2009, entered into force 24 November 2011) Article II(2)(a); US-Uruguay BIT (2005) (n 754) Article 5.

¹³⁵⁷ See above in this Chapter, Part IV(1).

covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 7.

2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:
 - (a) denial of justice in criminal, civil or administrative proceedings;
 - (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
 - (c) manifest arbitrariness;
 - (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
 - (e) abusive treatment of investors, such as coercion, duress and harassment; or
 - (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.

...

4. When applying the above fair and equitable treatment obligation, the Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.¹³⁵⁸

That section is subject to an earlier section entitled 'Investment and Regulatory Measures' which provides, *inter alia*:

¹³⁵⁸

EU-Canada Comprehensive Economic and Trade Agreement (signed 30 October 2016, not yet in force) Article 8.10.

1. For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.
2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section.¹³⁵⁹

The provision on Investment and Regulatory Measures covers all standards of treatment in the investment chapter, including expropriation and FET.

As the EU-Canada CETA is not yet in force, there has not been any consideration of the provisions by investor-State arbitration tribunals. Thus, the impact of such provisions remains to be seen and will therefore only be addressed briefly. It can tentatively be concluded that provisions of the type quoted above offer 'a very significant limitative definition'¹³⁶⁰ of FET, which would 'reduce tribunals' interpretive discretion by clarifying the types of conduct that would violate fair and equitable treatment'.¹³⁶¹ This could obviate the need for any invocation of the police powers doctrine under customary international law

¹³⁵⁹ *ibid*, Article 8.9.

¹³⁶⁰ Armand de Mestral, 'When Does the Exception Become the Rule? Conserving Regulatory Space under CETA' (2015) 18 *Journal of International Economic Law* 641, 650; see also Eric de Brabandere, 'States' Reassertion of Control over International Investment Law: (Re)Defining 'Fair and Equitable Treatment' and 'Indirect Expropriation' Andreas Kulick (ed) *Reassertion of Control over the Investment Treaty Regime* (Cambridge University Press 2017) 285.

¹³⁶¹ Henckels, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP' (n 917) 36.

entirely, or at least limit its relevance to the meaning of FET, as the treaty itself provides a definition of the standard. In any event, the combined effect of the 'Investment and Regulatory Measures' provision and the FET provision in the EU-Canada CETA would be likely be similar to that which would result if the police powers doctrine were applied via Article 31(3)(c). That is, a State which enacts proportionate or reasonable *bona fide* public interest regulation in a non-discriminatory manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, would not amount to a breach of the FET obligation.

V. CONCLUSION

The police powers doctrine, accommodated using principles of treaty interpretation, assists in resolving the broader issue of demarcating the line between regulation and indirect expropriation. These principles apply equally to the FET analysis, and provide similar assistance in demarcating the line between lawful State activity and unfair and inequitable treatment. Ultimately, this Chapter has proposed that the proper application of the principles of treaty interpretation would allow the police powers doctrine to be accommodated in the resolution of an indirect expropriation and FET claim, and would thereby ensure that public interest regulation, and States' police powers, would be treated with greater consistency and clarity.

CHAPTER EIGHT

CONCLUSION

The right to regulate and the police power are concepts that suffer from a degree of imprecision and are often assumed to be axiomatic. In light of the analysis in this thesis, it can be concluded that it is only the police power, through the police powers doctrine, that provides a basis upon which States may defend the lawfulness of public interest regulation against claims of indirect expropriation and unfair and inequitable treatment.

As was examined in Chapters Five and Six, the varied language to describe and invoke the right to regulate is indicative that the concept is not one that can be used to limit the obligations States would otherwise be taken to have. To the extent that the right to regulate is another way of expressing right of States to enact laws within their territory as an inherent element of State sovereignty, that 'right' is not disputed but it does not take the matter any further. As Chapters Two and Three demonstrated, appealing to sovereignty as a justification for undermining international commitments freely entered into is not, and has never been, accepted. In this sense, as was argued in Chapter Six, the right to regulate is a concept that is more rhetorical than substantive.

In contrast, while the way in which the police powers doctrine has been articulated and invoked is not entirely consistent, Chapter Four established that there is an underlying principle that is anchored in customary international law.

The exercise of police power, namely the enactment of *bona fide*, non-discriminatory and proportionate or reasonable regulation for a public purpose is recognised under customary international law as lawful. The effect of this is that exercises of police power, properly construed, will not constitute indirect expropriation. In this way, the police powers doctrine is relevant in determining whether a measure constitutes an indirect expropriation and operates as a limitation on the scope of a State's obligation. Further, as was argued in Chapter Six, the police powers doctrine in principle can extend to standards of treatment beyond expropriation, including FET.

Finally, Chapter Seven examined how the principles of treaty interpretation may be used to ensure that the police powers doctrine can be accommodated when interpreting expropriation and FET provisions in IITs. The application of the police powers doctrine to the expropriation and FET standards provides more certainty and consistency than the more abstract right to regulate, and may assist a tribunal when determining the scope of an expropriation or FET obligation in the relevant IIT.

Through the arguments advanced in this thesis, a consistent approach to the treatment of States' regulatory powers in international investment law is achievable. This does not mean the outcome will always be the same, nor will the analysis be identical across FET and indirect expropriation claims: indirect expropriation and FET are different obligations, and the IITs themselves may provide textual guidance that gives the police powers doctrine a more limited role

to play. However, to the extent that the police powers doctrine can assist in shaping the contours of the standards of investment protection, the approach in this thesis may provide greater clarity to tribunals seeking to resolve disputes concerning alleged breaches of IITs, and guidance to States and investors alike as to the types of conduct that customary international law recognises as lawful.

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