The London School of Economics and Political Science

States' regulatory powers and the turn to public law in international investment law and arbitration

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A thesis submitted to the Department of Law of the London School of Economics and Political Science for the degree of Doctor of Philosophy, London, September 2020

DECLARATION

Declaration

I certify that the thesis I have presented for examination for the MPhil/PhD degree of the London School of Economics and Political Science is solely my own work other than where I have clearly indicated that it is the work of others (in which case the extent of any work carried out jointly by me and any other person is clearly identified in it).

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Statement of inclusion of previous work

I can confirm that I conducted research on topics covered in Section 2.2 and Chapter 4 during previous study for an MPhil in Law award I undertook at the University of Oxford in 2014/15. No material from that thesis has been directly incorporated below. I undertake to make a copy available upon request.

Parts of thesis previously published

No parts of this thesis have yet been published.

A manuscript based on research toward Chapters 5–7 was submitted to the *British Yearbook of International Law* in January 2020 and is currently under review. I undertake to make a copy available upon request.

Callum Musto

29 September 2020

ABSTRACT

Disputes between foreign investors and host States often involve fundamental questions concerning the distribution of opportunity and cost in society. Adjudicators settling such disputes decide issues with significant bearing on the State-market relationship and States' capacities to define and pursue the public interest. The perception that investment tribunals — and the rules they apply — often fail to appropriately balance competing public and private interests and to permit host States adequate regulatory space has contributed significantly to investment arbitration's enduring legitimacy crisis. In response, scholars and practitioners have increasingly analogised investment law and arbitration with domestic public law and regional rights-based adjudication, based on alleged functional and structural similarities.

This thesis critically examines the turn to public law in international investment law, focusing particularly on its manifestations in arbitral practice. After considering how international law governs States' 'regulatory powers' and tracing the origins of the turn to public law, inquiry seeks to answer two questions: (i) to what extent, if any, is the turn to public law discernible in arbitral practice?; and (ii) what consequences flow the turn to public law as it has manifested in arbitral practice, particularly for States' capacities to define and pursue the public interest?

Examining arbitral practice concerning two 'borrowed' public law concepts in detail — the 'police powers doctrine' and proportionality principle — the thesis maps arbitrators' use of extraneous materials and incorporation of norms and approaches derived from other fields of law, considers the impact of borrowing on arbitral reasoning, and assesses whether arbitral recourse to borrowed public law concepts constitutes the valid application of extant law. Based on trends in arbitral practice, it then presents the broader normative case against reconceptualising investment law and arbitration as a species of international public law, and suggests alternative — more legitimate — means of addressing the field's actual and perceived ills.

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Callum Musto

September 2020

NOTE ON CITATION

Footnote citation in this dissertation follows a modified OSCOLA convention. All primary materials are cited using the abbreviated citations indicated in the Tables of Authorities, including in the first instance. Books and book chapters are cited using surname, year of publication, publisher and (for chapters) start page. Articles are cited using surname, year of publication and journal reference. Subsequent references use a short form of surname, year, and pinpoint. UN and other international organisations' documents are cited using only the issuing body, year or date, and document number. Pinpoint references are provided wherever possible; numbers in square brackets indicate paragraphs. Some small exceptions are made to the above to avoid confusion in the case of similar citations.

As much as possible journal abbreviations follow the Cardiff Index to Legal Abbreviations.

Full citations are provided for all cited materials in the Bibliography and Tables of Authorities.

The examination of arbitral practice in Chapters 4 and 5 takes into account decisions issued up to 31 December 2018 and publicly available in English on 30 April 2019. The methods of selection and analysis are outlined in Section 1.2 below; the search terms used in identifying practice and lists of the decisions comprising the full corpus are contained in Annexes 1 and 2.

Unless otherwise indicated, all other references are intended to be accurate as of the final date of writing, 30 August 2020.

ABBREVIATIONS

AB	WTO Appellate Body
ALI	American Law Institute
BIT	Bilateral Investment Treaty
CBC	Central Bank of Cyprus
CJEU	Court of Justice of the European Union
ECtHR	European Court of Human Rights
EU	European Union
FCN	Freedom of commerce and navigation
FDI	Foreign direct investment
FET	Fair and equitable treatment
FTA	Free Trade Agreement
GAL	Global administrative law
GC	Global constitutionalism
HRC	Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICTY	International Criminal Tribunal for the Former Yugoslavia
IIA	International investment agreement
ILC	International Law Commission
IMS	international minimum standard of treatment
IPL	International public law
ISDS	Investor-State dispute settlement
ISLG	Investor-State LawGuide
ITLOS	International Tribunal for the Law of the Sea
IUSCT	Iran-US Claims Tribunal
IUSCTR	IUSCT Reports
KNF	Polish Financial Supervision Authority
MFN	Most-favoured nation
MIC	Multilateral Investment Court
OECD	Organisation for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
SCC	Stockholm Chamber of Commerce
UKHL	United Kingdom House of Lords
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
US	United States of America
WTO	World Trade Organization

AUTHORITIES

Decisions of *ad hoc* investment tribunals (alphabetical, by abbreviated citation)

Abbreviated citation	Full citation	Arbitration rules	Cited at page/s
AAPL	*AAPL v Sri Lanka* [Final Award] (27 Jun 1990) ICSID Case No ARB/87/3	ICSID	4
Abaclat	*Abaclat v Argentina* [Decision on Jurisdiction and Admissibility] (4 Aug 2011) ICSID Case No ARB/07/5	ICSID	24
Abaclat [Abi-Saab DO]	*Abaclat v Argentina* [Dissenting Opinion, Georges Abi Saab] (28 Oct 2011) ICSID Case No ARB/07/5	ICSID	24
Achmea	*Achmea BV v Slovakia* [Award] (7 Dec 2012) UNCITRAL, PCA 2008-13	UNCITRAL	136, 169
ADC	*ADC Affiliate Ltd v Hungary* [Award] (2 Oct 2006) ICSID Case No ARB/03/16	ICSID	12, 78, 91
ADM	*ADM Co and Tate & Lyle v Mexico* [Award] (21 Nov 2007) NAFTA, ICSID Case No ARB(AF)/04/05	ICSID	109, 115
AES v Kazakhstan	*AES Corp and Tau Power BV v Republic of Kazakhstan* [Award] (1 Nov 2013) ICSID Case No ARB/10/16	ICSID	2, 117, 119, 120, 121, 123, 128, 132, 133
Aguas del Tunari	*Aguas del Tunari SA v Bolivia* [Decision on Jurisdiction] (21 Oct 2005) ICSID Case No ARB/02/3	ICSID	144
Allard	*Allard v Barbados* [Award] (27 Jun 2016) UNCITRAL PCA Case No 2012-06	UNCITRAL	80, 165
Al-Tamimi	*Adel A Hamadi Al-Tamimi v Oman* [Award] (3 Nov 2015) ICSID Case No ARB/11/33	ICSID	78, 80, 87, 88, 118, 119, 121, 151, 165, 167, 168, 169, 184

Ampal-American	*Ampal-American Israel Corp and others v Egypt* [Decision on Liability and Heads of Loss] (21 Feb 2017) ICSID Case No ARB/12/11	ICSID	118, 119, 121
Antaris	*Antaris GmbH & Göde v Czech Republic* [Award] (2 May 2018) PCA Case No 2014-01	UNCITRAL	2, 117, 119, 121
Antin	*Antin v Spain* [Award] (15 Jun 2018) ICSID Case No ARB/13/31	ICSID	78, 117, 119, 121, 168
Apotex	*Apotex Holdings Inc & Apotex Inc v United States* [Award] (25 Aug 2014) ICSID Case No ARB(AF)/12/1	ICSID	53
Arif	*Mr Franck Charles Arif v Moldova* [Award] (8 Apr 2013) ICSID Case No ARB/11/23	ICSID	54, 80, 155, 165
Aven	*Aven & ors v Costa Rica* [Final Award] (18 Sep 2018) ICSID Case No UNCT/15/3	UNCITRAL	80
Awdi	*Mr Hassan Awdi, Enterprise Business Consultants, Inc and Alfa El Corporation v Romania* [Award] (2 Mar 2015) ICSID Case No ARB/10/13	ICSID	118, 119, 121, 123, 128, 135, 153
Azinian	*Azinian & ors v Mexico* [Award] (1 Nov 1999) ICSID Case No ARB(AF)/97/2	ICSID	155
Azurix	*Azurix Corp v Argentina* [Award] (14 Jul 2006) ICSID Case No ARB/01/12	ICSID	2, 78, 80, 84, 118, 119, 121, 131, 134, 165, 174, 184
Bear Creek	*Bear Creek Mining v Peru* [Award] (30 Nov 2017) ICSID Case No ARB/14/21	ICSID	2, 74, 78, 81, 83, 98, 102, 148, 160, 165, 179, 180
Bear Creek [Sands DO]	*Bear Creek Mining v Peru* [Partial Dissenting Opinion of P Sands] (12 Sep 2017) ICSID Case No ARB/14/21	ICSID	74, 78, 81, 98, 102, 148, 180

Belokon	*Valeri Belokon v Kyrgyzstan* [Award] (24 Oct 2014) UNCITRAL	UNCITRAL	78, 80, 82, 87, 88, 89, 118, 119, 120, 121, 123, 125, 128, 131, 136, 165
BG	*BG Group PLC v Argentina* [Final Award] (24 Dec 2007) UNCITRAL	UNCITRAL	80, 165, 169
Bilcon	*William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc v Canada* [Award on Jurisdiction and Liability] (17 Mar 2015) UNCITRAL, PCA 2009-04	UNCITRAL	225
Biwater Gauff	*Biwater Gauff Ltd v Tanzania* [Award] (24 Jul 2008) ICSID Case No ARB/05/22	ICSID	2
Blusun	*Blusun SA, Jean-Pierre Lecorcier and Michael Stein v Italy* [Final Award] (27 Dec 2016) ICSID Case No ARB/14/3	ICSID	2, 27, 117, 119, 120, 121, 123, 128, 131, 132, 135, 153, 168, 201
Burlington	*Burlington Resources Inc v Ecuador* [Decision on Liability] (14 Dec 2012) ICSID Case No ARB/08/5	ICSID	70, 78, 80, 83, 84, 86, 87, 88, 89, 98, 101, 165, 169
Canfor	*Canfor v United States* [Decision on Preliminary Question] (6 Jun 2006) UNCITRAL	UNCITRAL	144
Caratube	*Caratube International Oil Co LLP and Hourani v Kazakhstan* [Award] (27 September 2017) ICSID Case No ARB/13/13	ICSID	53
Casinos Austria [Jurisdiction]	*Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v Argentina* [Decision on Jurisdiction] (29 Jun 2018) ICSID Case No ARB/14/32	ICSID	118, 121
Charanne	*Charanne BV and Construction Investments SARL v Spain* [Final Award] (21 Jan 2016) SCC Arb No 062/2012	SCC	2, 27, 117, 119, 120, 121, 125, 128, 132, 135, 201

Chemtura	*Chemtura Corp v Canada* [Award] (2 Aug 2010) UNCITRAL	UNCITRAL	78, 80, 83, 86, 88, 93, 102, 165
Chevron & Texaco (I) [Partial Award]	*Chevron and Texaco v Ecuador (I)* [Partial Award] (30 Mar 2010) PCA 34877	UNCITRAL	2, 53, 144
Chevron & Texaco (II) [Second Partial Award on Track II]	*Chevron and Texaco v Ecuador (II)* [Second Partial Award on Track II] (30 August 2018) PCA 2009-23	UNCITRAL	53
CME [Brownlie SO]	*CME v Czech Republic* [Separate Opinion of Ian Brownlie] (14 Mar 2003) UNCITRAL	UNCITRAL	26
CME [Final Award]	*CME v Czech Republic* [Final Award] (14 Mar 2003) UNCITRAL	UNCITRAL	26
CME [Partial Award]	*CME v Czech Republic* [Partial Award] (13 Sep 2001) UNCITRAL	UNCITRAL	26
CMS	*CMS Gas Transmission Co v Argentina* [Award] (12 May 2005) ICSID Case No ARB/01/8	ICSID	12, 27, 221
CMS [Annulment]	*CMS Gas Transmission v Argentina* [Decision on Annulment] (25 Sep 2007) ICSID Case No ARB/01/8	ICSID	12, 180
Continental	*Continental Casualty Co v Argentina* [Award] (5 Sep 2008) ICSID Case No ARB/03/9	ICSID	27, 80, 109, 115, 118, 119, 121, 131, 150, 153, 165, 177
Copper Mesa	*Copper Mesa Mining Corp v Ecuador* [Award] (15 Mar 2016) PCA 2012-2	UNCITRAL	2, 78, 80, 83, 84, 86, 88, 89, 90, 92, 93, 94, 98, 99, 101, 102, 118, 119, 120, 121, 150, 165
Corn Products	*Corn Products International Inc v Mexico* [Decision on Responsibility] (15 Jan 2008) ICSID Case No ARB(AF)/04/01	ICSID	78, 80, 83, 169
Crystallex	*Crystallex International Corp v Venezuela* [Award] (4 Apr 2016) ICSID Case No ARB(AF)/11/2	ICSID	118, 119, 151, 169
Daimler	*Daimler Financial Services v Argentina* [Award] (22 Aug 2012) ICSID Case No ARB/05/1	ICSID	26

Daimler [Brower DO]	*Daimler Financial Services v Argentina* [Dissenting Opinion of CN Brower] (15 Aug 2012) ICSID Case No ARB/05/1	ICSID	26
Dan Cake	*Dan Cake v Hungary* [Decision on Jurisdiction and Liability] (24 Aug 2015) ICSID Case No ARB/12/9	ICSID	155
de Levi	*Renée Rose Levy de Levi v Peru* [Award] (26 Feb 2014) ICSID Case No ARB/10/17	ICSID	74, 78, 80, 82, 86, 87, 118, 119, 120, 121, 123, 167
de Levi [Morales Godoy DO]	*Renée Rose Levy de Levi v Peru* [Dissenting Opinion of JM Morales Godoy] (26 Feb 2014) ICSID Case No ARB/10/17	ICSID	118
Deutsche Bank	*Deutsche Bank AG v Sri Lanka* [Award] (31 Oct 2012) ICSID Case No ARB/09/2	ICSID	80, 118, 119, 121, 123, 131, 159, 165
Deutsche Bank [Khan DO]	*Deutsche Bank AG v Sri Lanka* [Dissenting Opinion of MA Khan] (23 Oct 2012) ICSID Case No ARB/09/2	ICSID	78, 80
Deutsche Telekom	*Deutsche Telekom AG v India* [Interim Award] (13 Dec 2017) PCA 2014–10	UNCITRAL	2, 118, 119, 121
Devas	*CC/Devas (Mauritius) Ltd, Devas Employees Mauritius Private Ltd and Telecom Devas Mauritius Ltd v India* [Award on Jurisdiction and Merits] (25 Jul 2016) PCA Case No 2013-09	UNCITRAL	2, 118, 119, 121, 123
Eastern Sugar	*Eastern Sugar v Czech Republic* [Partial Award] (27 Mar 2007) SCC Case No 88/2004	SCC	143
ECE	*ECE Projektmanagement v Czech Republic* [Award] (19 Sep 2013) UNCITRAL, PCA Case No 2010-5	UNCITRAL	80, 117, 119, 121, 153, 165
EDF v Argentina	*EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentina* [Award] (11 Jun 2012) ICSID Case No ARB/03/23	ICSID	80, 165, 168

EDF v Romania	*EDF (Services) Ltd v Romania* [Award] (8 Oct 2009) ICSID Case No ARB/05/13	ICSID	78, 80, 81, 95, 97, 117, 119, 121, 123, 128, 134, 135, 165, 174, 184
Eiser	*Eiser Infrastructure Limited and Energía Solar Luxembourg SÀRL v Spain* [Final Award] (4 May 2017) ICSID Case No ARB/13/36	ICSID	27, 117, 119, 121, 201
El Paso	*El Paso Energy International Co v Argentina* [Award] (31 Oct 2011) ICSID Case No ARB/03/15	ICSID	70, 71, 78, 80, 81, 83, 84, 85, 95, 117, 119, 120, 121, 123, 131, 150
El Paso [Jurisdiction]	*El Paso Energy International Co. v Argentina* [Decision on Jurisdiction] (28 Apr 2006) ICSID Case ARB/03/15	ICSID	26
Electrabel	*Electrabel SA v Hungary* [Award] (25 Nov 2015) ICSID Case No ARB/07/19	ICSID	117, 119, 120, 121, 123, 125, 127, 128, 131, 133, 134, 135, 150, 153, 174, 201
EnCana	*EnCana Corp v Ecuador* [Award] (3 Feb 2006) UNCITRAL, LCIA UN3481	UNCITRAL	78, 165
Enron	*Enron Corp and Ponderosa Assets LP v Argentina* [Award] (22 May 2007) ICSID Case No ARB/01/3	ICSID	27, 80, 165, 169
Ethyl Corp [Jurisdiction]	*Ethyl Corp v Canada* [Award on Jurisdiction] (24 Jun 1998) UNCITRAL	UNCITRAL	144
Fábrica de Vidrios	*Fábrica de Vidrios Los Andes, CA and Owens-Illinois de Venezuela, CA v Venezuela* [Award] (13 Nov 2017) ICSID Case No ARB/12/21	ICSID	219
Feldman	*Feldman v Mexico* [Award] (16 Dec 2002) ICSID Case No ARB(AF)/99/1	ICSID	78, 80, 87, 132, 165
Fireman's Fund	*Fireman's Fund Insurance Co v Mexico* [Award] (17 Jul 2006) ICSID Case No ARB(AF)/02/1	ICSID	78, 80, 84, 169

Foresight v Spain	*Foresight Luxembourg Solar 1 SÀRL & ors v Spain* [Final Award] (14 Nov 2018) SCC Arb No V 2015/150	SCC	78, 80, 165, 168
Foresti	*Piero Foresti & ors v South Africa* [Award] (4 Aug 2010) ICSID Case No ARB(AF)/07/01	ICSID	2, 169, 218
Fuchs	*Ioannis Kardassopoulos and Ron Fuchs v Georgia* [Award] (3 Mar 2010) ICSID Case Nos ARB/05/18 and ARB/07/15	ICSID	78, 83
GEA v Ukraine	*GEA Group AG v Ukraine* [Award] (31 Mar 2011) ICSID Case No ARB/08/16	ICSID	24
Gemplus	*Gemplus SA and Talsud SA v Mexico* [Award] (16 Jun 2010) ICSID Case No ARB (AF)/04/3 and ARB(AF)/04/4	ICSID	53
Glamis Gold	*Glamis Gold Ltd v USA* [Award] (8 Jun 2009) UNCITRAL	UNCITRAL	25, 80, 155, 216
Gold Reserve	*Gold Reserve Inc v Venezuela* [Award] (22 Sep 2014) ICSID Case No ARB(AF)/09/1	ICSID	53, 118, 119, 121, 153
Grand River	*Grand River Enterprises Six Nations Ltd & Ors v USA* [Award] (12 Jan 2011) UNCITRAL	UNCITRAL	155, 166, 216
Greentech [Sacerdoti DO]	*Greentech Energy Systems A/S, et al v Italy* [Dissenting Opinion of G Sacerdoti] (5 Dec 2018) SCC 2015/095	SCC	117, 119, 120, 121, 123, 128, 153
Hochtief [Jurisdiction]	*Hochtief AG v Argentina* [Decision on Jurisdiction] (24 Oct 2011) ICSID Case No ARB/07/31	ICSID	26
Hochtief [Thomas DO]	*Hochtief AG v Argentina* [Separate and Dissenting Opinion of JC Thomas] (7 Oct 2011) ICSID Case No ARB/07/31	ICSID	26
ICS [Jurisdiction]	*ICS Ltd v Argentina* [Award on Jurisdiction] (10 Feb 2012) UNCITRAL, PCA 2010–9	UNCITRAL	26
Impregilo (2011)	*Impregilo SpA v Argentina* [Award] (2 Jun 2011) ICSID Case No ARB/07/17	ICSID	26

Impregilo (2011) [Brower DO]	*Impregilo SpA v Argentina* [Concurring and Dissenting Opinion of CN Brower] (21 Jun 2011) ICSID Case No ARB/07/17	ICSID	78, 80, 83
Infinito [Jurisdiction]	*Infinito Gold v Costa Rica* [Decision on Jurisdiction] (4 Dec 2017) ICSID Case No ARB/14/5	ICSID	80
Inmaris	*Inmaris Perestroika Sailing Maritime Services GmbH and Others v Ukraine* [Award] (1 Mar 2012) ICSID Case No ARB/08/8	ICSID	118, 119, 121, 123
InterAgua	*Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v Argentina* [Decision on Liability] (30 Jul 2010) ICSID Case No ARB/03/17	ICSID	70, 78, 80, 82, 83, 84, 98, 165
InterTrade	*InterTrade Holding GmbH v Czech Republic* [Final Award] (7 Jun 2012) PCA 2009-12	UNCITRAL	80, 165
Invesmart	*Invesmart v Czech Republic* [Award] (26 Jun 2009) UNCITRAL	UNCITRAL	78, 86, 125, 165
Isolux	*Isolux Netherlands BV v Spain* [Final Award] (17 Jul 2016) SCC Case No V 2013/153	SCC	27
JSW Solar	*Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co KG v Czech Republic* [Final Award] (11 Oct 2017) PCA Case No 2014-03	UNCITRAL	78, 81, 83, 153, 156, 165, 168
Kim [Jurisdiction]	*Vladislav Kim & ors v Uzbekistan* [Decision on Jurisdiction] (8 Mar 2017) ICSID Case No ARB/13/6	ICSID	115
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1948 US-Italy FCN Treaty	Treaty of friendship, commerce and navigation between the United States of America and the Italian Republic (completed 2 Feb 1948, entered into force 26 Jul 1949) 79 UNTS 171	Art V(2)	162
1955 Iran-US FCN Treaty	Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States of America (completed 15 Aug 1955, entered into force 16 Jun 1957) 284 UNTS 93	Art IV(2)	163
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1991 Czech Republic-US BIT	Treaty between the Czech and Slovak Federal Republic and United States of America Concerning the Reciprocal Encouragement and Protection of Investment (completed 22 Oct 1991, entered into force 19 Dec 1992)	Art II(2)(b)	26
1991 Netherlands-Czech Republic BIT	Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the	Art 3	26

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1991 US-Argentina BIT	Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (completed 14 Nov 1991, entered into force 20 Oct 1994)	Preamble	121, 140, 221
1993 US-Ecuador BIT	Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment (completed 27 Aug 1993, entered into force 11 May 1997, terminated 18 May 2018)	Letter of Submittal	146
1994 US-Mongolia BIT	Treaty Between the United States of America and Mongolia Concerning the Encouragement and Reciprocal Protection of Investment (completed 4 Oct 1994, entered into force 4 Jan 1997)	Letter of Submittal	146
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2006 Colombia-US TPA	Colombia-United States Trade Promotion Agreement (completed 22 Nov 2006, entered into force 15 May 2012)	Art 10.5, Annex 10-A	181
2006 India-China BIT	Agreement between the Government of the Republic of India and the Government of the People's Republic of China for the Promotion and Protection of Investments (completed 21 Nov 2006, entered into force 1 Nov Aug, terminated 3 Oct 2018)	*ad* Art 5	149

2006 Peru-US TPA	Peru-United States Trade Promotion Agreement (completed 12 Apr 2006, entered into force 1 Feb 2009)	Art 22.2(b)	24
2006 US-Oman FTA	Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area (completed 2006, entered into force)	Arts 10.5(2), 10.6, Annexes 10-A and 10-B	169, 181
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2008 New Zealand-China FTA	Free Trade Agreement between the Government of New Zealand and the Government of the People's Republic of China (completed 7 Apr 2008, entered into force 1 Oct 2008)	Paras 3–5 Annex 13	149
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2009 India-Korea CEPA	Comprehensive Economic Partnership Agreement between India and the Republic of Korea (completed 7 Aug 2009, entered into force 1 Jan 2010)	Arts 10.3, 10.5 Annex II; Para 3, Annex 10–A	149
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2010 Austria-Kazakhstan BIT	Agreement for the Promotion and Reciprocal Protection of Investment between the Government of the Republic of Austria and the Government of the Republic of Kazakhstan (completed 12 Jan 2010, entered into force 21 Dec 2012)	Preamble	222
2010 Canada-Panama FTA	Free Trade Agreement between Canada and Panama (completed 15 May 2010, entered into force 1 Apr 2013)	Preamble	222
2010 Costa Rica-Singapore FTA	Free Trade Agreement between Costa Rica and Singapore (completed 6 Apr 2010, entered into force 1 Jul 2013)	Art 11.6, Annex 11.1	225, 226
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2010 Korea-Peru FTA	Free Trade Agreement between the Republic of Korea and Peru (completed 14 Nov 2010, entered into force 1 Aug 2011)	Art 9.5, Para (C) Annex 9B	149, 225
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2010 Turkey-Senegal BIT	Agreement between the Government of the Republic of Turkey and the Government of the Republic of Senegal Concerning the Reciprocal Promotion and Protection of Investments (completed 15 Jun 2010, entered into force 17 Jul 2012)	Preamble	222
2010 UK-Colombia BIT	Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia (completed 17 Mar 2010, entered into force 10 Oct 2014)	Art VI(1)(c)	149
2011 Malaysia-India CECA	Comprehensive Economic Cooperation Agreement between the Government of Malaysia and the Government of the Republic of India (completed 18 Feb 2011, entered into force 1 Jul 2011)	Paras 3(d), 4 Annex 10–1	149, 222
2012 Australia-Malaysia FTA	Free Trade Agreement between Australia and Malaysia (completed 22 May 2012, entered into force 1 Jan 2013)	Paras 3, 4 Annex on Expropriation	149
2012 CACM-EU Agreement	Agreement Establishing an Association between Central America, on the One Hand, and the European Union and its Member States, on the Other (completed 26 Jun 2012, entered into force 1 Oct 2013)	Preamble	222
2012 China-Japan-Korea TIA	Investment promotion and protection agreement between Japan, Republic of Korea and China (completed 13 May 2012, entered into force 17 May 2014)	Para 2 Protocol	149
2012 EU–Colombia-Peru-Ecuador FTA	Trade Agreement between the European Union and its Member States, of the one part, and Colombia, Peru and Ecuador, of	Art 243	108

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2012 EU-Iraq PCA	Partnership and Cooperation Agreement between the European Union and its Member States and the Republic of Iraq (completed 11 May 2012, not yet in force)	Preamble	222
2012 Mauritius-Kenya BIT	Agreement between the Government of the Republic of Kenya and the Government of the Republic of Mauritius for Promotion and Reciprocal Protection of Investments (completed 7 May 2012, not yet in force)	Preamble	222
2012 Turkey-Montenegro BIT	Agreement between the Government of the Republic of Turkey and the Government of Montenegro Concerning the Reciprocal Promotion and Protection of Investments (completed 14 Mar 2012, not yet in force)	Art 4	222
2013 Austria-Nigeria BIT	Agreement for the Promotion and Protection of Investment between the Republic of Austria and the Federal Republic of Nigeria (completed 8 Apr 2013, not yet in force)	Preamble	222
2013 Canada-Tanzania BIT	Agreement between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments (completed 7 May 2013, entered into force 9 Dec 2013)	Preamble	222
2013 China-Tanzania BIT	Agreement between the Government of the People's Republic of China and the Government of the United Republic of Tanzania concerning the Promotion and Reciprocal Protection of Investments (completed 24 Mar 2013, entered into force 17 Apr 2014)	Arts 6(2)(d), 6(3)	149
2013 Colombia-Korea FTA	Free Trade Agreement between the Republic of Colombia and the Republic of Korea (completed 21 Feb 2013, entered into force 15 Jul 2016)	Art 8.5, Annex 8–B(3)	149, 225, 226
2013 Korea-Cameroon BIT	Agreement between the Government of the Republic of Korea and the Government of the Republic of Cameroon for the Promotion and Protection of Investments	Para 3 Annex on Expropriation	149

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2013 New Zealand-Taiwan AEC	Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu on Economic Cooperation (completed 10 Jul 2013, entered into force 1 Dec 2013)	Preamble	222
2013 Switzerland–China FTA	Free Trade Agreement between the Swiss Confederation and the People's Republic of China (completed 6 Jul 2013, entered into force 1 Jul 2014)	Arts 11, 19	108
2014 ASEAN-India IA	Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India (completed 12 Nov 2014, not yet in force)	Arts 20(19), 20(20)	217
2014 Australia-Korea FTA	Free Trade Agreement between Australia and the Republic of Korea (completed 8 Apr 2014, entered into force 12 Dec 2014)	Art 11.23, Para 4(c) Annex 11–B	149, 216
2014 Korea-Myanmar BIT	Agreement between the Government of the Republic of Korea and the Government of the Republic of the Union of Myanmar for the Promotion and Protection of Investments (completed 5 Jun 2014, entered into force 31 Oct 2018)	Para 3, Annex on Expropriation	149
2015 China-Australia FTA	Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China (completed 17 Jun 2015, entered into force 20 Dec 2015).	Arts 9.18.2, 9.19	216
2015 China-Korea FTA	Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Korea (completed 1 Jun 2015, entered into force 20 Dec 2015)	Para 3 Annex 12–B, Annex 12-B(1)	149, 222, 226
2015 New Zealand-Korea FTA	Free Trade Agreement between New Zealand and the Republic of Korea (completed 23 Mar 2015, entered into force 20 Dec 2015)	Art 10.7(2)(b)	146
2016 Japan-Iran BIT	Agreement between Japan and the Islamic Republic of Iran on Reciprocal Promotion and Protection of Investment (completed 5 Feb 2016, entered into force 26 Apr 2017)	Art 18(3)	219

2016 Morocco-Nigeria BIT	Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (completed 3 Dec 2016, not yet in force)	Preamble	222
2017 Colombia-UAE BIT	Bilateral Agreement for the Promotion and Protection of Investments between the Government of the Republic of Colombia and the Government of the United Arab Emirates (completed 12 Nov 2017, not yet in force)	Preamble	222
2017 PACER Plus	Pacific Agreement on Closer Economic Relations Plus (completed 14 Jun 2017, not yet in force)	Preamble	222
2017 Rwanda-UAE BIT	Agreement between the Republic of Rwanda and the United Arab Emirates on the Promotion and Reciprocal Protection of Investments (completed 1 Nov 2017, not yet in force)	Preamble	222
2018 Argentina-Japan BIT	Agreement between the Argentine Republic and Japan for the Promotion and Protection of Investment (completed 1 Dec 2018, not yet in force)	Arts 15, 19.4	216, 217, 228
2018 Argentina-UAE BIT	Agreement for the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the United Arab Emirates (completed 16 Apr 2018, not yet in force)	Art 11	222
2018 Belarus-Turkey BIT	Agreement between the Government of the Republic of Belarus and the Government of the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments (completed 2018, entered into force)	Preamble	222
2018 Brazil-Ethiopia BIT	Agreement between the Federativo Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation (completed 11 Apr 2018, not yet in force)	Art 7(1)	224, 226
2018 Canada-Moldova BIT	Agreement between the Government of Canada and the Government of the Republic of Moldova for the Promotion and Protection of Investments (completed	Art 14.7	216, 217

	12 Jun 2018, entered into force 23 Aug 2019)		
2018 EU-Japan EPA	Agreement between the EU and Japan for an Economic Partnership (completed 17 Jul 2018, entered into force 1 Feb 2019) EU Doc 52018PC0192	Preamble	222
2018 EU-Singapore IPA	Investment Protection Agreement between the European Union and its Member States, of the One Part, and the Republic of Singapore, of the Other Part (completed 15 Oct 2018, not yet in force)	Preamble	220, 222
2018 Indonesia-EFTA CEPA	Comprehensive Economic Partnership Agreement between the Republic of Indonesia and the EFTA States (completed 16 Dec 2018, not yet in force)	Preamble	222
2018 Japan-Jordan BIT	Agreement between Japan and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investment (completed 27 Nov 2018, not yet in force)	Preamble	222
2018 Korea-Central America FTA	Free Trade Agreement between the Republic of Korea and the Republics of Central America (completed 21 Feb 2018, entered into force 1 Nov 2019)	Annex 9-C	226
2018 Peru-Australia FTA	Peru-Australia Free Trade Agreement (completed 12 Feb 2018, entered into force 11 Feb 2020)	Art 8.18	228
2018 Sri Lanka-Singapore FTA	Free Trade Agreement between the Democratic Socialist Republic of Sri Lanka and the Republic of Singapore (completed 23 Jan 2018, entered into force 1 May 2018)	Annex 10-A(2)(a)	226
2019 Australia-Hong Kong IA	Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China (completed 26 Mar 2019, entered into force 17 Jan 2020)	Preamble, Annex II	222, 225, 226
2019 Australia-Uruguay BIT	Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments (completed 5 Apr 2019, not yet force)	Preamble	222
2019 Belarus-Hungary BIT	Agreement between the Government of the Republic of Belarus and the Government of Hungary for the Promotion and Reciprocal Protection of Investments	Preamble	222

	(completed 14 Jan 2019, entered into force 28 Sep 2019)		
2019 EU-Vietnam IPA	Investment Protection Agreement between the European Union and its Member States and the Socialist Republic of Viet Nam (completed 30 Jun 2019, not yet in force)	Art 2.2	222
2019 Hong Kong-UAE BIT	Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the United Arab Emirates for the Promotion and Reciprocal Protection of Investments (completed 16 Jun 2019, entered into force 6 Mar 2020)	Preamble	222
2019 Indonesia-Australia CEPA	Indonesia-Australia Comprehensive Economic Partnership Agreement (completed 4 Mar 2019, entered into force 5 Jul 2020)	Art 14.4(1)	225, 227
2020 Brazil-India BIT	Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India (completed 25 Jan 2020, not yet in force)	Art 5.2	224, 227, 228
2020 Intra-EU BIT Termination Agreement	Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union (completed 5 May 2020, not in force) SN/4656/2019/INIT		218
ACHPR	African Charter on Human and Peoples' Rights (completed 27 Jun 1981, entered into force 21 Oct 1986) 1520 UNTS 217	Art 14	167
ACHR	American Convention on Human Rights "Pact of San José, Costa Rica" (completed 22 Nov 1969, entered into force 18 Jul 1978) 1144 UNTS 123	Art 21	44, 167
CETA	Comprehensive Trade and Economic Agreement between Canada and the European Union (completed 30 Oct 2016, not yet in force)	Arts 8.38(2), 26.1(3)	216, 220, 222, 223, 226
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership (completed 8 Mar 2018, entered into force 30 Dec 2018)	Preamble, Arts 9.6, 9.25(1)	179, 219, 222, 223, 225

ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (completed 4 Nov 1950, entered into force 3 Sep 1953) 213 UNTS 221	Arts 8(2), 10, 14	44, 110, 111, 134, 137
ECHR Protocol 1	Protocol (1) to the Convention for the Protection of Human Rights and Fundamental Freedoms (completed 20 Mar 1952, entered into force 18 May 1954) 213 UNTS 262	Art 1	110, 167
ECT	The Energy Charter Treaty (completed 17 Dec 1994, entered into force 16 Apr 1998) 2080 UNTS 95	Art 10(1)	27, 121, 127, 132, 150, 201
GATS	General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B (completed 15 Apr 1994, entered into force 1 Jan 1995) 1869 UNTS 183	Art XIV	110, 228
GATT	General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (completed 14 Apr 1994, entered into force 1 Jan 1995) 1867 UNTS 190	Art XX	21, 38, 102, 110, 228
GCAP1	Protocol Additional to the Geneva Conventions of 12 Aug 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (completed 8 Jun 1977, entered into force 7 Dec 1978) 1125 UNTS 3	Arts 51(5)(b), 57(2)(a)(iii), 57(2)(b)	109
GCIV	Geneva Convention relative to the protection of civilian persons in time of war (completed 12 Aug 1949, entered into force 21 Oct 1950) 75 UNTS 287	Arts 67, 68	108
ICPRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (completed 18 Dec 1990, entered into force 1 Jul 2003) 2220 UNTS 3	Art 15	167
ICSIDC	Convention on the Settlement of Investment Disputes between States and Nationals of Other States (completed 18 Mar 1965, entered into force 14 Oct 1966) 575 UNTS 159	Arts 25, 41, 42, 46, 53, 70, 71, 72	28, 140, 142, 176, 219
NAFTA	North American Free Trade Agreement (completed 17 Dec 1992, entered into force 1 Jan 1994) 32 ILM 289	Arts 1105, 1110, 1131, 1715(5)	5, 25, 39, 44, 108, 114, 140,

			148, 151, 155, 179, 181, 216, 219
Rome Statute	Rome Statute of the International Criminal Court (completed 17 Jul 1998, entered into force 1 Jul 2002) 2187 UNTS 3	Arts 31(1)(c), 83(3)	108
SICJ	Statute of the International Court of Justice (completed 26 Jun 1945, entered into force 24 Oct 1945)	Art 38	49, 52, 53, 142, 157, 170, 172
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (completed 14 Apr 1994, entered into force 1 Jan 1995) 1867 UNTS 493	Art 2.2	110
TBT Agreement	Agreement on Technical Barriers to Trade, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (completed 14 Apr 1994, entered into force 1 Jan 1995) 1868 UNTS 120	Art 2.1	110
TEU	Treaty on European Union (completed 7 Feb 1992, entered into 1 Nov force 1993)	Art 5(4)	109
TFEU Protocol 2	Treaty on the Functioning of the European Union, Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality EU Doc No 12016E:PRO:02		109
TRIPS Agreement	Agreement on Trade–Related Aspects of Intellectual Property Rights (completed 15 Apr 1994, entered into force 1 Jan 1995) 1867 UNTS 187	Art 46	108
UNCLOS	United Nations Convention on the Law of the Sea (completed 10 Dec 1982, entered into force 16 Nov 1994) 1833 UNTS 3	Arts 74, 83, 221	108, 109, 110, 221
USMCA	Agreement between the United States of America, the United Mexican States, and Canada (completed 30 Nov 2018, revised 13 Dec 2019, entered into 1 Jul 2020)	Art 14.8, Annex 14-B, Annex 14-B(1)	148, 219, 226
VCCR	Vienna Convention on Consular Relations (completed 24 Apr 1963, entered into force 19 Mar 1967) 596 UNTS 261		183
VCLT	Vienna Convention on the Law of Treaties (completed 23 May 1969, entered into force 27 Jan 1980) 1155 UNTS 331	Arts 27, 34, 31, 32	15, 72, 113, 141, 142, 144, 145,

			150, 151, 152, 156, 170, 182, 183, 184, 211, 215, 219
WTO DSU	Understanding on rules and procedures governing the settlement of disputes (completed 15 Apr 1994, entered into force 1 Jan 1995) 1867 UNTS 187	Art 22.4	109

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2017 India-Bangladesh Joint Interpretative Notes	Joint Interpretative Notes on the Agreement between the Government of the Republic of India and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investments (signed 4 Oct 2017)	147

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2017 SCC Arbitration Rules	2017 Arbitration Rules, Arbitration Institute of the Stockholm Chamber of Commerce (entered into force 1 Jan 2017)	176

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US Constitution	The Constitution of the United States of America 17 September 1787 (United States)	36, 63, 64, 66, 69, 100, 153, 161, 193

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Aven [Costa Rica's Counter-Memorial]	*Aven & ors v Costa Rica* [Costa Rica's Counter-Memorial] (8 Apr 2016) ICSID Case No UNCT/15/3	UNCITRAL	80
Aven [Costa Rica's Post-Hearing Brief]	*Aven & ors v Costa Rica* [Costa Rica's Post-Hearing Brief] (13 Mar 2017) ICSID Case No UNCT/15/3	UNCITRAL	80
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Bear Creek [Peru's Counter-Memorial on Merits and Memorial on Jurisdiction]	*Bear Creek v Peru* [Peru's Counter-Memorial on Merits and Memorial on Jurisdiction] (6 Oct 2016) ICSID Case No ARB/14/21	ICSID	165
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Bear Creek [Canada's Art 832 Submission]	*Bear Creek v Peru* [Canada's Art 832 Submission] (9 Jun 2016) ICSID Case No ARB/14/21 [5-6] [Award] (30 Nov 2017) ICSID Case No ARB/14/21	ICSID	165

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PART I:

THE TURN TO PUBLIC LAW IN INVESTMENT LAW AND ARBITRATION

1

GENERAL INTRODUCTION

1.1 Introduction

1. Disputes between foreign investors and host States arising under the over 2,600 loosely constellated international investment agreements (IIAs) currently in force[1] often raise important questions concerning the distribution of opportunity and cost in society. Given in the majority of these agreements States have given standing consent permitting investors to commence arbitral proceedings, arbitrators settling disputes arising under IIAs often decide issues with significant bearing on 'profound questions of allocation of power and authority' and the nature of the State-market relationship.[2] Awareness of these realities has been increased by disputes touching upon States' policies in areas including environmental protection,[3] public health,[4] access to water and sanitation,[5] energy policy,[6] social welfare,[7] labour rights,[8] (redistributive) land reform,[9] the rights and interests of indigenous peoples,[10] taxation,[11] financial regulation,[12] and defence.[13]

2. The perception that arbitrators — and the rules they apply — often fail to appropriately balance competing public and private interests and to permit host States adequate regula-

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1 According to UNCTAD figures, 2,658 agreements were in force as of 31 Jul 2020. This comprises both bilateral investment treaties and 'treaties with investment provisions'. UNCTAD, 'International Investment Agreements Navigator' <https://investmentpolicy.unctad.org/international–investment–agreements>

2 Lowe (2002) 55 CLP 447, 466

3 *Santa Elena*; *Tecmed*; *Copper Mesa*; and *Chevron & Texaco*

4 *Methanex*; *Philip Morris v Australia*; *Philip Morris v Uruguay*

5 *Azurix*; *Biwater Gauff*; *SAUR*; *Urbaser*

6 *Vattenfall*; *AES v Kazakhstan*; *Charanne*; *Windstream*; *Blusun*; *Antaris*; and *Masdar*

7 *UP&CD*

8 *Paushok*

9 *Foresti*; and *von Pezold*

10 *Bear Creek*; and *South American Silver*

11 *Vodafone (I)*; and *Vodafone (II)*

12 *Saluka*; *PL Holdings*; and *Marfin*

13 *Devas*; and *Deutsche Telekom*

tory space has contributed significantly to investment arbitration's enduring legitimacy crisis.[14] Criticism has also been levelled due to the perception that vagueness in the primary rules on investment protection gives tribunals barely-fettered discretion,[15] and because tribunals often reach divergent findings when applying similarly-worded obligations in similar factual and legal circumstances.[16] As well as contributing to individual States' recent moves to withdraw from their IIAs or the treaties underpinning investor-State dispute settlement, or to embark in wholesale reform and renegotiation of their commitments in respect of foreign capital, such concerns have significantly contributed to current multilateral processes aimed at legislative and institutional reform.[17]

3. Scholars and practitioners have devoted significant attention to reforming investment law and arbitration from 'within' — ie without (formal) legislative or institutional reform. Since the early 2000s, based on alleged conceptual, functional and structural similarities, scholars and practitioners have increasingly analogised investment law and arbitration with domestic public law and (in many accounts) other areas of regional and international adjudication — such as human rights adjudication and trade law — said to constitute a new 'international public law'.[18] This 'turn' to public law represents a fundamental re-imagination of investment law and arbitration, with the potential to significantly change the way we approach theory and practice in the field.

4. This thesis critically examines the turn to public law in international investment law, focusing particularly on its manifestations in, and consequences for, arbitral practice. It is especially concerned with examining the turn to public law's potential to fundamentally reshape States' capacities to define and pursue the public interest — States' 'regulatory powers'. Examination is structured around three principal research questions: (i) what factors explain the re-imagination of investment law and arbitration as a species of international public law?; (ii) to what extent, if any, is the turn to public law discernible in the

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14 Of the voluminous literature on this issue, see, esp: Ortino (2012) 3 JIDS 31; and Kurtz in Douglas, Pauwelyn and Viñuales (eds) (OUP 2014) 257-96

15 See, eg: Petersmann in Binder & ors (eds) (OUP 2009) 877-93, 885; Alvarez (2011) 344 RCADI 193, 56, 227–35, 407; Tams in Gazzini and De Brabandere (eds) (Nijhoff 2012) 320-31, 323; Bonnitcha (CUP 2014) 144–5, 351–7; Salacuse (OUP 2015) esp 13, 85–6

16 See, esp: Franck (2005) 73 Fordham LR 1521; Kurtz (CUP 2016) 6; and Ortino (2012) 43–7

17 For an overview, see: Roberts (15 Jun 2017) EJIL:Talk!; and Roberts and St John (20 Sep 2019) EJIL:Talk!

18 In addition to below (Sec 3.3) see, esp: Van Harten and Loughlin (2006) 17 EJIL 121; Wälde in Kahn and Waelde (eds) (Brill 2007) 43-120; Montt (Hart 2009) 4–27; Kingsbury and Schill in Schill (ed) (OUP 2010) 75-104; and Henckels (2013) 4 JIDS 197

practice of tribunals composed to settle disputes arising under IIAs?; and (iii) what doctrinal, conceptual and normative consequences flow from the turn to public law, both as it has so far manifested in arbitral practice, and as a broader normative project?

1.2 Methodological and conceptual approaches

5. This study commences from the starting point that, while the re-imagination of investment law and arbitration as a species of international public law is a primarily ideational, or conceptual, 'turn', it is most significant as a normative project. It has the potential, in other words, to fundamentally affect the ways that questions concerning rule ascertainment and interpretation are approached in practice — with resulting effects for the operation of States' obligations in respect of foreign-owned capital and capacities to define and pursue the public interest. Given compulsory investor-State arbitration is a central feature of the majority of IIAs currently in force,[19] the turn to public law's potential to generate practical consequences lies principally in its capacity to influence arbitral reasoning.

6. As such, two central aims of this study are: (i) to comprehensively map the extent to which the turn to public law is discernible in the practice of tribunals deciding investment disputes; and (ii) to assess the doctrinal, conceptual and normative consequences of trends identified in such practice. To do so, it examines a corpus of 717 publicly available arbitral decisions issued between 27 June 1990[20] and 1 January 2019, as well as 805 decisions of the Iran-US Claims Tribunal issued between 1 January 1982 and 31 December 2018.[21]

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19 ISDS was provided for in 98 percent of the 1,628 BITs surveyed in: Alschner and Skougarevskiy (2016) 8 Trade L & Dev 189, esp 206. Similarly, according to UNCTAD, nearly 95 percent of IIAs 'mapped' as of 31 Jul 2020 allowed for ISDS: UNCTAD, 'Investment Policy Hub: International Investment Agreement Navigator, Mapping of IIA Content' <https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping>

20 The date of the first published award: *AAPL*

21 My thanks go to Vlad Lanovoy and Heather Clark for assisting in obtaining electronic copies of these materials.

7. The examination of arbitral practice — detailed (especially) in Chapters 4, 5 and 6 — consisted of three stages. In the first stage, relevant decisions of *ad hoc* tribunals were identified across seven sources: the UNCTAD,[22] ICSID,[23] Italaw,[24] and Investor-State Law-Guide[25] web-based databases, and the PCA,[26] Investment Arbitration Reporter,[27] and (for NAFTA Chapter 11 disputes) the Global Affairs Canada,[28] United States' State Department,[29] and Mexican *Secretaría de Relaciones Exteriores*[30] websites.

8. Only decisions rendered, or available, in English were included. The corpus consists only of decisions issued in proceedings in which international law was part of the applicable law; proceedings involving purely contractual disputes and disputes solely concerning the application of domestic investment law (without *renvoi* to international law) were excluded. The corpus includes decisions on jurisdiction, provisional measures, merits, remedies, and annulment, as well as individual arbitrators' concurring, separate and dissenting opinions at these phases. Consent awards, procedural orders, and decisions on challenges, costs, and requests for interpretation were excluded. Decisions were included irrespective of the governing arbitration rules. IUSCT materials consulted include all decisions, interlocutory, partial, and final awards, and all statements, concurring, separate and dissenting opinions reported in volumes 1–38 of the IUSCTR (irrespective of category of dispute), as well as six unreported decisions. As collation was finalised on 30 April 2019, the corpus does not include any decisions issued in the study period (1990–2018) made public after this date. Once collated, the decisions were text-recognised using Adobe Acrobat Pro and PDF X-Change Editor and were imported into NVivo to aid analysis. A complete list of the decisions comprising the corpus appears in Annex 2.

9. Following collation, relevant practice and patterns were identified using multiple levels of keyword inquiry. Keywords were chosen on their likelihood of identifying: (i) instances in which tribunals expressly cited 'extraneous' materials, such as domestic legislation or cases

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22 UNCTAD, 'Investment Dispute Settlement Navigator' <https://investmentpolicy.unctad.org/investment-dispute-settlement>

23 ICSID, 'Cases' <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx>

24 italaw <https://www.italaw.com/search/site?f%5B0%5D=im_field_case_type%3A1090>

25 ISLG <https://www.investorstatelawguide.com/>

26 PCA, 'Cases: Investor-state arbitrations' <https://pca-cpa.org/en/cases/>

27 IAReporter, 'Arbitration Cases' <https://www.iareporter.com/arbitration-cases/>

28 Government of Canada, Global Affairs Canada, 'NAFTA, Chapter 11 – Investment' <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/nafta.aspx?lang=eng>

29 United States Department of State, 'NAFTA Investor-State Arbitrations' <https://www.state.gov/nafta-investor-state-arbitrations/>

30 Gobierno de México, Secretaría de Relaciones Exteriores, 'Archivo: Documento' <https://www.gob.mx/sre/archivo/documentos?idiom=es&filter_id=2342&filter_origin=archive>

or the decisions of other international courts and tribunals; (ii) express application of general principles of law; (iii) express references to certain study concepts originating in domestic legal orders; and (iv) engagement with States' capacities to define and pursue the public interest.[31] Further relevant practice was identified through the citation practices in shortlisted decisions and in academic writings. Once relevant practice was identified in this manner, it was subjected to detailed textual analysis. As explored further in Chapter 3, these methods were aimed at measuring the extent to which the principal normative claims of the turn to public law in scholarship are discernible in arbitral practice.

10. Based on patterns identified in arbitral practice, two 'concept studies' were selected to further explore the turn to public law in arbitral practice. The investigations of arbitral practice concerning the police powers doctrine and proportionality principle in Chapters 4 and 5 seek to consider (i) the extent (in quantitative terms) of arbitral recourse to the study concepts; (ii) the meaning and effects ascribed to these concepts in arbitral reasoning; and (iii) the doctrinal and normative consequences of (i) and (ii). The study concepts were selected on four grounds: (i) each originated in domestic public law and practice; (ii) at time of first arbitral recourse, neither concept found formal expression in any IIA; (iii) the two concepts are used in different domestic legal orders to address similar problems, particularly the degree of permissible governmental interference with individuals' property interests; and (iv) the existing literature concerning these concepts' roles in arbitral practice had not comprehensively mapped the diversity of constructions afforded, nor had it considered arbitral recourse to the concepts in the context of a broader ideational shift in investment law and arbitration.

11. In addition to the examination of arbitral decisions, the study (particularly the examination in Chapters 4–6) also considers States' pleadings in the corpus proceedings. Analysis of pleadings was based on tribunals' summaries of parties' arguments in the corpus decisions and the limited number of written submissions and transcripts available through the above-cited resources. Similarly, also considered were the texts of 1,806 IIAs in force on 31 Dec 2018, publicly available in English on UNCTAD's IIA Navigator database.[32] These agreements were subjected to keyword-based inquiries using the same method as outlined above.

12. There are, of course, limits to conducting research in this manner. Depending on the quality of the imaged document, OCR processes do not always accurately render text, meaning

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31 A full description of keywords employed is contained in Annex 1.

32 UNCTAD, Investment Policy Hub, 'International Investment Agreement Navigator' <https://investmentpolicy.unctad.org/international-investment-agreements>

that keyword searches are not an exhaustive means of identifying relevant practice. Similarly, while every effort was made to build as comprehensive a corpus as possible, some publicly available decisions were undoubtedly inadvertently omitted from the corpus. Supplementary keyword searches on the web based UNCTAD, ICSID, ISLG and italaw databases were therefore used to attempt to capture any omissions.

13. Although Chapters 4 and 5 aim to give an accurate picture of the (quantitative and qualitative) significance of arbitral recourse to the two study concepts, no study can claim to be truly comprehensive. The quantitative aspects of the study are meant merely to illustrate the extent to which the turn to public law is discernible in arbitral practice and to situate decisions against the broader context of arbitral practice. The qualitative significance of arbitral recourse to public law concepts is assessed with reference to the concept's role in, and apparent impact on, arbitrators' reasoning on issues or questions related to the merits. As such, the frequency with which language is employed is not determinative; rather the focus of attention is on a concept's place in a chain of logic or causation.

14. Further, due to the size of the corpus, degree of analysis required, and the constraints of a doctoral project, the decision was made to focus on two concept studies. While highly relevant to understanding the turn to public law, it does not comprehensively examine arbitral practice concerning other borrowed public law concepts. Most notably, arbitral practice concerning investors' 'legitimate expectations',[33] the increased roles of 'reasonableness' review and the 'margin of appreciation doctrine'[34] are not considered. Finally, the study does not consider decisions published solely in a language other than English, nor that have entered the public domain through means other than the above-cited resources.

1.3 Overview of structure and principal arguments

15. The thesis is structured as follows. Part I, consisting of Chapters 2 and 3, examines the origins of the turn to public law. Chapter 2 begins by introducing the 'regulatory powers problem'. Section 2.2 considers orthodox approaches to international law's regulation of States' capacities to define and pursue the public interest, and the intersection between such powers and States' international legal obligations toward foreign nationals and their property. Section 2.4 then considers three aspects of investment law and arbitration's persistent

[33] Arbitral practice concerning this concept has been subjected to considerable and detailed analysis elsewhere. See, illustratively: Ortino (OUP 2019) 143–52; Bonnitcha (2014) 161–93, 265–88; Potestà (2013) 28 ICSIDR 88; Téllez (2012) 27 ICSIDR 432; and Brown (2009) 1 TDM

[34] For analysis, see, eg: Arato (2014) 54 VirgJIL 545; Leonhardsen in Gruszczynski and Werner (eds) (OUP 2014) 135-51; Fukunaga (2018) 10 JIDS 69; and Muhammad (2019) 7 ChinJCL 212

legitimacy crisis that are fundamental to our understanding of the emergence, and principal normative aims of the turn to public law Drawing out core aspects of the field's historical and doctrinal development, Section 2.2 argues that both the both the regulatory powers problem and core aspects of the field's legitimacy crisis can be traced to the shallow consensus underpinning contemporary international law concerning investment protection. Awareness of this shallow consensus is fundamental both to our understanding of the origins of the turn to public law in scholarship and practice, and, as explored in Chapter 7, to understanding the turn to public law's conceptual and normative consequences.

16. Chapter 3 considers the conceptual foundations of the turn to public law, considers the normative aspects of the turn to public law as a scholarly project, and begins to map the ways the turn to public law is discernible in arbitral practice. Section 3.2 considers the arguments underlying the claim that bodies of rules have emerged — or are emerging — that constitute 'international' or 'post-national' forms of public law. Section 3.3 sketches the main features of the turn in scholarship toward viewing international investment law and arbitration as such a species of international(ised) or 'post-national' public law. Section 3.4 traces the doctrinal, conceptual and normative consequences said to flow from such a re-imagining of investment law and arbitration, and considers whether, and how, this re-imagining is discernible in the practice of tribunals constituted to settle disputes arising under IIAs. It is shown that the turn to public law is most discernible in arbitral practice in increased arbitral recourse to concepts originating in domestic public law.

17. Part II, consisting of Chapters 4 and 5, critically explores the turn to public law in arbitral practice through two 'concept studies'. Each concept study is motivated by three questions: (i) how successful has the concept's migration into arbitral practice been?; (ii) what, precisely, has migrated?; and (iii) what are the consequences of the concept's migration for States' abilities to define and pursue the public interest? In answering these questions, each study addresses: (i) the extent and significance of arbitral recourse to the concept (both quantitatively and qualitatively); (ii) the interpretative contexts in which it has been used; and (iii) the structure and content of inquiry and effects it has been deemed to generate.

18. Chapter 4 investigates the place of the 'police powers doctrine' in arbitral practice. Section 4.2 considers the origins of the police powers doctrine as a means of conceptualising States' regulatory powers and moderating conflicts between public and private interests. Section 4.3 considers how the concept has featured in national legal orders, particularly in US public law. Section 4.4 outlines the ways the concept has been formulated in scholarship concerning international law's protection of foreign owned property and the arguments presented in favour of its incorporation in interpretative exercises under IIAs. Section 4.5

provides a comprehensive account of the ways the police powers doctrine has featured in arbitral practice.[35]. It is shown that, considered in purely quantitative terms, arbitral recourse to the police powers doctrine cannot yet be considered significant. Recourse to the concept is, however, increasing. Understood in qualitative terms, the concept's place in arbitral practice is more significant. Tribunals are increasing ascribing the concept significant weight in analysis, albeit with sometimes significant differences in structure, content and operation.

19. Chapter 5 considers the growing role played by proportionality analysis in arbitral practice. Section 5.2 considers the conceptual, historical and doctrinal origins of proportionality analyses as a means of moderating conflicts between public and private interests. Section 5.3 provides an account of the varied ways proportionality features in domestic legal orders and substantive areas of international law. Section 5.4 considers the arguments often presented to justify proportionality's place in deciding investment disputes. Section 5.5 maps the various ways and contexts in which proportionality has been employed in arbitral practice. As with the police powers doctrine, it is shown that in quantitative terms arbitral recourse to proportionality cannot yet be considered significant. Arbitrators are, however, both employing the concept with increased frequently and are ascribing it increased significance in merits determination. However, despite this recent growth in arbitral recourse to the concept, arbitrators have not yet adopted consistent approaches to proportionality analysis or its place in settling investment disputes. Rather, the growth in arbitral recourse to proportionality has been accompanied by a proliferation of approaches, with resulting consequences for arbitral approaches to States' capacities to define and pursue the public interest.

20. Part III examines the actual consequences of the turn to public law as it has so far manifested in arbitral practice, as well as the likely consequences entailed in a broader re-imagining of investment law and arbitration as 'international public law'. Focusing especially on examples drawn from the arbitral practice concerning the police powers doctrine and proportionality principle examined in Chapters 4 and 5, Chapter 6 considers whether the turn to public law in arbitral practice conforms with the (customary) rules on law ascertainment and interpretation — in other words, whether arbitral recourse to public law concepts can be properly understood as the valid application of extant law. Section 6.2, outlines the law applicable in settling investment disputes and the ways in which norms can 'migrate'

[35] As noted in Section 1.2, this account is based on a study of 717 decisions publicly-available in English issued between 1 Jan 1990 and 31 Dec 2018 pursuant to IIAs then in force, as well as 805 decisions of the Iran-US Claims Tribunal issued between 1 Jan 1982 and 31 Dec 2018. For a full list of decisions consulted, see Annex 2.

between, on the one hand, municipal legal orders and the international legal order, and, on the other, between different substantive areas of international law. Section 6.3 considers whether the police powers doctrine and proportionality principle can be said to have successfully migrated into the body of rules applicable in settling investment disputes. Accepting, *arguendo*, that one or both concepts has successfully migrated, Section 6.4 explores the further complications that arise in managing relationships between norms derived from treaty and general international law.

21. Chapter 7 addresses the broader practical, conceptual, doctrinal and normative consequences that flow from re-imagining investment law and arbitration as 'international public law'. It considers whether — questions of validity aside — the turn to public law in investment law and arbitration is likely to generate desirable results. Section 7.2 considers the practical capacity of the turn to public law to remedy investment law and arbitration's ills. It argues that rather than remedying them, the inherently values-dependant nature of public law reasoning and the entropic nature of investment law and arbitration as currently organised mean that the turn to public law may well exacerbate the very problems that its proponents hope to address. Section 7.3 explores three further undesirable tendencies in the turn to public law: (i) to further deformalize law ascertainment and interpretation; (ii) to fundamentally alter the limited bargains States strike when completing IIAs; and (iii) to further erode States' 'ownership' of their obligations in respect of foreign-owned capital. Having concluded that the turn to public law is undesirable, by way of conclusion, Section 7.4 briefly considers the alternative means available for addressing investment law and arbitration's actual and perceived deficiencies, and, particularly for protecting and promoting host States capacities to define and pursue the public interest. It presents the case that, given the field's ills stem primarily from vagueness in its substantive obligations, these ills can only be truly remedied through meaningful legislative reform.

*

2

STATES' 'REGULATORY POWERS' AND FOREIGN CAPITAL

2.1 Introduction

22. As a first step toward a critical appraisal, this chapter considers the background to and origins of the turn to public law in investment law and arbitration. It first considers how general international law governs States' capacities to define and pursue the public interest, and the intersection between these rules States' obligations toward investors and their property (Section 2.2). Then, drawing out key features of the field's historical and doctrinal development, it begins by outlining the shallow normative consensus underpinning current international law concerning the treatment to be afforded to foreign investors (Section 2.2). Finally, it considers three elements of investment law and arbitration's persistent legitimacy crisis central to the turn to public law: the (i) 'indeterminacy'; (ii) 'inconsistency'; and (iii) 'imbalance' critiques (Section 2.4).

2.2 States' 'regulatory powers' and general international law

23. It has become common in discourse concerning international investment law and arbitration to see reference to States' 'regulatory powers',[36] 'right to regulate',[37] or 'legitimate regulatory interests'.[38] Recent academic debate has devoted significant attention to the appropriate degree of 'regulatory autonomy', or 'regulatory' or 'policy' 'space' that the rules governing investment protection — as applied by tribunals — should afford host States.[39] Much of this discussion stems from the observation that the rules contained in IIAs (and derived from

36 See, eg: Kingsbury and Schill (2010); Gazzini (2010) 7 Manchester JIEL 36

37 See, eg: Paulsson (2006) 3 TDM [online]; Titi (Hart 2014); Yannaca-Small in Yannaca-Small (ed) (OUP 2018) 562-93. See too: *Lemire* [505]; *Micula* [666]

38 A phrase originating in: *Saluka* [306]

39 See, variously: Spears (2010) 13 JIEL 1037; Newcombe in Cordonier Segger, Gehring and Newcombe (eds) (Kluwer 2011) 355-70; Henckels (2013); Bazrafkan and Herwig in Ambrus, Rayfuse and Werner (eds) (OUP 2017) 237-56; Kim (2017) 50 Geo Wash Intl L Rev 289; Mitchell, Munro and Voon in Sachs, Johnson and Coleman (eds) (OUP 2018) 305-55; Zhu (2019) 60 HarvInt'lLJ

custom) have potentially significant consequences for States' capacities to implement policies to promote 'public interests'[40] including environmental protection, the protection of human health, or the protection and promotion of human, minority and indigenous, or labour rights. States too have increasingly adopted similar language; it is now common for States to refer to or rely upon their 'regulatory powers', or 'right to regulate' in proceedings.[41]

24. However, this growth in the use of the language of States' 'regulatory powers' raises a problem. None of these now commonly used terms are legal terms of art used by public international lawyers. Rather, references to States' 'regulatory powers' seems to have entered international legal discourse indirectly from political science and economics where the study of the 'regulatory State' and development of 'regulatory theories' have been devoted significant scholarly attention.[42] We are therefore tasked with picking apart such concepts. Understood broadly, a State's 'regulatory powers' encapsulate its entire capacity to set and pursue policy — including through legislative, administrative, executive and judicial action — and, thereby, to define and pursue the public interest. The question that arises is, therefore, how general international law governs these issues.

25. The legal construct of the State at the domestic level is often normatively thick. Through its (written or unwritten) constitution and the matrix of rules regulating the powers and conduct of government officials, domestic legal orders establish in-built constraints on the permissible ends and means of government action.[43] In contrast, international law has historically adopted a normatively thin conception of the State. Its governance of States' 'regulatory powers' has mostly been confined to structural rules delimiting the reach of States' activities *inter se*.

26. As a matter of general customary international law States enjoy jurisdiction over their territories 'and over all persons and things therein'[44] as one of the bundle of rights that inhere in the legal personality of Statehood — that is to say, because they are 'sovereign'.[45] The cus-

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40 For use of this terminology, see esp: Brower in Sauvant (ed) (OUP 2009) 347–78; Lowe in French, Saul and White (eds) (Hart 2010) 3-16; Kulick (CUP 2012); Henckels (2013); and Schill and Djanic (2018) 33 ICSIDR 29. See, more generally: Feintuck (OUP 2004)

41 See: *ADC* [384]; *CMS* [Annulment] [79]; *Stati* [1162] ff. See further below: Sec 6.3.3

42 This can perhaps be traced to the emergence of the inter-disciplinary 'regulatory studies' movement in the 1990s and its concern with the 'regulatory State' and 'regulatory capitalism'. See, esp: Braithwaite in Goodin (ed) (OUP 2013) 217-36; and contributions in: Drahos (ed) ANU Press 2017)

43 See below: Sec 3.2

44 Art 2, ILC (12 Apr 1949) A/CN.4/13

45 This conception of sovereignty as an umbrella term has received wide support; See, eg: Huber, as sole arbitrator in *Island of Palmas*, 838–9; Waldock (1962) 106 RCADI 1, 156; Brownlie (OUP 2008) 291; Lowe in Shan, Simons and Singh (eds) (Hart 2008) 77-84. See too: Kennedy (1996) 65 Nordic JIL 385, 406–7

tomary rules on jurisdiction recognise, delimit, and protect States' right to prescribe and enforce laws.[46] The main purpose of these rules, however, is to allocate and delimit the *entitlement* to create and apply laws between formally equal legal subjects. This 'external' aspect of the law on jurisdiction is concerned with delimiting States' permissible spheres of action.[47] The proximity of persons, objects or events to a State is, as a general matter, the litmus for determining the appropriateness of a State's exercise of regulatory authority.[48] Control of territory is the foundation of these rules and the territoriality principle provides the hub of States' entitlement to create and apply laws, from which all other bases of jurisdiction radiate.[49] The territoriality principle permits States to legislate in respect of all persons, events and property within their territory, including — of course — the regulation of foreign nationals and foreign-owned property in a State's territory.[50] This 'power-to' right to control persons and events within a geographic area sits alongside certain 'freedom-from' rights. Chief amongst these are the right of non-intervention, a State's right to freely choose its own political, economic and social system (both based on the principle of sovereign equality), and permanent sovereignty over natural resources.[51]

27. While often overlooked, general international law also contains structural rules which regulate the 'internal' aspect of States' jurisdiction, thereby shaping the content, contours and limits of States' regulatory powers. These rules apply even when a regulatory exercise is clearly within a States' allocated competence and no issues of entitlement or priority arise.

28. The first such structural rule is the notion of States' 'reserved domain' of jurisdiction — at least as understood since the 1920s. In well-known dicta in *Nationality Decrees*, the PCIJ considered that 'whether a certain matter is or is not solely within the jurisdiction of a State', and thereby not limited by international legal obligations, 'is an essentially relative question' which 'depends on the development of international relations'.[52] Importantly, however, the Court declared that even when particular conduct is not directly regulated by international law, 'the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle,

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46 Mann (1964) 111 RCADI 1, 9. See too: *Lotus*, 19; *German Settlers AO* 36; *Eastern Greenland* 48; *Nicaragua* 111; *Jurisdictional Immunities* 123–4; *Territorial and Maritime (Nicaragua v Honduras)* 713; *Territorial and Maritime Dispute (Nicaragua v Colombia)* 655

47 Ryngaert (OUP 2008) 21

48 Simma and Müller in Crawford and Koskenniemi (eds) (CUP 2012) 134-57, 134–57; Staker in Shaw (ed) (OUP 2014), 315

49 *Lotus*, 18–19; *Jurisdictional Immunities*, 123–4. See too: Jennings (1962) 32 Nordisk Tidsskrift Int'l Ret 209, 210; Ryngaert (2008) 42; Jennings and Watts (eds) (9th edn, Longman 1992) 457–8; Mann (1984) 186 RCADI 9, 20–1

50 Mann (1964) 37

51 Expressed, inter alia in: UNGA Res 2625 (XXV) (1970); and UNGA Res 1803 (XVII) (1962)

52 *Nationality Decrees*, 24

belongs solely to the State, is limited by rules of international law.'[53] The ICJ applied the PCIJ's reasoning in *Nationality Decrees* in *Nicaragua*, although it further remarked that nothing 'debar[s] a State […] from undertaking obligations towards other States in respect of matters which otherwise would be within its exclusive jurisdiction.'[54] In other words, no subject-matter remains essentially within a State's domestic jurisdiction, which, rather than an immutable category of topics beyond international regulation, is nothing more or less than the sum of issues unregulated by *any* rules of international law.[55]

29. The content and outer limits of States' regulatory powers are always determined by the existence or absence of rules of international law governing a particular topic.[56] States' residual regulatory freedom (or its 'regulatory powers' or 'right to regulate') gradually shrinks as its international legal relations widen, deepen and thicken.[57] This process occurs both through the creation of additional layers of 'outward-looking' obligations — those rules that regulate the relations *between* States — and also through the growth of 'inward-looking' (promissory) obligations, like the rules on investment protection, which require a State 'to take, or refrain from certain conduct within its domestic jurisdiction'.[58]

30. Thus, unlike domestic public law, general international law does not prescribe the permissible ends and means of States' regulatory activities. However, neither does it reserve for States an inalienable core of regulatory powers. While States' right to prescribe and enforce laws is recognised and protected in general international law, it is a right with variable content; its scope can be reduced through the accumulation of legal obligation. Just as no two States will ever be subject to an identical matrix of legal obligation, in principle, the content of two States' 'right to regulate' will seldom be identical. Further, nothing prevents a State from placing conditions upon the exercise of its sovereign rights — or even contracting them away entirely — including its right to adopt and apply laws domestically.[59] Crucially, however, to the extent that it has not, and provided it does so consistently with any obligations it has assumed ('regardless of [their] source'),[60] the State retains the freedom to regulate for any purpose and in any manner it deems fit.

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53 ibid

54 *Nicaragua* [245]

55 Klabbers (1998) 3 Austrian RIEL 345, 349–50; Waldock (1954) 31 BYIL 96, 140; Waldock (1962) 173, 9; Brownlie (2008) 293

56 *Free Zones*, 166

57 Nolte in Simma & ors (eds) (OUP 2002), 171

58 Tzanakopoulos and Tams (2013) 26 LJIL 531, 533; Cohen (CUP 2012) 160–2

59 *Wimbledon*, 25. For the idea of host States as rights–holders in the investment context, see: Miles (CUP 2013) 364–5

60 Art 12 ARSIWA

31. Any question concerning the lawfulness of a State's 'regulatory' measures (indeed, of *any* conduct attributable to a State) must therefore always proceed from a displaceable presumption of legality: a State is presumed to be entitled to regulate — through executive, legislative, judicial or administrative acts — persons, objects and events within its jurisdictional competence unless it has assumed a positive obligation which would prevent, restrict or condition such an exercise.[61] States' 'regulatory powers' are always residual. In other words, because States are permitted (both factually and legally) to act in any manner and to pursue any purposes which are not conditioned or prohibited by a positive rule of international law, the State's ability to lawfully adopt and enforce regulatory measures must always be determined through the processes of law-ascertainment and interpretation.[62] Indeed, characterising conduct as 'regulatory' is largely immaterial; State responsibility can follow from any category of attributable action — whether that be, for example, general legislation, administrative action, executive decree, or judicial decision.[63] Similarly, while States can (and frequently do) assume duties to implement their international obligations domestically, including through law, the existence (or absence) and content of domestic law merely evidences acts or omissions relevant in establishing responsibility.[64] Of course, legality under domestic law — including under a State's constitution — cannot preclude wrongfulness.[65]

32. Although only one available model for understanding rights, Hohfeld's much cited nomenclature is helpful in thinking about States' 'regulatory powers'. The core of Hohfeld's approach is that rights can consist of four main elements: privileges, claims, powers and immunities.[66] A right is a privilege if its holder has no duty *not* to act;[67] it is a claim if its fulfilment requires a third-party to fulfil a duty owed to its holder;[68] it is a power if it permits

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61 While thematically related, this idea should not be confused with the existence of the 'permissive principle' as a (positive) closing rule; See, eg: Lauterpacht (OUP 2011) 78–92, 5–7; Stone (1959) 35 BYIL 124, 136; Kammerhofer (2009) 80 BYIL 333, 337; Quane (2014) 84 BYIL 240, 256 . See too approaches adopted in: *Nuclear Weapons*, *Bedjaoui D* [12, 15–16]; and Judge Guillaume's apparent approval of *Lotus*: *Nuclear Weapons*, *Guillaume SO* [10]; and: *Kosovo AO*, 425, and Judge Simma's criticism of this approach and strong rejection of *Lotus* as authority for the permissive principle: *Kosovo, Simma D* 480–1

62 Kelsen (Rinehart 1952) 304–6; Kammerhofer (2009) 337. See similarly: Titi in Moon and Toohey (eds) (CUP 2018) 122-36, 122–3

63 See: *Salvador Commercial Co*, 477; *Upper Silesia*, 19; *Special Rapporteur AO* [62]. See too the ILC's largely abortive study on 'International liability for injurious consequences arising out of acts not prohibited by international law': UNGA Res 51/160 (1997)

64 *Upper Silesia*, 19. But see: Hepburn (OUP 2017) 104–8

65 *Polish Nationals AO*, 24; Art 27 VCLT; Art 3 ARSIWA. As the Commentary to Art 3 ARSIWA notes (at 36–38), from *Wimbledon* on, this idea was continually reiterated by the PCIJ and ICJ: *Wimbledon*, 29–30; *Greco–Bulgarian Communities AO*, 32; *Free Zones, Order, 6 Dec 1930*, 12; *Free Zones*, 167; *LaGrand, Order, 3 Mar 1999* [28]

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

67 ibid 39-40

68 ibid 37-8, 70-2

the holder to create or change a claim or duty held by a third-party;[69] it is an immunity if it prevents a third party from creating or changing the holder's claim.[70]

33. Within Hohfeld's model, a single 'right' can consist of several interlinking elements of different categories — States' 'regulatory powers' can thus be understood as a 'complex aggregate'.[71] The 'external' aspect of States' jurisdiction consists of a (discretionary) *privilege-right* to prescribe laws in respect of persons and events within their sphere of competence and a corresponding *claim-right* that other States refrain from interfering with this privilege. We might also describe States' jurisdiction to prescribe laws as exhibiting the features of an *immunity-right* as it cannot (in principle) be affected by third States, but inheres in States' legal personality. The 'internal' aspect of States' jurisdiction can be viewed as a *power-right*, as through its exercise States affect the claims and privileges ('legal relations')[72] of natural and legal persons subject to their jurisdiction. It is, seemingly, the *power-right* constituting the 'internal' aspect of States' jurisdiction that is most commonly referred to when scholars refer to States' 'right to regulate'. This *power-right*, however, is neither inalienable, nor delimits an immutable range of legally-protected conduct.

34. We can contrast these structural rules with the way that certain domestic legal orders condition the exercise of governmental authority — *ab initio* — on the existence of permissive rules authorising certain action (and thereby generally precluding others) and prescriptions on the permissible means of action.[73] It follows that the 'state' in domestic law and the 'State' in international law — while composed of the same organs and same natural persons — occupy distinct legal spaces and possess diverse powers and obligations. Both may be sovereign, but the legal content of these sovereignties differs under international and municipal law. International law may prohibit or condition conduct — including in respect of individuals — which would be legally available to the government under domestic law and, conversely, domestic law may impose conditions on the exercise of governmental authority not required by international law (or, of course, vice versa).[74] Importantly, while providing us with a crucial starting point — plenary freedom subject to voluntary subtraction — the above structural rules cannot generate answers concerning the degree of 'policy space' left to a State party to an IIA. Rather, as a residual category, the limits of States' 'regulatory powers' will necessarily be set through the processes of rule ascertainment and interpretation.

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69 ibid 50 et seq

70 ibid 60 et seq

71 Cook in Cook (ed) (OUP 1919), 14

72 ibid 7

73 See, eg: Allott (OUP 1990) 312

74 *ELSI* [73]

35. As explored further below, the trend in scholarship and practice of referring to States' inherent 'right to regulate' does not always map well onto general international law's governance of what we can call States' 'regulatory powers'.[75] Neither, too, do certain scholars' and practitioners' (conscious or unconscious) moves toward more normatively thick approaches.[76]

2.3 The shallow normative consensus underpinning contemporary investment law and arbitration

36. The histories of the emergence of the present constellation of IIAs and of investor-State arbitration as the preferred dispute settlement mechanism have been devoted significant attention,[77] and I do not intend to re-examine these. However, it is necessary to draw out an important feature of these histories crucial to our understanding of the turn to public law: contemporary international investment law is founded on a normatively shallow consensus. It is 'shallow' in two senses. First, custom, and the obligations contained in (especially early) IIAs, do not reflect a meaningful political settlement on the role of foreign capital. Second, most treaty obligations are 'shallow' due to the sparse, and often vague, language in which they are expressed. Both the debate concerning IIAs' impacts on States' regulatory powers and the three core elements of investment law and arbitration's legitimacy crisis discussed below stem from — are in fact both symptoms of — these facts.

37. The existence, content, and operation of customary international law concerning States' treatment of foreign capital have been subject to contention since at least the early 1900s.[78] Such is well illustrated by several flashpoints, including resistance amongst particularly Latin American States toward (mostly) Western States' attempts to insist that their nationals be afforded a minimum standard of treatment higher than national treatment through diplomatic protection,[79] debates concerning the status of foreign nationals' 'acquired rights',[80] and especially developing, newly-independent, and socialist States' resistance during the 1960s and 1970s to prevailing Western approaches to compensation for expropriation.[81] The

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75 See, esp: Secs 3.4, 4.6, 5.6, and 7.3

76 See, esp Secs 3.2–3.3 and 7.3

77 See, esp: Dolzer and Schreuer (OUP 2012) 1–12; Miles (2013); Miles (2014) 3 CILJ 986, esp 992–1010; Newcombe in Bungenberg & ors (eds) (Hart 2015) 202-20; Gaffney and Akçay in Bungenberg & ors (eds) (Hart 2015) 186-201; Brown in Bungenberg & ors (eds) (Hart 2015) 153-85; Hobe in Bungenberg & ors (eds) (Hart 2015) 6-22; and St John (OUP 2018)

78 See analysis in: Paparinskis (OUP 2013) 39–98; and Miles (2013) 19–119

79 See, eg: Schwarzenberger (1955) 8 CLP 212, 227; Paparinskis (2013) 39 ff. For recent discussion of this theme, See, esp: Shan (2007) 55 AJCL 123; and exchange in: Alvik (2020) 31 EJIL 289; and Kurtz (2020) 31 EJIL 313

80 See, eg: De Snaszy (1930) ILA, Report of the Thirty-Sixth Conference held at New York, September 2nd to 9th, 1930 583; Kaeckenbeeck (1936) 17 BYIL 1

81 See, esp: Weston (1985) 75 AJIL 437; and debate in Schachter (1984) 78 AJIL 121; Mendelson (1985) 79 AJIL 414; and Schachter (1985) 79 AJIL 420. See further: St John (2018) 63–7

rifts in States' views on the existence and content of customary law are evident too in the several failed attempts at codification, including the aborted 1930 Hague Conference,[82] and the ILC's controversial codification attempt in the late 1950s and early 1960s.[83] Due to these tensions, the content and operation of the few widely-accepted obligations— notably the duty to afford a minimum standard of treatment, including to pay (some) compensation when property is nationalised or otherwise expropriated[84] — remained (indeed remain) unclear. Dolzer remarked in the 1980s that customary international law concerning expropriation was 'obscure in its basic aspects'.[85] Similarly, in 1990, Salacuse wrote that BITs were necessary because, 'despite western nations' claims to the contrary', 'few generally accepted principles of customary international law' existed governing States' treatment of investors.[86]

38. States' failure to reach a universal political settlement is also evidenced by the numerous failed (public and private) attempts at concluding a multilateral agreement. States failed to reach consensus at the 1929 Paris Conference.[87] The 1948 Havana Charter, which provided for some framework rules on investment, never entered into force.[88] Neither did the 1948 Economic Agreement of Bogota.[89] Attempts to conclude a multilateral agreement within the OECD (following private drafting attempts, notably the 1957 Abs, 1960 Abs-Shawcross Draft Conventions,[90] and 1961 Harvard Draft)[91] also failed, first following negotiations from 1962–1967,[92] and then from 1995–1998.[93] While investment was included on its agenda in Singapore in 1996, since 2004 activities within the WTO have been focused on facilitating

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82 See: Rosenne (Oceana 1975) Vol IV

83 See, esp: ILC, 'Fourth report on international responsibility by FC García-Amador, Special Rapporteur' (26 Feb 1959) A/CN.4/119. See too the various 'codification' attempts by the American Institute of International Law (Anderson (1927) 21 AJIL 306); and American Law Institute (Restatement of the Law (Second): The Foreign Relations Law of the United States, vol 2 (ALI 1965); Restatement of the Law (Third): The Foreign Relations Law of the United States, vol 2 (ALI 1987)). See too: International Law Association, 'Report of the Thirty-Sixth Conference held at New York, September 2nd to 9th, 1930' 301–62

84 Paparinskis (2013) 70

85 Dolzer (1981) 75 AJIL 553, 553. In 1986, he remarked that rules concerning indirect expropriation could only be determined using conventional sources of international law 'in a very sketchy and rough manner': Dolzer (1986) 1 ICSIDR 41, 59. Reminiscent of the recent turn to public law, Dolzer's proposed solution was to look for general principles in the practice of 'liberal' legal orders, notably France, Germany, UK and US.

86 Salacuse (1990) 24 Int'lLaw 655, 655, 9. See similarly, ICJ's dicta in: *Barcelona Traction* [89–90] concerning the customary rules on nationality of claims and diplomatic protection.

87 Cutler (1933) 27 AJIL 225

88 Art 12 1948 Havana Charter

89 Arts 22–7 1948 Economic Agreement of Bogota

90 Miller (1959) 53 AJIL 371; and Schwarzenberger (1960) 9 JPL 147. See too: Shawcross (1961) 102 RCADI 335

91 Sohn (1961) 55 AJIL 545

92 Brown (2015) 170–5

93 Karl in Bungenberg & ors (eds) (Hart 2015) 342-60, 340–57. See too: Dattu (2000) 24 Fordham ILJ 275; Miles (2014) 1006

development-focused FDI, rather than on the protections to be afforded to investors.[94] Famously, contested custom and failed multilateralization led the World Bank to spearhead an alternative approach in the 1960s focusing exclusively on institutionalising procedures for investor-State arbitration as an alternative to diplomatic protection, and encouraging States to opt-in to the resulting mechanism: ICSID.[95]

39. As such, States wishing to secure favourable conditions for their investors had to rely on bilateral and regional agreements — as they began to do from 1959.[96] Growth in the completion of IIAs was facilitated, *inter alia*, by World Bank officials encouraging States to ratify BITs containing ISDS provisions,[97] and UNCTAD's U-turn in the early 1990s toward promoting FDI and the completion of IIAs as development tools.[98] As the Cold War ended, prevailing approaches to development based on State participation, regulated markets and restrictions on foreign capital were displaced in favour of what came to be known as the 'Washington Consensus', focusing on free markets, deregulation, privatisation, and liberalised approaches to foreign capital's participation in domestic markets.[99] Against this shift in orthodoxy, the number of IIAs completed exploded. Over 2,600 new agreements were completed between 1985 and 2005.[100]

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94 See: WTO, 'Trade and Investment' <https://www.wto.org/english/tratop_e/invest_e/invest_e.htm>; and, 'Investment facilitation for development news archives' <https://www.wto.org/english/news_e/archive_e/infac_arc_e.htm>

95 Dolzer and Schreuer (2012) 9. See detailed analysis of the World Bank's efforts to encourage States to ratify the ICSIDC and to include consent-to-arbitration provisions in new agreements in: St John (2018) 150–79

96 1959 Germany-Pakistan BIT

97 St John (2018) 183–207

98 See, esp: Fredriksson (Dec 2003) UNCTAD/ITE/IIT/35, 4–8

99 On these two development models, See, esp: Salacuse (1999) 33 Int'lLaw 875, 877–89. On the ten ideas constituting the 'Washington Consensus' (fiscal discipline; public expenditure re-ordering; tax reform; financial liberalisation; exchange rate competition; trade liberalisation; FDI liberalisation; privatisation; deregulation; property rights protection) see: Williamson in Serra and Stiglitz (eds) (OUP 2008) 14-30, esp 16–7

100 According to UNCTAD figures, 2,623 agreements containing investment provisions were completed between 1 Jan 1985 and 31 Dec 2005. UNCTAD, 'IIA Navigator' <https://investmentpolicy.unctad.org/international-investment-agreements/advanced-search>

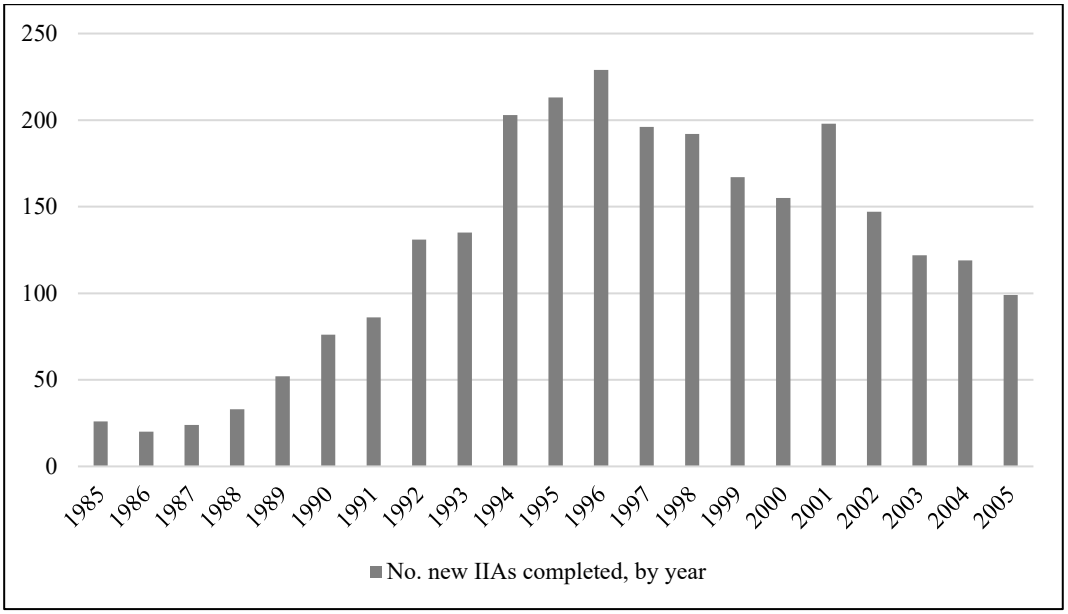

Figure 1: Annual IIA completion, 1 Jan 1985–31 Dec 2005 (UNCTAD figures)

40. However, IIA negotiations during this period were often hastily completed and, in the case of North-South agreements, were conducted in circumstances of acute power imbalance.[101] Capital-exporting States were often able to exert significant influence on drafting processes. In addition to promoting more secure environments for investors, capital-exporting States often had a liberalising agenda, which arguably 'entrenched certain attitudes in the law'.[102] The use of these States' model agreements led to the frequent adoption of boilerplate provisions and, therefore, a high degree of homogeneity in resulting obligations. Further, as St John notes, officials from capital-exporting States met frequently to compare and coordinate approaches during from the 1970s to 1990s.[103] Path-dependencies in treaty negotiation led to a further proliferation of similarly-worded agreements.[104] This is particularly true of the two core substantive obligations owed toward investors: the duty to refrain from uncompensated (direct or indirect) expropriation, and the duty to afford fair and equitable treatment and explains the relative homogeneity in treaty texts.

41. Two important lessons need to be drawn from the above. First, the rapid conclusion of similarly-worded IIAs in the 1990s and early 2000s does not represent either a sea change in States' attitudes to the obligations owed toward foreign capital, or the creation of a *de facto* multilateral 'system' of investment protection.[105] Guzman's preferable suggestion is that,

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101 Sornarajah (CUP 2010) 177–9; Kulick (ed) CUP 2016) 11–2. See, more generally: Craven (2005) 74 Nordic JIL 335

102 Sornarajah argues these have 'yet to be dismantled': Sornarajah in Shan, Simons and Singh (eds) (Hart 2008) 199-224, 200. See, similarly: Miles (2013) 3; St John (2018) 211–33

103 St John (2018) 207–10

104 See, esp: Alschner in Hirsch and Lang (eds) (Elgar 2018) 347–68

105 For further exploration, see: d'Aspremont in Gazzini and De Brabandere (eds) (Nijhoff 2012) 5-47, esp 26 ff

faced with a changed global political environment and the drying up of once-available State aid, (especially) developing countries — having fought hard to resist capital-exporting States' formulations of custom — agreed to nevertheless accept such formulations in (limited) bilateral agreements, for the sole purpose of securing competed-for FDI: what he calls least-developed countries' 'prisoners' dilemma'.[106] IIAs' content, and States' practice in interpreting treaty provisions, absent more, does not evidence custom.[107] Rather, far from reflecting custom, IIAs 'vault over th[e] traditional divide[s] of the international community and provide specific, progressive terms for the treatment and taking of foreign investment'.[108]

42. Second, the shallow consensus reached — based almost entirely on exigency — largely left the underlying tensions unresolved. As States' disagreements regarding custom and failures to conclude multilateral agreements attest, there was, and remains, no organising political consensus regarding the role of (foreign-owned) capital in society, or concerning the ideal State-market and State-individual relationships that should underpin investment protection.[109] Both current debates concerning States' regulatory powers and investment law and arbitration's persistent legitimacy crisis can be traced to the opening up of the numerous fault-lines underlying the shallow consensus reached between the 1980s and early 2000s.[110] These insights ought to guide both our understanding of the roots of the turn to public law, and our reaction to claims that solutions to the field's ills can be found within investment law and practice as currently formulated.

2.4 Investment law and arbitration's persistent legitimacy crisis

43. As has been well-explored elsewhere, the legitimacy of the rules protecting foreign investment and, particularly, of investor-State dispute settlement, has been under scrutiny for almost two decades.[111] At time of writing, persistent and widespread scholarly, public debate

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106 Guzman (1997-1998) 38 Va J Int'l L 639; Guzman in Sauvant and Sachs (eds) (OUP 2009) 73-97. See similarly: Miles (2013) 88–93. But see: Alvarez (2011) 278–95

107 See, esp: Schöbener in Bungenberg & ors (eds) (Hart 2015) 64-79. See further below: Sec 6.3.3

108 Comments of former ICJ President Judge Stephen Schwebel to US State Department, 'Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty' (30 Sep 2009) Annex A <https://2009-2017.state.gov/e/eb/rls/othr/2009/131118.htm>

109 Arguably, we can compare this with the clearer compromise reached of 'embedded liberalism' in the GATT, and, more controversially, the neo-liberal agenda motivating the WTO. See esp: Lang (OUP 2011) 1–60; Kolsky Lewis in Moon and Toohey (eds) (CUP 2018) 12-30; and Titi (2018)

110 See, more generally: Kaushal (2009) 50 HarvInt'lLJ 491

111 See, eg: Franck (2005); Van Harten (OUP 2007) 175–84; Choudhury (2008) 41 Vand J Transnat'l L 775; Brower (2009); Montt (2009) 121–61; Schill (2011) 52 VaJInt'lL 57, 61–7; Schneiderman (2011) 2 JIDS 471, 472–4; Roberts (2011) 16 ICCA Congress Series 170, 173; Kurtz (2014) 257–9; Schill in Caron & ors (eds) (OUP 2015) 106-24; Sornarajah (CUP 2015) 136 ff; Kulick in Kulick (ed) (CUP 2016) 3-29, 5. See too: Kurtz (2012) 106 AJIL 686

and dissatisfaction amongst certain States regarding central elements of the have generated formal and informal processes aimed at legislative, institutional and procedural reform.[112] Of course, legitimacy has its limits as an analytical tool.[113] It is not my aim here to address the utility of legitimacy-speak, nor to comprehensively reconsider investment law and arbitration's legitimacy crisis. Nor (except indirectly) will I suggest ways it can be resolved.[114] However, given the turn to public law in investment law and arbitration largely constitutes an attempt at crisis management,[115] it is necessary to address some central features.

44. To co-opt terms originally used by Scharpf and Schmidt in considering democracy in the EU, as a general matter, institutional legitimacy is often assessed with reference to three categories of factors: (i) 'input' factors — relating to participation; (ii) 'throughput' factors — relating to processes; and (iii) 'output' factors — relating to the (functional) desirability of outcomes.[116] While the field's legitimacy crisis stems from critique at all three *loci*, the idea that investment law and arbitration constitute a species of international(ised) public is intimately linked to — and largely motivated by — the perceived need to address three deficiencies. We can refer to these as the 'three Is': (i) indeterminacy; (ii) inconsistency; and (iii) imbalance. All relate primarily to output legitimacy. I consider each — and the extent to which they constitute genuine ills —below.

2.4.1 Indeterminacy

45. Contemporary investment law has been widely criticised for being indeterminate.[117] All legal rules are susceptible to uncertainty because their existence and expression depend on language. Norm expression always entails the risk of lexical, syntactical, or grammatic ambiguity: language is always somewhat 'open-textured'.[118] Even when a norm is (more) clearly expressed, its application can also be complicated by what Endicott calls 'non-linguistic in-

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112 See below Sec 7.4

113 See, eg: Koskenniemi (1992) 86 AJIL 175, 175; Koskenniemi (2009) 15 EJIR 395; and Crawford (2004) 98 ASIL Proc 271, 271–3. See further, Sec 7.1

114 See Sec 7.4

115 See below Sec 3.3

116 See, eg: Scharpf (OUP 1999); Schmidt in Erik & ors (eds) (OUP 2012) 661-72. In the investment context the terms 'procedural' and 'substantive' have been used for similar purposes: Waibel & ors in Waibel & ors (eds) (Kluwer 2010) xxxvi-li, xxxviii

117 See, eg: Petersmann (2009) 885; Alvarez (2011) esp 246 ff, 319 ff, 94 ff; Tams (2012) 323; Bonnitcha (2014) 144–5, 351–7; Salacuse (2015) 13, 85–6; and Schill in Besson and d'Aspremont (eds) (OUP 2017) 1095-119, 1099–100

118 Hart (OUP 2012) 124–36. See too: Bix (1991) 10 Law and Philosophy 51. This does not mean, however, that legal language, or legal rules, are always 'radically' indeterminate: Endicott (1996) 16 OJLS 667

determinacies and uncertainties' stemming from the complex nature of legal orders comprised of diverse norms and actors: for example, by uncertainties in the relationship between diverse rules or the operation of broader principles and legal policies.[119]

46. Both categories of uncertainty are common to all legal orders.[120] But the international legal order's decentralised nature can make both linguistic and non-linguistic indeterminacies appear acute.[121] Norms derived from custom or general principles are especially problematic: their informal expression and their generation through complex social and political processes often leads to uncertainties regarding their existence, content and operation.[122] Rules articulated in writing (eg in a treaty or document expressly codifying custom) are almost equally susceptible to uncertainty due to drafters' lexical, syntactical or grammatic choices. Rules cannot auto-execute:[123] '[e]ven when expressions are precise, it is people who must apply the words.'[124] In Kelsen's phrasing, the law 'constitutes only a frame within which several applications are possible, whereby every act is legal that stays within the frame':[125]

> If "interpretation" is understood as cognitive ascertainment of the meaning of the object that is to be interpreted, then the result of a legal interpretation can only be the ascertainment of the frame which the law that is to be interpreted represents, and thereby the cognition of several possibilities within the frame. The interpretation of a statute, therefore, need not necessarily lead to a single decision as the only correct one, but possibly to several, which are all of equal value, though only one of them in the action of the law-applying organ (especially the court) becomes positive law. The fact that a judicial decision is based on a statute actually means only that is keeps inside the frame represented by the statute; it does not mean that it is *the* individual norm, but only that it is *one* of those individual norms which may be created within the frame of the general norm.[126]

Even relatively clear language will permit multiple plausible interpretations and imprecise terms permit a greater number, expanding a rule's 'interpretative radius'.[127] If the tasks of interpretation and application are entrusted to third parties (eg adjudicators), open-textured rules can establish 'a vast field for a creative activity which some call legislative'.[128]

47. International investment law, derived from two principal sources — IIAs and customary international law — often generates interpretative exercises falling within the 'penumbra of

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119 Endicott (1996) 667–8

120 Kammerhofer (Routledge 2011) 2–3

121 ibid

122 d'Aspremont (OUP 2011) esp Chs 6–8

123 See, esp: d'Aspremont in Kammerhofer and d'Aspremont (eds) (OUP 2014) 114-50, 113–38; Hernández in Kammerhofer and d'Aspremont (eds) (OUP 2014) 317-48, 319–22

124 Waldron (1994) 82 Cal LR 509, 510

125 Kelsen (University of California Press 2005) 351

126 ibid (original emphasis)

127 Methymaki and Tzanakopoulos in Kulick (ed) (CUP 2016) 155-81, 158–9

128 Hart (2012) 204. See too: Hernández in Bianchi, Peat and Windsor (eds) (OUP 2015), esp 168–73

doubt'.[129] These stem from both linguistic and non-linguistic indeterminacies. Well-known examples of uncertainty in the content and operation of treaty rules include: the definition of 'investment' and whether this term captures, for instance, portfolio investments, contractual rights (or even arbitral awards);[130] whether 'treatment' under MFN provisions captures investors' access to arbitration;[131] the operation of umbrella clauses and distinction between States' commercial and public acts;[132] and the effect of self-judging language, especially in essential security exception provisions.[133]

48. Most importantly, however, are significant and pervasive uncertainties in the content and operation of the two most commonly-invoked categories of obligation, the prohibition of expropriation (especially of indirect expropriation)[134] and the duty to afford investors fair and equitable treatment.[135] These uncertainties stem primarily from the vague language used to express such terms in the majority of IIAs currently in force.[136] The need for tribunals to determine precisely when, for example, host State conduct is 'tantamount' or 'equivalent' to expropriation, or is 'unfair' or 'inequitable', or impairs an investment 'unreasonably', 'arbitrarily' or 'discriminatorily' mean that many disputes arising under IIAs fall within the category Raz refers to as 'unregulated' disputes — those in which questions, while 'subject to laws applying to them' and 'guiding' the adjudicator, to which 'no particular solution […] is required by law.'[137] This, of course, has permitted tribunals a very wide degree of interpretative latitude, and, as such has generated a range of approaches with resulting consequences for the degree of residual regulatory space afforded to States.[138]

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129 Rather than the 'core of certainty'. See, esp: Hart (2012) 12–3, 123, 33–6. See too: Schauer in d'Aspremont and Besson (eds) (OUP 2017) 384-98, 386–9

130 *Abaclat* [343–387]; contra: *Abaclat* [Abi Saab DO] [34–117, 276]; *GEA v Ukraine* [159–62]. See, too: Lévesque (2012) 27 ICSIDR 247; Williams and Foote in Brown and Miles (eds) (CUP 2011) 42-64

131 See, eg: Radi (2007) 18 EJIL 757. See further below nn 148–150

132 Van Harten (2007) 56 ICLQ 371, 388–92

133 See, eg: Art 22.2(b) 2006 Peru-US TPA, which provides that the Agreement shall not: 'preclude a Party from applying measures *that it considers necessary* for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests' [my emphasis]. Gibson (2015) 38 Fordham ILJ 1. Self-judging language is not, of course, limited to investment treaties: Schill and Briese in von Bogdandy and Wolfrum (eds) (Brill 2009) 61-140, esp 72–3, 110–13

134 See, eg: Dolzer (2002) 11 NYU Env LJ 64; Lowe (2002); Fortier and Drymer (2004) 19 ICSIDR 293; Newcombe (2005) 20 ICSIDR 1; Reinisch in Reinisch (ed) (OUP 2008) 171-204; Yannaca-Small in Yannaca-Small (ed) (OUP 2010) 445-78; Perkams in Schill (ed) (OUP 2010) 107-50, 108; Dolzer and Schreuer (2012) 101 ff; Ortino (2016) 43 LEIE 351, esp 363–5; Ortino (2019) 61–100

135 See, eg: Schreuer (2005) 6 JWI&T 357; Orakhelashvili (2008) 46 AVR 74; Yannaca-Small in Reinisch (ed) (OUP 2008) 111-30; Vandevelde (2010) 43 NYU JIL&P 43; Kläger (CUP 2011); Paparinskis (2013); and Ortino (2019) 108–53

136 See examples of (once-) standard formulations in: Arts 2(2) (FET) and 4(2) (expropriation) 2005 Germany-Afghanistan BIT

137 Raz (OUP 1979) 181–2. Noting the open-textured nature of much treaty language, see, eg the EU's submissions to UNCITRAL Working Group III: (12 Dec 2017) A/CN.9/WG.III/WP.145 [6–7, 26–30]

138 Titi (2018) 123 ff

49. As already noted, broader uncertainties persist concerning the existence, content and applicability of custom, and, especially, how such rules relate to treaty-based obligations.[139] Illustratively, while it is widely accepted that the purpose of States' remedying internationally wrongful acts must be to 'as far as possible, wipe-out' the effects of breach,[140] significant questions persist concerning the existence and content of any special customary rules on the methods of calculating compensation for unlawful interference with foreign-held property interests, especially in circumstances not involving expropriation.[141] We may likewise point to the divergent positions adopted by scholars and practitioners concerning the relationship in the operation of treaty-based exceptions provisions and the secondary (customary) rules concerning circumstances precluding wrongfulness.[142]

50. Importantly, the content and operation of the customary prohibition on uncompensated expropriation, and the customary international minimum standard of treatment ('IMS') remain unclear. Given treaty texts are often (but not always)[143] ambiguous concerning the relationship between these rules and treaty-based expropriation and FET obligations, the issue has generated significant controversy, both in practice and in commentary.[144] Uncertainties persist concerning whether, on the one hand, treaty terms ought to be given the same meaning as under custom (and what, precisely, this entails) and, on the other, whether States' practice in completing IIAs — and the decisions of arbitral tribunals interpreting such treaties — has modified the pre-existing customary prohibition on uncompensated expropriation or customary IMS.[145] Custom therefore provides few solutions to the problems generated by vagueness in, especially, FET and expropriation provisions.

2.4.2 Inconsistency

51. The second aspect of investment law's persistent legitimacy crisis relevant to our understanding of the turn to public law is the perception that that tribunals settling investment disputes often reach divergent outcomes or adopt dissimilar reasoning when faced with the

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139 McLachlan (2008) 57 ICLQ 361, esp 365–9, 80 ff

140 *Chorzów Factory*, 47

141 See, eg: Sabahi (OUP 2011) esp 94–5, 102–33

142 See nn 155–156

143 See, eg: *Glamis Gold* [589–97] (considering Art 1105 NAFTA)

144 See, variously: Gazzini (2007) 8 JWI&T 691, 697–701; Paparinskis (2013) 160–70; Kurtz (2014) 294–5; Alvarez (2009) 42 NYU JIL&P 17; Alvarez (2011) 227–42; d'Aspremont (2012) 23–6. See further below, esp: Secs 6.3.3, 6.4.2

145 See, illustratively: Paulsson and Petrochilos (2007) 22 ICSIDR 242; and Paparinskis (2013)

same or similar provisions, invoked in the same or similar factual matrices.[146] Arbitral practice is, indeed, famously replete with examples of inconsistency. Often, arbitral practice on a particular question divides into (quasi-precedential) strands or 'clusters'— groups of decisions which are relatively consistent internally, but directly contradict the reasoning adopted in another group (or groups) of awards. Oftentimes patterns of arbitral and counsel appointment are discernible in these strands; tribunals often favourably cite to earlier awards with a similar composition or in which members acted as counsel.[147]

52. Instances of inconsistent — even contradictory — decisions cut across issues of jurisdiction, procedure and substance. Frequently-cited examples include: the diametrically-opposed reasoning of the tribunals in *Maffezini*[148] and *Plama*[149] concerning the application of MFN provisions to jurisdictional matters;[150] the opposite views reached on the substance of the claim and the *CME* tribunal's approach to *res judicata* in *CME* and *Lauder*;[151] the divergent views expressed on the operation of umbrella clauses in *SGS v Pakistan*[152] and *SGS v Philippines*;[153] the tribunals' opposite findings in *Santa Elena* and *Methanex* concerning the relevance of governments' purpose in assessing expropriation;[154] and, perhaps most famously, the conflicting conclusions on the effects of exception provisions and the availability and applicability of customary international law of necessity reached by the tribunals in (eg)

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146 Franck (2005) 1558–82; Kurtz (2016) esp 6, 244–56. Decisions have also been criticised for being internally inconsistent: Ortino (2012) 43–7. States too have raised concerns regarding consistency and predictability. See, illustratively, the EU's, and Ecuador's submissions to UNCITRAL Working Group III (respectively): (12 Dec 2017) A/CN.9/WG.III/WP.145 [21–30]; (17 Jul 2019) A/CN.9/WG.III/WP.175 [5–14]. See too summary of States' positions in: UNCITRAL (26 Feb 2018) A/CN.9/930/Add.1/Rev.1 [9–35] esp [25–35]. A (not always unproblematic) distinction is often made between 'legitimate' or 'justified' inconsistencies and those that find little support in treaty language.

147 Pellet, for example, considers that there are '*jurisprudences constantes* on a limited number of points' and 'an unfortunate jurisprudential mess on many others': Pellet (2013) 28 ICSIDR 223, 224–5

148 *Maffezini* [Jurisdiction] [38–64]. See similarly: *Siemens* [Jurisdiction] [94] ff; *Impregilo* (2011) [104–108]; *Hochtief* [Jurisdiction] [77] ff; see too: *Daimler* [Brower DO] [18] ff

149 *Plama* [Jurisdiction] [215]. See, similarly: *Salini v Jordan* [Jurisdiction] [112]; *Wintershall* [161–97]; *Daimler* [205–81]; and *ICS* esp [305–17]. See too: *CME* [Brownlie SO] [11]; *Hochtief* [Thomas DO] [22] ff

150 See esp, analysis in: Ziegler in Reinisch (ed) (OUP 2008) 59-86, 84–6; Paparinskis (2011) 26 ICSIDR 14, 23 ff; Greenwood in Caron & ors (eds) (OUP 2015) 556-64, 561 ff; and Wordsworth and Brown (2015) 30 ICSIDR 365

151 In dual claims by a shareholder and by CME; whereas the *Lauder* tribunal deemed the Czechia had breached (only) its duty to refrain from imposing arbitrary and discriminatory measures (under Art II(2)(b) 1991 Czech Republic-United States BIT), the *CME* tribunal considered that the same conduct comprised breaches of the (Art 3 1991 Netherlands–Czech Republic BIT's) FET, impairment, FPS, and deprivation provisions (as well as the customary IMS): *Lauder* [237] ff; *CME* [Partial Award] [624]. Further, the *CME* tribunal considered that despite the similarities in the claims, *res judicata* did not prevent it deciding the merits of the dispute: *CME* [Final Award] [426–37]. See further: Spoorenberg and Viñuales (2009) 8 L&P IC&T 91, 98–9

152 *SGS v Pakistan* [Jurisdiction] [166–7]. See similarly: *El Paso* [Jurisdiction] [82]; and *Pan American* [Preliminary Objections] [112–15]

153 *SGS v Philippines* [Jurisdiction] [115, 119]. See similarly: *Noble* [46–62]; and *SGS v Paraguay* [Jurisdiction] [162–85]

154 *Santa Elena* [71–2]; *Methanex*, Part IV [7–18]. See too: Kurtz in Bjorklund (ed) (OUP 2015) 251-304

CMS, *Enron*, and *Sempra* (on the one hand)[155] and *LG&E* and *Continental* (on the other).[156] In a more recent illustration, divergent outcomes were reached in disputes under the ECT concerning Spain's legislative reforms in the renewable energy sector. Faced with similar (but not identical) facts, the tribunal in *Charanne* considered that Spain's measures did not breach Article 10 ECT (FET);[157] the *Eiser* and *Masdar* tribunals, by contrast, held that they did.[158]

53. Given there is no *stare decisis* in international adjudication (unlike uncertainty and imbalance) inconsistent arbitral practice is not *per se* problematic. Inconsistency, may, however, be undesirable in the sense that it is a *symptom* of rules' indeterminacy, of their misidentification, misinterpretation or misapplication, or of imbalance. However, if we begin from an assumption that investment decisions are often wrongly-decided or produce 'bad' substantive outcomes — as Schultz does — we may actually *prefer* inconsistency; a regime of normatively undesirable rules that are consistent might be worse than one that is (at least) inconsistent.[159] This issue has, however, become linked to accounts of the rule of law, and it is now commonplace in investment law scholarship to seek ways of promoting greater consistency in arbitral reasoning.[160] This trend is based on assumptions that the development of something resembling a *jurisprudence constante* is possible, permissible, and desirable, and that tribunals' role includes a duty to develop a cohesive system of investment protection. As I explore further in Chapters 6 and 7 below, these assumptions all require further scrutiny.

2.4.3 Imbalance

54. The final aspect of investment law and arbitration's legitimacy crisis we must consider is the critique that the field is imbalanced.[161] Such accusations can be separated into two broad categories. The first relates to perceived imbalance in structural and procedural features of investor-State arbitration. Such critiques have focused on imbalances generated by the fact that the power to instigate arbitration rests solely with investors and that many arbitration

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155 *CMS* [304–94]; *Enron* [288–345]; *Sempra* [325–97]

156 *LG&E* [226–66]; *Continental* [160–236]. See too: Waibel (2007) 20 LJIL 637, 638 ff; Paparinskis (2016) 31 ICSIDR 484, 497–9; Forji (2010) 76 Arbitration 44, 48 ff; Mitchell and Henckels (2013) 14 Chinese JIL 93, 110–17; and Kurtz (2010) 59 ICLQ 325, esp 355 ff

157 *Charanne* [475–542]. See similarly: *Isolux*. See too: *Blusun*

158 The tribunals considered that the relevant Spanish legislation contained specific commitments of regulatory stability: *Eiser* [362–87, 418]; *Masdar* [482–522]

159 Schultz in Douglas, Pauwelyn and Viñuales (eds) (OUP 2014) 297-316, esp 315–16. Cate (2012) 51 Columbia JTL 418

160 Kaufmann-Kohler in Gaillard and Banifatemi (eds) (Juris 2008) 137-47, 143–5; Franck (2005) 1582–3; Lévesque in Bjorklund (ed) (OUP 2015) 361-400, 361–2

161 See generally: Bernasconi-Osterwalder (2005) 6 JWI&T 69; Chung (2006) 47 Va J Int'l L 953. States too have stressed the importance of balance in arbitral reasoning. See, illustratively, Indonesia's and Morocco's submissions to UNCITRAL Working Group III (respectively): (29 Oct 2018) A/CN.9/WG.III/WP.156 [5–14]; (4 Mar 2019) A/CN.9/WG.III/WP.161 Annex II [2–8]

rules do not expressly provide for counter-claims.[162] At the substantive level, observers have stressed that, while investors benefit from the protections contained in IIAs, they have not until recently had corresponding duties under these agreements, for example to comply with corporate social responsibility and human rights guidelines.[163]

55. The second category relates to the perceived biases of arbitrators. A central criticism is that the prevailing party-appointment mechanisms generate an economically-incentivised, 'hired gun' phenomenon whereby arbitrators favour their appointing party in order to increase the chance of reappointment.[164] Relatedly, it is sometimes alleged that because arbitrators generally have expertise in commercial law and litigation, they (even if chairing the tribunal or appointed by the host State) often favour investors.[165] This, in turn, has been alleged to contribute to a reluctance to consider governments', domestic polities', or civil societies' concerns and interests and to focus on disputes' commercial and economic elements.[166] This has been said to manifest in a focus on investment protection as IIAs' principal object and purpose and the liberal approaches to both issues of jurisdiction and substantive protection, resulting in a *de facto* interpretative maxim '*in dubio pro investore*'.[167]

56. While we can undoubtedly point to individual examples of such practices, the question arises whether investment law and arbitration — overall — are imbalanced. A growing body of empirical research has (understandably) produced a complex picture.[168] If we focus on the outcomes of disputes, claims of bias appear inflated. According to UNCTAD figures, as of November 2018, host States prevailed in 35.9 percent of disputes; investors prevailed in

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162 Although, in combination, Arts 25 and 46 ICSIDC, umbrella provisions, and many IIA dispute settlement provisions have been construed as providing tribunals with jurisdiction over host States' counter–claims. See, eg: Crawford (2008) 24 ArbInt'l 351, 364–6

163 Schultz and Dupont (2014) 25 EJIL 1147, 1153. See too: Alvik (2020); and Kurtz (2020)

164 See, esp: Van Harten (2012) 50 Osgoode Hall LJ 211, 219–21; Bonnitcha, Skovgaard Poulsen and Waibel (OUP 2017) 255

165 See discussion in, esp: Pauwelyn (2015) 109 AJIL 761, 763; and Puig and Strezhnev (2017) 46 JLS 371. For evidence that tribunals tend to favour investors from OECD countries, Van Harten (2016) 53 Osgoode Hall LJ 540, esp 574–6

166 This often manifests through an excessively teleological approach, based on a narrow construction of IIAs' object and purpose as the promotion and protection of investment. See, esp: Waibel in Hofmann and Tams (eds) (Nomos 2011) 29-52, 39 ff; Ortino (2017) 30 LJIL 71, 75–83

167 Methymaki and Tzanakopoulos (2016) 157, citing: *Noble* [52]. See too: Kurtz (2010) 350–1;Waibel (2011) 39–40

168 See, eg: Franck (2007) 86 North Carolina LR 1; Waibel and Wu, 'Are Arbitrators Political?' (5 November 2011) *ASIL Research Forum, UCLA* <https://www.researchgate.net/publication/256023521_Are_Arbitrators_Political> accessed 12 November 2018; Schultz and Dupont (2014); Van Harten (2012); Van Harten (2016); Puig (2016) 56 Va J Int'l L 647; and Puig and Strezhnev (2017)

30.4 percent; 23.1 percent were settled; and 10.6 percent were discontinued.[169] This win-loss ratio is consistent with recent trends.[170] However, win-loss ratios alone are also not particularly useful indicators of bias 'because investors are likely to take their probability of success into account when deciding whether to bring particular disputes';[171] they cannot account for disputes that were settled before arbitral proceedings were commenced.

57. Likewise, patterns in claimants' and host States' nationalities do not clearly support the view that investment arbitration is (only) a tool used by investors from the global North against host States in the global South.[172] Claims are increasingly brought by investors from traditionally capital-exporting States against capital-exporting host States (North-North); by investors from traditionally capital-importing States against capital-exporting host States (South-North); and by investors from traditionally capital-importing States against capital-importing host States (South-South). While some attempts have also been made to measure the influence of the often club-like nature of arbitral appointment and factors such as professional background, education and national origin on arbitral reasoning and outcomes, it is difficult to discern strong patterns in outcomes.[173]

58. However, when patterns in interpretation on certain jurisdictional and substantive issues are mapped, it is revealed that arbitrators are statistically more likely to select an expansive interpretation that favours claimants, both on jurisdictional and substantive matters.[174] Van Harten has shown that expansive interpretation is also far more likely if the claimant is from

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169 UNCTAD, 'Investment Dispute Settlement Navigator, Concluded original arbitration proceedings' <http://investmentpolicyhub.unctad.org/ISDS> accessed 12 Nov 2018; (these figures include ten known, completed disputes for which information was not available). As well as disputes in which compensation was awarded, the figure in favour of investors includes the 2.3 percent of disputes in which the host State was found to have breached its obligations but no compensation was awarded. If we consider discontinuation to favour host States and settlement to favour investors, the win–loss ratio becomes 46.5:53.5 in favour of investors.

170 UNCTAD, 'Investor–State Dispute Settlement: Review of Developments in 2017' (28 Jun 2018) <https://investmentpolicyhub.unctad.org/Publications/Details/1188> accessed 12 Nov 2018; UNCTAD, 'Investor–State Dispute Settlement: Review of Developments in 2016' (19 May 2017) <https://investmentpolicyhub.unctad.org/Publications/Details/172> accessed 12 Nov 2018; UNCTAD, 'Investor–State Dispute Settlement: Review of Developments in 2016' (8 Jun 2016) <https://investmentpolicyhub.unctad.org/Publications/Details/144> accessed 12 Nov 2018

171 Bonnitcha, Skovgaard Poulsen and Waibel (2017) 26–7

172 This somewhat complicates the notion that investment law remains *inherently* 'neo–colonial': Schultz and Dupont (2014) 1154–7

173 Brekoulakis (2013) 4 JIDS 553, suggesting, especially, that arbitrators' decisions are likely informed by institutional factors (determining assumptions, values and approaches) not always discernible when only behavioural outcomes are measured; and Puig (2014) 25 EJIL 387

174 Examining a dataset comprising 261 decisions available on 1 Jun 2010, Van Harten selected and coded for fourteen 'contested jurisdictional and substantive issues', comprising seven jurisdictional issues: 'corporate person investor'; 'natural person investor'; 'concept of investment'; 'minority shareholder interests'; 'permissibility of investment'; 'parallel claims'; and 'scope of MFN treatment' and seven substantive issues: 'national treatment'; 'fair and equitable treatment'; 'full protection and security'; 'indirect expropriation'; 'umbrella clause'; and 'national security exception': Van Harten (2016) 549–54

one of the 'main Western capital-exporters' (France, Germany, UK, US).[175] While there are signs in recent research that allegations of imbalance are not ill-founded, in light of the difficulties inherent in both defining and measuring bias, it suffices to conclude that the perception of bias is as damaging as established bias — and that such perceptions are not groundless, and have proven remarkably resilient.[176]

2.5 Conclusions

59. Like other 'inward-looking' rules, international law concerning States' treatment of foreign nationals and their property can have important effects for States' capacities to freely define and pursue the public interest, to approach the State-market and State-individual relationships, and to set the permissible ends and means of government. The obligations a State assumes with respect to foreign investors, in other words, can have significant effects on its exercise of what we can call its 'regulatory powers'. As States' regulatory powers are always defined residually under general international law, how investment tribunals approach their tasks of law ascertainment and interpretation can have profound effects on States' capacities to freely define and pursue the public interest — including through executive action, the adoption of general legislation, and the application and administration of existing laws and regulations. While general international law governs States' regulatory powers with a normatively light touch, and neither permits nor limits particular ends or means of action *ab initio*, it nevertheless provide us with a crucial starting point for any interpretative exercise — each limitation on a State's otherwise plenary freedom of action must be traced to a positive rule of international law.

60. A further complication in considering precisely how the obligations States assume in IIAs and owe under custom affect their capacities to define and pursue the public interest stems from the normatively shallow consensus underpinning contemporary investment law. Rather than reflecting a meaningful political settlement concerning the role of capital in society and the types of treatment to be afforded to investors, the rapid completion of IIAs from the late 1980s to early 2000s can more properly be understood as an agreement not to disagree. The rifts in States' attitudes to these issues were ultimately not resolved but rather were papered over. This is partially reflected in the vague wording of States' substantive obligations — most notably the duties to afford fair and equitable treatment and to refrain from compensated expropriation. Vagueness in such obligations appears to have been both the price and

175 ibid esp 559–62

176 See similarly: Bonnitcha, Skovgaard Poulsen and Waibel (2017) 257

a symptom of the shallow consensus reached. This all means, however, that the circumstances of IIAs' completion provide little guidance when considering their (intended) effects on States' capacities to define and pursue the public interest.

61. The roots of investment law and arbitration's persistent legitimacy crisis also lie in this shallow consensus — and particularly the open-grained terms in which States assumed obligations (based largely on the preferences of capital-exporters). Three aspects of this legitimacy crisis are particularly pertinent to our examination of the turn to public law in scholarship and practice — the critiques that: (i) that States' obligations toward investors are indeterminate; (ii) that arbitral practice is inconsistent; and (iii) that the rules on investment protection are imbalanced. As explored above, while we ought to be concerned by (many) tribunals' inclinations toward interpretative outcomes that favour investors, and instances in which the same provisions were construed differently in similar factual circumstances or tribunals adopted divergent positions on the application of rules of general international law, both are symptoms of — or at least are exacerbated by — the field's original sin: indeterminate substantive obligations. As explored in the next chapter, addressing these three perceived failings of investment law and arbitration is a key motivation of the turn to public law.

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3

THE TURN TO PUBLIC LAW

3.1 Introduction

62. This chapter explains the emergence of the turn to public law in investment law and arbitration and provides an initial roadmap of its doctrinal, conceptual and normative consequences. As necessary background to considering the turn to public law in investment law and arbitration, Section 3.2 considers the idea that forms of public law can exist beyond the State. Section 3.3 sketches the main features of the move in recent scholarship of viewing international investment law and arbitration as such a species of 'international(ised)' or 'post-national' public law. Section 3.4 traces the doctrinal, conceptual and normative consequences said to flow from such a re-imagining of investment law and arbitration, and considers whether, and how, this re-imagining is discernible in the practice of tribunals constituted to settle disputes arising under IIAs.

3.2 Public law beyond the State?

63. To understand the assumptions and motivations underpinning the turn to public law in investment law and arbitration, we must first consider an ancillary question: whether public law can exist beyond the State. Public international law regulates the relations of formally equal and independent (ie sovereign) entities — States. As explored in Chapter 2, while States may assume international legal obligations that look 'inward'— ie that condition, proscribe or prescribe action at the national level — public international law has not historically regulated in a detailed manner the structure and exercise of public authority within the domestic sphere. Rather, the 'basic tasks' of 'constitut[ing], maintain[ing] and regulat[ing] governmental authority' are performed by each State's public law — its constitution (whether written or not) and those laws (such as administrative law) that regulate the exercise of authority by governmental agencies and officials.[177] Often through a myriad of rules and practices, domestic public law establishes a legal construct of the individual in

[177] Loughlin (OUP 2010) 312–15

society, including through recognising and delimiting individuals' rights and freedoms — including in respect of property — and by defining the permissible ends and means of various branches of government. Such ordering is central to contemporary notions of the modern State as an abstract entity defined by the interaction between 'private' and 'public' spheres of activity. A central aim of domestic public law — at least within liberal conceptions — is to ensure limited, rules-based (rather than arbitrary), government. Individuals' abilities to challenge the substance and processes of governments' decisions through administrative and judicial review — and the resulting aim of ensuring transparent and accountable decision-making — is likewise often considered fundamental to modern public law.[178]

64. While common roots in Enlightenment political and legal theory, the legacies of European colonialism, and the historical and contemporary migrations of norms and ideas mean that many domestic constitutional orders exhibit similar features,[179] the orthodox approach holds that there is no universal public law. Rather, public law inherently concerns the shaping (and reshaping) of a single territorial space (a State) through political and legal processes — it both constitutes and reflects political (and material) conditions within a particular society and the ways actors within that society attempt to address these conditions at a particular point in time.[180] Public law is, in other words, intrinsically linked to the notion of political sovereignty.[181] The fundamental question that arises is whether forms of public law are possible — or have already developed — that elide territorial boundaries and that govern relations across multiple polities.

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178 For a useful introduction to these themes, see: Elliott and Feldman in Feldman and Elliott (eds) (CUP 2015) 1-16; and Loughlin in Mac Amhlaigh, Michelon and Walker (eds) (OUP 2013) 11–24

179 See explorations in, eg: Goldsworthy in Choudhry (ed) (CUP 2007) 115-41, 116 ff; Beatty (OUP 2004) 1–35; and Loughlin (2010) 50–88

180 See, esp: Preuss in Dobner and Loughlin (eds) (OUP 2010) 23-46, 23–5; Saunders in Feldman and Elliott (eds) (CUP 2015) 256-74, 257–8. Indeed, some scholars have questioned the idea that it is possible to hold a uniform concept of 'public law' that captures the various historical and doctrinal trajectories within domestic legal orders. See: Halpin in Wilkinson and Dowdle (eds) (Hart 2018) 33-50, 37 ff; and Baranger in Wilkinson and Dowdle (eds) (Hart 2018) 235-52, 237–49. Exploring the idea (in the UK context) whether we ought to think of public law (within a polity) as unitary, see: Craig in Feldman and Elliott (eds) (CUP 2015) 153-71

181 Preuss (2010) esp 26–39. See, more generally: Loughlin in Walker (ed) (Hart 2003) 55-86, 57 ff; and Loughlin (OUP 2004) 72–98

65. While in many ways it seems counter-intuitive to speak of public law *beyond* the State, the view that there now exist fields of 'post-national',[182] 'global',[183] 'transnational',[184] 'international',[185] or 'internationalized'[186] public law — bodies of rules that transcend national boundaries and that order the exercise of authority in a manner similar to domestic public law — has become relatively commonplace. Such trends respond largely to developments in the international legal order including the increasing institutionalisation of legal relations and proliferation of 'norm-producing' bodies,[187] increased focus on human rights, and the formation of supranational entities — most notably the EU — that exercise powers beyond those traditionally allocated to inter-governmental organisations.[188]

66. Such trends in scholarship are important for two reasons. First, scholars writing within these movements have claimed that investment law and arbitration constitutes an emerging field of post-national public law. Second, such trends have seemingly had more general influence on the ways scholars' and practitioners' have approached the field, even amongst those not writing from within one of these scholarly movements. In order to properly understand the origins and motivations of the turn to public law, we therefore must briefly consider these broader intellectual movements. Three (separate, but frequently overlapping) trends in scholarship deserve particular attention, each of which seeks to describe and shape new forms of 'post-national' public law, albeit in different ways: (i) 'global constitutionalism'; (ii) 'global administrative law'; and (iii) 'international public law'.

3.2.1 Global constitutionalism

67. Global constitutionalism ('GC') is both a descriptive and normative project often traced to Verdross's (and Simma's) development of the idea of a universal international constitution,[189] and Mosler's and Tomuschat's (normatively-heavy) conceptions of international

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182 Walker (2012) 3 TLT 61, 62–73

183 Donaldson and Kingsbury in Mac Amhlaigh, Michelon and Walker (eds) (Oxford University Press 2013) 264-85; Hovell (2017) 110 AJIL Unbound 80, 81–3; Montt (2009) 5–17

184 Benhabib (2016) 5 GlobCon 109

185 von Bogdandy, Goldmann and Venzke (2017) 28 EJIL 115

186 This term has been used in two ways: (i) to refer to the increased influence of international law and comparative practices on national legal orders (see, eg: Chang and Yeh in Rosenfeld and Sajó (eds) (OUP 2012) 1166-83); and (ii) in a manner more-or-less synonymous with 'international', 'post-national' or 'global' public law (see: Schill (2011) 59, 71 ff; and Foster (2015) 64 ICLQ 461, 464 ff. When used in the latter, it connotes that rules of public law found in domestic legal orders are being transported or translated to the international level — ie 'internationalized'.

187 For use of this terminology, which encompasses a broader range of activities than 'law-creation', see, egs: Sadurski (2015) 4 GlobCon 396

188 See, overviews in, eg: Walker (2008) 56 Political Studies 519, esp 519–20s; von Bogdandy, Goldmann and Venzke (2017) 115–18

189 Presented in, eg: Verdross (Springer 1926); and: Verdross and Simma (Duncker & Humblot 1984). See too: Simma (1994) 250 RCADI 217, 256–61

community.[190] While comprised of various arguments, a main concern is the transposition of ideas (and ideals) of national constitutionalism to the international (or 'post-national') level.[191] As scholarly movement, it has both descriptive and normative aims,[192] principally: (i) the '(re-)descri[ption]' of existing features of international law 'in their interplay with domestic law' as 'reflecting complementary constitutional principles, notably the rule of law, human rights and democracy';[193] and (ii) providing normative justifications for developing institutions and procedures that promote the above 'constitutional principles'.[194]

68. Commencing from what can only be properly understood as a '"thick"' (and undoubtedly liberal) 'conception of a constitution',[195] GC scholars have argued that activities within any political space ('within or beyond the state') ought to be organised around the idea of 'free and equals governing themselves through law' and, therefore, commitment to human rights, democracy and the rule of law.[196] Only the mechanics of how these aims ought to be achieved differ between the international and national planes.[197] A core objective of the global constitutionalist movement is thus to identify and further elaborate a set of higher-order, universal values and principles that govern the relations between all actors in the international legal order — whether States, international organisations, legal and natural persons, companies, or (other) non-State actors.[198] According to De Wet, 'the constitutionalization of international law' is:

> an attempt to exercise legal control over politics within the international legal order itself, in order to compensate for the erosion of such control within domestic constitutional orders. In doing so, it attempts to translate to the international plane concepts that were traditionally reserved for domestic constitutions. Prominent domestic elements featuring in the debate concerning the constitutionalization of public international law include a hierarchy of norms, enforceable individual rights, and judicial review.[199]

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190 Mosler (1974) 140 RCADI 1, 31–44; Tomuschat (1993) 241 RCADI 195, 209–39. See too: Fassbender in Tsagourias (ed) (CUP 2007) 307-28, 312–13; Kleinlein (2012) 4 GoeJIL 385. Von Bernstorff traces the idea of international law as having a constitutional structure to Jellinek (who in turn drew extensively on Hegel): Von Bernstorff (2012) 4 GoeJIL 659, 661–2, 9–70, 72–3

191 See, esp: De Wet (2006) 19 LJIL 611; De Wet in Rosenfeld and Sajó (eds) (OUP 2012) 1209-29; and exchanges in: O'Donoghue (2013) 11 ICON 1021; Perju (2013) 11 ICON 1046; O'Donoghue (2013) 11 ICON 1052; and in: Loughlin (2014) 3 GlobCon 9, esp 24 ff and Walker in Wilkinson and Dowdle (eds) (Hart 2018) 133-40, 134 ff

192 Peters & ors in Suami & ors (eds) (CUP 2018) 1-26, 5

193 ibid . See too: Vadi in Bjorklund (ed) (OUP 2015) 337-60, 342–3

194 Peters & ors (2018) 5

195 ibid 8

196 ibid

197 ibid

198 Tomuschat (1999) 281 RCADI 9, 355. This idea is reminiscent of Duguit's view that, once identified at the national level, 'objective' laws of good government will find their way to the international level. Exploring this idea, Loughlin (2010) 463–66. See too: Walker (CUP 2014) eso 18–24

199 De Wet (2012) 1213

69. Global constitutionalism does not rest on 'the claim that there is a [single] international "Constitution" with a capital C.'[200] Rather, the constitution within GC is diffuse: there are many international constitutional orders.[201] Within this conception, the international legal order is replete with examples of 'institutions, processes and principles' fulfilling the 'typical constitutional functions' of founding, organising, integrating and stabilising political communities, containing political power, providing 'normative guidance' and regulating 'the governance activities of law-making, law application and law enforcement'[202] that are the quintessential features of (national) constitutions.

70. Scholars within the movement divide the 'constitutional law' at the centre of GC into 'three broad subcategories': (i) 'fundamental norms which serve a constitutional function for the international legal system at large'; (ii) 'norms which serve as constitutions of international organizations or regimes'; and (iii) 'norms which have taken over or reinforce constitutional functions of domestic law'.[203] Concerning the latter, Kleinlein and Peters elaborate that 'certain norms of international law may be qualified as constitutional because they function as supplementary constitutional law in the domestic context.'[204] Inward-looking rules derived from international human rights law, WTO law and, crucially, international investment law are all presented as examples of such norms, establishing a '"second line of constitutional entrenchment"' restricting States' domestic activities.[205] Thus, within this view, rather than seeing inward-looking rules of international law as essentially akin to outward-looking rules, norms that directly affect States' treatment of persons and conditions within domestic jurisdiction are viewed as 'constitutional' norms, akin to those derived from domestic public law and conceptualised using the language of constitutionalism. As explored below, this assumption is often echoed in the turn to public law in investment law and arbitration. Similarly, the notion that international actors — eg arbitrators — exercise governance authority which ought to be directed by — and shape — universal (constitutional) norms, is often shared by scholars advocating a turn to public law in investment law and arbitration.

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200 Peters & ors (2018) 7

201 Teubner (OUP 2012) 52

202 Peters & ors (2018) 8

203 Kleinlein and Peters, 'Oxford Bibliographies: International Constitutional Law' (*OUP*, 22 February 2018) <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0039.xml?rskey=rcxIcN&result=17> . The movement has been heavily criticised, however, for the vague way it constructs its organising concept of 'constitution'. See, esp: : AL Paulus in JL Dunoff and JP Trachtman (eds) (CUP 2009) 69-11; Wood in Kaikobad and Bohlander (eds) (Nijhoff 2009) 85-98; Paulus in Dunoff and Trachtman (eds) (CUP 2009) 69-111; Somek (2011) 18 Constellations 567; and d'Aspremont in Lang (ed) (Elgar 2017) 155-69

204 Kleinlein and Peters

205 ibid

3.2.2 Global administrative law

71. The second stream in recent academic thought — global administrative law ('GAL') — is pertinent to our understanding of the turn to public law in investment law in arbitration both as a general matter and because numerous GAL scholars have 'claimed' investment law and arbitration. The movement is based on the idea that 'much administration is taking place in what might be thought of as a global administrative space, involving blurring of national and international, and public and private, dimensions.'[206] Global administrative law scholars have sought to define a universal body of laws comprising 'the legal rules, principles, and institutional norms applicable to processes of "administration" undertaken in ways that implicate more than purely intra-State structures of legal and political authority.'[207]

72. While sharing similar conceptual DNA, GAL has somewhat more modest ambitions than GC.[208] Whereas GC is largely concerned with substantive guarantees, administrative law, within GAL scholarship, is concerned with the *processes* of governing. Its professed focus, therefore is on whether decisions made in the 'global public space' are reached through mechanisms that promote 'good governance', normally defined against the broad standards of rationality and accountability. Similarly, whereas *international* administrative law is considered by GAL scholars to refer to the law and practice of the various administrative tribunals established to review the (mostly employment-related) decisions of international organisations,[209] GAL takes a broader view of both of 'administration' and the relevant actors.[210] Significantly, GAL departs from conventional approaches to legal personality, law ascertainment and interpretation within public international law; often GAL scholars adopt broad conceptions of what constitutes 'law' for the purposes of GAL, pushing against orthodox approaches to the rules of recognition, including by incorporating 'soft law' and standards.[211]

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206 Kingsbury and Donaldson, 'Global Administrative Law' (April 2011) MPEPIL <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e948> accessed 5 December 2018 accessed 5 Dec 2018

207 ibid . GAL's roots are sometimes traced to Nêgulesco's 1935 Hague Academy course: Nêgulesco (1935) 51 RCADI 579. Bianchi (OUP 2016) 62–3

208 Krisch in Dobner and Loughlin (eds) (OUP 2010) 245-66, 255–61; Wood (2009) 90. It can, however, still be viewed as essentially a constitutional project: Kuo (2011) 44 NYU JIL & P 55

209 Amerasinghe in Romano, Alter and Avgerou (eds) (OUP 2014) 317-35. See too: Carlston (1959) 8 JPL 329

210 Bianchi (2016) 61–3

211 Kingsbury (2009) 20 EJIL 23. These aspects have led Cassese to remark that '[it] is now clear that global administrative law is not only global, not only administrative, and not only law': Cassese (2015) 13 ICON 564, 466

73. Like global constitutionalists, a principal aim of many GAL scholars is to develop a universal set of values and principles regulating 'administration' — a good governance 'toolkit' aimed at ensuring the rationality of administrative decision-making — which should be applied wherever administration occurs. While authors differ on the precise contents of this toolkit, there seems to be consensus amongst GAL scholars that it at least includes the general principles — although 'objectives' is more apt — of transparency, participation, reason-giving, and the availability of review.[212] Kingsbury, however, adds to this list other 'general principles of public law': 'the principle of legality'; 'the principle of rationality'; 'the principle of proportionality'; 'rule of law'; and 'human rights'.[213]

74. In a foundational piece, Kingsbury, Krisch and Stewart identify '[f]ive main types of globalized administrative regulation': (i) 'administration by formal international organizations'; (ii) 'administration based on collective action by transnational networks of cooperative arrangements between national regulatory officials'; (iii) 'distributed administration conducted by national regulators under treaty, network, or other cooperative regimes'; (iv) 'administration by hybrid intergovernmental-private arrangements'; and (v) 'administration by private institutions with regulatory functions'.[214] GAL scholars tend to focus on three 'institutional mechanisms' (or *loci*) for GAL's 'application and development':[215] (i) domestic adjudicative and administrative agencies' review of the decisions and processes of international institutions — primarily international organisations;[216] (ii) internal mechanisms and procedures 'adopted by global institutions' aimed at ensuring participation and accountability;[217] and (iii) 'global disciplines on distributed administration', which (either through formal legal rules or non-binding standards) impose process-oriented requirements on States' decision-making.[218]

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212 See overview and critique in: von Bogdandy, Goldmann and Venzke (2017) 130–1

213 Kingsbury (2009) 32–3

214 Kingsbury, Krisch and Stewart (2005) 68 LCP 15, 20. See too: Benvenisti (2013) 368 RCADI 47, esp 97–109

215 Kingsbury, Krisch and Stewart (2005) 31

216 ibid . The authors cite, inter alia: the practice of Bosnian courts in reviewing the conduct of the High Representative for Bosnia; proceedings before EU courts challenging aspects of UNSC sanctions; proceedings before the ECtHR dealing with aspects of the immunity of international organisations such as the European Space Agency; and domestic courts' review of the procedures of 'private' arbitral bodies such as the International Court of Arbitration for Sport.

217 ibid . The authors cite, inter alia: the UNSC's introduction of limited administrative procedures in reviewing the inclusion of individuals on sanctions lists; and the capacity of affected individuals to challenge the World Bank's compliance, with its own guidelines through the World Bank Inspection Panel; while they are not expressly mentioned under this category, international organisations' administrative tribunals are presumably captured within this category.

218 ibid . As examples, the authors cite: the WTO AB's interpretation of Art XX GATT as generating certain procedural fair-ness and transparency guarantees; the ECtHR's scrutiny of domestic administrative measures; and the World Bank's and IMF's 'extensive codes of principles and rules for the organization and procedures of domestic administration'. On WTO AB's 'procedural turn', see: Musto and Redgwell in Bjorge and Miles (eds) (Hart 2017) 489-508, 501–2

75. The most significant aspect of the GAL movement for present purposes is that it has attempted to 'claim' investment law and arbitration. Kingsbury, Krisch and Stewart, argue that this objective of policing States' administrative actions to promote good governance through global disciplines:

> [...] is also the rationale behind the far-reaching arbitral review established under investment treaties, via the ICSID system, and by NAFTA. Under such mechanisms, investors can challenge administrative action of the host state before international arbitral tribunals if they believe their rights under the relevant investment treaty have been violated. Increasingly, decisions of these tribunals have extended procedural, as well as substantive, limitations on domestic regulators. [...][219]

Numerous scholars have since categorised investment law and arbitration as a species of global administrative law.[220] As explored below, even when scholars do not expressly describe investment law and arbitration as 'global administrative law', the turn to public law as a normative project shares many of the above aims.

3.2.3 International public law

76. The third trend in recent scholarship conceptualising aspects of the international legal order as 'public law' — international public law ('IPL') — is perhaps most central to our understanding of the turn to public law in scholarship concerning investment law and arbitration. The idea of international public law has largely arisen due to concerns relating to the authority and legitimacy of international law in general, and, in particular, of international institutions. Building on other authors' works drawing analogies between public international law and domestic public law,[221] and their own prior work elaborating aspects of such a theory,[222] in 2017 von Bogdandy, Goldmann, and Venzke summarised their proposed theory of international public law as follows:

> In response to the legitimacy concerns and regulatory demands, we propose a theory of international public law.

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219 Kingsbury, Krisch and Stewart (2005) 36

220 Van Harten and Loughlin (2006); Kingsbury and Schill (2009) NYU Public Law & Legal Research Theory Research Paper Series, Working Paper No 09-46; Ehsassi in Schill (ed) (OUP 2010) 213-42, 214; Kalderimis in Brown and Miles (eds) (CUP 2011) 145-60; Childress (2013) 54 HarvInt'lLJ 115

221 Lowe (1989) 12 Aust YbIL 54, 59–60, fn 11; and debate in: Waldron (2011) 22 EJIL 315; Poole (2011) 22 EJIL 351; Waldron (2011) 22 EJIL 389, esp 393–4

222 Articulated in, eg: Von Bogdandy (2008) 9 German LJ 1909; von Bogdandy, Dann and Goldmann in von Bogdandy & ors (eds) (Springer 2010) 3-32; von Bogdandy and Venzke (eds) Springer 2012); von Bogdandy and Venzke (OUP 2014); and Goldmann (2016) 5 GlobCon 48. See too: Dann and Von Engelhardt in Pauwelyn, Wessel and Wouters (eds) (OUP 2012) 106-21

> The purpose of our theory is to identify, reconstruct and develop that segment of public international law that governs the exercise of international public authority. Switching 'public' and 'international' is not a slip of the pen but expresses the overall thrust of our theory: to advance a public law paradigm in international law. Thereby, we aim at taking account of world public opinion in the language of international law. International public law stands for the reconstruction and development of the legal regimes governing the activities of international institutions in light of their publicness. In this way, legal scholarship may contribute to improving the legitimacy and the effectiveness of their activities.[223]

77. According to von Bogdandy, Goldmann and Venzke, (listing ICSID as an example) because institutions within the international legal order 'devise policies with huge domestic impact', the activities of such bodies ought to be understood as the 'exercise of international public authority'.[224] While these authors acknowledge that 'world public opinion may diverge on many important issues', 'it seems to be common ground' that such exercises of public authority 'should advance common interests […] in a way that merits obedience'.[225] Von Bogdandy, Goldmann and Venzke argue that, given tensions between these 'twin requirements' 'are the key characteristics for contemporary public law in most domestic legal orders, public law theories, doctrines and practical expertise may help in the development of international public law.'[226] International public law, within this conception, is therefore essentially an extended exercise in comparative public law.

78. A key aspect of this theoretical approach is the observation that due to the substantive and structural development of the international legal order in the past decades, the view that international law — law based on obligations assumed through auto-limitation by formally equal parties (sovereign States) — is no longer sustainable. According to von Bogdandy, Goldmann and Venzke, 'there are increasing signs' that this 'private law analogy' 'is inadequate for many, if not most, parts of public international law' because in attempting to 'cater to common interests, international law has developed a sophisticated institutional structure that is hard to reconcile with ideas of horizontal relations based on (state) consent alone.'[227]

79. Von Bogdandy, Goldmann and Venzke outline five premises that form the base of their theory of international public law: (i) 'international public law is inspired by, and dependent on, domestic public law, but it is not fused with it', and, while acknowledging their

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223 von Bogdandy, Goldmann and Venzke (2017) 116

224 ibid

225 ibid

226 ibid

227 ibid

'interdependence', the theory does not 'merge them into one global (or transnational) law' but maintains the distinction between the international and domestic legal orders;[228] (ii) despite the complexity and plurality of 'world society', this does not 'render the formulation of common interests impossible. Rather, international public law provides the institutional framework for such public policies, even in the absence of a world state or other forms of deep political integration' (like the EU);[229] (iii) the 'concept of international public authority' is central: international public law 'focuses on the acts that claim to pursue common interests and therefore require a public law framework that ensures their legitimacy, regardless of their legal nature' and 'is the law applicable to the exercise of international public authority' thus excluding the 'strictly horizontal phenomena of public international law that do not claim to pursue common interests';[230] (iv) its 'main rationale' is the protection and promotion of 'freedom', in its 'political dimension, which entitles people to collectively exercise public power' and its 'individual dimension, which is reflected in human rights.'[231] Hence, international public law 'focuses on the impact of concrete acts upon freedom' and uses the notion of 'freedom' to restructure 'the public law framework' to ensure that 'public authority respects freedom in its political or individual dimension';[232] and (v) the theory is geared primarily to doctrinal development and is aimed at 'translating complex social relationships into a language of legality' and is, in essence, a project aimed at identifying and developing a body of concrete legal norms.[233] As a theoretical project, international public law can in many ways be viewed as an extension of Lauterpacht's project of expanding the depth and breadth of international law's coverage through recourse to (private law) concepts present in municipal legal orders.[234]

3.3 Investment law and arbitration as international(ised) public law

80. As well as at times attempting to 'claim' investment law and arbitration, the above movements promoting the recognition of new forms of public law beyond the State are significant for two reasons. First, they evidence a general shift in approaches in scholarship away

228 ibid 131

229 ibid

230 ibid

231 ibid

232 ibid

233 ibid

234 Lauterpacht (Longmans Green 1927). While Lauterpacht seems initially to have regarded general principles derived from domestic *public* law as unworkable, in his later work, however, he seems to have softened this view: Lauterpacht (2011) 123–6

from what might be considered orthodox approaches to the nature and structure of the international legal order. This shift is often accompanied by the adoption of more flexible approaches on questions relating to, especially, law ascertainment and the roles of adjudicators in interpreting and applying norms. Second, the use of analogical reasoning is central. Awareness of their core assumptions and aims is undoubtedly important when engaging with these movements' attempt at claiming investment law and arbitration. More generally, a departure from formal approaches to law ascertainment and interpretation, and (often heavy) reliance on analogical reasoning are also evident in approaches that draw parallels between investment law and arbitration and domestic constitutional and administrative law (or regional rights-based adjudication) that do not necessarily fall into any of the three camps identified above.

81. Analogy is a device commonly found in the lawyer's rhetorical toolbox and plays numerous roles in legal reasoning and argumentation. The use of analogy is, of course, commonplace in legal argument in domestic legal orders — especially those within the common law tradition, in which it is used to promote cohesion and consistency in the development of case law.[235] Analogy is also often resorted to when strictly formal approaches to law ascertainment and interpretation do not produce adequate — or desirable — outcomes; analogy permits a norm to influence circumstances to which it would not normally directly apply.[236] Relatedly, analogy may have the effect of importing value considerations underpinning a particular norm or present in another substantive area of law.[237]

82. According to Lowe, there are no '*a priori* limits on the legitimacy of analogical reasoning in international law'[238] and international lawyers — both in practice and in academic commentary — make frequent use of analogy.[239] In light of the persistent perception that international law remains an incomplete legal order, much of the use of analogy has been directed at the substantive development of international law and on the perceived need to increase its coverage, so as to avoid perceived 'regulatory gaps'.[240] In recent years, analogy

235 See, generally: MacCormick (OUP 1994); Becker (1973) 83 Ethics 248; Brewer (1996) 83 HLR 923. But see: Dworkin (1997) 29 Ariz St LJ 353, 367–74; Kamm (OUP 2013) 551–64

236 MacCormick (1994) 155–6

237 Including through the use of presumptions and principles: ibid

238 Lowe (1989) 61; Paparinskis (2013) 176

239 But see: Weiler (2004) 64 ZaöRV 547, 550

240 This theme was fundamental, for example, to Lauterpacht's projects in *Private Law Analogies* and Chapter VI of *The Function of Law*: Lauterpacht (1927); Lauterpacht (2011) 113–42

has been employed as a rhetorical and interpretative tool when discussing 'regime interaction' and the perceived problem of international law's increasing 'fragmentation',[241] as well as in the above scholarly movements seeking to recognise public law beyond the State.

83. The use of analogy is not limited to academic discussion. Whether explicitly or implicitly — for example through citation to extraneous materials and decisions — as Alvarez notes, adjudicators settling disputes arising in various areas of international law frequently 'cross borders':

> International adjudicators cross inter-regime boundaries, in short, because pragmatically they need to do so because of rudimentary or incomplete treaty regimes, a shared aversion to judicial findings of *non-liquet*, and the requirement that judges explain their findings enough to satisfy litigants and other stakeholders. They engage in cross-regime pollination for more normative reasons as well. If regimes such as trade or investment were truly 'self-contained' and therefore subject to gaps in coverage, this could undermine confidence in the peaceful resort to dispute settlement on which such regimes rely, while also undermining the prospects for expanding international law's reach through orderly case law development.[242]

84. The idea that investment law ought to be equated with public law has appeared in scholarship for well over a decade. Pre-empting recent debate, in 1989, Lowe remarked that, while international law 'has commonly been regarded as a compact between nations, consisting of rights and duties' akin to municipal private law, it can also be viewed 'as a system of limitations upon the powers of actors in the international legal system' more akin to 'constitutional and administrative law in municipal legal systems.'[243] The first extension of this general observation to investment law can perhaps be traced to another passing comment by Lowe in 2002 drawing similarities between the types of question addressed by domestic courts engaged in constitutional and administrative review and those faced by many investment tribunals.[244] Wälde's 2005 exposition of the idea of viewing investment arbitration as akin to domestic or international 'judicial review' in a Dissenting Opinion in *Thunderbird* provided further impetus for a broader ideational shift:

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241 See, eg: Forowicz in Andenas and Bjorge (eds) (CUP 2015) 191-217, 201; Kurtz (2016) esp 10–28

242 Alvarez (2016) 17 JWI&T 171, 174. See, similarly, Judge Owada's criticism of what he saw as the majority's use of the WTO AB's 'objective reasonableness' test in: *Antarctic Whaling, Owada DO* [33–8

243 Lowe (1989) 59–60, fn 11. Lowe argues that the 'paradigm shift' toward viewing public international law as akin to public law, and the aim of requiring 'States to conform to public law standards of reasonableness,rationality, and proportionality ought to be welcomed': Lowe in Byers (ed) (OUP 2001) 207-26, 218–19

244 Lowe (2002) 460, 5. In 2001 Wälde and Kolo drew far–reaching analogies between investment disputes concerning environmental regulation and domestic and regional rights adjudication and used comparative public law as a guide in: Wälde and Kolo (2001) 50 ICLQ 811, esp 845–6

> [...] while public international law still provides the main principles [...], one needs to bear in mind that investment treaties such as the NAFTA, deals with a significantly different context from the one envisaged by traditional public international law: At its heart lies the right of a private actor to engage in an arbitral litigation against a (foreign) government over governmental conduct affecting the investor. That is fundamentally different from traditional international public law, which is based on solving disputes between sovereign states and where private parties have no standing. Analogies from such inter-state international law have therefore to be treated with caution; more appropriate for investor-state arbitration are analogies with judicial review relating to governmental conduct — be it international judicial review [under the WTO Agreements, ECHR, ACHR or EU Treaties] or national administrative courts judging the disputes of individual citizens' over alleged abuse by public bodies of their governmental powers. In all those situations, at issue is the abuse of governmental power towards a private party that did and could legitimately trust in governmental assurances it received; in commercial arbitration on the other hand it is rather a good-faith interpretation of contractual provisions that is at stake. Abuse of governmental powers is not an issue in commercial arbitration, but it is at the core of the good-governance standards embodied in investment protection treaties. The issue is to keep a government from abusing its role as sovereign and regulator after having made commitments of a more formal character (contracts and licenses) or of a less formal character (i.e. the assurances by explicit communication or by meaningful conduct that form the basis of the legitimate expectations principle [...]).[245]

85. A significant body of scholarship expressly describing investment law and arbitration as a form of international public law has built upon these early expressions of the public law analogy. It is also clear that the trend has had an impact on scholarship more broadly: the vocabulary of public law is now increasingly used in debate. It is, for example, now common to see arbitrators' role in settling investment disputes described as 'review',[246] involving the 'balancing' of competing interests,[247] and for issues in debate to be framed using terms familiar in public law discourse such as 'deference',[248] 'subsidiarity',[249] and 'judicial restraint'.[250] Significantly, this logic has diffused more broadly. The EU, for example, has recently endorsed the idea of viewing investment law and arbitration as similar 'to public or constitutional law, in which individuals are protected from acts of the state and can act

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245 *Thunderbird* [Wälde SO] [13]

246 See, eg: Ortino (2013) 24 ARIA 437; Leonhardsen (2014)

247 Petersmann in Gruszczynski and Werner (eds) (OUP 2014) 19-37, esp 31–6

248 See, eg: Henckels (2013); Schill and Djanic in Benvenisti and Nolte (eds) (OUP 2018) 221-48, 239–40

249 See, eg: von Staden (2012) 10 ICON 1023; Uruena (2016) 79 LCP 99, esp 99–101; and Jachtenfuchs and Krisch (2016) 79 LCP 1, 14–6

250 See, esp: Van Harten (OUP 2013) esp 3–6

to enforce those protections',[251] and in which it is necessary to 'strik[e] a balance' between competing public and private interests.[252]

86. The idea that investment law and arbitration constitute public law is founded on two main streams of argument — in fact, assumptions — about the nature of investment law and arbitration and the functions arbitrators perform when settling disputes arising under IIAs. The first of these are consequentialist, relating to perceived similarities in function and effects between investment arbitration and public law adjudication. The second are structural, relating to the perceived nature of the relationship between host States and foreign investors and the interests protected under IIAs.

87. Within the first stream of argument, it has been widely suggested that investment law and arbitration can be (functionally) equated with domestic (or 'regional' or 'international') public law because tribunals' decisions have the capacity — and in practice do — discipline the exercise of governmental authority.[253] On this view, in settling disputes, arbitrators 'shape the relationship between state, on the one hand, and private individuals on the other' and 'determine matters such as the legality of governmental activity, the degree to which individuals should be protected from regulation, and the appropriate role of the state'.[254] This, especially when combined with compulsory ISDS and the often large sums of compensation sought and awarded, has consequences for governments' abilities to define and pursue the public interest, including through regulation (whether of a legislative, administrative, executive or judicial character), thereby limiting the exercise of sovereign powers and potentially shaping the policy choices of both respondent States and non-disputing State parties to (other) IIAs.[255]

88. These consequences are considered functionally analogous to those generated by judicial review in domestic legal orders, or to the effects of international courts and tribunals with jurisdiction to assess the compliance of States' national measures — most notably regional human rights courts, WTO panels and the AB, and EU courts.[256] According to some accounts, States have *de facto* delegated governance authority to tribunals, empowering them

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251 UNCITRAL (12 Dec 2017) ACN.9WG.IIIWP.145E [5]

252 ibid [6]

253 See, esp: Wälde (2007) 100–1; Van Harten (2007) 45; Schill (2011) 67

254 Vadi (2015) 344–5

255 Van Harten (2007) 45; Schill (ed) OUP 2010) 75; Roberts (2011); Kulick (2016) 4. See further: Schneiderman (CUP 2008) 25–68

256 See, esp: Van Harten and Loughlin (2006) 144–5; Krisch and Kingsbury (2006) 17 EJIL 1, 7–8; Wälde (2007) 100–1; Burke-White and von Staden in Schill (ed) (OUP 2010) 689-720, 691–5; Henckels (CUP 2015) 12–3; and Ortino (2013)

to develop a universal system of rules for the protection and promotion of investment.[257] While he employs less hyperbolic terms, Ortino similarly suggests that 'the main object' of IIAs is to establish 'a system of judicial review reserved for foreign investors' lying beyond the host State's courts for the 'control of public decision-making at the domestic level'.[258] The obligations States assume in IIAs, he argues, can best be understood as concrete expressions of the rule of law; by identifying certain 'principles of good public governance that feature in many public law systems', States commit to abiding by minimum standards of 'legality, fairness and reasonableness.'[259]

89. Within the second stream of argument, proponents of the public law analogy often stress that, whereas inter-State disputes and commercial arbitration can largely be viewed as 'horizontal' because they involve formally equal or contracting parties, investor-State dispute settlement is 'vertical'.[260] This argument is often founded on three sets of premises: (i) the existence of a governed-governor relationship, the factual inequality between investors and host States, and the idea that the purpose of international investment law and (particularly) of investor-State dispute settlement are to curb host States' exercise of power vis-a-vis foreign-owned capital;[261] (ii) the idea that the substantive protections afforded to investors are 'rights', functionally and conceptually analogous to those guaranteed to citizens under many domestic constitutions or by domestic or international human rights instruments;[262] and (iii) (building on the idea of investment arbitration as 'governance', or 'judicial review') that close similarity in the wording of substantive provisions in IIAs, the inclusion of MFN provisions and umbrella clauses, and tribunals' widespread use of *in pari materia* reasoning indicate the existence of a universal 'system' of investment protection, generated by a still-emergent common law of arbitral decisions.[263]

90. We might be tempted to dismiss the public law analogy on the basis that key assumptions within both streams of argument are inaccurate or incomplete. There are good reasons to doubt the analogy's descriptive utility. For example, we might point out that the State-limiting aspect of investment law is a feature common to many substantive areas of public

257 See, illustratively: Yackee (2012) 53 HarvInt'lLJ 391, 393–4

258 Ortino (2013) 443

259 ibid 443–4

260 Roberts (2013) 107 AJIL 45, 63–4; Brown in Schill (ed) (OUP 2010) 659-88, 659–61

261 Van Harten and Loughlin (2006) 143–4; Schneiderman (2008) 223

262 While this assumption is not shared by all writers equating investment law and arbitration with public law, see discussion in: Schneiderman (2008) 223. But see: Ortino (2013) 443; Foster (2015) 474–80

263 Mills in Brown and Miles (eds) (CUP 2011) 97-116, 99, citing: Schill (CUP 2009) 375. See too: Montt (2009) 125–61; and Mills (2011) 14 JIEL 469, 471–3

international law that feature 'inward-looking' obligations.[264] Similarly, we may argue that the logic of (quasi-constitutional) 'balancing' requires investors to hold substantive rights under investment agreements (or custom), and that — while investors hold rights to property under domestic law — there are strong grounds for the view that investors are merely the beneficiaries of States' rights and obligations and, in certain circumstances, the holders of limited, procedural rights (eg to initiate arbitration).[265] We may likewise point out that there are fundamental differences in the roles performed by arbitrators settling disputes arising under IIAs and the roles performed by judges in domestic constitutional orders, or by adjudicators in international rights-based adjudication, stemming from their *ad hoc* appointment and lack of connection to host States' polities.

91. We can similarly question whether the 'global governance' paradigm accurately captures the role tribunals play, *inter alia* given tribunals generally award only damages and there is not yet conclusive evidence supporting the 'freezing effect' of arbitral decisions.[266] On all these grounds, we can reasonably challenge the claim that investment law and arbitration are intrinsically 'vertical'. Perhaps most significantly, we can question the accuracy of the assumption that investment law and arbitration are 'systemic' on the grounds that, despite some linkages between obligations generated by MFN clauses, the background application of general international law and tribunals' widespread use of *in pari materia* reasoning, there is no multilateral(ised) 'system' of investment protection, but, rather, only a very loose constellation of agreements between diverse parties, with diverse substantive obligations, and (even) potentially diverse objects and purposes.[267]

92. However, accurate as such observations may be, the turn to public law in scholarship's import does not stem principally from its descriptive utility. Rather, we ought to understand it as a primarily normative, or 'prescriptive'[268] project, seeking to change the ways that we, as scholars and practitioners, approach investment law. It further must be recalled that the turn to public law in scholarship is largely reactionary. Dissatisfied with the two dominant ways of conceptualising the field — the 'commercial arbitration paradigm', considered to inappropriately favour investors' interests, and the 'public international law paradigm', considered in many respects to favour States — certain scholars sought to strike a third way

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264 Tzanakopoulos and Tams (2013) 534

265 See, esp: Paparinskis (2013) 24(2) EJIL 617, 619 ff; Foster (2015) 474–77

266 This is not to deny that awards may produce 'regulatory chill', but merely to note that such is difficult to scrutinise empirically. See: Bonnitcha, Skovgaard Poulsen and Waibel (2017) 238–44

267 For elaboration, see below: Sec 7.2.4

268 Alvarez (2016) 7 JIDS 534

that served to better accommodate both sets of interests.[269] Indeed, as Ortino notes, at a 'fundamental level' the debate about the 'nature' of investment law and arbitration is, in fact, often a proxy for a broader debate concerning the relative importance of, on the one hand, 'granting maximum protection to foreign investors', and, on the other, protecting 'host States' ability to regulate in the public interest'.[270]

93. Dismissing the public law analogy on the basis that it lacks descriptive utility leaves two important questions unaddressed: (i) what doctrinal, conceptual and normative consequences are alleged to flow, have in fact flowed, and are likely to flow, from such a turn; and (ii) whether there has in fact been a turn to public law in arbitral practice, co-extensive with or inspired by the turn to public law in scholarship. I begin to address each below.

3.3.1 Implications of the turn to public law in theory

94. Authors drawing parallels between investment arbitration and public law often do not do so as a merely descriptive exercise, but as a normative one: the comparison is designed to facilitate development in the way we approach issues of law ascertainment and interpretation within the field of investment law, and, particularly, the ways that tribunals approach their task when considering whether host State conduct breaches obligations owed to investors. Scholars advocating a turn to public law in investment law and arbitration have argued that it generates two main sets of consequences.

95. The first set of consequences of the functional and structural similarities alleged to exist between investment law and public law adjudication is the permissibility of and need for greater recourse to extraneous legal rules and approaches — in other words, investment law needs to become more susceptible to the incorporation of rules and approaches derived from public law.[271] Kalderimis, argues, for example, that arbitrators must 'look sideways and take note of the converging strands in global governance, of which investment treaty arbitration is an important part', requiring them to act as 'pioneers as well as practitioners and scholars' and to 'contribute to the development of sound and legitimate international regulatory principles'.[272] Schill similarly argues that 'public law thinking' can be brought

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269 Recall: Roberts (2013) 63 ff

270 Ortino (2013) 437

271 See, esp: Schill (2011) 85 ff. See similarly: Van Harten (2007) esp 143–4; Montt (2009) 165 ff; Kingsbury and Schill (2010) 85 ff; Schill in Schill (ed) (OUP 2010) 151-83, 170–82; Van Harten in Schill (ed) (OUP 2010) 627-58, 632 ff; and Kleinheisterkamp (2015) 78 MLR 793, 813–25. But see: Vadi (2010) 39 Denv JIL&P 67 esp 98–100; Vadi (2015) 356 ff; and Foster (2015) 465 ff

272 Kalderimis (2011) 159

'into the existing structure of investment arbitration' through arbitrators 'think[ing] of themselves as public law adjudicators' and

> act[ing] in accordance with the expectations connected to such a role […] by recognizing similarities between their activity and the institution of judicial review at the domestic and international levels, and by getting inspiration from the solutions adopted by other public law adjudicatory bodies […]. […] Such a re-conceptualization would allow arbitrators to integrate public law thinking and reasoning more deeply into investor-State arbitration and to adapt the system accordingly from within.[273]

96. This process of normative integration is alleged to requires two main steps. A first step, advocates argue, is to be made through the adoption of comparative methodologies. According to Schill, one of the most vocal champions of this view:

> [t]raditional methods of treaty interpretation that focus on the meaning of treaty provisions in their context and in light of their object and purpose and approaches stressing the importance of customary international law, while immensely important, face significant limits in applying the vague principles of international investment law in the context of the modern regulatory state.[274]

Schill argues that we must therefore search for 'general principles of public law' to aid the interpretation of investment treaties.[275] Identifying such principles requires that comparative public law become part of arbitrators' and academics' 'standard methodology of thinking about issues in international investment law':[276]

> [U]nder a comparative public law approach to international investment law parallel problématiques in domestic public law and in other international legal regimes should be studied in order to develop solutions in international investment arbitration that are acceptable to investors, states and civil society. Comparative public (administrative, constitutional, and international) law, therefore, should become part of the standard methodology of thinking about issues in international investment law, both as regards the interpretation of the often vague standards of investment protection and also in addressing concerns about the institutional and procedural structure of investor-state dispute settlement.[277]

97. The identification through comparative public law and transposition of general principles (in the sense of Article 38(1)(c) SICJ) governing private-public relations and regulating States' involvement in markets has since been presented as a potential solution to many of the challenges facing investment law and arbitration.[278] In a further step toward normative

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273 Schill in Kalicki and Joubin-Bret (eds) (Brill 2015) 621-52, 638–9

274 Schill (ed) (2010) 25

275 ibid

276 ibid

277 ibid . See similar proposal in: Dolzer (2002) 76 ff

278 See, esp: Schill (2011) 90–9; Schill in Gazzini and De Brabandere (eds) (Nijhoff 2012) 133-82, 136 ff; Bücheler (OUP 2015) 28–83

integration, once identified, relevant principles and adjudicatory techniques employed in domestic public adjudication or (what advocates see as) equivalent 'international' public law adjudication (such as WTO law and rights-based adjudication under the EU Treaties and regional human rights instruments) can be borrowed, modified if necessary, and transplanted to investment law through their application by tribunals in settling investment disputes.[279] As well as discrete norms, much attention has been devoted to the utility of borrowing so-called 'methods of review':[280] broad principles of good governance employed by adjudicators to determine the propriety of governmental conduct. Discussion to date has largely centred around two such, related, methods — proportionality and reasonableness review, each originating in different domestic legal traditions.[281]

98. The second major consequence argued to flow from the public law analogy — implicit in many of the cases presented in favour of greater integration between investment arbitration and public law adjudication — is that arbitrators deciding investment disputes need to reimagine their role in order to properly accommodate investment law's 'publicness'.[282] Within this line of argument, arbitrators interpreting and applying investment treaties need to be more aware of the competing public and private interests underlying many interpretative exercises and, accordingly, must be conscious that their task involves the weighing and balancing of such interests. By recognising that their function in settling investment disputes bears resemblance to public law adjudication, it is alleged, arbitrators will be able to strike more appropriate balances between competing interests.[283] By drawing on the 'grounding values' of public law adjudication (such as procedural fairness and judicial independence), arbitrators will, it is argued, be able to more appropriately fulfil their functions.[284]

99. Relatedly, and particularly when discussing the incorporation of methods of review into investment arbitration, the argument is often made that in judicial review under domestic administrative and constitutional law — and even in rights-based adjudication at the international level — adjudicators adopt varying standards (intensities) of review, including

279 Henckels (2013) 204–5; Henckels (2015) 45 ff

280 Henckels (2015) 6

281 Vadi (2015) 202 ff. See too debate comparing the two concepts in: Poole (2010) 2010 NZLR 369; Craig (2010) 2010 NZLR 265; Hickman (2010) 2010 NZLR 303; and King (2010) 2010 NZLR 327

282 Kingsbury and Schill (2009) 41 ff

283 Adopting the logic of balancing, see variously, eg: Kingsbury and Schill (2010) 78–9; Kriebaum (2007) 8 JWI&T 717, 729 ff; Mills in Douglas, Pauwelyn and Viñuales (eds) (OUP 2014) 437-65, 445 ff; Krommendijk and Morijn in Dupuy, Petersmann and Francioni (eds) (OUP 2009) 421-55, 432 ff; Henckels (2013) 198 ff; Kulick (2012) 153–217; Muchlinski in Sauvant (ed) (OUP 2009) 35-78, esp 67 ff; Kurtz (2015) esp 252–6; Stern in Alvarez and Sauvant (eds) (OUP 2011) 174-92, 189–92; Dobrev in Bjorklund (ed) (OUP 2016) 269-94, 283 ff

284 Van Harten (2010) 633

standards which are openly deferential to governments.[285] In order to provide States with sufficient regulatory autonomy, and based on certain structural realities of investment arbitration, including arbitrators' general lack of familiarity with domestic law and politics, issues related to proximity, democratic accountability, expertise and, for example, evidentiary, scientific, or normative uncertainty, and the relative institutional functions of domestic governments and administrators, it is often argued that arbitrators should be guided by the notion of subsidiarity, and exercise restraint in 'reviewing' States conduct — deferring to governments' decisions when setting policies, and exclusively focusing on the means and manner of these policies' implementation.[286]

3.3.2 Manifestations of the turn to public law in arbitral practice

100. In light of the above, the most significant aspect of the turn to public law is its capacity to alter how arbitrators approach the tasks of interpreting and applying IIAs — and the potential spill-on effects both for States' abilities to define and pursue the public interest and, more generally, for investment law as a field of public international law. Is the turn to public law in scholarship discernible in arbitral practice? Have the consequences of the analogy predicted by and called for by its advocates manifested in practice? If so, in what ways, to what extent, and with what consequences? These questions are the focus of the remainder of this chapter, and are the central issues addressed in Parts II and III below.

101. The first step in considering whether the turn to public law is discernible in arbitral practice is to consider the ways that analogising investment law and arbitration with domestic public law — or, as in many accounts, other fields of international law said to constitute species of international(ised) public law (notably WTO law, regional human rights adjudication, and EU law) — might manifest. In other words, what clues must we look for, and what measurements must we consider in attempting to discern the impact or descriptive utility of the public law analogy?

102. It is to be recalled that one important consequence — or normative aim— of the turn to public law is for arbitrators' to re-imagine their role, rather than merely requiring the *ad hoc*

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285 See, esp: Burke-White and von Staden (2010) 711–15; Burke-White and von Staden (2010) 35 Yale JIL 283, 311–23; Roberts (2011) 171 ff; Schill (2012) 3 JIDS 577, 581 ff; von Staden (2012) 1038–9; Ortino (2013) 458; Van Harten (2013) esp 19–48; Henckels (2013) 203 ff; Shirlow (2014) 29 ICSIDR 595, 606 ff; and Barker in Kulick (ed) (CUP 2016) 230-58, 247–58. But see: Foster (2012) 3 JIDS 525, 528 ff; and Foster (2015) 464 ff. See exploration of practice in, esp: Vadi and Gruszczynski (2013) 16 JIEL 613

286 Exploring the normative case in favour of deference, see, esp: von Staden (2012) esp 1047–8; Petersmann (2014) 31–7; Cheyne in Gruszczynski and Werner (eds) (OUP 2014) 38-57, 49–55; and Henckels in Gruszczynski and Werner (eds) (OUP 2014) 113-34, 120–32. But see: Alvarez (2016) 538–9

settlement of individual disputes, as contributing to the development of a new field of internationalised public law. Given this reflexive element, one potential means of discerning the reach of the public law analogy is through analysis of the attitudes of practitioners — ie counsel and (especially) arbitrators — involved in settling investment disputes. Such an investigation would entail detailed empirical research into the views expressed by such actors in, for example, academic writings and public statements, arbitrators' separate and dissenting opinions and expert evidence before tribunals, as well as (ideally) the views expressed on key indicators in questionnaires and interviews. While a potentially fruitful avenue for research, the use of such socio-legal tools lies beyond the ambition of this study.

103. The other principal means of addressing whether the turn to public law is discernible in practice is to consider whether the descriptive and normative claims made by its proponents find expression in arbitral decisions. To recall, the chief consequences alleged to flow from the public law analogy in this respect are: (i) the increased use of comparative methodologies, and, particularly, of reference to domestic law and practice and the law and practice of other international courts and tribunals engaged in allegedly analogous forms of adjudication; (ii) increased reference to and reliance upon general principles of law derived from such analogous fields of law; and (iii) the utilisation of specific concepts and techniques derived from such fields.

104. We can attempt to measure (i) by studying citation patterns in tribunals' decisions and identifying the ways in which arbitrators refer to 'extraneous' law and practice. Similarly, in relation to (ii), we can (at least partly) trace the purported use of general principles by, for example, analysing tribunals' express references to 'general principles', 'principles of law', or the invocation of the customary rule reflected in Article 38(1)(c) SICJ. The identification of 'public law' 'concepts' and 'techniques' for the purposes of (iii) presents more potential challenges. Identifying when tribunals can be said to have adopted such borrowed concepts requires us to have both an idea of what is meant by 'public law' (as opposed, for example, to 'private law', or 'public international law') and to adopt some test for when tribunals can be said to be 'borrowing' or 'transplanting' such concepts or techniques, rather than merely interpreting or applying applicable treaty rules or general international law. In attempting to identify when tribunals can be said to have 'borrowed' or 'transplanted' such concepts or techniques, the present study surveyed arbitral practice (and academic commentary on this practice) for the use of concepts and techniques that (i) do not find express inclusion in the text of IIAs; and (ii) that use the same terminology as concepts or techniques originating in domestic administrative or constitutional law.

105. Based on a survey of the 717 decisions that are the subject of this study,[287] a few conclusions can already be made regarding the manifestations of the turn to public law in arbitral practice. The first of these is that, based on their citation practices, tribunals have not made significant use of comparative methodologies — least of all in the way advocated by the turn to public law's proponents. As Peat shows, only a handful of tribunals have expressly referred — and in a 'perfunctory'[288] manner — to the practices of adjudicative or administrative bodies in States outside the host State when considering whether conduct amounts to a breach of an IIA.[289] Where they have done so, tribunals have referred to the law or practice of a limited range of jurisdictions to shore up interpretative approaches reached through other means.[290]

106. Similarly, we see little evidence in arbitral practice of a wholesale shift toward the use of general principles — not least those derived from or inspired by the practices of municipal (or international) courts and tribunals.[291] While tribunals have frequently referred to 'general principles', and have even claimed that a particular principle falls within the ambit of Article 38(1)(c) SICJ, such 'principles' have not been linked to the practices of public law courts and tribunals.[292] Often, it is difficult to determine whether tribunals intended to indicate the existence of a general principle 'proper' or of a customary 'principle'.[293]

107. Rather, the turn to public law is most discernible in arbitral practice in the use of concepts and techniques seemingly originating in or inspired by domestic law and practice. Thus, rather than the express use of comparative methodologies or increased recourse to general principles of law, the turn to public law has to date most clearly manifested in tribunals' 'borrowing' or 'transplantation' of a limited number of public law concepts originating in a handful of (predominantly Western, Northern and OECD) jurisdictions.

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287 The decisions included in this corpus, means of selection and methods of analysis are outlined in Sec 1.2 above. Full list in Annex 2.

288 Peat (CUP 2019) 123

289 ibid 119–27, citing: *Total* [111, 128–9]; *Toto* [166]; *Gold Reserve* [576]; *Noble* [176–8]; *Plama* [269–71]; and *Lemire* [505–7]; as well as a more oblique reference in *Occidental* [404]. We could add to this list the use of US domestic case law relating to good faith and estoppel in: *Chevron & Texaco (II)* [Second Partial Award on Track II] [7.99–7.104]

290 ibid 119

291 ibid 108–9

292 See, illustratively: *El Paso* [622–4] (concerning the principle 'that necessity cannot be recognised if a Party to a contract has contributed to it'); *Waste Management* [39, 43], and *Apotex* [7.11] (*res judicata*); *Caratube* [376] (abuse of process); *Gemplus* [13.81, 17.21–22] (concerning the *Chorzów* standard of reparation); *Chevron & Texaco (II)* [Second Partial Award on Track II] [7.86] ff (good faith). Tribunals have also expressly rejected parties' arguments concerning the existence of general principles. See, esp: *Yukos* [1357–63], and *South American Silver* [439–48] ('unclean hands')

293 Discussing tribunals' 'pragmatism' on the distinction, see: Gazzini (2009) 10 JWI&T 103, 110–11. See too: Tanzi in Andenas & ors (eds) (Brill 2019) 297-306, 298–302

108. For example, and as has been much discussed in commentary, the concept of (investors') 'legitimate expectations' has come to play a significant role in many tribunals' analyses, particularly in interpreting and applying fair and equitable treatment provisions.[294] Tribunals' adoption of the concept is seemingly inspired by the recognition in a number of domestic jurisdictions and in EU law that individuals may in certain circumstances hold public bodies to account when a change in policy adversely affects their interests.[295] Similarly, and while only expressly employed by a handful of tribunals to date, the notion that tribunals should afford host States a 'margin of appreciation'[296] when considering whether conduct amounts to a breach of an obligation owed to an investor has similarly gained a something of a foothold in arbitral practice.[297] The idea that host States ought to be afforded a margin of appreciation can be linked to a broader trend in arbitral practice of referring to the need to adopt appropriately deferential approaches to host States' policy choices and determinations of fact and of risk.[298] It has also become relatively commonplace to see reference to the need to 'weigh' or 'balance' the competing interests of investors and host States,[299] both as a general matter and through the use of particular balancing techniques.[300]

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294 Claimant investors now invoke their expectations in the majority of disputes, across numerous interpretative contexts, but particularly when claiming breach of FET. Indicatively, the phrase "legitimate expectation" was used by one or both parties, or the tribunal, in 299 of the 717 decisions comprising the main study corpus; "reasonable expectation" in 122 decisions; and "investment-backed expectation" in 28 (full lists on file). Claiming that legitimate expectations constitutes a general principle, see, esp: *Total* [128–34]; and *Thunderbird* [Wälde SO] [28–30]. The ICJ all but rejected the idea that legitimate expectations constitutes such a principle (applicable in inter-State relations) in: *Obligation to Negotiate* [162]

295 For a useful comparative overview and interrogation of the idea of legitimate expectations as a general principle, see: Ostřanský in Gattini, Tanzi and Fontanelli (eds) (Brill 2018) 344-77, esp 356–66. See too: Potestà (2013) 90 ff. See more generally: Forsyth (1988) 47 CLJ 238, 241 ff; Schønberg (OUP 2000) esp 7–30; and Thomas (Hart 2000) esp 53–74

296 The phrase "margin of appreciation" was used in 50 decisions; and "margin of discretion" in 34 decisions (full lists on file). While frequently employed by the ECtHR in a range of interpretative contexts, the concept has been linked to similar approaches in domestic (administrative law), notably the roughly equivalent ideas expressed by the French Conseil d'Etat's '*marge d'appréciation*', the Italian '*margine di discrezionalità*', and '*Ermessensspielraum*' in German administrative law and practice. See, esp: Yourow (1987) 3 ConnJIL 111, 121 ff; Arai-Takahashi in Føllesdal, Peters and Ulfstein (eds) (CUP 2013) 62-105, 64–8; Itzcovich (2013) 13 HRLR 287, 292. Arguably, similar ideas are expressed in common law jurisdictions by, eg, the 'political question doctrine' in the US and 'legal reasonableness' standard in Australia. See, respectively: Henkin (1976) 85 YLJ 597; and Greenwood, 'Judicial Review of the Exercise of Discretionary Public Power: Address given to the Queensland Chapter of the Australian Institute of Administrative Law by the Hon Justice Andrew Greenwood, Federal Court of Australia' (27 Apr 2017), <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-greenwood/20170427> accessed 30 Aug 2020,

297 See, esp, exchange in: *Philip Morris v Uruguay* [398–400], and [Born DO]][181–91]. See further: Arato (2014) 553 ff; Leonhardsen (2014) 139 ff; Fukunaga (2018) 84 ff; Muhammad (2019) 217 ff

298 For detailed examination of the potential and actual manifestations of deference in arbitral practice, see: Van Harten (2013) 81–115

299 See, illustratively: *Saluka* [306]; *Arif* [537]

300 Most notably proportionality analysis and reasonableness review. The former is discussed in Ch 5. On the latter, including the challenge of identifying precisely when tribunals can be said to engage in 'reasonableness' inquiry, see, esp: Vadi (2015) 208–20

109. Arbitrators' use of two borrowed concepts deserves particular attention: the so-called 'police powers doctrine' — originating in US constitutional law [301] — and the principle of proportionality — a concept often traced to German administrative and constitutional law.[302] These concepts are of central significance to the present inquiry for three reasons: (i) until recently, neither concept expressly featured in any IIA in force; (ii) the concepts can be understood as alternative means in domestic jurisdictions of addressing when compensation must be paid for governmental interference with property interests, including (indeed especially) through regulation; and (iii) both have come to play significant roles in a variety of interpretative contexts in arbitral practice. As well as generating valuable insights into the concepts' impacts on States' capacities to define and pursue the public interest, attempting to categorically map the circumstances in which they are used, the ways in which they are constructed and employed, and whether their use can be justified as the application of existing law, can therefore help to elucidate broader lessons about the turn to public law in investment law and arbitration. As such they are used as concept studies in the following chapters.

3.4 Conclusions

110. Scholars have analogised investment law and arbitration with public law for almost two decades. The origins of the public law analogy are to be found in investment law's long-standing — and persistent — legitimacy crisis. As recent trends in the activities of States and international organisations attest, dissatisfaction with many features of investment law, and particularly investor-State arbitration, is no longer confined to academic discussion or to a handful of States or regions. It is now widespread. Aspects of the substantive and structural organisation of investment law and arbitration which were seemingly unassailable have recently been targeted for concrete, far-reaching and global reform. As well as spurring legislative and structural reform, investment law's legitimacy crisis — especially claims that investment law and practice are uncertain, imbalanced and inconsistent — motivates many of the arguments in favour of viewing investment law as a species of international public law.

111. The public law analogy must also be considered against the background of broader trends in international legal scholarship. Whereas modern international law has traditionally taken a normatively-light approach to the State and its regulatory powers and has largely viewed

301 See: Secs 4.2–4.3

302 See: Secs 5.2–5.3

the international and domestic legal orders as operating in separate — if parallel — universes, scholarship over the last two decades has argued that fundamental changes have occurred, or are occurring, which undermine such conceptions. Scholars have drawn attention to what they see as the erosion of national distinctions and the purported constitutionaliation (and growing verticality) of international legal affairs. Such writers have argued that new forms of inter- or trans-national legal relations resembling public law have emerged or are emerging. Authors analogising investment law with public law adjudication often do so within — or are seemingly inspired by — such broader claims. Oftentimes, the public law analogy does not merely compare investment law to domestic public law, but, at the same time , to other sectors of international legal practice including human rights law, EU law and world trade law said also to constitute forms of public law beyond the State.

112. The public law analogy has both consequentialist (or functional) and structural foundations. Authors drawing parallels between investment law and public law adjudication often argue that they produce similar functional outcomes in defining the relationship between governments and private individuals and constraining permissible governmental conduct, including through policing governments' involvement in markets. The public law analogy is also often based on structural arguments concerning the allegedly vertical nature of investment arbitration which highlight, inter alia, the relative power imbalance of governments and investors and the removal of the traditional requirements of diplomatic protection.

113. As a descriptive project, the public law analogy has certain merits; this is particularly true of the observation that the types of measures reviewed by tribunals often involve the consideration of competing public and private interests and that the ways tribunals approach these questions can potentially have important consequences for States' abilities to define and promote the public interest, and, ultimately, for the polities affected by their decisions. We may validly question, however, whether the analogy's assumptions concerning, particularly, arbitrators' 'governance' functions, arbitration's 'verticality', investors as 'rights'-holders and investment law and arbitration as a 'system' accurately reflect the realities of law and practice in the field.

114. However, the public law analogy is most significant not as a descriptive project but as a normative one. The turn to public law has potentially far-reaching consequences, particularly for the way scholars and practitioners approach questions of law ascertainment and interpretation. Scholars analogising investment law with public law argue that it results in the permissibility and desirability of greater normative interaction between these fields of

law. This, it is often argued, should be effected through the widespread adoption of comparative methodologies — especially by arbitrators — in giving content to the obligations contained in IIAs, and in the resulting transplantation of legal rules and approaches derived from public law adjudication in diverse fora. In a related argument, by re-imagining their role as akin to judicial review within public law adjudication and particularly through adopting deferential intensities of review (both forms of reflexivity), advocates of the public law analogy allege that arbitrators will begin to strike more appropriate balances between competing public and private interests, thus assuaging concerns that investment arbitration is biased toward investors.

115. To date, however, based on citation patterns and express references in decisions, there is little evidence that investment tribunals have embraced comparative methodologies, and have not, at least expressly, developed an increased role in analyses for general principles of law derived from or inspired by the practice of domestic courts or international rights-based adjudication. Instead, over the past two decades, tribunals have made increasingly frequent and significant use of distinct concepts and approaches seemingly derived from or inspired by equivalent concepts at the domestic level — such as the legitimate expectations, margin of appreciation and police powers 'doctrines', reasonableness review, and the proportionality principle.

116. The growing tendency of arbitral tribunals to employ (seemingly) borrowed concepts raises significant doctrinal and normative questions that have yet to be adequately explored. While scholars have directed their attention to particular concepts — most notably legitimate expectations and proportionality analysis — such efforts have not yet addressed the incorporation of such concepts as a symptom of a broader process, nor as it relates to the growing tendency amongst scholars and certain practitioners of re-conceptualising investment law and arbitration as a species of international public law. Significant questions remain unaddressed. Can arbitral recourse to such concepts be considered to constitute the valid application of extant law, or does their incorporation signal that tribunals are engaged in quasi-legislation, or have moved away from orthodox approaches to law ascertainment? What consequences flow from their incorporation — both of particular concepts and as a general matter — for States' capacities to 'manage' the obligations owed to foreign investors, to define and pursue the public interest and to promote particular constructions of the State-market and State-individual relationships? What broader consequences flow from the growth in arbitral recourse to such concepts for the arbitral function and investment law's place within public international law?

117. To seek to answer these questions and to further elucidate some of ways the turn to public law has manifested in arbitral practice, Part II of this study seeks to give a comprehensive account of arbitral recourse to two borrowed public law concepts: (i) the 'police powers doctrine' (Chapter 4); and (ii) the proportionality principle (Chapter 5). In Chapters 6 and 7, I consider the doctrinal and conceptual consequences of the turn to public law as it has manifested in the borrowing of public law concepts, as well as the broader consequences — both for States' capacities to define and pursue the public interest and for investment law and arbitration as a sub-field of public international law.

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PART II:

THE TURN TO PUBLIC LAW IN ARBITRAL PRACTICE

4

THE POLICE POWERS DOCTRINE

4.1 Introduction

118. In Chapter 3, I demonstrated that rather than manifesting in the express use of comparative methodology or a growth in express use of general principles, the turn to public law in investment arbitration is most clearly discernible in the practice of employing concepts that seemingly originate in domestic or regional rights-based adjudication. I showed that while several such 'public law concepts' have migrated into arbitral practice, this phenomenon of arbitral borrowing revolves around only a handful.[303] To critically explore this phenomenon and its implications for the practice and theory of investment law within public international law, in this chapter — the first of two such 'concept studies' — I investigate the place of the 'police powers doctrine' in the practice of investment tribunals. The study seeks to address three questions: (i) how significant (both quantitatively and qualitatively) has the idea that States have 'police powers' been to arbitral practice?; (ii) what structures and roles has the concept been ascribed in arbitral reasoning?; and (iii) what are the consequences of arbitral recourse to the concept, particularly for States' abilities to define and pursue the public interest?

119. The chapter is organised as follows. In Section 4.2 I briefly consider the origins of the police powers doctrine as a means of conceptualising States' regulatory powers and moderating conflicts between public and private interests. In Section 4.3 I consider how the concept has featured in national legal orders, particularly in US public law. In Section 4.4 I outline the ways the concept has been formulated in scholarship concerning international law's protection of foreign owned property and the arguments presented in favour of its incorporation in interpretative exercises under IIAs. In Section 4.5 I provide a comprehensive account of the ways the police powers doctrine has featured in arbitral practice.[304] I illustrate the extent and significance of arbitral recourse to the concept, the interpretative contexts in which it has been used

303 Above Sec 3.3.2

304 As noted in Sec 1.2, this account is based on a study of 717 decisions publicly-available in English issued between 1 Jan 1990 and 31 Dec 2018 pursuant to IIAs then in force, as well as 805 decisions of the Iran-US Claims Tribunal issued between 1 Jan 1982 and 31 Dec 2018. For a full list of decisions consulted, see Annex 2.

and the structure, content, and effects of inquiry it has been deemed to generate. Section 4.6 outlines the lessons we can draw from this practice.

4.2 Conceptual and historical origins

120. The police powers doctrine originates in attempts by Enlightenment political and legal theorists to rationalise the growth of governments' administrative powers and to justify interferences with individuals' interests. During this period, questions concerning the proper role of government in promoting and regulating 'the general welfare' became acute,[305] as (European) theorists shifted attention 'from the rights of citizens to the functions of government'.[306] Several (liberal) theorists writing at this time thus came to argue that the power to govern was contingent on governments' promotion of the public welfare.[307] Against this background, Loughlin traces the idea that States have 'police powers' to the writings of German-speaking theorists: '*Polizei*, the power of police, was conceived as an all-encompassing power of regulation vested in the sovereign for the purpose of promoting peace, order, and good government' which 'formed part of the prerogatives of the ruler' and 'were vested absolutely in the prince'.[308]

121. Drawing on Latin and Greek roots (*politia; politeia; polis*) the term 'police' was similarly often used in English writings from the 16th to 18th centuries 'as a synonym of "policy"', to broadly refer to the activities of government: 'regulation, discipline, and control of a community; civil administration and public order'.[309] Scheiber notes that '[i]n the eighteenth century, Anglo-American jurists treated police power as being virtually the entire authority, civil and criminal, exercised by government in the domestic affairs of the polity.'[310] The term appears in this context for instance in the 1797 English translation of de Vattel's *Law of Nations*,[311]

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305 Loughlin (2010) 408

306 ibid 407–8

307 Notably Rousseau: ibid 427–9

308 ibid 422, 3. Loughlin traces the idea to the *Kameralist* movement, particularly prevalent in Prussia in the 18th and 19th centuries: ibid 417–28.

309 Legarre (2006) 9 U Penn J Constl L 745, 749. This practice was particularly important in 18th century Scotland: ibid 750–2.

310 Scheiber in Hall, Ely and Grossman (eds) (OUP 2005) 741-5, 741

311 de Vattel states 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*. For instance, if vineyards are multiplied to too great an extent in a country which is in want of corn, the sovereign may forbid the planting of the vine in fields proper for tillage; for here the public welfare and the safety of the state are concerned […]': Kapossy and Whatmore (eds) Liberty Fund 2008) 236; quoted in: Viñuales in Douglas, Pauwelyn and Viñuales (eds) (OUP 2014), 327

Blackstone's *Commentaries*,[312] Smith's *Lectures on Jurisprudence*,[313] and Bentham's *Principles of Morals and Legislation*.[314] Ultimately, this usage was embedded in colonial and then post-colonial North American jurisprudential discourse.[315]

122. A State's 'police power' is thus its inherent power to regulate the acts of its citizens in pursuit of the public interest — what might be called its 'regulatory sovereignty',[316] or its 'prerogative […] to regulate activities within its jurisdiction.'[317] An important aspect of this power is that, unlike jurisdiction as traditionally understood in the international context — an in principle plenary power inhering in States' legal personality [318] — the 'police power' has inherent conceptual limits: not every action taken by a government is legitimate, only those that pursue legitimate objectives in a legitimate manner.[319] Any inquiry into whether a measure falls within the police power is thus essentially an examination of the justifiable ends, means and manner of government.[320] Of course, how these questions are answered depends on socio-economic conditions and political conceptions of the public welfare and the rights of an individual within a given polity.[321] In capitalist societies this includes prevailing constructions of the appropriate State-market relationship, notions of private property, and the relative importance of community and individual interests. An arbiter — typically a court — must determine, *ex post*, whether government action qualifies as a permissible exercise of its police powers.[322]

4.3 The police power in domestic law

123. While originating in European political and legal theory, the idea that governments have 'police powers' has found its most concrete doctrinal elaboration in US public law. Reflecting the common 18th century practice of using the term 'police' to refer to governments' regulation of persons and events, in 1776 the 'police power' was expressly recognised in the charters of

312 Loughlin (2010) 423–5

313 Smith in Meek, Raphael and Stein (eds) (OUP 1978) 486-541, 486

314 Bentham in Harrison (ed) (Blackwell 1948) 113–435

315 See, esp: Loughlin (2010) 426–7; Scheiber (2005); Legarre (2006) . See too: Viñuales (2014) 326 ff

316 For contemporary use of this rather problematic term, see eg: Grierson-Weiler and Laird in Muchlinski, Ortino and Schreuer (eds) (OUP 2008) 259-302, 299; Martinez-Fraga and Reetz (CUP 2015)

317 Rajput (Kluwer 2019) Sec 2.02

318 Above Sec 2.2

319 Epstein (HUP 1985) 108-10

320 ibid 13, 102, 8–10

321 I further explore this idea in Ch 7 below.

322 See, esp: Karkkainen (2006) 90 Minn L Rev 826, 904. See too: Epstein (1985) 108 ff; Loughlin (2010) 426; L. (1923) 11 CLR; Sax (1964) 74 Yale LJ 36; Freund (UChic.P 1904) 3 ff.

several newly-formed American states.[323] The term also came to be used by US courts, initially in describing the powers left to the states after federation.[324] The term does not, however, expressly appear in the US Constitution.[325] Rather, the 'police power' is a judicial construct designed to recognise the 'residual sovereignty' left with governments;[326] it is an implied 'universal qualification' to the Constitution's express limitations on governments' powers.[327] Recognition of the police power is thus designed to ensure that governments retain the powers necessary to 'discharg[e] the very mission that justifies [their] existence': governing.[328]

124. The police power is therefore best understood as a 'conditional authorisation' serving a 'closing', or 'saving', function. It is an 'authorisation' in the sense that, like the Tenth Amendment, it empowers (state) governments to act in the absence of express Constitutional provision — or, to put it another way, to exercise the sovereign powers they held prior to federation, as well as any powers not expressly, and exclusively, granted to the federal government.[329] It is 'conditional' because its exercise is in principle subjected to certain inherent limits derived from the protections guaranteed to individuals under the federal Constitution, including the Fifth Amendment's protection of personal property and the Fourteenth Amendment's guarantee of substantive due process (respectively the 'takings' and 'due process clauses').[330] As discussed further below, the juridical nature of the police power as conditional authorisation can, however, often lead to a certain amount of circularity of reasoning in its application.

125. While the term 'police' or 'internal police' features in early discussions of the federal and state governments' respective powers to regulate persons and conduct,[331] the earliest express use of the concept by the US courts seems to be in the Supreme Court's decision in 1827 in

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323 According to Scheiber, albeit with different formulations in the 1776 declarations of rights of Pennsylvania, Vermont, Delaware, Maryland and North Carolina: Scheiber (2005) 741

324 Loughlin (2010) 426. For a detailed account of the emergence of the concept in US case law, Hastings (1900) 39 ProcAmPhilosSoc 359. Hastings describes the concept as 'an outgrowth of the American conception of protecting the individual from the state' and notes that in its early development was used as 'a brief formula for the expression of the federalist idea of the state's functions in the federal system': ibid 360, 72.

325 Epstein (1985) 107

326 Denny (1921) 20 Mich LR 173, 174. See too: Hastings (1900) 549–54 Talmadge (2000) Wash LR 857, 865–8

327 Epstein (1985) 107; *Black's Law Dictionary* defines the 'police power' as: '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. It is a fundamental power essential to government, and it cannot be surrendered by the legislature or irrevocably transferred away from government': Garner (ed) (8th edn, Thomson 2004)

328 Epstein (1985) 14_

329 By contrast, the Supreme Court has held that unlike the states, the federal government possesses only those powers expressly enumerated in the Constitution: *US v Lopez*, 552, 567–8; *US v Morrison*, 618

330 Consideration of government's police powers is not limited to these contexts. See, esp: Scheiber (2005) 745

331 Cook (1907) 7 Columbia Law Review 322, 325–6

Brown v Maryland, a case concerning the unlicensed importation and sale of goods.[332] In considering whether state governments could lawfully impose licensing restrictions on the sale of imported goods, by way of example, the Court opined that '[t]he power to direct the removal of gunpowder is *a branch of the police power*, which unquestionably remains and ought to remain with the states.'[333] Further, the Court considered that '[t]he removal or destruction of infectious or unsound articles is undoubtedly [also] an exercise of that power', providing an exception to the prohibition in Section 10(2) US Constitution on states imposing 'imposts, or duties on imports or exports'.[334] In a further set of early cases concerning the unlicensed sale of alcohol, the Court elaborated that 'police powers' are:

> the powers of government inherent in every sovereignty to the extent of its dominions. […] [W]hether a State passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to cover men and things within the limits of its dominion. It is by virtue of this authority that it legislates.[335]

Similarly, in *Munn v Illinois* the Supreme Court explained that under its 'police powers', 'the government regulates the conduct of its citizens [...] and the manner in which each shall use his own property when such regulation becomes necessary for the public good.'[336]

126. Like many judicial constructs, the boundaries of the police power in US law have not always been clearly demarcated.[337] In 1964, Sax remarked that '[t]he term "police power" has no exact definition',[338] and observed that 'ambiguity seems to be the rule rather than the exception' in courts' approaches to its content and operation.[339] Scheiber likewise notes that 'it seems that the leading characteristic of the police power is that its definition changes with shifting social economic realities and with changing political conceptions of the legitimate reach of governmental authority.'[340] In 1954 in *Berman v Parker*, Justice Douglas similarly suggested that rather than describing a fixed category of permissible purposes of governmental

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332 *Brown v Maryland*. Subsequently reinforced in: *New York v Miln*

333 *Brown v Maryland*, 443–4 (my emphasis). The Court extensively cited its slightly earlier decision in: *Gibbons v Ogden*. While the Court used the term 'police' in *Gibbons v Ogden* (seemingly) to refer to states' powers to regulate the public interest, it did not refer expressly to states' 'police powers'. *Gibbons v Ogden*, 204, 208, 210. See further: Hastings (1900) 359–60, 64–5

334 *Brown v Maryland*, 443–4

335 *License Cases*, 583, extracted in: Burdick (GP Putnam's Sons 1922) 465. It is important to note that when referring to 'States' and 'sovereignty', the Court is considering the US states' powers, *not* the powers of States in international law.

336 *Munn v Illinois*, extracted in: ibid 466

337 For vastly different accounts of the role and content of the doctrine during this period, compare: Freund (1904) v, 7; and Cook (1907) 329–30.

338 Sax (1964) 36, n 6

339 ibid 46; see similarly: Loughlin (2010) 425, 6

340 Scheiber (2005) 741; see too: Karkkainen (2006) 898–905

action, the police power is 'essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition'.[341] In his view, given 'the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation',[342] unless it has exceeded specific constitutional limits, 'when the legislature has spoken, the public interest has been declared in terms well nigh conclusive'.[343]

127. The shifting nature of the police power means it is difficult to definitively describe its content and operation — and it is not my ambition to do so here. It is vital, however, to our understanding of the concept to appreciate its construction in judicial review of government interferences with private property. Crucially, because governments' 'police powers' are always defined residually, the precise ends, means and manners of action captured by the concept have varied over time as judicial approaches have shifted.[344]

128. There are three phases in the Supreme Court's takings jurisprudence that illustrate the changing content and operation of the police power. The first phase — what we can call the 'pre-*Mahon*' period — ran from around the 1870s until 1922.[345] While the principle of eminent domain covered situations of direct government appropriation of property,[346] from the 1870s, US courts increasingly accepted that compensable takings can occur even when title to property is not formally affected.[347] In determining whether such had occurred, the Supreme Court typically focused on whether government action amounted to *de facto* appropriation or resulted in physical invasion of property. Any interferences that did not involve physical invasion (or de facto appropriation) were considered to be 'mere restrictions' on the use of property.[348] Provided they were deemed to pursue a recognised public purpose and met minimum requirements of substantive due process, such restrictions constituted valid exercises of the police power, and thus did not require compensation.

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341 *Berman v Parker*, 32

342 ibid

343 ibid

344 See, eg: Craig (2014) 22 NYU Envtl L J 85, 107–8; Legarre (2006) 785–93. Its role today is significantly diminished when compared to its previous functions in the Supreme Court's jurisprudence: Karkkainen (2006) 893 ff;Rose (1983) 57 S Cal LR 561, 564.

345 This phase ended with the Court's 1922 decision in *Mahon*. See below nn 360–365

346 On the relationship between eminent domain and the police power, See, eg: Epstein (1986) 41 U Miami L Rev 253; Keene (2005) 14 Penn St Envtl L R 397; Fawcett (1985) 47 U Pitt L Rev 491; Havran (1930) 5 Notre Dame Law 380. While exercises of eminent domain require 'just compensation' be paid, valid exercises of the police power do not.

347 Inter alia through recognition of the concept of 'inverse condemnation' of real property: May in Hall (ed) (OUP 2005)

348 Sax (1964) 73. See too the Supreme Court's summary of these categories in: *Lucas*, 1015

129. While the exact range of permissible governmental ends was not definitively determined, such included (initially) measures 'appropriate or needful for the protection of the public morals, the public health, or the public safety',[349] as well as (later) action 'providing for the general welfare'.[350] Purposes upheld as within the police power include the regulation of the production or sale of alcohol,[351] regulating the burning of natural gas for non-heating purposes,[352] and relating to land reclamation,[353] and land use.[354] Judicial approaches during this period tended to recognise a broad discretion on the part of governments to set policy and to determine 'what is and what is not necessary'.[355] Its operation in the pre-*Mahon* period thus resembles a (potentially) total 'defence' in takings proceedings.[356] This said, the police power was not construed as shielding action deemed 'unreasonable, inadequate, irrational, or pretextual.'[357] Illustratively, the *Mugler* Court described its role as ensuring that a legislature had not 'transcended the limits of its authority', by enacting measures that bore 'no real or substantial relation' to its stated objects, benefited only certain classes within society,[358] or that resulted in the 'palpable invasion of rights' — especially of due process — secured by the Constitution.[359]

130. The second phase of the Supreme Court's practice — what we can call the 'intermediate' period — spans the period between its decisions in *Mahon* in 1922 and *Penn Central* in 1978. In a drastic break from its earlier approaches, in *Mahon* — a case concerning Pennsylvanian legislation banning the mining of coal whenever such might cause the subsidence of (*inter alia*) structures used for housing[360] — the Court explicitly attempted to rein in the police power.[361] While accepting that '[g]overment hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law', and stressing that 'greatest weight' ought to be 'given to the judgment of the legislature', the Court considered that the police power's 'implied limitation' on property rights must itself

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349 *Mugler*, 661

350 *Manigault*, 481

351 *Mugler*, 661

352 *Walls v MCC*, 315

353 *Manigault*, 481; *Gibson v US*, 275–6

354 *Reinman*, 176; *Hadacheck*, 410

355 *Manigault*, 480–1; see too: *Mugler*, 661

356 See, eg: Craig (2014) 107; Sax (1964) 73

357 Karkkainen (2006) 897

358 What the Court dubbed 'class legislation': ibid 895–6

359 *Mugler*, 661; see further: Craig (2015) 45 Env L 519, 527; Karkkainen (2006) 838–44, 97

360 *Mahon* 412–13

361 The Court warned that the 'natural tendency of human nature is to extend the [police power] qualification more and more, until at last private property disappears': ibid 415

'have its limits'.[362] The Court declared that 'while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.'[363] In attempting to determine the limits of the police power, the Court declared that 'the extent of the diminution' in value of the property interests in question was an important 'fact for consideration':[364] regardless of a measure's motivations, when diminution 'reaches a certain magnitude [...] there must be an exercise of eminent domain and compensation to sustain the act.'[365]

131. By recognising the concept of 'regulatory takings', the decision in *Mahon* opened something of a Pandora's box: a key challenge for US courts since has been to develop a principled means of identifying the tipping point beyond which otherwise lawful regulation becomes excessive.[366] However, while *Mahon* signalled a radical change in direction, the Court's approach in subsequent cases during this period oscillated somewhat in setting the precise degree of interference with property permissible.[367] Further, and importantly, as the activities of modern governments diversified, during this period the concept of the "general welfare" was given increasingly broad construction, significantly expanding the categories of government action that could be classified as falling within the police power, essentially equating the police power with the Fifth Amendment's 'public use' requirement.[368]

132. The third phase in US takings law began in 1978 with the Supreme Court's decision in *Penn Central*, a dispute concerning New York city's denial of a permit to construct a 53-storey tower above the landmark-listed Grand Central Station. In a further radical shift, the Court declared that it had 'been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government' in its prior decisions on regulatory takings.[369] Rather, its approaches were based on 'essentially *ad hoc,* factual inquiries', dependant 'largely "upon the particular circumstances [in each] case."'[370] In what is now referred to as the '*Penn Central* test', the Court then

362 *Mahon* 413

363 ibid 415–16

364 ibid 413

365 ibid

366 Rose (1983) 564

367 See, eg: *Brooks-Scanlon v US*; *Village of Euclid*; *Miller v Schoene*; *Nashville, Chattanooga & St Louis Railway v Waters*; *Chippewa Indians v US*; *US v Caltex; Armstrong v US*; and *Goldblatt*

368 *Berman v Parker*, 33; see too, more recently: *Midkiff*, 240; *Ruckelshaus v Monsanto*, 1014. Karkkainen notes that during this period, the courts moved to a situation in which there was 'no apparent judicially enforceable limit to the "general welfare"', with the result that, '[w]ithout meaningful limits, the police power could no longer serve a useful purpose in delineating the boundaries of legitimate governmental assertions of authority': Karkkainen (2006) 900. See, relatedly: Fawcett (1985) 504–5

369 *Penn Central* 124

370 ibid

distilled the 'factors' having 'particular significance' in such inquiries:[371] (i) the 'economic impact of the regulation'; (ii) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (iii) the 'character of the governmental action'.[372] Regarding the latter — and, crucially, without referring to the police power — the Court noted that '[a] "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government [...] than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.'[373]

133. The three-pronged *Penn Central* 'balance of interests' test now dominates US courts' approaches to regulatory takings.[374] While the ostensible purpose of the test is 'to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property',[375] the test has famously and controversially proved susceptible to a wide range of approaches.[376] Importantly for our present purposes, the *Penn Central* test (and associated takings tests) have diminished the role played by the police power, given many of the types of inquiry that previously occurred under the police powers framework — for example into a measure's purpose and the way costs are apportioned in society — are now conducted under the second and third prongs of the *Penn Central* test. In fact, the term 'police power' now seldom expressly appears in takings cases.

134. To stress, despite the seismic shifts in the Supreme Court's jurisprudence since the 1870s, it is not US public lawyers' understanding of the police power *itself* that has changed. Rather, because the police power is by definition residual, the expansion of the notion of regulatory takings — and the associated shifts in attitudes toward the State-market relationship and the role of the judiciary in reviewing legislative and executive action — has meant that the range of measures that can be justified as valid exercises of that power has shrunk. *Penn Central* has, further, made express analysis under the police powers framework largely redundant. Thus, a valid exercise of the police power is, under the Court's contemporary approaches, any exercise that *does not*: (i) result in physical invasion or appropriation of property,[377] place an exaction

371 ibid

372 ibid

373 ibid

374 Eagle (2014) 118 Penn State LR 601, 605 ff; Perkams (2010) 123–6. But, for the view that US takings jurisprudence is based on analogical reasoning rather than true a true balancing test, see: Aleinikoff (1987) 96 YLJ 943, 945

375 *Lingle v Chevron*

376 Sanders (2010) 30 Northwestern Journal of International Law & Business 339; Pomeroy (2012) 22 FedCirBJ 677

377 *Arkansas Game & Fish Comm. v US*

on land as a condition of use;[378] (ii) deny an owner all economically beneficial use of property;[379] (iii) on the balance of interests, fail the three-pronged *Penn Central* test;[380] or (iv) breach guarantees of substantive due process.[381]

4.3.1 Police powers beyond US public law

135. The question arises whether the idea that States have 'police powers' finds doctrinal expression outside the United States. It is beyond my ambition to explore how diverse domestic legal orders approach governments' powers to regulate and distinguish between permissible and impermissible interferences with private property.[382] However, amongst English-speaking jurisdictions, it appears that the police powers doctrine — as such — has remained confined to the US.[383] Nevertheless, it has been suggested that many domestic legal orders recognise equivalent concepts, though these sit behind other labels.[384] Whether this claim bears up to scrutiny is most relevant to our consideration of whether the police powers doctrine has been 'translated' or 'transplanted' into international law — through, for example, the emergence of a general principle. I will thus return to this issue in Chapter 6.

4.4 Police powers as international law

136. Numerous writers have claimed that a version of the police powers doctrine has migrated into international law's treatment of foreign nationals and their property. In this section, to aid our understanding of the concept's place in arbitral practice, I trace the main themes in scholarly discussion of police powers and outline the competing approaches to the concept in existing scholarship.

137. Perhaps the clearest early invocation of the doctrine in the context of international law's protection of foreign-owned property is in a 1941 article by John Herz. In considering the weight given to a government's purpose in interfering with private property under US takings law, Herz noted that while the direct appropriation of property had come to be governed by the

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378 *Nollan*; *Dolan; Koontz*

379 *Lucas* 1014 ff

380 *Penn Central* 124

381 Protected, eg, under the Fourteenth Amendment. See, esp: *Village of Euclid*

382 Despite persistent calls for such studies, unsurprisingly no comprehensive comparative analysis of domestic jurisdictions emerged in the course of research. For a more limited study, Perkams (2010)

383 See, esp: Hastings (1900) 360

384 See, eg: Schill (2010) 339–40; Viñuales (CUP 2012) 369; Perkams (2010) 148–9; Rajput (2019) esp Sec 6.03. See too: Walsh in Douglas, Hickey and Waring (eds) (Hart 2015) 227-56, 231; Stubbs, 'The Eminent Domain in Australia: The 'Individual Rights' Approach to s 51 (xxxi) of the *Australian Constitution*' (PhD, University of Adelaide 2011) esp 203–15

eminent domain principle, 'even in the era of most radical non-intervention policy [during the *Lochner* era]', acts deemed necessary 'to safetuard [sic] 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' were not considered expropriatory.[385] Significantly, while noting complexities persisted in its operation, Herz argued that this 'right of the state to interfere with private property in the exercise of its police power' had also become part of the 'general international law' applicable to States' treatment of foreign-owned property: 'interference with foreign property in the exercise of police power is not considered expropriation'.[386] In Herz's view, 'in spite of difficulties of demarcation, the distinction between measures of police and expropriation for public utility is one of positive international law, recognized by state practice as well as by the almost unanimous opinion of theorists.'[387] Herz's view was subsequently picked up, and the term 'police powers' was used, for example, by ILC Special Rapporteur García-Amador in his (ultimately fruitless) attempt to codify the rules on State responsibility for injury to aliens, to describe State action not generating a duty to compensate.[388]

138. The 1961 Harvard Draft Convention on the Responsibility of States for Injuries to the Economic Interests of Aliens, drafted by Louis Sohn and Richard Baxter, is likewise often cited as evidence of the police powers doctrine's migration.[389] According to Article 10(5) of the Draft, States will not be responsible for '[a]n uncompensated taking' of alien property or 'a deprivation of the use or enjoyment' of such property resulting from (i) the 'execution' of tax laws; (ii) general currency adjustments; (iii) 'the action of the competent authorities of the State in the maintenance of public order, health, or morality'; or (iv) 'the valid exercise of belligerent rights' or that is 'otherwise incidental to the normal operation of the laws of the

385 Herz (1941) 35 AJIL 243, 251 (my emphasis). For earlier, yet more equivocal, references to States' police powers in the context of international law's regulation of foreign-owned property, Borchard (1927) 21 ASIL Proc 23, 25; Anderson (1927) 21 AJIL 525, 525; Witenberg (1930) ILA, Report of the Thirty-Sixth Conference held at New York, September 2nd to 9th, 1930 301, 332; De Snaszy (1930) 588–9. See too the United States' comments concerning the 'right of a nation … to exercise its police power' in the context of legislative interference with foreigners' rights under contract or concession during the 1930 Hague Conference: League of Nations, Conference for the Codification of International Law, 'Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners, Replies made by the Governments to the Schedule of Points' (22 May 1929) C.75(a)M.69(a).1929.V, 8

386 Herz (1941) 252

387 ibid , citing, inter alia: *Parsons Award*, 165–6; *Upper Silesia*, 22; Borchard (1927) 24–5; Jessup (1927) 21 ASIL Proc 38, 39–40; International Law Association (1930); Kaeckenbeeck (1936) 16; Verdross (1931) 37 RCADI 325, 364, 73–4; Fachiri (1929) 10 BYIL 32, 52–3; and Lauterpacht (1937) 62 RCADI 97, 345–6. While broadly supporting the idea that not all government action affecting property requires compensation, on examination these materials do not support Herz's argument that the police powers doctrine comprises a distinct rule of international law. Further, none of the materials cited constitute State practice.

388 ILC, 'Fourth report on State Responsibility by FV García-Amador, Special Rapporteur' (26 Feb 1959) A/CN.4/119 [43, 46], citing: *Parsons Award*; and Herz (1941) 251–2

389 Sohn (1961) . See, eg: *Saluka* [256–7]; *InterAgua* [146–50]; *El Paso* [238]; *Philip Morris v Uruguay* [292–3]; Fortier and Drymer (2004) 298–9; Viñuales (2010) 80 BYIL 244, 310–11. See too: *Burlington* [393–404]

State', provided such measures are not 'a clear and discriminatory violation' of domestic law, do not result from a denial of access to justice, are not 'an unreasonable departure from the principles of justice recognized by the principal legal systems of the world', or an abuse of power 'for the purpose of depriving an alien of his property.'[390] Notably, there is no express mention of States' 'police powers' in the Draft itself. Rather, the authors explained in commentary to Article 10(5)(d) that the judicial, fiscal, and *police powers* of the State not be used to cloak an uncompensated seizure of an alien's property.'[391]

139. Alongside the Harvard Draft, the American Law Institute's Third Restatement of the Foreign Relations Law of the United States (1987) is also often cited in support of the police powers doctrine's migration.[392] In commentary to Section 712 — concerning *inter alia* States responsibility for the taking of property — the authors opined that the duty to provide 'just compensation' 'applies not only to avowed expropriations in which the government formally takes title to property', but also to measures 'that have the effect of "taking" the property, in whole or in large part'.[393] In the authors' view, such would occur whenever a State 'subjects alien property to taxation, regulation, or other action that is confiscatory' or 'prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property or its removal from the state's territory'.[394] Importantly, while noting that '[a]s under United States constitutional law, the line between "taking" and "regulation" is sometimes uncertain',[395] States are 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*' provided such is 'not discriminatory' or 'designed to cause the alien to abandon the property to the state or sell it at a distress price.'[396]

140. It is from this habit of (predominantly North American scholars) of referring to States' 'police powers' when discussing indirect expropriation that awareness of and interest in the concept

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390 Sohn (1961) 554

391 ibid 562 (my emphasis). The only other express reference to States' 'police power' is in commentary to Art 9(2) on destruction of property by the State 'in the maintenance of public order, health, or morality': ibid 551–2. See too: García Amador, Sohn and Baxter (Oceana 1974) 46, citing *Parsons Award* in support of the claim that '[i]n international jurisprudence exemption from responsibility has also been based on the "police power" of the State.' See similarly (in the context of the international minimum standard): (ALI 1965) Sec 197. Importantly these sources seem to be using the term 'police powers' in a narrow sense — ie to refer to law enforcement action.

392 Henkin & ors (ALI 1987) 'ALI Third Restatement'. See, eg: *Saluka* [260]; *Tecmed* [115]; *El Paso* [238]; *Philip Morris v Uruguay* [293]; Viñuales (2014) 336; Pellet in Kinnear & ors (eds) (Kluwer 2015) 447-62, 451

393 Henkin & ors (1987) 200–1

394 ibid

395 ibid 201 (my emphasis)

396 ibid (my emphasis)

has grown.[397] Academic attention to the concept, perhaps unsurprisingly, surged around a decade ago alongside the wave of scholarship aimed at addressing core aspects of investment law and arbitration's legitimacy crisis. Scholars looked to the concept to solve the seemingly interminable challenge of distinguishing lawful regulation from indirect expropriation,[398] and — crucially — as a means of safeguarding States' 'right' (or, even, 'duty')[399] to promote the public interest through regulation, thereby strengthening States' position vis-a-vis private parties and realigning analysis to better accommodate public interests.[400]

4.4.1 Two models of police powers

141. Discussion of States' police powers revolves around two competing conceptualisations. We can call these the 'broad' and the 'narrow' models. Within the broad model, the police powers doctrine is an 'autonomous' customary principle designating a State's 'right' and 'duty' 'to regulate'.[401] Viñuales provides perhaps the most detailed endorsement. According to Viñuales, 'the idea that states have the inherent legal authority to regulate, even if that harms the economic interests of aliens, has ever since [de Vattel] been increasingly elaborated and applied in international jurisprudence'[402] and has achieved the status of custom through 'codification' in *inter alia* the Harvard Draft and US Third Restatement and through the 'generalisation of municipal practice'.[403] Importantly, Viñuales claims that, consistently with 'both the historical rationale of police powers and with the development of foreign investment law in the last half of the twentieth century',[404] '[t]he police powers doctrine is not an exception but the legal expression of the rule of state sovereignty'.[405] Thus, he argues, its application 'does not depend on the type of investment discipline or the type of interference with property'.[406] Rather, by operation of Article 31(3)(c) VCLT, the police powers doctrine requires that all interpretative exercises under IIAs (including contractual claims brought under umbrella clauses) begin from

397 See: Higgins (1982) RCADI 259, 328–31

398 See: Brower and Schill (2009) 9 Chi J Int'l L 471, 483–4

399 Viñuales (2014) 332; Schill (2010) 336; Alvik (Hart 2011) 262

400 See, esp: Viñuales (2010) 309-10; Viñuales (2012) 367-9; Viñuales (2014) 329 et seq; Newcombe and Paradell (Kluwer 2009) 357; Alvik (2011) 260 et seq; Henckels (2012) 15 JIEL 223, 225; Yannaca-Small (2010) 448; Spears in Miles and Brown (eds) (CUP 2011), 277

401 This view has been expressed, with varying degrees of conviction, in, eg: Viñuales (2010) 309-10 Viñuales (2012) 367–9; Viñuales (2014) esp 329, 32; Moloo and Jacinto (2011) 29 Berkeley J Int'l L 1, 16 Newcombe and Paradell (2009) 357; Alvik (2011) 260 et seq; Yannaca-Small (2010) 448; Spears (2011) 277; and Henckels (2012) 225

402 Viñuales (2014) 327

403 Viñuales (2012) 367–9

404 Viñuales (2014) 343

405 ibid

406 ibid 344

a 'presumption of regularity' in favour of governments' freedom of action.[407] Several authors have similarly endorsed this broad model of States' police powers.[408]

142. By contrast, according to the narrow model— which enjoys more support in academic discussion, arbitral practice and, as shown in Chapter 6, amongst States — the concept applies solely in the context of determining when government action is 'equivalent' or 'tantamount to' expropriation.[409] Under this conception, a finding that action constitutes a valid exercise of a State's police powers shields it from having to compensate foreign nationals if the measures result in the reduction (or destruction) in value of property:

> [t]he police powers doctrine recognizes host states' right to regulate or take other measures significantly affecting foreign investors' property interests without a finding of expropriation where such measures fall within the ambit of the state's general regulatory or administrative powers, pursue a legitimate purpose, are aimed at the general welfare, and are non-discriminatory.[410]

143. This approach is somewhat reflected in the practice of international organisations. In a 2012 report, UNCTAD recognised that '[i]t has long been accepted in international law that State acts are in principle not subject to compensation when they are an expression of the police powers of the State'.[411] While noting that 'there is no universally accepted definition' of police powers, the report considered the doctrine:

> covers State acts such as (a) forfeiture or a fine to punish or suppress crime; (b) seizure of property by way of taxation; (c) legislation restricting the use of property, including planning, environment, safety, health and the concomitant restrictions to property rights; and (d) defence against external threats, destruction of property of neutrals as a consequence of military operations and the taking of enemy property as part payment of reparation for the consequences of an illegal war.[412]

144. Thus, within the narrow model, consideration of States' police powers arises only in relation to a single category of protection— the prohibition on uncompensated expropriation. Because it attaches to the customary definition of expropriation — either as an element of the rule's

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407 ibid 329, 44

408 See, esp: Alvik (2011) 262–4, 8–9; Schill (2010) 336, 9–40. See too: Alvarez (2011) 322. For a recent, albeit brief, exploration in the context of the COVID-19 epidemic, Hailes (27 Mar 2020) EJIL:Talk!.

409 See, illustratively discussion in: Christie (1962) 38 BYIL 307, 334–8;Aldrich (1994) 88 AJIL 585, esp 605; and Pellet (2015) .

410 Mitchell and Henckels (2013) 123. See too, eg: Newcombe (2005) 25–40;Henckels (2012) 225; Mitchell (28 July 2016) EJIL:Talk! Choudhury (2008) 792–8; Subedi (Hart 2012) 157; Salacuse (2015) 65–7

411 UNCTAD, 'Expropriation', Series on Issues in International Investment Agreements (2012) UNCTAD/DIAE/IA/2011/7, 78. See too: UNCTAD, 'Taking of Property', UNCTAD Series on Issues in International Investment Agreements (2000) UNCTAD/ITE/IIT/15, 12 and 15, citing: Brownlie (OUP 1992); and the ALI Third Restatement's commentary to Section 712; *Mellacher v Austria*; *Fredin v Sweden*; and *Mobil v New Zealand*

412 UNCTAD (2012) UNCTAD/DIAE/IA/2011/7 79

definition or as a semi-autonomous customary 'exception' or 'defence' — in principle consideration of State's police powers will not influence an interpretative exercise if it has been expressly or implicitly excluded or cannot otherwise be accommodated by an IIA's express terms.[413]

145. While the broad and narrow models of police powers cast the concept's scope of operation in different terms, they share a core of content. Both accept that States have a 'right' to regulate in the public interest and that this right is recognised (somehow) in customary international law. Likewise, both accept that in exercising this right States may validly interfere with private property interests without having to provide compensation.[414] It is thus a crucial assumption of both models that States possess a core of residual (sovereign) regulatory powers that survive the limitations imposed under IIAs.[415] Writers endorsing both models also largely agree that four conditions must be met for a measure to qualify as a valid exercise of police power: (i) it must be directed at a public interest in the general welfare; (ii) it must be non-discriminatory, (iii) those affected must be afforded due process; and (iv) the State must respect any specific assurances made to an investor, for example concerning administrative processes or regulatory stability.[416] More controversially, certain scholars include a fourth criterion concerning the relationship between a measure's ends and means, requiring, variously, that a measure be a 'reasonable',[417] or 'proportionate'[418] way of achieving its objectives. Unlike when discussing, for example, the proportionality principle (considered in Chapter 5) scholars have not clearly articulated whether the police powers doctrine generates a staged, sequential analysis or whether its component elements ought to be assessed individually or cumulatively and the relative weight each should bear in analysis.

4.4.2 Outstanding questions

146. Regardless of whether we consider the broad or narrow conceptions of States' police powers, four significant questions arise. Given these also arise in — and often divide — arbitral recourse to the police powers doctrine, I will introduce them here to aid our investigation of practice in the next section.

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413 See, illustratively: Kurtz (2014) 294–5; Ranjan (2018) 9 Asian JIL 98, 109 ff; *Bear Creek* [473–4] and [Sands DO] [41]. I consider these issues further in Ch 6.

414 For the use of the terminology of 'validity' and 'legitimacy', see: *Saluka* [263–4]; *Suez & Vivendi* [139]; and *de Levi* [476]

415 As explored further in Chapter 7, In structural terms, the result of this assumption somewhat resembles a return to a 'normatively-heavy' conception of the *domaine réservé*. See above Sec 2.2

416 See, esp: Kingsbury and Schill (2010) 91; Schill (2010) 336 and Viñuales (2014) 344

417 Viñuales (2014) 344

418 Schill (2007) 24 JIA 265, 277

147. First, how ought we identify the exercise of police powers? There are essentially two ways we can approach this, each consistent with the idea of police powers as States' core, or essential, regulatory powers. Under the first — admittedly more popular [419]— approach, whether action falls within a State's police powers is determined solely by its purpose, requiring us to identify a taxonomy of permissible (and therefore impermissible) objectives.[420] By contrast, the second approach starts from the assumption that there are 'intrinsically lawful *methods* of regulation […] indispensable for the functioning of a State' that by necessity destroy the value of property or interfere with its enjoyment, that will not entail compensation if exercised in a non-discriminatory manner and in accordance with due process.[421]

148. Second, what effect ought to be generated by a finding that a measure falls within a State's police powers? There are, again, essentially two (largely irreconcilable) answers to this question. Under the first — what we can call the 'preclusion' or 'exception' approach — a finding that a measure constitutes a valid exercise of a State's police powers 'exempts automatically' any duty to provide compensation.[422] By contrast, under the second — 'non-preclusion' or 'relevant factor' — approach, whether a measure is a valid exercise of police powers ought merely to be taken into account (principally when assessing expropriation) but does not automatically preclude a duty to compensate.[423]

149. Third, what intensity of inquiry ought analysis of States' exercise of police powers generate? To be considered valid exercises of police powers, ought State's measures be subjected to a 'deferential' or 'intrusive' inquiry? As shown in the following sections, this question turns on which factors arbitrators consider are relevant in analysis and, crucially, the tests applied in considering these factors.

150. Finally, who ought to bear the burden of proof? Does the police powers doctrine operate as a (presumably rebuttable) 'presumption of regularity' in favour of States in all interpretative exercises under IIAs?[424] Or, as an element of a substantive obligation — for example the cus-

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419 *Saluka* [263–4]; Fortier and Drymer (2004) 299; Paparinskis in Cordonier Segger, Gehring and Newcombe (eds) (Kluwer 2011) 299-327, 311–14; Dolzer and Schreuer (2012) 123; Bonnitcha (2014) 260

420 In this context, Paparinskis describes the concept of 'police powers' as 'classically ambiguous': Paparinskis (2011) 311; Paparinskis (2013) 222. While this broadly reflects the way US courts approached the police power in the late 19th and early 20th centuries, the category of permissible purposes ultimately proved to be more-or-less open: *Berman v Parker* (nn 341–343)

421 Paparinskis (2011) 314. See too the UNCTAD definition (n 411)

422 OECD (2004) 2004/04 18

423 ibid . See, further, eg: Pellet (2015) 458–61; Zamir (2017) 14 Manchester JIEL 318, 332–3; Subedi (Hart 2016) 197–8; Newcombe (2005) 25–40.

424 Viñuales (2014) 344

tomary prohibition on uncompensated expropriation — ought claimant investors show its conditions have not been met? Or, rather, if the doctrine constitutes a customary exception or defence, should the host State invoking it bear the onus of proof?

151. The answers to these questions are vital to our understanding of the police powers doctrine's actual and potential place in investment law and arbitration and its consequences for States' capacities to define and pursue the public interest. However, just as scholars have presented competing constructions, as I show below, so too is arbitral practice divided on many aspects of the concept's content and operation.

4.5 Police powers in arbitral practice

152. The first express reference to States' 'police powers' by an adjudicative body addressing international law's protection of foreign-owned property seems to have been made in 1985 by the Iran-United States Claims Tribunal (IUSCT) in *Sedco v NIOC*. In a dispute concerning the alleged indirect expropriation of the assets of a US offshore energy company,[425] the Tribunal remarked that:

> [i]t is an established principle of international law that an act of expropriation does not require a formal decree of nationalization. […] It is also an accepted principle of international law that a State is not liable for economic injury which is a consequence of bona fide "regulation" *within the accepted police power of states*.[426]

This was followed by a brief reference to the concept in *Too v Greater Modesto Insurance*, in which the claimant alleged that the US Internal Revenue Service had 'wrongfully expropriated' his property, by confiscating real property, sequestering a bank account and terminating a liquor license in satisfaction of a tax debt.[427] While noting the seizure, the Tribunal considered that a State will not be responsible 'for loss of property or for any other action that is *commonly accepted as within the police power of States*' provided that seizure is not conducted in a discriminatory manner or so as 'to cause the alien to abandon the property to the State or to sell it at a distress price.'[428] In the Tribunal's view, neither factor was evident in the IRS's

425 *Sedco*, 250–2

426 *Sedco*, 274–5 (my emphasis), citing: *Kügele*; and Weston (1975) 16 Va J Int'l L 103

427 *Too*, 387

428 In the Tribunal's view, non-discriminatory tax measures are non-compensable: *Too*, 387 (my emphasis), citing: ALI Third Restatement; *Kügele*; and *Brewer, Moller & Co*

conduct.[429] Significantly, the references in *Sedco* and *Too* appear to be the only times the IUSCT has referred to States' police powers in over 800 reported decisions.[430] Thus IUSCT jurisprudence appears not to have provided fertile ground for the concept's transplantation.

153. As shown below, the idea that States have 'police powers' has, however, gained more traction in the practice of tribunals settling disputes under IIAs. This said — as Paparinskis rightly noted in 2013 — measured both quantitatively and qualitatively, the concept has not yet secured a central, or settled, place in arbitral practice.[431] Below, I trace arbitral recourse to the police powers doctrine in the 717 decisions issued between 1 January 1990 and 31 December 2018 that are the subject of this study.[432] I evaluate the extent and significance of such recourse (Section 4.5.1); consider the interpretative contexts in which the concept has been used (Section 4.5.2); and illustrate the various ways arbitrators have approached the content, structure and the intensity of inquiry the concept generates (Section 4.5.3).

154. Two aspects of the practice addressed below deserve highlighting at the outset. First, the police powers doctrine's various constructions in arbitral practice do not much resemble its roles in US public law. Tribunals have ascribed States' police powers content — and attached conditions to its exercise — that (while perhaps stemming from other constitutional guarantees) cannot be considered inherent elements of the doctrine in its jurisdiction of origin. Second, while practice reveals certain common features, recourse to the police powers doctrine has generated a variety of approaches to the concept and its role in analyses. Its use therefore cannot be said to have contributed to greater consistency. Similarly, given its use has generated (what we might label) 'intrusive' as well as 'deferential' inquiries, whether recourse to the police powers doctrine produces more 'balanced' outcomes, or preserves a more appropriate degree of regulatory autonomy, depends on the particular construction afforded.

155. To stress, this examination considers instances in which arbitrators expressly referred to States' 'police power/s'. Undoubtedly this will not capture all practice relevant to, for example, the distinction between compensable indirect expropriation and lawful regulation, or States' exercise of regulatory powers. It has become relatively commonplace to see references in decisions to States' (sovereign) 'right to regulate'[433] or 'regulatory powers',[434] and tribunals

429 *Too*, 387–8

430 Based on a survey of 805 decisions issued between Jan 1982 and Mar 2015. Full list in Annex 2.

431 See, eg: Paparinskis (2013) 223

432 The decisions included in this corpus, means of selection and methods of analysis are outlined in Section 1.3 above. Full list in Annex 2.

433 See, eg: *InterAgua* [216–7]; *Suez & Vivendi* [139, 236–7]; *ADC* [423–5, 435]; *PL Holdings* [327]; and *Foresight* [340] ff

434 See, eg: *Antin* [530]; and *RREEF* [244–5]

employing the 'purposive' approach to indirect expropriation have employed logic that closely resembles analysis of States' police powers, without using the phrase.[435] Nevertheless, by focusing on express references to States' 'police powers', I attempt to take seriously and critically interrogate the idea that the police powers doctrine comprises a distinct rule of international law. We can in this way assess how prevalent its use is, and gain insight into the ways it has shaped arbitral practice. Such an understanding is, further, vital to the assessment of the broader normative issues raised by arbitrators' turn to public law.[436]

4.5.1 Extent and significance

156. Between 1 January 1990 and 31 December 2018, reference to States' 'police power/s' appeared in parties' arguments or tribunals' reasoning on the merits 82 times. One or more arbitrators referred expressly to States' 'police powers' in 42 decisions (across 39 disputes).[437] While the majority of these tribunals were responding to arguments raised by the parties, in 13 instances, arbitrators appear to have had recourse to police powers proprio motu.[438] Significantly, as shown in Figure 2 and Figure 3 below, while parties' invocation of the concept remained relatively steady during the same period, there was a marked increase in the number of decisions in which arbitrators referred to States' police powers from 2012–2018. However, while making express use of the terminology of police powers, arbitrators ascribed the concept varied roles and weights in analysis, considered a finding that a measure was a valid exercise of a State's police powers generated varied results, and engaged in inquiries of diverse structure, content and intensity.

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435 For example, several tribunals have adopted approaches to distinguishing between compensable expropriation and lawful regulation that closely resemble tribunals' 'police powers' analyses. See, esp: *Methanex* IV.D [7]; *Invesmart* [498–500]

436 See below, Chapter 6

437 *Pope & Talbot* [Interim] [96, 99]; *Feldman* [105–6]; *Tecmed* [115, 119]; *EnCana* [173]; *Saluka* [258–62]; *Azurix* [310–11]; *Fireman's Fund* [176]; *Telenor* [65]; *LG&E* [194–6]; *Siemens* [260]; *Corn Products* [87]; *National Grid* [88]; *EDF v Romania* [292, 299, 305, 308]; *Fuchs* [387]; *InterAgua* [128, 147–8]; *Suez & Vivendi* [139–40]; *Chemtura* [266]; *Impregilo* (2011) [Brower DO] [29]; *El Paso* [234–5, 238–9, 322]; *Servier* [276–9, 569, 584]; *Unglaube* [246–7]; *Deutsche Bank* [Khan DO] [80]; *Burlington* [471–3; 485; 508–29]; *Mobil v Argentina* [Remiro Brotóns SO] [59, 77]; *de Levi* [475–6]; *Belokon* [204]; *Tza Yap Shum* [144–7, 173–81]; *Quiborax* [139, 200–7, 227, 238–9, 243, 302–4]; *Al-Tamimi* [439, 444–6]; *Copper Mesa* [6.58–67]; *Philip Morris v Uruguay* [287, 290–300, 304, 306–7]; *Windstream* [284]; *WNC Factoring* [394–5, 400]; *JSW Solar* [272]; *Bear Creek* [471–4], and [Sands DO] [41]; *UAB* [1080–8, 1091]; *Marfin* [827–30, 895–986, 1031–1126, 1324]; *UP&CD* [415]; *South American Silver* [541–2, 622–30], and [Orrego Vicuña SO] 2–3; *Al-Tamimi* [177–8, 180]

438 While not always clear, based on tribunals' accounts of parties' pleadings and publicly available written and oral proceedings, this includes: *Tecmed* [115, 119]; *Saluka* [258–2]; *Fireman's Fund* [176]; *Telenor* [65]; *LG&E* [194–6]; *Siemens* [260]; *Corn Products* [87]; *Fuchs* [387]; *Impregilo* (2011) [Brower DO] [29]; *El Paso* [234–5, 238–9, 322]; *Unglaube* [246–7]; *de Levi* [475–6]; and *UAB* [1080–88, 1091]

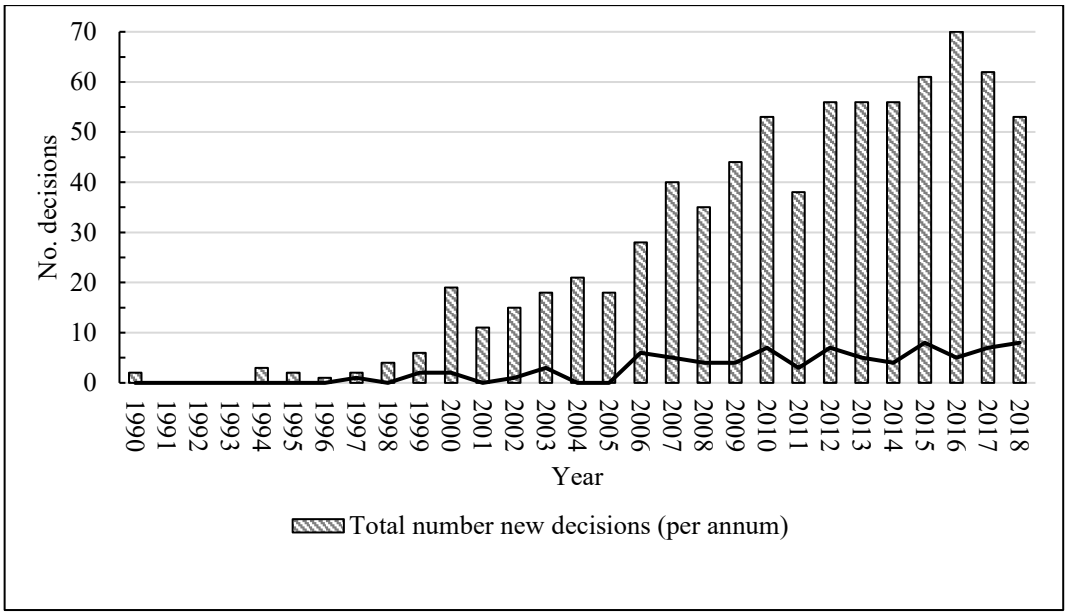

Figure 2: Number of decisions in which a party or arbitrator made at least one express reference to States' "police power/s", annual total, non-cumulative (1 Jan 1990–31 Dec 2018) [439]

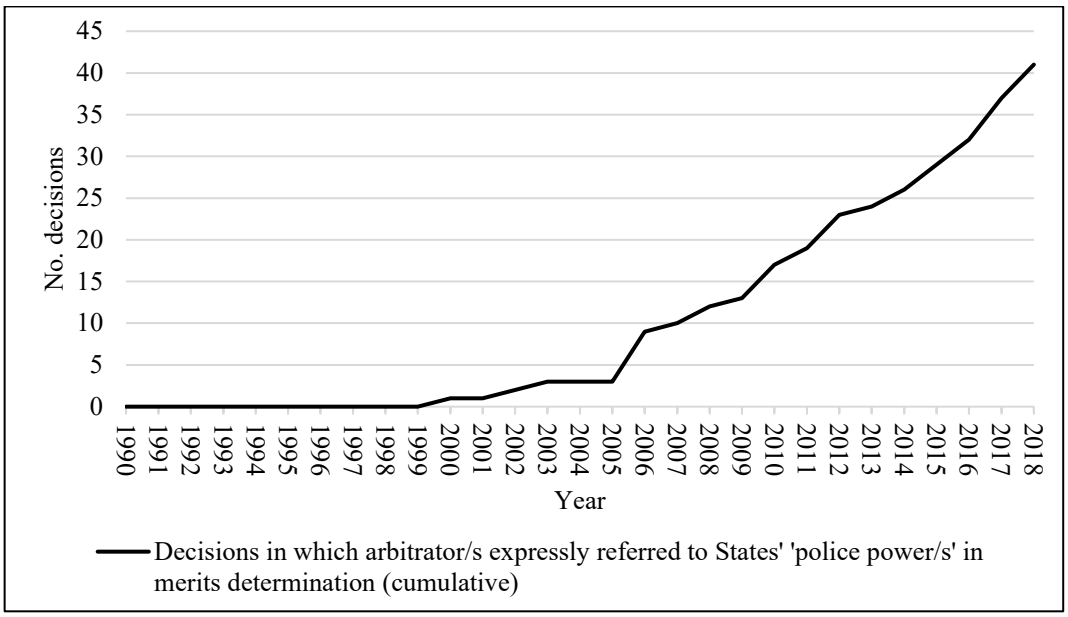

Figure 3: Number of decisions in which at least one arbitrator made at least one express reference to States' police power/s in merits determination, annual, cumulative (1 Jan 1990–31 Dec 2018) [440]

[439] Includes references in parties' arguments and arbitrator/s reasoning on merits. In addition to summaries of pleadings in 717 decisions, includes publicly available written pleadings available on Investor-State Law Guide. See further above, Section 1.3.

[440] Includes all references by one or more arbitrator to States' 'police power/s' in merits determination. Excludes references clearly intended only to refer to the exercise of law enforcement activities.

157. In a further 40 disputes, while the claimant,[441] respondent,[442] or both parties,[443] presented arguments concerning police powers, arbitrators did not expressly refer to the concept or engage directly with parties' submissions. Often, this appears to be because tribunals considered measures did not interfere sufficiently with an investment to be considered equivalent or tantamount to expropriation.[444] While we might draw implicit support from this for the idea that the police powers doctrine operates to exclude the duty to provide compensation only when measures' effects rise to the level of an indirect expropriation, such silence may equally indicate that parties' arguments were deemed entirely without merit or were otherwise inapplicable.

158. When we examine significance in more qualitative terms — understood as the concept's discernible role in a chain of reasoning or causation (regardless of the frequency of the use of language) — in the 42 decisions in which arbitrators made at least one express reference to States' 'police power/s', the concept was the subject of in-depth reasoning, was given significant weight in analysis and played a central role in merits determination in only nine decisions.[445] Significantly, six of these decisions were issued within the space of three years (2015–2018).[446] In a further 25 decisions, while arbitrators employed the concept, its use did not generate extensive analysis,[447] often because it was deemed inapplicable in the circumstances.[448] In three decisions, the tribunal expressly declined to consider the merits of parties'

441 *Glamis Gold* [542]; *Infinito* [Jurisdiction] [163]; *Novenergia* [720, 732–7]; *RREEF* [222]

442 *Ethyl Corp* [Canada's Statement of Defence] [95]; *SD Myers* [Canada's Statement of Defence] [55], [Canada's Counter-Memorial] [423–6], [Canada's Reply to Supplemental Memorial] [54–5]; *Metalclad* [Mexico's Post-Hearing Submission] [279–81]; *Lauder* [198]; *Nagel* [211]; *Methanex* [United States' Amended Statement of Defence] [410–11], [Canada's Fourth Art 1128 Submission] [14-16], [United States' Rejoinder] [194–6]; *Cargill* [Mexico's Rejoinder] [370]; [277]; *Continental* [85]; *Grand River* [United States' Counter-Memorial] 157–61; *Renta 4* [Preliminary Objections] [63]; [479]; *RosInvestCo* [2, 4, 456, 558–9]; *Railroad Development* [Guatemala's Counter-Memorial] [297–99, 306–9, 447–8]; *Roussalis* [663]; *EDF v Argentina* [428, 444]; *Deutsche Bank* [416, 501]; *Mobil v Argentina* [835, 850]; *Stati* [1163]; *Yukos* [79]; *Perenco* [241]; *Mamidoil* [529]; *Berkowitz* [United States' Art 10.20(2) Submission] [27–8]; *EuroGas* [Slovakia's Counter-Memorial] [352–63]; *von Pezold* [90, 454]; *Allard* [262]; *Urbaser* [976, 980, 986–93]; *PL Holdings* [277]; *Aven* [384, 404], [Costa Rica's Counter-Memorial] [32, 612–13, 628–35], [Costa Rica's Rejoinder] [1007, 1043–7], [Costa Rica's Post-Hearing Brief] [1016]; *Foresight* [422]

443 *Enron* [219, 239]; *BG* [250, 255]; *Total* [188, 190]; *InterTrade* [253]; *Arif* [227, 274, 307]; *ECE* [4.180, 4.363–5, 4.538, 4.542, 4.693]

444 *Allard* [263–6]; and *Foresight* [431]

445 *Tecmed* [115–49; *Saluka* [258–62]; *Burlington* [508–29]; *Tza Yap Shum* [144–7, 173–81]; *Quiborax* [139, 200–7, 227, 238–9, 243, 302]; *Copper Mesa* [6.58–67]; *Philip Morris v Uruguay* [287, 290–300, 304, 306–7]; *UAB* [1080–88, 1091]; and *Marfin* [827–30, 895–986, 1031–1126, 1324]

446 *Tza Yap Shum*; *Quiborax*; *Copper Mesa*; *Philip Morris v Uruguay*; *UAB*; and *Marfin*

447 *Pope & Talbot* [Interim] [96, 99]; *Feldman* [105–6]; *Azurix* [310–11]; *Fireman's Fund* [176]; *Telenor* [65]; *LG&E* [194–6]; *Corn Products* [87]; *EDF v Romania* [292, 299, 305, 308]; *Suez & Vivendi* [139–40]; *El Paso* [234–5, 238–9, 322]; *Servier* [276–9, 569, 584]; *Unglaube* [246–7]; *Deutsche Bank* [Khan DO] [80]; *de Levi* [475–6]; *Al-Tamimi* [172, 177–80, 263, 372, 439, 444–6]; *Ryan* [473, 492–5]; *WNC Factoring* [394–5, 400]; *UP&CD* [415]

448 *InterAgua* [128, 147–8]; *Chemtura* [266]; *Impregilo* (2011) [Brower DO] [29]; *Belokon* [204]; *Windstream* [284]; *South American Silver* [541–2, 622–30], and [Orrego Vicuña SO] 2–3

arguments concerning police powers.[449] In the remaining four decisions, arbitrators employed the concept adjectivally, as a synonym for 'regulatory power',[450] or '*acta jure imperii*',[451] seemingly without ascribing it a role in reasoning.

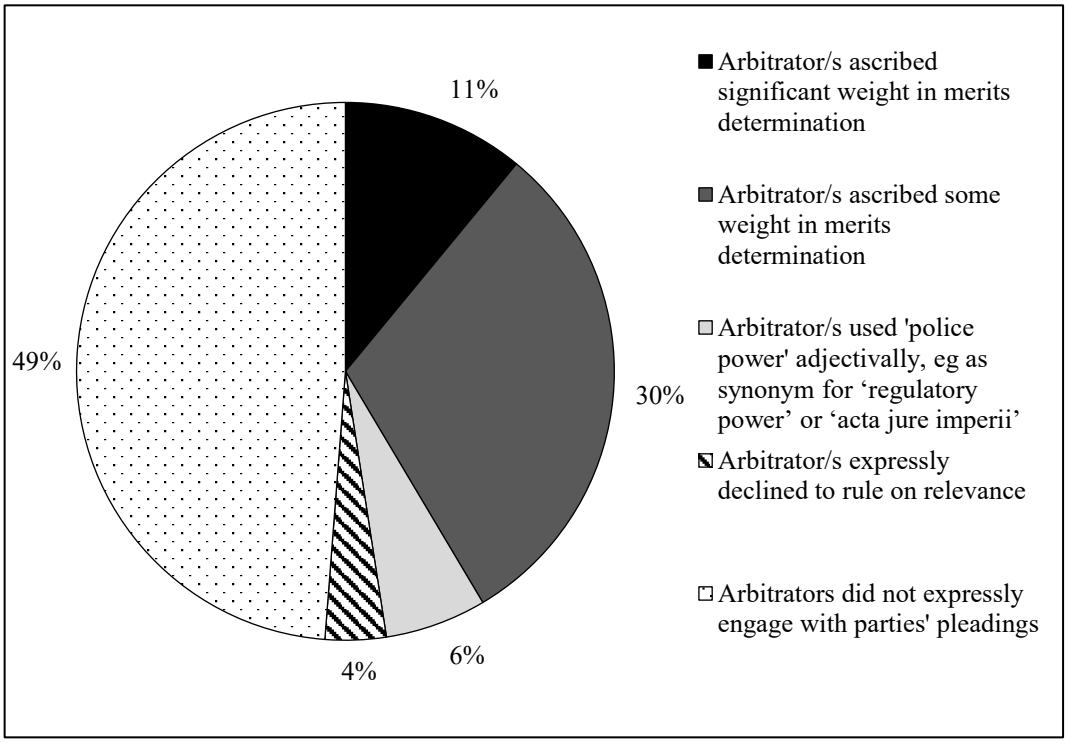

Figure 4:Weight ascribed to police powers doctrine in merits determination

4.5.2 Interpretative contexts

159. As Figure 4 illustrates, whereas other borrowed public law concepts have been employed in several interpretative contexts — and despite certain scholars' claim that the police powers 'defence' or 'exception' inserts itself into all interpretative exercises under IIAs[452] — in the overwhelming majority instances arbitrators referred to States' police powers in the context of interpreting and applying expropriation provisions. In four instances arbitrators referred to the concept both in assessing an expropriation claim and in considering whether investors had been afforded fair and equitable treatment — including whether investments had been impaired through unreasonable, arbitrary or discriminatory measures.[453] In one notable example, *Unglaube*, the tribunal referred to States' police powers exclusively in the FET context.[454] This approach is to be contrasted with the *InterAgua* tribunal's express refusal to consider the

449 *JSW Solar* [272; *Bear Creek* [471–4], and [Sands DO] [41]

450 *National Grid* [88]; *Mobil v Argentina* [Remiro Brotóns SO] [59, 77], quoting: *El Paso* [322]

451 *Siemens* [260]

452 Below Sec 6.3.1

453 *Quiborax*; *EDF v Romania*; *El Paso*; *Mobil*

454 *Unglaube* [246–7]

doctrine in considering FET and FPS claims as, because consideration of States' 'reasonable right to regulate' is necessarily relevant to all FET and FPS provisions, reference to the police powers doctrine 'would be duplicative and therefore inappropriate'.[455]

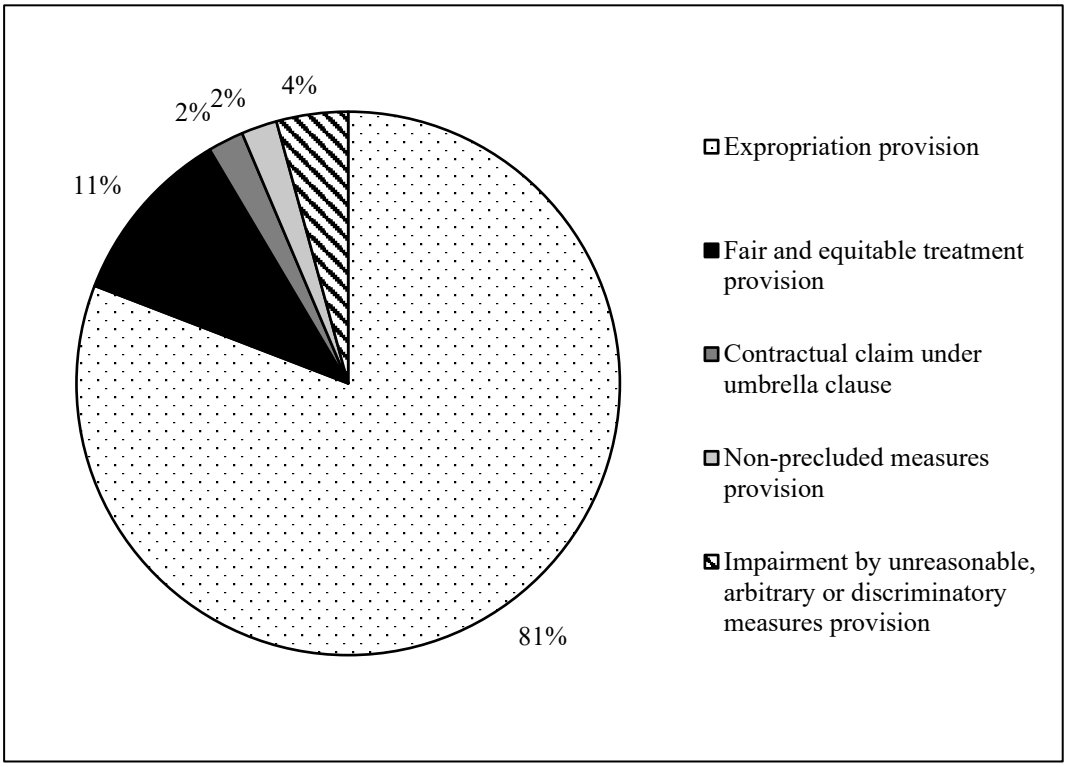

Figure 5: Arbitral recourse to police powers doctrine in merits determination, by interpretative context

160. Arbitrators referred to States' police powers when examining both (what are commonly, but not unproblematically, referred to as) 'targeted' and 'general' measures.[456] In several notable disputes, reference to States' police powers was made in assessing the application or enforcement of existing law — general legislation or regulations in force at the time an investment was made, or in operation for a significant period before the impugned action occurred. Notable examples include the application and enforcement of banking and financial regulations,[457] and tax legislation.[458] Arbitrators also made use of the concept when considering changes made to aspects of the regulatory framework pertaining at the time an investment was made. Notable examples include changes to the conditions attaching to products' production,[459] or marketing,[460] modification of how tariffs are calculated for service provision contracts in an

455 *InterAgua* [148]

456 On the doctrine's equal applicability in cases of promulgation and application of general regulations, *Marfin* [903]; see too: *UAB* [1080]

457 See, esp: *Saluka*; *de Levi*; *Belokon* and *Marfin*

458 *Tza Yap Shum*

459 *Corn Products*

460 *Philip Morris v Uruguay*

entire sector,[461] the banning of previously lawful activities,[462] or the exclusion of actors previously permitted to engage in certain activities.[463] Arbitrators further had recourse to the police powers doctrine when assessing claims impugning the termination or non-renewal of a contract, permit, license or concession — including to operate waste management facilities,[464] extract or sell natural resources,[465] market pharmaceutical products,[466] or to provide telecommunications,[467] or heating services.[468] It is to be noted that, very often, host States adopt both 'general' and 'targeted' measures. Arbitrators referred to the police powers doctrine in several such composite disputes, in which a general legislative change resulted in the subsequent termination of an underlying license, permit or concession, or action was taken ostensibly to enforce the new regulatory framework.[469]

4.5.3 Operation of the police powers doctrine

161. The most crucial aspects of arbitral practice for our understanding of the police powers doctrine — and how its use affects States' capacities to define and pursue the public interest — concern its operation. Below, focusing primarily on the nine 'core' decisions identified above,[470] I consider the ways arbitrators have approached: (i) the effects generated by a finding that a measure falls within a State's police powers; (ii) the factors relevant in assessing whether a measure qualifies as police powers action; and (iii) the onus of proof. I show that, given the range of ways tribunals have approached these questions, the police powers doctrine has generated numerous structures and intensities of inquiry, with variable consequences for States' capacities to define and pursue the public interest.

i. Effects generated

162. As already noted, most tribunals have referred to States' police powers in the expropriation context. A finding that a measure constitutes a valid exercise of police powers can nevertheless generate two effects: it may either automatically preclude a duty on the part of the host State

461 See, esp: *Windstream*; *JSW Solar*

462 *SD Myers*

463 *UP&CD*. The tribunal considered that measures that deliberately targeted an individual could never be justified as exercises of the police power: [415]

464 *Tecmed*

465 See, esp: *Quiborax*; *Bear Creek*; and *South American Silver*

466 *Servier*

467 *Telenor*

468 *UAB*

469 See, notably: *Pope & Talbot* [96, 99]; *Fuchs* [387]; *InterAgua* [128, 147–8]; *Suez & Vivendi* [139–40]; *Chemtura* [266]; *Impregilo* (2011) [Brower DO] [29]; *El Paso* [234–5, 238–9, 322]; *Unglaube* [246–7]; *Burlington* [471] ff; *Quiborax* [200–20]; *Copper Mesa* [6.28] ff

470 n 445

to compensate an investor for a measure's negative impacts, or, it may merely be considered a relevant factor in a broader test for expropriation based, for example, on a balance of interests inquiry.

163. Consistent with the idea that the police powers doctrine operates as an (implicit) 'exception'[471] or 'defence'[472] attaching to or generated by the customary definition of expropriation, most tribunals — especially within our 'core' nine decisions in which the concept had most bearing on merits determination — deemed a finding that a measure falls within a State's police powers per se precludes it from constituting expropriation, thereby excluding any resulting duty to provide compensation.[473] By contrast, for example, the *Pope & Talbot*,[474] *Azurix*,[475] *Fireman's Fund*,[476] and *LG&E*,[477] tribunals expressly declined to adopt this approach, preferring to consider States' police powers as merely a relevant factor in a broader inquiry.

164. However, rather than evidencing a fundamental schism in arbitral approaches, the difference seems to lies in how the doctrine is articulated. Those arbitrators that equated 'police powers' simply with 'public interest regulation' without attaching additional criteria (such as rationality, non-discrimination or due process requirements) tended to consider that a finding that conduct falls within the police power insufficient to preclude a duty to compensate. The tribunal's reasoning in *El Paso* is illustrative in this respect. In considering a claim stemming from Argentina's 2002 'pesification' of public service provision contracts, the tribunal 'refused to hold' that general regulations interfering with investors' rights 'can never be considered expropriatory' because they 'should be analysed as an exercise of the State's sovereign power or of its police powers.'[478] Rather, the tribunal considered that while 'general regulations' benefitted from a presumption of legality, such measures must be 'non-discriminatory', 'adopted in accordance with the rules of good faith and due process'[479] and — crucially — reasonable.[480] Reasonableness, in the tribunal's view, required that measures not be 'arbitrary, discriminatory, disproportionate or otherwise unfair' or result in 'neutralisation of the foreign investor's property rights'.[481] The difference, then, is whether the police powers doctrine *itself*

471 See, esp: *Saluka* [257]; *Copper Mesa* [6.58]

472 See, esp: *InterAgua* [148]; *UAB* [1080]; *South American Silver* [622–30]

473 See, esp: *Burlington* [506]; *Tza Yap Shum* [173]; *Quiborax* [200]

474 *Pope & Talbot* [99–105]

475 *Azurix* [311–12]

476 *Fireman's Fund* [176, 188–94, 200–6]

477 *LG&E* [194–5]

478 *El Paso* [234]

479 *El Paso* [240]

480 *El Paso* [241]

481 *El Paso* [241]

incorporates such analyses, or whether these are deemed to apply as factors external to the inquiry generated by the concept. The result, however, is largely the same.

ii. Factors considered and inquiries adopted

165. The most crucial — and, for our purposes, most interesting — aspects of arbitral approaches to the police powers doctrine concern the various factors considered and inquiries generated in its application. The range of factors considered, and the tests used in considering them, ultimately determine how 'intrusive' or 'deferential' examination under the police powers doctrine is,[482] and, therefore, determine the concept's role in shaping States' capacities to define and pursue the public interest, and whether it can be seen to generate more appropriate or balanced reasoning.

166. Tribunals' analyses within the police powers framework revolve around eight — often overlapping — factors, addressed in turn below: (a) whether a measure is a 'generally applicable regulation'; (b) whether a measure pursues a 'public interest'; (c) whether a measure is adopted in good faith; (d) whether a measure is adopted in accordance with domestic law; (e) whether the investor was afforded due process; (f) whether a measure is discriminatory; (g) whether a measure respects investors' expectations; and, most importantly, (h) whether a measure sufficiently relates to its objectives, expressed as means-ends analysis. As the below shows, given tribunals' often scant reasoning, it is not always possible to precisely determine the content, structure and intensity of inquiry adopted in assessing these factors.

a. Whether a 'generally applicable regulatory measure'

167. While not directly addressed in the majority of decisions, in *Marfin* the tribunal considered (albeit in response to the claimant's arguments) the threshold issue of whether a 'targeted' measure constitutes a 'generally applicable regulatory measure' falling within the States' police powers.[483] Downplaying the significance of the 'general regulation' requirement, the tribunal remarked that, while the Central Bank of Cyprus's removal of a member of the claimant's management 'was not a regulatory measure having general application, it was carried out pursuant to one such regulation [Section 30 of the Banking Law].'[484] The tribunal considered that 'the distinction […] between on the one hand generally applicable regulations, and on the other hand, the application of those regulations to a specific set of facts' was not significant to

482 For use of these (not unproblematic) terms, see esp: Henckels (2015) 29–32

483 *Marfin* [826, 902–3]

484 *Marfin* [903]

the application of the police powers doctrine.[485] Other tribunal's silence on this issue seems to support this approach.

b. Whether a measure pursues a 'public interest'

168. Almost every tribunal that has employed the concept of police powers in merits determination has devoted some attention to the question of whether a measure pursues a 'valid' or 'legitimate' public interest.[486] However, no tribunal to date has yet attempted to definitively describe how measures captured by States' police powers are to be identified.[487] Arbitral practice on this point oscillates between the 'purpose-based' and 'means-based' approaches flagged above.[488] Illustratively, numerous tribunals — including in five of our nine 'core' decisions — endorsed the (hybrid) approach embodied in the ALI Third Restatement's description of the types of measures captured by the police power, thus including 'bona fide general taxation', 'regulation' and 'forfeiture for crime', as well as 'other action […] commonly accepted as within the police power'.[489] Similarly, rather than focusing on the purpose of the regulations being applied, the *Saluka*,[490] *Burlington*,[491] *Tza Yap Shum*,[492] *Quiborax*,[493] *UAB*,[494] and *Marfin*,[495] tribunals accepted that the police power covers action taken by administrative or regulatory authorities to execute or implement laws of general application in cases of infringement or violation.[496]

169. At the same time, tribunals have also employed logic suggesting that whether a measure qualifies as police powers action can be determined (solely) by its purpose. Working inductively, the police power would thus capture (at least): environmental protection;[497] regulation of land

485 *Marfin* [903], citing: *Saluka*; *Invesmart*; and *de Levi*.

486 See, eg: *Chemtura* [266]; *WNC Factoring* [394]

487 Thus the tribunal's observation in *Saluka* remains accurate: [263]

488 See Sec 4.4.2

489 ALI, Third Restatement (1987), Commentary to Sec 712; cited in: *Saluka* [260]; *Tza Yap Shum* [146]; *Quiborax* [202]; *Copper Mesa* [6.60]; and *Philip Morris v Uruguay* [292–3]

490 *Saluka* [256–7]

491 *Burlington* [506]

492 *Tza Yap Shum* [173]

493 *Quiborax* [206]

494 *UAB* [1091]

495 *Marfin* [826]

496 See too: *Tecmed* [124]

497 *Burlington* [519–29]; *Quiborax* [219]. See too: *Feldman* [103]

use, including through zoning laws;[498] the protection of public health,[499] welfare,[500] and morality;[501] industrial safety and labour protection;[502] the 'maintenance of public order',[503] and responses to 'social crisis or public unrest';[504] action taken by law enforcement personnel to implement civil or criminal penalties;[505] the administration and application of customs laws,[506] and (general) tax laws, including through the imposition of new taxes;[507] currency adjustments;[508] the 'granting or withdrawal of subsidies';[509] tariff adjustments;[510] regulation of the banking and finance sectors;[511] efforts taken to avoid economic crises;[512] and the 'valid exercise of belligerent rights' during armed conflict.[513]

170. It is thus not clear from arbitral practice whether States' police powers captures a finite list of permissible purposes and means of regulation, or — as seems more likely from the variety of measures accepted to date — covers all means and purposes deemed to express core functions of government. In this context, it is notable that in the 42 decisions in which arbitrators made some use of the concept, no tribunal held that a measure's aim did not constitute a 'valid' or 'legitimate' public policy objective. While certain tribunals have impugned whether a measure pursued its stated aims in good faith,[514] substituted their own assessment of risk for the host State's,[515] or declared that a measure was in fact direct at another (public interest) objective,[516] tribunals have thus proved hesitant to impugn States' categorisation of the public interest and the choice of means of protecting or promoting such interests.[517]

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498 *Feldman* [103]; (implicitly) *Tecmed* [120] ff

499 *Saluka* [256]; *Tza Yap Shum* [145]; *Philip Morris v Uruguay* [291–4, 300–1]. See too: (implicitly) *Servier* [569–84];

500 *Tza Yap Shum* [145]; *Philip Morris v Uruguay* [294]. See too: *UP&CD* [415]

501 *Saluka* [256]

502 *Quiborax* [219]

503 *Saluka* [256]

504 *Tecmed* [133]; *Philip Morris v Uruguay* [294]

505 *Al-Tamimi* [372]

506 *Quiborax* [219]

507 See, esp: *Feldman* [103]; *Saluka* [256]; *Tza Yap Shum* [173]; *Quiborax* [219]; *Ryan* [473, 495–6]

508 *Saluka* [256]

509 *Feldman* [103]

510 *Feldman* [103]; *Suez & Vivendi* [140]

511 *Saluka* [272–8]; *Marfin* [830]. See too: *de Levi* [475–6]; *Belokon* [204]

512 *Suez & Vivendi* [140]; *Burlington* [519–29]; *Marfin* [830]

513 *Saluka* [256]

514 See, eg: *Belokon* [204]

515 *Tecmed* [133–49]; *Burlington* [520–9]

516 *Tecmed* [127–32]

517 See, esp: *Copper Mesa* [6.64]; *Philip Morris v Uruguay* [418]; *Marfin* [870]

c. Whether adopted in good faith

171. Most tribunals applying the police powers doctrine have required that measures be adopted in good faith,[518] or be 'genuinely',[519] or 'legitimately',[520] aimed at their stated purposes. However, once again, this requirement has not been the subject of significant, distinct, elaboration; in most cases, whether a measure has been adopted in good faith has been imputed — positively or negatively — from other factors. For example, where a measure has been found to be 'arbitrary', 'discriminatory', or 'disproportionate' it has also been inferred to lack good faith.[521] This said, the tribunals in *Saluka* and *Marfin* engaged in distinct inquiry, and, rather than merely linking the good faith requirement to other factors, looked for evidence of bad faith — notably an intention to nationalise or otherwise expropriate an investment,[522] or an abusive exercise of regulatory authority designed to force the investor to abandon its investment.[523]

d. Whether adopted in accordance with domestic law

172. As has been well-explored and, as discussed further in Chapter 6, investment tribunals' engagement with domestic law raises numerous thorny issues.[524] In making use of the police powers doctrine, several tribunals have, nevertheless, expressly considered whether a measure complied with the requirements of domestic law. This occurred, understandably, most often in disputes concerning the imposition of sanctions for alleged prior breaches of domestic legislation, contractual violations, or breach of the conditions of a license or concession.[525]

173. In considering this factor, certain tribunals have engaged in their own assessment of the requirements of domestic law and the propriety of host States' measures. Illustratively in this regard, while the precise test it applied is unclear, the *Burlington* tribunal's determination that Ecuador could not benefit from the police powers doctrine was largely based on its interpreta-

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518 See, esp: *Philip Morris v Uruguay* [305]; *UAB* [1092]; and *Marfin* [826]. See too: *WNC Factoring* [394]

519 *Chemtura* [266]

520 See, eg: *UP&CD* [415]

521 See, esp: *Belokon* [201–4]

522 *Marfin* [832–66]. See too: *Quiborax* [139]; *South American Silver* [625–9]

523 *Saluka* [257]. See too: *Ryan* [484–5]. See further, in the FET context: *Al-Tamimi* [444–5]

524 For example, on the distinction between domestic law as directly applicable or as 'fact' relevant in assessing responsibility, ascribed to the PCIJ's dicta in *Upper Silesia*, at 19; See, eg: Nollkaemper (2006) 5 Chinese JIL 301 and: Gaja in Nijman and Nollkaemper (eds) (OUP 2007), 58–9. For the argument that reference to domestic law remains relevant — or at least occurs on a regular basis in practice — regardless of choice of law provisions, See, esp: Douglas (CUP 2009) 69–72; Grisel in Douglas, Pauwelyn and Viñuales (eds) (OUP 2014) 213-33, 222–3, Hepburn (2017) 107–8 and Živković (2019) 20 JWI&T 513, 530 ff.

525 See, esp: *Saluka* [271–5]; *Burlington* [509–29]; *Tza Yap Shum* [206–22] *Quiborax* [207–14]; *UAB* [1092–8] *Marfin* [884–99]. See similarly: *Belokon* [204]

tion of domestic law and the finding that the government's occupation of the investor's concession was not a lawful sanction for the investor's alleged breaches of a participation contract.[526] Similarly, the *Tza Yap Shum* tribunal devoted significant attention to assessing whether Peru's tax authorities had adequately observed applicable procedural rules,[527] and impugned an appellate decision for insufficient reasoning.[528] Likewise, in *Quiborax*, the tribunal considered Bolivia's measures fell outside its police powers *inter alia* on the basis that the termination of a concession was not, in its determination, a sanction provided for the investor's alleged misconduct.[529] While its analysis on this issue was not extensive, the *Copper Mesa* tribunal seems to have imputed unlawfulness when deemed it significant that Ecuador's move to terminate the investor's concessions followed its successful appeal against an earlier attempt at nullification.[530]

174. Other tribunals, have, by contrast, adopted seemingly less rigorous tests. For example, in *Saluka*, the tribunal considered that a measure would only fail to qualify as a valid exercise of police powers where there was 'clear and compelling evidence of error or impropriety' in the application of the relevant legislation by domestic authorities.[531] This approach was endorsed by the *Marfin* tribunal, which added that in the absence of such 'clear and compelling evidence' (at least in technical areas such as banking regulation) tribunals ought to defer to the special knowledge and expertise of domestic authorities.[532] Likewise, after noting that the Uruguayan constitution empowered and required the government to enact legislation to promote citizens' health,[533] the *Philip Morris* tribunal considered that impugned measures would fall outside States' police powers (and also constitute a breach of the duty to afford fair and equitable treatment) only if it were shown that there was a 'manifest lack of reasons for legislation'.[534] Similarly, while the *UAB* tribunal noted that several grounds invoked as justification for the revocation of the investor's licences lacked merit, the existence of a single 'sufficient

526 *Burlington* [509–15]

527 *Tza Yap Shum* [206–18]

528 *Tza Yap Shum* [234–40]

529 *Quiborax* [207–13]. See, too: *Belokon* [204]; *Tecmed* [120–4]

530 *Copper Mesa* [6.72–4]

531 *Saluka* [273]. The tribunal further considered it relevant that domestic appellate bodies had upheld the regulator's decisions: [274]

532 *Marfin* [898–9]

533 *Philip Morris v Uruguay* [302]

534 *Philip Morris v Uruguay* [399]. The tribunal expressly linked its analysis within the framework on FET to its police powers inquiry: [306]

and valid ground' was determinative,[535] and thus revocation was within the regulator's 'statutory discretion'.[536]

e. Whether investor afforded due process

175. Several tribunals have expressly addressed whether an investor was afforded due process when considering States' police powers.[537] Tribunals' approaches suggest that any defect in due process throughout the life of a measure will mean a State cannot rely on its police powers to exclude the duty to compensate, even if these defects (and measures' substance) could be challenged in domestic proceedings — and even if an investor has failed to exhaust such domestic remedies.[538] Tribunals have, however, approached due process in both procedural and substantive terms,[539] and have framed inquiry at different levels of intensity. For example, at one end of the spectrum, in endorsing the Harvard Draft's approach, the *Saluka* tribunal — while it did not expressly address whether due process had been afforded within the framework of its police powers analysis — accepted that measures could not be justified under States' police powers if an investor was denied the opportunity to challenge decisions before a competent tribunal, was denied a fair hearing, or, if a penalty imposed constitutes a 'clear and discriminatory violation' of domestic law, or 'unreasonably departs from the principles of justice recognized by the principal legal systems of the world'.[540] Similarly — and while it likewise did not directly address the issue when applying the police powers doctrine — the *Philip Morris* tribunal seems to have considered the applicable standard to require '"a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety"' on the part of host State authorities.[541]

176. Likewise, in finding that the investor had been afforded due process, the *Marfin* tribunal considered 'the Treaty and international law' required the Central Bank of Cyprus (CBC) to give 'reasonable notice and reasons for its decision'.[542] In applying this test, the tribunal held that prior to removing a manager, the CBC: informed the investor of its concerns over its compli-

535 *UAB* [1094]

536 *UAB* [1098]

537 See, esp: *Marfin* [826]

538 See, esp: *Quiborax* [226]; *Copper Mesa* [6.69]

539 On the (not unproblematic) distinction, See, eg: Kotuby and Sobota (OUP 2017) 70–3

540 *Saluka* [257], citing: Arts 10(5) and 6–8 Sohn (1961) . The tribunal did, however, emphasise that the measures had been upheld on appeal by competent tribunals on two occasions: [274]

541 This follows from the tribunal's linking of the notions of 'arbitrariness' under the police powers doctrine and the FET provision contained in Art 3(2) 1988 Switzerland-Uruguay BIT: *Philip Morris v Uruguay* [390], quoting: *ELSI* [128]. The *UAB* tribunal similarly linked consideration of due process as an element of fair and equitable treatment with its analysis within the police powers framework: [1093, 989–1000]

542 *Marfin* [975]

ance with minimum liquidity ratios; expressed its concerns stemmed from the bank's management; raised the possibility of potential intervention under the applicable provisions of the Banking Law; and gave the investor opportunities to respond to and mitigate its concerns before taking action.[543] Notably, the tribunal considered its task did not require it to determine whether all procedural requirements relating to the timing and form of notice had been complied with.[544] The *UAB* tribunal likewise centred its analysis of due process on the quality and timeliness of the notice given to an investor prior to the revocation of its licenses, as well as the opportunities afforded to remedy the regulator's concerns prior to revocation.[545] The *UAB* tribunal further emphasised that the regulator's decisions had been 'reviewed by the Latvian courts'.[546]

177. In *Quiborax*, the tribunal considered the 'standard of due process under international law, and more specifically in the expropriation context' required '"an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it."[547] The tribunal also considered that this 'standard' was reinforced by Article 16 of the Bolivian Law on General Administrative Procedure, which protected individuals' rights, *inter alia*, to be informed of and participate in proceedings, to receive reasoned responses to requests or applications, and not to be subjected to discrimination.[548] The tribunal considered that Bolivia had failed to meet these requirements in several respects, and thus could not rely on its police powers.[549] While it linked its consideration of whether the investor had been afforded due process to the issue of whether the measures were (substantively) justified in the circumstances under Bolivian law,[550] a core aspect of this finding was the tribunal's determination that the investor had not been notified of,[551] or been permitted to seek or provide information concerning,[552] a crucial audit prior to the decision to revoke its concessions. Significantly, while the tribunal noted that 'Bolivian law provides for several constitutional or administrative actions that the Claimants may have attempted',[553] the availa-

543 *Marfin* [967–76]

544 *Marfin* [975]

545 *UAB* [1002–4]. While conducted in interpreting the BIT's FET provision, the tribunal considered that this analysis applied *'mutatis mutandis*' in considering whether the revocation was justified under Latvia's police powers: [1093]

546 *UAB* [1001]

547 *Quiborax* [221], quoting: *ADC* [435]

548 *Quiborax* [222]

549 *Quiborax* [227]

550 *Quiborax* [226]

551 *Quiborax* [223]

552 *Quiborax* [225]

553 *Quiborax* [226]

bility (and non-use) of 'domestic actions [… did] not change [its] conclusion that the revocation did not comply with due process, the determinative factors being that the Claimants were not heard during the audits and that the revocation lacked valid reasons.'[554]

178. Other tribunals have more closely linked due process to measures' substance. For example, in *Tza Yap Shum,* while the tribunal accepted that the investor had recourse to — and had in fact made use of — procedures to appeal the imposition of precautionary measures on its assets designed to ensure payment of a tax debt, both before the imposing authority and the competent tribunal (*Tribunal Fiscal*),[555] it nevertheless considered that due process had been denied, *inter alia*, because the *Tribunal Fiscal* had failed to adequately consider the investor's arguments — including that precautionary measures only be imposed in 'exceptional' circumstances.[556] While couched in terms of a failure to give adequate reasons, the tribunal's analysis thus resembles de novo, substantive, review of both the imposing authority's and *Tribunal Fiscal*'s decisions.

179. Similarly, in finding that Ecuador's 2008 'Termination Resolutions were no mere regulatory measures' *inter alia* because they 'were made […] without due process',[557] the *Copper Mesa* tribunal held that the Resolutions 'were made and implemented without any "prompt review by a judicial or other independent authority"' as required by Article VIII of the 1996 Canada-Ecuador BIT.[558] The tribunal considered that despite the investor's 'best efforts' it had 'no effective remedies under Ecuadorian law to challenge the Termination Resolutions, the absence of due process or the non-payment of any compensation', and that it was 'no answer […] that no such compensation, legal remedy or administrative review were permitted […] under the Mining Mandate or otherwise under its national laws'.[559] The 'higher standards' imposed by the BIT, the tribunal remarked, did 'not require an investor to pursue ineffective legal remedies when its goose is well and truly cooked.'[560] Notably, however, in reaching this conclusion, the tribunal did not address Ecuador's arguments that the investor had filed unsuccessful 'claims for extraordinary constitutional relief', and had failed to exercise its rights to commence further administrative and constitutional review proceedings.[561] Rather than examining national administrative or judicial authorities' conduct for procedural or substantive

554 *Quiborax* [226]
555 *Tza Yap Shum* [224, 231–4]
556 *Tza Yap Shum* [234–40]
557 *Copper Mesa* [6.66]
558 *Copper Mesa* [6.68]
559 *Copper Mesa* [6.69]
560 *Copper Mesa* [6.69]
561 *Copper Mesa* [6.38]

defects, the tribunal thus seems simply to have equated 'due process' and the availability of 'prompt review' with the provision of an 'effective' remedy. It is not clear from the tribunal's reasoning, however, what — beyond the payment of compensation — would satisfy this 'effectiveness' requirement (a term not present in Article VIII of the BIT).

f. Discrimination

180. Relatedly, while most tribunals applying the police powers doctrine referred to the requirement that measures be 'non-discriminatory',[562] this aspect of the concept has not been the subject of much elaboration. It is in this context unclear *how* discrimination ought to be examined. The intuitive starting point for considering whether an actor has been subjected to discriminatory treatment — and that employed by other international courts and tribunals — is to identify whether the individual was subjected to differentiated treatment.[563] Once such treatment has been established, the second step in analysis is typically to determine whether differentiation was justified by permissible grounds of distinction.[564] Although they did not provide much in the way of elaboration, this method is reflected in the relational approaches adopted by the *Saluka*, *Philip Morris* and *Marfin* tribunals' requirement that the investor show it had been treated less favourably than the host State's nationals or other foreign investors in similar circumstances.[565] However, most tribunals referring to the need for non-discrimination in considering whether measures could be justified as an exercise of police powers did not engage in such a relational assessment. By contrast, the *Tza Yap* Shum tribunal seems to have conflated the issue with the question of arbitrariness, understood as requiring due process, good faith and a sufficient connection between a measure and its stated aims.[566]

g. Investors' expectations

181. While not often expressly deemed relevant, certain tribunals also considered investors' 'reasonable' or 'legitimate' expectations when determining whether a measure was a valid exercise of police powers.[567] For example, in *Tecmed* — ostensibly as part of its inquiry into whether Mexico's measures were justified as an exercise of police powers — the tribunal considered that the investor 'had legitimate reasons to believe that the operation of [its] [l]andfill

562 See, illustratively: *Saluka* [257]; *Chemtura* [266]; *Tza Yap Shum* [148]; *Philip Morris* [305]; *WNC Factoring* [394]; *Copper Mesa* [6.60]; and *UAB* [1080]

563 See, illustratively: *Japan–Alcoholic Beverages, AB Report,* 26–31; *US–Shrimp, AB Report* [165]

564 See, eg: *US–Tuna II (Mexico), AB Report* [203] ff

565 *Saluka* [307] (endorsed in: *UAB* [839]); *Philip Morris v Uruguay* [402]; and *Marfin* [980]. See too, the *Copper Mesa* tribunal's approach when considering whether national treatment had been afforded: [6.71]

566 *Tza Yap Shum* [194]

567 See, eg: *Tecmed* [122, 149–50]; *Copper Mesa* [6.61]; and *Marfin* [868]. See (implicitly): *Tza Yap Shum* [173]

would extend over the long term' and could not have reasonably foreseen the 'political and social circumstances' that (the tribunal held) had led to the non-renewal of its licence.[568] Similarly, while however finding that the investor had not established any such 'expectation to prevent the application of […] general changes adversely affecting its investments', the *Copper Mesa* tribunal considered that although investors assume the risk of legislative change when they make their investment, legitimate expectations could be formed even in the absence of express commitments of regulatory stability.[569] Finally, while it devoted the issue little attention, and noted that consideration of investors' expectations was more suited to an FET inquiry, when examining Cyprus's exercise of police powers, the *Marfin* tribunal accepted that 'investor's legitimate expectations are also relevant within the framework of an expropriation analysis'.[570] The tribunal, however, rejected the idea that the investor could have a legitimate expectation that Cyprus would adopt a particular position in Eurozone crisis negotiations.[571] While impossible to draw firm conclusions from these tribunals' limited elaboration of the role of investors' expectations, these approaches risk elevating mere expectations to the level of property rights capable of expropriation — even those formed in the absence of any assurances concerning the stability of a regulatory framework or length of authorisation to engage in activities.

h. Means-ends analysis

182. Amongst the most important factors in tribunals' approaches to States' police powers — and that which often most directly controls the intensity of inquiry generated and, hence, the concept's consequences for States' capacities to define and pursue the public interest — is the connection required between a measure and its objectives. Most tribunals have, expressly or implicitly, engaged in means-ends analysis when examining States' exercise of police powers. As already noted, such analyses often overlap with consideration of other factors and it is not a simple task to tease out the precise tests applied. However, the range of terms employed in describing the required nexus — often used in combination — and the structures and intensities of inquiry clearly signal tribunals have employed competing standards.

568 *Tecmed* [149]

569 *Copper Mesa* [6.61]

570 *Marfin* [868]

571 *Marfin* [873–5]. See too in the FET context: [1233–6]

183. For example, in *Saluka*, the tribunal considered whether measures were 'aimed at' their stated goals,[572] and constituted a 'justified',[573] and 'reasonable',[574] response in the circumstances, based on information it was 'reasonable for [the regulator] to consider'.[575] The tribunal remarked that '[i]n the absence of clear and compelling evidence that the [Czech National Bank] erred or acted otherwise improperly in reaching its decision' to put the bank the investor held shares in into forced administration, it had to 'accept the justification given by the […] regulator'.[576] We can infer from the tribunal's later elaboration of 'reasonableness' when discussing FET that it considered this standard requires that a measure is 'related to', or 'reasonably justifiable' with reference to 'a rational policy'[577] Similarly, while it did not expressly state what the appropriate nexus required, given the *UAB* tribunal linked its analysis under the BIT's expropriation and FET provisions,[578] we can infer that it likewise considered a measure must bear a 'reasonable relationship to some rational policy',[579] and be a 'justifiabl[e]' response in the circumstances, including in light of the investor's conduct.[580] Importantly, the tribunal's comment that adopting a proportionality test in the context of assessing States' police powers 'is controversial' suggests that it regarded proportionality assessment as inappropriate.[581] While it seemed less willing to defer to national authorities' determinations, the *Quiborax* tribunal likewise assessed whether certain grounds given for cancellation of the investor's concessions were supported by the evidence available to decision-makers at the time of their decision.[582]

184. Notably, several tribunals' analyses within the police powers framework have incorporated — and largely turned on — assessment of measures' 'proportionality'.[583] While I discuss these decisions in more detail in the next chapter, it bears briefly highlighting some important aspects. Proportionality assessment has been framed in several different ways, generating vastly different intensities of inquiry. At the more 'deferential' end of the spectrum, in *Philip Morris*, in concluding that Uruguay's single presentation and health warning labelling requirements

572 *Saluka* [254–5, 275]; see too: *Marfin* [905]

573 *Saluka* [271]

574 *Saluka* [272]

575 *Saluka* [272]

576 *Saluka* [273]

577 *Saluka* [307, 309]

578 *UAB* [1093]

579 *UAB* [911]

580 *UAB* [1013–16; 1093]. See, similarly: *WNC Factoring* [395–6]

581 *UAB* [1088]

582 *Quiborax* [211]

583 See, esp: *Tecmed* [122]; *Philip Morris v Uruguay* [305]; and *Marfin* [826]. See too: *Tza Yap Shum* [148]; *EDF v Romania* [292–4]; *El Paso* [241]; *Servier* [570]; *Mobil v Argentina* [Remiro Brotóns SO] [77]; *Koch Minerals* [7.19]; and *South American Silver* [520–1]

were 'proportionate to the objective they meant to achieve',[584] and thus could be justified as the valid exercise of its police powers,[585] the tribunal required (merely) that the measures were 'directed to [the] end [of reducing 'the incidence of smoking'] and were capable of contributing to its achievement'.[586] Based on the tribunal's analysis in the FET context — which it expressly linked to its police powers assessment [587] — measures would only fail to adequately relate to their objectives if they were 'entirely lacking in justification or wholly disproportionate',[588] or if there was a '[m]anifest lack of reasons for the legislation'.[589] Importantly, the tribunal did not consider it necessary to establish that measures meaningfully contributed to the achievement of their objectives, simply that, based on available evidence, they were a 'potentially effective' means of achieving their aims,[590] and thus, 'reasonable' at the time of adoption.[591]

185. The *Philip Morris* tribunal's approach was endorsed in *Marfin*.[592] While it considered that, '[u]nless the measure at issue is shown to be arbitrary, capricious and unrelated to a rational policy, or manifestly lacking even-handedness, [it] should not intervene',[593] in assessing proportionality, the *Marfin* tribunal expressly considered the relative weights of measures' imposition on the enjoyment of the rights attaching to the investor's property interests (management rights attaching to a shareholding) and the risk of societal and economic harm that might result from the 'disorderly bankruptcy' of 'one of the two systemic banks in the country'.[594] Given the magnitude of this risk and the fact that the investor retained many benefits of its shareholding (notably participation in management and the ability to collect dividends) it had not been 'made to bear an excessive burden'.[595]

186. By contrast, at the more 'intrusive' end of the spectrum, the *Tecmed* tribunal considered its task in considering whether Mexico's non-renewal of the investor's permit to operate a landfill

584 *Philip Morris v Uruguay* [306]
585 *Philip Morris v Uruguay* [305]
586 *Philip Morris v Uruguay* [306]
587 *Philip Morris v Uruguay* [306]
588 *Philip Morris v Uruguay* [420]
589 *Philip Morris v Uruguay* [399]
590 *Philip Morris v Uruguay* [306]
591 *Philip Morris v Uruguay* [409]
592 *Marfin* [829]
593 *Marfin* [870]
594 *Marfin* [984]
595 *Marfin* [984]

site was to determine whether measures 'are reasonable with respect to their goals, the deprivation of economic rights and [investors'] legitimate expectations'.[596] However, 'reasonableness' in the tribunal's view required 'a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure.'[597] The tribunal considered that '[t]o value such charge or weight, it is very important to measure the size of the ownership deprivation caused by the actions of the state and whether such deprivation was compensated or not.'[598] In doing so the tribunal determined, de novo, the 'actual' risk mitigated by a measure (substituting this objective in analysis for that claimed by the relevant authorities),[599] the likelihood of this risk occurring,[600] and the severity of risk that would justify what it considered to be highly damaging measures.[601]

187. Likewise, and endorsing the *Tecmed* approach, in *Tza Yap Shum*, the tribunal considered that States could not justify measures as an exercise of police powers if authorities 'act with such arbitrariness or disproportionality that the original objective is meaningless'.[602] The tribunal suggested this required that measures were 'reasonable and necessary' means of achieving their objectives.[603] The tribunal, however, largely equated the 'proportionality' requirement with its conception of 'arbitrariness', which it regarded constituted a general principle of law.[604] As well as relating to procedural aspects, the tribunal examined the relationship between the measure and its stated objectives within its arbitrariness assessment. Significantly, the tribunal made its own determinations concerning the measures' effectiveness,[605] and seems to have adopted something resembling a 'least restrictive means test' in finding that the tax enforcement authorities had not sought to minimise the harm to the investor's business by first attempting less impactful measures.[606]

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596 *Tecmed* [122], citing: *Mellacher v Austria* 24; *Pressos Compania Naviera v Belgium* 19; and *James v UK* 19–21, 24

597 *Tecmed* [122]

598 *Tecmed* [122]

599 *Tecmed* [132]

600 *Tecmed* [133, 144, 148–9]

601 *Tecmed* [144]

602 *Tza Yap Shum* [148], citing: Coe and Rubins in Weiler (ed) (Cameron May 2005) 597-700, 642

603 *Tza Yap Shum* [145]

604 *Tza Yap Shum* [186–91]. The tribunal considered the ICJ's elaboration of the principle in *ELSI* (at [128]) to set too lax a standard, preferring the more rigorous articulations in*: ELSI* [Schwebel DO]; and *EDF v Romania* [303]

605 *Tza Yap Shum* [219–22]

606 *Tza Yap Shum* [213–18, 145]. This followed, admittedly, from the tribunal's determination that such mitigation was required under the applicable regulations and internal procedures: [214]

iii. Onus of proof

188. Finally, most tribunals have not expressly addressed the issue of which party bears the onus of proving (or disproving) whether a measure is captured by the police powers doctrine. However, consistent with the view that the doctrine constitutes an element of the customary definition of expropriation, the tribunals in *Tza Yap Shum*,[607] *Philip Morris*,[608] *Marfin*,[609] and *Servier*,[610] suggested that claimant investors bear the responsibility of demonstrating that host States' measures do not comply with its requirements. By contrast, and consistent with the view that the doctrine operates as an 'affirmative defence' to expropriation claims,[611] the tribunals in *inter alia Tecmed*,[612] *Saluka*,[613] *InterAgua*,[614] *Burlington*,[615] *Quiborax*,[616] *Copper Mesa*,[617] *Bear Creek*,[618] and *South American Silver*,[619] seem to have considered it falls on the respondent to establish that it has fulfilled all requirements. While a less significant issue than the factors considered and intensity of inquiries adopted, where the onus lies has potentially significant bearing on the outcome of proceedings; it is, to use the *Servier* tribunal's phrasing, far more arduous from an evidentiary standpoint for host States to '"prove the negative" in the sense of demonstrating an absence of bad faith and discrimination, or the lack of disproportionateness in the measures taken.'[620]

4.6 Lessons from arbitral practice

189. What lessons, then, can we draw from the above account of the police powers doctrine in arbitral practice? Returning to the first of the three questions guiding analysis, while the prevalence of recourse to the concept is undoubtedly growing, consideration of States' police powers played a significant role in only nine 'core' decisions, and some, albeit less defined, role in merits determination in a further 25. In most instances, reference to the concept seemingly had little bearing on merits determination; rather, it was used adjectivally, to acknowledge

607 *Tza Yap Shum* [151]
608 *Philip Morris v Uruguay* [389] ff
609 *Marfin* [826] ff
610 *Servier* [582–4]
611 *InterAgua* [133, 148]
612 *Tecmed* [122] ff
613 *Saluka* [250–1]
614 *InterAgua* [116, 133, 146–50]
615 *Burlington* [511] ff
616 *Quiborax* [210–20]
617 *Copper Mesa* [6.58]
618 *Bear Creek* [Award] [471–4], [Sands DO] [41]
619 *South American Silver* [622]
620 *Servier* [583]

— in broad terms — States' sovereign authority to regulate events and individuals within their jurisdiction. Even in those decisions in which it was devoted most attention, it is sometimes difficult to appreciate the precise role played by the police powers doctrine.[621] Further, arbitrators did not expressly refer to the concept in the majority of the disputes in which it was raised in parties' pleadings. Thus, when these decisions are considered as a proportion of the entire corpus of this study, the police powers doctrine's place in arbitral practice remains rather insignificant. This said, however, it has clearly gained traction in recent years and is playing an increasingly important role in an ever larger number of decisions. Additionally, whereas earlier decisions were typified by the vague role the concept played in analyses, in recent decisions the concept has been expressed in more concrete terms and has been ascribed increased weight in merits determination — albeit with significant differences in content and operation.

190. This leads us to our second guiding question: *what*, precisely, has migrated? To answer this, two points must be made. First, while its migration can be traced to the writings of North American scholars during the 1930s and 1940s, and while the two versions are clearly inspired by the same underlying idea — that governments possess core, or inalienable, regulatory powers — the police powers doctrine's various constructions in arbitral practice (and in scholarship) do not much resemble its role — particularly its contemporary role — in US public law. If at all, its use in investment arbitration most resembles the US Supreme Court's approach to the concept in the period before it reined in the concept in *Mahon.* Importantly, neither tribunals nor scholars have expressly referred to domestic practice in elaborating the doctrine's content or operation. Thus, while its migration can at a general level be considered part of a broader process of 'universalizing' US approaches to property protection,[622] the version of police powers that has migrated into arbitral practice is a rather different beast to that recognised in the domestic context. As shown above, tribunals have ascribed States' police powers content — and attached conditions to its exercise — that (while perhaps stemming from other constitutional guarantees) cannot be considered inherent elements of the doctrine in domestic law.

191. The divergent evolution of the police powers doctrine in the investment context can largely be explained by the significant differences that pertain in the structure of the relationships it seeks to manage at the international and domestic levels. While, in US public law, the police power's function is by way of a 'saving' or closing rule, conditionally authorising state governments

621 We might, eg, point to the *Copper Mesa* tribunal's reasoning at: [6.63–7]

622 Schneiderman (2008) 57–62, 7. See too: Higgins (1982) 330–1 Paparinskis (2013) 223 Kurtz (2014) 294 Subedi (2012) 159 Viñuales (2014) 326, 35–6 Perkams (2010) 108–9, 22 Bonnitcha (2014) 256 Sornarajah (CUP 2004) 353–4 McLachlan, Shore and Weiniger (OUP 2008) 267, 87 Newcombe and Paradell (2009) 357 López Escarcena (Elgar 2014) 188. Paparinskis (2011) 313.

to exercise powers not expressly provided for in the Constitution provided such powers are exercised in accordance with certain minimum conditions, in the investment context, there is no state-federal relationship to moderate and no express constitutional limitations to take into account. Further, as shown in Chapter 2 (and as I return to in Chapter 7), the international legal order does not require a closing rule authorising States to exercise regulatory powers. This function is already fulfilled by the systemic rule recognising that States may engage in any conduct not conditioned by a positive rule of international law.[623]

192. The second point is that, while arbitrators have indeed agreed on certain common features, recourse to the police powers doctrine has not yet generated a single mode or structure of inquiry. Arbitrators have adopted a variety of approaches to the effects generated by a finding that a measure constitutes a valid exercise of police powers, where the onus of proof lies, the factors relevant in its application and, crucially, the types and intensities of inquiry it generates. Further, it remains unclear whether the factors considered relevant in assessing States' exercises of police powers are to be considered cumulatively or individually and, if sequentially, in what order. Thus, rather than the migration of a single rule, we seem to face a situation involving the attempted migration of several competing conceptions of States' police powers.

193. This brings us to our final — most significant — guiding question: *what consequences* arise from arbitrators' use of the police powers doctrine, particularly for States' capacities to define and pursue the public interest? The answer to this question, as unsatisfying as it may be, is: 'it depends' — it depends on what aspects of arbitral practice we consider. As a very general matter, recognition by tribunals — however slight — of host States' sovereign authority to regulate and (where accepted) the presumed lawfulness of government action is a welcome step forward, particularly when we consider that until recently the prevailing approach was often '*in dubio, pro investore*'.[624] However, whether recognition of this fact through the police powers doctrine will lead to more 'balanced' outcomes or contribute to preserving more regulatory space for host States depends entirely on its formulation and application. As shown above, however, use of the police powers doctrine has generated inquiries that we might label 'intrusive', as well as those that are more 'deferential' to States.

194. For example, those of us concerned with protecting a core of regulatory powers for States might well welcome the approaches adopted by the tribunals in *Saluka*, *Philip Morris*, *UAB* and *Marfin*. These awards' approaches — especially to the requisite means-ends nexus, dis-

623 *Lotus*, 18–20; Fitzmaurice (1957) 92 RCADI 1, 50; Raz (1979) 61–2, 77; Kelsen (1952) 304–6

624 Methymaki and Tzanakopoulos (2016) 29, 39 ff, citing: *Noble* [46–52]

crimination, and due process — arguably demonstrate that the police powers doctrine can protect well-intended exercises of regulatory power from (particularly) expropriation claims, without unduly exposing investors to genuinely arbitrary exercises of authority. By contrast, however, we may well be concerned by the structure of inquiry adopted in the *Tecmed*, *Tza Yap Shum* and *Copper Mesa* awards, which involve de novo, merits-based review of host State authorities' decision-making and which approach core questions relating to the nature of discrimination and due process in primarily substantive terms. The *Tecmed* and *Burlington* tribunals' willingness to substitute their own risk assessments for those of domestic authorities might, likewise, ring alarm bells.

195. All this is merely to say that caution is due. The police powers doctrine does not provide off-the-shelf solutions. Rather, like all borrowed public law concepts, it requires significant arbitral 'calibration'. However, and as I explore further in Chapter 7, it is unlikely that arbitral practice will settle definitively on one version of the police powers doctrine. Diversity in arbitral practice largely stems from the concept's inherent malleability and the structural realities of investment dispute settlement. There is nothing, in other words, that guarantees future inquiries under the framework of assessing States' police powers will resemble, say, the *Marfin* tribunal's, rather than the *Tecmed*'s.

196. Three additional observations deserve drawing out. First, as flagged above, approaching States' police powers as precluding a duty to compensate seems to circumvent the plain wording of many expropriation provisions which typically require (at a minimum) that measures 'tantamount to expropriation or nationalization' may only be adopted 'for a public purpose', 'in a non-discriminatory manner'; upon payment of compensation; and in accordance with due process.[625] If the text of an expropriation clause (or the customary definition of expropriation) requires a State to expropriate or nationalise only for a public purpose, with due process, in a non-discriminatory fashion, and to compensate — even if the public purpose requirement is met — how then can the fact that the measure pursues a public purpose preclude a finding of expropriation? As Higgins noted in 1982 and several authors have since reiterated,[626] the 'strange circularity' of logic generated [627] rings alarm bells concerning whether the police powers doctrine is 'intellectually viable'.[628] The only way to save the preclusion approach seems to be to accept that, under the customary definition of expropriation, measures that fall within a State's police powers, are per se not 'tantamount' or 'equivalent' to expropriation

625 See, illustratively: Art IV(1) 1991 US-Argentina BIT

626 Higgins (1982) 330–1; Kurtz (2014) 290; Henckels (2012) 225, n 5

627 Kurtz (2014) 290

628 Higgins (1982) 331

— regardless of their impact on the value or enjoyment of property. However, as I explore in Chapter 6, the viability of this approach depends on whether sufficient State practice and *opinio juris* have coalesced to support it.

197. Second, as the above shows, due to significant overlap in the factors considered and types of inquiries engaged in, recourse to the police powers doctrine in interpreting and applying expropriation provisions often bears striking resemblance to the inquiries tribunals typically conduct when assessing States' obligations to afford fair and equitable treatment. Indeed, as in *Chemtura*,[629] *Philip Morris*,[630] and *UAB*,[631] when considering States' exercise of police powers, tribunals have even gone so far as to expressly link or repeat analyses conducted in interpreting FET provisions. By requiring essentially the same conditions to be met under both provision types, an unintended consequence of arbitral practice thus seems to be the creation of a single 'super standard' of treatment.

198. Third, and similarly, by construing States' police powers as an 'exception' or 'defence' applicable in expropriation claims, arbitrators have effectively incorporated, proprio motu, an implicit general exceptions (or definitional 'carve-out') provision of the type now often expressly included in IIAs. The *Copper Mesa* tribunal's finding that the police powers doctrine turned on the 'same factors' as the general exceptions provision contained in Article XVII(3) 1996 Canada-Ecuador BIT (itself modelled on Article XX GATT) provides an illustrative example of this trend.[632] So too does the *Philip Morris* tribunal's attempt to shore up its use of the police powers doctrine with reference to States' practice of including such general exceptions and definitional provisions in recent treaties and model agreements.[633] We can likewise see evidence of this trend in the *Bear Creek* tribunal's finding that express inclusion of definitional and exceptions provisions precluded recourse to the police powers doctrine.[634]

199. Finally, before turning to the second concept study in the next chapter, it is worth briefly highlighting an essential question I have not yet addressed: whether arbitral recourse to the police powers doctrine in fact ought to be viewed as the application of extant international law — or, in other words, whether the concept finds adequate expression in the recognised sources of international legal obligation. As alluded to, both scholars and tribunals have to date relied

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629 *Chemtura* [266]

630 *Philip Morris v Uruguay* [390]. The *UAB* tribunal similarly linked consideration of due process as an element of fair and equitable treatment with its analysis within the police powers framework: [1093, 989–1000]

631 *UAB* [1093, 989–1000]

632 *Copper Mesa* [6.58]

633 *Philip Morris v Uruguay* [300–1]

634 *Bear Creek* [Award] [473–4], and [Sands DO] [41]

exclusively on subsidiary sources when justifying recourse to the police powers doctrine — notably prior arbitral decisions, scholarly writings and (scholarly) codification attempts like the Harvard Draft and ALI Third Restatement.[635] In considering the formal validity of the turn to public law in Chapter 6 below I address whether arbitral practice employing the police powers doctrine ought properly be seen as the valid application of extant international law, or, rather, as arbitral legislation.

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635 See, esp: Kurtz (2014) 284, 9 ff; Paparinskis (2011) 313

5

THE PROPORTIONALITY PRINCIPLE

5.1 Introduction

200. In further exploring the turn to public law concepts in arbitral practice identified in Chapter 3, in this chapter I consider the growing role played by the principle of proportionality in investment dispute settlement. As in the previous chapter, this inquiry will be guided by three questions (i) how significant (both quantitatively and qualitatively) has the use of proportionality analysis been to arbitral practice?; (ii) what structures and roles has the concept been ascribed in arbitral reasoning?; and (iii) what are the consequences of arbitral recourse to the concept, particularly for States' abilities to define and pursue the public interest?

201. The chapter is structured as follows. Section 5.2 briefly considers the conceptual, historical and doctrinal origins of proportionality analysis as a means of moderating conflicts between public and private interests. Section 5.3 provides an account of the varied ways proportionality features in domestic legal orders and substantive sectors of the international legal order. Section 5.4 considers the doctrinal and policy-based arguments so far presented justifying proportionality's place in deciding investment disputes. Most importantly, in Section 5.5, I map the various ways and contexts in which proportionality has in fact been employed in arbitral practice. By way of conclusion, Section 5.6 seeks to draw lessons from arbitral practice concerning the varied roles proportionality has played settling investment disputes and the consequences of its use for States' capacities to define and pursue the public interest.

5.2 The 'ultimate rule of law'?

202. The proportionality principle has been dubbed the 'ultimate rule of law',[636] and one 'at which all courts ultimately arrive' in seeking to moderate competing rights, interests, values, or objectives.[637] As a normative concept in contemporary legal orders, proportionality has been traced to early modern Catholic moral and political traditions and to the philosophical and juristic writings underpinning them.[638] Scholars have thus identified its presence in (predominantly Western) philosophic, religious and legal thought across historical periods, including in notions of distributive justice in Plato,[639] Aristotle,[640] and Cicero;[641] in early Roman law;[642] in the Abrahamic *lex talionis* and "Golden Rule";[643] in the Magna Carta;[644] and in the Late Medieval writings of Aquinas and de Vitoria.[645] Proportionality has also been identified as founding and stemming from the Enlightenment's ideas of 'rationally limited and appropriately exercised power'[646] and the notion of the social contract which — with their translation through the concept of the 'liberal State' in the 19th Century — many consider underpin contemporary notions of legality and the rule of law.[647] Proportionality thus seeks to establish an 'optimal relationship between States and citizens',[648] by determining the "proper limits of governmental power"', thereby '"restraining the state"' through law.[649]

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636 Beatty (2004) 159 ff

637 Schlink in Rosenfeld and Sajó (eds) (OUP 2012) 718-36, 736. Due to its intrinsic imagery of virtue and harmony between unlike phenomena, proportionality has been described as 'one of the central metaphors underpinning the persuasiveness, legitimacy, and coordinating power of modern law': Lacey (2016) 43 JLS 27, 32. See too: Poole (2010) 372; Newton and May (OUP 2014) 17; Loughlin (2010) 366–7

638 Huscroft, Miller and Webber (eds) CUP 2014) 29

639 Poole (2010) 371

640 Engle (2012) 10 Dartmouth LJ 1, 2

641 Poole (2010) 371

642 Barak (CUP 2012) 175–6

643 Franck (2008) 102 AJIL 715, 763; Barak (2012) 175

644 Barak (2012) 175–6

645 ibid; Franck (1993) 240 RCADI 9, 76–96, 226–9; Gardam (1993) 87 AJIL 391, 394–7

646 Lacey (2016), 31; see too: Barak, n 640, 176–7

647 Or the roughly equivalent concepts *d'Etat de droit* and *Rechtsstaat.* According to Loughlin, modern public law emerged during the Enlightenment through the 'secularization' and 'positivization' of earlier scholastic approaches: Loughlin (2010) 37–49, 312–14. Barak claims that proportionality can in fact be *derived* as a positive constitutional principle from the rule of law and idea of constitutional democracy, without further textual basis: Barak (2012) 213

648 Newton and May (2014) 33

649 Thomas (2000) 89. See too: Dyzenhaus in Huscroft, Miller and Webber (eds) (CUP 2014) 234-58; Dyzenhaus (1998) 14 S African JHR 11; and Mureinik (1994) 10 S African JHR 31

203. This 'State-limiting'[650] conception of proportionality aims to achieve a balanced, or reasonable, relationship between 'the ends of public action and the means used to attain them',[651] without imposing 'excessive burdens' on individuals.[652] Often this is considered to require — or manifest as — a structured, sequenced, cumulative, means-ends inquiry (performed ex-post by an adjudicator) consisting of four elements or criteria:[653] (i) pursuit of a legitimate public purpose; (ii) suitability between the means adopted and the purpose pursued; (iii) necessity of the means adopted (often requiring that no less intrusive means were available); and (iv) balance between the (social) value of an interference's purpose and the right or interest affected ('proportionality *stricto sensu*', or 'excessiveness').[654] One strength often alleged of this staged, structured conception of proportionality analysis is its capacity to break down an amorphous rationality or reasonableness inquiry into clearly articulated elements.[655] Debate concerning its place in international investment law largely revolves around this notion of proportionality.

5.3 Proportionality's 'triumphant advance'

204. Many of the arguments in favour of arbitral recourse to proportionality draw, expressly or implicitly, on its ubiquity across legal orders and contexts. Indeed, proportionality has been described as enjoying a 'triumphant advance' across a great number of legal orders.[656] As a concrete legal concept, proportionality is widely considered to have its origins in late 18th Century German administrative law, particularly the 1794 Prussian Civil Code and the Prussian Supreme Administrative Court's introduction of limits on penalties.[657] The Code was adopted

650 Rivers distinguishes between proportionality as 'state–limiting' or 'optimizing': Rivers (2006) 65 CLJ 174. But for view that the two conceptions are in complementary, see: Young in Huscroft, Miller and Webber (eds) (CUP 2014) 43-66. See too: Luterán in Huscroft, Miller and Webber (eds) (CUP 2014) 21-42, 23–4

651 Thomas (2000) 77

652 Craig (2010) 272. But, by alleging to 'bring discretionary power within limits', as well as constraining public authority, proportionality also legitimates its exercise: Lacey (2016) 31. See too: Higgins (OUP 1994) 236

653 See, esp: Kingsbury and Schill (2010) 85–8; Schill (2012) 27 ICSIDR 87, 115–19; Stone Sweet and Mathews (2008) 47 ColumJTransnat'l L 75, 75–7; Henckels (2012) 24–7; Henckels (2015) 23 ff; Bücheler (2015) 62–3

654 See, eg: Luterán (2014) 21. Lang describes this as 'traditional proportionality analysis': Lang (2011) 322–3

655 Ortino (2017) 87–8

656 Borowski (2007) 1 Legisprudence, 210. Möller uses the term 'triumphal march': Möller (2012) 10 ICON 709, 709. See too: Klatt and Meister (OUP 2012) 2. Proportionality's spread is sometimes alleged to be the result of a relentless and inevitable process of transnational norm convergence: Engle (2012) 2–3. But for a more rigorous account, see: Nolte (2010) 4 L&E HR 245, 246 ff

657 Nolte (2010) 246; Dyzenhaus (2014) 236; Cohen-Eliya and Porat (2010) 8 ICON 263, 271; Loughlin (2010) 367; Perju in Rosenfeld and Sajó (eds) (OUP 2012) 1304-26, 1315; Barak (2012) 179. See too: Ledford (2008) 37 Central European History 203, 207

by other German states in the 19th Century and German courts progressively developed the principle until the rise of Nazism in the 1930s.[658] Proportionality (*Verhältnismäßigkeit*) was resuscitated by the Federal Constitutional Court after World War II and now forms a central check to limitations on individual rights under the Basic Law.[659] Adjudicators in a wide variety of domestic and international legal contexts are often argued to have replicated this practice.[660] This advance is often cast in polemic terms. Certain comparative public lawyers have — rather hyperbolically — described proportionality as an 'integral, indispensable part of every constitution that subordinates the system of government it creates to the rule of law',[661] a 'universal criterion of constitutionality',[662] a vital part of 'the post-war paradigm of human rights protection',[663] and a 'foundational element of global constitutionalism'.[664]

205. It is impossible here to properly address the many ways proportionality features in domestic jurisdictions and other substantive areas of international law. However, given arguments concerning both the permissibility and desirability of investment tribunals' use of proportionality rely on its ubiquity, we must consider the varied contexts in which it appears. According to one widely-cited account of its global 'migration', around thirty domestic jurisdictions have adopted something resembling the German — or 'European' — model of proportionality, usually in constitutional rights review, administrative review and criminal sentencing.[665] Despite inevitable differences in language, culture, history and legal tradition,[666] it has been claimed that proportionality has now 'transcend[ed] the civilian/common law and other classificatory

658 Barak (2012) 179. For detailed historical account, see: Krieger (UChic.P 1972)

659 Barak (2012) 179; Cohen-Eliya and Porat (2010) 24–32. But see more nuanced account in: Bomhoff (CUP 2013) 60–70

660 Barak (2012) 180–1; Nolte (2010) 246

661 Beatty (2004) 162

662 ibid

663 Barak (2012) 180–1

664 Klatt and Meister (2012) 1. Schlink contends that, even if they do not use the term, 'the principle of proportionality is […] a rule at which all courts ultimately arrive': Schlink (2012) 736. Schlink considers the means–ends analyses conducted by the US Supreme Court follows 'the rule' of proportionality 'in substance' if not in form: ibid. Similar ideas underpin debates on the distinction between, for example, proportionality, *Wednesbury* reasonableness, and other applicable standards of judicial and merits review. See debate in: Taggart (2008) 1 NZLR 423; Poole (2010); King (2010); Hickman (2010); Craig (2010) . Bücheler describes proportionality as a "meta–constitutional rule": Bücheler (2015) 68

665 Barak (2012) 186–202. See too: Stone Sweet and Mathews (2008) 75; Cohen-Eliya and Porat (2010) 10–4

666 Bomhoff (2013) 2

divisions',[667] and features in the legal orders of numerous European countries,[668] several common law countries,[669] a number of Latin American jurisdictions,[670] and in Israel, South Korea and Turkey.[671]

206. As is well known, versions of proportionality also feature in diverse substantive areas of international law. In some circumstances, proportionality derives from treaty. Often this occurs in the context of sanctions. Numerous trade agreements also impose a proportionality requirement on States' right to dispose of goods as a sanction for intellectual property infringements.[672] Occupying Powers are likewise obliged to ensure that penalties issued by their courts are proportionate.[673] The Rome Statute incorporates notions of self-defence widely shared in domestic criminal law by recognizing that criminal responsibility should be excluded in cases involving proportionate self-defence.[674] Similarly, the ICC Appeals Chamber may vary a Trial Chamber's sentence if it considers it disproportionate.[675] Outside the sanctions context, coastal States must limit their conduct in preventing damage from pollution to that proportionate to the risk posed by a maritime casualty.[676]

207. More often, versions of proportionality have entered international law through international adjudicative practice. Again, echoing domestic notions of lawful self-help and the logic of proportionality of sanctions, States' inherent right to self-defence,[677] the residual customary right of belligerent reprisal,[678] and States' right to adopt lawful countermeasures in response

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667 Lacey (2016) 36

668 Albania, Belgium, France, Germany, Greece, Hungary, Ireland, Italy, Moldova, Poland, Portugal, Romania, Slovenia, Spain, Switzerland and the United Kingdom

669 Australia, Canada, Hong Kong, India, New Zealand, and South Africa

670 Argentina, Brazil, Chile, Colombia, Mexico and Peru

671 Barak (2012) 186–202. It is not always clear how Barak selects his examples, how he approaches questions of language and whether he includes only practice that expressly employ the term, or also approaches that nevertheless resemble proportionality analysis. For a wide-ranging critique, see: Bendor and Sela (2015) 13 ICON 530

672 Art 46 TRIPS Agreement See too, eg: Art 1715(5) NAFTA; Art 243 2012 EU–Colombia-Peru-Ecuador FTA; Arts 11, 19 2013 Switzerland–China FTA

673 Arts 67 and 68, GCIV. Art 67 describes 'the principle that the penalty shall be proportionate to the offence' as a 'general principle of law'. It could be argued that alongside Art 83(3) Rome Statute, these provisions reflect a general principle of criminal law that punishment must be commensurate to the gravity of an offence.

674 Art 31(1)(c) Rome Statute. See too: Krebs (2013) 3 CJICL 382, 397

675 Art 83(3) Rome Statute

676 Art 221 UNCLOS; and Arts I and V(1) 1969 Intervention Convention

677 *Nicaragua* [176, 194, 237]; *Nuclear Weapons AO* [41–4]; *Oil Platforms* [43, 73–7]; *Armed Activities* [147]

678 *Nuclear Weapons AO* [46]. See too: *Kupreškić, Trial Judgment* [535]; *Naulilaa* 1025–28

to prior unlawful conduct,[679] are all governed by proportionality requirements. The principle of proportionality in attack is also a fundamental rule of customary international humanitarian law.[680] In order to ensure equitableness, in the final step in the prevailing 'three-step' approach to maritime delimitation,[681] adjudicators consider whether there is 'manifest disproportionality' between the areas apportioned by a proposed boundary.[682] In fulfilling their secondary duty to 'wipe out' the effects of a prior wrongful act,[683] responsible States will be obliged to provide restitution rather than compensation only when the burden of restoring the status quo is not disproportionate.[684] Finally, proportionality has played a role in certain procedural measures proceedings.[685]

208. Of course, there are also versions in international adjudicative practice that more closely resemble the 'State-limiting' conception of proportionality identified above. The Court of Justice of the European Union (CJEU) famously recognised proportionality as a general principle in the mid-1950s,[686] and routinely applies staged proportionality analyses in numerous contexts when reviewing both Union and Member States' conduct.[687] Likewise, the European Court of Human Rights (ECtHR) often has recourse to proportionality when considering States' limitations on the fulfilment or enjoyment of rights, both in the context of express treaty

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679 Arts 49(2) and 51 ARSIWA; the ILC's approach to proportionality in this context can be equated with a least–restrictive means test. See, eg: General Commentary to Part II and Commentary to Art 51 ARSIWA, 129 and 134–135. The same structure is reflected in Art 22.4 WTO DSU, which requires a 'suspension of concessions' in response to a prior breach of an obligation in the Covered Agreements to be 'equivalent to the level of the nullification or impairment' of the injured Members' rights or benefits. See, generally: Franck (2008) 762–7. For application of this requirement in the investment context, see: *ADM* [152–60]

680 See, eg: Arts 51(5)(b), 57(2)(a)(iii) and 57(2)(b) GCAP1; *Galić, Trial Judgment* [58]; *Strugar, Appeal Judgment* [179]. See: Meron (OUP 1991) esp 62 ff. But see: Gardam (1993) 407–9. The precise operation of the proportionality requirement in IHL is contentious. See, eg: *Gotovina & ors, Trial Judgment* esp [1910–11], *Appeal Judgment* [82–3], and *Agius DO* esp [34–44]; Bartels (2013) 46 Isr L Rev 271, 275–6; Wright (2012) 94 IRRC 819, 833–5

681 A judicial construct designed to give effect to the requirements of Arts 74 and 83 UNCLOS ('UNCLOS')

682 In considering whether a proposed boundary results in a 'gross disproportion' between the areas apportioned, considering the length of the States' relevant coasts. See, e.g. : *North Sea Continental Shelf* 47, 54; *Continental Shelf (Tunisia v Libya)* 75–7; *Gulf of Maine* 335; *Jan Mayen* 65–7; *Land and Maritime Boundary (Cameroon v Nigeria)* 435; *Maritime Delimitation in the Black Sea* [210–216]; *Territorial and Maritime Dispute (Nicaragua v Colombia)* [2012] 715; *Maritime Dispute (Peru v Chile)* 61; *Maritime Delimitation (Costa Rica v Nicaragua)* [159–66, 202–4]; *Barbados v Trinidad and Tobago* [238]; *Bay of Bengal* [491–s7]. See further: Lando (CUP 2019) 252 ff

683 *Chorzów Factory* 47

684 Reflected in Art 35 ARSIWA. The ICJ has endorsed Art 35's formulation as reflecting custom: *Pulp Mills* [273]; *Gabčíkovo–Nagymaros* [152]; *Wall AO* [152–3]; and *Bosnian Genocide* [460]. In the investment context, see: *Teinver* [1093–8]; *Masdar* [558–61]

685 In the investment context, see: *United Utilities* [Provisional Measures] [78, 107–8]. While not expressly referring to proportionality, it has been argued that the ICJ's scrutiny of measures' necessity resembles proportionality analysis: Uchkunova (2013) 12 LPICT 391, 420–2

686 See, eg: *Fédération Charbonnière Belgique* 228; *Internationale Handelsgesellschaft* [2–4, 16]; *British American Tobacco* [122]. This recognition has since been partially codified in Art 5(4) TEU concerning the legislative functions of the EU under the principle of subsidiarity; and in TFEU Protocol 2

687 See: Tridimas (OUP 2006) 137–9; Arai-Takahashi (2005) 24 YbEL 27, 29–33; Craig (OUP 2012) 601–2; de Búrca (1993) 13 YbEL 105, 118–20

language permitting derogation[688] and as an implied justification.[689] The Human Rights Committee (HRC) has at times adopted a similar approach.[690] Recent UNCLOS Annex VII tribunals have attached a proportionality requirement to coastal States' enforcement actions in the exclusive economic zone when these burden foreign-flagged vessels and foreign nationals.[691] More tenuously, given the Court never employed the language of proportionality nor engaged in a staged review, the ICJ's approach to the definition of 'scientific research' in Antarctic Whaling has been claimed to resemble proportionality analysis.[692] Finally, it has also been claimed that while not expressly employing the term and often omitting the *stricto sensu* stage of analysis, the means-ends inquiries conducted by WTO panels and the AB resemble staged proportionality analysis — particularly in the contexts of non-discrimination and necessity under the general exceptions.[693]

209. Though only a cursory examination, the above reveals that iterations of proportionality exist in varied domestic contexts and numerous contexts in the international legal order. Crucially, however, it also reveals that proportionality plays vastly different roles and bears profoundly different meanings in the many contexts in which it appears. This is clear when we consider the international legal order: proportionality appears in varied guises, manifests in varied ways, draws on myriad assumptions and values, and has diverse purposes, doctrinal bases and structures. At times, proportionality is used to manage tensions between competing (legally-protected) rights or interests. At others, it defines the content or outer limits of such rights or

688 See, eg: the Court's interpretation of Arts 8(2) and 14 ECHR in: *Languages in Education in Belgium* [10]; and Art 10 ECHR in: *Handyside v UK* [49]. See also: *Otto–Preminger v Austria* [49]; *Sunday Times* [50]. See further: Legg (OUP 2012) 178 ff

689 Recourse to proportionality is common, for example, in determining whether an 'objective and reasonable justification' exists under Art 14 ECHR: *Darby v Sweden* [28] ff; *Lithgow v UK* [120] ff; and *Inze v Austria* [41] ff; *Glor v Switzerland* [71–6]; and: Bjorge (OUP 2015) 156–7. Pertinently, this includes when considering restrictions on the right to property in Art 1 ECHR Protocol 1; See, eg: *Sporrong and Lönnroth* [69, 73]; *James v UK* [50, 54]; *Valkov v Bulgaria* [90–101].

690 See, eg: HRC (12 Sep 2011) CCPR/C/GC/34; HRC (2 Nov 1999) CCPR/C/21/Rev.1/Add.9

691 Although seemingly inspired by ECtHR and HRC practice, the formal basis for such incorporation remains doubtful. See: *Arctic Sunrise* [197–8, 227–30, 325–6, 333]; *Duzgit Integrity* [209–10, 254, 260–1]; and *Guyana v Suriname* [441]. See further: Harrison (2018) 42 L'Observateur des Nations Unies 117. While the Court did not expressly employ the language of proportionality, these tribunals' approaches somewhat resemble the ICJ's reasonableness test in: *Navigational Rights* [86–7]

692 Cannizzaro argues that despite never employing the term or going beyond consideration of the measures' suitability, the Court's inquiry into the reasonableness of Japan's methods in light of their stated purpose resembles a proportionality inquiry: Cannizzaro (2017) 27 EJIL, 1063, citing: *Antarctic Whaling* [67, 88]

693 Particularly in interpreting Art XX GATT, Art XIV GATS, Art 2.2 SPS Agreement and Art 2.1 TBT Agreement. See, esp: *Korea–Beef, AB Report* [161, 164]; *China–Rare Earths, AB Report* [5.116]; and *India–Solar Cells, AB Report* [7.349]; *US–Gambling, AB Report* [305–6]. See too: *Argentina–Goods and Services, AB Report* [6.221]; *Japan–Apples, Panel Report* [8.198]; *Japan–Apples, AB Report* [163–4]; *US–COOL*, *AB Report* [349]. See further: Rigod (CUP 2015) 175–7, 201, 37–8. While panels and the AB often inquire into measures' suitability and consider whether alternative measures were available, it is debatable if this practice genuinely resembles 'full' proportionality analysis as the relative social value of the aim pursued and the interest infringed are often not explicitly balanced. See, further: Bücheler (2015) 70–1; Vranes (OUP 2009) 274–5, 83; Desmedt (2001) 4 JIEL 441, 478–80; Hilf (2001) 4 JIEL 111, 120 ff; Andenæs and Zleptnig (2007) 42 Tex ILJ 371, 421; Henckels (2015) 69 ff; and Van den Bossche (2008) 35 LIEI 283, 288–9. But see: Lang (2011) 323

interests. Whereas in domestic fora, proportionality usually moderates State-individual relations, at the international level it manages inter-State relations, relations between States and (individual) beneficiaries of rights, relations between States and international organisations, and relations between individuals and international organisations (including adjudicative bodies). Versions of proportionality thus manage both 'vertical' and 'horizontal' relationships.[694] However, except in the EU and European human rights contexts, proportionality does not usually manifest in the multi-stage inquiry familiar to some public lawyers.[695] Even in these latter two contexts, various versions of proportionality analysis exist.[696]

210. It is beyond my ambition in this chapter to grapple with the equally diverse ways proportionality operates in national jurisdictions. As examined further below, while certain scholars contend that despite variations in terminology and adjudicatory technique we are witnessing the global spread of essentially the same concept, we ought to be more cautious.[697] As Lacey notes, even within a single domestic legal order proportionality can play numerous roles[698] and, depending on the jurisdiction and context, can be derived from numerous sources.[699] Importantly, certain comparative public lawyers have raised significant doubts as to whether domestic practice is in fact converging upon or coalescing around a single idea of proportionality.[700] Proportionality's ubiquity seems merely to follow from the fact that means-ends analysis seems a 'natural' component of much legal reasoning.

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694 Roberts (2013) 58 ff

695 Stone Sweet (2010) 4 L&E HR 48, 71

696 Both the EU courts and ECtHR structure their proportionality assessments in various ways and with variable content and intensity. See, in the EU law context: De Witte (2013) 50 CMLR 1545, esp 1565–6; de Búrca (1993) 118–20. In the ECHR context, See: Legg (2012) 178 ff. It is particularly contested whether the CJEU routinely reviews measures' proportionality *stricto sensu*. Similarly, while frequently adopting a three–stage analysis (combining necessity and suitability), it has been argued that the ECtHR tends toward 'rather non–transparent use of terminology and a tendency to confuse and mix distinct elements of judicial review': Gerards (2013) 11 ICON 466, 467–8

697 As Bomhoff notes, 'the rise of the language of balancing and proportionality is commonly invoked as the foundation for extraordinarily far–reaching comparative claims': Bomhoff (2013) 2

698 Lacey (2016) 37–41

699 Barak (2012) 186–202. It may, eg, originate in express language in a State's constitution or have been incorporated as an implied requirement through judicial elaboration. It may also be expressly contained in legislative provisions or — as in the UK — result from implementation of a State's treaty obligations. Proportionality has largely entered UK law through application of EU law and domestic implementation of the ECHR: ibid 43, citing House of Lords in: *R (International Traders' Ferry) v Chief Constable of Sussex*; *R (Countryside Alliance) v AG*; *R (Daly) v Home Secretary*; and Court of Appeal in: *Sinclair Collis v Health Secretary*. See too: Bjorge (2015) 157

700 Cohen-Eliya and Porat (CUP 2013) 153–8. See too: Loughlin (2010) 366–7; Jackson (OUP 2010) 60–4 As explored below, this issue is central to the claim that proportionality constitutes a general principle of international law (Sec 6.3.4), and when attempting to 'transpose' principles derived from domestic public law to the international level (Sec 7.2.2)

5.4 The case in favour of transplantation

211. It is perhaps surprising that proportionality has been presented as a potential saviour in investment law and arbitration given it has generated significant controversy in other contexts in which it is routinely applied.[701] But as it has emerged in the context of investment law's persistent legitimacy crisis, the turn to proportionality in investment law and arbitration can largely be explained by the concept's legitimation pull. Proportionality necessarily evokes imagery of fairness, balance and justice.[702] Its manifestation as structured inquiry offers the allure of determinacy.[703] Its ubiquity in other domestic, regional and international contexts provides an apparent pedigree.[704] Proportionality legitimates decision-making — or at least attempts to. Who would argue that investors should be compensated for disproportionate government action? Similarly, who would disagree that States may adopt 'balanced' or 'proportionate' regulatory measures? We may thus explain the turn to proportionality — and the reconceptualization of investment law as a species of international public law more generally — as an attempt at legitimation in a field beset by critics.[705] It is also therefore unsurprising that proportionality's proponents have typically made their case in functional — rather than formal or conceptual — terms, as a means to combat vagueness in primary rules and inconsistency and imbalance in arbitral practice.

212. Relatedly, and linked to the notion that it constitutes the 'ultimate rule of law',[706] the idea is often presented that recourse to proportionality analysis is somehow inevitable. In this vein, it is sometimes alleged that balancing is an inherent feature of the adjudicative function, and is an essential component of the rule of law whenever competing rights or interests come into contact in dispute settlement.[707] While we could simply dismiss such claims as hyperbole, they contain elements of truth. The weighing and balancing of factors and considerations is, of course, a necessary aspect of adjudication — in other words, judges must judge. It is also true that most substantive (or 'thick') conceptions of the rule of law would deem adjudicators' role to be to judge fairly, or in a 'balanced' manner.[708] But — and now the tautology in this logic

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701 See debate in: Tsakyrakis (2009) 7 ICON 468; Khosla (2010) 8 ICON 298; Tsakyrakis (2010) 8 ICON 307; Klatt and Meister (2012) 10 ICON 687; Tremblay (2014) 12 ICON 864; Klatt (2014) 12 ICON 891; and Tremblay (2014) 12 ICON 900. See too: Möller (2012)

702 Lacey (2016) 28–32

703 Nolte (2010) 247–9; Foster (2012) 533–4

704 Leonhardsen (2012) 3 JIDS 95, 111 ff

705 Lacey (2016) 31. Consider too the WTO AB's shift to a 'weighing and balancing' approach in response to Members' dissatisfaction: Lang (2011) 320–1

706 Above Sec 5.2

707 See: Kingsbury and Schill (2010) 88

708 See, eg: Beatty (2004) 163–4; Stone Sweet and Mathews (2008) 77. See too: Dworkin (HUP 1986) 355–99

becomes apparent — nothing requires that this exercise be conducted through the lens of proportionality, and, particularly, proportionality as expressed as a multi-stage inquiry. Further, this argument also seems to assume that the requisite relationship between competing interests and, particularly, how priority ought to be assigned, is not dealt with by positive law — in other words it requires that competing rights or interests are of equal (legal) value and that, therefore, the task of accommodation falls on the adjudicator.

213. Four closely related assumptions thus underpin arguments in favour of transplanting proportionality. First, we must accept that investor-State arbitration more closely resembles public law than 'traditional' inter-State dispute settlement (or commercial arbitration). Second, we must accept that the customary rules on interpretation reflected in Articles 31 and 32 VCLT provide little assistance in fleshing out vague primary rules. Third, we must accept that it is permissible and desirable to look to analogous fields — domestic public law, regional human rights adjudication, EU law or WTO law — to borrow approaches and methods.[709] Fourth, we must accept that arbitrators already necessarily engage in balancing the rights or interests of investors and host States.[710]

214. In light of these assumptions, its proponents argue that by more openly structuring analyses within tribunals' inevitable balancing exercises, adopting a staged proportionality test comprising sequential analytical steps inquiring into the purpose, suitability, necessity and excessiveness of host States' measures would promote greater coherence, predictability, consistency and transparency in arbitral practice.[711] Perhaps most importantly, if structured around an 'institutionally sensitive approach' and appropriately deferential intensities of review, the use of proportionality analysis would assist in overcoming the perceived tendency of tribunals to favour investors' economic interests over rival public interests, thereby assisting to rebalance investment law and more appropriately protect host States' regulatory capacities.[712] Such, it is often alleged, would be particularly beneficial in elaborating the FET standard, and in reaching a principled distinction between compensable indirect expropriation and lawful regulation.[713]

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709 See, esp: Schill (2010) 25; Henckels (2015) 7–20. On the use of analogy in considering the interaction of diverse bodies of law, see: Matz-Lück in Young (ed) (CUP 2012) 201-34; Lowe (2001) 221; Lowe (1989) 61; and Paparinskis in Douglas, Pauwelyn and Viñuales (eds) (OUP 2014) 73-107, 76 ff

710 It is often noted that vagueness in both treaty- and custom-based rules provides arbitrators with significant discretion in approaching this task. See, esp: Kingsbury and Schill (2010) 88 ff

711 Stone Sweet (2010) 63; Bücheler (2015) 302–3; Henckels (2015) 26–7; Schill and Djanic (2018) 45–7

712 Henckels (2015) 19–20, 126–73; Haynes (2013) 14 JWI&T 114, 143–4

713 See: Pellet (2015) 458–60; and Zarra (2017) 14 BrazJIL 95, 114–5

215. A further central argument is that proportionality analysis is a substantively-neutral methodological framework,[714] and — because it encourages decision-makers to lay bare the factors considered — is preferable to other balancing approaches employed by investment tribunals or domestic or regional adjudicators.[715] Finally, it is also sometimes alleged that widespread arbitral recourse to proportionality can contribute to improving governance at the domestic level as its routine use by tribunals will encourage host States to adapt their domestic practices so as to incorporate similar inquiries when designing, adopting and implementing measures.[716]

216. To aid our examination of whether it has, or can, live up to such promises, and to gain insight into the broader consequences of its migration for States' capacities to define and pursue the public interest, in the next section I consider the varied roles proportionality analysis has so far played in the practice of investment tribunals.

5.5 Proportionality in arbitral practice

217. Arbitral recourse to proportionality can be traced to 1985 when Judge Lagergren briefly referred to the concept in the *INA Corp* proceedings before the IUSCT.[717] In 2000, the *SD Myers* tribunal considered that whether a measure created 'a disproportionate benefit for nationals over non-nationals' was relevant in assessing if conduct breached the duty to afford national treatment in Article 1102 NAFTA.[718] In the almost two decades since, arbitrators have employed the language of proportionality with increased frequency and have incorporated versions of proportionality analysis in numerous interpretative contexts.

218. As Vadi noted in 2015 — and as remains true at time of writing — while proportionality has managed to gain something of a foothold, considered both quantitatively and qualitatively, it cannot yet be said to occupy a central place in arbitral practice.[719] This said — and perhaps due to increased scholarly attention — we appear to be in the midst of an upsurge in arbitral recourse to proportionality discernible since around 2014. As well as being drawn on more frequently, proportionality analysis is increasingly influencing merits determination. While

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714 See: Kingsbury and Schill (2010) 77–81; Henckels (2015) 16; Klatt and Meister (2012) 3; Huscroft, Miller and Webber (eds) (2014) 2

715 Kingsbury and Schill (2010) 88–9, 90–102; Henckels (2015) 69. On proportionality's alleged strengths vis–à–vis other balancing methods, see: Beatty (2004) 161–2, 6–8; Barak (2012) 375; Möller (OUP 2012) 179

716 Exploring this idea in relation to the World Bank's (2006) 'Handbook for Evaluating Infrastructure Regulatory Systems', see: Donaldson and Kingsbury (2013) 268 ff

717 *INA Corp* [Lagergren SO] 388, citing the then-pending proceedings before the ECtHR and 7 Mar 1984 Commission report in: *Lithgow v UK*. Significantly, proportionality analysis appears not to have featured in merits determination in any of the Tribunal's over 800 subsequent decisions.

718 *SD Myers* [252]

719 Vadi (2015) 349

tribunals have also made use of proportionality when considering issues of jurisdiction and admissibility,[720] when considering exceptions provisions,[721] and in the context of considering the secondary rules of State responsibility,[722] this overview focuses on proportionality's role in giving shape to the substantive protections afforded to investors under treaty and custom.

219. As in Chapter 4's investigation of the police powers doctrine, analysis within this section is limited to those decisions in which express reference was made to proportionality.[723] As Henckels rightly notes, at times tribunals reason in a manner that resembles proportionality analysis without expressly employing the term, or refer to the need to 'weigh' or 'balance' competing interests, values, or objectives.[724] Parties likewise employ diverse language seemingly inviting similar means-ends analyses. Focusing only on express references to proportionality will, naturally, not capture all examples of practice that may be said to resemble proportionality analysis or arbitral balancing. However, this section again proceeds from the assumption that proportionality is a conceptually distinct analytical tool or substantive rule. By focusing on express use of its terminology, we can begin to gain understanding of proportionality's content and operation in arbitral practice and the consequences of its use for States' capacities to define and pursue the public interest.

5.5.1 Extent and significance of arbitral recourse to proportionality

220. Based on express references, proportionality's popularity seems to be on the rise. Both arbitrators and disputing parties are expressly referring to proportionality with increased frequency. One or both disputing parties argued that an assessment of a measure's proportionality was relevant to determining the merits in eighty-three disputes; tribunals considered the proportionality of host States' measures proprio motu in thirteen disputes.[725] While undoubtedly playing an increasingly important role, considered in purely quantitative terms, proportionality cannot yet be said to occupy a significant place in parties' arguments or arbitral reasoning.

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720 In one striking example of conflating jurisdictional and merits–based inquiries, the *Kim* tribunal considered whether denial of the protections afforded by an IIA was a proportionate response to an investor's breach of a legality provision: *Kim* [Jurisdiction] [20–1, 396–413]

721 *Continental* esp [227, 232, 276]

722 *ADM* [152–60]. The *Siemens* tribunal rejected Argentina's contention that when applying the customary rules reflected inter alia in Art 36 ARSIWA and articulated in *Chorzów Factory*, the public purpose of an expropriation should be taken into account to proportionately reduce the amount of compensation due: *Siemens* [354]

723 For a full list of terms used in identifying relevant practice, see Annex 1.

724 Henckels (2015) 69

725 When separate and dissenting opinions are counted, these disputes comprise a total of 103 decisions (13 per cent of corpus). Based on decisions' accounts of pleadings, in 39 disputes, only the claimant investor considered proportionality was relevant; in 26 disputes, both the claimant and respondent State considered measures' proportionality relevant; in 18 disputes, only the respondent made such pleadings; and in 13 disputes, arbitrators considered proportionality *proprio motu*. Full list on file with author.

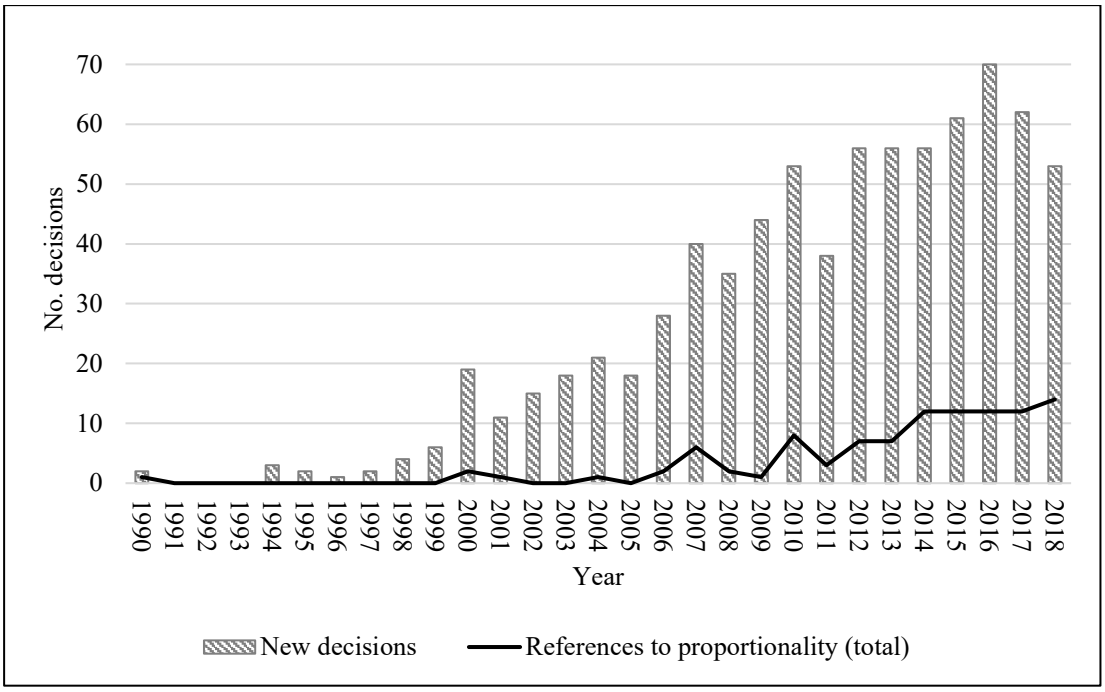

Figure 6: Number of decisions in which a party or arbitrator made at least one express reference to proportionality in the context of the merits, annual total, non-cumulative (1 Jan 1990–31 Dec 2018)[726]

221. In most cases (c. 42%) arbitrators did not engage with parties' arguments concerning proportionality. Tribunals or individual arbitrators expressly employed proportionality in merits determination in fifty-three decisions (across forty-nine disputes). However, proportionality played an important role — in varied ways and contexts — in only twenty-eight decisions. In the remaining examples, while arbitrators accepted the proportionality of host States' measures was relevant to merits determination, the precise role ascribed to the concept was unclear.[727]

726 In parties' pleadings and tribunals' reasoning on the merits. Excludes references in context of jurisdiction, provisional measures, compensation and apportionment of costs.

727 See nn 729, 730 and 731 and Figure 8 below.

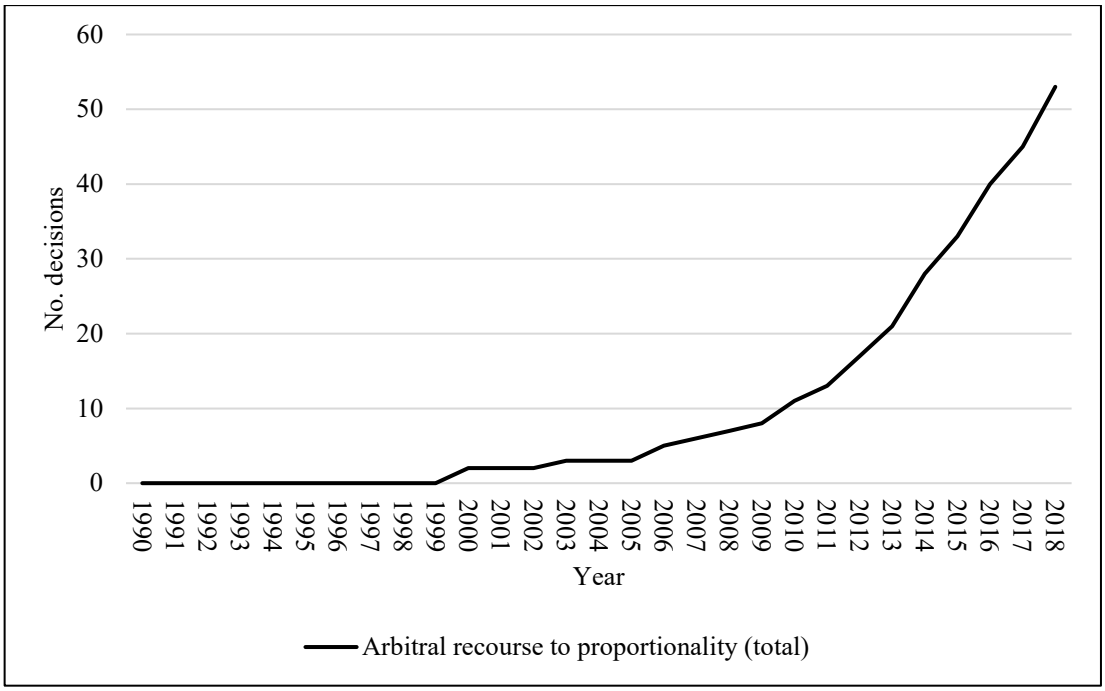

Figure 7: Number of decisions in which at least one arbitrator made at least one express reference to proportionality in merits determination, annual, cumulative (1 Jan 1990–31 Dec 2018)[728]

222. When we examine significance in more qualitative terms — understood, as above, as the concept's discernible role in a chain of reasoning or causation (regardless of the frequency of the use of language) — proportionality was ascribed significant weight, was subject to in-depth consideration, and played a clear role in the determination of the merits in thirteen decisions (c. 13%).[729] In a further sixteen decisions proportionality was considered significant and was ascribed some weight in determining the merits, but was the subject of less detailed reasoning (c. 14%).[730] In these decisions, while deemed relevant, a measure's proportionality was often not directly addressed, was considered in general terms or alongside other factors, or particular conduct was declared proportionate or disproportionate without detailed explanation of how such a determination was made. Most commonly, in twenty-six decisions (c. 25%), while arbitrators accepted that a proportionality assessment was somehow relevant in interpreting and applying treaty terms, the role and weight ascribed to the concept were unclear or were not

728 In tribunals' reasoning and separate and dissenting opinions. Excludes references in context of jurisdiction, provisional measures, compensation and apportionment of costs. Excludes instances where arbitrators rejected parties' arguments or expressly declined to determine whether proportionality relevant. See below nn 732 and 733.

729 *Tecmed* [122–8; 133, 148–9]; *Total* [123–4, 162–5, 197, 333, 429]; *Occidental* [297, 338, 397–409, 414–56] (see too: *Occidental* [Annulment] [322–3, 327, 350]); *AES v Kazakhstan* [361–3, 403–9, 433]; *Electrabel* [167–8, 179–80, 186]; *Charanne* [514, 517, 531–39]; *Philip Morris v Uruguay* [305–6, 409–10, 420], and [Born DO] [130–6, 139–48, 157–60, 172–4, 196]; *Blusun* [317–9, 339–43, 372]; *PL Holdings* [354–90]; *Marfin* [824–30, 981–5, 1087–98, 1211–15, 1228–30]; *RREEF* [460–75, 516, 547]; and *Greentech* [Sacerdoti DO] [12, 47–50, 56].

730 *LG&E* [195]; *EDF v Romania* [292–4]; *Lemire* [285]; *El Paso* [241–3, 371–4]; *Roussalis* [358, 394, 520, 690]; *Servier* [570, 575]; *Mobil v Argentina* [818–22, 843, 954]; *ECE* [4.53, 4.786–7]; *Perenco* [689]; *Mamidoil* [619, 657–62]; *Pac Rim* [8.38, 8.42–4]; *Eiser* [370]; *Koch Minerals* [7.19]; *Antaris* [444–6]; and *Antin* [555–7]

devoted significant attention.[731] In these decisions, the language of proportionality was used largely rhetorically, as a synonym for apparently related terms, or without clearly discernible effect. Five tribunals (c. 5%) expressed scepticism or outright rejected parties' arguments concerning proportionality,[732] and one tribunal (c. 1%) recounted the parties' arguments and noted ongoing debate concerning whether proportionality was a semi-autonomous principle within the customary international minimum standard, but explicitly declined to engage with the issues raised.[733]

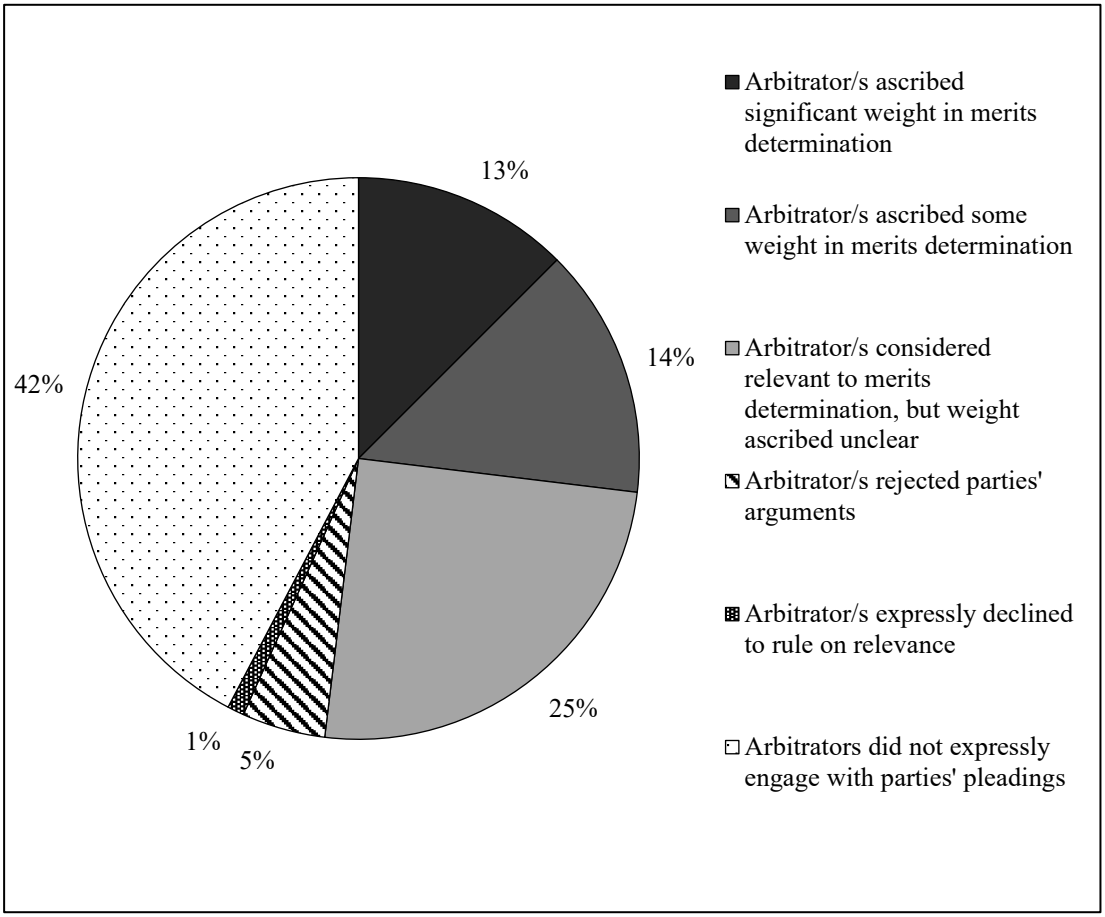

Figure 8:Weight ascribed to proportionality in reasoning on merits

731 *SD Myers* [252], and [Schwartz SO] [144, 235]; *Azurix* [307, 311–2]; *Parkerings* [368]; *Continental* [276]; *Suez & Vivendi* [Nikken SO] [34–43]; *Tza Yap Shum* [174]; *Inmaris* [301–3]; *Deutsche Bank* [522–4]; *Mobil v Argentina* [Remiro Brotóns SO] [77]; *de Levi*[173–4, 252, 257–9, 332, 342, 479–82], and [Morales Godoy DO] [118, 314, 175]; *Yukos* [504, 514, 677]; *Gold Reserve* [301, 387, 569, 595]; *Vigotop* [631–2]; *Belokon* [201, 211–2, 232–43, 254]; *Awdi* [382]; *Quiborax* [246–248]; *Oxus* [318, 785, 819]; *Copper Mesa* [6.84]; *Devas* [413–4]; *Ampal-American* [342–4]; *Deutsche Telekom* [336]; *Casinos Austria* [Jurisdiction] [244]; *Unión Fenosa* [9.131]; and *South American Silver* [568–71, 619–24]

732 Such should not necessarily be read as a blanket denial of the relevance of measures' proportionality, but denial in the circumstances invoked by the parties. *Siemens* [354]; *Sempra* [113–4, 299]; *von Pezold* [460–3]; *Crystallex* [551]; *UAB* [1087–8]

733 *Al-Tamimi* [391–3]

5.5.2 Interpretative contexts

223. Just as proportionality has played various roles in arbitrators' analyses, it has also been employed in a variety of interpretative contexts. In the fifty-three decisions identified above in which one or more arbitrators considered the proportionality of a host State's measure was (somehow) relevant to merits determination, in thirty-three instances (c. 47%) this occurred in the context of applying an FET provision[734] and in twenty-three instances (c. 33%) arose in determining whether a host State was responsible for a compensable expropriation.[735] In three instances (c. 4%) arbitrators referred to proportionality in considering whether an investment had been impaired by unreasonable, arbitrary or discriminatory measures.[736] In a further three examples (c. 4%) arbitrators considered proportionality was relevant in applying national treatment provisions[737] and one tribunal (c. one per cent) deemed proportionality was relevant to considering discrimination under a most-favoured nation provision.[738] Two tribunals (c. 3%) referred to proportionality in considering a full protection and security provision.[739] In four cases (c. 6%) arbitrators expressly considered proportionality as part of the customary international minimum standard[740] and one tribunal (c. 1%) applied proportionality as relevant domestic law of the host State.[741]

224. Of the five decisions cited above in which tribunals either expressed scepticism regarding, or expressly reserved deciding upon, parties' arguments regarding proportionality, three concerned the interpretation and application of FET provisions,[742] and two concerned expropriation.[743] In thirteen decisions, the proportionality of a host State's measure was deemed relevant

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734 *SD Myers* [Schwartz SO]; *EDF v Romania*; *Lemire*; *Suez & Vivendi* [Nikken SO]; *Total*; *El Paso*; *Roussalis*; *Occidental*; *Mobil v Argentina*; *Mobil v Argentina* [Remiro Brotóns SO]; *ECE*; *AES v Kazakhstan*; *de Levi*; *Perenco*; *Gold Reserve*; *Belokon; Awdi*; *Mamidoil*; *Electrabel*; *Oxus*; *Charanne*; *Copper Mesa*; *Philip Morris v Uruguay, Philip Morris v Uruguay* [Born DO]; *Blusun*; *Eiser*; *Deutsche Telekom*; *Antin*; *Casinos Austria*; *Marfin, Unión Fenosa*; *RREEF*; *Greentech* [Sacerdoti DO]

735 *Tecmed*; *Azurix*; *LG&E*; *Continental*; *El Paso*; *Servier*; *Inmaris*; *Occidental*; *Deutsche Bank*, *Mobil v Argentina*; *de Levi*; *Yukos*; *Perenco*; *Vigotop; Belokon*; *Quiborax*; *Philip Morris v Uruguay*; *Devas*; *Ampal-American*; *PL Holdings*; *Koch Minerals*; *Marfin;* and *South American Silver.* While the majority of arbitrators have considered proportionality in the context of excluding responsibility for expropriation, the *South American Silver* tribunal considered proportionality in the context of differentiating between lawful and unlawful expropriation and a finding that a measure was proportionate was not sufficient to excuse otherwise expropriatory conduct or to relieve the host State of the burden to compensate: *South American Silver* [568–71, 619–24]

736 *Roussalis*; *ECE*; *Antaris*

737 *SD Myers*; *SD Myers* [Schwartz SO]; *Parkerings*

738 *Parkerings*

739 *Roussalis*; *Copper Mesa*

740 *SD Myers*; *SD Myers* [Schwartz SO]; *Parkerings*; *Suez & Vivendi* [Nikken SO]

741 *Pac Rim*

742 *Sempra*; *Al-Tamimi*; *Crystallex*

743 *Siemens*; *von Pezold*; *UAB*

in more than one interpretative context.[744] Perhaps of most relevance to our understanding of how proportionality is used in practice, in the thirteen 'core' decisions identified above in which tribunals or individual arbitrators placed the greatest emphasis on proportionality analysis,[745] arbitrators referred to proportionality when considering whether treatment breached an FET provision in eleven instances,[746] and in five examples, a measure's proportionality was deemed relevant to the issue of whether an expropriation had occurred.[747]

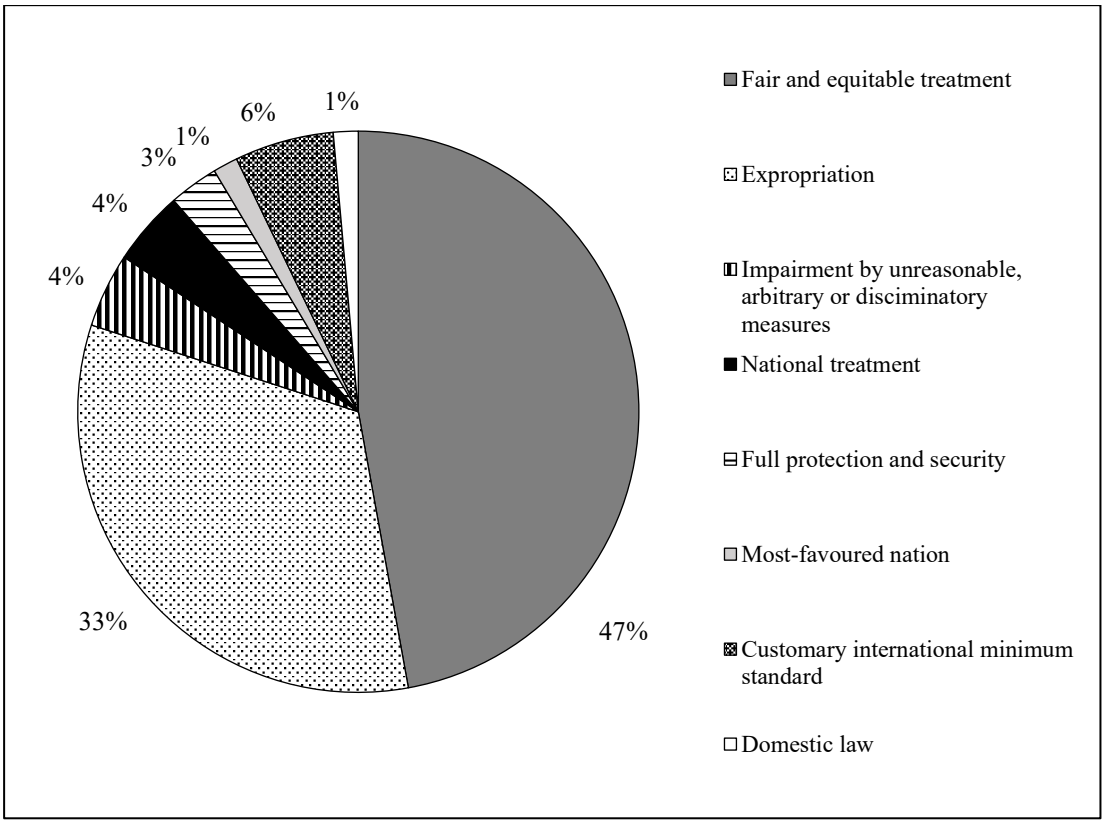

Figure 9: Arbitral recourse to proportionality in merits determination, by interpretative context [748]

225. As well as in interpreting a range of treaty provisions, proportionality was employed in disputes involving a diverse categories of host State measures, including both general and targeted measures. In the fifty-five disputes described above in which arbitrators engaged (in whatever manner) with the issue of proportionality's relevance, in thirty-two (c. 58 per cent) this occurred in the context of considering 'targeted' measures — ie the application or administration of existing laws, most commonly the termination of an underlying contract or the

744 *SD Myers* [Schwartz SO]; *Parkerings*; *Suez & Vivendi* [Nikken SO]; *El Paso*; *Roussalis*; *Occidental*; *Mobil v Argentina*, *de Levi*, *Perenco*; *Belokon*; *Copper Mesa*; *Philip Morris v Uruguay*; *Marfin*

745 Above, n 729

746 *Total*; *Occidental*; *AES v Kazakhstan*; *Electrabel*; *Charanne*; *Philip Morris v Uruguay*, *Philip Morris v Uruguay* [Born DO]; *Blusun*; *Marfin*; *RREEF*; *Greentech* [Sacerdoti DO]

747 *Tecmed*; *Occidental*; *Philip Morris v Uruguay*; *PL Holdings*; *Marfin*

748 Full list of provisions interpreted on file with author.

revocation or non-renewal of a license or concession[749] — and in twenty-three (c. 42 per cent) when considering 'general' measures — ie changes to the host State's regulatory framework. The view is somewhat reversed if we focus on our twelve 'core' disputes. In *Total*, *AES*, *Electrabel*, *Charanne*, *Philip Morris*, *Blusun*, *RREEF* and *Greentech* recourse to proportionality was made in considering changes to host States' legislative framework. *Tecmed*, *Occidental*, *PL Holdings* and *Marfin*, by contrast, largely concerned the administration and application of existing laws.

226. Although arbitrators have had recourse to proportionality in a range of interpretative contexts involving numerous provisions and treaties with diverse parties, a few notable clusters of practice have formed. For example, in five disputes arising out of the 1998–2002 'Argentine Great Depression', arbitrators considered proportionality was relevant in applying Article IV(1) 1991 US-Argentina BIT (concerning expropriation).[750] In a more recent and arguably more significant trend, in eight disputes — mostly concerning tariff structures in the renewable energy sector — arbitrators have employed proportionality (in various ways and with various results) in constructing host States' obligation to provide regulatory stability as a component of the duty to afford FET under Article 10(1) ECT.[751] As explored in Chapter 4, a further notable, but less significant, cluster has formed due to the fact that when arbitrators make use of proportionality in the context of interpreting and applying expropriation provisions, this has often occurred as part of their consideration of the (purportedly customary) 'police powers doctrine' 'exception' or 'defence'.[752]

227. As I return to in Chapter 6, all of this suggests that arbitrators have not considered that proportionality analysis is necessary to give effect to a set range of treaty terms. Rather, recourse to proportionality has seemingly been deemed permissible or desirable whenever treaty provisions (and in some circumstances customary international law) requires a 'balancing' of interests or considerations. This has most often been considered to arise in giving effect to FET provisions and (albeit slightly less often) when determining whether States' measures are 'tantamount' or 'equivalent' to expropriation.

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749 *SD Myers*; *Tecmed*; *Azurix*; *Siemens*; *EDF v Romania*; *Lemire*; *Roussalis*; *Servier; Inmaris*; *Occidental*; *Deutsche Bank*; *ECE*; *de Levi*; *Yukos*; *Gold Reserve*; *Vigotop*; *Belokon*; *Awdi*; *Quiborax*; *Al-Tamimi*; *Copper Mesa*; *Devas*; *Pac Rim*; *Ampal-American*; *PL Holdings*; *Koch Minerals*; *Deutsche Telekom*; *UAB*; *Casinos Austria* [Jurisdiction]; *Marfin*; *Unión Fenosa*; and *South American Silver*

750 *Azurix*; *LG&E*; *Continental*; *El Paso*; *Mobil v Argentina*

751 *Mamidoil*; *Electrabel*; *Charanne*; *Blusun*; *Eiser*; *Antin*; *RREEF*; and *Greentech* [Sacerdoti DO]. See, relatedly: *AES v Kazakhstan*; and *Antaris*. This said, proportionality analysis does not yet seem to be the prevailing approach in interpreting and applying the regulatory stability component of Art 10(1) ECT. See, eg: *Masdar*; *Novenergia*

752 *EDF v Romania* [292]; *El Paso* [234]; *Servier* [276–80]; *Mobil v Argentina* [Remiro Brotóns SO] [77]; *Philip Morris v Uruguay* [305]; *Koch Minerals* [7.19]; *Marfin* [828] and *South American Silver* [622–4]. See too: *Perenco* [243]; *von Pezold* [454]; and *Al-Tamimi* [446]

5.5.3 Structure and content of inquiry

228. As noted in examining the police powers doctrine in the previous chapter, the most crucial aspects of practice for our understanding of proportionality's place in investment arbitration — and how its use affects States' capacities to define and pursue the public interest — concern its operation, and, particularly, the content and structure of inquiry its use has generated. However, as Henckels observed in 2015 and remains the case at time of writing, most tribunals employing the language of proportionality have not expressly carried out the staged inquiry many consider 'true' proportionality analysis requires.[753] To date, only the *PL Holdings* tribunal has explicitly engaged in detailed, sequenced review under the four stages of analysis identified above (proper purpose, suitability, necessity and proportionality *stricto sensu*).[754] Further, arbitral recourse to proportionality is beset by vagueness: often when arbitrators referred to the need to consider measures' proportionality, this requirement was conflated with other analyses and arbitrators did not clearly lay out the criteria through which proportionality was to be assessed or pinpoint the relevant features of measures' design and implementation. Our task in understanding the precise roles played by proportionality analysis is thus further complicated. This said, in assessing measures' proportionality, arbitrators have both expressly and implicitly engaged in analyses that resemble what we would expect to see under one or more of the four stages of review canonical to the 'European' model. However, as explored below, in doing so, arbitrators have expressed their inquiries in a number of ways, seemingly signalling the use of a variety of tests.

229. Below, again drawing primarily on examples from the thirteen 'core' decisions identified above,[755] I analyse arbitral practice with reference to these four elements of inquiry. I consider key aspects of the ways arbitrators have approached: (i) whether a measure pursues a public purpose; (ii) whether a measure is a suitable means of achieving its purpose; (iii) whether a measure is a necessary means of achieving its purpose; (iv) whether a measure's impact on a protected interest is proportionate (*stricto sensu*) to its purpose; and, additionally (v) which party bears the burden of proving whether a measure is (dis)proportionate.

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753 See further: Henckels (2015) 126–68

754 *PL Holdings* [374–83]. While it lists three stages of analysis ('suitability', 'necessity' and 'excessiveness' the tribunal ultimately conflated its analysis by considering many of the same issues and adopting very similar tests under separate headings: [354–90]

755 n 729

i. Purpose pursued

230. While most arbitral recourse to proportionality has involved at least a cursory examination of whether a host State's measure is justified by a 'legitimate' or 'valid' public purpose,[756] arbitrators differed significantly in how this task ought to be approached. Most importantly in this respect, practice is somewhat divided on the test to be used in assessing a measure's purpose — and especially whether a host State's categorisation of the purpose of its measures should be accepted or subjected to inquiry. Because all three remaining stages of 'full' proportionality analysis depend on such categorisation, how tribunals approach this issue is crucial.

231. In most instances, arbitrators seemed willing to accept host States' categorisation of the purpose of its measures and, rather, focused attention on measures' design and implementation.[757] This often seems to follow from the fact that claimants only infrequently directly impugn governments' motives.[758] Several tribunals, however, engaged in minimally intrusive investigations aimed, largely, at seeking to identify possible ulterior motives for measures' adoption.[759] Illustratively in this respect, in considering measures' proportionality within the framework of its police powers analyses, the *Marfin* tribunal focused primarily on whether there was evidence of an intention on the part of the Cypriot authorities to nationalise the claimant investor's bank.[760] Similarly, in considering Uruguay's single presentation requirement (SPR), the *Philip Morris* tribunal considered whether the evidentiary record — including the claimant's internal documents — supported Uruguay's conclusion that certain cigarette variants were being packaged and labelled so as to appear to pose less health risks to consumers.[761]

232. However, in several decisions, rather than accepting States' categorisation at face value — and using the States' categorisation in any subsequent analysis of measures' suitability, necessity, or proportionality *stricto sensu* — arbitrators determined, seemingly de novo, how a measure should be categorised. Illustratively, based on several factors, including that the environmental concerns alleged to underpin Mexico's non-renewal of the investor's operating permits had already, in its view, been addressed through fines, the *Tecmed* tribunal determined for itself that the Mexican authorities' decision was not primarily motivated by concern for human

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756 See, eg: *Tecmed* [122] ff; *EDF v Romania* [292–4]; *El Paso* [243]; *Roussalis* [686, 691]; *Servier* [570]; *Inmaris* [303]; *Occidental* [406, 414 ff, 444-9]; *Deutsche Bank* [524]; *de Levi* [335, 476]; *Yukos* [514]; *Belokon* [211, 232]; *Awdi* [382]; *Mamidoil* [657]; *Electrabel [*168, 179]; *Philip Morris v Uruguay* [305 ff, 391]; *Philip Morris v Uruguay* [Born DO] [86, 142, 148]; and *Pac Rim* [8.38]

757 See, illustratively: *Blusun* [318, 339–43]; *Total* [162–4]; *Quiborax* [244]; *PL Holdings* [354–6]; *Greentech* [Sacerdoti DO] [40–2, 49–50]

758 See, eg: *AES v Kazakhstan* [361]

759 See, eg: *Roussalis* [515–20, 685–91]; *Inmaris* [303]; *Devas* [413–4]; *Deutsche Bank* [524]; *Quiborax* [247–8]

760 *Marfin* [826–30, 848, 1069–70, 1233]

761 *Philip Morris v Uruguay* [305–6, 402–4]

health or environmental protection, but, rather, was a response to public dissatisfaction with the location and operation of the site.[762] While the tribunal agreed this was in principle a valid public purpose, it also engaged in its own assessment of risk, considering that there was no evidence that public unrest would rise to the level needed to justify non-renewal.[763] Also based on its own assessment of the factual record, (albeit in the context of assessing the measures' suitability) the *PL Holdings* tribunal likewise considered that the reasons given by Poland for the mandatory sale of the investor's shares in a bank (relating to its liquidity) could not be considered the measure's genuine motivation.[764]

233. Likewise, although the *Occidental* tribunal partly accepted Ecuador's construction that its measures' purpose was to deter companies farming-out mineral rights, in what seems to be an implicit finding of bad faith, it suggested that the termination of the concession was equally motivated by ulterior (non-public) purposes, including public dissatisfaction and the deterioration in the government's relationship with the investor following earlier arbitral proceedings.[765] Similarly, whereas the majority accepted Uruguay's characterisation of its SPR, in *Philip Morris* arbitrator Born categorised the measure's purpose more narrowly as being aimed at the abusive or misleading use of trademarks.[766] This re-categorisation was key to Born's subsequent finding that the measures were unsuitable and therefore disproportionate and, further, shows that even slight adjustments in how a measure is characterised can have profound effects.

ii. Suitability

234. While frequently using competing terms to describe the degree of connection required between a measure's purpose and its design and implementation, in most of the decisions identified above, arbitrators expressly engaged in some form of assessment of measures' suitability, appropriateness or effectiveness. While still varied, practice in considering this requirement is somewhat less fragmented than that concerning other elements of the four-stage test; where they expressly engaged in consideration of a measure's suitability or appropriateness (separately from its necessity) arbitrators tended to require that a measure was not an unsuitable or 'irrational' means of achieving its ends.

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762 *Tecmed* [127–8]. While the tribunal considered this was a valid purpose, it was considered comparatively less significant: [145]

763 *Tecmed* [145]

764 *PL Holdings* [359–61, 373]

765 *Occidental* [437–41]. See, similarly: *PL Holdings* [360–71]

766 *Philip Morris v Uruguay* [Born DO] [148] ff

235. Illustratively, the majority of the tribunal in *Philip Morris* considered that the requisite test for considering proportionality in the context of expropriation was not whether the measure actually had the impact intended, but rather whether it constituted a 'potentially effective' means 'capable' of achieving the measure's purpose.[767] The *Electrabel* tribunal considered that the 'test for proportionality […] developed from certain municipal laws' requires that a measure be 'suitable to achieve a legitimate policy objective'.[768] Applying a seemingly stricter test than that applied by the majority in *Philip Morris*, the tribunal required both that a measure pursued a 'rational policy', and also was a 'reasonable' means of achieving such a policy.[769] While its reasoning on this point was brief and somewhat circular — and without elaborating what would be considered 'appropriate' — the tribunal regarded this required an 'appropriate correlation' between a measure and its stated objectives.[770] Similarly, the *Marfin* tribunal considered that in assessing proportionality as a requirement of fair and equitable treatment it is sufficient that a measure '"bea[r] a reasonable relationship to some rational policy"' and be 'appropriately tailored so as not to impose an excessive burden on an investor.'[771] While their baseline for 'rationality' remained rather opaque, the *Total* and *Charanne* tribunals considered whether host States' regulatory changes were economically rational in the circumstances.[772]

236. However, these (relatively non-intrusive, if vague) approaches can be contrasted with the (relatively intrusive, if somewhat confused) approach adopted by the tribunal in *PL Holdings*, in which the tribunal purported to address the suitability of the Polish Financial Supervision Authority (KNF)'s decision to order the claimant to sell its shareholding in a bank.[773] After rejecting Poland's assertion that the order had been made to address the bank's severe financial situation and failure to meet minimum liquidity requirements,[774] the tribunal considered that the 'contemporaneous justifications' for the order concerned, rather, changes to the bank's management and 'certain irregularities' in its management.[775] In the tribunal's view, certain of the claimed irregularities were beyond the claimant's control, and those within its control had largely been rectified, in consultation with the KNF.[776] The tribunal thus considered that

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767 *Philip Morris v Uruguay* [306]. While he in principle agreed with this test, Born disagreed that Uruguay's measures had met this standard: *Philip Morris v Uruguay* [Born DO] esp [192–5]. See too: *Belokon* [232]

768 *Electrabel* [179]

769 *Electrabel* [179]. The tribunal applied the standard of an 'appropriate correlation between the policy sought by the State and the measure', requiring demonstrable unreasonableness not to be met: [180]

770 *Electrabel* [180]

771 *Marfin* [1213], citing: *Invesmart* [454]

772 *Total* [333]; *Charanne* [531–4]. The *Charanne* tribunal considered this must turn on analysis of 'objective criteria': *Charanne* [534]

773 *PL Holdings* [211–13, 356–73]

774 *PL Holdings* [359–60, 373]

775 *PL Holdings* [361]

776 *PL Holdings* [362–7]

these irregularities provided 'unconvincing' 'rationales'.[777] Further, the tribunal seems to have implied bad faith when it stated that, in light of decisions' timings and the bank's improved financial situation, the decision to force the claimant to sell its shares was 'predetermined'.[778]

237. The *PL Holdings* tribunal thus conflated suitability with the determination of a measure's purpose, and, simultaneously, with the type of assessment normally conducted in assessing necessity. As noted above, the suitability stage of inquiry within a 'full' proportionality analysis is generally understood to be aimed at determining whether there is any rational connection between a measure and its objectives — in other words, whether the measure is capable of achieving its aims.[779] Clearly (accepting the tribunal's categorisation of the measure's purpose) the order compelling the claimant to sell its shares would have had the effect of preventing any further irregularities caused by its roles in appointment and management. It was, in other words, capable of achieving its aims. The tribunal's analysis, thus, more closely related to the question of whether, being capable of achieving its aims, the measure went further than necessary.

iii. Necessity

238. While there is significant conceptual overlap between considerations of suitability and necessity, a necessity inquiry is often distinguished to the extent it considers whether less-impactful alternative measures were available for reaching the same or similar objective.[780] Generally, arbitrators have not expressly inquired into whether a host State had less-impactful measures available. However, in several notable examples, arbitrators did so — albeit employing various levels of scrutiny and drawing diverse inferences.

239. *Occidental* provides a clear example of when the availability of less investment-impacting alternative measures proved central to merits determination. In considering whether the Ecuadorian Minister of Energy and Mines's declaration of the expiry ('*caducidad*') of a hydrocarbons exploration and exploitation contract was a proportionate response to the investor 'farming-out' its contractual rights, the tribunal considered that, while policing the practice of transferring contractual rights was a valid purpose, termination was not necessary.[781] The tribunal considered that the payment of a transfer fee, partial or complete contractual renegotiation and

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777 *PL Holdings* [362]

778 *PL Holdings* [371]

779 See, eg: Möller (2012) 713

780 But see the different inquiries performed by the CJEU in: *Deutsche Parkinson Vereinigung* [37–42]; and: *Scotch Whisky Association* [40–50]

781 *Occidental* [426, 428–36]

the issuing of a public statement notifying companies of the government's position on farming-out were all reasonably available alternatives.[782]

240. Similarly, in *PL Holdings*, the tribunal expressly framed its necessity assessment as turning on the issue of 'whether the KNF had at its disposal less draconian means for achieving the legitimate and substantial public interest it considered to be at stake.'[783] Confusingly, given its findings relating to suitability (addressed above), the tribunal stated that because 'no serious sanction at all was warranted' to address the irregularities identified in the claimant's management of the bank, the question of necessity 'plausibly ar[ose] only in connection with the Bank's financial problems'.[784] The tribunal accepted the claimant's experts' testimony that there were a number of 'milder available remedies and sanctions' available to attempt to address the bank's liquidity problems, short of mandating the investor sell its shares.[785] In the tribunal's view, these included, 'among others', 'suspending or discharging a member of the Management Board, limiting the permissible scope of banking activity, enjoining bank officials to take or refrain from taking certain actions, issuing public statements, or imposing a financial penalty'.[786] Importantly, the tribunal considered that the burden of showing that such alternatives were not capable of fulfilling the adopted measures' objectives fell on the host State — a burden it considered had not been met.[787]

241. In several further decisions, tribunals considered that the availability of less impactful means of pursuing the host State's objectives was relevant in determining whether measures were proportionate in the circumstances. For example, and while it did not ascribe the issue significant attention, in considering proportionality as an element of FET under Article 10(1) ECT the *Electrabel* tribunal considered Hungary's payment of partial compensation for losses incurred as a result of legislative change against the legally-available alternatives, including the payment of full or no compensation.[788] Likewise, in *AES*, in assessing the 'proportionality or reasonableness' of Kazakhstan's 'tariff in exchange for investment' policy — under which energy producers had to reinvest all profits for a fixed period — and whether Kazakhstan had violated what the tribunal considered were the investor's legitimate expectations that it 'would have the opportunity to make a reasonable return of and on their investment and to repatriate

782 *Occidental* [434–35]. While likely constructed from parties' pleadings, it is not entirely clear how the tribunal reached its findings on this point.

783 *PL Holdings* [374]

784 *PL Holdings* [375–6]

785 *PL Holdings* [377]

786 *PL Holdings* [377]

787 *PL Holdings* [377–8]

788 *Electrabel* [186]

such return within a reasonable timeframe'[789] under Article 10(1) ECT, without providing any indication of what such measures might include, the tribunal emphasised the potential availability of alternative means for Kazakhstan to achieve its objective of preventing 'the collapse of the electricity distribution system' that 'involved a lesser intrusion upon the Claimants' rights',[790] both in terms of effect and duration. The tribunals in *Tecmed*,[791] *Yukos*,[792] *Perenco*,[793] and *Belokon*,[794] similarly considered that the availability of less-impactful measures was a relevant factor, without engaging in further assessment of any such alternatives, whether they were reasonably available or whether they would adequately fulfil the host State's objectives.

iv. Proportionality stricto sensu

242. The final component of 'full' proportionality analysis, *stricto sensu* balancing, is often considered the most controversial aspect of a four-stage test as, because it requires a comparison of the relative social value of two interests or objectives, it permits adjudicators to substitute their own substantive preferences for governments'. It is also, however, the element that most clearly differentiates proportionality analysis from other reasonableness-, suitability-, or necessity-based approaches.[795] While they seldom expressly categorise inquiries in such terms, it is often the case that when referring to proportionality, arbitrators seem implicitly to refer to measures' proportionality *stricto sensu*.[796] Despite this fact, because tribunals tend to provide scant analysis when (seemingly) engaging in *stricto sensu* balancing, it is often unclear, first, what precisely is being balanced, and, second, whether tribunals are, in fact, weighing the relative (societal) values of competing interests.

243. Illustratively, the tribunal's reasoning in *Occidental* in considering proportionality within its FET inquiry suggests it engaged in an assessment, and weighing, of the relative values of the interests underlying Ecuador's measures. In considering whether Ecuador's forfeiture of an oil and gas participation contract on the grounds that the investor had 'farmed-out' its contractual rights without the (legally required) prior authorisation of the Ministry of Energy and Mines,

789 *AES v Kazakhstan* [411]

790 *AES v Kazakhstan* [406]

791 *Tecmed* [143]

792 *Yukos* [677]

793 *Perenco* [689]

794 *Belokon* [233]

795 Lang (2011) 323

796 *Tecmed*, esp [122, 132–3]; *Philip Morris v Uruguay* esp [409–10, 419–20], and [Born DO] [146–79]; *AES v Kazakhstan* [403–10]; *Electrabel* [180–2]; *PL Holdings* [384–9]; *Charanne* [515]; *Blusun* [319]; *RREEF* [465]; *Greentech* [Sacerdoti DO] [12]. See too: *Mamidoil* [657–75]; *Awdi* [382–3]; *Belokon* [201, 254]; and *EDF v Romania* [293–7]

the tribunal attempted to distil the 'rationale' behind the relevant legislation's authorisation requirement.[797] In the tribunal's view, this rationale was 'to protect Ecuador's natural resources, and the income it can generate from them, by carefully assessing the technological capability, financial soundness and overall suitability of any party who will have access to and/or a measure of control over those resources.'[798] But having so identified the authorisation requirement's 'rationale', the tribunal considered that the key question was, in fact, whether any actual harm had arisen as a consequence of the investor's unlawful farming-out — in its view, no such harm had occurred.[799] The tribunal thus considered that the true 'value' at stake for Ecuador merely comprised its interest in ensuring 'adherence to its regulatory regime' and deterring future unauthorised farming-out.[800] These goals, however, were deemed to be inequivalent to 'the price paid' by the investor, the 'total loss of an investment worth many hundreds of millions of dollars'.[801]

244. The *Marfin* tribunal's approach is similarly suggestive of *stricto sensu* balancing. In assessing the proportionality of the Central Bank of Cyprus's removal of members of a bank's management within the framework of its police powers assessment, it considered its task was to weigh 'the competing interests at stake: on the one hand, the State's legitimate interest to protect the public welfare and, on the other hand, the investor's legitimate interest to continue managing its investment.'[802] The tribunal considered that the interests to be weighed were Cyprus's interest 'in protecting the safety and soundness of its banking sector, the interests of depositors and of taxpayers' against 'the risk that one of the two systemic banks in the country would be unable to meet its financial commitments and would become bankrupt' and the investor's 'interest to continue managing' the bank in which it had a shareholding.[803] In the tribunal's view, the severe nature of the crisis facing Cyprus's banking and finance sectors and the real risk 'of insolvency of the State were [it] to be called upon to support guaranteed deposits', outweighed the limited burden placed on the investor's right to freely manage its investment, particularly as the investor retained the right to be represented on the bank's management, to vote, and to draw any dividends.[804]

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797 *Occidental* [446]

798 *Occidental* [446]

799 *Occidental* [447]

800 *Occidental* [450]

801 *Occidental* [450]

802 *Marfin* [983]

803 *Marfin* [984]

804 *Marfin* [984]

245. Coming perhaps closest to expressly engaging in assessment of measures' proportionality *stricto sensu*, the *PL Holdings* tribunal remarked that '[a]s its final prong, the principle of proportionality requires that a measure taken not be excessive in relation to the purposes meant to be served.'[805] In the tribunal's view, there was 'no question' that the KNF's measures, especially mandating the sale of the claimant's shareholding, 'were exceptionally harsh';[806] the outcome of analysis, in the tribunal's view, turned on 'whether the situation facing the KNF was so dire as to justify them.'[807] Once again seemingly conflating *stricto sensu* balancing with necessity, the tribunal considered that to 'justify imposing as severe a sanction as a forced sale of shares […] the KNF should have been persuaded not only that the situation was dire, but also that the shareholders had shown themselves to be so utterly unwilling or unable to take corrective action if specifically ordered to do so that dispossession was the KNF's only option.'[808] Importantly, in reaching the conclusion that this had not met, the tribunal did not engage in an assessment of the relative values and risks at stake. It did not, for example assess whether there was a genuine risk of the bank collapsing or inquire into the potential effects such might have on Poland's banking and finance sectors. Rather, the tribunal's findings on excessiveness seem merely to have flowed from its findings on, and repeated analysis already conducted in considering, the measures' suitability and necessity.

v. Elements balanced

246. Closely related to the above, a further significant aspect of arbitral recourse to proportionality concerns what, precisely, arbitrators saw themselves as balancing. While this question applies in considering the range of tests employed, it is particularly relevant in understanding those decisions in which arbitrators' reasoning resembles *stricto sensu* balancing. Given the lack of clarity in arbitral approaches, it is not, however, possible to draw particularly firm conclusions on this issue.

247. For example, and at one end of the spectrum, the *Marfin* tribunal clearly articulated what rights it considered had been impacted by the Central Bank of Cyprus's decision to (*inter alia*) replace certain members of the claimant investor's management. Thus, the tribunal purported to balance the right (flowing from the investor's shareholding) to control all aspects of the management of the bank with the government's interest in taking steps to ensure its liquidity and the stability of its banking and finance sectors during a time of crisis.[809] *Inter alia* because the

805 *PL Holdings* [384]

806 *PL Holdings* [384]

807 *PL Holdings* [384]

808 *PL Holdings* [387]

809 *Marfin* [983]

investor retained a significant part of the rights flowing from its shareholding — including to continue to have representatives on the bank's Board of Directors, to vote as a shareholder and to collect any dividends — and in light of the extreme nature of the crisis, the tribunal considered the limitation on the exercise of the investor's rights was proportionate.[810]

248. By contrast, in *Tecmed*,[811] *LG&E*,[812] *Continental Casualty*,[813] and *El Paso*,[814] the tribunals referred to the need to balance a measure's purpose against its adverse impacts on investors' property or economic rights without elaborating the precise nature of these rights or the benefits derived therefrom.[815] Similarly, in *Sempra*,[816] *Electrabel*,[817] and Born's dissent in *Philip Morris*,[818] while they referred to investors' 'rights' in their balancing exercises, arbitrators gave no hint as to whether such were rights to property vested under the host State's domestic laws, or were 'rights' purportedly derived from treaty or custom.[819] In most instances — and regardless of interpretative context — arbitrators seem merely to have balanced a measure's purpose, or (even more amorphously) the host State's interest in regulating persons, events and activities within its jurisdiction, against any harm to the value and future profitability of the investor's business: in other words, measures' impact on the claimant in aggregate.[820]

249. Certain tribunals have taken a further, more worrying, step of balancing a host State's interest in regulating its economy against investors' *expectations* of future profits. For example, in *Tecmed*, the tribunal seems to have balanced Mexico's public purpose of reacting to public outcry over the location and operation of landfill sites against what it considered to be the investor's legitimate expectation of the annual renewal of its operating permits and of recouping and profiting on what was intended to be a long-term investment.[821] Similarly, the

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810 *Marfin* [984]

811 *Tecmed* [122]

812 *LG&E* [195]

813 *Continental* [281]

814 *El Paso* [234, 240–3]

815 See, eg: *Tecmed* [122]; *LG&E* [195]; *Continental* [281]; *El Paso* [234, 240–243].

816 *Sempra* [114]

817 *Electrabel* [180]

818 *Philip Morris v Uruguay* [Born DO] [83, 136, 139]

819 See too the *Pac Rim* tribunal's reference to the investor's 'fundamental' and 'constitutional' rights: *Pac Rim* [8.38].

820 *SD Myers* [252]; *Azurix* [312]; *Lemire* [285]; *Occidental* [415, 417, 444–52]; *Deutsche Bank* [522]; *Belokon* [203]; *Mamidoil* [619]; *Quiborax* [247–248]; *Philip Morris v Uruguay* [420]; *Blusun* [342]

821 *Tecmed* [149]

Charanne,[822] *Blusun*,[823] *RREEF*,[824] and *AES*,[825] tribunals considered the relevant factors to be balanced were, on the one hand, the investor's legitimate expectation of reasonable profits (and regulatory stability) and, on the other, the host State's power to regulate and the public purpose underpinning its changes to the regulatory framework. Given the vagueness of these tribunals' reasoning on this issue, such statements may merely have been rhetorical devices meant to describe, in a broad sense, what the tribunals saw as their function in the circumstances. Further this approach can largely be explained as these tribunals' attempts to give effect to parties' obligations under Article 10(1) ECT to 'encourage and create *stable*, equitable, favourable and transparent conditions' for investors (my emphasis). However, we can also see in this signs of a broader — concerning — tendency on the part of tribunals of elevating mere expectations (however 'legitimately or 'reasonably' held) to the level of legally-protected (viz propriety) rights.

vi. Onus of proof

250. Finally, it is worth briefly reflecting on where tribunals have placed the onus of proving that a measure is '(dis)proportionate'. As Henckels noted in 2015 and remains true at time of writing, despite its significance, tribunals have largely not expressly addressed this issue.[826] Nevertheless, based on their engagement with parties' arguments, tribunals often implicitly seem to follow the general approach adopted by international courts and tribunals requiring the party relying on a fact or legal argument to bear the burden of proving it — often expressed as the *actori incumbit probatio* or *actor allegans probat* 'rules'.[827] This approach, for example, seems to have guided the *Philip Morris* tribunal throughout its inquiry, including when considering whether Uruguay's measures were proportionate in the circumstances.[828] Obviously, such an approach often results in a 'migratory' onus of proof: once a fact or argument is *prima facie* established by the invoking party, it will then fall to the other to rebut it. As I noted above in considering the police powers doctrine, it is also crucial to who initially serves in this game of ping-pong whether a norm is characterised as a substantive element of an obligation or as an 'exception' or 'defence'. Looking to the structure of parties' arguments, as noted *inter alia* in Section 5.5.1 above, in many disputes, claimants raise proportionality as an element of the

822 *Charanne* [349, 513–6]

823 *Blusun* [318–319]

824 *RREEF* [470–1]

825 *AES v Kazakhstan* [404–10]

826 Henckels (2015) 153

827 ibid 151, 3–4; Foster (2012) 21 RECIEL 80, 40–7; *Nicaragua* [101]; *Arrest Warrant, Bula-Bula SO* [73]; *Avena* [55–7]; *Navigational Rights* [128]; *Pulp Mills* [162]. In the investment context, see: *Feldman* [117]; *Thunderbird* [95]

828 See, esp: *Philip Morris v Uruguay* [29, 388–435]

treatment mandated under (typically) FET or expropriation provisions. Respondents then tend to counter such arguments. In other instances, this pattern is inverted; States raise proportionality in a manner resembling an affirmative defence or exception and claimants present countering arguments and evidence. While particularly evident in such cases, this trend is not limited to those disputes in which host States refer to proportionality in seeking to justify measures as an exercise of police powers.[829]

251. Illustratively, though we lack insight into precisely how it conducted its analysis because the publicly-availably award is heavily redacted, (as we might expect) the *Servier* tribunal stated that the onus of proving 'disproportionateness' — at least in establishing whether measures constitute compensable expropriation or, rather, can be justified as the exercise of police powers — initially lies with the claimant.[830] However, once 'sufficient evidence' is adduced, the tribunal considered the onus shifts to the host State 'to rebut' such a qualification.[831] This seems also to explain the tribunal's approach in *PL Holdings* when, having seemingly accepted the claimant's expert witnesses' evidence on the potential availability of less-impactful alternatives, it considered that Poland had not carried its burden in proving that the mandatory sale of the investor's shares was necessary in the circumstances.[832] While perhaps less clear, and undoubtedly employing different intensities of analysis, we can see a similar pattern in the *AES* and *Electrabel* tribunals' approaches.[833]

5.6 Lessons from arbitral practice

252. What lessons, then, can we draw from the above? Let us return to the three questions I introduced earlier: (i) how significant (both quantitatively and qualitatively) has the use of proportionality analysis been to arbitral practice?; (ii) what structures and roles has the concept been ascribed in arbitral reasoning?; and (iii) what are the consequences of arbitral recourse to the concept, particularly for States' abilities to define and pursue the public interest?

253. Turning to (i), proportionality has clearly not yet secured a central place in arbitral practice. While parties are referring to the need for proportionality analysis in their pleadings and arbitrators are using the language of proportionality in their reasoning with increased frequency, proportionality analysis has only played a significant role in merits determination in thirteen

829 Above, Sec 4.5.3.h

830 *Servier* [583]

831 *Servier* [584]

832 *PL Holdings* [377–8]

833 See, esp: *AES v Kazakhstan* [404–10]; *Electrabel* [154, 173, 180–6]. On the policy issues underlying the questions of where the onus of proof ought to lie in assessing necessity, particularly given asymmetry in expertise and access to records of decision-making processes, see further: Henckels (2015) 151, –4

decisions, and a more limited (and highly varied) role in a further 42. While, when considered alone, this comprises a relatively large number of decisions, considered as a proportion of the total number of decisions considered in this study, proportionality analysis cannot, in purely quantitative terms, yet be said to occupy a central place in arbitral reasoning. This is particularly so given almost every dispute will involve (one or both) an FET or expropriation claim — we might therefore reasonably expect to see proportionality play some role in every tribunal's consideration of the merits. This said, given in recent practice arbitrators are referring to the concept more frequently and are seemingly ascribing it more weight in reasoning, proportionality analysis of some shape or form is having an increasingly significant impact on merits determination — and thus in shaping arbitral approaches to States' capacities to define and pursue the public interest. Further, if current trends continue, recourse to proportionality looks set to become an entrenched feature of arbitral practice.

254. However, and turning to (ii), despite this recent growth in arbitral recourse to the concept, arbitrators have not yet adopted consistent approaches to proportionality analysis or its place in settling investment disputes. As shown above (and explored further in Chapter 6) proportionality continues to be applied in a diverse range of interpretative contexts, seemingly to give effect to diverse treaty terms. Although tribunals have considered an assessment of measures' proportionality relevant in a handful of other contexts, proportionality has been most frequently (and nearly equally) employed when interpreting and applying the two most-commonly-invoked provision types: fair and equitable treatment and expropriation. It has likewise been used to assess a wide range of host State measures of both a 'targeted' and 'general' nature, ranging from the imposition of sanctions or penalties aimed at addressing allegedly unlawful conduct, to general, widespread legislative amendment affecting an entire economic sector.

255. Crucially, despite occasional references to extraneous decisions,[834] (and despite the discussion prevailing in recent scholarship) increased arbitral recourse to proportionality has not manifested in the use of multi-stage inquiries of the type familiar to certain domestic public lawyers or those acquainted with its uses in, for example, the EU and ECHR contexts. With the notable exception of the tribunal in *PL Holdings*, arbitrators have not staged out their assessment of measures' proportionality. Rather, proportionality has been regarded as a substantive requirement generating various types and intensities of inquiry. While tribunals have expressly or implicitly engaged in reasoning that resembles certain stages of a 'full' proportionality analysis, when doing so they have adopted seemingly divergent tests, have expressed their inquiries

834 See, esp: *SD Myers* [Schwartz SO] [234]; *Tecmed* [122]; *Azurix* [311]; *EDF v Romania* [294]; *Occidental* [402–3]; and *Electrabel* [179]

using a variety of terms, and have ascribed weight to a range of diverse factors. In this sense, arbitral recourse to proportionality is only very rough facsimile of 'full' proportionality analysis. We can thus relatively succinctly conclude that increased arbitral recourse to proportionality has not yet lived up to its proponents' promises of encouraging more consistent and predictable reasoning, but, rather, seems to have contributed to a further proliferation of approaches.

256. Turning to (iii), it follows that (as with the police powers doctrine) the consequences of increased arbitral recourse to proportionality depend entirely on what aspects of practice and which 'versions' of proportionality analysis we consider. Whether proportionality generates 'intrusive' or 'deferential' inquiries — and hence protects or encroaches upon States' freedom of action — depends on the tests arbitrators apply and the factors considered relevant in satisfying these tests.[835] However, because decisions are always highly fact-dependant, tribunals often consider measures' proportionality in tandem with other issues, employ seemingly competing terms interchangeably, and rarely expressly articulate all elements of their reasoning, it is somewhat challenging to gauge the full consequences of proportionality's migration. We can, nevertheless, conclude that proportionality has been used in ways that — when compared with other prevailing approaches to interpreting and applying FET and expropriation provisions — have the effect of protecting States' freedom of action, as well as in ways that impose significant constraints on the exercise of such freedom.

257. For example, the *Electrabel*, *Charanne*, *Philip Morris*, *Blusun* and *Marfin* tribunals' approaches can largely be considered 'non-intrusive'. While, as shown above, their approaches to key aspects of the structure of inquiry and relevant factors differed, the tests adopted largely revolved around assessing whether host States' conduct met minimum requirements of rationality, non-discrimination, and good faith.[836] Notably, these tribunals did not engage in detailed recategorization of impugned measures' purposes, engage in *de novo*, substantive review of authorities' decision-making, or require measures to be the least-restrictive means of achieving their objectives. By contrast, we may point to Born's use of proportionality analysis in *Philip Morris* — which entailed, *inter alia*, the recategorization of a measure's purpose, *de novo* assessment of internal decision-making processes and use of scientific and expert knowledge, and substantive review of domestic courts' decisions — as an example of proportionality analysis's potential to generate intrusive forms of inquiry.[837] The approaches adopted

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835 See, generally: Henckels (2014) 203–15; Vadi and Gruszczynski (2013) 622–32

836 See, esp: *Electrabel* [166–227]; *Charanne* [514–42]; *Philip Morris v Uruguay* [305–7, 317–24, 407–20], *Blusun* [318–43]; and *Marfin* [826–31, 981–6, 1087–1126, 1210–7]. See similarly: *Mamidoil* [657–75]; *Awdi* [382–3]; and *EDF v Romania* [293–7]

837 *Philip Morris v Uruguay* [Born DO] [126–96]

in *Tecmed*, *Occidental* and *PL Holdings* (notably, the only tribunal to expressly consider all stages of a 'full' proportionality analysis) provide further examples, particularly of the onerousness of least-restrictive means analyses in considering measures' necessity.[838]

258. This split is equally reflected in parties' pleadings. Whereas claimant investors tend to argue that proportionality requires that no less restrictive means are available for achieving the State's objectives (suggesting optimisation),[839] States, by contrast, tend to plead that only a rational connection between ends and means is required (suggesting manifest disproportionality, or a standard closer to 'arbitrariness', as articulated by the ICJ in *ELSI*).[840] It is, further, noteworthy that the intensity of inquiry adopted does not always correlate with arbitrators' rhetoric. Although in several decisions arbitrators expressly articulated the need to show deference to host States' determination of the public interest and setting of objectives in pursuit of such interests,[841] such statements often seem to be aimed at softening the blow of ultimately quite intrusive inquiries.[842]

259. Thus, while often argued to (seemingly automatically) lead to more 'balanced' results, as Foster rightly observes, proportionality analysis can equally contribute to the progressive strengthening of the protections afforded to investors, at the expense of host States.[843] This is particularly true of 'full' proportionality analysis, given its necessity and *stricto sensu* stages encourage in-depth, merits-based review of government decision-making.[844] As well as failing to live up to its promise of encouraging more consistent, predictable reasoning, it cannot be unequivocally said that proportionality has led to more balanced decision-making.[845]

260. We might be tempted to conclude that the diversity of arbitral approaches adopted to date is simply a symptom of arbitrators' failure to 'properly' adopt proportionality analysis — in other words, that something has been lost in translation. The solution, within this line of argument, would be for tribunals to more clearly stage out their analyses and focus on adequately addressing all elements of a 'full' proportionality analysis.[846] However, diversity in arbitral

838 *Tecmed* [122–49]; *Occidental* [402–52]; *PL Holdings* [354–410]

839 Alexy in Rosenfeld and Sajó (eds) (OUP 2012) 284-97, 291–2

840 Compare: *Windstream* [252–6]; and: *Achmea* [239]. See too: *ELSI* [128]

841 See: *Tecmed* [122]; *Quiborax* [244]; *Philip Morris v Uruguay* [418]; *Koch Minerals* [7.20–2]

842 See: *Tecmed* [122]; *Belokon* [198] and *Philip Morris v Uruguay* [Born DO] [139–46, 177–8]

843 Foster (2015) 470–1

844 ibid; Calamita in Bjorklund (ed) (OUP 2015) 157-200, 177–8; Henckels (2015) 170–1

845 See, similarly: Vadi (2015) 353–6; and Calamita (2015) 177–8

846 See, in this vein: Stone Sweet (2010) 63; Bücheler (2015) 302–3; Schill and Djanic (2018) 45–7; echoing: Andenæs and Zleptnig (2007) 420–1. Henckels devotes significant attention to this question, arguing that the intensity of inquiry adopted under each stage requires careful calibration: Henckels (2015) 19–20, 6–7, 126–73

practice is better explained by the fact that (even 'full') proportionality analysis always requires significant adjudicative calibration. The intensity of inquiry within each stage of analysis can move along a spectrum.[847] Proportionality does not provide off-the-shelf solutions, or, in Poole's words, it 'means almost nothing in itself.'[848] Rather, as a form of 'political reasoning',[849] proportionality analysis necessarily requires an identifiable body of values — or a 'meta-agreement'— which a decision-maker can draw upon to determine where on these spectrums to place inquiry.[850] As Thomas notes, it reaches out to an 'idealised conception of the relationship between the individual and the state', necessitating the adjudicator applying it to adopt 'some political conception of the competing interests' at stake,[851] and their own role in policing exercises of governmental authority. This reality similarly explains the fact that diversity in adjudicative approaches to proportionality is not unique to the practice of investment tribunals; as numerous commentators have noted, for example, both the ECtHR and EU courts have employed competing 'versions' of proportionality analysis in the same or similar circumstances.[852]

261. Proportionality's ubiquity is perhaps best explained by the fact that, while it expresses a broad objective (the rationality or reasonableness of government conduct), it remains conceptually malleable, a mere vessel. In fact, we can justifiably conclude that proportionality's allure lies in the fact that it gives the impression of providing concrete answers and making reasoning transparent, while simultaneously permitting adjudicators a wide latitude of discretion. As I explore further in Chapter 7, investment dispute settlement lacks both the institutional structure and 'meta-agreement'[853] on the underlying values and assumptions necessary for anything approaching a settled jurisprudence concerning proportionality to take root.

262. To further explore the doctrinal, conceptual and normative implications of the turn to public law in investment arbitration, in the next chapter I consider whether — despite the many complexities and incongruities in practice — arbitral recourse to the police powers doctrine and proportionality principle can nevertheless be understood as the valid application of extant and relevant rules of law.

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847 See, eg: Ortino (2017) 87–9

848 Poole (2010) 390

849 Loughlin (2004) 163

850 Nolte (2010) 250

851 Thomas (2000) 89. See too: Calamita (2015) 175

852 See, esp (in the EU law context): de Búrca (1993) 118–20; Craig (2012) 592; De Witte (2013) 1565–6; and (in the ECHR context): Legg (2012) 178 ff; and Gerards (2013) 467–8

853 Nolte (2010) 250

PART III:

THE LEGALITY AND LEGITIMACY OF THE TURN TO PUBLIC LAW

6

THE VALIDITY OF THE TURN TO PUBLIC LAW

6.1 Introduction

263. Like all adjudicative bodies, the central function of investment tribunals is to settle disputes in accordance with applicable law.[854] In the preceding chapters I explored the growing tendency amongst investment tribunals to utilise norms seemingly derived from, or inspired by, concepts originating in municipal legal orders or other substantive areas of international law. While I explored its extent and considered some of its consequences, I left open the question of whether this trend of arbitral borrowing can properly be understood as the valid application of extant law — in order words, whether it is consistent with international law on rule-ascertainment and interpretation. In this chapter, I address this question, focusing especially on examples drawn from the arbitral practice concerning the police powers doctrine and proportionality principle examined in Chapters 4 and 5 above.

264. The chapter is structured as follows. In Section 6.2, I consider the law applicable in settling investment disputes and the ways in which norms can 'migrate' between, on the one hand, municipal legal orders and the international legal order, and, on the other, between different substantive areas of international law. In Section 6.3, returning to our two concept studies, I consider whether the police powers doctrine and proportionality principle can, in fact, be said to have 'successfully' migrated into the body of rules applicable in settling disputes between investors and host States under IIAs. By 'success' in this context, I mean merely whether they can properly be understood as constituting, or stemming from, extant international legal norms (without considering their 'success' in normative or functional terms). In Section 6.4, accepting (*arguendo*) that one, or both, concepts' migration has been successful, I explore the further complications that arise in managing relationships between norms derived from treaty and general international law. Section 6.5 briefly considers the broader lessons to be drawn from our analysis of the validity of the turn to public law.

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854 See, esp: Kurtz (2014) 280. But see too: Alvarez in Romano, Alter and Avgerou (eds) (OUP 2013) 158-78, 168–78

6.2 Applicable law and the 'migration' of norms

265. Like all international dispute settlement, the resolution of disputes between investors and host States is founded on the principle of consent to jurisdiction.[855] It is, further, fundamental to arbitration that disputing parties are free to indicate the law to be applied, as well as to set the material and temporal limits of arbitrators' jurisdiction.[856] In the case of arbitrations arising under IIAs — where consent to arbitrate is given in the agreement and taken up by a private individual at a later date — the State parties determine these questions upon ratification.[857] In the case of arbitrations resulting from States' national investment laws, the law to be applied will be indicated either in such legislation, or will fall to the relevant arbitration rules to determine.[858]

266. Although formulations vary, the most commonly used arbitration rules and prevailing approaches to choice of law provisions empower tribunals to settle disputes based on applicable domestic law, the agreement's terms, and other applicable international law.[859] If a treaty is silent on the issue, the applicable law will be determined by the relevant arbitration rules. For example, under Article 42(1) ICSID Convention, tribunals must apply the host State's domestic law and 'such rules of international law as may be applicable'. Under Article 35(1) (2013) UNCITRAL Rules, a tribunal may 'apply the law which it determines to be appropriate' — generally international law. Exceptionally, or, if expressly provided, through recourse to equitable principles. It follows from this that a central task of any investment tribunal constituted pursuant to an IIA is, first, to give accurate effect to the agreement's terms in accordance with treaty-based and customary rules concerning interpretation, and, second, to accurately identify, construct and (if necessary) apply any other relevant rules derived from domestic law, 'extraneous' agreements or other recognised sources of international legal obligation.

267. Turning to the question of the 'migration' of norms, as discussed in Chapter 2, the international legal order and domestic legal orders have traditionally been understood as largely separate — albeit parallel or connected — universes. This is illustrated, for example, in the rule that an act's legality under domestic law — including a State's constitutional law —

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855 Collier and Lowe (OUP 1999) esp 33, 9

856 See, eg: Art 41(1) ICSIDC; Art 23(1) 2013 UNCITRAL Rules. See too: *Gulf of Maine* [23]; *Arbitral Award case* [49]. See further: Spiermann in Muchlinski, Ortino and Schreuer (eds) (OUP 2008) 89-116; Kjos (OUP 2013) 20–9.

857 Kjos (2013) 105 ff

858 Schreuer in Hafner, Matscher and Schmalenbach (eds) (Facultas 2012) 527-37, 530–2; Hepburn (2018) 112 AJIL 658, 693 ff; *Pac Rim* [5.60–64]

859 See, illustratively: Art 9(8) 1988 Switzerland-Uruguay BIT; Art VIII(1) 1991 US-Argentina BIT; and Art 9(11) 2008 Colombia-China BIT; and Article 1131(1) NAFTA. See further: Douglas (2009) 81–90; Spiermann (2008) 107 ff

cannot be raised to preclude its international wrongfulness.[860] State responsibility for an internationally wrongful act can be established through any conceivable means of action attributable to a State — whether that be, for example, through mere conduct or omission, general legislation, administrative action, executive decree, or judicial decision.[861] Thus, while States can (and do) assume duties to implement their international obligations domestically, including through law, the existence, content, and operation of domestic law are usually treated as mere facts 'which express the will and constitute the activities of States', in establishing responsibility.[862] Similarly, approaching it from the other direction, the question of the direct influence of international legal rules within domestic legal orders is governed by municipal (constitutional) law.[863]

268. More importantly for present purposes, as part of the broader processes of what has been referred to as 'regime interaction',[864] norms can and do migrate from domestic legal orders into international law. We may in this context point to those general principles — like estoppel or *res judicata* — derived from municipal practice, or the influence of domestic criminal law and procedure in the development of international criminal law.[865] But for a norm originating in municipal law to have effect *as law* in the international legal order, it must undergo a process of transformation. Its migration must occur along an established route to (ie source of) international legal obligation. A norm must, in other words, be incorporated expressly or by reference into a treaty, or domestic practice must generate a rule of custom or general principle. But if this occurs, it is not the domestic norm itself that migrates, but rather a 'new', rule of international law, thereafter largely decoupled from domestic practice.

269. Given the predominantly consensual nature of international legal relations, the *pacta tertiis nec nocent nec prosunt* rule,[866] and the fact that the contemporary international legal order has been organised into functionally distinct areas (or sectoral 'regimes'),[867] similar hurdles must be overcome for a norm originating in one substantive area of the international legal

860 *Polish Nationals AO* 24; Art 27 VCLT; Art 3 ARSIWA. As the Commentary to Art 3 ARSIWA notes (at 36–8) from *Wimbledon* on, this idea was continually reiterated by the PCIJ and ICJ: *Wimbledon* 29–30; *Greco–Bulgarian Communities AO* 32; *Free Zones, Order, 6 Dec 1930* 12; *Free Zones* 167; *LaGrand, Order, 3 Mar 1999* [28]

861 See: *Salvador Commercial Co* 477; *Upper Silesia* 19; *Special Rapporteur AO* [62]

862 *Upper Silesia* 19. For an examination of the challenges of applying this idea in investment arbitration, See, eg: Hepburn (2017) 104–8

863 On this much explored topic, See, eg: Gaja (1992) 3 EJIL 123; Gaja in Nijman and Nollkaemper (eds) (OUP 2007) 52-62; Tzanakopoulos (2011) 34 LoyLAInt'l & CompLRev 133, 142–44; Tzanakopoulos and Tams (2013) 534–6; Higgins (1994) 205–18; and the various contributions in: Charlesworth & ors (eds) Federation Press 2005)

864 See, eg: Young (ed) CUP 2012); Peters (2017) 15 ICON 671

865 Concerning the latter, See, eg: Raimondo in Darcy and Powderly (eds) (OUP 2011) 45-60; Jain (2016) 57 HarvInt'lLJ 111

866 Recognised, eg in Art 34 VCLT. See further: Chinkin (OUP 1993) esp 25–50, 134–44

867 Young in Chinkin and Baetens (eds) (CUP 2015) 71-89

order to generate effects in another.[868] Such hurdles are not, however, insurmountable. While (as explored in Section 6.4.3) often misconstrued and used to support grossly exaggerated integrative claims, the rule of interpretation recognised in Article 31(3)(c) VCLT (now commonly referred to as the principle of 'systemic integration')[869] provides a potential route for norms 'extrinsic'[870] to an IIA to influence interpretative exercises.

270. Relatedly, and significantly, the international legal order is (albeit incompletely) 'systematised' by a body of generally-applicable (customary) structural rules concerning, for example, the recognition and interpretation of rules, legal personality and the fundamental rights and duties of legal persons, and the content, invocation and consequences of responsibility. Subject to the caveats explored in Section 6.3, these rules form the canvas on which other substantive rules paint, and must necessarily inform tribunals' interpretation and application of treaty terms, as well as (independently) constituting 'rules of international law' directly 'applicable' in the relations between treaty parties and between investors and host States.

271. It is also important to stress at this juncture that, despite the overwhelming practice of investment tribunals of affording prior decisions quasi-precedential status, and despite certain writers' claims to the contrary, investment tribunals cannot validly 'make' law.[871] Under the major arbitration rules, and pursuant to the customary rule reflected in Article 38(1)(d) SICJ, arbitral decisions only have the force of law for disputing parties,[872] and — like academic writings[873] — may only be used as a 'subsidiary means' for the determination of rules of international law. The prior decisions of investment tribunals interpreting the same, or similar, treaty provisions, and the decisions of other adjudicative bodies (whether domestic or international) may therefore only be used to 'support' (otherwise permissible) construction of express treaty terms, or tribunals' findings concerning the existence, content and operation of general international law — whether customary rules or general principles.[874] As the ILC recently stated when discussing the identification of custom, given '[t]here is no doctrine of *stare decisis* in international law', the weight to be given to prior decisions in ascertaining

868 See, generally: Matz-Lück (2012)

869 McLachlan (2005) 54 ICLQ 279

870 Matz-Lück (2012) 202

871 For analysis of this long-standing practice, See, esp: Commission (2007) 24 J Int'l Arb 129. For the position that tribunals' decisions form a 'third source' of international law, See, eg: Lowenfeld (2003) 42 Colum J Transnat'l L 123; Schwebel (2004) 98 ASIL Proc 27; Alvarez (2009) . But see, more accurately: De Brabandere in Gazzini and De Brabandere (eds) (Nijhoff 2012) 245-88; Tams (2012) 326–7

872 Art 34(2) 2013 UNCITRAL Rules; Art 53(1) ICSIDC; Alvarez (2009) 45-6.

873 Borda (2013) 24 EJIL 649, 660

874 Thirlway (OUP 2014) 69 See also: Borda (2013) 665

the existence and operation of rules of international law depends 'on the quality of the reasoning, the composition of the court or tribunal, and the size of the majority by which they were adopted.'[875]

272. In other words, prior decisions are only as persuasive as the reasoning employed in reaching a particular construction or as the quality of the evidence presented for the existence and operation of customary rules and general principles. Thus, in itself, the growth in recourse to public law concepts — like the police powers doctrine and proportionality principle — tells nothing about the validity of the turn to public law in investment arbitration. It is entirely possible that the migration of public law concepts merely represents tribunals' misidentification or misapplication of the law.

6.3 'Migration routes'

273. A key challenge in examining arbitral practice concerning the police powers doctrine and proportionality principle (as well as other public law concepts) is that arbitrators very rarely expressly address the formal grounds relied upon to justify their use.[876] We must therefore often read between the lines and assess potential justifications based on the manner and context of such recourse. In order to determine whether the police powers doctrine and proportionality principle have successfully 'migrated', I assess whether arbitral recourse to these norms can be justified: (i) as permissible treaty interpretation (Sub-section 6.3.1); (ii) through reference to domestic law (Sub-section 6.3.2); (iii) as the valid application of customary international law (Sub-section 6.3.3); (iv) as the valid application of general principles of international law (Sub-section 6.3.4); and (v) as the valid application of equitable principles (Sub-section 6.3.5).

6.3.1 Permissible treaty interpretation

274. While the distinction between 'interpretation' and 'application' of treaty provisions is seldom categorised by bright lines,[877] the function of interpretation is, to borrow Ian Sinclair's phrasing, to 'elucidate the meaning of [a] text in the light of certain defined and relevant

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875 ILC (27 Mar 2015) A/CN.4/682 [59–60]

876 This is symptomatic of a broader trend amongst tribunals purportedly interpreting treaty terms of employing (to use Wälde's phrasing), the 'style characteristic of commercial arbitration' of following a detailed account of the facts with a short determination of liability: Wälde in Binder & ors (eds) (OUP 2009) 724-81, 727, citing: *Eastern Sugar*

877 Of the voluminous debate on this issue, See, eg: Gourgourinis (2011) 2 JIDS 31; Merkouris (Brill 2015) 107; Klabbers in Craven, Fitzmaurice and Vogiatzi (eds) (BRILL 2006) 141-61, 144; Weeramantry (OUP 2012) 30–1; Gardiner (ed) (2nd edn, OUP 2015) 26–30. See too: *Headquarters Agreement, Shahabuddeen SO* 59

factors'.[878] It is now near-universally accepted that States have recognised as a matter of custom that the factors that must guide their own, and adjudicators', interpretative exercises are enumerated in Articles 31 and 32 VCLT.[879] This view has been endorsed by the ICJ on numerous occasions,[880] and by a significant number of other international courts and tribunals,[881] including investment tribunals.[882]

275. While it not my intention here to synthesise the law and practice concerning treaty interpretation, given their centrality in assessing the validity of the turn to public law, it is necessity to briefly outline the Vienna rules' main requirements. As has been much discussed, and as per the ILC's original intention, the customary rules reflected in Articles 31 and 32 provide for a minimally structured interpretative approach, permitting of a wide range of emphases.[883] As expressed in the ILC's imagery of the 'crucible', no hierarchy exists between the factors listed Article 31's four paragraphs.[884]

276. This said, the VCLT requires an interpreter to follow a logical sequence of analysis, at the heart of which must be a detailed interrogation of provisions' express terms. Thus, as the ILC indicated during the VCLT's drafting, an interpreter should start by giving the terms their ordinary meaning, considering their context —which, significantly (per Article 31(2)), comprises *only* the remainder of the treaty text and any agreements or instruments connected to its conclusion — and in light of the treaty's object and purpose.[885] An agreement's object

878 Made in the context of representing the UK at the UN Conference on the Law of Treaties: (22 Apr 1968) A/CONF.39/C.1/SR.33 [6]

879 See analysis in: Orakhelashvili (OUP 2008) 308–92

880 *Oil Platforms, Preliminary Objections* [23]; *Avena* [83]; *Wall AO* [94]; *Bosnian Genocide* [160]; *Mutual Assistance* [112]; *Pulp Mills* [64–5]; and *Maritime Dispute (Peru v Chile)* [57]. This includes in cases where one or both parties were not party to the VCLT, and where the treaty in question predated its conclusion: *Pulau Ligitan and Pulau Sipadan* [37]; and *Navigational Rights* [47]

881 See, eg: *Golder v UK* [29–30]; *Death Penalty AO* [48–9]; *Area AO* [58]; *US–Gasoline, AB Report* 17

882 See, esp: *Ethyl Corp* [52]; *Aguas del Tunari* [88]; *Canfor* [177]; *Chevron & Texaco (I)* [Partial Award] [159]; and *Methanex* [Partial Award] [97]

883 See, eg: Villiger in Cannizzaro (ed) (OUP 2011) 105, esp 118; Waibel (2011) 22 EJIL 571; Nordeide (2009) 20 Finnish YIL 189; Kolb in Andenæs and Bjorge (eds) (CUP 2015) 473-85, 475–84; Peat (2019) 46–8. But see: Orakhelashvili (2008) 309–13

884 Comments 8 and 9 to Arts 27 and 28, 1971 DALT 39–40

885 Comment 9 to Arts 27 and 28, 1971 DALT 40

and purpose is to be determined from the detailed treatment of issues in its substantive provisions, as well as its title and preamble.[886] Importantly, a treaty may have several, complimentary or competing, objects and purposes that may inform the construction of treaty terms.[887]

277. Once this first stage is complete, the interpreter must[888] move on to consider the elements enumerated in Article 31(3): (a) any subsequent agreements between the treaty parties concerning its interpretation or application; (b) any subsequent practice of the parties in applying the treaty that establishes their agreement on its correct interpretation (ie a constructive, or implicit, agreement establishing an authoritative interpretation); and (c) any rules of international law applicable in the treaty parties' mutual relations. While paragraph (3) does not refer to 'all parties', the ILC has further made it clear that all treaty parties must have 'agreed' for the purposes of (3)(a), participated in or tacitly accepted the practice referred to in (3)(b), and must be bound by the rules referred to in (3)(c).[889] The ICJ has reached the same conclusion.[890] While less pertinent in the present context given that in most cases we lack the relevant materials (and those that exist provide little guidance), according to Article 32 recourse to (for instance) an IIA's *travaux préparatoires* may only be used to supplement the above process, in the event that it generates an 'ambiguous' or 'obscure' meaning or leads to a 'manifestly absurd' or 'unreasonable' result.[891] Despite their *renvoi* to other methods, close textual analysis remains the cornerstone of all stages of analysis under the Vienna rules.

278. Although they frequently pay 'lip service' to the Vienna rules,[892] as Reinisch observes, in reality investment tribunals tend to follow more '*à la carte*' approaches, often going beyond the (admittedly broad) latitude Articles 31 and 32 permit.[893] Tribunals frequently decouple (what are often described as) the 'standards' contained in IIAs from their interpretative context: the treaty in which they appear. A key aspect of this involves the common practice of resorting to '*in pari materia*' interpretation, whereby treaty terms are construed by reference

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886 Gardiner (ed) (2015) esp 216–18

887 Sinclair (MUP 1984) 130–2;Gardiner (ed) (2015) esp 215–9, citing, ia: *Nicaragua* [273]; *Oil Platforms* [26, 27–8, 31, 36, 52]; *Pulau Litigan and Pulau Sipadan* [51]; *US–Shrimp, AB Report* [12, 17]; *EC–Hormones, AB Report* [70]; and *Chile–Price Band System, AB Report* [196–7]. Tribunals' (often narrow) approaches to identifying IIAs' objects and purposes has generated significant controversy: Methymaki and Tzanakopoulos (2016) 157; Calamita in Baetens (ed) (CUP 2013) 164-84, 176; Brower and Blanchard (2014) 52 Col JTL 689, 773

888 Further to the idea that there is no hierarchy in its elements, the ILC regarded that consideration of all elements enumerated in Art 31 is 'obligatory': Comment 9 to Art 27 and 28, 1971 DALT 40

889 Comment 15 to Art 27, 1971 DALT 42

890 See, in respect of Art 31(3)(b) VCLT: *Antarctic Whaling* [83]

891 Methymaki and Tzanakopoulos (2016) 157

892 Kurtz (2014) 275

893 Reinisch in Bungenberg & ors (eds) (Hart 2015) 372-410, 410. See too: Saldarriaga (2013) 28 ICSIDR 197; Gardiner (ed) (2015) 287

to the prior practice of other tribunals interpreting either the same provision, or, more commonly, a similarly-worded provision contained in another treaty involving the same or, often, different parties.[894] As Schill notes, this practice is based on the assumption that the over 2600 IIAs in force form a 'framework or system of treaties',[895] 'similar to a genuinely multilateral regime'.[896] In fact, a normative project of many arbitrators is to 'create' such a system by stitching together its disparate parts through common approaches to interpretation.[897] This trend, is not, however, explicable with reference to the Vienna rules, except to the extent it can be accommodated under Article 31(3)(c), or if we accept that the term 'including' in Article 32 permits use of supplemental materials beyond a treaty's preparatory work — notably the prior interpretations of international courts and tribunals.[898]

i. Justifying recourse to the police powers doctrine as permissible treaty interpretation

279. The majority of IIAs in force do not expressly recognise States' 'police powers'. In fact, only one clear example of express reference to the concept emerged during research — in the Protocol to the 2009 Kuwait-Singapore BIT, in which the parties clarified that:

> any measure relating to the freezing or blocking of investments will not be expropriation for the purposes of Article 6 […] if done pursuant to a [a UN resolution, treaty] or in accordance with a Contracting Party's laws and regulations, including for forfeiture of crime, *or other action of the kind that is commonly accepted as within the police power of States* [my emphasis].

280. The only other references to the concept are found in the US Department of State's Letters of Submittal to the President accompanying the 1993 US-Ecuador, 1994 US-Mongolia, and 1998 US-Lithuania BITs, and in a definitional provision in the 2015 New Zealand-Korea FTA stating that the obligation to afford full protection and security requires the parties 'take such measures as may be reasonably necessary in the exercise of its police powers to ensure the protection and security' of investments.[899] Notably, none of the decisions examined in Chapter 4 involved the interpretation of a treaty containing express reference to States' police powers.

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894 See, esp: Merkouris (2015) 76–9; Paparinskis in Fauchald and Nollkaemper (eds) (Hart 2012) 76-96, 96 ff; Gazzini (Hart 2016) 291 ff. As shown in the preceding chapters, this practice is abundant in those decisions in which tribunals had recourse to the police powers doctrine and proportionality principle.

895 Schill (2009) 295

896 ibid 305. See too: Douglas (2003) 74 BYIL 151, 167–8

897 For discussion of the idea that certain categories of treaty require greater interpretative focus on *telos*, Bjorge in Andenæs and Bjorge (eds) (CUP 2015) 498-535, 508–25

898 See discussion on this issue in: Gardiner (ed) (2015) 401–10; Merkouris (2015) 92. The other main candidates for inclusion under Art 32 are the maxims (derived from interpretation in domestic legal orders) that guided interpretation before the ILC's codification project: Gardiner (ed) (2015) 357–8, 404–5

899 Art 10.7(2)(b) 2015 New Zealand-Korea FTA

281. Given this, and that reference to the concept clearly falls beyond the approach mandated by Article 31(1) and (2), there remain two potential routes within the Vienna rules for the police powers doctrine to influence interpretation: (i) through the rules expressed in Article 31(3)(a) and (b) — ie because treaty parties have through subsequent agreement or subsequent practice adopted an authoritative interpretation of treaty terms, recognising that provisions implicitly incorporate the concept; or (ii) through the rule expressed in Article 31(3)(c)— ie because the police powers doctrine is expressly included in other treaties involving the same parties, has achieved the status of general custom, or constitute general principles of international law. As I address '(ii)' below (Sections 6.3.3 and 6.4.3), I will only consider '(i)' here.

282. Article 31(3)(a) and (b) largely express the same idea: that, as the architects and masters of their treaty relations, States may subsequently (consensually) adopt authoritative interpretations of treaty terms — for example if a treaty, as ratified, leads to uncertain or unintended results.[900] The first avenue, recognised in paragraph (a) is for the parties to expressly agree to adopt such an interpretation. For example, certain State parties to IIAs have recently issued joint interpretative statements elaborating the interpretation to be given to key treaty terms — in most cases, such will fall within the ambit of paragraph (a).[901] However, no examples of such agreements containing reference to States' police powers emerged in the course of research. We must thus look to paragraph (b).

283. Whereas Article 31(3) (a) covers express agreements adopting authoritative interpretations, paragraph (b) covers those situations in which treaty parties have, through their conduct, reached tacit agreement on treaty terms' correct construction.[902] Unlike under paragraph (a), such conduct need not be joint.[903] It is merely necessary that all treaty parties have acted in a 'discernible pattern',[904] that evidences (to use Sinclair's phrasing) their 'concordant, common and consistent' view concerning the construction to be given to treaty terms.[905] It is widely accepted that the 'practice' referred to in Article 31(3)(b) includes, in principle, all acts and omissions attributable to a State, both at the domestic and international levels — what matters most in this context is that practice is of a quality that evidences the parties' 'common understanding'.[906] As such — and of most significance for our inquiry — States'

900 See, eg: *Jaworzina AO* 37; Chinkin (1993) 82; Methymaki and Tzanakopoulos (2016) 160. On the somewhat thornier issue of whether States may 'amend' their treaties through this process, see detailed discussion in: Gardiner (ed) (2015) 275–80. See further below: Sec 7.4.3

901 See, illustratively: Note on Art 5, 2017 India-Bangladesh Joint Interpretative Notes; and NAFTA FTC 2001 Interpretative Notes

902 See, esp, the ICJ's discussion of its approaches to paragraphs (a) and (b) in: *Kasikili/Sedudu* [49–50]

903 ILC (26 Mar 2014) A/CN.4/671 20

904 ILC (26 Mar 2014) A/CN.4/671 23

905 Sinclair (1984) 137

906 International Law Commission (2014) 24 and 3–7; Gardiner (ed) (2015) 269–73

pleadings constitute a potential avenue to express their views on the operation of treaty terms and (through accumulation and convergence) to evidence tacit agreement on treaty terms' proper construction.[907]

284. Based on the matrices in parties' pleadings discovered during research, justification for recourse to the police powers doctrine in this manner appears only to plausibly arise in the case of claims under Article 1110 NAFTA. All three States party to NAFTA — Canada,[908] Mexico,[909] and the United States [910] — have at various times, and relatively uniformly, all expressly endorsed the police powers 'exception' or 'defence' in their pleadings concerning Article 1110. A tribunal giving appropriate weight to such practice pursuant to Article 31(3)(b) would thus be able to apply the police powers doctrine — not as a self-standing customary exception, or an element of the customary definition of expropriation — but as an authoritative interpretation of Article 1110. However, this question appears largely moot, given NAFTA's imminent replacement by the USMCA, which in Annex 14-B expressly addresses the circumstances in which general public interest regulation can be deemed equivalent to expropriation.[911] Notwithstanding the thorny issue of whether practice in respect of its successor agreement may inform interpretation of Article 14.8 USMCA, Annex 14-B seems to make recourse to the police powers doctrine practically redundant, if not precluded by the USMCA's express terms.[912]

ii. Justifying recourse to proportionality analysis as permissible treaty interpretation

285. The situation is somewhat — though not much — better when attempting to justify recourse to proportionality as permissible treaty interpretation. Like recognition of States' police powers, until recently, the language of proportionality did not feature expressly in any IIA. This has, however, begun to change with the recent wave of 'new-generation' agreements. Various proportionality requirements have now entered treaty texts and have been included in States' declarations and reservations.

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907 McLachlan in Nolte (ed) (OUP 2013), 77–8. See too: Methymaki and Tzanakopoulos (2016) 169–73

908 *Ethyl Corp* [Canada's Statement of Defence] [95]; *SD Myers* [Canada's Statement of Defence] [55], [Canada's Counter-Memorial] [423–36], [Canada's Reply to Supplemental Memorial] [54–5]; *Pope & Talbot* [Canada's Counter-Memorial] [19, 409–37, 449–50]; *Methanex* [Canada's Fourth Art 1128 Submission] [14–16]; *Chemtura* [Canada's Counter-Memorial] [500, 530, 552, 565–84, 594–6, 613–23, 630] [Canada's Rejoinder] [251, 275–97], [Canada's Post-Hearing Brief] [219–20], and [Award] [97, 254, 266]; and *Windstream* [Canada's Counter-Memorial] (20 Jan 2015) [494–500], [Canada's Rejoinder] [20, 93, 179], and [Award] [277–8]

909 *Pope & Talbot* [Mexico's Second Art 1128 Submission] [51]; *Feldman* [Mexico's Counter-Memorial] [292]; *Cargill* [Mexico's Rejoinder] [370]; and *Nelson* [Mexico's Rejoinder] [87]

910 *Methanex* [United States' Amended Statement of Defence] [410–11], [United States' Rejoinder] [194–6]; and *Grand River* [United States' Counter-Memorial] 157–61

911 Art 14.8 and Annex 14-B USMCA

912 Per logic in: *Bear Creek* [473–4], and [Sands DO] [41]

286. The most common form of express inclusion is through provisions defining indirect expropriation, like that annexed to the 2009 India-Korea FTA, which stipulates that an assessment of whether a host State's conduct amounts to indirect expropriation 'requires a case-by-case, fact-based inquiry that considers all relevant factors relating to the investment', including 'the character of the government action, including its objectives and context'.[913] Most importantly, the Annex requires consideration of whether an investor had to make 'special sacrifice' in excess of what 'should be expected to endure for the public interest',[914] and states that 'non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives' will only constitute indirect expropriation only in 'rare circumstances', such as 'when a measure or series of measures *is extremely severe or disproportionate in light of its purpose or effect*'.[915] Numerous examples of expropriation provisions based on comparable terms are now present in a growing number of IIAs.[916] Similarly, certain States have incorporated general exceptions or non-precluded measures provisions preserving the parties' right to adopt and maintain 'measures intended to preserve public order', provided such measures 'are proportional to the objective they seek to achieve'.[917]

287. While both categories of provision remain largely silent on the factors relevant in assessing proportionality and the precise tests to be applied, tribunals interpreting treaties containing such formulations thus seem to be required to consider measures' economic impacts on protected investments in light of the significance of the policy objectives pursued by a measure — seemingly connoting *stricto sensu* balancing. Differences in formulation (eg 'severe or disproportionate' versus 'proportional') suggest that despite sharing common features, such provisions are intended to generate different intensities of inquiry. However, it must be stressed that despite recent growth in their inclusion, provisions containing express refer-

913 Para 3(a)(iii), Annex 10–A 2009 India-South Korea CEPA

914 ibid

915 ibid, para 3(b) (my emphasis). See too Korea's inclusion of a proportionality condition in its reservation to its national treatment and performance requirements obligations; Korea's reservation to Arts 10.3 and 10.5, Annex II, ibid. Korea has been the most active in inserting proportionality into its treaty texts. See: Korea's declaration to para 4(c), Annex 11–B 2014 Australia-Korea FTA; paras (C)(i)(c) and (C)(ii), Annex 9B, 2010 Korea-Peru FTA; paras 2(b) and 2(c) Protocol to 2012 China-Japan-Korea TIA; paras 3(a)(iii) and 3(b) Annex 8–B, 2013 Colombia-Korea FTA; paras 3(a)(iii) and 3(b) Annex on Expropriation, 2014 Korea-Myanmar BIT; paras 3(a)(iii) and (3)(b) Annex on Expropriation, 2013 Korea-Cameroon BIT; Art 5(4) 2009 Korea-Rwanda BIT; and paras 3(a)(iii) and (3)(b) Annex 12–B, 2015 China-Korea FTA

916 Paras 3(c) and 4 Annex on Expropriation and Compensation, 2009 AANZFTA; paras 3(c) and 4, Annex 2, 2009 ASEAN CIA; paras 3(c) and 4, Annex on Expropriation, 2012 Australia-Malaysia FTA; Art VIII 2010 UK-Colombia BIT; Arts 6(2)(d) and 6(3) 2013 China-Tanzania BIT; paras 3–5 Annex 13, 2008 New Zealand-China FTA; Paras 3(d) and 4 Annex 10–1, 2011 Malaysia-India CECA. In other treaties, India employs a seemingly less–stringent 'reasonable nexus' requirement rather than the language of disproportionality: Para 2 (iv) Annex on Expropriation, 2008 India-Syria BIT; Art 6(2)(b)(iv) 2009 Colombia-India BIT; Ad Art 5 2006 India-China BIT; Para 2(iv) Annex on Expropriation, 2007 India-Trinidad and Tobago BITs

917 See, eg: Art 12(d) 2008 Colombia-China BIT

ences to proportionality are present in only a small proportion of the over 2,600 treaties currently in force. Most importantly, none of the examples of arbitral recourse to proportionality identified in Chapter 5 concerned the interpretation of such a provision. Arbitral practice concerning proportionality to date thus cannot be justified based on the concept's express inclusion in treaty texts.

288. According to another view, however, proportionality analysis may also constitute an *implied* requirement of express treaty terms. Significantly, this justification seems to most accurately explain the approaches of most tribunals identified in Chapter 5. By this logic for example, for a host State's measure to be considered 'necessary' (and therefore captured by many non-precluded measures provisions),[918] 'fair', 'equitable', 'reasonable', 'non-arbitrary', or 'non-discriminatory' (and hence not to amount to a violation of States' duties to afford fair and equitable treatment and not to interfere with investments through unreasonable, arbitrary or discriminatory measures),[919] it must also be a 'proportionate' way to achieve its objectives, in light of its economic impact on an investment. Hence, recourse to proportionality — whether as a unitary or staged means-ends inquiry — is permitted to give effect to express terms' ordinary meaning under Article 31(1) VCLT.

289. There are, however, several problems with this view. As well as raising questions regarding precisely which treaty terms will permit its use, proportionality's inherent flexibility and conceptual links to numerous terms commonly included in IIAs means there is a genuine risk — which, as shown in Chapter 5, is evident in practice — that it assumes the role of a universal, catch-all treatment standard in substitution of express treaty terms.[920] Further, despite arbitrators' tendency to conflate terms,[921] if proportionality manifests as a staged inquiry and includes substantive review of a measure's necessity in light of available alternatives (a least-restrictive means test) and arbitral review of the relative social value of the State's objective *vis-à-vis* investors' interests (proportionality *stricto sensu*) its use connotes a more rigorous inquiry than that implied by the ordinary meaning of terms such as 'fair', 'equitable', or 'reasonable'. On the other hand, if these stages of inquiry are omitted, it becomes unclear

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[918] See, esp: *Continental* [227, 232, 276]. See too debate in, eg: Burke-White and von Staden (2007) 48 VaJIL 307, 715–19; Kurtz (2010) 365–70; Stone Sweet (2010) 67–76; Bücheler (2015) 211–52; Henckels (2015) 81–2

[919] See, eg: *El Paso* [373]; *Mamidoil* [601–34, 657]; *Copper Mesa* [6.84] and *Oxus* [318]. See too: Bücheler (2015) 194

[920] *Total* [197]; Foster (2015)

[921] Illustratively, the *Electrabel* tribunal remarked that while it and the parties 'used interchangeably, references to "arbitrariness", "irrationality", "unreasonable", "inequitable" and "disproportionate" treatment' such terms amounted to the same standard in interpreting Art 10(1) ECT, 'collectively addressed as "arbitrariness"': *Electrabel* [167]

what, if anything, proportionality adds to analysis.[922] Justifying recourse to proportionality as a necessary element of giving effect to express terms' ordinary meaning therefore lacks cogency.

290. Turning to subsequent agreements and practice, unlike the police powers doctrine, no examples of States incorporating express references to proportionality in joint interpretative statements emerged in the course of this study. As when assessing police powers, we must therefore look to States' subsequent practice per Article 31(3)(b) VCLT. Once again, States' pleadings before investment tribunals provide the clearest potential material source of such practice. However, unlike the practice of the NAFTA parties concerning the relationship between States' police powers and Article 1110, based on publicly-available pleadings and tribunals' summaries of parties' positions, no positive examples emerged of treaty parties' forming tacit agreement incorporating proportionality through their concurring pleadings. In fact, the only relevant example of such consensus emerged in Oman and the United States' pleadings in *Al-Tamimi*, in which the parties agreed that proportionality analysis is *not* required in assessing parties' obligations to afford investors fair and equitable treatment in accordance with the customary international minimum standard (Article 10.5 Oman-US FTA).[923] Significantly, none of the decisions identified in Chapter 5 attempted to justify recourse to proportionality by reference to States' subsequent practice within the meaning of Article 31(3)(b). The only remaining avenue of justifying arbitral recourse to proportionality as permissible treaty interpretation is through Article 31(3)(c).

6.3.2 Reference to domestic law

291. Absent their express incorporation in treaty texts, perhaps the strongest formal basis for tribunals to refer in some manner to public law concepts is through host States' domestic law. Such is clearly permitted when tribunals are empowered to apply domestic law. But domestic law is also potentially relevant when a choice of law provision seems to limit a tribunal to applying treaty rules and norms of general international law. The object of protection under an IIA, an 'investment', can only be made through the acquisition of proprietary and (often) contractual interests, necessarily defined by domestic law.[924] It is thus relatively unproblematic that an investment tribunal may have significant recourse to domestic law in assessing whether a purported investment falls within an IIA's scope of operation and whether any

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922 See, eg: the *Crystallex* tribunal's observation that invocation of an obligation to treat investors proportionally in the context of fair and equitable treatment suffered from 'a circularity of argument': *Crystallex* [551]

923 *Al-Tamimi* [188, 260–1]

924 Douglas (2003) 197–9

applicable conditions — for example under legality provisions — have been met.[925] It will also often be necessary for tribunals to address the operation of domestic law when considering whether any jurisdictional prerequisites have been met, for example in applying 'fork in the road' provisions or in assessing whether local remedies have been exhausted. Many rules of international law contain similar implicit *renvois* to domestic law.[926]

292. More complex issues arise when we turn to how tribunals ought to go about considering the existence, content, and operation of rules of domestic law when assessing if a State's conduct violates its substantive treaty obligations or duties under general international law. It is trite to observe that, pursuant to the long-standing customary rule, a State cannot invoke provisions of internal law, including its constitution, to justify otherwise unlawful conduct.[927] Further, a State's obligations under treaty and general international law may oblige it to treat investors in a manner distinct from that required by national law, and the unlawfulness of government action under domestic law does not necessarily imply international wrongfulness.[928]

293. But, as recognised by the PCIJ in *Lotus* — and as shown above when considering arbitral recourse to the police powers doctrine and proportionality principle — the content and operation of domestic law, and domestic bodies' approaches to such law, are nevertheless potentially relevant in determining whether States' measures comply with their obligations under international law.[929] This is a common feature of 'inward-looking' norms.[930] For example, it will often be necessary for tribunals to form views concerning the existence, content and operation of domestic law — including administrative and constitutional law — in assessing whether an investor was afforded less favourable treatment than nationals under national treatment provisions, whether an investor was afforded due process (relevant to claims arising under both expropriation and FET provisions), whether an investor suffered a denial of justice, was discriminated against, or was subjected to 'arbitrary', 'unfair', or 'inequitable' treatment.[931] In such cases, recourse to domestic law constitutes an element of the application of the international norm. But by making determinations on the content and operation of

925 ibid 211. See too: *Philip Morris* [177–9]

926 The obvious examples being nationality of claims and shareholders' rights: *Barcelona Traction* [70–1]; *Diallo* [104]

927 Reflected, ia, in Art 27 VCLT and Art 3 ARSIWA. See too, eg: Draft Art 5, League of Nations (1930) C.351(c)M.145(c).1930.V; *Greco-Bulgarian Communities AO* 32; *Polish Nationals AO* 24–5; and *Free Zones* 12

928 *ELSI* [74, 123–8]

929 *Lotus* 24. See further, eg: Nollkaemper (2006); Shany (OUP 2007) 42–3, 81–3; and Gaja (2007) 58–9

930 Comment 7 to Art 3, ARSIWA; and: Tzanakopoulos and Tams (2013) 534

931 See eg: Boisson de Chazournes and McGarry (2014) JWI&T 862. See too: *Diallo* [65]

internal law, such use often elides the 'application-fact' dichotomy.[932] It further raises complex questions concerning precisely *when* rules' application will require reference to domestic law and — most importantly — *how* tribunals should approach this task.[933]

294. Turning to our two study concepts, while several tribunals examined State agencies' compliance with domestic law when applying the doctrine, no tribunal has yet expressly justified its recourse to the police powers doctrine by reference to its recognition in the host State's internal law.[934] Arbitrators have, however, noted that the proportionality principle was recognised in some manner in the domestic law of the host State — and have (seemingly) justified their recourse to proportionality on this basis — in seven decisions.[935] With the exception of the *Occidental* and *Pac Rim* awards, it is largely unclear from these tribunals' approaches, however, whether they regarded themselves as directly *applying* internal law, or whether recognition of the proportionality principle in internal law was treated as a relevant fact in establishing responsibility for breach of a rule of international law.

295. In *Occidental*, alongside its discussion of proportionality's prevalence in other contexts (including the practice of domestic courts in Europe, the EU courts, the ECtHR and WTO dispute settlement body)[936] the tribunal noted that the principle of proportionality is recognised in Article 24 of the Ecuadorian Constitution[937] and in Ecuadorian administrative law, particularly in Article 11 of the 2002 Regulation for the Control of Discretion in Acts of Public, requiring that '"measures involved in the discretionary action must be proportionally suitable to the goal."'[938] The tribunal also noted that both expert witnesses and counsel 'accepted that the principle of proportionality was an established feature of Ecuadorian law' applicable to the discretionary application of administrative sanctions following violations of domestic law.[939] Further, the tribunal found that the proportionality principle constrained government conduct concerning both 'act[s] of administration' and 'the promulgation of legislation or

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932 Nollkaemper (2006) 321–2. For the view that this dichotomy should be abandoned, Ketcheson, 'The Application of Domestic Law by International Tribunals' (PhD, University of Cambridge 2013) 85, 277

933 See further the debate on whether tribunals can properly decide the constitutionality of domestic laws and processes in: Betancourt (2013) 4 JIDS 227

934 This includes those disputes in which the United States was respondent. But see the *Tecmed* tribunal's equivocal reference to Mexico's internal law when recognising its 'police powers': [119–20]

935 These tribunals have, however, often done so equivocally. *Awdi* [341]; *ECE* [4.53, 4.786–90]; *Electrabel* [179, 181–6]; *Gold Reserve* [606]; *Blusun* [318]; *Occidental* [397–409, 427]; *Pac Rim* [8.42–4]. While the claimant in *PL Holdings* invoked the proportionality principle as an element of 'Polish administrative and constitutional law', the tribunal does not appear to have justified its recourse to the concept as the application of domestic law: *PL Holdings* [250]. See too the engagement with domestic organs' prior determination concerning proportionality in: *JSW Solar* [56–67]; *Greentech* [Sacerdoti DO] [14–31]; and, in interpreting a non-precluded measures provision, in: *Continental* [274–6, 281–84]

936 *Occidental* [402–3]

937 *Occidental* [397–8]

938 *Occidental* [400]

939 *Occidental* [401]

regulations' where property rights are affected,[940] and took preference over the provisions of the relevant legislation, the Hydrocarbons Law.[941] The tribunal thus seems to have straddled the (admittedly often ragged) line between taking factual notice of the existence and operation of internal law, and directly applying it.[942] However, having done so, the tribunal then hedged its bets, declaring that even if it was wrong, it had 'no doubt that the principle of proportionality [wa]s applicable as a matter of general international law'.[943]

296. By contrast, the *Pac Rim* tribunal referred to the proportionality principle exclusively as applicable domestic law. *Pac Rim* involved a dispute arising under Article 15(a) of El Salvador's Investment Law, concerning inter alia the denial of the US-registered investor's applications for environmental permits and an exploitation licence for mining projects in northern El Salvador. While the dispute did not relate to the interpretation of an IIA, given the Investment Law lacked a choice of law provision, the tribunal, in accordance with Article 42(1) ICSID Convention, determined it had jurisdiction to apply Salvadoran law and any applicable rules of international law. The dispute largely turned on the tribunal's interpretation of the requirements of Article 37 of the Salvadoran Mining Law.[944] The tribunal considered that it was bound to apply Salvadoran law in interpreting the Mining Law and that constitutional principles made up part of the body of rules governing statutory interpretation.[945] This involved the tribunal hearing considerable expert evidence on approaches to interpretation under Salvadoran law, including on the existence and application of the principle of proportionality.[946] Explicitly relying on the El Salvadoran Supreme Court's jurisprudence,[947] the tribunal remarked that proportionality was the 'paramount principle' applicable in its interpretative exercise.[948] While the tribunal did not expressly engage in an assessment of the measures' proportionality, by accepting El Salvador's interpretation of the Mining Law, it seems ultimately to have accepted that the denial of the concession satisfied the proportionality requirement.[949]

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940 *Occidental* [408–9]

941 *Occidental* [427]

942 On this long-standing dilemma, See, esp: *Upper Silesia* 19; and, eg: Gaja in Ascensio & ors (eds) (Pedone 2017) 369-72; Grisel (2014) 222–3; Hepburn (2017) 104–8; and Živković (2019) 530 ff

943 *Occidental* [427]. It is unclear whether by referring to 'general international law' the tribunal intended to indicate proportionality is a general principle or a customary norm.

944 *Pac Rim*, esp [3.5–6, 8.37–42]

945 *Pac Rim* [7.6]

946 *Pac Rim* [8.37–42]

947 Particularly the Constitutional Chamber's judgment in *Case No 42-2003* (14 Dec 2004): *Pac Rim* [8.38]

948 *Pac Rim* [8.42]

949 *Pac Rim* [8.43–4]. It may be significant that Brigitte Stern sat on both the *Occidental* and *Pac Rim* tribunals.

297. These tribunals' approaches highlight some of the risks associated with arbitral engagement with domestic law. Many of these are common across areas of international adjudication. While others have recently explored them in greater depth and with greater attention than I can here,[950] several particularly problematic aspects deserve attention. The most obvious risk is that arbitrators will misidentify, misconstrue, or misapply internal law. This risk is heightened by the fact that in most cases arbitrators will lack the backgrounds and expertise necessary to make accurate determinations on the existence, content, and operation of domestic law. This risk seems particularly acute when we consider engagement with host States' administrative and constitutional law, given such rules often gain shape through the accretion of practice on the part of internal courts and tribunals. Lack of expertise and complexity of issues will often mean that tribunals must largely depend on parties' pleadings and expert evidence.[951]

298. This, in turn, leads us to the most fraught issue: the appropriate intensity of examination of domestic actors' conduct and, especially, the weight to be given to prior applications of internal law by national administrative or judicial bodies. This issue is often discussed through the lens of the appropriate 'deference' due to State organs in the determination of the existence, content, and operation of domestic law.[952] Despite their frequent protestation to the contrary, it is a concomitant risk of engagement with domestic law that tribunals assume quasi-appellate functions.[953] Engagement with domestic law can be placed along a spectrum. At one end, a tribunal may defer entirely to a State's determinations concerning the operation of its laws — whether these are made in pleadings or in the decisions of administrative or judicial bodies. At the other, a tribunal may engage in *de novo* assessment of the existence, content, and operation of internal law, including by relying on its own factual findings.[954]

299. In cases where reference to internal law is made in giving effect to States' obligations under treaty or general international law, the level of engagement will be determined by the construction afforded to the rule itself. For example, the engagement appropriate in assessing

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950 See, eg: Hepburn (2017); Douglas (2003); Živković, 'International investment protection and the national rule of law: a normative framework for a new approach' (PhD in Law, LSE 2017; Živković (2019)

951 Hepburn (2017) 112–38

952 See, eg: ibid 77, 114–16, 28–9

953 See, eg: *Azinian* [99]; *Arif* [440–1]; *Dan Cake* [117]; and *Philip Morris v Uruguay* [418]. See too: *Koch Minerals* [7.20]

954 On this theme, See, esp: Schill (2016) 7 EYbIEL 309, 332; Živković (2019) esp 534–5; and Bjorklund (2005) 45 VaJIL 809, 866 ff. One potential solution, and that seemingly favoured by the PCIJ and ICJ in similar circumstances, is for tribunals to adopt a presumption favouring the approach of domestic authorities that can be rebutted by evidence that a decision is 'defective' due to severe procedural impropriety or substantive error. See, esp: *Serbian Loans* 46; *Brazilian Loans* 124; *Diallo* [69–71]; Douglas (2003) 273; Boisson de Chazournes and McGarry (2014) 869–78; (contra) Hepburn (2017) 108–38, 82–92. See too (albeit in considering denial of justice under Art 1105 NAFTA): *Glamis Gold* [758–88]; *Grand River* [234]

denial of justice (under an FET provision or the customary IMS), will differ from that required in assessing whether the host State's application of its laws resulted in the investor being treated less favourably than comparably situated nationals of the host State (in assessing national treatment). Similarly, the prior determination of a domestic adjudicator that a measure breached a constitutional guarantee of proportionate treatment may (or may not) suggest that the measure violated the State's duty to afford fair and equitable treatment.[955] The question of the appropriate level of engagement is even more open-ended, and hence more fraught, however, in cases like *Pac Rim* where a tribunal is empowered to directly apply domestic law.

300. In light of the above, tribunals may validly refer to domestic public law concepts — including the police powers doctrine and proportionality principle, where these form part of the internal laws regulating the relationship between an investor and host State — either: (i) when empowered to directly apply domestic law; or (ii) when considering the operation of domestic law as a 'fact' relevant in establishing whether State conduct amounts to a breach of an international obligation. However, both constitute extremely rocky routes for the migration of public law concepts and — given the fraught nature of arbitral engagement with domestic law — significant caution is due.

6.3.3 Application of customary international law

301. Arbitral recourse to the police powers doctrine and proportionality principle can (perhaps) be justified if these concepts have achieved the status of customary international law. There are essentially two ways in which they may be so recognised: (i) as independent norms regulating States' treatment of foreign nationals and their property; or (ii) as subsidiary elements of other extant customary rules — notably the duties to refrain from expropriation without compensation, to afford foreign nationals a minimum standard of treatment, or, more controversially, a customary duty to afford fair and equitable treatment.[956] If so recognised, arbitral recourse to the concepts may be justified to the extent a tribunal may directly apply rules of custom, treaty provisions refer to general international law, or under Article 31(3)(c) VCLT.

302. Custom formation is based on interrelation between the full subjects of international law: States.[957] Customary rules grow (or do not) from the action of one subject, and the reactions

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955 See, eg: *JSW Solar* [56–67]

956 The questions of the customary status of these norms, and more problematically, their content in custom, is the subject of significant debate. For an excellent overview, Dumberry (2016) 8 JIDS 155

957 ILC (22 May 2014) A/CN.4/672 15; Thirlway (2014) 63

of other subjects in the form of 'acceptance, rejection, or toleration.'[958] According to the orthodox approach reflected in Article 38(1)(b) SICJ — recently confirmed by the ILC and widely endorsed by States [959] — the formation of custom requires two elements of equal weight: (i) 'extensive and virtually uniform' practice;[960] and (ii) accompanying evidence that States regard this practice as being permitted (in the case of a permission) or mandated (in the case of a prescription or prohibition) by law (*opinio juris sive necessitatis*).[961] This two-element approach to custom formation is itself the manifestation of a (customary) rule of recognition serving vital structural functions.[962]

303. While there has been a discernible growth in deductive (ie 'top down') approaches to customary rule ascertainment amongst scholars and practitioners in recent years, and while international adjudicative bodies frequently merely assert the existence of custom,[963] the identification of custom requires an inductive approach.[964] We must, in other words, build a customary rule from the 'bottom up', based on detailed analysis of States' behaviour. Importantly, not only must we be able to show that States consider that a rule regulating certain conduct exists, but State practice must also be of a quality that it can generate an operable rule — it must be of a 'fundamentally norm-creating character'.[965] Practice must thus establish a norm that is both generalisable,[966] and must be precise enough to identify a rule of determinate content.[967]

304. Turning to the material sources of State practice and *opinio juris* relevant in our examination, unless it appears in the context of interpreting or applying international law, domestic legislative and adjudicative practice cannot (positively or negatively) evidence the existence of custom.[968] Despite the tendency on the part of certain scholars of referring to the content and

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958 ibid . See too: *Anglo-Norwegian Fisheries* 138; *Nicaragua* [183]; *Continental Shelf (Libya/Malta)* [27]

959 ILC (22 May 2014) A/CN.4/672 7; ILC (14 Mar 2018) A/CN.4/717 12

960 *North Sea Continental Shelf* [74]

961 *North Sea Continental Shelf* [77]

962 Raz (1974) 19 Am J Juris 94, 95–6

963 Exploring this theme, Talmon (2015) 26 EJIL 417; d'Aspremont (14 April 2014) EJIL:Talk!; and d'Aspremont (14 April 2014) EJIL:Talk!; Gaja (2011) 364 RCADI 9, 37–45. For a recent (and somewhat blatant) failure on the part of the ICJ to adequately elaborate the practice underpinning its findings concerning the existence of custom, see: *Chagos AO* [152–60]

964 This requirement was recently stressed by several States in their responses to the ILC's Draft Conclusions: ILC (14 Mar 2018) A/CN.4/717 [29]. See too: *Gulf of Maine* [111]

965 *North Sea Continental Shelf* [72]

966 The meaning ascribed to phrase by the ICJ: *North Sea Continental Shelf* [72]

967 Discussing this issue in the context of the potential for treaty practice concerning FET provisions to affect the customary minimum standard, Paparinskis (2013) 171–2

968 ILC (26 Mar 2014) A/CN.4/671 esp [76]

operation of domestic public law as evidence, per se, of the existence of custom,[969] recognition of the police powers doctrine or proportionality principle in domestic law (without more) tells us nothing about their customary status.[970]

305. Likewise — and despite often strident arguments to the contrary [971] — as Dumberry rightly notes, 'nothing can be deduced about the customary status of specific provisions contained in BITs from the simple fact that States have entered into numerous treaties' containing similar language.[972] States may enter into treaty relations to regulate activities otherwise unregulated by custom, to *inter se* exclude or modify existing custom, or to add additional security by 'codifying' existing custom.[973] Thus unless it expressly purports to reflect custom, or contains a *renvoi* to custom, the existence and formulation of treaty provisions and States' practice in interpreting and applying such provisions (including in their pleadings before tribunals) is irrelevant to the task of ascertaining custom.[974] The same is true of States' model agreements. Similarly, arbitral decisions and academic writings are relevant in custom ascertainment only to the extent they survey and analyse existing State practice and *opinio juris*, or because they have a catalyse States to address particular issues — for example in subsequent pleadings.[975]

306. As such, two material sources are of most relevance in considering whether the police powers doctrine and proportionality principle have achieved customary status. The first of these are States' statements made in the context of discussing international law's regulation of the treatment of foreign nationals and their property. Such includes those made during the various (public and private) attempts at codification of the rules relating to the protection of foreign nationals during the past century, unilateral statements, and discussion in the proceedings of competent intergovernmental organisations, including the UNGA, UNCTAD, UNCITRAL and OECD.[976] States' pleadings before international courts and tribunals with jurisdiction to apply general international law concerning the treatment of foreign nationals and their property constitute the second, more significant, material source.

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969 See, esp: Viñuales (2010) 310; Viñuales (2012) 369; Montt (2009)

970 Consideration of such practice remains, of course, relevant in assessing whether either concept is recognised as a general principle of international law.

971 See, esp: Schwebel (2004)

972 Dumberry (CUP 2016) 179

973 ibid 172–9

974 See further, eg: Mendelson (1998) 272 RCADI 155, 329–32

975 See, eg: Verdier and Voeten (2014) 108 AJIL 389, 420

976 See: Muchlinski (OUP 2007) 653–74

307. Before examining State practice, we must briefly consider pleadings' probative value. As it is axiomatic that only practice attributable to States is relevant in ascertaining custom,[977] investors' pleadings are irrelevant unless they provoke a reasoned response from States. Agents can (and do) bind States, including through expressing views on the existence or operation of custom in written or oral pleadings.[978] Pleadings constitute practice. Whenever States express their views on the existence, content or operation of general rules of international law, they also evidence *opinio juris*. However, unlike representations made by officials in more public fora, certain practical constraints mean pleadings must be approached cautiously: arguments produced in the context of dispute settlement are inherently pragmatic;[979] States often merely respond to claimants' arguments; the general practice of non-intervention of non-disputing parties means that usually only one treaty party is present in a dispute; and, given oral and written proceedings are generally not published, we depend heavily on tribunals' (often incomplete) summaries of parties' positions. Unlike public representations, we also cannot presume that silence on the part of other States — even investors' home States — indicates their tolerance.

308. Finally, the examination below considers whether either the police powers doctrine or proportionality principle have achieved the status of *general* custom. Given the limits of this study, it does not attempt to establish whether pairs or groups of States can be said to have accepted either concept as governing their mutual relations by way of *special* custom.[980]

i. The police powers doctrine as custom

309. As noted in Chapter 4, while differences of opinion persist as to precisely when such occurred,[981] numerous scholars have claimed the police powers doctrine has achieved customary status.[982] Similarly, the majority of tribunals employing the concept have expressly (or implicitly) justified their recourse to the concept on this basis.[983] However, in attempting to justify recourse to the police powers doctrine, neither scholars nor tribunals have referred to actual evidence of State practice.[984] Rather, both have referred solely to the practice of earlier tribunals, to (public and private) attempts to codify international law (especially the 1961

977 Thirlway (2014) 63

978 Akehurst (1975) 47 BYIL 1, 2, 4–5; Roberts (2010) 104 AJIL, 217–20; commentary to draft conclusion 10 in: ILC (2018) A/73/10 141

979 See, eg: *Renta 4* [Preliminary Objections] [63]; *Deutsche Bank* [416]

980 See, eg: D'Amato (1969) 63 AJIL 211; *Right of Passage* 39

981 See, esp: Escarcena (Elgar 2014) 188–9; and Pellet (2015) 454–7

982 Above Sec 4.4; and, esp: Viñuales (2014) 329 et seq; Henckels (2012) 225; Newcombe and Paradell (2009) 357

983 See, esp: *Sedco*, 275 (describing the police powers doctrine as 'an accepted principle of international law'); *Saluka* [262]; *Philip Morris v Uruguay* [290–307, 317]; *Marfin* [828]

984 Kurtz (2014) 284, 9 et seq; Paparinskis (2011) 313

Harvard Draft, 1967 OECD Draft, and ALI Third Restatement), and to documents produced by intergovernmental bodies — none of which themselves ground the concept in any State practice.[985] We must therefore look for evidence of the concept's customary status elsewhere.

310. If the police powers doctrine is a long-standing customary norm (and especially one attaching to or expressing States' legal personality)[986] we would expect to find evidence of it beyond recent investment disputes. We would particularly expect to see its shadow in the practice of those courts and tribunals considering international law's regulation of the treatment of foreign nationals and their property — notably the mixed claims tribunals of the late 19th and early 20th Centuries, the *ad hoc* tribunals established to settle disputes arising from so-called 'internationalised' State contracts, and the PCIJ and ICJ. More importantly, where these are available or are summarised in decisions, we would expect to see reference to the concept in parties' pleadings in such proceedings. We would likewise expect to find signs of the concept in States' representations made while participating in the several (unsuccessful) attempts at codifying existing international law on the treatment of aliens.

311. However, such signs are scarce. Express reference to States' police powers is largely absent from the practice of mixed claims tribunals. The decisions most often cited in support of the police powers doctrine's customary status in arbitral and academic discussion (and invoked by States),[987] the awards of the German-Venezuelan Commission in *Bischoff*, and *Brewer, Moller & Co*; and of the Great Britain-United States Arbitral Tribunal in *Parsons*, neither refer to the concept expressly nor describe anything resembling the concept as articulated in current debate. These awards do, however, provide support for the view that physical interference with tangible property (including by law enforcement officials) will not constitute expropriation if such is required to protect the public from dangers arising from its use.[988] Similarly, the award of the Upper Silesian Arbitral Tribunal in *Kügele* merely supports the view that decreases in profitability stemming from a tax or license fee will not constitute a taking of property or impairment on the right to engage in trade if property rights and a business's capacity to engage in trade are left intact.[989]

312. The only use of the phrase that resembles the practice discussed in Chapter 4 is to be found in the Italian-Venezuelan Mixed Claims Commission's award in *Poggioli*, in which the

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985 And in the case of the OECD Draft, does not mention it expressly. Although the Harvard Draft purports to codify existing custom, the drafters of the ALI's Restatements intend, rather, to state US perspectives on the law: Bernhardt & ors (1992) 86 AJIL 620, 609

986 Viñuales (2014) 327–9, 43–4

987 See esp: *Philip Morris v Uruguay* [298]; Peru's arguments in: *Bear Creek* [224]; *Chemtura* [Canada's Counter-Memorial] [568]. See further: ibid 335

988 See too: ILC (26 Feb 1959) A/CN.4/119 [43]

989 *Kügele* 69. See similarly: *Oscar Chinn* 87–8

United States' umpire 'assume[d]' that Venezuela's closure of a port to prevent the importation of weapons during a revolution was 'within [its] police power'.[990] The umpire considered that in the absence of a contract between the claimant and the government, 'by virtue of which damages could be claimed for the closure of the port, the power of the Government must be regarded as plenary and the reasons for its exercise beyond question.'[991] Unsurprisingly, this formulation closely resembles the way the concept was understood in the domestic (US) context at the time.

313. We find similarly scarce support for the view that the police powers doctrine is a long-standing customary rule in *ad hoc* (mixed and inter-State) arbitrations concerning the protection of foreign nationals and their property. Notably (although perhaps understandably, given the dispute concerned an outright appropriation, albeit of intangible property) based on the summary of proceedings, neither the parties nor the tribunal in *Norwegian Shipowners* addressed the existence or operation of the police powers doctrine either as a matter of domestic law, or under general international law, despite engaging with the protection of property under the Fifth Amendment to the US Constitution, whether contractual right or liens constituted 'property' under US law, and the conditions attaching to the government's exercise of eminent domain.[992]

314. We do find one tangentially relevant instance of practice in the United Kingdom's argument (largely accepted by the tribunal) in *North Atlantic Coast Fisheries* that, notwithstanding its grant by way of treaty of a perpetual 'liberty' to US nationals to take fish in certain areas off the Newfoundland coast, it retained the inherent right to regulate such activities.[993] Employing logic somewhat reminiscent of investment tribunals' application of the police powers doctrine, the tribunal accepted that the granting of such rights could not be seen as a total abandonment of the territorial sovereign's right to regulate the fishery (ie to exercise prescriptive and enforcement jurisdiction), but held that the principle of good faith required that the exercise of this right was limited to measures 'appropriate or necessary for the protection and preservation' of the shared fishery, or 'desirable or necessary on grounds of public order and morals without unnecessarily interfering with the fishery'.[994] Significantly, the tribunal considered that the content and application of regulations could not be 'framed as to give unfairly an advantage' to UK nationals.[995]

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990 *Poggioli* 690–1

991 *Poggioli* 691

992 *Norwegian Shipowners* 322–4

993 *North Atlantic Coast Fisheries* 179

994 *North Atlantic Coast Fisheries* 189

995 *North Atlantic Coast Fisheries* 189. For similar reasoning, see: *Navigational Rights* [101–33]

315. Given the tribunals' respective findings that a State can, through the terms of a concession contract with a private party, limit or suspend the exercise of its sovereign rights to regulate activities,[996] and to lawfully nationalise property,[997] we might expect to find express or implicit reference to States' police powers in the *ARAMCO*, *TOPCO*, *AMINOIL*, *LIAMCO*, and *BP* arbitrations. Such is not the case. The only somewhat relevant practice arises in Saudi Arabia's pleadings in *ARAMCO*. Saudi Arabia argued that the concession agreement did not 'exempt [ARAMCO] from complying with the laws and regulations enacted by the Government in order to regulate trade and commerce in the interests of national welfare',[998] and that the company remained subject to its 'regulatory powers', which as, stemming from its 'territorial sovereignty', entitled it 'to control all activities occurring in its domain'.[999] However, the crux of Saudi Arabia's argument was that the exercise of such regulatory powers *in casu* did not affect the concessionaire's rights under the agreement.[1000] Importantly, Saudi Arabia conceded that the exercise of such powers was subject to the requirements of the customary minimum standard.[1001] Saudi Arabia's arguments thus rather support the view that States' exercise of regulatory powers can be affected by (at least) contractual commitments and through the operation of general rules of international law.

316. Reference to States' 'police powers' is also conspicuous by its absence in States' pleadings, majority decisions and individual opinions in the inter-State disputes concerning the treatment of foreign nationals and their property brought before the PCIJ and ICJ. However, two instances of State practice arising in such disputes deserve attention. First, in its written pleadings in *ELSI*, Italy argued that temporary limitations on the enjoyment of the use of property did not constitute 'takings' for the purposes of Article V(2) 1948 US-Italy FCN Treaty. In doing so, Italy contended that:

> […] the deprival of the use of the ELSI plant for the duration of six months cannot be equated to the deprivation of fundamental property rights.
>
> Certainly, the Mayor of Palermo was exercising a power granted to him for reasons of public necessity in order to remedy temporarily a situation of social unrest and to prevent disorders. In other words, *he was using a regulatory power, more precisely a police power*, and the exercise of such a power can hardly be assimilated to an expropriation measure.

996 *ARAMCO* 211–13; *TOPCO* [71]; *LIAMCO* 59–60; and *BP* 331

997 *AMINOIL* [93–5], but see: [Fitzmaurice SO] [24]; *TOPCO* [59–61, 66, 73]; *LIAMCO* 93–103, 120–2; *BP* 329–30

998 *ARAMCO* 132, see too: 133

999 *ARAMCO* 140

1000 *ARAMCO* 140

1001 *ARAMCO* 141

> In a study based on practice, the following conclusion was reached: "A State's declaration that a particular interference with an alien's enjoyment of his property is justified by the so-called 'police power' does not preclude an international tribunal from making an independent determination of this issue. But if the reasons given are valid and bear some plausible relationship to the action taken, no attempt may be made to search deeper to see if the State was activated by some illicit motive."[1002]

317. We also find reference to the police powers doctrine in Iran's pleadings in *Certain Iranian Assets*, in which it noted that the US 'may argue that certain regulatory acts of a State are not expropriatory in nature *because they constitute an exercise of "police powers"*.' [1003] Iran noted that this concept is 'reflected' in the ALI's Third Restatement, 'as well as in various treaties to which the USA is a party', but argued that '[i]n any event, and on any analysis, an exercise of "police powers" must be non-discriminatory and designed and applied to achieve legitimate public welfare objectives, i.e. proportionate and not in violation of other applicable principles of international law' — conditions it considered had not been met.[1004] It is not clear from this somewhat couched reference whether Iran regarded the police powers doctrine had achieved customary status. It remains to be seen whether the parties will present further arguments concerning the concept and whether the Court will address its status in considering the US' measures' compliance with Article IV(2) 1955 US-Iran Treaty of Amity.

318. Finally, a survey of available sources likewise uncovered little sign of the concept in States' representations made in the context of discussing the numerous attempts at codifying international law concerning the protection of foreign-owned property and in competent intergovernmental organisations. The only clear invocation of the concept was made by the United States in a letter responding to the work of the Preparatory Committee to the League of Nations' Conference for the Codification of International Law held in The Hague in 1930. While accepting in principle that States must compensate foreign nationals for the termination of contracts and concessions, the US stressed that:

1002 *ELSI, Italy's Rejoinder* 468, quoting: Christie (1962) 338 (my emphasis). See too the United States' response: *ELSI,* Verbatim Record, Public sitting held on Friday 27 November 1987, at 12 noon, at the Peace Palace (Gardner), 106–11

1003 *Certain Iranian Assets, Iran's Memorial* [5.71] (my emphasis)

1004 *Certain Iranian Assets, Iran's Memorial* [5.71]

> [t]he right of a nation […] *to exercise its police power remains unimpaired*. The police power: "is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. … To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations."[1005]

Given this aspect of the Committee's draft text was not the subject of discussion during the Conference these comments appear to have largely escaped the attention of other participating States.[1006]

319. The absence of recognition of States' 'police powers' outside the contemporary investment dispute settlement context can perhaps be explained by the fact that the police powers doctrine — as an affirmative 'defence' or 'exception' — is only necessitated by expansive notions of what constitutes expropriation and what is required by the duty to afford fair and equitable treatment. Its rise in arbitral practice and growing role in States' pleadings before investment tribunals is explained by (States', arbitrators' and scholars') responses to tribunals' approaches to the types of measure considered 'tantamount' or 'equivalent' to expropriation under (especially) the so-called 'sole effects' test, and growth in the role of investors' expectations in reasoning concerning FET provisions. As the *ad hoc* oil arbitrations of the 1960s and 1970s attest, concerns similar to those underpinning the discussion of States' 'police powers' historically motivated debates concerning, for example, individuals' 'vested' or 'acquired' rights, States' permanent sovereignty, and whether States could limit their exercises of jurisdiction through contractual obligations.[1007]

320. Given the above, we must look for evidence of States' positions regarding the customary status of the police powers doctrine in their pleadings before investment tribunals. Analysis of the 717 decisions making up this study's corpus, as well as the written and oral pleadings publicly available, reveals that 27 States have presented arguments expressly invoking the

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1005 United States' letter (22 May 1929) C.75(a).M.69(a).1929.V, 8; quoting US Supreme Court in: *Lawton v Steele* 136 (responding to the Committee's Basis of Discussion No 3)

1006 Paparinskis (2013) 61

1007 Of the extensive literature on these topics, See, eg: Brownlie (1979) 162 RCADI 245, 269–71, 78–82; Sik (2009) 24 NILR 120; Alvik (2011) 30–41, 238 ff; Miles (2013) 78 ff

police powers doctrine in 68 disputes, as follows: Albania (1);[1008] Argentina (12);[1009] Barbados (1);[1010] Bolivia (3);[1011] Canada (7);[1012] Costa Rica (1);[1013] Cyprus (1);[1014] Czech Republic (6);[1015] Ecuador (4);[1016] Guatemala (1);[1017] Hungary (1);[1018] Kazakhstan (1);[1019] Kyrgyzstan (1);[1020] Mexico (5);[1021] Moldova (1);[1022] Oman (1);[1023] Pakistan;[1024] Peru (2);[1025] Poland (3);[1026] Romania (2);[1027] Russia (2);[1028] Slovakia (1);[1029] Spain (3);[1030] Sri Lanka (1);[1031]

1008 *Mamidoil* [529]

1009 *Azurix* [278]; *Enron* [239]; *Sempra* [277]; *BG Group* [255]; *Continental* [85]; *National Grid* [141, 236]; *InterAgua* [116, 190]; *Suez & Vivendi* [202]; *Total* [188]; *EDF v Argentina* [428, 444]; *Mobil v Argentina* [835, 850]; *Urbaser* [976, 980, 986–93]

1010 *Allard* [262]

1011 *Quiborax* [124]; *South American Silver* [Bolivia's Rejoinder] [218, 384–95], [Award] [523–5]; *Glencore* [Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation] [443–77], [Bolivia's Reply on Preliminary Objections and Rejoinder on Merits] [632–84]

1012 *Ethyl Corp* [Canada's Statement of Defence] [95]; *SD Myers* [Canada's Statement of Defence] [55], [Canada's Counter-Memorial] [423–36], [Canada's Reply to Supplemental Memorial] [54–5]; *Pope & Talbot* [Canada's Counter-Memorial] [19, 409–37, 449–50]; *Methanex* [Canada's Fourth Art 1128 Submission] [14–16]; *Chemtura* [Canada's Counter-Memorial] [500, 530, 552, 565–84, 594–6, 613–23, 630], [Canada's Rejoinder] [251, 275–97], [Canada's Post-Hearing Brief] [219–20], [Award] [97, 254, 266]; *Windstream* [Canada's Counter-Memorial] [494–500], [Canada's Rejoinder] [20, 93, 179], [Award] [277–8]; *Bear Creek* [Canada's Art 832 Submission] [338]

1013 *Aven* [Costa Rica's Counter-Memorial] [32, 612–13, 628–35], [Costa Rica's Rejoinder] [1007, 1043–7], [Costa Rica's Post-Hearing Brief] [1016], [Final Award] [384, 404]

1014 *Marfin* [879]

1015 *Nagel* [211]; *Invesmart* [479]; *InterTrade* [253]; *ECE* [4.362–5, 4.693]; *WNC Factoring* [243, 256–7, 374, 394]; *JSW Solar* [268, 272]

1016 *EnCana* [173]; *Burlington* [169, 373 ff]; *Perenco* [241, 261–2, 647, 650–4]; *Copper Mesa* [6.10–11]

1017 *Railroad Development* [Guatemala's Counter-Memorial] [297–99, 306–9, 447–8]

1018 *UP&CD* [315, 327, 379, 408]

1019 *Stati* [1163]

1020 *Belokon* [188, 192–3]

1021 *Metalclad* [Mexico's Post-Hearing Submission] [279–81]; *Pope & Talbot* [Mexico's Second Art 1128 Submission] [51]; *Feldman* [Mexico's Counter-Memorial] [292]; *Cargill* [Mexico's Rejoinder] [370]; *Nelson* [Mexico's Rejoinder] [87]

1022 *Arif* [227, 307]

1023 *Al-Tamimi* [177–8, 180]

1024 *Tethyan* [1306–9]

1025 *Tza Yap Shum* [156]; *Bear Creek* [Peru's Rejoinder on Merits and Reply on Jurisdiction] [14, 428–65, 493], [Peru's Counter-Memorial on Merits and Memorial on Jurisdiction] [12, 224, 227–50], [Award] [453–4, 459–70]

1026 *Servier* [276]; *Ryan* [470]; *PL Holdings* [277]

1027 *EDF v Romania* [180]; *Roussalis* [663, 719]

1028 *Renta 4* [Preliminary Objections] [63]; *Yukos* [79]

1029 *EuroGas* [Slovakia's Counter-Memorial] [352–63]

1030 *Novenergia* [720, 732–36]; *Foresight* [422]; *RREEF* [222]. It is not clear from the summaries of the parties' positions in *Novenergia* and *RREEF* whether Spain expressly employed the phrase 'police power'.

1031 *Deutsche Bank* [416, 501]

United States (3);[1032] Uruguay (1);[1033] and Zimbabwe (1).[1034] Of course, not all instances of practice are of equal value in our examination. While Argentina, Bolivia, Canada, Czech Republic, Ecuador, Peru, the United States, and Uruguay have clearly stated that the police powers doctrine constitutes custom, and have provided detailed arguments concerning the concept's operation, much of the practice identified above (at least as summarised in awards) remains rather inconclusive.

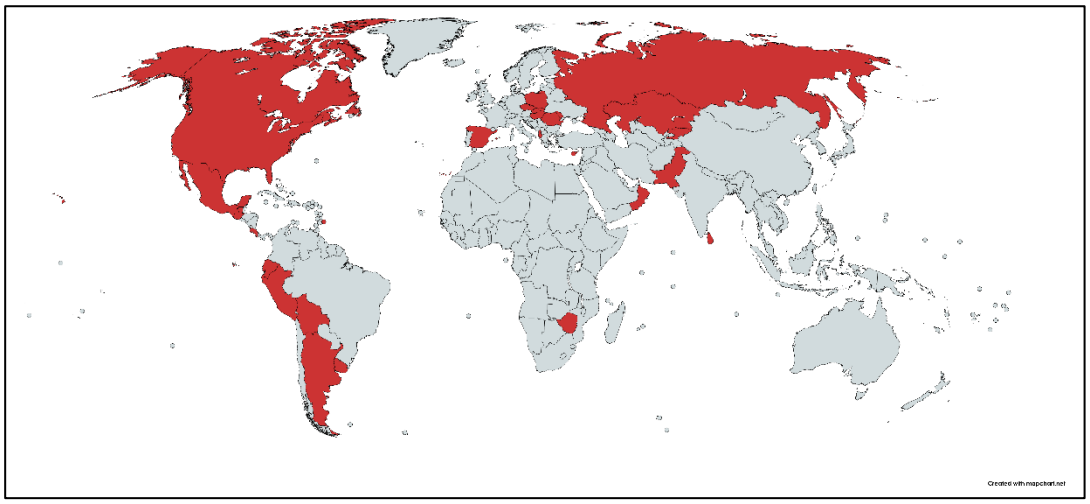

Figure 10: States that have expressly invoked the police powers doctrine in pleadings before competent courts/tribunals, up to 31 Dec 2018 (highlighted in red)

321. Given the above, we might reason it is relatively unproblematic to conclude that the police powers doctrine had not achieved customary status at the time of its first applications by the IUSCT in *Sedco* and *Too*, and when it initially migrated into the practice of investment tribunals. The several attempts made by US scholars and officials to universalise the concept did not bear fruit until the early 2000s.

322. The police powers doctrine's current status is more equivocal. Based on their pleadings, support amongst States for a customary police powers 'exception' has undoubtedly grown. While a handful of States invoked their police powers as a complete 'defence' to all claims arising under IIAs,[1035] the majority have accepted that the doctrine — as a subsidiary element of the customary definition of expropriation — is (solely) relevant in distinguishing between lawful action and compensable expropriation. However, and significantly, despite being increasingly accepted by a diverse range of States, less than a third of the 96 States that were named as respondent in the proceedings comprising our corpus had expressly invoked the

1032 *Methanex* [United States' Amended Statement of Defence] [410–11], [United States' Rejoinder] [194–6]; *Grand River* [United States' Counter-Memorial] 157–61; *Berkowitz* [United States' Art 10.20(2) Submission] [27–8]

1033 *Philip Morris v Uruguay* [180–1, 216–21, 382]

1034 *von Pezold* [90, 454, 604]

1035 See, eg: Uruguay's arguments in *Philip Morris v Uruguay* [216]

police powers doctrine as of 1 January 2019.[1036] Admittedly, this may not reflect the full picture, given many disputes are not made public and we often must rely on tribunals' summaries of parties' arguments. However, it suggests that a critical mass of support for the view that the police powers doctrine constitutes custom has still yet to form. Nevertheless, while it cannot yet be said to have achieved customary status, if the patterns identified above in States' pleadings continue (which seems likely) we may soon reach a situation in which a norm that was originally the sole product of arbitral practice has been subsequently endorsed — and as such converted into a legal rule — through States' pleadings.

ii. The proportionality principle as custom

323. As flagged above, there are essentially two ways in which proportionality could constitute custom: as an independent norm regulating States' treatment of foreign nationals and their property, or, as is more often argued, as a subsidiary element of an already extant customary rule. In relation to the former, despite the prevalence of proportionality analyses in the practice of adjudicative and treaty bodies considering the protection of property in human rights instruments,[1037] there is little sign in their pleadings before investment tribunals to suggest that States accept proportionality constitutes a self-standing customary norm. It is beyond the ambition of this study to analyse States' practice in relation to the protection of property under human rights instruments. The value of such practice for present purposes is, further, doubtful.

324. Proportionality may constitute a subsidiary customary norm in two ways. First, it is often argued that the customary minimum standard entails a contingent duty to ensure that measures' economic effects on investors are proportionate in light of (legitimate) objectives.[1038] Second, and separately, as discussed in Chapters 4 and 5, recourse to proportionality may be required in giving effect to the police powers doctrine, to the extent it is recognised as custom.[1039]

325. Numerous States have accepted in their pleadings that an inquiry into a measure's proportionality is relevant in determining whether the (treaty-based) duty to afford fair and equitable treatment has been breached, largely by arguing that proportionate regulatory measures

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1036 According to UNCTAD figures, 105 States were named as respondent during the study period: 'Investment Dispute Settlement Navigator' <https://investmentpolicy.unctad.org/investment-dispute-settlement> Accessed 5 May 2020

1037 Eg under Art 1 ECHR Protocol 1; Art 21 ACHR; Art 14 ACHPR; and Art 15 ICPRMW

1038 This argument is well illustrated by the investor's claim that tribunals 'have recognised proportionality as a freestanding requirement of fair and equitable treatment under the minimum standard of treatment' in: *Al-Tamimi* [263]. See too: *SD Myers* [252], and [Schwartz SO] [144, 235]; expert evidence of Judge Schwebel in: *MTD Equity*, quoted at [109]; *Parkerings* [368]; *Suez & Vivendi* [Nikken SO] [16–19]

1039 Above Sec 4.5.3.ii.. See too the parties' arguments in: *de Levi* [251]; *Servier* [276–8, 280, 584]

(whether general or targeted) cannot be considered unfair or inequitable. With (significant) variations, based on express references, nine States have accepted that measures' proportionality is somehow relevant in interpreting FET provisions in 18 disputes: Argentina (5);[1040] Cyprus (1);[1041] Czech Republic (1);[1042] Egypt (1);[1043] Italy (2);[1044] Kazakhstan (1);[1045] Poland (1);[1046] Spain (5);[1047] and Uzbekistan (1).[1048]

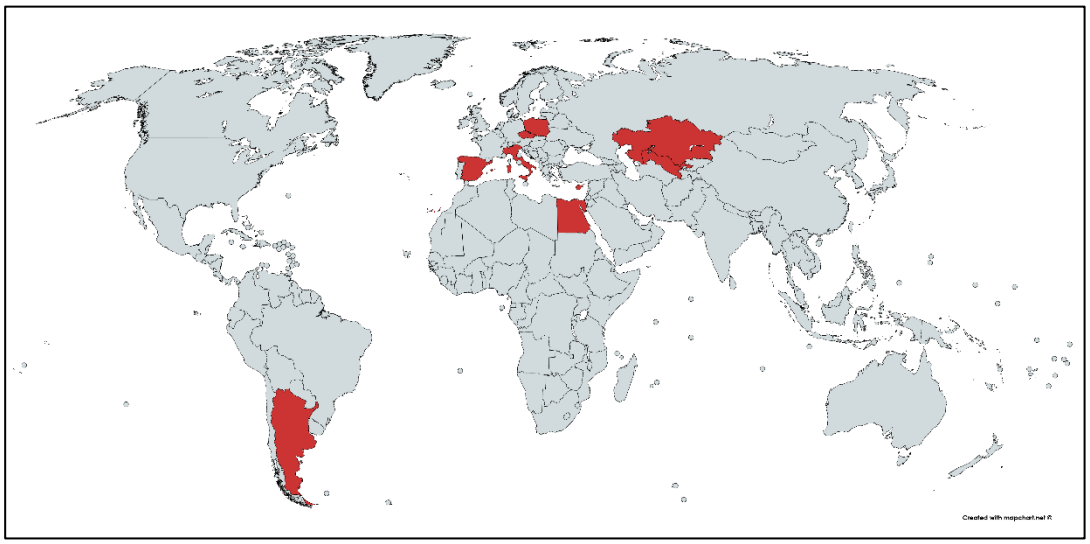

Figure 11:States that have expressly argued proportionality assessment relevant in interpreting FET provisions in pleadings before competent courts/tribunals, up to 31 Dec 2018 (highlighted in red)

326. However, with the notable exception of Argentina's arguments in *Metalpar*, these States have not expressly — or implicitly, for example by referring to 'international law' or 'general international law' — argued that a proportionality requirement now comprises part of the customary minimum standard (or a customary equivalent of FET) and the FET provisions in question did not contain a *renvoi* to custom.[1049] In fact, the only instance of practice relevant to an FET provision with such a *renvoi* to the customary minimum standard provides an example of negative *opinio juris*. In *Al-Tamimi,* Oman submitted that while proportionality 'has been endorsed by international tribunals', such did not demonstrate that it has 'become an element of the minimum of standard of treatment under customary international law', and

1040 *Metalpar* [117]; *Total* [208–9]; *EDF v Argentina* [370]; *Mobil v Argentina* [767]; *Urbaser* [581]

1041 *Marfin* [1211–13]

1042 *JSW Solar* [310]

1043 *Unión Fenosa* [9.31]

1044 *Blusun* [184]; *Greentech* [425–31]

1045 *AES Kazakhstan* [391–3]

1046 *PL Holdings* [278]

1047 *Novenergia* [567–75]; *Masdar* [441–2, 480]; *Antin* [453, 469, 490, 495]; *Foresight* [333]; *RREEF* [251]

1048 *Oxus* [769–71

1049 Argentina argued that the customary international minimum standard required 'reasonableness and proportionality' on the part of host States. However, this acceptance was tied to Argentina's argument that treaty–based FET provisions do not require treatment more favourable than the customary minimum standard: *Metalpar* [117]

that there was insufficient evidence in State practice and *opinio juris* for such a view.[1050] Importantly, the United States echoed this position in its statement as non-disputing party and argued that proportionality did not constitute a stand-alone customary requirement, and was 'like good faith […] "not in itself a source of obligation where none would otherwise exist"'.[1051]

327. Only a slightly larger number of States have expressly pleaded that a measure's proportionality is relevant in assessing expropriation. While States have sometimes argued that measures' proportionality is relevant when determining if interference has risen to the level of a taking, such arguments were predominantly made when justifying measures as valid exercises of police (or 'regulatory') powers. Eleven States accepted the need to consider measures' proportionality when determining expropriation claims in their pleadings before investment tribunals in 20 disputes: Argentina (7);[1052] Bolivia (2);[1053] Czech Republic (1);[1054] Ecuador (1);[1055] Kazakhstan (1);[1056] Poland (2);[1057] Venezuela (2);[1058] Slovakia (1);[1059] South Africa (1);[1060] United States (1);[1061] and Zimbabwe (1).[1062] In its pleadings concerning expropriation in *Certain Iranian Assets*, Iran likewise argued 'that the element of proportionality is implicit' in justifying a measure as an exercise of police powers.[1063]

1050 *Al-Tamimi* [188]. Art 10.5(2) 2006 US-Oman FTA provides that the obligation to afford fair and equitable treatment in paragraph 1 'prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. [...]'. See, similarly, Hungary's arguments in: *UP&CD* [434]

1051 *Al-Tamimi* [Submission of the United States] [9], citing*: Border and Transborder Armed Actions* [94]. The United States also (correctly) remarked that arbitral decisions interpreting FET and full security and protection provisions that go beyond or do not contain a *renvoi* to the customary minimum standard cannot evidence that standard's content or operation: [Submission of the United States] [4]

1052 *Siemens* [243–4]; *BG Group* [252]; *Enron* [239]; *Sempra* [277]; *Metalpar* [71]; *Urbaser* [988]; and (more equivocally): *Mobil v Argentina* [767]

1053 *South American Silver* [523]; *Quiborax* [188]

1054 *WNC Factoring* [257]

1055 *Burlington* [496, 503–4]

1056 *Stati* [1167, 1183]

1057 *Servier* [229, 277]; *PL Holdings* [278]

1058 *Crystallex* [415, 651]; *Koch Minerals* [7.8]

1059 *Achmea* [239]. In what appears to have been a pleading *quod non*, Slovakia considered that if proportionality was relevant in assessing expropriation, the tribunal should adopt the standard of 'obvious disproportionality'.

1060 *Foresti* [75]

1061 In *Al-Tamimi*, the US seems to have accepted that a measure's proportionality is 'one factor [relevant] in a discussion of expropriation': [Submission of the United States] [9]. See, however Hungary's arguments to the contrary in: *UP&CD* [394–5]

1062 See Zimbabwe's (somewhat equivocal) arguments in: *von Pezold* [451–4]

1063 Iran argued 'that the element of proportionality is implicit' in the question of whether a measure can be justified under a State's police power: Memorial of Iran (1 Feb 2017) [5.71], citing: *Corn Products* [87–8]; and *Fireman's Fund* [196]

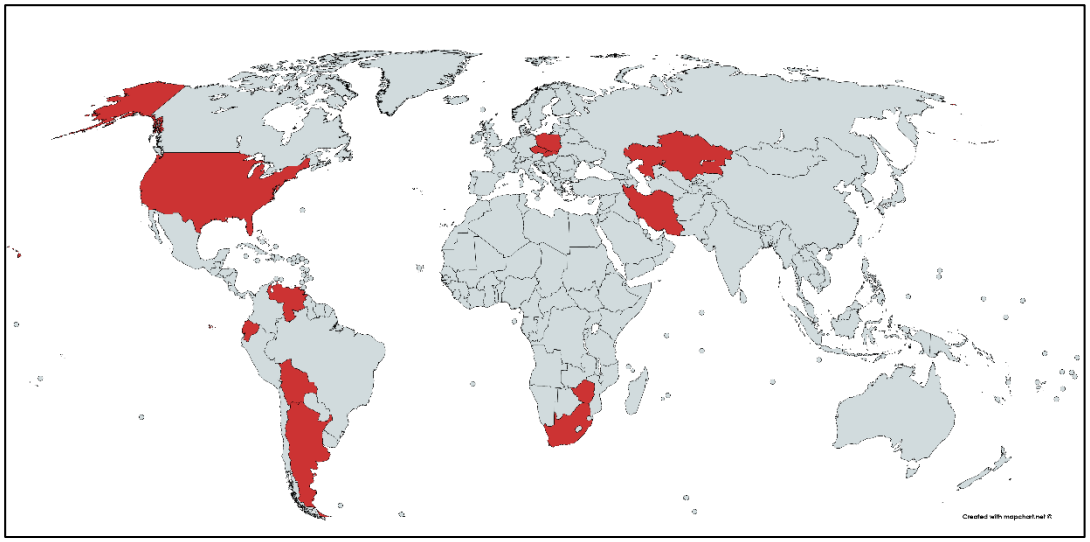

Figure 12: States that have expressly argued proportionality assessment relevant in interpreting expropriation provisions in pleadings before competent courts/tribunals, up to 31 Dec 2018 (highlighted in red)

328. In light of the above, as with the police powers doctrine, while a number of States have argued that measures' proportionality is a relevant factor in numerous interpretative contexts, given the extent and quality of States' pleadings concerning proportionality, it is not possible on the basis of this practice to conclude that the concept has achieved the status of custom, either as a stand-alone customary norm or as an element of the customary minimum standard, or customary definition of expropriation.

6.3.4 Application of general principles of international law

329. A further potential 'route' through which norms originating in domestic legal orders may validly inform investment tribunals' reasoning is through the emergence of a general principle of international law within the meaning of Article 38(1)(c) SICJ.[1064] To the extent either has achieved such status, arbitral recourse to the police powers doctrine and proportionality principle would be justified either as the direct application of relevant rules of international law, or in construing treaty terms through the sympathetic interpretation rule embodied in Article 31(3)(c) VCLT.[1065]

1064 Recently described by the ILC sitting in plenary as an 'authoritative statement' of the rule recognising general principles, 'corroborated in the practice of States and international courts and tribunals': ILC (2019) A/74/10 [231]

1065 McLachlan (2008) 395–8

330. While general principles are currently enjoying something of a 'renaissance',[1066] including amongst scholars addressing international law's protection of foreign investment,[1067] they remain a problematic source beset by conceptual and practical problems, particularly regarding their ascertainment and application.[1068] Indeed, former ILC special rapporteur Michael Wood recently warned that the resurgence in enthusiasm for general principles might, if not properly managed, pose a 'challenge to the stability of the international legal system.'[1069] To borrow Fitzmaurice's phrasing, because general principles are by nature 'fluid', their identification and use often resembles a 'quasi-legislative' process,[1070] and, despite the passage of time, it has proved difficult to assuage fears that their widespread use permits '"unfettered law-creation"' or merely provides a vehicle for adjudicators' moral and political preferences.[1071] There is, further, a widespread concern that general principles are susceptible to being used to generate rules that fail to pass muster as custom — what has been referred to as 'fake custom' or 'custom-'light'.[1072] For these reasons adjudicators have tended to avoid characterising a norm as a general principle or, when they do, provide little in the way of rationale or justification.[1073]

331. With these major caveats in mind, in principle scholars have reached something resembling consensus in recognising two categories of general principle: (i) those derived from States' domestic practice (principles in *foro domestico*);[1074] and (ii) those 'formed within' the international legal order or that can be deduced from other (positive) rules or are a necessary

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1066 Tams (2012) 325. This trend is now present across substantive areas of international law. Alongside the topic's inclusion on the International Law Commission's work schedule, numerous recent scholarly studies have been devoted to the subject. See, eg:, the various contributions in: Andenæs & ors (eds) Brill 2019). See too: Kotuby and Sobota (2017); Yotova (2017) University of Cambridge Faculty of Law Research Paper No 38/2017; Carpanelli in Pineschi (ed) (Springer 2015) 125 - 43; Kleinlein in Lepard (ed) (CUP 2017) 131-58; Bonafé and Palchetti in Brölmann and Radi (eds) (Elgar 2016) 160 - 76

1067 See, eg: Gattini, Tanzi and Fontanelli (eds) Brill 2018); Schill (2012); Tanzi (2019); Stone Sweet and Della Cananea (2013) 46 NYU J Int'l L & Pol 911; Gazzini (2009) . But see: Tams (2012) 324–6

1068 Not much has changed in this respect from 1967 when Jennings commented that '[t]here has never been agreement upon what is meant by [section (1)(c)] of Article 38. The one certainty is that its context in the Article requires that it must mean something different from [custom].': Jennings (1967) 121 RCADI 323, 338–9. For a recent re-examination, d'Aspremont in Pisillo Mazzeshi and De Sena (eds) (Brill 2018) 163-84.

1069 Wood (2019) 21 Int'l CL Rev 307, 308

1070 Fitzmaurice in l'Institut de Droit International (ed) (Karger 1973) 196-363, 325

1071 Kammerhofer (2009) 354, citing: Kelsen (Manz 1979) 4; see generally: Cheng in Arangio-Ruiz (ed) (Editoriale Scientifica 2004), 3–4; Tunkin (HUP 1974) 190 ff

1072 See, respectively: Tesón in Lepard (ed) (CUP 2018) 86-110, 96–7; Thirlway (2014) 236. On this problem, see: Wood (2019) 316–21

1073 Tomuschat (1993) 311, 5–6; Gaja in Andenas & ors (eds) (Brill 2019) 35-43, 36–7; Tams (2012) 325–6. The International Court of Justice has been reticent to address the merits of a claim solely based on a norm derived from a general principle and has a record of avoiding providing a definitive answer when parties raise the potential existence of a general principle. See, illustratively: *Corfu Channel* 22; *Barcelona Traction* 26; *Gabčíkovo–Nagymaros* [76]; *Avena* [127]

1074 PCIJ, Advisory Committee of Jurists, *Procès–verbaux of the Proceedings of the Committee, June 16th – July 24th 1920, with Annexes*, 335 (comments of Lord Phillimore)

feature of a system of law regulating the relations between formally equal States.[1075] There is a core of agreement that for a norm to constitute a principle in *foro domestico*, it must be sufficiently prevalent in a widely representative number domestic legal orders.[1076] A nascent principle must be present in the majority of domestic jurisdictions and, additionally, such jurisdictions must represent a wide range of legal traditions and cultures.[1077] A principle must further be 'apt for translation onto the international plane',[1078] and be compatible with 'the framework of the principles and rules of international law' within which it would operate.[1079]

332. Turning to the first of our two concepts of study, as touched upon in Chapter 4 above,[1080] it has been suggested that numerous domestic legal orders recognise that governments' capacities to adopt measures aimed at the public welfare cannot, as a matter of principle, be entirely extinguished by individuals' rights and interests — whether arising, for example, from constitutional guarantees or from contract.[1081] In considering whether the police powers doctrine can properly be understood as reflecting a general principle of international law relevant in the relations between States and private individuals, the question that arises is whether a sufficient number of domestic jurisdictions recognise, through sufficiently similar concepts, such a notion of reserved regulatory powers in the context of the protection of private interests in property. Answering this question requires in-depth comparative analysis of a large number of domestic legal orders that represent a variety of legal, cultural and historical traditions.

333. Likely because it is often presented as custom, neither tribunals nor scholars discussing the police powers doctrine have engaged in the requisite comparative inquiries.[1082] Extant comparative research into domestic law's treatment of individuals' property interests — and particularly States' powers to negatively affect such interests through regulation — has tended to focus on advanced economies and, particularly, English-speaking countries —usually

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1075 This is despite the fact that Art 38(1)(c) SICJ provides textual support only for the former. See, esp: ILC (5 Apr 2019) A/CN.4/732. See too recent discussion in, eg: Dupuy in Bodansky, Brunnée and Hey (eds) (OUP 2008); Ellis (2011) 22 EJIL 949; Pellet in Zimmermann & ors (eds) (OUP 2012) 731-870; Gaja, 'General Principles of Law' (2013) MPEPIL <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1410?rskey=qOLw0Z&result=2&prd=OPIL> accessed 3 Jul 2017; Gaja (2019) 36; Palchetti and Bonafé in Brölmann and Radi (eds) (Elgar 2016) 160-75; see too: *Proceedings of the Committee of Jurists*, 335–6 (comments of de la Pradelle).

1076 Lowe (OUP 2007) 88

1077 See, eg: *Tadić, Trial Judgment* [225]. According to Bücheler, proportionality is sufficiently prevalent in enough domestic legal orders: Bücheler (2015) 62. Henckels somewhat contests this view of domestic practice: Henckels (2015) 19–20

1078 Lowe (2007) 88. See too: Jackson (2019) 30 EJIL 391, 407–12

1079 Gaja (2019) 39

1080 See Section 4.4

1081 See, eg: Schill (2010) 339–40; Viñuales (2012) 369; Perkams (2010) 148–9; Rajput (2019) esp Sec 6.03. See too: Walsh (2015) 231; Stubbs (2011) esp 203–15

1082 See too: Titi in Gattini, Tanzi and Fontanelli (eds) (Brill 2018) 323-43, 327

OECD member States.[1083] The few comparative studies in the investment context follow a similar pattern. For example, in examining the effects of umbrella clauses on States regulatory powers, based on a review of the 'major domestic legal systems' — in his view France, the United Kingdom (and former British colonies, Australia, New Zealand and Canada) and the United States — Schill concludes that 'a general principle of law' exists according to which States possess the power to lawfully 'modify or even terminate contracts with private parties in view of a superseding public interest', provided they pay compensation for 'damages incurred by such modification or termination' proportionate to the significance of such changes.[1084] Similarly, while he concludes that 'all jurisdictions' studied recognise 'a certain margin of appreciation' for authorities to 'adopt regulations in the public interest', and governments' right to 'reshape' or 'restrict' property rights 'for the benefit of the public good' (albeit both subject to the property holder's legitimate expectations), Perkams acknowledges that these findings are only based on a survey of German, US and EU approaches.[1085] Comparative research beyond the investment context where a larger sample of jurisdictions are studied has tended to reveal the diverse ways domestic legal orders structure and approach questions relating to governments' powers to regulate property interests.[1086]

334. Turning to proportionality, several advocates of arbitral recourse to the concept justify its place in investment law and arbitration on the basis that it constitutes a general principle.[1087] Such arguments go back at least to 2007 when Lowe suggested there could be grounds for seeing proportionality as a general principle, subject to its successful 'translation onto the international plane'.[1088] While it has been suggested that proportionality might be considered a general principle derived from other existing rules of international law — notably the closely related (and themselves often problematic) principles of good faith and abuse of

1083 See, eg: Alterman in Alterman (ed) (ABA 2010) 21-80 (comparing: Australia; Austria; Canada; Finland; France; Germany; Greece; Israel; Netherlands; Poland; Sweden; UK and US); Christie (2006) Brooklyn JIL 343 (comparing: the US; Australia; and Canada)

1084 Schill (2010) 340

1085 Perkams (2010) 121

1086 Alterman (2010) 21; Alterman (2010) 42/43 Urban Lawyer 331, 355. See, more generally: Bell in Reimann and Zimmermann (eds) (OUP 2012), 1262–4

1087 See, esp: Cottier & ors (2017) 18 JWI&T 628, 655–65, 71; Kingsbury and Schill (2009) 16, 24; Bücheler (2015) 29; Stone Sweet and Mathews (2008); Stone Sweet (2010); Leonhardsen (2012) 135; Stone Sweet and Della Cananea (2013); Schill (2017) 1109; Schill and Djanic (2018) 46. Such arguments somewhat echo those made in the context of international trade law. See, esp: Andenæs and Zleptnig (2007) 380, 4; Desmedt (2001) 441–2. See too: Engle (2012) 2–3; Cohen-Eliya and Porat (2013) 12

1088 Lowe (2007) 88

rights [1089] — it has generally been characterised as a principle in *foro domestico*.[1090] However, as with the police powers doctrine, tribunals simply have not engaged in anything approaching in-depth comparative inquiry in justifying recourse to proportionality.[1091] When they have cited extraneous materials arbitrators have referred only to a limited number of decisions in the practice of the EU courts, ECtHR and WTO dispute settlement bodies,[1092] or (with the exception of those awards in which proportionality was considered as part of domestic law)[1093] have made vague allusions to domestic jurisdictions without referring to concrete examples.[1094]

335. It has similarly yet to be demonstrated in academic discussion that proportionality is prevalent enough in domestic legal orders to be considered a general principle. While proportionality analysis has been the subject of considerable comparative research, academic accounts tend either to provide a broad overview of its place in comparative public law, or focus on only a handful of jurisdictions where proportionality is present (rather than taking note of how similar issues are dealt with elsewhere using alternative approaches).[1095] In support of the view that proportionality has achieved the status of a general principle of international law relevant in settling investment disputes, (alongside EU, WTO and ECtHR practice) Bücheler considers proportionality's place in the domestic law of (only) Canada, Germany, Israel and South Africa.[1096] Based on a survey of broader studies, proportionality analysis has been identified as playing some role in regulating public interferences with private (various) private rights or interests in at least 30 jurisdictions (equating to around one sixth of all States).[1097] However, in the course of research no detailed analyses emerged of the ways domestic adjudicators employ proportionality in the particular context of governmental interference with vested rights in property and how proportionality compares to other adjudicative approaches to such interference.

336. Given the above, significant questions remain as to whether either the police powers doctrine or proportionality principle find support in sufficiently analogous concepts in a sufficient

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1089 Kotuby and Sobota, for example, suggest proportionality can be derived from the principles of good faith and abuse of rights: Kotuby and Sobota (2017) 116–9. Such arguments, however, raises the problematic notion of general principles derived from general principles — a process that could continue *in perpetuum*.

1090 Kingsbury and Schill (2009) 16, 24; Stone Sweet and Della Cananea (2013) 916–23; Bücheler (2015) esp 29; but see: Henckels (2015) 190–3.

1091 Peat (2018) 9 JIDS, 9–15

1092 See, esp: *SD Myers* [Schwartz SO] [234]; *Tecmed* [122]; *Azurix* [311]; *EDF v Romania* [294]; *Occidental* [402–3]; and *Electrabel* [179]

1093 See above, Sec 6.3.2

1094 See, eg: *Occidental* [403]; and *PL Holdings* [355

1095 See, eg: Barak (2012) 186–202; Bücheler (2015) 34–62.

1096 Bücheler (2015) 34–62. But see: Henckels (2015) 19–20

1097 See studies cited above: Sec 5.3

number and range of domestic jurisdictions. But the greater obstacles for viewing these concepts as general principles relate to their transposability. It bears remembering in this context that in the few cases in which general principles *in foro domestico* have been successfully transposed, these have been derived from domestic *private* law (like good faith and estoppel) or are derived from the practices of domestic courts (like *res judicata*). This has historically been because domestic private law and international law have been considered somewhat analogous, given each deals with relations between formally equal legal subjects.[1098] Similarly, the nature of adjudication and shared notions of procedural fairness at the domestic and international levels have aided transposition of structural principles. By contrast, concepts originating in domestic public law manage vertical relations between governed and governor rather than horizontal relations between equal subjects.[1099]

337. Most problematically, as I discuss further in Chapter 7, in the domestic context, by their nature public law concepts like the police powers doctrine and proportionality principle require adjudicators to draw on an idealised conception of the governed-governor relationship, and in the context of interferences with property, to draw upon external values and assumptions regarding the appropriate relationship between the State and the market. Public law concepts like the police powers doctrine and proportionality principle depend on the existence and content of a 'meta-agreement',[1100] to be found throughout the domestic legal order's constitutional and legislative framework. The absence of a readily identifiable compact on such issues amongst States makes the transposition of public law concepts inherently problematic. Either such concepts risk being stripped of their role and content — and only a shell is transposed to the international level — or transposition will bring with it a particular vision of the State-market relationship not necessarily endorsed by the majority of States.[1101] It is the latter that has historically been of greatest concern to States, scholars and international adjudicators when considering the transposition of principles *in foro domestico*.[1102]

338. Given the above — at least based on our current understandings of these concepts' places in domestic legal orders, and, particularly given the challenges facing their transposability — arbitral recourse to the police powers doctrine and proportionality principle cannot be justified on the basis that these concepts constitute general principles of international law.

1098 See, eg: Lauterpacht (2011) 65–6. See too: Tams (2012) 325

1099 But see: Bjorge (2018) 48 VUWLR 533. Lauterpacht initially seems to have suggested that general principles derived from domestic public law were unworkable, but subsequently softened this stance: Lauterpacht (1927) 28–9;Lauterpacht (2011) 123–6

1100 Nolte (2010) 250

1101 On this challenge generally, see: *Barcelona Traction, Fitzmaurice SO* [5]

1102 See, eg: Kelsen (Rinehart 1967) 539. The ICJ expressed a similar sentiment in: *South West Africa Cases (Second Phase)* [88]

6.3.5 Application of equitable principles

339. For the sake of completeness, it bears noting that the major arbitration rules preserve tribunals' powers to decide disputes '*ex aequo et bono*' 'if the parties so agree'[1103] or 'if the parties have expressly authorised' the arbitral tribunal to do so.[1104] While it is difficult given its doctrinal origins to imagine how the police powers doctrine could be considered such an equitable principle, given its conceptual links to natural justice, good faith, fairness and balance, the argument might plausibly be made that proportionality constitutes a principle relevant to *ex aequo et bono* determination, either as a unitary concept or as staged analysis. As Lowe notes, there is considerable blurring between the concepts of equitable principles and of general principles of international law, and equitable considerations may either be incorporated in positive law (*aequitas infra legem*), or may operate 'outside' such rules, filling gaps (*aequitas praetor legem*), or serving a corrective function (*aequitas contra legem*).[1105]

340. Investigating whether proportionality should rightly be understood as an equitable principle is beyond the scope of this study. For present purposes, it suffices to note that *ex aequo et bono* settlement of investment disputes is incredibly rare, and by necessity lifts the burden of tying principles to valid sources of law.[1106] No tribunal to date has attempted to justify its use of proportionality analysis as the applicable of an equitable principle, and this potential migration route has not been subjected to scholarly attention. While justification through this route remains an open question, given the rarity of *ex aequo et bono* settlement, we can it leave that way.

6.3.6 Borrowed adjudicative technique

341. A final potential migration route briefly deserves our attention if only to dismiss it: the idea that recourse to public law concepts is permissible, not as the direct application of legal rules, but as adjudicative technique. According to this view, arbitrators may permissibly make use of concepts borrowed from domestic legal orders and regional rights-based adjudication (as well as other substantive areas of international law) not as substantive legal norms but as ways of structuring their reasoning: as 'tools', rather than as 'rules'.

342. While an ill fit when attempting to explain arbitral recourse to the police powers doctrine, this argument has been presented as a means of justifying arbitrators' use of proportionality

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1103 Art 42(3) ICSIDC. Art 21(3) 2017 ICC Arbitration Rules uses a slightly different wording: 'The arbitral tribunal shall assume the powers of an *amiable compositeur* or decide *ex aequo et bono* only if the parties have agreed to give it such powers.'

1104 Art 35(2) 2013 UNCITRAL Rules; Art 27(3) 2017 SCC Arbitration Rules

1105 Lowe (1989) 55, 6–67

1106 See further: Schreuer (1996) 11 ICSIDR 37; Reichert in Rovine (ed) (Brill 2017) 95-107

analysis.[1107] It is based on the assumption that rather than a substantive rule entailing obligations for States, structured, multi-stage proportionality analysis is merely a method — a way of giving shape to an adjudicator's balancing exercise. This idea of proportionality as a substantively-neutral analytical framework runs throughout accounts of the concept in its various manifestations across legal contexts.[1108] Given this, it has been argued that it is 'legitimate' for tribunals to employ staged proportionality analysis in fleshing out vague treaty protections and customary rules, without tying its use to a valid source of legal obligation.[1109]

343. While this view is perhaps attractive — not least because it relieves us of the many difficulties identified above — it ignores a fundamental issue: while staged proportionality analysis is clearly adjudicative method, its use necessarily presupposes and expresses a substantive rule, albeit one of wide breadth. This rule might be expressed as: 'States must conduct themselves so as to avoid disproportionate impacts on protected investments' or even 'States must treat foreign nationals and their property proportionately'. Further, each stage of proportionality analysis — particularly the suitability, necessity and *stricto sensu* stages of a 'full' test — impose additional substantive requirements on the permissible ends and means of State action. But such limits can only be derived from positive law. Casting proportionality analysis as method — as a 'tool', not a 'rule' — does not relieve of us the burden of tracing such substantive requirements to obligations assumed by the host State and applicable in the relations between the parties, in accordance with the law governing a dispute.[1110]

6.4 Further complications

344. Assuming, *arguendo*, that trends in States' pleadings continue and sufficient State practice and *opinio juris* coalesce, or that detailed comparative research shows that one or both of our study concepts can properly be considered general principles, further complications arise concerning the weight such general international law may be afforded in interpreting and applying treaty provisions.[1111] Fully assessing these complications requires us to engage with a range of complex issues, and it is beyond this study's limits to do so comprehensively or to provide much in the way of solutions. To complete our analysis of the turn to public law's

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1107 Henckels (2015) 15–6, 9–20. See too: Kingsbury and Schill (2010) 78

1108 See, esp: Beatty (2004) 161–2, 6–8;Huscroft, Miller and Webber (eds) (2014) 2; Klatt and Meister (2012) 3; Möller (2012) 178–9; Bomhoff (2013) 88; Engle (2012) 2; Andenæs and Zleptnig (2007) 384; and Kingsbury and Schill (2010) 77–81. See too: Higgins (1994); Lowe (2001) 218–9. While noting the competing arguments, Bücheler largely dodges the question: Bücheler (2015) 79–80

1109 Henckels (2015) 15–6, 9–20, 194–5

1110 Bücheler reaches largely the same conclusion: Bücheler (2015) 80

1111 Evidenced by the range of approaches and emphases to the issue in, eg: *North Sea Continental Shelf* [63–4]; *ELSI* [50]; *Oil Platforms* [32, 41, 78]; *Amoco* 222; *OSPAR Award* [84]; *Korea–Procurement, Panel Report* [7.96]; *EC–Bananas, AB Report* [10, 63, 133]; *US–Wool Shirts, AB Report* [14]; and *India–Patents (US), AB Report* [65]

validity it is necessary, however, to briefly highlight that its trials do not end once it is established that norms derived from domestic or regional legal orders have entered general international law.

345. As alluded to above, there are four ways that those applying IIAs may validly make use of general international law (general custom and general principles): (i) by directly applying such rules, if empowered to do so ('direct application'); (ii) because treaty terms expressly refer to general international law for their proper construction ('express *renvoi*'); (iii) because treaty terms implicitly, but necessarily, refer to general international law for their proper construction ('implicit *renvoi*');[1112] and (iv) as additional interpretative context under Article 31(3)(c).[1113] Below I briefly address the principal complications arising in respect of each of these, as well as the general problem of inter-temporality.

6.4.1 When is direct application of general international law permitted?

346. Given that most IIAs' applicable law provisions allow the direct application of general international law, the question that arises is when recourse to such rules will be permitted. There are essentially two situations to consider. The first — comparatively unproblematic — situation arises when a treaty is silent on an issue governed by a customary rule or general principle. Such 'gaps' or 'silences' in treaty rules' substantive coverage are often an intended consequence of their negotiation, and it is not always necessary to the tasks of interpretation and application to 'fill' them by reference to general international law.[1114] Given most investment tribunals are expressly empowered to apply rules beyond a treaty's express terms,[1115] the bigger question is when general international law can be deemed to be 'applicable'. While requiring individual assessment, this issue is also not particularly problematic. To be 'applicable', a rule of general international law must either govern the host State's treatment of the foreign investor, must govern the rights and obligations of the treaty parties, or it must, as a rule of systemic character, govern aspects of the function of the international legal order.[1116] It must, further, be 'applicable' in the sense that its application is not precluded by other rules of international law, especially those contained in the treaty itself.

1112 Reference to general international law (under both forms of *revoi*) can be understood as necessary to determine terms' 'ordinary meaning' (Art 31(1)), in recognition of the fact that parties can give terms 'special meaning' (Art 31(4)): Paparinskis (2013) 158; Kurtz (2015) 261

1113 See: ILC (13 Apr 2006) A/CN.4/L.682 [410] ff

1114 See, eg: Wood (2007) IJMCL 351, 361

1115 Unlike court or tribunal's whose jurisdiction is limited to settling disputes arising under a single treaty. See, illustratively: *Chagos MPA* 441–522; *South China Sea* [Jurisdiction] [397–412]

1116 See in this respect Bartels' distinction between 'principal' and 'incidental' norms: Bartels in Broude and Shany (eds) (Hart 2011) 115-42

347. This brings us to the second, more complex, situation in which a treaty-based rule deals with the same subject matter as a rule of general international law in a non-identical manner, raising the issue of which norm should be given priority. Based on the ILC's treatment of this issue, there are no hard rules.[1117] Rather, an interpreter must attempt to determine what relationship was intended by the treaty parties in each case. Ideally, IIA parties will have expressly addressed issues of overlap in a 'conflict clause'.[1118] It might also reasonably be inferred from the terms of most applicable law provisions that the treaty is intended to be given priority.[1119] However, absent such express indications, it is common practice to adopt the rebuttable presumption that States are aware of the content and operation of general international law and do not intend to depart from it.[1120] In situations (like the present hypothetical examination) where the rule of general international law is the *lex posterior*, absent the parties' indication, we would expect an adjudicator to fall back on the *lex specialis* maxim to guide analysis.[1121]

348. The *Bear Creek* tribunal's approach to the parties' arguments concerning the police powers doctrine provides a useful illustration. Responding to Peru's extensive arguments concerning the operation of the purportedly customary police powers doctrine,[1122] and having 'taken note of the comments received from the Government of Canada' (intervening) on the matter, the tribunal held that, while it did 'not disagree' with the States' 'general evaluation', it had to 'be taken into account in the context of the specific provisions provided in the [2008 Canada-Peru] FTA.'[1123] In the tribunal's view, Article 2201.1 of the FTA provided for an exhaustive list of exceptions to the obligations in its investment chapter.[1124] Further, the parties had elaborated the types of measure constituting expropriation in Article 812 and Annex 812.1.[1125] The tribunal considered therefore that 'no other exceptions from general international law or otherwise' could be 'considered applicable'[1126] and there was no need to address the parties' arguments concerning the existence or operation of 'any police power exception'.[1127] While the tribunal correctly approached its task based on a contextual reading

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1117 See discussion in: ILC, 2006 Fragmentation Report, 30–65

1118 Pauwelyn (CUP 2003) 328–60

1119 Such can plausibly be inferred from the fact that many applicable law provisions place the agreement ahead of general international law, implying a hierarchical relationship (and designating treaty rules as *lex superior*). See, illustratively: Art 9(11) 2008 Colombia-China BIT; Art 837 2008 Canada-Peru FTA; Art 1131 NAFTA; and Art 9.25(1) CPTPP

1120 Michaels and Pauwelyn in Broude and Shany (eds) (Hart 2011) 19-44, 33

1121 *Nuclear Weapons AO* [25]

1122 *Bear Creek* [459–69]

1123 *Bear Creek* [471]

1124 *Bear Creek* [472]

1125 *Bear Creek* [472]

1126 *Bear Creek* [472]

1127 *Bear Creek* [473]

of express treaty terms, it is based on a largely unexplored (and contestable) assumption: that the police powers doctrine operates as an 'exception'. While this assumption seems admittedly to be guided by the parties' arguments, it also conveniently disposed of the need to address the thorny issue of the police powers doctrine's status.[1128]

349. The *Bear Creek* tribunal's approach appropriately illustrates the complications arising in identifying when general international law ought to give way to treaty rules. Many investment tribunals have tended to consider that treaty rules will always be the *lex specialis*, and hence displace general international law.[1129] However (accepting that the *lex specialis/generalis* dichotomy is a valid tool to ascertain the intention of the parties) this result is not inevitable — general international law need not always be the *lege generalis*. Rather, this question ought to be determined not by rules' coverage (in terms of parties), but by a comparison of their nature, purpose, content and operation.[1130] While the often-unwritten nature of general international law means such is uncommon, a customary rule may well regulate a subject more directly and in more detail than a treaty rule.[1131] This is particularly true where a customary rule finds expression in an extraneous agreement or has been otherwise codified, and, hence, its content and operation are more determinate.

350. As explored in Chapters 4 and 5, it might plausibly be argued that (were they to be achieve the status of general international law) given their multiple requirements, the police powers doctrine and proportionality principle in fact regulate the conditions under which host States are liable to compensate investors for harm in a more detailed manner than many expropriation and FET provisions. Such a determination would have to be made on a case-by-case basis, in light of the actual wording of the provisions in question. The more specific treaty provisions' elaboration, the less interpretative weight the police powers doctrine and proportionality principle could permissibly be ascribed.

1128 Given it did not provide express justification, the tribunal's logic might be viewed as based on the *lex specialis derogat legi generali*, *lex posterior derogat legi priori,* or *expressio unius est exclusio alterius* 'maxims'. Sands seems to suggest it was on the basis of *lex specialis*: *Bear Creek* [Sands DO] [41]

1129 This is especially widespread in arbitral practice concerning the availability of customary circumstances precluding wrongfulness when treaties contain non-precluded measures or exceptions provisions. See, esp: *CMS* [Annulment] [128–36]; *Sempra* [Annulment] [378]

1130 See, eg: Akande (1998) 69 BYIL 165; Pauwelyn (2003) 94–6; ILC (13 Apr 2006) A/CN.4/L.682 [56–8, 119–20]. This is a plausible reading of the ICJ's somewhat cryptic use of the *lex specialis* maxim in: *Nuclear Weapons AO* [25]. See further: Simma and Pulkowski (2006) 17 EJIL 483, 500; Musto and Tzanakopoulos (2019) Oxford Legal Studies Research Paper No 35/2019, 23–5

1131 See, similarly: Fitzmaurice (1957) 33 BYIL 203, 236–8

6.4.2 Identifying renvois *to general international law*

351. The next complication relates to the task of identifying when express treaty terms refer to general international law. While requiring close attention to their precise phrasing and consequences, identifying express *renvois* is generally straightforward.[1132] More difficult questions arise when considering implicit *renvois*. The ICJ has held in this context that the use of a term of art widely used in describing States' obligations under general international law can indicate parties intended to link treaty terms' meaning to such rules.[1133] Similarly, even absent such terms, the ICJ has held that general international law may be incorporated by logical inference — including rules that developed subsequent to treaties' ratification.[1134]

352. In the investment context, it has been contended that the use of terms of art such as 'expropriation' (or 'taking', 'deprivation'), 'fair and equitable treatment', 'full protection and security', and 'denial of justice' — commonly employed when discussing the customary protections afforded to foreign nationals and their property prior to the completion of IIAs — indicates that parties intended to link provisions containing such terms to customary international law on expropriation and the international minimum standard, or even that custom provides a ceiling to the types of measure captured by such provisions.[1135] As Kurtz and Guzman independently note, however, this view is based on the assumption that such customary rules existed at the time the relevant IIA was ratified.[1136] By contrast, in his critique of the *Saluka* tribunal's 'textual shortcut' to the police powers doctrine, Kurtz argues that we can equally see the completion of IIAs as an attempt by capital exporting States to stave off the 'downward shifts' in custom's protection of foreign-owned capital stemming, inter alia, from the resistance of newly-independent and developing countries to prevailing approaches.[1137]

353. This debate raises significant questions concerning the historical trajectory of customary international law's development that lie beyond this project's ambitions. As I show below, given the prevailing approaches in international adjudicative practice to questions of intertemporality in ascertaining and applying rules of general international law, such questions

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1132 See in this respect, eg: Art 102(2) NAFTA; Arts 10.5 and 10.6 and Annexes 10-A and 10-B 2006 US-Oman FTA; Art 10.5 and Annex 10-A 2006 Colombia-US TPA

1133 *Aegean Continental Shelf* [76]

1134 *Nicaragua* [176]; *Gabčíkovo-Nagymaros* [112]. See too PCIJ in: *Upper Silesia*, 21. See further: Musto and Tzanakopoulos (2019) 25–8; Sands (1998) 1 Yale HR & Dev LJ 85, 99–101; French (2006) 55 ICLQ 281, 307–13

1135 See various positions in, eg: Gazzini (2007) 697–701; Paparinskis (2013) 160–70; Kurtz (2014) 294–5; Alvarez (2009); Alvarez (2011) 227–42; d'Aspremont (2012) 23–6

1136 Kurtz (2014) 294–5; Guzman (2009)

1137 Kurtz (2014) 294–5

will often prove of little practical significance. At a more fundamental level, while in principle conceptually sound, the assumption that inclusion of a term of art typically considered to refer to aspects of general international law must be applied with caution and in light of the precise wording of treaty provisions — not all such references will indicate an implicit *renvoi* to custom or general principles.[1138]

6.4.3 The limits of Article 31(3)(c) VCLT

354. Certain tribunals have expressly attempted to justify recourse to the police powers doctrine,[1139] and (albeit indirectly) the proportionality principle,[1140] under Article 31(3)(c) VCLT. While the rule of contextual or sympathetic interpretation this provision expresses is often described in rather hyperbolic terms,[1141] properly construed its role is in fact far more limited than often claimed.[1142] As has been discussed at length, Article 31(3)(c) contains three conditions that must be met for an extraneous norm to influence the construction of treaty terms: (i) it must be a 'rule' — meaning it must be contained in another treaty or constitute a rule of (general or special) custom or a general principle;[1143] (ii) it must be 'applicable' in the treaty parties' relations; and (iii) it must be 'relevant'.[1144]

355. Assuming that either the police powers doctrine or proportionality principle achieve customary status or are recognised as general principles, it is relatively unproblematic that as rules of universal application, general custom and general principles are in principle 'applicable in the relations between [all] treaty parties'.[1145] However, not all such rules will be 'relevant'. Rather, there must be a genuine 'substantive and functional overlap' or 'normative parallelism' between the treaty terms and the extraneous rule.[1146] This requirement is easily satisfied in the case of provisions limiting States' capacities to 'expropriate' or 'nationalise' or adopt measures 'tantamount' or 'equivalent' to expropriation or nationalisation — there is a high

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1138 See further: Wyatt (Hart 2020) 110–11

1139 See, esp: *Saluka* [254–5]; *Philip Morris v Uruguay* [290]; *Marfin* [827–8]. See too: Viñuales (2014) 329, 44

1140 *Philip Morris v Uruguay* [307, 317, 410, 419–20]; *Marfin* [829]

1141 For example, Judge Xue, while at the ILC, is reported to have described Art 31(3)(c) as the 'master key to international law': Simma (2011) 60 ICLQ 573, 584. McLachlan refers to his conception of 'systemic integration' as 'a constitutional norm within the international legal system': McLachlan (2005) 280

1142 See esp: Yotova in Kulick (ed) (CUP 2016) 182-208, 185, 207–8

1143 As such, contrary to some writers' claims, paragraph (c) does not permit reference, per se, to judicial decisions and the writings of publicists. See discussion in: Merkouris (2015) 18–20

1144 See eg: Sands (1998) 102

1145 See, eg: *Pulp Mills* [66, 101]; Merkouris (2015) 42–4

1146 See, respectively: Paparinskis (2013) 159; and Paparinskis in Brown and Miles (eds) (CUP 2011) 65-96, 72. Merkouris prefers the term 'subject-matter proximity': Merkouris (2015) esp 84–101

degree of substantive and functional overlap between the treaty provision and custom concerning expropriation and nationalisation. While somewhat less clear cut, it has been convincingly argued that we can reach the same conclusion in respect of FET provisions and the customary minimum standard.[1147] It remains open to debate whether there is enough of an overlap between the protections afforded in human rights instruments and IIAs to enable the former to inform interpretation of the latter.[1148]

356. If this criterion is satisfied, we reach the question of the extraneous rule's interpretative function. As Article 31(3) VCLT makes clear, relevant rules of general international law may only serve a 'contextualizing' function under paragraph (c).[1149] The ICJ recently confirmed this when considering the weight to be given to the ICCPR's provisions on remedies when interpreting the VCCR.[1150] As such, like other contextualising factors — for example terms' immediate placement within a provision, and the way the same or similar terms are used elsewhere in a treaty (including its preamble and annexes) — extraneous rules under Article 31(3)(c) should be used merely to assist in selecting terms' ordinary meaning and to modify any 'over-literal' constructions.[1151] Like the exercise under Article 31(1), use of extraneous rules under Article 31(3)(c) ought to be aimed at reaching a detailed elaboration of express treaty terms in light of a treaty's object and purpose. This said, extraneous rules will by necessity have more impact on the construction of vague treaty provisions than those with more detailed and determinate content.[1152]

357. It is nevertheless debatable whether the tribunals' approaches to the police powers doctrine in, for example, *Saluka*, *Philip Morris* and *Marfin* conform to the limited interpretative function of relevant rules of general international law under Article 31(3)(c), or, rather, resemble something more akin to the direct application of custom and corresponding displacement of express treaty terms.[1153] The practice of broadly citing the decisions of other courts and tribunals — particularly those of WTO dispute settlement bodies and regional human rights

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1147 Paparinskis (2013) 160–8

1148 See discussion in, esp: McLachlan (2008) 396; Dupuy in Dupuy, Petersmann and Francioni (eds) (OUP 2009), 57–9; Simma and Kill in Binder & ors (eds) (OUP 2009) 678-707; Simma (2011); Vadi in Dupuy, Petersmann and Francioni (eds) (OUP 2009), 480–2; Calamita (2013) 174–82; and Alvarez (2016)

1149 Paparinskis (2013) 158

1150 *Jadhav* [135]. See too: *Pulp Mills* [65–6]. It is to be recalled that Art 31(2) limits context to the text as a whole, any preambles and annexes, and any agreements and instruments mutually agreed as being 'made in connexion' with the text.

1151 Gardiner (ed) (2015) 197. On the need for restraint, see too: Paparinskis (2011) 70–80; and Salacuse (2015) 167

1152 Paparinskis argues that in the case of FET, it will often resemble direct reference: Paparinskis (2013) 167

1153 *Saluka* [254–5]; *Philip Morris v Uruguay* [290]; *Marfin* [827–8]. Raising similar concerns regarding *Saluka,* see: Kurtz (2014) 294–5

courts — in support of recourse to the police powers doctrine or proportionality analysis, likewise falls outside the scope of Article 31(3)(c).[1154]

6.4.4 The inter-temporality problem

358. Finally, all recourse to general international law in treaty interpretation — whether as direct application, by *renvoi*, or under Article 31(3)(c) — raises the same challenge: inter-temporality. When directly applying general international law, or using such law as additional context under Article 31(3)(c), should this be the law as it existed at the time of a treaty's completion or the time of a dispute? Likewise, when parties expressly or implicitly link treaty terms to the content and operation of general international law, should such be considered static or dynamic? As is well known, two schools of thought dominate discussion of this problem, the 'contemporaneous' and 'evolutive' approaches.[1155] As in the general matter of the relationship between treaty and general international law, the adoption of either of these categorical approaches was largely rejected in the drafting of the VCLT, in favour of a 'flexible' approach.[1156] Parties may thus have intended to 'freeze' or 'incorporate' general international law as it applied at the time of a treaty's completion. They may equally have intended that provisions referring to general international law mirror that law's development. The difficult task for an interpreter is to determine which.[1157]

359. Given IIAs typically do not contain much in the way of evidence for either position, this adds a further layer of complexity to our inquiry into the validity of arbitral recourse to public law concepts. While its doctrinal and conceptual justifications are not always adequately articulated, the prevailing approach amongst international courts and tribunals — including investment tribunals —is to presume that international law is to be construed as of the time the dispute is settled, with the caveat that such is done in a manner sensitive to an agreement's object and purpose.[1158] There is some support for this approach in States' pleadings before investment tribunals.[1159] Given this *de facto* settlement on the dynamic approach, it is thus likely that — in the event that the police powers doctrine or proportionality principle attain

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1154 See, eg: *Tecmed* [122]; *Azurix* [311]; *EDF v Romania* [294]; *Occidental* [402, 406–9]; and *Philip Morris v Uruguay* fn 403 to [304]

1155 See, eg: Elias (1980) 74 AJIL 285; Merkouris (2015) 103; ILC (13 Apr 2006) A/CN.4/L.682 [475–8]; and, esp: Wyatt (2020) 213–14

1156 In fact, as Klabbers shows, Art 31(3)(c)'s current formulation largely reflects the failure of the ILC to reach an acceptable express solution to the temporality problem during the VCLT's drafting: Klabbers (2006) 143–8. See similarly: Wyatt (2020) 24–6. Wyatt concludes that the VCLT is 'temporally neutral': ibid 128–9

1157 Merkouris (2015) 161 ff. Wyatt refers in this context the need to infer a 'temporal sense-intention': Wyatt (2020) 253–7

1158 See: *Iron Rhine* [79–80]

1159 See, illustratively the tribunals' discussion of the issues raised in the State parties' arguments in: *Al-Tamimi* [380–393]; and *Mondev* [106–14]

the status of general international law — arbitrators would be able to make use of them in settling disputes under IIAs already in force, absent evidence of the parties' intention to adopt a static approach to general international law.

6.5 Conclusions and broader lessons

360. As shown above, arbitral recourse to the police powers doctrine and proportionality principle can only be justified in limited circumstances — notably when these concepts are expressly incorporated in treaty provisions or they constitute relevant rules of domestic law applicable in the relationship between investors and host States. Based on evidence of State practice and *opinio juris*, and particularly States' pleadings before investment tribunals, neither concept has yet achieved customary status despite clear trends toward their recognition. Likewise, it has yet to be convincingly demonstrated that either concept finds adequate expression in a sufficiently diverse range of domestic jurisdictions, and significant questions persist regarding their transposability to the international context, so as to be properly be understood as general principles of international law.

361. In light of this, we must conclude that the overwhelming majority of arbitral practice outlined in Chapters 4 and 5 can only be understood as arbitral legislation. While this body of practice may in the future generate (true) legislative results, such has not yet occurred. Further, were either concept to achieve the status of general international law, their interpretative effects will depend entirely on the wording of the agreement under which a dispute arises. The precise role to be played by either concept would be determined, *in casu*, by the amount of 'space' left by an agreement's terms for the operation of general international law, whether provisions expressly or implicitly refer to general international law, and how the treaty parties approach the temporal question. A significant portion of arbitral recourse to the concepts to date exceeds what would be permissible in light of these considerations.

362. While this chapter has focused on the police powers doctrine and proportionality principle, it bears remembering that the turn to public law is not confined to these two concepts. The above assessment therefore has broader implications for the turn to public law as it has so far manifested in the borrowing (or migration) of concepts from domestic and regional legal orders. This study does not aim to determine whether recourse to other public law concepts finds better justification as the valid application of existing law. It bears noting however that serious concerns have been raised concerning the validity of arbitral recourse to, for example,

the margin of appreciation and legitimate expectations 'doctrines'.[1160] As with the police powers doctrine and proportionality principle, the evidence suggests that neither concept constituted general custom when first applied by investment tribunals. Like our present study concepts, the validity of their use thus depends on the extent to which they can be said to have since been endorsed by States (either in agreements or as custom), or on comparative research establishing that they constitute general principles *in foro domestico*.

363. We could end our examination of the turn to public law in arbitral practice here, having shown that arbitral recourse to public law concepts overwhelmingly lacks sound formal foundations. But while significant, this conclusion leaves the public law analogy's normative aspects unaddressed. It says nothing, in other words, about whether the turn to public law is nevertheless desirable and whether it can meaningfully contribute to overcoming investment law and arbitration's (real and perceived) deficiencies. Given the turn to public law is largely motivated by functional — rather than formal — considerations, in the next (final) chapter I reconsider the desirability of re-imagining investment law and arbitration as internationalised public law.

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[1160] Of the voluminous literature on these concepts, see, eg: (on margin of appreciation) Zarra (2017); Fukunaga (2018); Arato (2014); and (on legitimate expectations) Fietta (2006) 7 JWI&T 423; Snodgrass (2006) 21 ICSIDR 1; Brown (2009); Pandya and Moody (2010-2011) 15 Tilburg L R 93; Téllez (2012); Campbell (2013) 30 JIA 361; Potestà (2013); Annacker in Bjorklund (ed) (OUP 2015) 229-50; Ostřanský (2018)

7

THE LEGITIMACY OF THE TURN TO PUBLIC LAW

7.1 Introduction

364. In the preceding chapters, I considered the turn to public law in investment law and arbitration in largely descriptive and analytical terms. I sought to examine the motivations underpinning scholars' and practitioners' turn to public law, considered the extent to which the turn to public law is discernible in arbitral practice, and analysed whether trends in practice are consistent with the customary rules of recognition and on interpretation. As identified in Chapter 3 and 6, however, the turn to public law is largely motivated by functional, rather than formal, concerns: it is a normative as well as a descriptive project.[1161] Re-imagining investment law and arbitration as public law is primarily intended to address the field's (perceived and actual) deficiencies — notably the 'three Is' of indeterminacy, inconsistency, and imbalance. Such normative claims must be addressed. This is especially so given many scholars and practitioners might be willing to depart from orthodox (ie formal) approaches to rule ascertainment and interpretation on functional grounds.

365. This final chapter therefore considers whether — despite its often-erratic expression in arbitral practice and the many formal challenges it faces — the turn to public law in investment law and arbitration is nevertheless 'legitimate'.[1162] It argues that it is not. The chapter is structured as follows. Section 7.2 considers the turn to public law's capacity to achieve its stated aims. It shows that, rather than remedying them, the turn to public law well exacerbate the problems that its proponents hope to address.[1163] Section 7.3 argues that the turn to public law, if widely

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1161 Or, in Alvarez's phrasing, it has 'prescriptive' as well as 'descriptive' elements: Alvarez (2016)

1162 'Legitimacy' is a fraught, subjective, analytical tool. Its (limited) utility in any circumstances depends on how it is understood and a clear demarcation of its component factors and assumptions. See, esp: Thomas LSE Legal Studies Working Paper Series, No 12/2013; Koskenniemi (2009) 409–10; Crawford (2004) . For the purposes of this chapter, the turn to public law's legitimacy is assessed along two axes: (i) its practical capacity to achieve its stated aims; and (ii) the extent to which it disrupts what are claimed to be normatively desirable aspects of the international legal order.

1163 Similar conclusions are reached concerning the use of general principles, proportionality balancing and other 'system-internal' reform projects in: Paine (2015) 6 JIDS 332

adopted, would have broader undesirable consequences for international investment law within public international law. Section 7.4 sketches five elements of an alternative treatment plan for addressing investment law and arbitration's ills. Chapter 8 reiterates the study's main findings and arguments, and highlights issues deserving further research and reflection.

7.2 The turn to public law's incapacity to remedy investment law's ills

366. According to the turn to public law's proponents, re-imagining investment law and arbitration as public law will enable arbitrators settling disputes under IIAs to fill in gaps in the substantive rules governing States' treatment of foreign nationals and their property, will decrease inconsistency in arbitral reasoning, and will assist them to strike a more appropriate balance between competing public and private interests.[1164] Such claims are unlikely to eventuate for three main — interrelated — reasons: (i) the limits of comparativism (Sub-sec 7.2.1); (ii) difficulties in transposing principles from domestic public law (Sub-sec 7.2.2); (iii) the turn's tendency to further expand, rather than restrict, arbitral discretion (Sub-sec 7.2.3); and (iv) the largely entropic nature of investment law and arbitration as currently composed (Sub-sec 7.2.4).

7.2.1 The limits of comparativism

367. While no widespread adoption of comparative methods has yet occurred in arbitral practice,[1165] a central claim of many scholarly accounts advocating a turn to public law is that comparative research can usefully solve problems generated by indeterminacy in substantive obligations and equip arbitrators to reach more balanced decisions.[1166] Given that comparison, by its nature, depends on analogy, we could simply dismiss the enjoinder to comparativism on the grounds that the public law analogy is inaccurate. But doing so leaves unaddressed the significant normative claim that a shift to comparativism in scholarship and in arbitral practice would yield useful insights, concepts and approaches.[1167] While well-known, comparativism's practical and conceptual limits deserve drawing out. These limits mean that comparative methods are unlikely to yield the clear or appropriate solutions intended.

1164 See: Secs 3.3–3.4

1165 See: Sec 3.3.2. Recall: Peat (2018) 662 ff

1166 The turn to public law's approach seems to oscillate between what have been labelled the 'universalist' and 'functionalist' approaches to comparative research. Jackson in Rosenfeld and Sajó (eds) (OUP 2012) 54-72, 60–6

1167 Recall, esp: Schill (2010) 23 ff

368. A first challenge facing the use of comparative methods stems from the question of whether we can reach a meaningful definition of the 'public' in 'public law' concepts and approaches. As has been well-explored in the domestic and regional contexts, the 'public/private' dichotomy is often fraught.[1168] As shown, for example, in the context of domestic anti-discrimination laws,[1169] and in relation to matters of procedure (notably costs),[1170] rules exist that elide categorisation. This issue is closely linked to the uncertainty of the idea of 'publicness' underpinning the public law analogy, identified in Chapter 3. While this problem may be overcome in a practical sense by focusing exclusively on the approaches of a limited range of courts and tribunals, or limiting inquiry to certain classes of rules and proceedings, such begs the question of the selection criteria employed, and, in turn, the definition of 'publicness' underpinning selection.

369. Assuming that some acceptable definition of 'publicness' guides the search for concepts and approaches, as the prolific literature attests, comparative research is beset by practical and conceptual challenges. Much has been written on the problem of (what we might call) selection bias in comparative research.[1171] The impossibility of conducting meaningful research across over 190 domestic jurisdictions means selection is unavoidable. But any claim toward universality is undermined to the extent that an inquiry is not sufficiently inclusive or representative. As noted in Chapter 6, this is particularly the case when the aim of a comparative exercise is to identify general principles *in foro domestico*. Unless selection is conducted on a random basis, choosing comparators, in turn, requires some working theories concerning the factors that make legal orders distinct, and the elements of (inter alia) linguistic, cultural, social, legal, economic, and political histories that are relevant in making such distinctions.[1172] Common shortcuts such as the regional and legal families techniques have been criticised for their tendencies to over-emphasise similarities in jurisdictions with common heritage (often stemming from colonial relationships) and to under-emphasise linguistic, cultural, social, and political diversity.[1173] It is, further, unavoidable that practical factors play a significant role in the selection of comparators — particularly the availability of materials and researchers' linguistic abilities.

1168 See, esp, Merryman (1968) 17 JPL 3; exchange in: Harlow (1980) 43 MLR 241; and Samuel (1983) 46 MLR 558. For examination in the international context, see esp: Clapham (OUP 1993) 124–33; Chinkin (1999) 10 EJIL 387, 389 ff. See more generally: Harlow in Varuhas and Stark (eds) (Hart 2020) 315-34, 330 ff; and Davies in Varuhas and Stark (eds) (Hart 2020) 335-52, 339 ff

1169 See, eg: Thornton (1991) 18 JLS 448

1170 Alvarez (2016) 551.

1171 See, esp: Örücü in Smits (ed) (Elgar 2006) 442-54, 447; Hirschl in Choudhry (ed) (CUP 2007) 39-66

1172 See, esp, excellent overview of classificatory challenges in: Siems (CUP 2018) 84–111.

1173 Pargendler (2012) 60 AJCL 1043

370. Putting aside problems of selection, the practice of comparative research brings further complications. As already noted, linguistic differences between jurisdictions present a persistent problem for comparative research. Whether materials ought to be translated, for example, continues to divide opinion amongst comparative lawyers.[1174] However, similar significant challenges arise when relevant materials are available in a researcher's spoken languages. Chief amongst these is the commensurability of different concepts and the issue of differentiating the use of a label from a concept — in other words the relationship between the (lexical) means of expression and the object of expression. To use one familiar example, it has been much debated whether 'reasonableness review' and 'proportionality balancing' can be equated, despite being described using different terms.[1175] Obviously, such queries will depend on the terms of inquiry, the questions asked and how objects of comparison are interrogated. Confirmation bias is always a risk of comparative inquiries, given researchers' seemingly natural tendency to focus on positive practice rather than absence.[1176]

371. Good comparative research takes significant time and resources. It requires methodological rigour and a willingness to embrace complexity, and to look beyond surface-level similarities (and differences). Especially in the context of investigating domestic constitutional and administrative law, comparative research requires familiarity with a jurisdiction's cultural, social, legal, economic, and political histories.[1177] Practical constraints such as access to materials and linguistic obstacles will always limit the extent to which any comparative survey can claim to be comprehensive. These realities, in turn, require the researcher to approach their task reflexively.

372. We can thus reasonably question whether the arbitrators appointed to settle disputes under IIAs have the time, expertise, and resources to engage in anything resembling comprehensive investigations of domestic (and in many accounts regional) practice. As borne out by investment tribunals' erratic use of extraneous materials to date, [1178] to the extent that they do not, adopting comparative methods is likely to exacerbate perceptions that decisions are selective,

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1174 Jackson (2012) 69–70

1175 See, discussion in, eg: Taggart (2008); Poole (2010); King (2010); Hickman (2010); Craig (2010) . See too: Cohen-Eliya and Porat (2013). See, relatedly, debate in: Möller (2012);Urbina (2014) 12 ICON 221; Möller (2014) 12 ICON 222

1176 For an excellent examination of these themes, see; Zumbansen in Adams and Bomhoff (eds) (CUP 2012) 186-211

1177 See, eg: Claes in Smits (ed) (Elgar 2006) 187-99, 187; Nehl in Smits (ed) (Elgar 2006) 18-32

1178 Above Sec 3.4.2. Recall, esp: Peat (2018) 9–15;Peat (2019) 119–27

poorly reasoned, or imbalanced. [1179] These realities in large part explain why (like other international adjudicative fora) investment tribunals have been reluctant to expressly engage in such reasoning except on shallow and ancillary bases.

7.2.2 Obstacles to the transposition of general principles from domestic public law

373. Let us put aside such practical and methodological concerns and assume that comparative research has identified practices common to a significant number of diverse domestic jurisdictions — practices that seems to support a nascent principle *in foro domestico*. We now face the task of assessing whether this nascent principle is transposable to the international level.[1180] Despite recent scholarly attempts at reviving general principles, the meaning and methods of transposition remain under-explored. Two factors have nevertheless been emphasised. The first is the requisite similarity between a nascent principle's respective objects of regulation at the domestic and international levels; the second is the concept's compatibility with existing rules and structures in the international legal order.[1181] ILC Special Rapporteur Vázquez-Bermúdez similarly considers that transposition can be said to have occurred if the nascent principle 'is compatible with fundamental principles of international law' and 'the conditions exist for [its] adequate application […] in the international legal system.'[1182] In this sense, transposability depends significantly on how we conceptualise the nature and *teloi* of the international legal order and the substantive area in which a nascent principle is to operate. Finally, it is often acknowledged that transposition (contrary to transplantation) suggests that it is not a clone or mere amalgam of domestic practice that is transferred, but that the nascent principle may be modified to 'fit' its new role — presumably by the adjudicator first identifying it.[1183]

374. Transposition thus again requires us to consider the descriptive accuracy of the public law analogy. In the context of the turn to public law concepts and approaches, the analogy depends on the central notion that international investment law and arbitration govern 'vertical' rather

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1179 This is not to deny comparative research all practical utility: States may well find inspiration for legislative reform in approaches originating in other domestic legal orders or substantive areas of international law. For two potential ways of incorporating such approaches, see, eg: Kleinheisterkamp (2014) 63 ICLQ 449, 471–3; and Kleinheisterkamp (2015) 817 ff. Kleinheisterkamp's proposal for a set of principles to guide interpretation can only be considered a legitimate solution, however, to the extent it has wide State participation and endorsement.

1180 Paparinskis (2013) 20, 63

1181 See, esp: *Erdemović, Appeals Chamber, Cassese DO* [2]

1182 ILC (9 Apr 2020) A/CN.4/741 [74]. See too description of State and adjudicative practice: idem [75–96]

1183 On the long-running debate whether it is ever possible to 'transplant' rules between legal orders, See, esp: Watson (1995) 43 AJCL 469; Legrand (1996) 45 ICLQ 52

than the 'horizontal' relationships that have traditionally been the focus of rules of international law.[1184] The fact that disputes concern the lawfulness of governments' actions vis-à-vis the interests of private parties is thus said to resemble (inter alia)[1185] domestic constitutional and administrative law.[1186] According to Bjorge, nothing precludes the derivation of a general principle from domestic public law, 'if for no other reason than the fact that international law no longer governs only relations of states'.[1187]

375. But, while the international legal order has certainly gained increasingly 'vertical' qualities through the accretion of inward-looking rules,[1188] and the increased direct participation of individuals,[1189] the fact that the international legal order has in some ways and in some areas come to more closely resemble domestic public law than private law is, alone, insufficient when considering transposition. Despite the increased participation of non-State actors in international legal affairs in recent decades — notably international organisations and individuals — such actors' legal personality, rights and obligations remain, fundamentally, the creation of States' law-making activities. They are, further, always susceptible to modification as and when States change the rules on which they depend.[1190] At a minimum, this undermines the view that individuals at the international level possess rights (and obligations) analogous to those held within domestic constitutional and legal orders.

376. Nevertheless, while there are valid grounds to challenge the central assumptions of the public law analogy,[1191] let us accept, *arguendo*, that we find its main tenets persuasive enough to accept that general principles can be derived from domestic public law. We face a more significant issue: can a principle of sufficiently precise content and that is adequately representa-

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1184 This was fundamental to Lauterpacht's project in *Private Law Sources and Analogies*. While Lauterpacht seems initially to have regarded general principles derived from domestic *public* law as unworkable, in his later work he seems to have softened this view. Lauterpacht (1927) 28–9;Lauterpacht (2011) 123–6

1185 Recall that in several accounts, investment law and arbitration are said to resemble 'other' bodies of internationalised public law — notably human rights adjudication and international trade law. See, illustratively: Henckels (2015) 12–20

1186 Recall that the 'public law analogy' is in fact three analogies, given investment law and arbitration are claimed to resemble: (i) domestic public law; (ii) regional human rights adjudication; and (iii) WTO law. The latter two are included in the turn to public law as within the notion of 'internationalised public law', they too are argued to resemble domestic public law. See above Sec 3.3.

1187 Bjorge (2018) 560

1188 Recall: Tzanakopoulos and Tams (2013) 534

1189 See, esp: Parlett (CUP 2011) 343–72

1190 See discussion in: ibid 109 ff

1191 See above Sec 3.3

tive of the domestic practice on which it is based 'survive' the transposition process? Or, rather, does transposition require a degree of abstraction and changes so fundamental that the principle that emerges bears no meaningful resemblance to domestic practice?[1192]

377. As well illustrated by comparative scholars, public law reasoning and public law concepts and approaches are necessarily deeply rooted in the political, cultural and legal histories of domestic legal orders.[1193] Many public law concepts — particularly those that seek to 'balance' competing interests, such as the concepts of reasonableness, proportionality, legitimate expectations, and margin of appreciation — are, by their nature, largely indeterminate until given concrete application. Rather, such concepts describe processes of political reasoning in which adjudicators draws on a myriad of values and assumptions external to the concept.[1194] In domestic legal orders, these values and assumptions are to be 'found' in a polity's constitutional and broader legislative framework, as well as less tangible elements of legal and political culture.[1195] Public law reasoning implicitly invites — in fact, usually *requires* — an adjudicator to reach out to some optimal conception of the State and its social and political orderings. Obviously, the values, assumptions, and conclusions that inform these processes are both dynamic and inherently contestable. But public law reasoning is impossible without implicit reference to such external values and assumptions.

378. These realities are well-illustrated by the trajectories of our two study concepts. In Chapter 4 I explored how the police powers doctrine initially emerged in response to a particular problem: the extent to which the powers formally held by the States prior to federation survived the US Constitution's express granting of powers to the federal government.[1196] From there, it came to be used as a means of defining State governments' powers to interfere with the use and enjoyment of private property. However, its role in fulfilling this function shifted significantly over time, in light of changing social and political realities and attitudes toward the permissible extent of judicial review — from its early construction, through the *Lochner* era, the New Deal and the eventual return to *laissez faire* capitalism. The concept has now been largely relegated by the Supreme Court's contemporary approaches to the Fifth and Fourteenth

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1192 On this theme, Casini (2014) 12 ICON 402, 427–8

1193 Nehl (2006) 18, citing: Bermann in Long and Vedel (eds) (Dalloz 1996) 29-36, 30–1 and della Cananea (2003) 9 EPL 563, 563–8.This is to be contrasted with domestic private law which, due to essential similarities in the relationships market economies generate is comparatively 'values-neutral' and, hence, transferrable to international law's (historical) governance of consent-based dealings between formally equal parties. Similarly, concepts relating to the practice of courts and tribunals are more easily transposed because of inherent similarities in the challenges domestic and international adjudicators face.

1194 Loughlin (2004) 163;Poole (2010) 389–91. See too: Urbina (2012) 57 Am J Juris 49, 62 ff

1195 In this vein, Legrand considers that 'rules and concepts' are only the 'surface manifestation' of a polity's deeper values and assumptions, based on its legal, political and cultural histories: Legrand (1996) 55–6. See similarly: Kahn-Freund (1974) 37 MLR 1, 10

1196 Above Sec 4.3

Amendments and, particularly, the balancing inquiries adopted since *Penn Central*.[1197] In other words, shifting attitudes toward, *inter alia,* the State-market relationship and the relationship between various branches of government have been crucial to the concept's (often ambiguous) content and operation over time.[1198] We can see echoes of this in the variety of factors considered and structures of inquiry in arbitrators' constructions of States 'police powers'.[1199]

379. The proportionality principle illustrates the context- and values-dependencies of public law concepts even more clearly. Proportionality tells us nothing — as such and itself — about the relative social value of property rights or freedom of economic activity *vis-à-vis* other societal interests.[1200] Proportionality balancing is, rather, a process through which moral, ethical, political and legal considerations coalesce.[1201] Because it necessitates mediation between previously identified rights, interests, goods or objectives, an adjudicator engaging in proportionality analysis must identify relevant values and considerations before attempting to harmonise them — ideally producing a 'just' outcome.[1202] Proportionality is merely a vessel that an adjudicator must fill with reference to such external values and assumptions. As discussed in Chapter 5, each stage of inquiry in a 'full' proportionality analysis must be calibrated along a spectrum of intensity and the relevant considerations identified.[1203]

380. Proportionality analysis thus necessitates a 'meta-agreement'— often imagined or implied — which a decision-maker can draw upon to determine where on these spectrums to place inquiry.[1204] Proportionality reaches out to an 'idealised conception of the relationship between the individual and the state', necessitating the adjudicator applying it to adopt 'some political conception of the competing interests' at stake.[1205] Of course, the content of this meta-agreement will necessarily differ from jurisdiction to jurisdiction and is never uncontested or static.[1206] Proportionality's ubiquity reinforces this conclusion; its migration across domestic

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1197 Above Sec 4.3. See too: Perkams (2010) 147–8

1198 Recall: Sax (1964) 36, n 6; Scheiber (2005) 741; Karkkainen (2006) 898–905; and Loughlin (2010) 425–6

1199 Above Sec 4.5.5

1200 Poole (2010) 390. See, more generally: Craig in Vogenauer and Weatherill (eds) (Hart 2017) 145-66; Sales in Vogenauer and Weatherill (eds) (Hart 2017) 179-94

1201 See, esp: Luterán (2014) 29–35. See too: Alexy (OUP 2010); Klatt (ed) OUP 2012)

1202 Lacey (2016) 30; Poole (2010) 387–8; Nolte (2010) 250. Here we clearly see proportionality's roots in classical, medieval and Enlightenment notions of divine or natural justice: Lacey (2016) 40–2; Poole (2010) 389–90. For similar reasons proportionality has been dubbed a facilitative or 'interstitial' concept; Higgins (1994) 219; Lowe (2001) 218–9

1203 See too: Ortino (2017) 87–9; Foster (2014) 17 JIEL 355, 359

1204 Nolte (2010) 250

1205 Thomas (2000) 89; Calamita (2015) 175; Alvarez (2016) 551–2

1206 See, relatedly: Lacey and Pickard (2015) 78 MLR 216; and Lacey (2016)

legal orders and substantive areas of international law is largely due to its conceptual malleability.[1207] Again, we see clear evidence of proportionality's malleability in the various constructions it has been afforded in arbitral practice.[1208]

7.2.3 The expansion of arbitral discretion inherent in the turn to public law

381. Given the above observations hold equally true for other public law concepts, including those that have already made their way into arbitral practice — particularly reasonableness analysis, and the legitimate expectations and margin of appreciation doctrines — their transposition poses a significant challenge: from where are the values and assumptions that necessarily inform such concepts' application to be derived? There are essentially two options, both of which raise significant concerns.

382. The first option is that borrowed public law concepts bring along their conceptual and normative baggage from their jurisdictions of origin. In something akin to normative colonisation, the application of a borrowed public law concept would entail one polity's (or a composite of several polities') approaches to the State-market and State-individual relationships informing the construction of these relationships in others. This notion is particularly concerning given the limited number of public law concepts that have been drawn upon to date have originated in a small number of (Western) legal orders.[1209]

383. The second option is for arbitrators to look outside domestic (or regional) legal orders for the values and assumptions necessary to give effect to borrowed public law concepts. In effect, this requires that international investment law and arbitration are deemed to be embedded in a (transnational) political space with a minimum of identifiable common values and assumptions — a 'meta-agreement — delineating at least the outlines of an optimal State-market relationship.[1210] However, we lack anything resembling such an agreement. Given the pluralist, inter-representative quality of the international legal and political orders, there is no globally-accepted, ideal conception of the State-individual or State-market relationships or the permissible ends and means of government action.[1211]

1207 Above Secs 5.3–5.4

1208 Above Secs 5.5–5.6

1209 See: Alvarez (2016) 567–9. See similarly : Chinkin (1999) 389 ff

1210 This necessity has been acknowledged by the turn to public law concepts' proponents. See, esp: Bücheler (2015) 3, 66, 86–7, 101–11. Bücheler argues that the 'value glue' necessary for proportionality's operation can be imported from, inter alia, practice concerning the United Nations Charter and multilateral human rights instruments. Bücheler draws heavily on Paulus, including for the idea of 'value glue': Paulus (2003) 25 Mich JIL 1047, 1050

1211 Foster (2015) 480–1

384. Rather, as explored in Chapter 2, general international law has historically sought to protect States' (formal, if not practical) autonomy to adopt individuated approaches to such questions.[1212] The consensus reached concerning the protection of foreign-owned property from the 1980s to early 2000s was only ever normatively shallow, and — as recent trends in States' and communities' attitudes have shown — contained numerous fault lines. Further, many of the reasons States were unable during the 20th Century to reach consensus on universal rules relate to fundamental questions concerning the relationship between the State and the market and the role of private property within society.[1213] Even the purpose of the rules governing investment protection — for example to promote foreign investment *per se*, or as a tool of (sustainable) development — (and the consequences of such categorisation) remains contested.[1214] It is symptomatic of this shallow consensus that States' treatment of foreign nationals and their property is governed by over 2600 — loosely-constellated and mostly bilateral — agreements and a handful of pre-existing customary rules, and lacks anything resembling a multilateral institutional framework. In light of these realities, it appears that arbitrators employing public law concepts and approaches would tend to continue to rely on the values and assumptions 'agreed upon' by a — real or imagined — transnational polity comprised of practitioners, scholars and officials from (mostly Western) States already engaged in 'best practice'.

385. That this is occurring seems to be borne out by arbitral practice concerning the police powers doctrine and proportionality principle. At least based on the lack of resemblance to their application in domestic (and in the case of proportionality, regional) contexts, and lack of express engagement with extraneous materials, it seems that public law concepts have only brought along a minimum of conceptual baggage when they have 'migrated' from domestic (and regional) legal orders. Rather, arbitrators are effectively (re-)constructing novel versions of these concepts, with varied consequences for States' capacities to define and pursue the public interest.

386. But regardless of whether the values and assumptions underlying the application of public law concepts are imported from domestic or regional legal orders, or are somehow drawn from outside these contexts, such concepts' dependence on external values and assumptions (alongside their often indeterminate character) necessarily expands the already wide latitude afforded to arbitrators by investment law's often vague substantive obligations. In this sense, the turn to public law provides little in the way of solutions or concrete guidance. At best, it merely

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1212 Above Sec 2.2

1213 Above Sec 2.4

1214 Ortino (2017) 75–83. See too: Vandevelde in Lim (ed) (CUP 2016) 43-68; Mann in Lim (ed) (CUP 2016) 289-323

shifts the exercise of arbitrators' wide discretion to other interpretative *loci*, thereby increasing arbitrators' freedom of action and the likelihood for (further) interpretative diversity.

387. This potential has not gone unacknowledged amongst the turn to public law's proponents.[1215] In response, much has been written on the need for arbitrators to settle on appropriately 'deferential' 'standards of review', and to 'exercise restraint due to the relative accountability, capacity, or suitability of another decision-maker',[1216] including when employing borrowed public law concepts.[1217] Within this argument, the potential for public law concepts to expand arbitral discretion can be addressed through tribunals adopting 'institutionally sensitive' approaches that set the intensity of inquiry at levels appropriate to accommodate domestic authorities' (whether executive, legislative or adjudicative) greater proximity to persons and events and, hence, greater suitability and capacity to make informed and appropriate policy determinations.[1218]

388. While laudable, attempts by scholars to identify (and encourage arbitrators' adoption of) appropriately deferential 'standards of review' are misplaced for two reasons. First, as I explore further below, the development of appropriately 'deferential' standards of review requires an institutional structure and doctrinal homogeneity that international investment law and arbitration — at least as currently constituted — simply do not possess.

389. Second, the development of such standards intrinsically relies on reaching something resembling consensus on both the arbitral function and the relationship between this function and the relative competences of domestic agencies — in other words, something approaching a theory of separation of powers applicable, at least, in the investment context. However, while some international courts and tribunals have indeed engaged in discussion using the notion of standards of review, the conceptually-loaded nature of this terminology has meant that, in the majority of international dispute settlement, such questions are left off the page.[1219] Rather, it is generally held that the intensity of inquiry required in giving effect to a State's obligations is to be discerned from the primary rules generating such obligations themselves, in accordance with the customary rules on law ascertainment and interpretation. In other words, the language in which rules are formulated will indicate how in-depth an adjudicator's inquiry should be, as well as the factual and evidentiary determinations that are necessary. The powers

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1215 See, esp: Schill and Djanic (2018) 46–7; and Henckels (2015) 123

1216 Van Harten (2013) 157

1217 See, esp: Montt (2009) 332–58; Henckels (2014); Burke-White and von Staden (2010) 333–44 and Van Harten (2013) 29–34, 49–79, and esp 157–64. But see: Roberts (2013) 66–71

1218 See esp: Montt (2009) 355–8; Kingsbury and Schill (2010) 78, 87–8, 102–3; Henckels (2015) 154–60, 64–71

1219 Roberts (2013) 70–1; Foster in Tamada and Fitzmaurice (eds) (Brill 2016) 11-37. See, esp:

of international adjudicative bodies to 'review' domestic agencies' conduct are thus matters determined by States when assuming obligations and when consenting to jurisdiction.

390. As Roberts rightly notes, the logic underpinning the separation of the powers of branches of government at the domestic level do not easily 'cross-apply' when considering the role of adjudicators settling international disputes.[1220] The very notion of a separation of powers presumes that the organs in question operate within the same political 'space': that they share functions of government. Given investment tribunals by necessity lie beyond the States' political and constitutional structures and exist only for the duration of a dispute, the logic underpinning the idea of a separation of powers does not transfer well. Developing a conception of separation of powers (again) requires us to implicitly draw on idealised conceptions of the governor-governed relationship and the proper powers of respective arms of government. The ways such questions are approached at the domestic level are both evolutive and result from dialogue, competition and contestation between adjudicative, legislative and executive organs — opportunities for which are few and far between in the investment law context. Further, given questions relating to the separation of powers often cannot be answered *in abstracto* or *ex ante*, but only *in concreto* and *ad hoc*, tribunals will ultimately be responsible for drawing lines beyond which inquiry will not continue, and by forming views on issues such as the relative technical expertise of, and evidence available to, domestic agencies, questions relating to democratic accountability and avenues for oversight and review at the national level.[1221] There is thus a degree of circularity in relying on standards of review to constrain arbitral discretion.

7.2.4 Investment law and arbitration are insufficiently 'systemic'

391. As explored in Chapter 3, the turn to public law is, at a fundamental level, built on the assumption that investment law is 'systemic' and that arbitration is generating something akin to a common law of investment protection.[1222] It considers that arbitral awards' elaboration of the requirements of similarly-formulated treaty provisions and general international law, alongside the practices of *pari matiera* interpretation and reliance on prior decisions, has led to the development of universal rules and a 'multilateralized' 'system'.[1223] At the same time, scholars advocating a turn to public law have acknowledged that if it is to achieve its objectives, the increased use of borrowed concepts and approaches must involve arbitrators converging on appropriately tailored 'versions' of such concepts and approaches. Without at least a minimum

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1220 Roberts (2013) 68

1221 Walker (2014) 45–6. See, illustratively: *Philip Morris v Uruguay* [306]

1222 Above Sec 3.3

1223 Recall: Schill in Douglas, Pauwelyn and Viñuales (eds) (OUP 2014) 109-41, esp 137–41

of convergence in arbitral approaches, the turn to public law cannot assist in overcoming inconsistency, indeterminacy, or imbalance in investment law and practice. Without a minimum of convergence, States' exercises of regulatory power will continue to be held to variable and often unpredictable standards.[1224]

392. There are, however, good reasons to believe that the convergence in arbitral approaches required for the turn to public law to achieve its objectives is impossible within investment law and arbitration's current structures.[1225] As already alluded to, given their inherently values-based and context-dependent natures, at the domestic level, public law concepts and approaches depend for their content and operation on the repeat application by (permanent) adjudicators, embedded within a (hierarchically) structured legal and political order. While concepts' and approaches' constructions will naturally vary over time and will never be approached in an entirely coherent manner, the availability of appeal and (in many systems) of dedicated constitutional and administrative adjudication mean there is always a final arbiter. It remains an open question — beyond the scope of this study — whether the loose community of arbitrators who frequently decide investment disputes is capable of generating shared values and approaches.

393. Based on their use in other substantive areas of international law, given the flexible and yet context- and values-dependent nature of public law concepts, something analogous would seem to be required for borrowed concepts to gain traction in international settings. We can in this context point to proportionality analysis in the practice of the ECtHR, IACtHR, and EU courts,[1226] as well as EU courts' development of the notion that individual traders can rely on legitimate expectations to challenge Union rules,[1227] and the ECtHR's development of the notion that Contracting Parties enjoy a margin of appreciation in fulfilling their treaty obligations.[1228] While the precise functions of adjudication and balance of institutional powers in each of these settings has been — and continues to be — (sometimes hotly) contested,[1229] they

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1224 All of this is not to suggest that consistency in arbitral practice is per se desirable, but merely to illustrate that investment arbitration's entropic tendencies mean arbitral recourse to public law concepts is more likely to be characterised by divergence rather than convergence. Exploring this broad idea, See, esp: Schultz (2014) 299–300

1225 Ranjan (2014) 3 CJICL 853, 875–7

1226 Above Sec 5.3

1227 See, esp: *Branco v Commission* [102]. See further: Craig (1996) 55 CLJ 289; Weatherill (OUP 2016) 133–4

1228 See, esp: Hutchinson (2008) 48 ICLQ 638; and Legg (2012). See too: Shany (2005) 16 EJIL

1229 Of the huge literature, see, esp: Zarbiyev (2012) 3 JIDS 247, 260 ff;Muir, Dawson and de Witte in Dawson, De Witte and Muir (eds) (Elgar 2013) 1-10; Bossuyt in (Brill 2015) 31-56. Comparing the two courts' management of perceptions of activism, Guðmundsdóttir in Arnardóttir and Buyse (eds) (Routledge 2017) 161-88

possess certain common features notably absent from international investment law and arbitration: (i) adjudicators within these areas apply treaties acknowledged to form distinct and unitary sets of obligations; (ii) these rules are generally regarded as serving broader (political) projects, typified by at least a core of agreement amongst participating States on certain fundamental *teloi*; (iii) it has become a widely tolerated (if not always enthusiastically accepted) feature of these regimes that the ECtHR's, IACtHR's, and EU courts' functions include the iterative development of *jurisprudence constante*; and (iv) adjudicators within these regimes can be said to be embedded in a developing institutional and political 'space'.

394. By contrast, both in terms of primary rules and institutional structure, investment law and arbitration lack the necessary systemic features to facilitate widespread recourse to public law concepts. To the extent that investment law and arbitration are 'systemic' at all — and, as I have already suggested, we ought to challenge this fundamental assumption — as Pauwelyn notes, they constitute a 'complex', 'decentralized', 'multifaceted', 'highly path-dependent', and 'adaptive' system,[1230] that emerged 'organically and incrementally in an often accidental process',[1231] and whose disparate parts (IIAs) are only loosely networked by similarity in provisions' wording, the inclusion of most-favoured nation provisions, and because general international law — including the customary rules concerning the protection of foreign nationals and their property — apply in most disputes.[1232]

395. While it is true that arbitrators' tendency to cite previous awards has led to relatively coherent practice on many issues,[1233] often such consolidation takes the form of 'clustering', whereby groups of tribunals — often similarly constituted or in which members have previously acted as counsel in comparable proceedings or participated in academic discussion of an issue — form internally consistent but externally irreconcilable clusters of decisions. Subsequent tribunals then pick and choose between different approaches. Competing interpretative approaches can survive for years in this manner.[1234] Clustering has proved to be a persistent feature of arbitral practice for decades.[1235] As shown in Chapters 4 and 5, such clustering is evident in the various constructions tribunals have afforded to the police powers doctrine and

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1230 Pauwelyn (2014) 29 ICSIDR 372, 383–415

1231 ibid 416

1232 ibid 414. See too: Schill (2010) 23 LJIL 401

1233 On idea of the formation of *de facto* system of precedent See, esp: Schreuer and Weiniger in Muchlinski, Ortino and Schreuer (eds) (OUP 2008) 1188-205; De Brabandere (2012) 257–82and Grisel (2014) 223 ff

1234 The tendency of arbitral practice to 'cluster' in this manner will be clear to anyone familiar with the controversies over whether MFN provisions extend to questions of jurisdiction and admissibility. Recall decisions and debate above nn 148–150.

1235 Viñuales (2018) 9 JIDS 628, 631–2

proportionality principle, as well as other borrowed concepts such as legitimate expectations.[1236] The survival of radically different approaches through such clustering is not limited to the construction of admittedly broad treaty provisions, but is evident in seemingly more narrow interpretative contexts — such as in constructing the requirement of regulatory stability under Article 10(1) ECT.[1237]

396. Accepting, *arguendo*, that it is within the arbitral function to achieve a semblance of consistency (for example when applying similarly-worded treaty provisions or ascertaining and applying rules of general international law) clustering seems to be a necessary feature of investment arbitration's current composition. *Ad hoc* party appointment of arbitrators means interpretative exercises are necessarily characterised by diffuse dialogue between diversely constituted tribunals. Despite patterns in arbitrators' backgrounds and the practice of repeat appointment, (like in all dispute settlement) arbitrators necessarily draw on diverse backgrounds, expertise, preferences, values and assumptions.[1238] In other words, the very reasons behind the lack of consistency in arbitral practice — and the turn to public law — militate against tribunals converging on tailored approaches.[1239] The absence of recourse to appeal and the limited grounds for annulment under the major arbitration rules mean annulment proceedings provide only the weakest of checks and balances. All of this is compounded by the general absence of institutional fora in which relevant discussion can occur. Further, and despite Schill and Djanic's contention that States can monitor tribunals' use of public law concepts and step in to correct practice through interpretative statements and legislative amendment if dissatisfied, there are limits on States' capacities to check arbitral innovation.[1240]

397. It is likely that investment arbitration's entropic tendencies will mean that, rather than converging on the use of appropriately-tailored (and ideally deferential) versions of borrowed public law concepts and approaches, the turn to public law will in fact generate a further proliferation of approaches. Investment arbitration simply lacks the consolidating forces necessary to foster the coherent (and appropriately tailored) incorporation of public law concepts and approaches envisaged by the turn to public law's proponents. As explored in Chapters 4 and 5, this is confirmed by the range of approaches arbitrators have adopted in making use of the police powers doctrine and proportionality analysis.

1236 See discussion of varied approaches in: Potestà (2013)

1237 Compare, eg, the approaches adopted in: *Charanne*; *Blusun*; *Electrabel*; and *RREEF*, with those in: *Eiser*; *Masdar*; and *Novenergia*. See further: Ortino (2018) 21 JIEL 845, esp 858–65

1238 For analysis of arbitrators' backgrounds Bonnitcha, Skovgaard Poulsen and Waibel (2017) 253–7

1239 Pirker (Europa 2013) 343; Ranjan (2014) 878–82

1240 Schill and Djanic (2018) 47. See analysis in: Paparinskis in Kulick (ed) (CUP 2016) 30-52; Methymaki and Tzanakopoulos (2016)

7.3 Broader consequences of the turn to public law

398. As well as questioning whether the turn to public law can deliver on its promises (what we might call its functional legitimacy), we ought also to resist the turn to public law due to its broader conceptual and normative consequences. While undoubtedly motivated by laudable goals — including, amongst many authors, by the need to protect an appropriate degree of regulatory autonomy for host States — if adopted on a widespread basis, the turn to public law, both as proposed and as it has so far manifested in practice, would erode structures that protect important interests within the international legal order by: (i) further disconnecting rule ascertainment and interpretation from formal approaches to law; and (ii) fundamentally re-structuring the limited bargains States strike when ratifying IIAs.

7.3.1 The shift away from formal approaches

399. A worrying conceptual and normative consequence of the turn to public law is its tendency to further 'deformalise' the modes of reasoning employed in investment law and arbitration. To use d'Aspremont's phrasing, 'deformalization' in law ascertainment 'boils down to a rejection of the idea that rules must meet predefined formal standards to qualify as a rule of law'.[1241] Such informal approaches tend to de-emphasise the importance of strict adherence to rules of recognition, in favour of more flexible conceptions of law and law-adjacency, often based on the rejection of the legal form as binary.[1242] Rather than relying on (set) rules of recognition to distinguish law from non-law, such approaches tend to justify a norm's validity by reference to its substance (ie whether it is motivated by desirable aims or protects important interests); effects (ie whether relevant actors' behaviours are influenced by the norm, for example by generating expectations); or the processes through which it is generated (ie by reference to the social and political relations of legally-relevant actors).[1243]

400. Similarly, formalism in the context of treaty interpretation can be understood as the reliance on 'formal structures' (ie rules or 'standards') that limit the 'leeway of the […] interpreters […] of a treaty.'[1244] Such structures 'do not dictate a particular result' in an interpretative process, or even exhaustively outline how such processes must be conducted.[1245] Rather, 'formalism provides a surface of predictability for the users and consumers of treaty law as to

1241 d'Aspremont (2011) 3 GoeJIL 503, 507–8

1242 ibid 526–8

1243 ibid 508–25; Schauer (2017) 391–2

1244 d'Aspremont in Tams, Tzanakopoulos and Zimmermann (eds) (Elgar 2014) 257-84, 259

1245 ibid; Schauer (2017) 388–9

what *cannot* be achieved' by an interpretative process.[1246] By ensuring a minimum of predictability, formalism in treaty interpretation aims to ensure the effectiveness of treaty making as a form of (auto-)regulation.[1247] By contrast, informal or 'flexible' approaches to treaty interpretation shift 'the burden of predicting outcomes' to interpreters — they are 'characterized by *laissez-faire*' and are motivated by the perceived need to continually adjust agreements 'to ensure [their] survival in a constantly changing environment.'[1248] Such approaches are often characterised by a tendency to place *telos* above text. Schauer summarizes these poles well:

> we can understand formalism as the measure of the degree to which […] the positive law and its source and methodological components resists modification in the service of achieving more desirable all-things-considered outcomes. A legal system [or scholarly movement, CM] is maximally formal when the law (whether sources, methods, or outputs) is treated as conclusive, no matter how compelling the moral or other reasons for avoiding the legal result [and] is maximally anti-formal when the law is treated as little more than a preliminary guideline (or rule of thumb), defeasible whenever going outside the law would produce a superior result.[1249]

401. As discussed in Chapter 3, the theoretical schools linked to the turn to public law — notably the GAL, IPL and global constitutionalist schools — tend to oscillate between substantive- and effects-based approaches to validity.[1250] The same is true of arguments in favour of the turn to public law. The idea that investment law is essentially now a quasi-common law due to the emergence of a *de facto* system of precedent draws primarily on effects-based assumptions regarding legally-relevant actors' expectations regarding the authority of prior decisions and *in pari materia* reasoning. By contrast, the functionalist grounds underpinning calls for the greater use of concepts derived from domestic public law (and apparently analogous substantive areas of international law) to address certain perceived practical challenges — particularly the 'three Is' — can be understood as essentially a substantive approach to validity: recourse to public law concepts and approaches is justified because they provide useful solutions.

402. In the same vein — as explored in Chapter 6 — in most instances the turn to public law ought to be understood as a process of arbitral legislation, that, while sometimes paying lip service to such rules, in fact largely cannot be reconciled with the customary rules concerning recognition and interpretation. As already explored, this has often occurred through the subtle rearrangement of such rules, rather than their outright rejection. Further, based on arbitral practice

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1246 d'Aspremont (2014) 259 (original emphasis). See similarly: Schauer (2017) 391

1247 d'Aspremont (2014) 259

1248 ibid

1249 Schauer (2017) 392

1250 d'Aspremont (2011) 521–4

concerning the police powers doctrine and proportionality principle, the use of public law concepts and the shift to 'balancing' tend to move analyses away from express treaty terms, with the result that any distinctions in the use of terms in IIAs are 'ironed out' and replaced with something resembling catch-all standards of treatment.[1251] Similarly, because they are not expressed in writing (until given written expression by adjudicators) and their ascertainment, content determination, and application necessarily depend on analogical reasoning and involve the exercise of significant discretion, the increased use of general principles in investment disputes would move the field further away from formal toward flexible approaches to rule ascertainment and interpretation.[1252]

403. We ought to be concerned by these tendencies. Informal approaches to rule ascertainment and interpretation necessarily empower those involved in the process of ascertainment and interpretation, reduce the *ex ante* predictability of both the existence and operation of legal obligations and, thereby, further marginalise States from legislative processes. Both tendencies have important negative consequences for the normativity and authority of international law at a general level [1253] — and are likely only to exacerbate investment law and arbitration's persistent legitimacy crisis.

404. The informal shift implicit in the turn to public law (both as advocated and as it has manifested to date in practice) may in this sense be understood as both symptomatic of and further embedding an existing trend toward what Koskenniemi refers to as 'managerial' approaches. Within his understanding, the 'managerial approach' that has accompanied the fragmentation of the international legal order into substantive 'regimes', is often 'critical of the formal aspects of the legal craft that it often sees as an obstacle for effective action', focusing rather on identifying pragmatic solutions in order to 'realize "actors"' […] more or less unproblematic "interests".'[1254] Within such approaches, 'form' is made subservient to 'function' (and thereby, text to *telos*).[1255] We can see signs of this tendency in the turn to public law's preoccupation with 'balancing' the competing (practical) 'interests' of States and investors and its willingness to borrow, magpie-like, extraneous normative solutions based on their perceived (practical) utility, as well as its implicit logic of functional optimisation.

1251 See, esp: *Philip Morris v Uruguay*; *Marfin* (police powers); and *Tecmed*; *Occidental* (proportionality). See too, regarding legitimate expectations: Grierson-Weiler and Laird (2008) 301–2

1252 d'Aspremont (2011) 171

1253 ibid 30–2

1254 Koskenniemi (2009) 20 EJIL 7, 15

1255 Koskenniemi (2007) 4 NoFo 7, 11

7.3.2 Restructuring the limited bargains struck in IIAs

405. Clearly, the widespread shift in arbitral practice envisaged by the turn to public law's advocates has the potential to fundamentally restructure the bargains States strike when ratifying IIAs — at least those permitting ISDS — moving toward what, to co-opt Lambert's phrasing might be called '*gouvernement des arbitres*'.[1256] As explored above, it is a necessary assumption of the turn to public law that, rather than entering into a limited and stand-alone agreement guaranteeing another State that their nationals will be afforded minimum standards of treatment, by ratifying an IIA a State opts-in to a 'multilateralized' 'regime' of investment protection. This regime is said to be comprised of a unitary, universal body of norms and expectations largely generated by the decisions of (*ad hoc*) tribunals empowered to settle investment disputes. These decisions further impact domestic policies and actors' expectations, thereby shaping and constraining behaviour. It is thus a fundamental underlying assumption that investment law and arbitration constitute 'global governance'.[1257]

406. But, the turn to public law is self-perpetuating in this respect. As already explored, replacing or supplementing formal approaches to rule ascertainment and interpretation with the increased use of comparative methodologies, borrowed concepts and general principles further enhances arbitral discretion and expands the scope for creativity. This is particularly the case given public law reasoning involves the deployment of inherently malleable concepts, requiring adjudicators to draw upon values and assumptions external to positive law to determine the limits of governmental authority and implicitly to reach out to ideal(ised) conceptions of the State-market and State-individual relationships. Even allowing for the imprecise nature of this term, the turn to public law thus also *increases* the extent to which the arbitral function can accurately be described as 'governance'. Three particularly problematic potential consequences of this restructuring deserve briefly highlighting.

i. The legitimation problem

407. Unlike judges at the domestic level, legal authority (ie the abilities to authoritatively interpret, and to make, law) is not automatically conferred on international adjudicators by virtue of their office.[1258] There is, in other words, no rule of recognition stating that judges can make law. Rather, adjudicators' authority to state the law is derivative. Binding international adjudication is the exception to the rule that it is only the full subjects of international law — States — that can interpret and apply it. By agreeing to compose a court or tribunal and to confer jurisdiction

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1256 Lambert (Giard & Cie 1921)

1257 Schill (3 Dec 2013) EJIL: Talk!; Schill (2015) 110. See too: Montt (2009) 129–33. For the idea that dispute settlement is 'governance': Keohane, Moravcsik and Slaughter (2003) 54 Int'lOrg 457

1258 Hernández (2015) 173

upon it, States delegate — in a more- or less-limited fashion depending on the scope of jurisdiction conferred — a portion of their authority to interpret and apply the obligations they have assumed. Given adjudicators' exercise of authority is legitimated by State consent — each simultaneously, within an inter-representative conception of the international legal order,[1259] both the embodiment and representative of a political community — the exercise of this authority will only remain legitimate if it stays within the bounds of the concerned States' consent.[1260] While arbitrators' role will more often resembles that of 'agent' than 'trustee', the degree of interpretative authority delegated always depends on how this consent is expressed in the conferring treaty.[1261] This is not to suggest that the practices of international courts and tribunals cannot influence the creation and (authentic) interpretation of rules, but such can only (validly) occur at one step of removal, by forming a focal point around which States generate new rules (either through treaty or custom), or accept an interpretative approach as authoritative (through subsequent agreement or subsequent practice).[1262]

408. Some commentators (and practitioners) have claimed that by using open-grained language and boilerplate provisions in IIAs, and by providing standing consent to compulsory (investor-State) arbitration, States intended to delegate governance authority to tribunals and to empower them to progressively develop a universal regime of investment protection.[1263] As shown in Chapter 2 when considering the shallow consensus underpinning the loose constellation of IIAs currently in force, this claim has little merit. The history of IIAs' completion, States' pleadings before tribunals, and reactions to expansive interpretative approaches all confirm that this was not an intended consequence. Further, as evidenced in States' representations in the course of current reform processes, and in pleadings before tribunals, we can also reject the argument that States have either expanded the category of legal official whose social practices are relevant in establishing rules of recognition,[1264] or themselves established a new rule of recognition granting arbitral decisions the authority of law. Rather, as explored in Chapter 6, to the extent that tribunals making use of public law concepts and approaches

1259 For use of this term, Foster (2015) 463

1260 Hernández (2015) 180

1261 Methymaki and Tzanakopoulos (2016) 176. On the problematic agent-trustee dichotomy, Alter (2008) 14 EJIR 33; Roberts (2011) 178–9; and Roberts (2010) 186. See, arguing the dichotomy lacks utility: Methymaki and Tzanakopoulos (2016) 176–7

1262 Tams and Tzanakopoulos (2010) 23 LJIL 781, esp 795–800; Tams in Tams and Sloan (eds) (OUP 2013) 377-96, esp 384–8; and Berman in Tams and Sloan (eds) (OUP 2013) 7-21, 17–20. But see: Petersmann (2008) 11 JIEL 827

1263 See, eg: Van Harten and Loughlin (2006) 145; Kingsbury and Schill (2009); Barker (2016) 236. See similar debate in WTO context: Howse (2016) 27 EJIL 9and Pauwelyn (2016) 27 EJIL 1119

1264 On this 'social practice' approach see: d'Aspremont (2011) esp 60, 203–4, drawing on: Tamanaha (OUP 2001) 139–42

have addressed such issues at all, they have attempted to justify borrowing through an established rule of recognition.[1265]

409. As explored in Chapter 6, much of the way the turn to public law has so far manifested in arbitral practice exceeds the bounds of what is possible under the customary rules on law ascertainment and interpretation. As shown above, a broader re-imagination of investment law and arbitration as public law would similarly increase arbitral discretion to determine the existence, content, and operation of rules, while simultaneously departing from formal approaches to these issues. The question thus arises: what, if not States' delegation of authority, legitimates this? Why is it legitimate for arbitrators faced with the task of interpreting and applying vague rules to look to the practice of domestic courts or other international courts and tribunals?

410. Arbitrators' *ad hoc* party appointment and the fact that they are often deliberately selected because they are not 'embedded' in a host State's polity, the limited options for public participation in disputes, and the central role played by national executives both in law-making and dispute settlement mean that the exercise of such authority cannot be legitimated by reference to input or throughput factors.[1266] Further, while at times advocates of the turn to public law seem to imply that the (mere) recognition and use of certain concepts and approaches in domestic legal orders and other substantive areas of international law legitimates their use in investor-State disputes, as explored in Chapter 3, the expansion of the arbitral function inherent in the turn to public law can only be legitimated in functional and consequentialist terms. In other words, the use of norms and approaches derived from or inspired by domestic practices and employed in other substantive areas of international adjudication can only be considered legitimate to the extent it promotes 'better' reasoning or contributes to stitching disparate elements within the field into a 'system'. As already explored, neither ground is satisfactory.

ii. Disenfranchising States

411. As already touched upon at several junctures, the likely effect of the turn to public law advocated is to further disenfranchise States from the law ascertainment and interpretation processes. If international investment law is conceived as a single body of rules, many of which emanate from the common 'best' practices of domestic constitutions and administrative law, and investment tribunals are responsible for identifying and applying such rules, States will inevitably be marginalised. This is due to the fact that, beyond the existence of such concepts in their own legal orders or participation in law-making and interpretative processes in other

1265 We can see in this what Hernández describes as 'cloaking': Hernández (2015) 181

1266 Cotula (2017) 30 LJIL 351

international fora, States can only minimally influence law ascertainment and interpretation — principally through their pleadings.

412. This is seemingly confirmed by current trends in arbitral practice. As explored in Chapters 4–6, States' participation in shaping the use of public law concepts has been diffuse and indirect. Through their pleadings, States have attempted to influence tribunals' recognition and construction of such concepts in a largely reactive, rather than deliberate, manner. As shown, rather perversely, the accumulation of States' pleadings has the potential to convert arbitral legislation, into 'law proper' through the formation of new custom.

413. This potential for further disenfranchisement is concerning for its potential to undermine the opportunities for meaningful debate, deliberation and contestation at the national level concerning governments' policies on foreign capital: for States as 'self-determining communities'[1267]. While it is unclear from scholars' accounts what capacity States' would retain to tailor their obligations toward investors — including by departing from the common approaches developed through tribunals' quasi-judicial review — in light of the ideational shift's universalising tendencies, and the increased arbitral discretion entailed, there is an obvious risk that States accepting investor-State arbitration effectively abrogate the core of their law-making and interpretative powers.

iii. Diminishing opportunities for diversity

414. Finally, and relatedly, it is a clear aim of the turn to public law in scholarship to assist in the development of a common law of investment protection. In light of, and in response to, vagueness in existing primary rules, according to the turn to public law's proponents, the content of this common law is to be (at least partially) found in the practices of domestic courts and tribunals. As already explored, as a matter of principle, genuinely representative comparative surveys revealing commonalities in domestic practices might reveal norms that can truly be regarded as general principles *in foro domestico* — and thus fall within a recognised source of legal obligation. But, given this is not how the turn to public law has in fact manifested, it seems more likely that the further entrenchment of the public law analogy will resemble something akin to normative colonialism — whereby norms and approaches derived from a limited number of (always developed, Northern, Western, usually OECD) legal traditions are 'universalised' — effectively 'constitutionalising' the protection of foreign investment along liberal lines.[1268] We already see evidence of this potential in the public law concepts and approaches that have been transplanted into arbitral practice to date. We can similarly point in this respect

1267 Koskenniemi (CUP 2001) 508; Bianchi (2016) 173

1268 Schneiderman (2008) esp 62–8

to the assumptions underpinning the logic of what constitutes 'good governance' and 'best practice' in the context of governmental interference with private property interests.[1269]

415. A potential end result of the turn to public law's centralising tendency — and particularly centralising around norms and approaches that rely, as explored above, on a given set of assumptions about the ideal(ised) State-market and State-individual relationships — is that the options for diversity (and innovation) in host States' approaches to these relationships will be diminished. As explored above, the turn to public law also reduces opportunities for contestation. In light of this potential and the fact that the validity of recourse to borrowed concepts is largely content- (rather than form-) dependent, we may justifiably question whether the turn to public law is not best understood as a (quasi-, or, less generously, crypto-) natural law or colonial project.[1270] There are in this respect strong parallels between the turn to public law and the global constitutional, and global administrative law movements, which have been subjected to similar criticisms, on similar grounds.[1271]

7.4 Five ways forward

416. Having shown that the turn to public law largely cannot be reconciled with the customary rules of recognition and interpretation, and having argued that it is both unlikely to achieve its stated aims and is likely to move theory and practice in conceptually and normatively undesirable directions, I have seemingly brought us full circle. If the turn to public law is neither valid nor legitimate, how ought we address investment law and arbitration's challenges?

417. It is well beyond this study to prescribe a detailed treatment plan. Such must be the result of further research, elaboration, and debate. The shortcomings and pitfalls of the turn to public law do, however, highlight five lessons — or ways forward — which I will briefly outline: (i) scholars and practitioners must embrace complexity (Sub-sec 7.4.1); (ii) we need to place renewed emphasis on formalism approaching to law ascertainment and interpretation (Sub-sec 7.4.2); (iii) States need to continue to increase their efforts to influence third party interpretation (Sub-sec 7.4.3); (iv) States must engage in, but not rely upon, institutional and jurisdictional reform (Sub-sec 7.4.4); and (v) States must continue to engage in substantive legislative reform (Sub-sec 7.4.5).

1269 Such concepts are, of course, inherently 'political' and contestable, rather than the object of technical expertise. See, esp: Marks (2005) 37 NYU JIL&P 995, 996–7

1270 See, similarly, concerning the growth in 'governance'-speak: Koskenniemi (2009) 408 ff

1271 See, esp: d'Aspremont in Lang and Wiener (eds) (Elgar 2017) 155-69; Volk (2012) 4 GöJIL 551; Somek (2011) 579; Somek in Dobner and Loughlin (eds) (OUP 2010) 267-87; and Wood (2009) 91. But see: Krisch (2006) 17 EJIL 247, 263–74; Kingsbury (2009) 29–30

7.4.1 Embracing complexity

418. The first step forward will constitute a paradigm shift for many scholars and practitioners. As I discussed in Chapter 2 and touched upon in the present chapter, the shallow consensus underpinning the loose constellation of investment agreements currently in force, as well as the customary rules governing States' treatment of foreign nationals and their property cannot sustain the project of universalisation that many have placed at the centre of study and practice in the field. In structural terms, as argued above, investment law and arbitration have only very minimally systemic features; rather, as currently constituted, it tends toward entropy as much as toward unity. Though scholarship tends to focus on areas of consistency and convergence, we ought also to acknowledge that inconsistency and divergence are inevitable. Certain scholars' and practitioners' claims that a multilateralized, universal, 'system' or 'regime' of investment protection has organically emerged through arbitral practice should be challenged, both on the grounds that they are descriptively inaccurate and undesirable.

419. The preferable view is that each IIA is, by necessity, an island. When two (or more) States sign an IIA, they agree to condition the exercise of their (in principle plenary) jurisdiction over foreign nationals and their property — usually in the hope of attracting FDI, and in the hope that investors' home States refrain from resorting to unilateral means of protection.[1272] To co-opt Alvarez's statement in expert testimony (for the claimant) in the *Sempra* proceedings, each agreement 'reflect[s] a particular bargain struck between two [or more] discrete parties at a particular moment in time'.[1273] Though the substantive obligations assumed may be expressed in similar language, the starting point can only be that each agreement establishes a unique set of duties.[1274] As well as recourse to the 'systemic' or 'meta-' rules of international law,[1275] depending on their expression and the applicable law, it may be necessary to have recourse to rules and materials extraneous to the agreement in order to interpret and apply such obligations; there may, in other words, be bridges from the island to customary law or to the State parties' practice. Referring to the prior interpretations afforded to similar provisions in third party agreements (*in pari materia* interpretation) will almost always fall outside what is permitted by the customary rules on interpretation.[1276]

420. Ending the prevailing practice of (unjustified) *in pari materia* reasoning ought to be a priority. At the domestic level (from where it originates) *in pari materia* interpretation is based on two

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1272 Pauwelyn (2014) 416

1273 *Sempra* [Opinion of José E Alvarez] (12 Sep 2005) ICSID ARB/02/16 [9]

1274 MFN provisions, properly construed, do not affect this position.

1275 Above Sec 6.4.1

1276 Above Sec 6.3.1. See too: Mitchell and Munro (2017) 28 EJIL 669, 694–5; Gardiner (ed) (2015) 401–10; Merkouris (2015) 92

core assumptions: (i) that domestic legal orders (ought to) constitute coherent and complete systems of rules; and (ii) that national legislatures *may* have intended to ascribe terms the same meaning when legislation on the same topic in different statutes. This approach to interpretation is, however, often given only a secondary, confirmatory, function.[1277] Neither assumption transfers to the present context. Given it almost always falls outside the scope of Articles 31–32 VCLT, as Merkouris explores, for *in pari materia* interpretation of the type conducted by investment tribunals to be acceptable, one of two things would need to be established. First, States may have accepted through their practice and *opinio juris* that reference to *pari materia* third party treaties is permissible either as additional context or as a supplemental means of interpretation.[1278] In other words, its use depends on the existence of a customary rule of interpretation beyond and additional to those reflected in the VCLT. Alternatively — and far more controversially — States may also have accepted as a matter of custom something resembling a principle of *stare decisis*, or at least of *jurisprudence constante*, against which State parties' consent to arbitrate and tribunals' powers enumerated in the relevant dispute settlement agreements and arbitral rules could be read. There is little evidence that either has occurred.[1279]

421. Clearly, the result of my proposal to embrace the entropic aspects of investment law and arbitration will necessarily be that tribunals will increasingly reach diverse conclusions (or *de novo* similar conclusions). As alluded to above, and as Schultz rightly notes, inconsistency in arbitral practice is not, as such, problematic.[1280] In fact, it is often justified. As treaty texts become more diverse, inconsistency will necessarily increase.

7.4.2 Renewing formal approaches to rule ascertainment and interpretation

422. A second step in our treatment plan ought to consist of a renewed emphasis on formal approaches to rule ascertainment and interpretation, both in scholarship and, especially, in arbitral practice. This renewal must consist of two moves. The first is largely ideational, or reflexive, and relates to the ways scholars and arbitrators understand their own roles and the nature of investment law as a field. It is justified, if nothing else, by the inadequacies of legitimating the exercise of interpretative authority on other bases. We need, as scholars and practitioners, to roll back to a narrower conception of what is legitimately part of our roles when ascertaining, interpreting and applying investment law.[1281] We need, in other words, to address the

1277 See, eg: Sec 15AB, *Acts Interpretation Act 1901* (Cth) (Australia)

1278 Merkouris (2015) 95–6

1279 Paparinskis (2012) 113–5

1280 Sec 2.4.2; Schultz (2014)

1281 For further exploration, see, esp: Kammerhofer in Crawford and Nouwen (eds) (Hart 2012) 115-26

(often understandable) cultural proclivities exhibited by scholars and practitioners toward normative convergence and coherence. Doing so will not, as such and alone, go to addressing directly addressing indeterminacy, inconsistency or imbalance — but is a necessary step nevertheless.

423. Such requires a renewed commitment to the idea that rather than the functional exigencies of investment promotion, the political choices made within and between States generate the rules governing the treatment of foreign nationals and their property. It requires, in other words, a recommitment to investment law within public international law, understood (to use Foster's term) as inter-representative.[1282] Some, but not all, of these ideas are encapsulated in Koskenniemi's encouragement of a return to a 'culture of formalism' in international legal thought.[1283] Certainly, a shared aim is to upset the functionalist and consequentialist tendencies that have become embedded in thought and in practice, not least, as shown above, in international investment law, both within and beyond the turn to public law.[1284] As explored below, the return to formal approaches is made more urgent by increased diversity in the obligations States are assuming in IIAs.[1285]

424. The second element, flowing from the first, is to put this new cognisance into practice. A renewed commitment to formalism would manifest, for example, in abandoning the prevailing tendency to rely (often almost-exclusively) on analogical reasoning rather than to engage in *de novo* interpretation textual construction, in closer attention to provisions' precise wording, the context in which treaty terms appear within an agreement, awareness of diversity in the framing of IIAs' objects and purposes, and an increased willingness to look for, and give effect to, the authoritative interpretations States adopt through the accumulation of consistent pleadings in prior disputes (ie through subsequent practice demonstrating agreement) and through subsequent agreements. Increasing (perceptions of) methodological rigour in rule ascertainment and interpretative practices is, undoubtedly, a necessary step toward addressing investment law and arbitration's persistent legitimacy crisis.[1286]

425. Such a renewal ought also to be accompanied by increased awareness of the default position under general international law concerning States' 'regulatory powers'. As explored in Chap-

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1282 Foster (2015) 480–1

1283 Koskenniemi (2001) 494–509. For detailed analysis, and at the risk of being accused of co-option, Klabbers (2013) 27 Temple ICLJ 417

1284 Koskenniemi (2001) 413 ff; Koskenniemi (CUP 2005) esp 523–7; and discussion in esp: Klabbers (2013) 431; and Tsagourias (2003) 16 LJIL 397, 398–9

1285 Below Sec 7.4.5

1286 Kurtz (2014) 296

ter 2, while general international law only governs States' 'regulatory powers' with a normatively light touch, these rules provide us with a normative floor which acts both as point of departure and fall-back position for any interpretative inquiry. According to the structural rules on jurisdiction, including those relating to States' *domaine réservé*, States possess plenary powers to regulate persons, objects and events through any means provided: (i) that such an exercise does not exceed (ie spatially, materially, or temporally) what is permitted by a (permissive) rule recognising a base of jurisdiction; and (ii) that the State has not otherwise assumed an obligation limiting its exercise of this power.

426. Unlike the normatively thick approach of domestic public law — and, as explored above, often resulting from the turn to public law in investment law and arbitration — general international law does not per se recognise permissible (or impermissible) means or ends of regulation. Such can only stem from assumed obligations. If a proper construction of a treaty term or customary rule reveals that a State's conduct falls outside the operation of a rule, the default position requires that it is lawful — even if it results in harm to an investor. Contrary to certain prevailing approaches, a perceived 'gap' in the substantive protection afforded by a treaty rule need not be 'filled' if that gap results from a correct construction of the rule.[1287] Some gaps exist due to legislators' deliberate choices, others due to omissions or changes in circumstances; investment tribunals are not empowered to fill either category.[1288] Recognition of our starting-point/fall-back position is neither an admission of *non liquet* (in fact it is the opposite), nor does it depend on us accepting the existence in positive law of a 'permissive principle' as closing rule.[1289]

427. Similarly, this approach should not be understood as advocating a general practice of restrictive interpretation — often expressed in the maxim *in dubio mitius*. While we might make a strong normative argument in favour of restrictively interpreting the obligations States assume in IIAs, it is widely agreed that the customary rules reflected in the VLCT require neither a 'restrictive' nor 'expansive' approach to interpretation.[1290] Rather, they express and are organised around the idea of giving maximal effect to the drafters' intention as discernible in the treaty text — what has come to be known as effective interpretation.[1291] The ICJ has stressed that:

1287 Douglas, eg, argues that when rules do not 'supply an answer to difficult questions arising in investment treaty disputes it is the principles of justice and fairness that must guide the interpretive exercise': Douglas (2006) 22 Arb Intl 27, 51

1288 On the pervasive tendency of international lawyers to 'attempt to escape from the unacceptable consequences of the Lotus principle', Koskenniemi (2005) 258–9

1289 See, esp: Kammerhofer (2009) 337; and Quane (2014) 256

1290 Crema (2010) 21 EJIL 681

1291 Gardiner (ed) (2015) 405–7

> 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 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.[1292]

428. Examination of terms' context, an agreement's object and purpose, (in the case of ambiguity, obscurity or a manifestly absurd result) supplementary materials, and (if available) State parties' subsequent agreement or subsequent practice, will reveal whether terms ought to be afforded narrow or broad construction.[1293] When faced with several possible constructions, it may be necessary, therefore, to adopt the most restrictive (in terms of substantive protection afforded to an investor) in order to faithfully give effect to treaty terms. This may be required, *inter alia*, because an agreement's preamble identifies particular objectives (such as the promotion of sustainable development) or contains 'without-prejudice' language, reserving a State's regulatory autonomy in certain areas.[1294] By the same token, a similarly faithful reading may necessitate the selection of a broad interpretation capturing a wide spectrum of host State conduct. What is crucial, however, is that such reasoning must be performed in response to concrete indicators in the individual agreement in question, and not based on a broader teleological approach and assumptions about the investment protection 'regime'. Finding that a rule does not capture certain conduct is an entirely valid conclusion.

7.4.3 Increasing State party influence over interpretative processes

429. A third way forward — one devoted renewed attention[1295] — is for States to increase their level of participation in interpretative processes, within and beyond dispute settlement. As already explored, by consenting to arbitration, States delegate a portion of their interpretative authority to tribunals. But States continue to 'own' their treaties.[1296] The benefits accruing to investors in IIAs (and not reflected in custom) and procedural right to initiate arbitral proceedings can be freely modified or withdrawn by State parties, in accordance with general international law.[1297] In addition to their pleadings as disputing or non-disputing treaty party, States retain tools to influence interpretative processes, without formally amending or withdrawing

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1292 *Navigational Rights* [48]

1293 ibid

1294 Ortino (2017); Boisson de Chazournes and McGarry (2014); Paparinskis (2011) . See further Sec 7.4.5

1295 See contributions to: Kulick (ed) (2016)

1296 Crawford in Nolte (ed) (OUP 2013) 29-33, 31

1297 Methymaki and Tzanakopoulos (2016) 173–5; Kulick (2016) 151–2

from an agreement.[1298] As explored in Chapter 6, chief amongst these are States' capacities under the rules reflected in Article 31(3)(a) and (b) VCLT to influence interpretative processes through subsequent agreement and subsequent practice.[1299] States ought to continue to make use of these avenues to set authoritative interpretations, particularly of FET and expropriation provisions — especially through unilateral and joint statements and pleadings as respondent. Home States and other treaty parties ought to intervene as non-disputing parties wherever possible in order to influence arbitral reasoning in a given dispute and to further accumulate relevant subsequent practice.

430. States' capacities to influence interpretative processes in these ways are, however, subject to both doctrinal and practical limits. As already noted, the rules reflected in paragraphs (a) and (b) require a relatively high bar to be met for practice to generate interpretative effects.[1300] Both require (at least tacit) agreement between all treaty parties, evidenced by a formal agreement, or active participation or (in certain circumstances) acquiescence in consistent practice.[1301] Perhaps greater are the practical constraints. Differences between treaty parties on the framing of authoritative interpretations, particularly of core categories of protection, may present obstacles. Similarly, given reaching agreement can often involve significant diplomatic resources, the number and complexity of IIAs to which a State is party may present challenges. But, perhaps the biggest challenge stems from the very problem such interpretative intervention hopes to address: arbitral culture.

431. As Hafner explores, a draft article permitting informal treaty modification through subsequent practice was rejected during the Vienna Conference — with the implication that 'interpretation' for the purposes of Article 31(3) cannot amount to *de facto* modification.[1302] It is not apparent that States have subsequently accepted a (customary) rule permitting such modification.[1303] However, the ILC has rightly observed that, because 'the line between interpretation and modification cannot be determined by abstract criteria', whether an attempt at authoritative interpretation goes too far can only be determined on an individual basis, with reference to the 'treaty itself, the character of the specific treaty provision at hand, and the legal context

1298 Roberts (2010) 198

1299 For detailed analyses, see contributions in: Nolte (ed) OUP 2013)

1300 above Sec 6.3.1

1301 See, esp: International Law Commission, 'First report on subsequent agreements and subsequent practice in relation to interpretation of treaties by Georg Nolte, Special Rapporteur' (19 Mar 2013) A/CN.4/660 [110]. See too: Crema in Nolte (ed) (OUP 2013) 13-28, 26–8; Crawford (2013) 31

1302 Hafner in Nolte (ed) (OUP 2013) 105-22, 116–7; ILC (26 Mar 2014) A/CN.4/671 [117–23]

1303 ILC (26 Mar 2014) A/CN.4/671 [123 ff]

within which the treaty operates, and the specific circumstances of the case.'[1304] There remains, therefore, scope for tribunals to resist or minimise (as a practical matter) States' attempts to set authoritative interpretations. The debate generated by the NAFTA parties' attempt in to shape arbitral approaches to Article 1105's FET requirement by way of the 2001 Interpretative Notes under Article 1131 provides an illustrative example. Tribunals engaging with the Notes (particularly early tribunals) exhibited varied approaches — more or less reluctant — in construing its effects.[1305] Given the still prevalent view that by establishing benefits for investors and providing standing consent to arbitrate, IIAs are somehow different to other agreements when considering when authoritative interpretation constitutes modification, States attempting to make use of this avenue may find a degree of resistance from tribunals.[1306]

432. While strictly superfluous, a promising trend in certain States' recent treaty practice — and one that may address arbitral reluctance to adopt authoritative interpretations — is the institutionalisation of party interpretation through the formal recognition of joint committees composed of the treaty parties.[1307] Illustratively, CETA establishes a Joint Committee with the power to issue binding interpretations,[1308] and formally recognises non-disputing parties' right to make submissions concerning interpretation.[1309] Similarly, under Article 9(3) 2019 Netherlands Model BIT, on the motion of either party, the exhaustive list of indicia for determining FET violations can be reviewed with the aim of issuing a joint interpretative declaration. A further welcome step is the creation of certain 'triggers' that require a tribunal to refer to such a commission whenever a party invokes a given provision, or at the request of a State party. For example, in addition to the Commission's general competence to issue binding interpretations (including relating to an ongoing dispute), under the China-Australia FTA, whenever the respondent seeks to rely on its scheduled non-conforming measures, if requested, the tribunal must refer the issue to the Committee on Investment for binding joint interpretation.[1310] The 2018 Argentina-Japan BIT and 2018 Canada-Moldova BIT likewise require any expropriation

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1304 ILC (26 Mar 2014) A/CN.4/671 [165]

1305 See, esp: *Pope & Talbot* [Damages] [47–69]; *Mondev* [100, 118]. More recent tribunals have, however, been more willing to give full effect to the 2001 Interpretative Notes. See, esp: *Methanex* [IV.C.20]; *Glamis Gold* [599]; *Windstream* [350]; and *Grand River* [175, 181]. See further: Brower (2005) 46 VJIL 347, 357–63; Methymaki and Tzanakopoulos (2016) 165–8

1306 This view is, problematically, visible in (even) the UNCITRAL Secretariat's approach in current reform processes: UNCITRAL Working Group III (17 Jan 2020) A/CN.9/WG.III/WP.191 [21]. See, too: Alvarez in Nolte (ed) (OUP 2013) 123-, 126–7; and Desierto (8 Jun 2012) Kluwer Arbitration Blog. But see preferable view in: Methymaki and Tzanakopoulos (2016) 173–5. For an assessment of States' recent practice, see: Van Aaken in Kalicki and Joubin-Bret (eds) (Brill 2015) 21-47

1307 See discussion in: Coleman & ors in Sachs, Johnson and Coleman (eds) (OUP 2019) 107-49, 130–1; Trakman and Musayelyan (2015) 31 ICSIDR 194; and Methymaki and Tzanakopoulos (2016) 163

1308 Art 26.1(3) CETA

1309 Art 8.38(2) CETA

1310 Art 9.18.2, Art 9.19 2015 China-Australia FTA. See similarly: Art 11.23 2014 Australia-Korea FTA. See further: Coleman & ors in Sachs and Johnson (eds) (OUP 2017) 42-115, 67

claims relating to taxation measures to be referred to the State parties for assessment; only in the case that the parties cannot agree on whether the measure is expropriatory can a tribunal consider the claim.[1311] Art 33(2) 2018 Canada-Moldova BIT similarly enables a host State to seek joint interpretation whenever a reservation or exception is invoked. Even more broadly, at a disputing party's request, Article 20 ASEAN-India CECA requires tribunals to submit any question concerning the interpretation of the agreement to the State parties and to adopt the resulting interpretation.[1312]

7.4.4 Reforming the institutional and jurisdictional environment

433. The fourth step forward involves targeted institutional and jurisdictional reform. As has been widely discussed, due to ongoing reform projects, the environment for settling disputes arising under IIAs is potentially about to change significantly.[1313] ICSID, for example, is currently amending its Rules and Regulations; amendments include: additional pre-appointment disclosure obligations (including to declare third-party funding); more detailed regulation of the grounds for disqualifying arbitrators; and steps to promote greater transparency, including through increased and more timely publication of decisions.[1314] Similarly, UNCITRAL Working Group III is investigating, *inter alia*: options for *ad hoc* review or appeal of arbitral decisions; creating a standing investment court with first instance and appellate jurisdiction; reforming arbitrator selection and challenge; mandatory disclosure of third-party funding; establishing an advisory centre to assist States facing claims; and mechanisms for reducing the cost and length of arbitral proceedings.[1315] While such steps, including the recent adoption of a draft Code of Conduct for arbitrators,[1316] are to be welcomed, it remains to be seen how much institutional reform will address key concerns and contribute to cultural change within the field. As argued below, such reforms while necessary, should not divert attention away from the need for meaningful change at the level of substantive obligations.

434. In addition to promoting institutional reform, States have taken steps to change the jurisdictional framework underpinning ISDS. Several States have taken steps to remove access to

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1311 See: Art 19.4 2018 Argentina-Japan BIT; Art 14.7 2018 Canada-Moldova BIT

1312 Art 20(19) and (20) 2014 ASEAN-India IA

1313 For an overview of the current reform agenda, see, esp: Roberts (7 Nov 2018) EJIL:Talk!; Roberts (8 Nov 2018) EJIL:Talk!; and Langford and Behn (31 Oct 2018) EJIL:Talk!. See further: Schill (2018) 19 JWI&T 1; Puig and Shaffer (2018) 112 AJIL 361; Roberts (2018) 112 AJIL 410

1314 ICSID, 'ICSID Rules and Regulations Amendment Process' <https://icsid.worldbank.org/en/amendments>, esp: ICSID, 'Proposals for Amendment of the ICSID Rules: Working Paper #4' (Feb 2020)

1315 UNCITRAL (2017) A/72/17 [263–4]

1316 UNCITRAL, Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement (1 May 2020) <https://uncitral.un.org/en/codeofconduct>

ISDS through existing IIAs. At one extreme, States have withdrawn from both the agreements underpinning arbitration (notably the ICSID and New York Conventions) and from IIAs. For example, between 2009 and 2020, Bolivia unilaterally denounced or otherwise withdrew from fifteen BITs.[1317] Ecuador and Venezuela withdrew from ICSID in (respectively) July 2009 and January 2012.[1318] Since auditing its IIAs in 2015, Ecuador has terminated 25 BITs.[1319] Venezuela terminated its BIT with the Netherlands in November 2008.[1320] As a result of an audit following the *Foresti* proceedings, South Africa terminated eleven BITs.[1321] In 2014, Indonesia announced it would withdraw from all BITs and has since terminated 24 agreements.[1322] In response to a series of controversial claims, including the *Vodafone* proceedings,[1323] in 2016 India announced it would terminate the majority of its BITs[1324] and has since withdrawn from (or allowed to lapse) 66 agreements.[1325] The EU has similarly attempted to phase out around 200 intra-EU BITs.[1326]

1317 UNCTAD, 'Investment Policy Hub, International Investment Agreements Navigator: Bolivia, Plurinational State of' <http://investmentpolicyhub.unctad.org/IIA/CountryBits/24>. As of 9 Aug 2020, Bolivia remains party to six BITs and six agreements containing investment provisions.

1318 Carbrera Diaz (8 June 2009) Investment Treaty News; Ripinsky (13 April 2012) Investment Treaty News

1319 Ecuadorian Citizens' Commission for a Comprehensive Audit of Investment Protection Treaties and of the International Arbitration System on Investments ('CAITISA') established by Executive Decree No 1506 (6 May 2013); Final Recommendations available at: <https://issuu.com/periodicodiagonal/docs/recomendaciones_caitisa> [in Spanish] accessed 22 October 2018; UNCTAD, 'Investment Policy Hub, International Investment Agreements Navigator: Ecuador' <http://investmentpolicyhub.unctad.org/IIA/CountryBits/61#iiaInnerMenu> last accessed 9 Aug 2020; Based on UNCTAD data, as of Aug 2020, Ecuador remains party to two BITs and seven other agreements containing provisions concerning investment.

1320 UNCTAD, 'Investment Policy Hub, International Investment Agreements Navigator: Venezuela, Bolivarian Republic of' <http://investmentpolicyhub.unctad.org/IIA/CountryBits/228> accessed 22 October 2018; as of 22 October 2018 Venezuela remains party to 25 BITs and five other agreements containing investment provisions. While a change of government in 2015 saw it reverse course, Argentina did not complete any new IIAs between 2001 and 2015 and reportedly contemplated withdrawing from ICSID: Mercopress, 'Argentina in the process of quitting from World Bank investment disputes centre' (31 January 2013) <http://en.mercopress.com/2013/01/31/argentina–in–the–process–of–quitting–from–world–bank–investment–disputes–centre> accessed 22 October 2018

1321 UNCTAD, 'Investment Policy Hub, International Investment Agreements Navigator: South Africa' <http://investmentpolicyhub.unctad.org/IIA/CountryBits/195#iiaInnerMenu> accessed 22 Oct 2018; as of 10 Aug 2020, South Africa remains party to twelve BITs and nine other agreements containing investment provisions; Republic of South Africa, Department of Trade and Industry, 'Bilateral Investment Treaty Policy Framework Review: Government Position Paper' (June 2009) <https://www.gov.za/sites/default/files/32386_961.pdf> accessed 23 Oct 2018

1322 UNCTAD, 'Investment Policy Hub, International Investment Agreements Navigator: Indonesia' <http://investmentpolicyhub.unctad.org/IIA/CountryBits/97#iiaInnerMenu> accessed 10 Aug 2020

1323 *Vodafone (I)*; and *Vodafone (II)*

1324 Investment Treaty News, 'India takes steps to reform its investment policy framework after approving new model BIT' (10 August 2016) <https://www.iisd.org/itn/2016/08/10/india–takes–steps–to–reform–its–investment–policy–framework–after–approving–new–model–bit/> accessed 22 October 2018; India reportedly offered to complete new agreements within a twelve month period based on its 2015 Model BIT.

1325 UNCTAD, 'Investment Policy Hub, International Investment Agreements Navigator: India' <http://investmentpolicyhub.unctad.org/IIA/CountryBits/96#iiaInnerMenu> accessed 10 Aug 2020

1326 See: 2020 Intra-EU BIT Termination Agreement; *Slovakia v Achmea* [31–60], esp [51–6]; EU Commission (19 July 2018) COM(2018) 547. See too: Kleinheisterkamp (2012) 15 JIEL 85, esp. 91–4; and Anskersmit (24 April 2018) Investment Treaty News

435. Withdrawal, of course, has its limits. The immediate efficacy of withdrawal is often severely constrained by IIAs' 'sunset' or 'survival' provisions.[1327] Further, while, correctly construed, Articles 70–72 ICSIDC provide that withdrawal from the Convention extinguishes State parties' consent to arbitrate as of the date notification is received,[1328] by making the performance of their dispute settlement obligations materially impossible, States withdrawing from ICSIDC without also withdrawing from their IIAs providing for ICSID arbitration may entail responsibility.[1329]

436. In addition to those that solely accept inter-State dispute settlement in new agreements,[1330] States are also increasingly conditioning their consent to investor-State arbitration. For example, access to ISDS under Chapter 14 of the (NAFTA-succeeding) USMCA has been dramatically reduced. Canada-US investments may no longer access ISDS and, with exceptions for State contracts in certain sectors (notably natural resources), US-Mexico investments will only have access to ISDS (in respect of claims alleging breach of national treatment, MFN or direct expropriation) after pursuing domestic remedies for 30 months.[1331] New Zealand has entered into 'side letters' (likely modifying agreements under Article 41 VCLT) with Australia, Brunei, Malaysia, Peru and Vietnam, suspending inter se the application of the CPTPP's ISDS provisions.[1332] There is also growing use of so-called 'fork-in-the-road' and 'no-U-turn' provisions.[1333] The Japan-Iran BIT, for example, prevents an investor from initiating arbitration in respect of claims that have been the subject of a final judgment in the host State's courts.[1334] In two further common trends, States have increasingly narrowed the category of nationals entitled to protection in an attempt to limit opportunities for parallel proceedings and (so-called) 'round-tripping', and forum- and treaty-shopping, including through the use of shell

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1327 ee: Harrison (2012) 13 JWT 928; Bordin in Kulick (ed) (CUP 2016) 209-29; and Voon and Mitchell (2016) 31 ICSIDR 413. Art 13(3) 2009 Pakistan-Germany BIT, eg, provides that its provisions will continue to apply '[i]n respect of investments made prior to the date of termination [...] for a further period of fifteen years from the date of termination'; see too: UNCTAD (9 Dec 2010) UNCTAD/WEB/DIAE/IA/2010/6

1328 *Fabrica de Vidrios* [283–305]

1329 Tzanakopoulos in Hofmann and Tams (eds) (Nomos 2011) 75-93; Schreuer in Waibel & ors (eds) (Kluwer 2010) 353-68, esp 367–8

1330 Notably: Brazil and the SADC and EFTA States: Johnson and Sachs in Bjorklund (ed) (OUP 2015) 25-68, 35; Johnson, Sachs and Coleman in Bjorklund (ed) (OUP 2016) 15-64, 49–50; Coleman & ors (2017) 71; Coleman & ors (2019) 124. For discussion, Kulick (2016)

1331 Annex 14-D USMCA

1332 New Zealand Ministry of Foreign Affairs and Trade, 'Investment and ISDS' <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/understanding-cptpp/investor-state-dispute-settlement>. Solomon (2019) Victoria University of Wellington Legal Research Paper No 31/2019; and Villiger (Brill 2009) 528–38

1333 See generally: Kaufmann-Kohler and Potestà (Springer 2020) 39–43

1334 Art 18(3) 2016 Japan-Iran BIT. See too: Art 19(5) 2019 Netherlands Model BIT

companies,[1335] and have included more detailed legality requirements that must be met as a precondition to a tribunal's exercise of jurisdiction.[1336] States' increasing tendency to omit umbrella provisions similarly limits (purely) contractual claims accessing ISDS.[1337]

437. It ought to be stressed that, despite States increasingly restricting or conditioning access to ISDS, there has not yet been a wholesale shift away from ISDS as the preferred dispute settlement mechanism under IIAs.[1338] While, as a general matter, recent signs of more critical engagement with ISDS is to be welcomed, it is for States to determine on a case-by-case basis whether to consent to ISDS — and on what terms. Given its availability is often seen as a core tool in attracting FDI, it is for each State to determine whether the potential benefits are worth the risk of exposure to adverse awards. This risk can be largely mitigated by reform of States' substantive obligations.

438. Before turning to this issue, something must be said of the EU's as-yet-nascent permanent multilateral investment court (MIC) (currently under consideration by UNCITRAL Working Group III) — recourse to which is already provided for in the 2018 EU-Vietnam IPA, 2018 EU-Singapore IPA and CETA.[1339] By *inter alia* replacing party-appointment with standing members, introducing strict standards on qualification, independence, and ethics, and introducing a (WTO-inspired) appellate mechanism, the proposed MIC has the potential to address several of the core complaints directed against ISDS as currently organised.[1340] But we ought to be sceptical of such an institution's capacity to bring about positive change for two reasons. First, a permanent MIC with standing and appellate jurisdiction may exhibit an institutional tendency toward substantive consolidation and convergence — and may seek consistent interpretative results even when unjustified. It may, in other words, act as (yet another) mechanism promoting back-door multilateralization. Nothing will prevent permanent judges from engaging in legislative projects in the same manner as party-appointed arbitrators.[1341] Second, as a

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1335 Typically by requiring an investor to conduct 'significant' or 'substantial' 'business activities' in its home State. See discussion in: Coleman & ors in Sachs, Johnson and Coleman (eds) (OUP 2019) 99-129, 103–9; Mistelis and Baltag (2018) Queen Mary School of Law Legal Studies Research Paper No 293/2018; and Hoffmann in Bungenberg & ors (eds) (Nomos 2015) 598-613

1336 Coleman & ors (2019) 132–5; and Miles (2012) 3 JIDS 329

1337 For eg, only one of the 29 agreements concluded in 2018 contained such a provision: UNCTAD, 'Taking Stock of IIA Reform: Recent Developments' (Jun 2019) <https://investmentpolicy.unctad.org/publications/1203/taking-stock-of-iia-reform-recent-developments> accessed 12 Aug 2020. See further:Pereira de Souza Fleury (2015) 31 Arb Intl 679, 688–90

1338 UNCTAD, 'Taking Stock of IIA Reform' (Jun 2019) Annex Table 2

1339 For a useful overview of debate and similar past proposals, see: St John and Chernykh (15 May 2018) EJIL:Talk!

1340 Van Harten suggested such a mechanism in 2007: Van Harten (2007) 180–84

1341 On this theme, see: Alvarez Zarate (2018) 59 BCLLR 2765. For similar concerns, see Bahrain's recent submissions to UNCITRAL Working Group III: (29 Aug 2019) A/CN.9/WG.III/WP.180 esp [4.2.5]

practical matter, as the cautionary example of ITLOS illustrates, there are dangers in establishing a permanent institution with materially limited, 'opt-in' jurisdiction.[1342] Given the MIC's utility will depend on uptake by States, it may be imprudent to establish yet another specialised international tribunal.[1343] Rather, many of the aims the MIC's creation hopes to achieve can be better accomplished through limited reform of the existing institutional framework and — principally — through substantive re-legislation.

7.4.5 Reforming States' substantive obligations

439. While the above are all steps forward, what is needed above all is change at the primary rule level. Given investment law's ills principally stem from the way its substantive obligations have historically been expressed, they can only be meaningfully and legitimately treated through substantive legislative reform. This process must — and can only — be completed by States.[1344] There are promising signs in treaty practice over the last decade that States' substantive obligations toward investors are being fundamentally restructured and diversified.[1345] However, because the majority of disputes to date have arisen under 'old-generation treaties' — which (in 2019) still accounted for 90 per cent of treaties in force — most innovations have not yet been subjected to third party interpretation.[1346] Given it remains to be seen whether existing innovations are sufficient or more radical re-legislation is necessary, I will simply highlight some more (and less) promising trends.

i. (Re)defining IIAs' objects and purposes in preambles

440. States' are increasingly updating IIAs' preambular texts to recognise a broader range of objectives than the often-formulaic preambles of 'old-generation' agreements.[1347] By clearly defining (increasingly diverse) objects and purposes States may 'nudge' tribunals away from the *de facto* maxim *in dubio pro investore* and encourage interpretative approaches that accom-

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1342 While its caseload is steadily growing, largely due to jurisdiction competition with the ICJ and Annex VII tribunals, the Tribunal has received only 29 applications in the 24 years it has been active, many of which prompt release proceedings under Art 292 UNCLOS. See: ITLOS, 'List of Cases' <https://www.itlos.org/cases/list-of-cases/> (last accessed 12 Aug 2020)

1343 A potential alternative is the use, creation, or reinvigoration of regional mechanisms. Anaya Vera and Polanco (June 2016) 13 TDM; Páez-Salgado and Pérez-Lozada (27 May 2016) Kluwer Arbitration Blog; and Swart (2 April 2018) Africa in Focus: Brookings Institute

1344 Foster (2012) 'Adjudication, Arbitration and the Turn to Public Law 'Standards of Review'', 527.

1345 According to UNCTAD figures, 434 agreements containing investment provisions were completed between 1 Jan 2010 and 12 Aug 2020 (215 in force). 226 are available in English. For overview of trends in practice, See, esp: Coleman & ors (2019); Coleman & ors (2019); Coleman & ors (2017)

1346 UNCTAD Secretariat (2 Sep 2019) TD/B/C.II/42 [3]

1347 See, illustratively, the preamble to the 1991 US-Argentina BIT, and tribunals' (controversial) constructions of the BIT's objects and purposes in, esp: *Sempra* [300, 372–4]; and *CMS* [353–4]

modate States' exercise of regulatory powers. While wording varies significantly, this has occurred through express references to (*inter alia*): the promotion of sustainable development;[1348] the protection of "human rights",[1349] including through investors' conduct and corporate social responsibility;[1350] environmental protection;[1351] labour standards;[1352] consumer protection;[1353] health and safety,[1354] and States' 'right to regulate' (both generally, and in respect of investment),[1355] or to pursue 'legitimate policy objectives'.[1356]

441. The CPTPP and CETA deserve particular attention, not least because these agreements' negotiation and completion were subject to intense public scrutiny and they represent the most detailed examples of States' attempts at (re)definition. In its preamble, the CPTPP parties resolve to 'establish a comprehensive regional agreement' that: 'promotes economic integration' to: 'liberalise trade and investment'; 'bring economic growth and social benefits'; 'create new opportunities for workers and businesses'; 'contribute to raising living standards'; 'benefit consumers'; 'reduce poverty'; and 'promote sustainable growth'. Importantly, this general aim is accompanied by the parties' recognition of their 'inherent right to regulate', and resolution to 'preserve':

> their flexibility to set legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals;

to 'promote':

1348 See, eg: 2010 New Zealand-Hong Kong CEPA; 2013 Canada-Tanzania BIT; 2015 China-Korea FTA; 2017 Rwanda-UAE BIT;

1349 See, eg: 2012 CACM-EU Agreement; 2019 Belarus-Hungary BIT

1350 See, eg: 2013 Austria-Nigeria BIT

1351 See, eg: 2010 Turkey-Senegal BIT; 2010 EFTA-Ukraine FTA; 2015 China-Korea FTA; and 2018 Japan-Jordan BIT. In a seemingly unique approach, the 2015 Norway Model BIT provides that its provisions and 'provisions of international agreements relating to the environment shall be interpreted in a mutually supportive manner'.

1352 See, eg: (different formulations in): 2010 Canada-Panama FTA; 2010 Austria-Kazakhstan BIT; 2018 Belarus-Turkey BIT; CPTPP; and 2018 EU-Singapore IPA. See, too: 2016 Czech Republic Model BIT; 2012 US Model BIT

1353 See, eg: 2010 Korea-Colombia BIT; and 2018 EU-Japan EPA. See, too: 2016 Czech Republic Model BIT

1354 2012 Mauritius-Kenya BIT; 2013 Austria-Nigeria BIT; 2018 EFTA-Indonesia CEPA; 2018 Japan-Jordan BIT. See, too: 2012 US Model BIT

1355 See, eg: 2011 Malaysia-India CECA; 2012 EU-Iraq PCA; 2013 New Zealand-Taiwan AEC; 2016 Morocco-Nigeria BIT; 2017 Colombia-UAE BIT; CPTPP; 2019 Australia-Hong Kong IA. See too: 2015 Brazil Model BIT; 2015 India Model BIT; 2016 Azerbaijan Model BIT; 2019 Netherlands Model BIT. Other States have opted to include more detailed 'savings' provisions. See, esp the 'right to regulate' provisions in: Art 4.8 2010 EFTA-Ukraine FTA; Art 4 2012 Turkey-Montenegro BIT; Art 11 2018 Argentina-UAE BIT; and Art 2.2 2019 EU-Vietnam IPA

1356 See, eg: CETA; 2017 PACER Plus; 2018 EU-Singapore IPA; 2018 Argentina-UAE BIT; 2019 Australia-Hong Kong IA; 2019 Hong Kong-UAE BIT; 2019 Australia-Uruguay BIT. See too: 2019 BLEU Model BIT; and 2019 Netherlands Model BIT

> high levels of environmental protection, including through effective enforcement of environmental laws, and further the aims of sustainable development, including through mutually supportive trade and environmental policies and practices;

and to 'protect and enforce labour rights, improve working conditions and living standards, strengthen cooperation and the Parties' capacity on labour issues'.

442. The CETA parties similarly recognise in its preamble (inter alia) that its provisions 'preserve' the parties' 'right […] to regulate within their territories' and their 'flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity'. It then affirms the parties' commitments under the 2005 UNESCO Convention and their rights 'to preserve, develop and implement their cultural policies', including through supporting 'cultural industries' and the use of 'regulatory measures' and 'financial support' to preserve cultural identity. Importantly, it reaffirms that the provisions on investment protection, 'are intended to stimulate mutually-beneficial business activity, without undermining the right of the Parties to regulate in the public interest within their territories'. It then reaffirms the parties' commitment to promoting 'sustainable development and the development of international trade in such a way as to contribute to sustainable development in its economic, social and environmental dimensions', and encourages 'enterprises operating within their territory or subject to their jurisdiction to respect internationally recognised guidelines and principles of corporate social responsibility […] and to pursue best practices of responsible business conduct'. The parties also resolve to implement the agreement 'in a manner consistent with the enforcement of their respective labour and environmental laws' and that 'enhances their levels of labour and environmental protection', and 'build[s] upon their international commitments on labour and environmental matters'.

443. While such moves are to be welcomed, it remains to be seen how effective they will be as a constraint on third party interpretation. The more detailed approaches adopted in the CPTPP and CETA are to be preferred to more open-grained approaches referring, for example, only to 'sustainable development', 'legitimate policy objectives', or States' 'right to regulate'. More clearly defining agreements' objects and purposes in preambles should, however, be only one step taken to limit the interpretative latitude afforded by treaty terms and to more clearly define States' 'regulatory space'.

ii. Revising obligations to afford fair and equitable treatment

444. Certain States have recently taken steps to reduce the interpretative latitude permitted by FET provisions in 'old-generation' agreements. While there are clear trends in approaches, the precise wording employed in each treaty will generate (sometimes slightly, sometimes widely)

different obligations. Such differences reflect the varied commitments States are willing to make to investors (from a co-party), which in turn reflect governments' varied preferences regarding the optimal State-market and State-individual relationships.

445. One welcome approach is to be found in, for example, Brazil's and India's recent treaty practice, in which references to 'fair and equitable treatment' have been replaced by more specific obligations — which reflect a level of treatment much closer to the arbitrariness standard articulated in *ELSI* and the minimum standard reflected in *Neer*.[1357] The 2015 Brazil-Malawi BIT, for example, replaces FET with two categories of obligation, entitled 'non-discrimination' (Article 10) and 'transparency' (Article 11). Going a step further, the 2018 Brazil-Ethiopia BIT requires (only) that 'investments and investors' be accorded 'due process of law' (Article 4(2)), and that 'all measures that affect investment are administered in a reasonable, objective and impartial manner, in accordance with their respective laws and regulations (Article 4(3)). Article 4.1 2020 Brazil-India BIT similarly requires that the parties' refrain from adopting measures which constitute: (a) 'denial of justice in any judicial or administrative proceedings'; (b) 'fundamental breach of due process'; (c) 'targeted discrimination, such as gender, race or religious belief'; (d) 'manifestly abusive treatment, such as coercion, duress and harassment'; or (e) 'discrimination in matters of law enforcement, including the provision of physical security'. India has adopted a similar approach in its 2015 Model BIT.

446. Other States have attempted to more strictly define the circumstances in which treatment will violate parties' obligations to afford FET. As De Brabandere notes, there are two broad approaches in recent treaties that have retained reference to FET: (i) specifically linking FET to the customary IMS; and (ii) expressly listing categories of conduct constituting unfair or inequitable treatment, or providing indicia for determining when treatment is unfair and inequitable.[1358]

447. Many of the approaches within the first category seem to be inspired by the NAFTA FTC 2001 Interpretative Notes, and sublimate FET within the customary IMS, which provides a ceiling of protection. For example, Article 9.5(1) 2018 Central America-Korea FTA (CAKFTA) provides that the parties afford 'covered investments treatment in accordance with customary international law, including fair and equitable treatment, and full protection and security'. Article 9.5(2) elaborates that paragraph (1) 'prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment', and that the 'concepts

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1357 What some tribunals have labelled the 'manifest arbitrariness' standard. Coleman & ors (2019) 113–14. Several other recent agreements, including those to which the EU is party, have taken similar steps. Coleman & ors (2019) 115–7

1358 De Brabandere in Kulick (ed) (CUP 2016) 285-308, 296–300

of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights'. Importantly, Article 9.5(2)(a) states that '"fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings, in accordance with the principle of due process embodied in the principal legal systems of the world', and (b) clarifies that '"full protection and security" requires each Party to provide the level of police protection required under customary international law.'[1359] A common variation, present, for example, in Article 8.6 2018 Australia-Peru FTA, clarifies that 'the mere fact' that a party's conduct is 'inconsistent with an investor's expectations', or a 'subsidy or grant' is refused, reduced or withdrawn, does not entail breach of the obligations, even if an investor incurs 'loss or damage'.

448. As has been noted, it remains to be seen how such attempts at clarification will be construed. For example, the use of the term 'includes' in defining FET leaves a potentially wide interpretative latitude.[1360] Many formulations leave space for an interpreter to take into account an investor's expectations. Additionally, given some of these agreements still contain duties to refrain from impairing investments through unreasonable, arbitrary, or discriminatory measures, there remain potential avenues for constructions similar to those adopted in interpreting conventional FET provisions.[1361] The main limitation of such formulations, however, lies in the scope permitted for an interpreter to adopt the position that the customary IMS has seen an upward shift, so that the standard is now materially indiscernible from the FET 'standard' described in arbitral practice.[1362]

449. An example of the second — preferable — approach is to be found in Article 2.4 EU-Singapore IPA, which requires the parties to afford investments 'fair and equitable treatment and full protection and security in accordance with paragraphs 2 to 6'. Article 2.4(2) states that a breach of FET may occur (only) through: (a) 'denial of justice in criminal, civil and administrative proceedings'; (b) 'a fundamental breach of due process'; (c) 'manifestly arbitrary conduct'; or (d) 'harassment, coercion, abuse of power or similar bad faith conduct'. Perhaps the most welcome addition is the IPA's detailed treatment of the role of investors' expectations in

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1359 With some variation, see too, eg: Art 9.6 CPTPP; Art 11.6 2010 Costa Rica-Singapore FTA; Art 9.5 2010 Korea-Peru FTA; Art 8.5 2013 Colombia-Korea FTA; Art 10.3 2018 Singapore-Sri Lanka FTA; Art 14.7 2019 Australia-Indonesia CEPA; and Art 8 2019 Australia-Hong Kong IA

1360 See discussion in: Coleman & ors (2019) 110–11

1361 Coleman & ors (2019) 117

1362 See, eg: Dolzer's expert testimony for the claimant in: *Windstream* [340]; and tribunal's approach in: *Bilcon* [427–44]. See further: Gaukrodger (2017) OECD Working Papers on International Investment 2017/03

assessing FET and the consequences that arise when a party violates such expectations. Article 2.4(6) provides that where a party gives 'specific and clearly spelt out commitment in a contractual written obligation towards a covered investor […] with respect to the covered investor's investment or towards such covered investment, that Party shall not frustrate or undermine the said commitment through the exercise of its governmental authority', either (a) 'deliberately'; or (b) by 'substantially alter[ing] the balance of rights and obligation in the contractual written obligation' unless it provides 'reasonable compensation', restoring the investor 'to a position which it would have been in had the frustration or undermining not occurred.' While permitting flexible application, this formulation both provides an exhaustive list of the means through which breach can occur and indicates (through the conduct listed) the appropriate intensity of inquiry. Notably, a similar approach is adopted in Article 8.10 CETA.

iii. Refining expropriation provisions

450. In addition to those States that have limited protection to direct expropriation,[1363] States have recently attempted to clarify the duty to refrain from uncompensated expropriation — and, particularly, when measures will constitute indirect expropriation. One step forward is the increased express recognition in treaty texts that only measures that 'interfere' with 'rights' and 'interests' in property that are legally recognised in the host State can be expropriated.[1364] While the notion of 'interference', and the nature of 'interests' in property (as opposed to 'rights') generate some ambiguity, such moves will go some way in addressing the tendency amongst tribunals of regarding economic harm — including loss of future profits — as the main indicator for (indirect) expropriation.

451. States have also sought to clarify the definition of indirect expropriation. A currently prevailing approach, recently adopted by a diverse range of States,[1365] is based on the approach adopted in the 2012 US Model BIT, which provides that whether measures constitute indirect expropriation 'requires a case-by-case, fact-based inquiry' considering 'among other factors':

> (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

1363 See, eg: Art 7(1) 2018 Brazil-Ethiopia BIT

1364 See, eg:, referring only to 'rights': Annex 9-C 2018 Korea-Central America FTA; and Annex 12-B(1) 2015 China-Korea FTA. Referring to both 'rights' and 'interests', see, eg: Annex 14-B(1) USMCA; Annex 11.1 2010 Costa Rica-Singapore FTA

1365 See, eg: Annex 10-A(2)(a) 2018 Sri Lanka-Singapore FTA; Annex II 2019 Australia-Hong Kong IA; Annex 8-B(3)(a) 2013 Colombia-Korea FTA; and *ad* Art 5(4) 2010 India-Latvia BIT (India has since departed from this formulation in its recent agreements and 2015 Model BIT)

> (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
>
> (iii) the character of the government action.[1366]

It also, however, provides that:

> (b) [e]xcept in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

As will be recalled from Chapter 4, this test is a close approximation of the three-prong test for regulatory takings adopted by the US Supreme Court in *Penn Central*,[1367] and should be understood as a (seemingly somewhat successful) attempt at universalising US takings law.[1368]

452. While undoubtedly preferable to the once-standard formulations capturing all measures 'equivalent' or 'tantamount' to expropriation, formulations based on the above raise several concerns. Three deserve briefly highlighting. The first is the place afforded to investors' expectations. While plausibly relevant in assessing other categories of obligation, investors' expectations (however reasonably or legitimately held) ought logically to have no bearing on whether a measure constitutes expropriation. The sole test for indirect expropriation ought to be whether the freedom to use the bundle of rights that make up an interest in property has been so severely impacted that the limiting measures can be equated to a direct appropriation. The second arises due to the reference to a measure's 'character'. This open-ended criterion will likely generate a range of interpretative approaches. The third stems from the attempt to carve-out 'regulatory actions'. States seem to have settled on the phrase 'legitimate public welfare objectives' as the preferred means for describing and protecting States' capacities to define and pursue the public interest.[1369] However, while the 'except in rare circumstances' establishes a presumption that non-discriminatory regulatory action will not constitute indirect expropriation, the inclusion of the term 'legitimate' potentially opens the door for an intrusive inquiry.[1370]

iv. Expanding sectoral exclusions and exceptions provisions

453. In addition to redefining core obligations, States have also increasingly sought to protect their freedom to define and pursue the public interest through sectoral exclusions and exceptions

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1366 Annex B 2012 US Model BIT

1367 Sec 4.3

1368 But see: Sanders (2010) 375–81

1369 The phrase is used beyond expropriation provisions; eg Art 5.2 2020 Brazil-India BIT and Art 14.4(1) 2019 Australia-Indonesia CEPA use the phrase in the context of national treatment.

1370 See further: Zhu (2019) 405–16

provisions. Sectoral carve-outs (whether partial or complete) are increasingly common, in particular, to exclude prudential financial regulation, taxation measures, subsidies, and financial services from agreements' rules on investment protection, or from ISDS.[1371] Article 29.5 CPTTP notably permits parties to elect to deny access to ISDS for claims concerning 'tobacco control measures'.[1372] It is, of course, entirely for States to determine whether the protections afforded to investors will cover all areas of economic activity and categories of State conduct. Given the range of approaches adopted and diversity of wording employed, it suffices to note that the effects of many such carve-outs remain to be determined through third party interpretation.[1373]

454. Potentially more significant issues arise in respect of States' recent approaches to general exceptions. An issue that deserves particular attention is the prevailing practice of transposing (with or without amendment), or incorporating by reference,[1374] the general exceptions provisions contained in Articles XX GATT and XIV GATS. At first glance, we may perhaps welcome such provisions' inclusion on the grounds that recognition of exceptions for, *inter alia*, public morals, human, plant and animal life and health, and environmental protection will preserve more regulatory flexibility for host States.

455. We ought, however, to be concerned by this practice for three reasons. The first is that, while there are some similarities, the substantive obligations States owe under, for example, the GATT, and in IIAs differ fundamentally. There is therefore a degree of unpredictability in attempting to re-purpose exceptions designed to function against another completely different set of (increasingly diverse) substantive obligations. The second is the degree to which the incorporation of such exceptions links an agreement to the law and practice of the WTO — and, especially the relevance of WTO panels and the AB's interpretations of Article XX GATT and Article XIV GATS. The third relates to the flexibility in fact permitted by standard formulations, given many formulations bring across the language of necessity,[1375] usually understood in the WTO context to require the satisfaction of a least-restrictive-means test and

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1371 See, esp: Coleman & ors (2019) 125–8; UNCTAD, 'IIA Reform' (Jun 2019), 2, Annex Table 1

1372 Defined as a measure 'related to the production or consumption of manufactured tobacco products (including products made or derived from tobacco), their distribution, labelling, packaging, advertising, marketing, promotion, sale, purchase, or use, as well as enforcement measures, such as inspection, recordkeeping, and reporting requirements.' See further: Voon (2020) 37 Aust YbIL 89

1373 See further: Korzun (2016) 50 Vand J Transnat'l L 355

1374 Eg Art 15 2018 Argentina-Japan BIT simply provides that: 'Article XX of the GATT 1994 and Article XIV of the GATS are incorporated into and form part of this Agreement, *mutatis mutandis*.'

1375 See, illustratively: Art 8.18 2018 Peru-Australia FTA; Art 10.23 2018 Singapore-Sri Lanka BIT; Art 23 2020 Brazil-India BIT; Art 24 2015 Norway Model BIT. See too: Art 2(2) 2019 Netherlands Model BIT's use of similar language in its 'scope of operation provisions

involving a 'weighing-and-balancing' of competing factors.[1376] There is, in other words, significant scope for an adjudicator applying such general exceptions to construe them restrictively and to engage in a high-intensity inquiry approaching *de novo* review. As with many of the reforms considered in this section, it remains to be seen how well such provisions will survive first contact with a tribunal. Variations in formulations between IIAs — both of exceptions and substantive obligations — will likely yield a range of approaches.[1377]

v. Informal mechanisms for substantive legislative reform

456. Finally, something must briefly be said regarding the potential of what we might call 'informal' mechanisms for changing investment law's substantive obligations — those that do not require formal treaty amendment. As explored in Chapter 6 when considering whether the police powers doctrine and proportionality principle are recognised in custom, States' pleadings before investment tribunals constitute another potential avenue for legislative change — through the accretion of State practice and *opinio juris* relevant in customary rule ascertainment. It might be argued that this avenue represents a further opportunity for States to adjust their substantive obligations, particularly if we adopt the view that the standard formulations of FET and expropriation obligations refer implicitly to custom.

457. However, while States must be aware of the potential for their pleadings to have legislative effect (in aggregate) this process remains too slow, too diffuse, too indirect, and too inefficient to present many (positive) prospects. As already noted, the exigencies of dispute settlement often require certain arguments to be made or addressed. More importantly, arbitrators and claimant investors play too central a role in shaping (and recording) the diffuse 'discourse' on the content and operation of customary obligations that occurs in proceedings for this avenue to generate positive legislative change.

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1376 Above: Sec 5.3

1377 See further analysis in: Keene (2017) 18 JWI&T 62; Wu in Douglas, Pauwelyn and Viñuales (eds) (OUP 2014) 169-209; Mitchell, Munro and Voon (2018) 354–5; Kurtz (2016) 168 ff

8

GENERAL CONCLUSION

458. As this thesis explored, the turn to public law in investment law and arbitration arose primarily as an attempt at addressing central aspects of the field's enduring legitimacy crisis. Scholars, and certain practitioners, turned to domestic constitutional and administrative law — and to the law and practice of courts and tribunals in substantive areas of the international legal order alleged to constitute a new 'international public law' and which they considered were deciding questions analogous to those arising in investment disputes — largely in response to the critiques that investment law (as interpreted and applied by tribunals) was indeterminate and produced inconsistent and imbalanced outcomes. This turn also followed increased recognition of the potential for the obligations States assume in IIAs to impose limits on States capacities to define and pursue the public interest and awareness that the open-grained language used in many agreements — both a result and reflection of the shallow normative consensus underpinning States' rapid completion of IIAs from the late 1980s to early 2000s — provided little assistance for tribunals, whose task (it was alleged) was to balance competing public and private interests.

459. As an ideational shift, especially during its emergence in the early 2000s and 2010s, the turn to public law sought principally to challenge a then-prevailing assumption that investment law and arbitration were principally private in nature. Scholars analogising investment law with domestic public law and regional rights-based adjudication made valuable contributions to debate by emphasising the essentially 'public' aspects of investment law and arbitration, and destabilising the (once often uncritically-held) assumption that the field's closest analogue is commercial arbitration.

460. As a normative project, the turn to public law sought to promote the accommodation of competing public and private interests by making theory and practice in the field more susceptible to insights from domestic public law and other alleged analogous substantive areas of the international legal order. For many endorsing the public law analogy, this required a greater emphasis on comparative methodologies and increased reliance on general principles of law — especially those derived from domestic public law — in settling investment disputes. An

implicit aim of the turn to public law, therefore, was to contribute to the creation of a more coherent, global, law of investment protection. In this way, the turn to public law drew upon and mirrored broader currents prevailing in international legal scholarship concerned with the recognition of forms of public law beyond the State, and the development of bodies of (universal) rules governing public authority wherever exercised — largely driven by a network of scholars based, often, in Amsterdam, Hamburg, Heidelberg, or New York.

461. Examining investment tribunals' decisions revealed, however, a disjuncture between the above aims and the ways the turn to public law has so far manifested in arbitral practice. There has not yet been anything resembling a move toward deeper normative integration with domestic public law or other allegedly analogous substantive areas of international law through the widespread use of comparative methods or reasoning. Neither has there been an express increase in the use of general principles. Rather, tribunals' turn to public law has manifested in a far less structured, and more diffuse, phenomenon of conceptual borrowing. Through this process, tribunals have made increased use of concepts originating in domestic administrative or constitutional law that (when first employed) found no concrete expression in treaty texts.

462. Subjecting two such concepts — the police powers doctrine and proportionality principle — to critical and comprehensive examination on both quantitative and qualitative grounds revealed that each has been employed in a variety of interpretative contexts, and has been ascribed diverse weight in analyses, has generated diverse structures and intensities of inquiry, and has produced a range of results. Hence, arbitral recourse to these concepts suggests that rather than constraining arbitral discretion and generating a more consistent (or inherently more balanced) jurisprudence, the simultaneously flexible, yet inherently values-dependent nature of borrowed public law concepts has in fact contributed to a proliferation of approaches, reflecting — and in fact reinforcing — a variety of constructions of the ideal State-market and State-individual relationships, and the appropriate degree of protection to be afforded to foreign-owned capital. We can conclude, therefore, that many of the promised benefits of the turn to public law have not yet materialised.

463. More problematically, the examination of arbitral practice revealed that, overwhelmingly, recourse to borrowed public law concepts cannot be reconciled with the customary rules on law ascertainment and interpretation. Once again focusing on practice concerning the police powers doctrine and proportionality principle, it was shown that recourse to borrowed public law concepts can only be justified in limited circumstances — most notably when they find express incorporation in treaty provisions, and when they constitute relevant rules of domestic law applicable in the relationship between investors and host States. Significantly, it was shown that, despite clear trends toward their recognition, based on evidence of State practice and

opinio juris — particularly States' pleadings before investment tribunals — neither concept has yet achieved customary status. It was further argued that it has yet to be convincingly demonstrated that either constitutes a general principle of international law. While further research is needed to confirm this, the general lessons learned through examining the police powers doctrine and proportionality principle can equally be applied to other borrowed public law concepts, especially the margin of appreciation and legitimate expectations doctrines. As such, we ought to understand the use of borrowed public law concepts as a form of arbitral legislation.

464. It was further shown that, while arbitral practice has the potential to generate truly legislative results — for example, through States' acceptance and repetition of particular constructions, either under the rules on subsequent practice or agreements, or through the emergence of new custom — such would not result in norms of universal relevance. Were a norm originating in domestic public law to achieve the status of general international law, its direct application or interpretative effects will depend entirely on the wording of the agreement under which a dispute arises. The precise role to be played by such concepts is governed by the amount of 'space' left, *in casu*, by an agreement's terms, whether provisions expressly or implicitly refer to general international law, and how the treaty parties approach the temporal question. A significant portion of arbitral recourse to the two concepts explored would exceed what would be permissible in light of these considerations, even assuming, *arguendo*, that the police powers doctrine or proportionality principle constitute potentially applicable rules of general international law.

465. An important, more general, consideration arises in this context. The turn to public law, in scholarship and in practice, stem from and are wedded to the notion that the core obligations in IIAs are open-grained and provide little in the way of assistance to tribunals. There was, in other words, a certain functional logic underpinning the turn to public law: the need for mechanisms to appropriately overcome indeterminacy. Proportionality analysis, for example, could particularly help tribunals to identify — absent any further guidance in treaty texts — when States' conduct was (particularly) 'unfair' or 'inequitable'. Likewise, by carving out certain conduct, the police powers doctrine could assist tribunals to identify when action was 'tantamount' or 'equivalent' to expropriation. Arbitral practice shows us, however, that this logic has generated certain costs. It has contributed to a further proliferation of arbitral approaches on key interpretative questions. As the varied arbitral constructions of States' police powers and the use of proportionality analysis attest, some of these approaches involve an undesirable shift toward merits-based, substantive review of States' conduct that find little support in treaty texts or States' customary obligations toward investors.

466. The answer, however, is not that the turn to public law as it has so far manifested has been insufficiently connected with comparative methodologies or a meaningful engagement with theory and practice within (allegedly) analogous fields such as domestic constitutional and administrative law, or regional rights-based adjudication. The inherent complexity of comparative research and the often heavily values-based and context-dependent nature of public law concepts and approaches means that even a widespread adoption of a comparative public law analytical framework is unlikely to generate the results intended by its proponents. Further, were calls to reimagine investment law and arbitration as international public law to succeed, this would result in a fundamental restructuring of the arbitral function and of the limited bargains States enter into when they ratify IIAs.

467. Rather, the (real and imagined) problems that the turn to public law hopes to address can better be addressed using the existing practical and doctrinal tools available when investment law is understood solely as public international law. Given most of the field's ills stem from indeterminacy in the substantive obligations States owe investors, they can only be properly and legitimately addressed through substantive legislative reform. Rather than through reference to concepts, principles and approaches employed at the domestic level or borrowed uncritically from other allegedly analogous substantive areas of international law and practice, it is ultimately for States to determine how much freedom they retain to define and pursue the public interest — in other words, to demark their 'regulatory powers'. As States' recent treaty practice evidences — while its results remain to be seen — this process is already underway. I identified above some of the more promising attempts at reform.

468. Importantly, as States' obligations toward investors gradually diversify, the logic originally underpinning the turn to public law in investment law and arbitration becomes less and less convincing. The normative 'gaps' and indeterminacies the turn to public law concepts and approaches was aimed at addressing will likely be replaced with a host of new questions, including concerning the proper construction of reformulated obligations, carve-outs, and exceptions provisions. It remains to be seen how arbitrators adapt to these new legislative realities. How they do so, will, as ever, have important consequences for States' capacities to define and pursue the public interest. Further scrutiny will be necessary to track tribunals' reactions to legislative change and willingness to move away from established interpretative practices — including the use of borrowed public law concepts.

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ANNEX 1:
LIST OF TERMS USED TO IDENTIFY RELEVANT PRACTICE

Table 1: Search terms used in identifying relevant arbitral and State practice

Target concept	Keywords
'arbitral balancing'	"weigh" OR "weighing" OR "balance" OR "balancing" OR "balance of interests"
'comparativism'	"municipal law" OR "domestic law" OR "national law" OR "court" OR "courts" OR "courts and tribunals" OR "comparative" OR "some countries" OR "other countries" OR "many countries" OR "countries' law" OR "countries' legislation" OR "countries" OR "states' law" OR "states' legislation"
'deference'	"defer" OR "deference"
'legitimate expectations'	"legitimate expectation" OR "reasonable expectation" OR "investment-backed expectation"
'margin of appreciation'	"margin of appreciation" OR "margin of discretion" OR "margin of deference"
'police powers doctrine'	"police powers doctrine" OR "police power" OR "police powers" OR "police"
'proportionality'	"proportionality" OR "proportionate" OR "proportional" OR "disproportionality" OR "disproportionate" OR "disproportional" OR "proportion" OR "disproportion" OR "in proportion" OR "out of proportion" OR "proportionately" OR "disproportionately"
'reasonableness review'	"reasonableness" OR "reasonable" OR "reasonable relationship" OR "unreasonableness" OR "unreasonable" OR "unreasonable relationship" OR "rational relationship" OR "rationality" OR "rational" OR "irrationality" OR "irrational"
'regulatory powers'	"regulatory power" OR "regulatory powers" OR "regulatory policy" OR "regulatory objective" OR "legislative objective" OR "legislative policy" OR "legitimate policy" OR "legitimate objective" OR "reasonable policy" OR "reasonable objective" OR "policy" OR "public interest" OR "public welfare" OR "general interest" OR "general welfare"
'right to regulate'	"right to regulate" OR "right to govern" OR "right to legislate" OR "right to adopt" OR "to regulate" OR "legislative power" OR "executive power" OR "administrative power" OR "governmental power" OR "powers of government"
'standard of review'	"standard of review" OR "intensity of review" OR "review standard" OR "review intensity"

ANNEX 2:
DECISIONS COMPRISING STUDY CORPUS

Table 2: Decisions of* ad hoc *investment tribunals comprising corpus of arbitral practice (sorted chronologically)

No	Full citation
1	*AAPL v Sri Lanka* [Dissenting Opinion of S Asante] (27 Jun 1990) ICSID Case No ARB/87/3
2	*AAPL v Sri Lanka* [Final Award] (27 June 1990) ICSID Case No ARB/87/3
3	*Southern Pacific Properties (Middle East) Ltd v Egypt* [Award] (20 May 1992) ICSID Case No ARB/84/3
4	*Vacuum Salt Products Ltd v Ghana* [Award] (16 Feb 1994) ICSID Case No ARB/92/1
5	*Saar Papier Vertriebs GmbH v Poland v Poland* [Interim Award] (17 Aug 1994) UNCITRAL
6	*Saar Papier Vertriebs GmbH v Poland v Poland* [Dissenting Opinion to the Interim Award of T Szurski] (24 Sep 1994) UNCITRAL
7	*Saar Papier Vertriebs GmbH v Poland* [Dissenting Opinion of T Szurski] (16 Oct 1995) UNCITRAL
8	*Saar Papier Vertriebs GmbH v Poland v Poland* [Final Award] (16 Oct 1995) UNCITRAL
9	*Tradex Hellas SA v Albania* [Decision on Jurisdiction] (24 Dec 1996) ICSID Case No ARB/94/2
10	*Cable Television of Nevis Ltd v St Kitts and Nevis* [Award] (13 Jan 1997) ICSID Case No ARB/95/2
11	*American Manufacturing & Trading Inc v Zaire* [Award] (21 Feb 1997) ICSID Case No ARB/93/1
12	*Fedax NV v Venezuela* [Decision on Jurisdiction] (11 Jul 1997) ICSID Case No ARB/96/3
13	*Fedax NV v Venezuela* [Award] (9 Mar 1998) ICSID Case No ARB/96/3
14	*Ethyl Corp v Canada* [Award on Jurisdiction] (24 Jun 1998)
15	*Franz Sedelmayer v Russia* [Award] (7 Jul 1998) SCC
16	*Lanco International Inc v Argentina* [Decision on Jurisdiction] (8 Dec 1998) ICSID Case No ARB/97/6
17	*Antoine Goetz & ors v Burundi* [Award] (10 Feb 1999) ICSID Case No ARB/95/3
18	*Tradex Hellas SA v Albania* [Award] (29 Apr 1999) ICSID Case No ARB/94/2
19	*Ceskoslovenska Obchodni Banka AS v Slovakia* [Decision on Jurisdiction] (24 May 1999) ICSID Case No ARB/97/4
20	*Wena Hotels v Egypt* [Decision on Jurisdiction] (29 Jun 1999) ICSID Case No ARB/98/6
21	*Robert Azinian, Kenneth Davitian, & Ellen Baca v Mexico* [Award] (1 Nov 1999) ICSID Case No ARB (AF)/97/2
22	*Emilio Agustín Maffezini v Spain* [Decision on Jurisdiction] (25 Jan 2000) ICSID Case No ARB/97/7
23	*Santa Elena SA v Costa Rica* [Award] (17 Feb 2000) ICSID Case No ARB/96/1
24	*Waste Management v Mexico* [Dissenting Opinion of K Highet] (8 May 2000) ICSID Case No ARB(AF)/98/2
25	*Waste Management Inc v Mexico* [Arbitral Award] (2 Jun 2000) ICSID Case No ARB(AF)/98/2
26	*Pope & Talbot Inc v Canada* [Interim Award] (26 Jun 2000) UNCITRAL
27	*Eudoro Armando Olguin v Paraguay* [Decision on Jurisdiction] (8 Aug 2000) ICSID Case No ARB/98/5
28	*Metalclad Corp v Mexico* [Award] (30 Aug 2000) ICSID Case No ARB(AF)/97/1
29	*Banro American Resources v DRC* [Award] (1 Sep 2000) ICSID Case No ARB/98/7
30	*Ronald S Lauder v Czech Republic* [Award] (3 September 2000) UNCITRAL
31	*Joseph Charles Lemire v Ukraine* [Award] (18 Sep 2000) ICSID Case No ARB(AF)/98/1

32	*SwemBalt AB v Latvia* [Decision by the Court of Arbitration] (23 Oct 2000) UNCITRAL
33	*SD Myers Inc v Canada* [Separate Opinion of B P Schwartz to Partial Award] (12 Nov 2000) UNCITRAL
34	*Emilio Agustín Maffezini v Spain* [Award] (13 Nov 2000) ICSID Case No ARB/97/7
35	*SD Myers Inc v Canada* [Partial Award] (13 Nov 2000) UNCITRAL
36	*Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v Argentina* [Award] (21 Nov 2000) ICSID Case No ARB/97/3
37	*Philippe Gruslin v Malaysia* [Award] (27 Nov 2000) ICSID Case No ARB/99/3
38	*Ceskoslovenska Obchodni Banka AS v Slovakia* [Further Decision on Jurisdiction] (1 Dec 2000) ICSID Case No ARB/97/4
39	*Marvin Roy Feldman Karpa v Mexico* [Interim Decision on Jurisdiction] (6 Dec 2000) ICSID Case No ARB(AF)/99/1
40	*Wena Hotels Ltd v Egypt* [Award] (8 Dec 2000) ICSID Case No ARB/98/6
41	*Loewen Group, Inc and Raymond L Loewen v United States* [Decision on Jurisdiction] (5 Jan 2001) ICSID Case No ARB/98/3
42	*Link-Trading v Moldova* [Award on Jurisdiction] (16 Feb 2001) UNCITRAL
43	*Pope & Talbot Inc v Canada* [Award on the Merits, Phase 2] (10 Apr 2001) UNCITRAL
44	*Alex Genin, Eastern Credit Limited, Inc and AS Baltoil v Estonia* [Award] (25 Jun 2001) ICSID Case No ARB/99/2
45	*Salini Costruttori SPA v Morocco* [Decision on Jurisdiction] (23 Jul 2001) ICSID Case No ARB/00/4
46	*Eudoro Armando Olguín v Paraguay* [Award] (26 Jul 2001) ICSID Case No ARB/98/5
47	*Ronald S Lauder v Czech Republic* [Final Award] (3 September 2001) UNCITRAL
48	*CME Czech Republic BV v Czech Republic* [Dissenting Opinion to Partial Award of J Handl] (11 Sep 2001) UNCITRAL
49	*CME Czech Republic BV v Czech Republic* [Partial Award] (13 Sep 2001) UNCITRAL
50	*Wena Hotels Ltd v Egypt* [Decision on Annulment] (5 Feb 2002) ICSID Case No ARB/98/6
51	*Mihaly International Corp v Sri Lanka* [Award] (15 Mar 2002) ICSID Case No ARB/00/2
52	*Middle East Cement Shipping and Handling v Egypt* [Award] (12 Apr 2002) ICSID Case No ARB/99/6
53	*Link-Trading Joint Stock Co v Moldova* [Final Award] (18 Apr 2002) UNCITRAL
54	*Pope & Talbot Inc v Canada* [Award on Damages] (31 May 2002) UNCITRAL
55	*Waste Management Inc v Mexico* [Decision on Preliminary Objection] (26 Jun 2002) ICSID Case No ARB(AF)/00/3
56	*Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v Argentina* [Decision on Annulment] (3 Jul 2002) ICSID Case No ARB/97/3
57	*Methanex Corp v United States* [Partial Award] (7 Aug 2002) UNCITRAL
58	*Mondev International Ltd v United States* [Award] (11 Oct 2002) ICSID Case No ARB(AF)/99/2
59	*SD Myers Inc v Canada* [Second Partial Award] (21 Oct 2002) UNCITRAL
60	*United Parcel Service of America Inc v Canada* [Award on Jurisdiction] (22 Nov 2002) ICSID Case No UNCT/02/1
61	*Marvin Roy Feldman Karpa v Mexico* [Dissenting Opinion of JC Bravo] (3 Dec 2002) ICSID Case No ARB(AF)/99/1
62	*Marvin Roy Feldman Karpa v Mexico* [Award] (16 Dec 2002) ICSID Case No ARB(AF)/99/1
63	*SD Myers Inc v Canada* [Final Award] (30 Dec 2002) UNCITRAL
64	*ADF Group Inc v United States* [Award] (9 Jan 2003) ICSID Case No ARB (AF)/00/1
65	*Petrobart Ltd v Kyrgyzstan* [Award] (13 Feb 2003) UNCITRAL
66	*CME Czech Republic BV v Czech Republic* [Final Award] (14 Mar 2003) UNCITRAL
67	*Yaung Chi Oo Trading Ltd v Myanmar* [Award] (31 Mar 2003) ASEAN ID Case No ARB/01/1

68	*Técnicas Medioambientales Tecmed, SA v Mexico* [Award] (29 May 2003) ICSID Case No ARB (AF)/00/2
69	*Loewen Group, Inc and Raymond L Loewen v United States* [Award] (26 Jun 2003) ICSID Case No ARB(AF)/98/3
70	*CMS Gas Transmission Co v Argentina* [Decision on Jurisdiction] (17 Jul 2003) ICSID Case No ARB/01/8
71	*Fireman's Fund Insurance Co v Mexico* [Award on Jurisdiction] (17 Jul 2003) ICSID Case No ARB(AF)/02/1
72	*SGS Société Générale de Surveillance SA v Pakistan* [Decision on Jurisdiction] (6 Aug 2003) ICSID Case No ARB/01/13
73	*William Nagel v Czech Republic* [Final Award] (9 Sep 2003) SCC Case No V 049/2002
74	*Generation Ukraine Inc v Ukraine* [Award] (16 Sep 2003) ICSID Case No ARB/00/9
75	*Autopista Concesionada de Venezuela v Venezuela* [Award] (23 Sep 2003) ICSID Case No ARB/00/5
76	*AIG Capital Partners Inc v Kazakhstan* [Award] (7 Oct 2003) ICSID Case No ARB/01/6
77	*Champion Trading Co, Ameritrade International, Inc v Egypt* [Decision on Jurisdiction] (21 Oct 2003) ICSID Case No ARB/02/9
78	*Azurix Corp v Argentina* [Decision on Jurisdiction] (8 Dec 2003) ICSID Case No ARB/01/12
79	*Nykomb Synergetics Technology Holding AB v Latvia* [Arbitral Award] (16 Dec 2003) SCC
80	*CDC Group PLC v Seychelles* [Award] (17 Dec 2003) ICSID Case No ARB/02/14
81	*IBM World Trade Corp v Ecuador* [Decision on Jurisdiction and Competence] (22 Dec 2003) ICSID Case No ARB/02/10
82	*CCL v Kazakhstan* [Final Award] (1 Jan 2004) SCC Case No V 122/2001
83	*Enron Corp and Ponderosa Assets, LP v Argentina* [Decision on Jurisdiction] (14 Jan 2004) ICSID Case No ARB/01/3
84	*Patrick Mitchell v DRC* [Dissenting Opinion of Y Agboyibo (excerpts)] (23 Jan 2004) ICSID Case No ARB/99/7
85	*SGS Société Générale de Surveillance SA v Philippines* [Decision of Tribunal on Objections to Jurisdiction] (29 Jan 2004) ICSID Case No ARB/02/6
86	*SGS Société Générale de Surveillance SA v Philippines* [Declaration of A Crivellaro] (29 Jan 2004) ICSID Case No ARB/02/6
87	*Patrick Mitchell v DRC* [Award] (9 Feb 2004) ICSID Case No ARB/99/7
88	*EnCana Corp v Ecuador* [Partial Award on Jurisdiction] (27 Feb 2004) UNCITRAL
89	*Tokios Tokelés v Ukraine* [Decision on Jurisdiction] (29 Apr 2004) ICSID Case No ARB/02/18
90	*LG&E Energy Corp, LG&E Capital Corp, and LG&E International, Inc v Argentina* [Decision on Jurisdiction] (30 Apr 2004) ICSID Case No ARB/02/1
91	*Waste Management Inc v Mexico (No 2)* [Award] (30 Apr 2004) ICSID Case No ARB(AF)/00/3
92	*Saluka Investments BV v Czech Republic* [Decision on Jurisdiction] (7 May 2004) UNCITRAL
93	*MTD Equity Sdn Bhd and MTD Chile SA v Chile* [Award] (25 May 2004) ICSID Case No ARB/01/7
94	*PSEG Global, Inc, The North American Coal Corp, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v Turkey* [Decision on Jurisdiction] (4 Jun 2004) ICISD ARB/02/5
95	*Occidental Exploration and Production Co v Ecuador* [Final Award] (1 Jul 2004) LCIA Case No UN3467
96	*Hussein Nuaman Soufraki v United Arab Emirates* [Award] (7 Jul 2004) ICSID Case No ARB/02/7
97	*Enron Corp and Ponderosa Assets, LP v Argentina* [Decision on Jurisdiction (Ancilliary Claim)] (2 Aug 2004) ICSID Case No ARB/01/3
98	*Siemens AG v Argentina* [Decision on Jurisdiction] (3 Aug 2004) ICSID Case No ARB/02/8
99	*Joy Mining Machinery Ltd v Egypt* [Award on Jurisdiction] (6 Aug 2004) CIISD ARB/03/11

100	*Gami Investments Inc v Mexico* [Final Award] (15 Nov 2004) UNCITRAL
101	*Salini Costruttori SpA and Italstrade SpA v Jordan* [Decision on Jurisdiction] (15 Nov 2004) ICSID Case No ARB/02/13
102	*Ceskoslovenska Obchodni Banka AS v Slovakia* [Award] (29 Dec 2004) ICSID Case No ARB/97/4
103	*Consortium Groupement LESI-DIPENTA v Algeria* [Award] (10 Jan 2005) ICSID Case No ARB/03/08
104	*Empresas Lucchetti, SA and Lucchetti Peru, SA v Peru* [Award] (7 Feb 2005) ICSID Case No ARB/03/4
105	*Plama Consortium Ltd v Bulgaria* [Decision on Jurisdiction] (8 Feb 2005) ICSID Case No ARB/03/24
106	*Petrobart Ltd v Kyrgyzsta*n [Award] (29 Mar 2005) SCC Case No V 126/2003
107	*Impregilo SpA v Argentina* [Decision on Jurisdiction] (22 Apr 2005) ICSID Case No ARB/07/17
108	*AES Corp v Argentina* [Decision on Jurisdiction] (26 Apr 2005) ICSID Case No ARB/02/17
109	*Camuzzi Internatioanl SA v Argentina* [Decision on Jurisdiction] (11 May 2005) ICSID Case No ARB/03/2
110	*Sempra Energy International v Argentina* [Decision on Jurisdiction] (11 May 2005) ICSID Case No ARB/02/16
111	*CMS Gas Transmission Co v Argentina* [Award] (12 May 2005) ICSID Case No ARB/01/8
112	*Gas Natural SDG SA v Argentina* [Decision on Jurisdiction] (17 Jun 2005) ICSID Case No ARB/03/10
113	*Methanex Corp v United States* [Final Award on Jurisdiction and Merits] (3 Aug 2005) UNCITRAL
114	*Eureko BV v Poland* [Dissenting Opinion of J Rajski] (19 Aug 2005)
115	*Eureko BV v Poland* [Partial Award] (19 Aug 2005)
116	*Yury Bogdanov v Moldova* [Arbitral Award] (22 September 2005) SCC Case No V 114/2009
117	*Noble Ventures Inc v Romania* [Award] (12 Oct 2005) ICSID Case No ARB/01/11
118	*Aguas del Tunari SA v Bolivia* [Decision on Jurisdiction] (21 Oct 2005) ICSID Case No ARB/02/3
119	*Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Pakistan* [Decision on Jurisdiction] (14 Nov 2005) ICSID Case No ARB/03/29
120	*International Thunderbird Gaming Corp v Mexico* [Separate Opinion of T Wälde] (1 Dec 2005) UNCITRAL
121	*EnCana Corp v Ecuador* [Partial Dissenting Opinion of H A G Naon] (30 Dec 2005) UNCITRAL, LCIA Case No UN 3481
122	*International Thunderbird Gaming Corp v Mexico* [Award] (26 Jan 2006) UNCITRAL
123	*Salini Costruttori SpA and Italstrade SpA v Jordan* [Award] (31 Jan 2006) ICSID Case No ARB/02/13
124	*EnCana Corp v Ecuador* [Award] (3 Feb 2006) UNCITRAL, LCIA Case No UN3481
125	*Continental Casualty Co v Argentina* [Decision on Jurisdiction] (22 Feb 2006) ICSID Case No ARB/03/9
126	*F/W Oil Interests Inc v Trinidad and Tobago* [Award] (3 Mar 2006) ICSID Case No ARB/01/14
127	*Saluka Investments BV v Czech Republic* [Partial Award] (17 Mar 2006) UNCITRAL
128	*Vladimir Berschader and Moïse Berschader v Russia* [Award] (21 Apr 2006) SCC Case No V 2004/080
129	*El Paso Energy International Co v Argentina* [Decision on Jurisdiction] (27 Apr 2006) ICSID Case No ARB/03/15
130	*Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v Argentina* [Decision on Jurisdiction] (16 May 2006) ICSID Case No ARB/03/17
131	*Telefónica SA v Argentina* [Decision on Jurisdiction] (25 May 2006) ICSID Case No ARB/03/20

132	*Canfor Corp v United States* [Decision on Preliminary Question] (6 Jun 2006) UNCITRAL
133	*Jan de Nul NV and Dredging International NV v Egypt* [Decision on Jurisdiction] (16 Jun 2006) ICSID Case No ARB/04/13
134	*National Grid PLC v Argentina* [Decision on Jurisdiction] (20 Jun 2006) UNCITRAL
135	*Azurix Corp v Argentina* [Award] (14 Jul 2006) ICSID Case No ARB/01/12
136	*Fireman's Fund Insurance Co v Mexico* [Award] (17 Jul 2006) ICSID Case No ARB(AF)/02/1
137	*Grand River Enterprises Six Nations Ltd & ors v United States* [Decision on Jurisdiction] (20 Jul 2006) UNCITRAL
138	*Pan American Energy LLC, BP Argentina Exploration Co and BP America Production Co & ors v Argentina* [Decision on Preliminary Objections] (27 Jul 2006) ICSID Case Nos ARB/03/13 and ARB/04/8
139	*Inceysa Vallisoletana SL of El Salvador* [Award] (2 Aug 2006) ICSID Case No ARB/03/26
140	*Suez, Sociedad General de Aguas de Barcelona SA, Vivendi Universal SA, and AWG Group v Argentina* [Jurisdiction] (3 Aug 2006) ICSID Case No ARB/03/19
141	*Total SA v Argentina* [Decision on Jurisdiction] (25 Aug 2006) ICSID Case No ARB/04/1
142	*Mytilineos Holdings SA v Serbia and Montenegro and Serbia* [Dissenting Opinion from Partial Award on Jurisdiction of D Mitrovic] (6 Sep 2006) UNCITRAL
143	*Mytilineos Holdings SA v Serbia and Montenegro and Serbia* [Partial Award on Jurisdiction] (8 Sep 2006) UNCITRAL
144	*Telenor Mobile Communications AS v Hungary* [Award] (13 Sep 2006) ICSID Case No ARB/04/15
145	*ADC Affiliate Limited and ADC & ADMC Management Ltd v Hungary* [Award] (2 Oct 2006) ICSID Case No ARB/03/16
146	*LG&E Energy Corp, LG&E Capital Corp, and LG&E International, Inc v Argentina* [Decision on Liability] (3 Oct 2006) ICSID Case No ARB/02/1
147	*Helnan International Hotels AS v Egypt* [Decision on Jurisdiction] (17 Oct 2006) ICSID Case No ARB/05/19
148	*Champion Trading Co, Ameritrade International, Inc v Egypt* [Award] (27 Oct 2006) ICSID Case No ARB/02/9
149	*Siemens AG v Argentina* [Award] (17 Jan 2007) ICSID Case No ARB/02/8
150	*PSEG Global, Inc, The North American Coal Corp, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v Turkey* [Award] (19 Jan 2007) ICSID Case No ARB/02/5
151	*Siemens AG v Argentina* [Separate Opinion of D Bello Janeiro] (30 Jan 2007) ICSID Case No ARB/02/8
152	*Saipem SpA v Bangladesh* [Decision on Jurisdiction and Provisional Measures] (21 Mar 2007) ICSID Case No ARB/05/07
153	*Eastern Sugar BV (Netherlands) v Czech Republic* [Partial Award] (27 Mar 2007) SCC Case No V 088/2004
154	*Waguih Elie George Siag and Clorinda Vecchi v Egypt* [Decision on Jurisdiction] (11 Apr 2007) ICSID Case No ARB/05/15
155	*Waguih Elie George Siag and Clorinda Vecchi v Egypt* [Partial Dissenting Opinion to Decision on Jurisdiction of F Orrego Vicuña] (11 Apr 2007) ICSID Case No ARB/05/15
156	*Eastern Sugar BV (Netherlands) v Czech Republic* [Final Award] (12 Apr 2007) SCC Case No V 088/2004
157	*Eastern Sugar BV (Netherlands) v Czech Republic* [Partial Dissenting Opinion of R Volterra] (12 Apr 2007) SCC Case No V 088/2004
158	*European Media Ventures SA v Czech Republic* [Award on Jurisdiction] (15 May 2007) UNCITRAL
159	*Malaysian Historical Salvors SDN BHD v Malaysia* [Award on Jurisdiction] (17 May 2007) ICSID Case No ARB/05/10
160	*Enron Corp and Ponderosa Assets, LP v Argentina* [Award] (22 May 2007) ICSID Case No ARB/01/3

161	*United Parcel Service of America Inc v Canada* [Award on Merits] (24 May 2007) ICSID Case No UNCT/02/1
162	*Soufraki v United Arab Emirates* [Separate Opinion of O Nabulsi] (27 May 2007) ICSID Case No ARB/02/7
163	*Hussein Nuaman Soufraki v United Arab Emirates* [Decision on Annulment] (5 Jun 2007) ICSID Case No ARB/02/7
164	*Rupert Joseph Binder v Czech Republic* [Award on Jurisdiction] (6 Jun 2007) UNCITRAL
165	*Bayview Irrigation District & ors v Mexico* [Award] (19 Jun 2007) ICSID Case No ARB(AF)/05/1
166	*Ioannis Kardassopoulos v Georgia* [Decision on Jurisdiction] (6 Jul 2007) ICSID Case No ARB/05/18
167	*Bayview Irrigation District & ors v Mexico* [Award] (19 Jun 2007) ICSID Case No ARB(AF)/05/1
168	*LG&E Energy Corp, LG&E Capital Corp, and LG&E International, Inc v Argentina* [Award] (25 July 2007) ICSID Case No ARB/02/1
169	*Tokios Tokelés v Ukraine* [Award] (26 Jul 2007) ICSID Case No ARB/02/18
170	*MCI Power Group LC and New Turbine, Inc v Ecuador* [Award] (31 Jul 2007) ICSID Case No ARB/03/6
171	*Hussein Nuaman Soufraki v United Arab Emirates* [Rectification of Decision on Annulment] (13 Aug 2007) ICSID Case No ARB/02/7
172	*Fraport AG Frankfurt Airport Services Worldwide v The Philippines* [Award] (16 Aug 2007) ICSID Case No ARB/03/25
173	*Occidental Petroleum Corp and Occidental Exploration and Production Co v Ecuador* [Decision on Provisional Measures] (17 Aug 2007) ICSID Case No ARB/06/11
174	*Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentina (I)* [Award] (20 Aug 2007) ICSID Case No ARB/97/3
175	*Industria Nacional de Alimentos, AS and Indalsa Perú SA v Peru* [Decision on Annulment] (5 Sep 2007) ICSID Case No ARB/03/4
176	*Parkerings-Compagniet AS v Lithuania* [Award] (11 Sep 2007) ICSID Case No ARB/05/8
177	*Sempra Energy International v Argentina* [Partial Dissenting Opinion of M Lalonde] (18 Sep 2007) ICSID Case No ARB/02/16
178	*CMS Gas Transmission Co v Argentina* [Decision on Annulment] (25 Sep 2007) ICSID Case No ARB/01/8
179	*Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico* [Concurring Opinion of A W Rovine (26 Sep 2007) , ICSID Case No ARB(AF)/04/05
180	*Sempra Energy International v Argentina* [Award] (28 Sep 2007) ICSID Case No ARB/02/16
181	*RosInvestCo UK Ltd v Russia* [Award on Jurisdiction] (1 Oct 2007) SCC Case No V 079/2005
182	*Oko Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank Plc v Estonia* [Award] (19 Nov 2007) ICSID Case No ARB/04/6
183	*Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico* [Award] (21 Nov 2007) ICSID Case No ARB(AF)/04/05
184	*Sempra Energy International v Argentina* [Award] (28 Sep 2007) ICSID Case No ARB/02/16
185	*MTD Equity Sdn Bhd and MTD Chile SA v Chile* [Decision on Annulment] (21 Dec 2007) ICSID Case No ARB/01/7
186	*BG Group PLC v Argentina* [Final Award] (24 Dec 2007) UNCITRAL
187	*Corn Products International Inc v Mexico* [Decision on Responsibility] (15 Jan 2008) ICSID Case No ARB(AF)/04/01
188	*Corn Products International Inc v Mexico* [Separate Opinion of AF Lowenfeld] (15 Jan 2008) ICSID Case No ARB(AF)/04/01
189	*Canadian Cattlemen for Fair Trade v United States* [Award on Jurisdiction] (28 Jan 2008) UNCITRAL
190	*Desert Line Projects LLC v Yemen* [Award] (6 Feb 2008) ICSID Case No ARB/05/17

191	*Cargill Inc v Poland* [Final Award] (29 Feb 2008) ICSID Case No ARB(AF)/04/2
192	*Noble Energy, Inc and Machalapower Cia Ltda v Ecuador* [Decision on Jurisdiction] (5 Mar 2008) ICSID Case No ARB/05/12
193	*AMTO LLC v Ukraine* [Final Award] (26 Mar 2008) SCC Case No V 080/2005
194	*Rompetrol Group NV v Romania* [Decision on Jurisdiction and Admissibility] (18 Apr 2008) ICSID Case No ARB/06/3
195	*Trans-Global Petroleum Inc v Jordan* [Decision under Rule 41(5) ICSID Rules] (12 May 2008) ICISD ARB/07/25
196	*Metalpar SA and Buen Aire SA v Argentina* [Award on the Merits] (6 Jun 2008) ICSID Case No ARB/03/5
197	*Libananco Holdings Co Ltd v Turkey* [Decision on Preliminary Issues] (23 Jun 2008) ICSID Case No ARB/06/8
198	*Helnan International Hotels AS v Egypt* [Award] (3 Jul 2008) ICSID Case No ARB/05/19
199	*Duke Energy International Peru Investments No 1 Ltd v Peru* [Partial Dissenting Opinion of P Nikken] (22 Jul 2008) ICSID Case No ARB/03/28
200	*Biwater Gauff (Tanzania) Ltd v Tanzania* [Concurring and Dissenting Opinion of G Born] (18 Jul 2008) ICSID Case No ARB/05/22
201	*Biwater Gauff (Tanzania) Ltd v Tanzania* [Award] (24 Jul 2008) ICSID Case No ARB/05/22
202	*Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Kazakhstan* [Award] (29 Jul 2008) ICSID Case No ARB/05/16
203	*Duke Energy Electroquil Partners & Electroquil SA v Ecuador* [Award] (18 Aug 2008) ICSID Case No ARB/04/19
204	*Duke Energy International Peru Investments No 1 Ltd v Peru* [Award] (18 Aug 2008) ICSID Case No ARB/03/28
205	*Société Générale in respect of DR Energy Holdings Ltd and Empresa Distribuidora de Electricidad del Este, SA v Dominican Republic* [Award on Jurisdiction] (19 Aug 2008) UNCITRAL LCIA UN 7927
206	*Vannessa Ventures Ltd v Venezuela* [Decision on Jurisdiction] (22 Aug 2008) ICSID Case No ARB(AF)/04/6
207	*Plama Consortium Ltd v Bulgaria* [Award] (27 Aug 2008) ICSID Case No ARB/03/24
208	*Continental Casualty Co v Argentina* [Award] (5 Sep 2008) ICSID Case No ARB/03/9
209	*Occidental Petroleum Corp and Occidental Exploration and Production Co v Ecuador* [Decision on Jurisdiction] (9 Sep 2008) ICSID Case No ARB/06/11
210	*Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania* [Decision on Jurisdiction and Admissibility] (24 Sep 2008) ICSID Case No ARB0520
211	*Railroad Development Corp v Guatemala* [Decision on Provisional Measures] (15 Oct 2008) ICSID Case No ARB/07/23
212	*National Grid PLC v Argentina* [Award] (3 Nov 2008) UNCITRAL
213	*Jan de Nul NV and Dredging International NV v Egypt* [Award] (6 Nov 2008) ICSID Case No ARB/04/13
214	*Railroad Development Corp v Guatemala* [Decision on Jurisdiction] (17 Nov 2008) ICSID Case No ARB/07/23
215	*Chevron Corp (USA) and Texaco Petroleum Company (USA) v Ecuador* [Interim Award] (1 Dec 2008) PCA Case No 34877
216	*Wintershall AG v Argentina* [Award] (8 Dec 2008) ICSID Case No ARB/04/14
217	*Nordzucker AG v Poland* [Partial Award] (10 Dec 2008) UNCITRAL
218	*TSA Spectrum de Argentina SA v Argentina* [Award] (19 Dec 2008) ICSID Case No ARB/05/5
219	*TSA Spectrum de Argentina SA v Argentina* [Concurring Opinion of G Abi-Saab] (19 Dec 2008) ICSID Case No ARB/05/5
220	*TSA Spectrum de Argentina SA v Argentina* [Dissenting Opinion of GD Aldonas] (19 Dec 2008) ICSID Case No ARB/05/5

221	*Railroad Development Corp v Guatemala* [Decision on Clarification] (13 Jan 2009) ICSID Case No ARB/07/23
222	*Nordzucker AG v Poland* [Second Partial Award] (28 Jan 2009) UNCITRAL
223	*Malaysian Historical Salvors SDN BHD v Malaysia* [Dissenting Opinion of M Shahabuddeen] (19 Feb 2009) ICSID Case No ARB/05/10
224	*Renta 4 SVSA & ors v Russia* [Award on Preliminary Objections] (20 Mar 2009) SCC Case No V 24/2007
225	*Phoenix Action Ltd v Czech Republic* [Award] (15 Apr 2009) ICSID Case No ARB/06/5
226	*Malaysian Historical Salvors SDN BHD v Malaysia* [Decision on Annulment] (16 Apr 2009) ICSID Case No ARB/05/10
227	*Bernardus Henricus Funnekotter & ors v Zimbabwe* [Award] (22 Apr 2009) ICSID Case No ARB/05/6
228	*Waguih Elie George Siag and Clorinda Vecchi v Egypt* [Dissenting Opinion of F Orrego Vicuña] (11 May 2009) ICSID Case No ARB/05/15
229	*Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v Paraguay* [Jurisdiction] (29 May 2009) ICSID Case No ARB/07/9
230	*Waguih Elie George Siag and Clorinda Vecchi v Egypt* [Award] (1 Jun 2009) ICSID Case No ARB/05/15
231	*Empresa Eléctrica del Ecuador, Inc v Ecuador* [Award] (2 Jun 2009) ICSID Case No ARB/05/9
232	*Glamis Gold Ltd v United States* [Award] (8 Jun 2009) UNCITRAL
233	*Hrvatska Elektroprivreda DD v Slovenia* [Decision on Treaty Interpretation] (12 Jun 2009) ICSID Case No ARB/05/24
234	*Hrvatska Elektroprivreda DD v Slovenia* [Individual Opinion of J Paulsson] (12 Jun 2009) ICSID Case No ARB/05/24
235	*Invesmart v Czech Republic* [Award] (26 Jun 2009) UNCITRAL
236	*Saipem SpA v Bangladesh* [Award] (30 Jun 2009) ICSID Case No ARB/05/07
237	*Walter Bau AG v Thailand* [Award] (1 Jul 2009) UNCITRAL
238	*European Media Ventures SA v Czech Republic* [Partial Award on Liability] (8 Jul 2009) UNCITRAL
239	*Pantechniki SA Contractors & Engineers (Greece) v Albania* [Award] 30 Jul 2009) ICSID Case No ARB/07/21
240	*Europe Cement Investment & Trade SA v Turkey* [Award] (13 Aug 2009) ICSID Case No ARB(AF)/07/2
241	*Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Pakistan* [Award] (27 Aug 2009) ICSID Case No ARB/03/29
242	*Azurix Corp v Argentina* [Decision on Annulment] (1 Sep 2009) ICSID Case No ARB/01/12
243	*Mohammad Ammar Al-Bahloul v Tajikistan* [Partial Award on Jurisdiction and Liability] (2 Sep 2009) SCC Case No V 064/2008
244	*Azpetrol International Holdings BV, Azpetrol Group BV and Azpetrol Oil Services Group BV v Azerbaijan* [Award] (8 Sep 2009) ICSID Case No ARB/06/15
245	*Sistem Mühendislik In aat Sanayi ve Ticaret A v Kyrgyzstan* [Award] (9 Sep 2009) ICSID Case No ARB(AF)/06/1
246	*Toto Costruzioni Generali SpA v Lebanon* [Decision on Jurisdiction] (11 Sep 2009) ICSID Case No ARB/07/12
247	*Cementownia "Nowa Huta" SA v Turkey* [Award] (17 Sep 2009) ICSID Case No ARB(AF)/06/2
248	*Cargill Inc v Mexico* [Award] (18 Sep 2009) ICSID Case No ARB(AF)/05/2
249	*EDF (Services) Ltd v Romania* [Award] (8 Oct 2009) ICSID Case No ARB/05/13
250	*Austrian Airlines v Slovakia* [Final Award] (9 Oct 2009) UNCITRAL
251	*MCI Power Group LC and New Turbine, Inc v Ecuador* [Decision on Annulment] (19 Oct 2009) ICSID Case No ARB/03/6

252	*Contintental Casualty Co v Argentina* [Decision on Preliminary Objection, Annulment] (23 Oct 2009) ICSID Case No ARB/03/9
253	*Contintental Casualty Co v Argentina* [Decision on Stay of Enforcement] (23 Oct 2009) ICSID Case No ARB/03/9
254	*Nordzucker AG v Poland* [Third Partial and Final Award] (23 Nov 2009) UNCITRAL
255	*Romak SA (Switzerland) v Uzbekistan* [Award] (26 Nov 2009) PCA Case No AA280
256	*Hulley Enterprises, Yukos and Veteran Petroleum (joined) v Russia* [Interim Award on Jurisdiction and Admissibility] (30 Nov 2009) PCA Case Nos AA 226, 227, 228
257	*Itera International Energy LLC and Itera Group NV v Georgia* [Dissenting Opinion on Ancillary Claims of F Orrego Vicuña] (30 Nov 2009) ICSID Case No ARB/08/7
258	*Itera International Energy LLC and Itera Group NV v Georgia* [Decision on Admissibility of Ancillary Claims] (4 Dec 2009) ICSID Case No ARB/08/7
259	*Joseph Charles Lemire v Ukraine* [Decision on Jurisdiction and Liability] (14 Jan 2010) ICSID Case No ARB/06/18
260	*SGS Société Générale de Surveillance SA v Paraguay* [Decision on Jurisdiction] (12 Feb 2010) ICSID Case No ARB/07/29
261	*Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Bolivia* [Decision on Provisional Measures] (26 Feb 2010) ICSID Case No ARB/06/2
262	*Ioannis Kardassopoulos and Ron Fuchs v Georgia* [Award] (3 Mar 2010) ICSID Case Nos ARB/05/18 and ARB/07/15
263	*Inmaris Perestroika Sailing Maritime Services GmbH & ors v Ukraine* [Decision on Jurisdiction] (8 Mar 2010) ICSID Case No ARB/08/8
264	*Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Kazakhstan* [Decision on Annulment] (25 Mar 2010) ICSID Case No ARB/05/16
265	*Yuri Bogdanov v Moldova* (30 Mar 2010) [Final Arbitral Award] SCC Case No V 114/2009
266	*Chevron Corp (USA) and Texaco Petroleum Company (USA) v Ecuador* [Partial Award] (30 Mar 2010) PCA Case No 34877
267	*Merrill & Ring Forestry LP v Canada* [Award] (31 Mar 2010) ICSID Case No UNCT/07/1
268	*Jan Oostergetel and Theodora Laurentius v Slovakia* [Decision on Jurisdiction] (30 Apr 2010) UNCITRAL
269	*ATA Construction, Industrial and Trading Co v Jordan* [Award] (18 May 2010) ICSID Case No ARB/08/2
270	*Railroad Development Corp v Guatemala* [Second Decision on Jurisdiction] (18 May 2010) ICSID Case No ARB/07/23
271	*Alasdair Ross Anderson & ors v Costa Rica* [Award] (19 May 2010) ICSID Case No ARB(AF)/07/3
272	*Burlington Resources Inc v Ecuador* [Decision on Jurisdiction] (2 Jun 2010) ICSID Case No ARB/08/5
273	*Mohammad Ammar Al-Bahloul v Tajikistan* [Final Award] (8 Jun 2010) SCC Case No V 064/2008
274	*Mobil Corp, Venezuela Holdings, BV & ors v Venezuela* [Decision on Jurisdiction] (10 Jun 2010) ICSID Case No ARB/07/27
275	*Helnan International Hotels AS v Egypt* [Decision on Annulment] (14 Jun 2010) ICSID Case No ARB/05/19
276	*Gemplus SA, SLP SA, Gemplus Industrial SA de CV v Mexico* [Award] (16 Jun 2010) ICSID Case Nos ARB(AF)/04/3 and (AF)/04/4
277	*Gustav FW Hamester GmbH & Co KG v Ghana* [Award] (18 Jun 2010) ICSID Case No ARB/07/24
278	*Liman Caspian Oil BV and NCL Dutch Investment BV v Kazakhstan* [Excerpts of Award] (22 Jun 2010) ICSID Case No ARB/07/14
279	*Sempra Energy International v Argentina* [Decision on Annulment] (29 Jun 2010) ICSID Case No ARB/02/16
280	*Saba Fakes v Turkey* [Award] (14 July 2010) ICSID Case No ARB/07/20

281	*Millicom International Operations BV and Sentel GSM SA v Senegal* [Decision on Jurisdiction] (16 Jul 2010) ICSID Case No ARB/08/20
282	*Enron Corp and Ponderosa Assets, LP v Argentina* [Decision on Annulment] (30 Jul 2010) ICSID Case No ARB/01/3
283	*Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v Argentina* [Decision on Liability] (30 Jul 2010) ICSID Case No ARB/03/17
284	*Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v Argentina* [Separate Opinion of P Nikken] (30 Jul 2010) ICSID Case No ARB/03/17
285	*Suez, Sociedad General de Aguas de Barcelona SA, Vivendi Universal SA, and AWG Group v Argentina* [Decision on Liability] (30 Jul 2010) ICSID Case No ARB/03/19
286	*Suez, Sociedad General de Aguas de Barcelona SA, Vivendi Universal SA, and AWG Group v Argentina* [Separate Opinion of P Nikken] (30 Jul 2010) ICSID Case No ARB/03/19
287	*Chemtura Corp v Canada* [Award] (2 Aug 2010) UNCITRAL
288	*Pac Rim Cayman LLC v El Salvador* [Decision on Preliminary Objections] (2 Aug 2010) ICSID Case No ARB/09/12
289	*Piero Foresti, Laura de Carli & ors v South Africa* [Award] (4 Aug 2010) ICSID Case No ARB(AF)/07/01
290	*RosInvestCo UK Ltd v Russia* [Final Award] (12 Sep 2010) SCC Case No V079/2005
291	*AES Summit Generation Ltd and AES-Tisza Erömü Kft v Hungary* [Award] (23 Sep 2010) ICSID Case No ARB/07/22
292	*Ulysseas Inc v Ecuador* [Interim Award] (28 Sep 2010) PCA Case No 2009-19
293	*Achmea BV v Slovakia* [Award on Jurisdiction, Arbitrability and Suspension] (26 Oct 2010) PCA Case No 2008/13
294	*Alpha Projektholding GmbH v Ukraine* [Award] (8 Nov 2010) ICSID Case No ARB/07/16
295	*Frontier Petroleum Services Ltd v Czech Republic* [Final Award] (12 Nov 2010) UNCITRAL
296	*Ioannis Kardassopoulos and Ron Fuchs v Georgia* [Decision on Stay of Enforcement] (12 Nov 2010) ICSID Case Nos ARB/05/18 and ARB/07/15
297	*Global Trading Resource Corp and Globex International, Inc v Ukraine* [Award] (1 Dec 2010) ICSID Case No ARB/09/11
298	*Rachel S Grynberg, Stephen M Grynberg, Miriam Z Grynberg, and RSM Production Corp v Grenada* [Award] (10 Dec 2010) ICSID Case No ARB/10/6
299	*Murphy Exploration and Production Co International v Ecuador* [Award on Jurisdiction] (15 Dec 2010) ICSID Case No ARB/08/4
300	*Total SA v Argentina* [Dissenting Opinion of H Alvarez] (21 Dec 2010) ICSID Case No ARB/04/1
301	*Balkan Energy (Ghana) Ltd v Ghana* [Interim Award] (22 Dec 2010) PCA Case No 2010-7
302	*Fraport AG Frankfurt Airport Services Worldwide v The Philippines* [Decision on Annulment] (23 Dec 2010) ICSID Case No ARB/03/25
303	*Total SA v Argentina* [Concurring Opinion of L H Marcano] (27 Dec 2010) ICSID Case No ARB/04/1
304	*Total SA v Argentina* [Decision on Liability] (27 Dec 2010) ICSID Case No ARB/04/1
305	*CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v Venezuela* [Decision on Jurisdiction] (30 Dec 2010) ICSID Case No ARB/08/15
306	*Grand River Enterprises Six Nations Ltd & ors v United States* [Award] (12 Jan 2011) UNCITRAL
307	*Ioannis Kardassopoulos and Ron Fuchs v Georgia* [Decision to Terminate Stay of Enforcement] (19 Jan 2011) ICSID Case Nos ARB/05/18 and ARB/07/15
308	*Malicorp Ltd v Egypt* [Award] (7 Feb 2011) ICSID Case No ARB/08/18
309	*Duke Energy International Peru Investments No 1 Ltd v Peru* [Decision on Annulment] (1 Mar 2011) ICSID Case No ARB/03/28
310	*Joseph Charles Lemire v Ukraine* [Dissenting Opinion of J Voss] (1 Mar 2011) ICSID Case No ARB/06/18

311	*Alps Finance and Trade AG v Slovakia* [Award] (5 Mar 2011) UNCITRAL
312	*Vattenfall AB, Vattenfall Europe AG, and Vattenfall Europe Generation AG v Germany* [Award] (11 Mar 2011) ICSID Case No ARB/09/6
313	*Commerce Group Corp & San Sebastian Gold Mines Inc v El Salvador* [Award] (14 Mar 2011) ICSID Case No ARB/09/17
314	*Ioannis Kardassopoulos and Ron Fuchs v Georgia* [Decision to Suspend Annulment Proceeding] (21 Mar 2011) ICSID Case Nos ARB/05/18 and ARB/07/15
315	*Joseph Charles Lemire v Ukraine* [Award] (28 Mar 2011) ICSID Case No ARB/06/18
316	*GEA Group AG v Ukraine* [Award] (31 Mar 2011) ICSID Case No ARB/08/16
317	*Sergei Paushok, CJSC Golden East Co and CJSC Vostokneftegaz Co v Mongolia* [Award on Jurisdiction and Liability] (28 Apr 2011) UNCITRAL
318	*HICEE BV v Slovakia* [Dissenting Opinion of CN Brower] (23 May 2011) PCA Case No 2009-11
319	*HICEE BV v Slovakia* [Partial Award] (23 May 2011) PCA Case No 2009-11
320	*Impregilo SpA v Argentina* [Award] (21 Jun 2011) ICSID Case No ARB/07/17
321	*Impregilo SpA v Argentina* [Concurring and Dissenting Opinion of B Stern] (21 Jun 2011) ICSID Case No ARB/07/17
322	*Impregilo SpA v Argentina* [Concurring and Dissenting Opinion of CN Brower] (21 Jun 2011) ICSID Case No ARB/07/17
323	*Perenco Ecuador Ltd v Ecuador* [Decision on Jurisdiction] (30 Jun 2011) ICSID Case No ARB/08/6
324	*Tza Yap Shum v Peru* [Award] (7 Jul 2011) ICSID Case No ARB/07/6 (unofficial tr.)
325	*Rupert Joseph Binder v Czech Republic* [Final Award] (15 Jul 2011) UNCITRAL
326	*Brandes Investment Partners LP v Venezuela* [Award] (2 Aug 2011) ICSID Case No ARB/08/3
327	*Abaclat & ors v Argentina* [Decision on Jurisdiction and Admissibility] (4 Aug 2011) ICSID Case No ARB/07/5
328	*East Cement for Investment Co v Poland* [Partial Award] (26 Aug 2011) ICC Case No 16509/JHN
329	*Abaclat & ors v Argentina* [Dissenting Opinion on Jurisdiction and Admissibility of G Abi/Saab] (28 Aug 2011) ICSID Case No ARB/07/5
330	*Chevron Corp (USA) and Texaco Petroleum Company (USA) v Ecuador* [Final Award] (31 Aug 2011) PCA Case No 34877
331	*EVN AG v Macedonia* [Award] (2 Sep 2011) ICSID Case No ARB/09/10
332	*Libananco Holdings Co Ltd v Turkey* [Award] (2 Sep 2011) ICSID Case No ARB/06/8
333	*Vito G Gallo v Canada* [Award] (15 Sep 2011) PCA Case No 2008-02
334	*Continental Casualty Co v Argentina* [Decision on Partial Annulment] (16 Sep 2011) ICSID Case No ARB/03/9
335	*Peter Franz Voecklinghaus v Czech Republic* [Final Award] (19 Sep 2011) UNCITRAL
336	*Hochtief AG v Argentina* [Dissenting Opinion on Jurisdiction of C Thomas] (7 Oct 2011) ICSID Case No ARB/07/31
337	*HICEE BV v Slovakia* [Supplementary and Final Award] (17 Oct 2011) PCA Case No 2009-11
338	*Hochtief AG v Argentina* [Decision on Jurisdiction] (24 Oct 2011) ICSID Case No ARB/07/31
339	*El Paso Energy International Co v Argentina* [Award] (31 Oct 2011) ICSID Case No ARB/03/15
340	*Spyridon Roussalis v Romania* [Declaration of W M Reisman] (29 Nov 2011) ICSID Case No ARB 06/1
341	*White Industries Australia Ltd v India* [Final Award] (30 Nov 2011) UNCITRAL
342	*Konsortium Oeconomicus v Czech Republic* [Decision on Termination] (5 Dec 2011) NN 452/FM

343	*Spyridon Roussalis v Romania* [Award] (7 Dec 2011) ICSID Case No ARB/06/1
344	*ICS Inspection and Control Services Limited (United Kingdom) v Argentina* [Jurisdiction] (10 Feb 2012) UNCITRAL PCA Case No 2010-9
345	*SGS Société Générale de Surveillance SA v Paraguay* [Award] (10 Feb 2012) ICSID Case No ARB/07/29
346	*Les Laboratoires Servier, SAA, Biofarma, SAS, Arts et Techniques du Progres SAS v Poland* [Award] (14 Feb 2012) UNCITRAL
347	*Chevron Corp and Texaco Petroleum Corp v Ecuador* [Jurisdiction and Admissibility] (27 Feb 2012) PCA Case No 2009-23
348	*Inmaris Perestroika Sailing Maritime Services GmbH & ors v Ukraine* [Award] (1 Mar 2012) ICSID Case No ARB/08/8
349	*Jan Oostergetel and Theodora Laurentius v Slovakia* [Final Award] (23 Apr 2012) UNCITRAL
350	*Kiliç Ĭnşaat Ĭthalat Ĭhracat Sanayi Ve Ticaret Anonim Şirketi v Turkmenistan* [Decision on Authentication] (7 May 2012) ICSID Case No ARB/10/1
351	*Libananco Holdings Co Ltd v Turkey* [Decision on Provisional Measures] (7 May 2012) ICSID Case No ARB/06/8
352	*Libananco Holdings Co Ltd v Turkey* [Decision on Stay of Enforcement] (7 May 2012) ICSID Case No ARB/06/8
353	*Marion Unglaube and Reinhard Unglaube v Costa Rica* [Award] (16 May 2012) ICSID Case Nos ARB/08/1 and ARB/09/20
354	*Mobil Investments Canada Inc and Murphy Oil Corp v Canada* [Partial Dissenting Opinion of P Sands] (17 May 2012) ICSID Case No ARB(AF)/07/4
355	*Mobil Investments Canada Inc and Murphy Oil Corp v Canada* [Decision on Liability and Quantum] (22 May 2012) ICSID Case No ARB(AF)/07/4
356	*Pac Rim Cayman LLC v El Salvador* [Decision on Jurisdiction] (1 Jun 2012) ICSID Case No ARB/09/12
357	*Caratube International Oil Co LLP v Kazakhstan* [Award] (5 Jun 2012) ICSID Case No ARB/08/12
358	*H&H Enterprises Investments Inc v Egypt* [Decision on Jurisdiction] (5 Jun 2012) ICSID Case No ARB/09/15
359	*Swisslion DOO Skopje v Macedonia* [Award] (6 Jul 2012) ICSID Case No ARB/09/16
360	*InterTrade Holding GmbH v Czech Republic* [Final Award] (7 Jun 2012) PCA Case No 2009-12
361	*Toto Costruzioni Generali SpA v Lebanon* [Award] (7 Jun 2012) ICSID Case No ARB/07/12
362	*EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentina* [Award] (11 Jun 2012) ICSID Case No ARB/03/23
363	*Ulysseas Inc v Ecuador* [Final Award] (12 Jun 2012) PCA Case No 2009-19
364	*Hesham TM Al Warraq v Indonesia* [Award on Jurisdiction and Admissibility] (21 Jun 2012) UNCITRAL
365	*Railroad Development Corp v Guatemala* [Award] (29 Jun 2012) ICSID Case No ARB/07/23
366	*Alapli Elektrik BV v Turkey* [Award] (16 Jul 2012) ICSID Case No ARB/08/13
367	*Renta 4 SVSA & ors v Russia* [Award] (20 Jul 2012) SCC Case No V 24/2007
368	*Khan Resources Inc, Khan Resources BV, and Cauc Holding Company Ltd v Mongolia* [Decision on Jurisdiction] (25 Jul 2012) UNCITRAL PCA Case No 2011-09
369	*AES Summit Generation Ltd and AES-Tisza Erömü Kft v Hungary* [Decision on Annulment] (29 Jun 2012) ICSID Case No ARB/07/22
370	*Railroad Development Corp v Guatemala* [Award] (29 Jun 2012) ICSID Case No ARB/07/23
371	*Daimler Financial Services AG v Argentina* [Dissenting Opinion of C N Brower] (15 Aug 2012) ICSID Case No ARB/05/1
372	*Daimler Financial Services AG v Argentina* [Concurring Opinion of D Bello Janeiro] (16 Aug 2012) ICSID Case No ARB/05/1
373	*Iberdrola Energía SA v Guatemala* [Award] (17 Aug 2012) ICSID Case No ARB/09/5

374	*Daimler Financial Services AG v Argentina* [Award] (22 Aug 2012) ICSID Case No ARB/05/1
375	*Occidental Petroleum Corp and Occidental Exploration and Production Co v Ecuador* [Dissenting Opinion of B Stern] (20 Sep 2012) ICSID Case No ARB/06/11
376	*Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Bolivia* [Decision on Jurisdiction] (27 Sep 2012) ICSID Case No ARB/06/2
377	*Ecuador v United States* [Award] (29 Sep 2012) PCA Case No 2012-5
378	*Ecuador v United States* [Dissenting Opinion of RE Vinuesa] (29 Sep 2012) PCA Case No 2012-5
379	*Occidental Petroleum Corp and Occidental Exploration and Production Co v Ecuador* [Award] (5 Oct 2012) ICSID Case No ARB/06/11
380	*Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v Paraguay* [Further Decision on Jurisdiction] (9 Oct 2012) ICSID Case No ARB/07/9
381	*European American Investment Bank AG (EURAM) v Slovakia* [Award on Jurisdiction] (22 Oct 2012) PCA Case No 2010-17
382	*Deutsche Bank AG v Sri Lanka* [Dissenting Opinion of MA Khan] (23 Oct 2012) ICSID Case No ARB/09/2
383	*Bosh International Inc & B&P Ltd v Ukraine* [Award] (25 Oct 2012) ICSID Case No ARB/08/11
384	*Deutsche Bank AG v Sri Lanka* [Award] (31 Oct 2012) ICSID Case No ARB/09/2
385	*Standard Chartered Bank v Tanzania* [Award] (2 Nov 2012) ICSID Case No ARB/10/12
386	*Tulip Real Estate and Development Netherlands BV v Turkey* [Decision on Bifurcation] (2 Nov 2012) ICSID Case No ARB/11/28
387	*Burlington Resources Inc v Ecuador* [Dissenting Opinion of F Orrego Vicuña] (8 Nov 2012) ICSID Case No ARB/08/5
388	*Electrabel SA v Hungary* [Decision on Jurisdiction, Applicable Law and Liability] (30 Nov 2012) ICSID Case No ARB/07/19
389	*Achmea BV v Slovakia* [Award] (7 Dec 2012) PCA Case No 2008-13
390	*Tethyan Copper Co Pty Ltd v Pakistan* [Decision on Provisional Measures] (13 Dec 2012) ICSID Case No ARB/12/1
391	*Burlington Resources Inc v Ecuador* [Decision on Liability] (14 Dec 2012) ICSID Case No ARB/08/5
392	*Victor Pey Casado and President Allende Foundation v Chile* [Decision on Annulment] (18 Dec 2012) ICSID Case No ARB/98/2
393	*Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentina* [Decision on Jurisdiction] (19 Dec 2012) ICSID Case No ARB/07/26
394	*Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v Argentina* [Decision on Jurisdiction] (21 Dec 2012) ICSID Case No ARB/09/1
395	*Accession Mezzanine Capital LP and Danubius Kereskedöház Vagyonkezelö Zrt v Hungary* [Decision on Objection under Rule 41(5)] (16 Jan 2013) ICSID Case No ARB/12/3
396	*Vannessa Ventures Ltd v Venezuela* [Award] (16 Jan 2013) ICSID Case No ARB(AF)04/6
397	*Railroad Development Corp v Guatemala* [Decision on Rectification] (18 Jan 2013) ICSID Case No ARB/07/23
398	*Ambiente Ufficio SpA & ors v Argentina* [Decision on Jurisdiction and Admissibility] (8 Feb 2013) ICSID Case No ARB/08/9
399	*Tidewater Inc, Tidewater Investment SRL, Tidewater Caribe, CA & ors v Venezuela* [Decision on Jurisdiction] (8 Feb 2013) ICSID Case No ARB/10/5
400	*Emmis International Holding, BV, Emmis Radio Operating, BV, MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft v Hungary* [Decision on Objection under Rule 41(5)] (11 Mar 2013) ICSID Case No ARB/12/2
401	*Mohamed Abdulmohsen Al-Kharafi & Sons Co v Libya* [Final Arbitral Award] (22 Mar 2013)
402	*SGS Société Générale de Surveillance SA v Paraguay* [Decision on Stay of Enforcement] (22 Mar 2013) ICSID Case No ARB/07/29

403	*Mobil Exploration and Development Inc Suc Argentina and Mobil Argentina SA v Argentina* [Separate Opinion of A Remiro Brotons] (27 Mar 2013) ICSID Case No ARB/04/16
404	*Franck Charles Arif v Moldova* [Award] (8 Apr 2013) ICSID Case No ARB/11/23
405	*Mobil Exploration and Development Inc Suc Argentina and Mobil Argentina SA v Argentina* [Decision on Jurisdiction and Liability] (10 Apr 2013) ICSID Case No ARB/04/16
406	*Yuri Bogdanov and Yulia Bogdanova v Moldova* [Final Award] (16 Apr 2013) SCC Case No V 091/2012
407	*Ambiente Ufficio SpA & ors v Argentina* [Dissenting Opinion of S Torres Bernardez] (2 May 2013) ICSID Case No ARB/08/9
408	*Rompetrol Group NV v Romania* [Award] (6 May 2013) ICSID Case No ARB/06/3
409	*Victor Pey Casado and President Allende Foundation v Chile* [Decision on Stay of Enforcement] (16 May 2013) ICSID Case No ARB/98/2
410	*OPIC Karimum Corp v Venezuela* [Dissenting Opinion of G Santiago Tawil] (16 May 2013) ICSID Case No ARB/10/14
411	*Luigiterzo Bosca v Lithuania* [Award] (17 May 2013) UNCITRAL PCA Case No 2011-05
412	*Libananco Holdings Co Ltd v Turkey* [Excerpts of Decision on Annulment] (22 May 2013) ICSID Case No ARB/06/8
413	*OPIC Karimum Corp v Venezuela* [Award] (28 May 2013) ICSID Case No ARB/10/14
414	*Burimi SRL and Eagle Games SHA v Albania* [Award] (29 May 2013) ICSID Case No ARB/11/18
415	*Apotex Holdings Inc & Apotex Inc v United States* [Award on Jurisdiction and Admissibility] (13 Jun 2013) ICSID Case No ARB(AF)/12/1
416	*Emmis International Holding, BV, Emmis Radio Operating, BV, MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft v Hungary* [Decision on Bifurcation] (13 Jun 2013) ICSID Case No ARB/12/2
417	*Apotex Inc v United States* [Award on Jurisdiction and Admissibility] (14 Jun 2013) ICSID Case No UNCT/10/2
418	*Kiliç Ĭnşaat Ĭthalat Ĭhracat Sanayi Ve Ticaret Anonim Şirketi v Turkmenistan* [Award] (2 Jul 2013) ICSID Case No ARB/10/1
419	*Philip Morris Brands SÀRL, Philip Morris Products SA and Abal Hermanos SA v Uruguay* [Decision on Jurisdiction] (2 Jul 2013) ICSID Case No ARB/10/7
420	*Garanti Koza LLP v Turkmenistan* [Decision on Objection to Jurisdiction] (3 Jul 2013) ICSID Case No ARB/11/20
421	*Garanti Koza LLP v Turkmenistan* [Dissenting Opinion of L Boisson de Chazournes] (3 Jul 2013) ICSID Case No ARB/11/20
422	*Malicorp Ltd v Egypt* [Decision on Annulment] (3 Jul 2013) ICSID Case No ARB/08/18
423	*Joseph Charles Lemire v Ukraine* [Excerpts of Decision on Annulment] (8 Jul 2013) ICSID Case No ARB/06/18
424	*Rafat Ali Rizvi v Indonesia* [Award on Jurisdiction] (16 Jul 2013) ICSID Case No ARB/11/13
425	*Rafat Ali Rizvi v Indonesia* [Concurring Opinion on Jurisdiction of M Sornarajah] (16 Jul 2013) ICSID Case No ARB/11/13
426	*ST-AD GmbH (Germany) v Bulgaria* [Award on Jurisdiction] (18 Jul 2013) PCA Case No 2011-06
427	*Hassan Awdi, Enterprise Business Consultants, Inc and Alfa El Corp v Romania* [Decision on Objections to Jurisdiction and Admissibility] (26 Jul 2013) ICSID Case No ARB/10/13
428	*Accession Mezzanine Capital LP and Danubius Kereskedöház Vagyonkezelö Zrt v Hungary* [Decision on Jurisdiction and Bifurcation] (8 Aug 2013) ICSID Case No ARB/12/3
429	*ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Venezuela* [Decision on Jurisdiction and the Merits] (3 Sep 2013) ICSID Case No ARB/07/30
430	*Ömer Dede and Serdar Elhüseyni v Romania* [Award] (5 Sep 2013) ICSID Case No ARB/10/22
431	*Victor Pey Casado and President Allende Foundation v Chile* [Decision on Supplementation] (11 Sep 2013) ICSID Case No ARB/98/2

432	*Chevron Corp and Texaco Petroleum Corp v Ecuador* [First Partial Award on Track 1] (17 Sep 2013) PCA Case No 2009/23
433	*ECE Projektmanagement v Czech Republic* [Award] (19 Sep 2013) PCA Case No 2010-5
434	*Metal-Tech Ltd v Uzbekistan* [Award] (4 Oct 2013) ICSID Case No ARB/10/3
435	*KT Asia Investment Group BV v Kazakhstan* [Award] (17 Oct 2013) ICSID Case No ARB/09/8
436	*AES Corp and Tau Power BV v Kazakhstan* [Award] (1 Nov 2013) ICSID Case No ARB/10/16
437	*Murphy Exploration and Production Co International v Ecuador* [Partial Award on Jurisdiction] (13 Nov 2013) PCA Case No 2012-16
438	*Murphy Exploration and Production Co International v Ecuador* [Separate Opinion of G Abi-Saab] (13 Nov 2013) PCA 2012-16
439	*Total SA v Argentina* [Award] (27 Nov 2013) ICSID Case No ARB/04/1
440	*Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania* [Separate Opinion of G Abi-Saab] (5 Dec 2013) ICSID Case No ARB/05/20
441	*Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania* [Final Award] (11 Dec 2013) ICSID Case No ARB/05/20
442	*Sanum Investments Ltd v Laos* [Award on Jurisdiction] (13 Dec 2013) PCA Case No 2013-13
443	*Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v Kazakhstan* [Award] (19 Dec 2013) SCC Case No V 116/2010
444	*TECO Guatemala Holdings LLC v Guatemala* [Award] (19 Dec 2013) ICSID Case No ARB/10/23
445	*Impregilo SpA v Argentina* [Decision on Annulment] (24 Jan 2014) ICSID Case No ARB/07/17
446	*Guaracachi America & Rurelec PLC v Bolivia* [Award] (31 Jan 2014) PCA Case No 2011-17
447	*Caratube International Oil Co LLP v Kazakhstan* [Decision on Annulment] (21 Feb 2014) ICSID Case No ARB/08/12
448	*Lao Holdings NV v Laos* [Decision on Jurisdiction] (21 Feb 2014) ICSID Case No ARB(AF)/12/6
449	*Churchill Mining PLC and Planet Mining Pty Ltd v Indonesia* [Decision on Jurisdiction] (24 Feb 2014) ICSID Case Nos ARB/12/14 and 12/40
450	*Renée Rose Levy de Levi v Peru* [Award] (26 Feb 2014) ICSID Case No ARB/10/17
451	*Renée Rose Levy de Levi v Peru* [Dissenting Opinion of J M Godoy] (26 Feb 2014) ICSID Case No ARB/10/17
452	*Tulip Real Estate and Development Netherlands BV v Turkey* [Separate Opinion of ME Jaffe] (7 Mar 2014) ICSID Case No ARB/11/28
453	*ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Venezuela* [Decision on Reconsideration] (10 Mar 2014) ICSID Case No ARB/07/30
454	*ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Venezuela* [Dissenting Opinion of G Abi-Saab] (10 Mar 2014) ICSID Case No ARB/07/30
455	*Tulip Real Estate and Development Netherlands BV v Turkey* [Award] (10 Mar 2014) ICSID Case No ARB/11/28
456	*Balkan Energy (Ghana) Ltd v Ghana* [Award on the Merits] (1 Apr 2014) PCA Case No 2010-7
457	*National Gas SAE v Egypt* [Award] (3 Apr 2014) ICSID Case No ARB/11/7
458	*Emmis International Holding, BV, Emmis Radio Operating, BV, MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft v Hungary* [Award] (16 Apr 2014) ICSID Case No ARB/12/2
459	*Enkev Beheer BV v Poland* [First Partial Award] (29 Apr 2014) PCA Case No 2013-01
460	*TSIKinvest LLC v Moldova* [Emergency Decision on Interim Measures] (29 Apr 2014) SCC Case No EA 2014/053

461	*Nova Scotia Power Inc v Venezuela* [Award] (30 Apr 2014) ICSID Case No ARB(AF)/11/1
462	*H&H Enterprises Investments Inc v Egypt* [Award] (6 May 2014) ICISD Case No ARB/09/15
463	*David Minnotte and Robert Lewis v Poland* [Award] (16 May 2014) ICSID Case No ARB (AF)/10/1
464	*SGS Société Générale de Surveillance SA v Paraguay* [Decision on Annulment] (19 May 2014) ICSID Case No ARB/07/29
465	*Achmea BV v Slovakia* [Award on Jurisdiction and Admissibility] (20 May 2014) PCA Case No 2013-12
466	*European American Investment Bank AG (EURAM) v Slovakia* [Second Award on Jurisdiction] (4 Jun 2014) PCA Case No 2010-17
467	*Peter A Allard v Barbados* [Award on Jurisdiction] (13 Jun 2014) PCA Case No 2012-06
468	*Stans Energy Corp and Kutisay Mining LLC v Kyrgyzstan (I)* [Award] (30 Jun 2014) MCCI Case No A-2013/29
469	*Alapli Elektrik BV v Turkey* [Decision on Annulment] (10 Jul 2014) ICSID Case No ARB/08/13
470	*Hulley Enterprises, Yukos and Veteran Petroleum (joined) v Russia* [Final Award] (18 Jul 2014) PCA Case Nos AA 226, 227, 228
471	*OAO Tatneft v Ukraine* [Award] (29 Jul 2014) PCA Case No 2008-8
472	*Apotex Holdings Inc & Apotex Inc v United States* [Award] (25 Aug 2014) ICSID Case No ARB(AF)/12/1
473	*Perenco Ecuador Ltd v Ecuador* [Decision on Jurisdiction and Liability] (12 Sep 2014) ICSID Case No ARB/08/6
474	*El Paso Energy International Co v Argentina* [Decision on Annulment] (22 Sep 2014) ICSID Case No ARB/03/15
475	*Gold Reserve Inc v Venezuela* [Award] (22 Sep 2014) ICSID Case No ARB(AF)/09/1
476	*Yuri Ghenadevich Bogdanov v Moldova* [Award] (29 Sep 2014) SCC Case No V 2012/162
477	*Vigotop Ltd v Hungary* [Award] (1 Oct 2014) ICSID Case No ARB/11/22
478	*Mobil Corp, Venezuela Holdings, BV & ors v Venezuela* [Award] (9 Oct 2014) ICSID Case No ARB/07/27
479	*Valeri Belokon v Kyrgyzstan* [Award] (24 Oct 2014) UNCITRAL
480	*Giovanni Alemanni & ors v Argentina* [Concurring Opinion of JC Thomas] (17 Nov 2014) ICSID Case No ARB/07/08
481	*Giovanni Alemanni & ors v Argentina* [Decision on Jurisdiction and Admissibility] (17 Nov 2014) ICSID Case No ARB/07/08
482	*MOL Hungarian Oil and Gas Co PLC v Croatia* [Decision on Application under Rule 41(5)] (2 Dec 2014) ICSID Case No ARB/13/32
483	*Fraport AG Frankfurt Airport Services Worldwide v The Philippines* [Award] (10 Dec 2014) ICSID Case No ARB/11/12
484	*Hesham TM Al Warraq v Indonesia* [Final Award] (15 Dec 2014) UNCITRAL
485	*Forminster Enterprises Ltd (Cyprus) v Czech Republic* [Final Award] (15 Dec 2014) UNCITRAL
486	*Renco Group Inc v Peru (I)* [Decision on Preliminary Objections] (18 Dec 2014) ICSID Case No UNCT/13/1
487	*British Caribbean Bank Ltd v Belize* [Award] (19 Dec 2014) UNCITRAL
488	*Lao Holdings NV v Laos* [Interim Ruling on Issues Arising under Deed of Settlement] (19 Dec 2014) ICSID Case No ARB(AF)/12/6
489	*Hochtief AG v Argentina* [Decision on Liability] (29 Dec 2014) ICSID Case No ARB/07/31
490	*Daimler Financial Services AG v Argentina* [Decision on Annulment] (7 Jan 2015) ICSID Case No ARB/05/1
491	*Renée Rose Levy and Gremcitel SA v Peru* [Award] (9 Jan 2015) ICSID Case No ARB/11/17
492	*Georg Gavrilovic and Gavrilovic DOO v Croatia* [Decision on Bifurcation] (21 Jan 2015) ICSID Case No ARB/12/39

493	*State Enterprise 'Energorynok' (Ukraine) v Moldova* [Final Award] (29 Jan 2015) SCC Case No V 2012/175
494	*Tza Yap Shum v Peru* [Decision on Annulment] (12 Feb 2015) ICSID Case No ARB/07/6
495	*Muhammet Çap Sehil Inşaat Endustri Ve Ticaret Ltd Sti v Turkmenistan* [Decision on Jurisdiction] (13 Feb 2015) ICSID Case No ARB/12/6
496	*ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Venezuela* [Dissenting Opinion of G Abi-Saab] (19 Feb 2015) ICSID Case No ARB/07/30
497	*Mobil Investments Canada Inc and Murphy Oil Corp v Canada* [Award] (20 Feb 2015) ICSID Case No ARB(AF)/07/4
498	*Hassan Awdi, Enterprise Business Consultants, Inc and Alfa El Corp v Romania* [Award] (2 March 2015) ICSID Case No ARB/10/13
499	*Khan Resources Inc, Khan Resources BV, and Cauc Holding Company Ltd v Mongolia* [Award on the Merits] (2 Mar 2015) UNCITRAL PCA Case No 2011-09
500	*William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc v Canada* [Dissenting Opinion of D McRae] (10 Mar 2015) PCA Case No 2009-04
501	*OI European Group BV v Venezuela* [Award] (10 Mar 2015) ICSID Case No ARB/11/25
502	*Chevron Corp and Texaco Petroleum Corp v Ecuador* [Decision on Track 1B] (12 Mar 2015) PCA Case No 2009-23
503	*Chevron Corp and Texaco Petroleum Corp v Ecuador* [Note of Dissent of H A G Naon] (12 Mar 2015) PCA Case No 2009-23
504	*Tidewater Inc, Tidewater Investment SRL, Tidewater Caribe, CA & ors v Venezuela* [Award] (13 Mar 2015) ICISD Case No ARB/10/5
505	*William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc v Canada* [Award on Jurisdiction and Liability] (17 Mar 2015) PCA Case No 2009-04
506	*Transglobal Green Energy, LLC and Transglobal Green Energy de Panama, SA v Panama* [Decision on Admissibility and Jurisdiction] (17 Mar 2015) ICSID Case No ARB/13/28
507	*Lao Holdings NV v Laos* [Decision on Provisional Measures] (18 Mar 2015) ICSID Case No ARB(AF)/12/6
508	*Mamidoil Jetoil Greek Petroleum Products Societe SA v Albania* [Award] (30 Mar 2015) ICSID Case No ARB/11/24
509	*Mamidoil Jetoil Greek Petroleum Products Societe SA v Albania* [Dissenting Opinion of SA Hammond] (30 Mar 2015) ICSID Case No ARB/11/24
510	*Detroit International Bridge Co v Canada* [Award on Jurisdiction] (2 Apr 2015) PCA Case No 2012-25
511	*Detroit International Bridge Co v Canada* [Dissenting Statement on Jurisdiction of M Chertoff] (2 Apr 2015) PCA Case No 2012-25
512	*Poštová banka, AS and ISTROKAPITAL SE v Greece* [Award] (9 Apr 2015) ICSID Case No ARB/13/8
513	*Suez, Sociedad General de Aguas de Barcelona SA, Vivendi Universal SA, and AWG Group v Argentina* [Award] (9 Apr 2015) ICSID Case No ARB/03/19
514	*Perenco Ecuador Ltd v Ecuador* [Decision on Reconsideration] (10 Apr 2015) ICSID Case No ARB/08/6
515	*Accession Mezzanine Capital LP and Danubius Kereskedöház Vagyonkezelö Zrt v Hungary* [Award] (17 Apr 2015) ICSID Case No ARB/12/3
516	*Marco Gavazzi and Stefano Gavazzi v Romania* [Decision on Jurisdiction, Admissibility and Liability] (21 Apr 2015) ICSID Case No ARB/12/25
517	*Georg Gavrilovic and Gavrilovic DOO v Croatia* [Decision on Provisional Measures] (30 Apr 2015) ICSID Case No ARB/12/39
518	*Ping An Life Insurance Co, Ltd and Ping An Insurance (Group) Co, Ltd v Belgium* [Award] (30 Apr 2015) ICSID Case No ARB/12/29

519	*PNG Sustainable Development Program Ltd v Papua New Guinea* [Award] (5 May 2015) ICSID Case No ARB/13/33
520	*Renco Group Inc v Peru (I)* [Decision Regarding Requests for Relief] (2 Jun 2015) ICSID Case No UNCT/13/1
521	*Lao Holdings NV v Laos* [Decision on the Merits] (10 Jun 2015) ICSID Case No ARB(AF)/12/6
522	*Mobil Corp, Venezuela Holdings, BV & ors v Venezuela* [Decision on Revision] (12 Jun 2015) ICSID Case No ARB/07/27
523	*Gambrinus Corp v Venezuela* [Award] (15 Jun 2015) ICSID Case No ARB/11/31
524	*Tidewater Inc, Tidewater Investment SRL, Tidewater Caribe, CA & ors v Venezuela* [Decision on Application for Revision] (7 Jul 2015) ICSID Case No ARB/10/5
525	*Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v Turkmenistan* [Decision on Annulment] (14 Jul 2015) ICSID Case No ARB/10/1
526	*Bernhard von Pezold & ors and Border Timbers & ors v Zimbabwe* [Award] (28 Jul 2015) ICSID Case Nos ARB/10/15 and ARB/10/25
527	*Perenco Ecuador Ltd v Ecuador* [Interim Decision on Environmental Counterclaim] (11 Aug 2015) ICSID Case No ARB/08/6
528	*Dan Cake SA v Hungary* [Decision on Jurisdiction and Liability] (24 August 2015) ICSID Case No ARB/12/9
529	*Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Bolivia* [Partially Dissenting Opinion of B Stern] (7 Sep 2015) ICSID Case No ARB/06/2
530	*Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Bolivia* [Award] (16 Sep 2015) ICSID Case No ARB/06/2
531	*Mobil Corp, Venezuela Holdings, BV & ors v Venezuela* [Decision on Stay of Enforcement] (17 Sep 2015) ICSID Case No ARB/07/27
532	*Guardian Fiduciary Trust, Ltd, fka Capital Conservator Savings & Loan, Ltd v Macedonia* [Award] (22 Sep 2015) ICSID Case No ARB/12/31
533	*Occidental Petroleum Corp and Occidental Exploration and Production Co v Ecuador* [Decision on Annulment] (2 Nov 2015) ICSID Case No ARB/06/11
534	*Adel A Hamadi Al Tamimi v Oman* [Award] (3 Nov 2015) ICSID Case No ARB/11/33
535	*Vincent J Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v Poland* [Dissenting Opinion of F Orrego Vicuña] (7 Nov 2015) ICSID Case No ARB(AF)/11/3
536	*Vincent J Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v Poland* [Award] (24 Nov 2015) ICSID Case No ARB(AF)/11/3
537	*Electrabel SA v Hungary* [Award] (25 Nov 2015) ICSID Case No ARB/07/19
538	*Hrvatska Elektroprivreda DD v Slovenia* [Award] (17 Dec 2015) ICSID Case No ARB/05/24
539	*Oxus Gold v Uzbekistan* [Final Award] (17 Dec 2015) UNCITRAL
540	*Oxus Gold v Uzbekistan* [Partially Dissenting Opinion of M Lalonde] (17 Dec 2015) UNCITRAL
541	*Philip Morris Asia Ltd v Australia* [Award on Jurisdiction and Admissibility] (17 Dec 2015) PCA Case No 2012-12
542	*Charanne BV and Construction Investments SARL v Spain* [Dissenting Opinion of G Santiago Tawil] (21 Dec 2015) SCC Case No V 062/2012
543	*Tulip Real Estate and Development Netherlands BV v Turkey* [Decision on Annulment] (30 Dec 2015) ICSID Case No ARB/11/28
544	*Adem Dogan v Turkmenistan* [Decision on Annulment] (15 Jan 2016) ICSID Case No ARB/09/9
545	*Charanne BV and Construction Investments SARL v Spain* [Final Award] (21 Jan 2016) SCC Case No V 062/2012
546	*Transglobal Green Energy, LLC and Transglobal Green Energy de Panama, SA v Panama* [Decision on Provisional Measures] (21 Janu 2016) ICSID Case No ARB/13/28
547	*Valle Verde Sociedad Financiera SL v Bolivia* [Decision on Provisional Measures] (25 Jan 2016) ICSID Case No ARB/12/18

548	*Tenaris SA and Talta — Trading eMarketing Sociedade Unipessoal Lda v Venezuela* [Award] (29 Jan 2016) ICSID Case No ARB/11/26
549	*Ampal-American Israel Corp & ors v Egypt* [Decision on Jurisdiction] (1 Feb 2016) ICSID Case No ARB/12/11
550	*Total SA v Argentina* [Decision on Annulment] (1 Feb 2016) ICSID Case No ARB/04/01
551	*EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentina* [Decision on Annulment] (5 Feb 2016) ICSD ARB/03/23
552	*ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Venezuela* [Decision on Reconsideration] (9 Feb 2016) ICSID Case No ARB/07/30
553	*ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Venezuela* [Dissenting Opinion on Reconsideration of A Bucher] (9 Feb 2016) ICSID Case No ARB/07/30
554	*İçkale İnşaat Limited Şirketi v Turkmenistan* [Partially Dissenting Opinion of CB Lamm] (23 Feb 2016) ICSID Case No ARB/10/24
555	*Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania* [Decision on Annulment] (26 Feb 2016) ICSID Case No ARB/05/20
556	*Hydro SRL & ors v Albania* [Order on Provisional Measures] (3 Mar 2016) ICSID Case No ARB/15/28
557	*UP and CD Holding Internationale v Hungary* [Decision on Jurisdiction] (3 Mar 2016) ICSID Case No ARB/13/35
558	*Merck Sharpe & Dohme (IA) Corp v Ecuador* [(First) Decision on Interim Measures] (7 Mar 2016) PCA Case No 2012-10
559	*İçkale İnşaat Limited Şirketi v Turkmenistan* [Award] (8 Mar 2016) ICSID Case No ARB/10/24
560	*Copper Mesa Mining Corp v Ecuador* [Award] (15 Mar 2016) PCA Case No 2012-2
561	*Bernhard von Pezold & ors and Border Timbers & ors v Zimbabwe (Annulment)* [Decision on Provisional Measures] (17 Mar 2016) ICSID Case Nos ARB/10/15 and ARB/10/25
562	*Mesa Power Group LLC v Canada* [Award] (24 Mar 2016) PCA Case No 2012-17
563	*Mesa Power Group LLC v Canada* [Dissenting Opinion of CN Brower] (25 Mar 2016) UNCITRAL PCA Case No 2012-17
564	*Crystallex International Corp v Venezuela* [Award] (4 Apr 2016) ICSID Case No ARB(AF)/11/2
565	*TECO Guatemala Holdings LLC v Guatemala* [Decision on Annulment] (5 Apr 2016) ICSID Case No ARB/10/23
566	*Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v Argentina* [Decision on Provisional Measures] (8 Apr 2016) ICSID Case No ARB/09/1
567	*Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v Argentina* [Dissenting Opinion of K Hossain] (8 Apr 2016) ICSID Case No ARB/09/1
568	*Vestey Group Ltd v Venezuela* [Award] (15 Apr 2016) ICSID Case No ARB/06/4
569	*Cem Cenzig Uzan v Turkey* [Award on Preliminary Objection] (20 Apr 2016) SCC Case No V 2014/023
570	*MNSS BV and Recupero Credito Acciaio NV v Montenegro* [Award] (4 May 2016) ICSID Case No ARB(AF)/12/8
571	*Murphy Exploration and Production Co International v Ecuador* [Partial Final Award] (6 May 2016) PCA Case No 2012-16
572	*United Utilities (Tallinn) BV and Aktsiaselts Tallinna Vesi v Estonia* [Decision on Provisional Measures] (12 May 2016) ICSID Case No ARB/14/24
573	*Evrobalt LLC v Moldova* [Award on Emergency Measures] (30 May 2016) SCC Case No EA 2016/82
574	*Corona Materials LLC v Dominican Republic* [Award on Preliminary Objections] (31 May 2016) ICSID Case No ARB(AF)/14/3
575	*Transglobal Green Energy, LLC and Transglobal Green Energy de Panama, SA v Panama* [Award] (2 Jun 2016) ICSID Case No ARB/13/28

576	*RREEF Infrastructure (GP) Ltd and RREEF Pan-European Infrastructure Two Lux SÀRL v Spain* [Decision on Jurisdiction] (6 Jun 2016) ICSID Case No ARB/13/30
577	*Kompozit LLC v Moldova* [Emergency Award on Interim Measures] (14 Jun 2016) SCC EA 2016/095
578	*CEAC Holdings Ltd v Montenegro* [Award] (26 Jul 2016) ICSID Case No ARB/14/8
579	*Peter A Allard v Barbados* [Award] (27 Jun 2016) UNCITRAL PCA Case No 2012-06
580	*Kristian Almås and Geir Almås v Poland* [Award] (27 Jun 2016) UNCITRAL PCA Case No 2015-13
581	*Dunkeld International Investment Ltd v Belize (No 1)* [Award] (28 June 2016) UNCITRAL PCA Case No 2010-13
582	*Philip Morris Brands SÀRL, Philip Morris Products SA and Abal Hermanos SA v Uruguay* [Award] (8 Jul 2016) ICSID Case No ARB/10/7
583	*Philip Morris Brands SÀRL, Philip Morris Products SA and Abal Hermanos SA v Uruguay* [Dissenting Opinion of G Born] (8 Jul 2016) ICSID Case No ARB/10/7
584	*Renco Group Inc v Peru (I)* [Partial Award on Jurisdiction] (15 Jul 2016) ICSID Case No UNCT/13/1
585	*CC/Devas (Mauritius) Ltd, Devas Employees Mauritius Private Ltd and Telecom Devas Mauritius Ltd v India* [Award on Jurisdiction and Merits] (25 Jul 2016) PCA Case No 2013-09
586	*Venezuela US, SRL (Barbados) v Venezuela* [Dissenting Opinion on Jurisdiction of MG Kohen] (26 Jul 2016) PCA Case No 2013-34
587	*Venezuela US, SRL (Barbados) v Venezuela* [Interim Award on Jurisdiction] (26 Jul 2016) PCA Case No 2013-34
588	*Flemingo DutyFree Shop Private Ltd v Poland* [Award] (12 August 2016) UNCITRAL
589	*Rusoro Mining Ltd v Venezuela* [Award] (22 Aug 2016) ICSID Case No ARB(AF)/12/5
590	*Hydro SRL & ors v Albania* [Decision on Provisional Measures] (1 Sep 2016) ICSID Case No ARB/15/28
591	*Merck Sharpe & Dohme (IA) Corp v Ecuador* [Second Decision on Interim Measures] (6 Sep 2016) PCA Case No 2012-10
592	*Victor Pey Casado and President Allende Foundation v Chile* [Award] (13 Sep 2016) ICSID Case No ARB/98/2
593	*Philip Morris Brands SÀRL, Philip Morris Products SA and Abal Hermanos SA v Uruguay* [Decision on Rectification] (26 Sep 2016) ICSID Case No ARB/10/7
594	*Windstream Energy LLC v Canada* [Award] (27 Sep 2016) PCA Case No 2013-22
595	*Poštová banka, AS and ISTROKAPITAL SE v Greece* [Annulment Award] (29 Sep 2016) ICSID Case No ARB/13/8
596	*İçkale İnşaat Limited Şirketi v Turkmenistan* [Supplementary Decision and Rectification] (4 Oct 2016) ICSID Case No ARB/10/24
597	*Bernhard von Pezold & ors and Border Timbers & ors v Zimbabwe (Annulment)* [Decision on Provisional Measures] (13 Oct 2016) ICSID Case Nos ARB/10/15 and ARB/10/25
598	*Pac Rim Cayman LLC v El Salvador* [Award] (14 Oct 2016) ICSID Case No ARB/09/12
599	*Gabriel Resources Ltd and Gabriel Resources (Jersey) v Romania* [Decision on Provisional Measures] (21 Oct 2016) ICSID Case No ARB/15/31
600	*Aaron C Berkowitz, Brett E Berkowitz and Trevor B Berkowitz (formerly Spence International Investments & ors) v Costa Rica* [Interim Award] (25 October 2016) UNCITRAL
601	*Renco Group Inc v Peru (I)* [Final Award] (9 Nov 2016) ICSID Case No UNCT/13/1
602	*Gabriel Resources Ltd and Gabriel Resources (Jersey) v Romania* [Decision on Provisional Measures] (22 Nov 2016) ICSID Case No ARB/15/31
603	*Churchill Mining PLC and Planet Mining Pty Ltd v Indonesia* [Award] (6 Dec 2016) ICSID Case Nos ARB/12/14 and 12/40
604	*Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentina* [Award] (8 Dec 2016) ICSID Case No ARB/07/26
605	*Lion Mexico Consolidated LP v Mexico* [Decision on Preliminary Objections] (12 Dec 2016) ICSID Case No ARB(AF)/15/2

606	*Garanti Koza LLP v Turkmenistan* [Award] (19 Dec 2016) ICSID Case No ARB/11/20
607	*Hochtief AG v Argentina* [Award] (21 Dec 2016) ICSID Case No ARB/07/31
608	*Saint-Gobain Performance Plastics Europe v Venezuela* [Dissenting Opinion of C N Brower (21 Dec 2016) ICSID Case No ARB/12/13
609	*Blusun SA, Jean-Pierre Lecorcier and Michael Stein v Italy* [Final Award] (27 Dec 2016) ICSID Case No ARB/14/3
610	*Tidewater Inc, Tidewater Investment SRL, Tidewater Caribe, CA & ors v Venezuela* [Decision on Annulment] (27 Dec 2016) ICSID Case No ARB/10/5
611	*Saint-Gobain Performance Plastics Europe v Venezuela* [Decision on Liability and Quantum] (30 Dec 2016) ICSID Case No ARB/12/13
612	*ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Venezuela* [Interim Decision] (17 Jan 2017) ICSID Case No ARB/07/30
613	*Supervision y Control SA v Costa Rica* [Award] (18 Jan 2017) ICSID Case No ARB/12/4
614	*Supervision y Control SA v Costa Rica* [Dissenting Opinion of J P Klock Jr] (18 Jan 2017) ICSID Case No ARB/12/4
615	*Burlington Resources Inc v Ecuador* [Decision on Counterclaims] (7 Feb 2017) ICSID Case No ARB/08/5
616	*Burlington Resources Inc v Ecuador* [Decision on Reconsideration and Award] (7 Feb 2017) ICSID Case No ARB/08/5
617	*A11Y Ltd v Czech Republic* [Decision on Jurisdiction] (9 Feb 2017) ICSID Case No UNCT/15/1
618	*Murphy Exploration and Production Co International v Ecuador* [Final Award] (10 Feb 2017) PCA 2012-16
619	*Tomasz Częścik and Robert Aleksandrowicz* v Cyprus [Final Award] (11 Feb 2017) SCC V 2014/169
620	*Italba Corp v Uruguay* [Decision on Application for Provisional Measures] (15 Feb 2017) ICSID Case No ARB/16/9
621	*Ampal-American Israel Corp & ors v Egypt* [Decision on Liability and Heads of Loss] (21 Feb 2017) ICSID Case No ARB/12/11
622	*WNC Factoring Ltd v Czech Republic* [Award] (22 Feb 2017) PCA Case No 2014-34
623	*Vladislav Kim & ors v Uzbekistan* [Decision on Jurisdiction] (8 Mar 2017) ICSID Case No ARB/13/6
624	*Ansung Housing Co Ltd v China* [Award] (9 Mar 2017) ICSID Case No ARB/14/25
625	*Mobil Corp, Venezuela Holdings, BV & ors v Venezuela* [Decision on Annulment] (9 Mar 2017) ICSID Case No ARB/07/27
626	*Anglia Auto Accessories Ltd v Czech Republic* [Final Award] (10 Mar 2017) SCC Arb Case V 2014/181
627	*Ivan Peter Busta and James Peter Busta v Czech Republic* [Final Award] (10 Mar 2017) SCC Case No V 2015/014
628	*Silverton Finance Service Inc v Dominican Republic* [Final Award] (15 Mar 2017) UNCITRAL
629	*Eli Lilly and Co v Canada* [Final Award] (16 Mar 2017) ICSID Case No UNCT/14/2
630	*Eskosol SpA in liquidazione v Italy* [Decision on Application under Rule 41(5)] (20 Mar 2017) ICSID Case No ARB/15/50
631	*Blue Bank International & Trust (Barbados) Ltd v Venezuela* [Separate Opinion of C Soderlund] (3 Apr 2017) ICSID Case No ARB/12/20
632	*Marco Gavazzi and Stefano Gavazzi v Romania v Romania* [Excerpts of the Award] (18 Apr 2017) ICSID Case No ARB/12/25
633	*Blue Bank International & Trust (Barbados) Ltd v Venezuela* [Award] (26 Apr 2017) ICSID Case No ARB/12/20
634	*Eiser Infrastructure Limited and Energía Solar Luxembourg SÀRL v Spain* [Award] (4 May 2017) ICSID Case No ARB/13/36
635	*Suez, Sociedad General de Aguas de Barcelona SA, Vivendi Universal SA, and AWG Group v Argentina* [Decision on Annulment] (5 May 2017) ICSID Case No ARB/03/19

636	*Aaron C Berkowitz, Brett E Berkowitz and Trevor B Berkowitz (formerly Spence International Investments & ors) v Costa Rica* [Interim Award (Corrected)] (30 May 2017) ICSID Case No UNCT/13/2
637	*Beijing Urban Construction Group Co Ltd v Yemen* [Decision on Jurisdiction] (31 May 2017) ICSID No ARB/14/30
638	*Orascom TMT Investments SÀRL v Algeria* [Award] (31 May 2017) ICSID Case No ARB/12/35
639	*PL Holdings SÀRL v Poland* [Partial Award] (28 June 2017) SCC Case No V 2014/163
640	*Sergei Viktorovich Pugachev v Russia* [Interim Award] (7 July 2017) UNCITRAL
641	*Marco Gavazzi and Stefano Gavazzi v Romania v Romania* [Excerpts of Decision on Rectification] (13 Jul 2017) ICSID Case No ARB/12/25
642	*Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v Argentina* [Dissenting Opinion of K Hossain] (17 July 2017) ICSID Case No ARB/09/1
643	*Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v Argentina* [Award] (21 July 2017) ICSID Case No ARB/09/1
644	*EuroGas Inc and Belmont Resources Inc v Slovakia* [Dissenting Opinion of E Gaillard] (26 July 2017) ICSID Case No ARB/14/14
645	*EuroGas Inc and Belmont Resources Inc v Slovakia* [Award] (18 August 2017) ICSID Case No ARB/14/14
646	*Karkey Karadeniz Elektrik Uretim AS v Pakistan* [Award] (22 Aug 2017) ICSID Case No ARB/13/1
647	*Bernhard von Pezold & ors and Border Timbers & ors v Zimbabwe (Annulment)* [Decision on Provisional Measures] (22 August 2017) ICSID Case Nos ARB/10/15 and ARB/10/25
648	*Burlington Resources Inc v Ecuador* [Decision on Stay of Enforcement] (31 August 2017) ICSID Case No ARB/08/5
649	*Caratube International Oil Co LLP and Devincci Salah Hourani v Kazakhstan* [Dissenting Opinion of J Sales] (15 September 2017) ICSID Case No ARB/13/13
650	*Caratube International Oil Co LLP and Devincci Salah Hourani v Kazakhstan* [Award] (27 September 2017) ICSID Case No ARB/13/13
651	*PL Holdings SÀRL v Poland* [Final Award] (28 Sep 2017) SCC V 2014/163
652	*Fouad Alghanim & Sons Co for General Trading & Contracting, WLL and Fouad Mohammed Thunyan Alghanim v Jordan* [Separate Opinion of Y Fortier] (2 Oct 2017) ICSID Case No ARB/13/38
653	*Gambrinus Corp v Venezuela* [Decision on Annulment] (3 October 2017) ICSID Case No ARB/11/31
654	*Victor Pey Casado and President Allende Foundation v Chile* [Decision on Rectification] (6 October 2017) ICSID Case No ARB/98/2
655	*Koch Minerals SÀRL and Koch Nitrogen International SÀRL v Venezuela* [Partially Dissenting Opinion of Z Douglas] (8 Oct 2017) ICSID Case No ARB/11/19
656	*Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co KG v Czech Republic* [Dissenting Opinion of G Born] (11 Oct 2017) PCA Case No 2014-03
657	*Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co KG v Czech Republic* [Final Award] (11 Oct 2017) PCA Case No 2014-03
658	*Koch Minerals SÀRL and Koch Nitrogen International SÀRL v Venezuela* [Award] (30 Oct 2017) ICSID Case No ARB/11/19
659	*Saint-Gobain Performance Plastics Europe v Venezuela* [Award] (3 Nov 2017) ICSID Case No ARB/12/13
660	*Fabrica de Vidrios Los Andes, CA and Owens-Illinois de Venezuela CA v Venezuela* [Award] (13 November 2017) ICSID Case No ARB/12/21
661	*Tethyan Copper Co Pty Ltd v Pakistan* [Decision Jurisdiction and Liability] (10 Nov 2017) ICSID Case No ARB/12/1
662	*Rizzani de Eccher SpA, Obrascón Huarte Lain SA and Trevi SpA v Kuwait* [Decision on Provisional Measures] (23 Nov 2017) ICSID Case No ARB/17/8
663	*Bear Creek Mining Corp v Peru* [Award] (30 November 2017) ICSID Case No ARB/14/21

664	*Infinito Gold Ltd v Costa Rica* [Decision on Jurisdiction] (4 December 2017) ICSID Case No ARB/14/5
665	*Bridgestone Licensing Services, Inc and Bridgestone Americas, Inc v Panama* [Decision on Expedited Objections] (13 Dec 2017) ICSID Case No ARB/16/34
666	*Deutsche Telekom AG v India* [Interim Award] (13 Dec 2017) PCA Case No 2014-10
667	*Fouad Alghanim & Sons Co for General Trading & Contracting, WLL and Fouad Mohammed Thunyan Alghanim v Jordan* [Award] (14 Dec 2017) ICSID Case No ARB/13/38
668	*Lao Holdings NV v Laos* [Decision on Second Material Breach Application] (15 Dec 2017) ICSID Case No ARB(AF)/12/6
669	*UAB E energija (Lithuania) v Latvia* [Award] (22 Dec 2017) ICSID Case No ARB/12/33
670	*Resolute Forest Products Inc v Canada* [Decision on Jurisdiction and Admissibility] (30 Jan 2018) PCA Case No 2016-13
671	*Mohammed Munshi v Mongolia* [Award on Emergency Measures] (5 Feb 2018) SCC EA 2018/007
672	*Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v Spain* [Final Award] (15 Feb 2018) SCC Case No V 2015/063
673	*Karkey Karadeniz Elektrick Uretim AS v Pakistan* [Decision on Stay of Enforcement] (22 Feb 2018) ICSID Case No ARB/13/1
674	*Salini Impregilo SPA v Argentina* [Decision on Jurisdiction and Admissibility] (23 Feb 2018) ICSID Case No ARB/15/39
675	*Mercer Internatinoal Inc v Canada* [Award] (6 Mar 2018) ICSID Case No ARB(AF)/12/3
676	*Victor Pey Casado and Foundation President Allende v Chile* [Decision on Stay of Enforcement] (15 Mar 2018) ICSID Case No ARB/98/2
677	*Dawood Rawat v Mauritius* [Award on Jurisdiction] (6 April 2018) PCA Case No 2016-20
678	*Georg Gavrilovic and Gavrilovic DOO v Croatia* [Decision on the Achmea Issue] (30 April 2018) ICSID Case No ARB/12/39
679	*CEAC Holdings Ltd v Montenegro* [Decision on Annulment] (1 May 2018) ICSID Case No ARB/14/08
680	*Antaris Solar GmbH and Dr Michael Göde v Czech Republic* [Award] (2 May 2018) PCA Case No 2014-01
681	*Antaris Solar GmbH and Dr Michael Göde v Czech Republic* [Declaration of P Tomka] (2 May 2018) PCA Case No 2014-01
682	*Antaris Solar GmbH and Dr Michael Göde v Czech Republic* [Dissenting Opinion of G Born] (2 May 2018) PCA Case No 2014-01
683	*ACP Axos Capital GmbH v Kosovo* [Award] (3 May 2018) ICSID Case No ARB/15/22
684	*Masdar Solar & Wind Cooperatief UA v Spain* [Award] (16 May 2018) ICSID Case No ARB/14/1
685	*Olin Holdings Ltd v Libya* [Final Award] (25 May 2018) ICC 20355/MCP
686	*Antin Infrastructure Services Luxembourg SÀRL and Antin Energia Termosolar BV v Spain* [Award] (15 Jun 2018) ICSID Case No ARB/13/31
687	Casinos Austria International GmbH and Casinos Austria AG v Argentina [Dissenting Opinion of S Torres Bernardez] (20 Jun 2018) ICSID Case No ARB/14/32
688	*A11Y Ltd v Czech Republic* [Award] (29 Jun 2018) ICSID Case No UNCT/15/1
689	*Casinos Austria International GmbH and Casinos Austria AG v Argentina* [Decision on Jurisdiction] (29 Jun 2018) ICSID Case No ARB/14/32
690	*Mobil Investments Canada Inc v Canada* [Decision on Jurisdiction and Admissibility] (13 Jul 2018) ICSID Case No ARB/15/6
691	*Georg Gavrilovic and Gavrilovic DOO v Croatia* [Award] (26 Jul 2018) ICSID Case No ARB/12/39
692	*Marfin Investment Group Holdings SA & ors v Cyprus* [Award] (26 Jul 2018) ICSID Case No ARB/13/27
693	*Lion Mexico Consolidated LP v Mexico* [Decision on Jurisdiction] (30 Jul 2018) ICSID Case No ARB(AF)/15/2

694	*Masdar Solar & Wind Cooperatief UA v Spain* [Decision on Stay of Enforcement] (24 Aug 2018) ICSID Case No ARB/14/1
695	*Chevron Corp and Texaco Petroleum Corp v Ecuador* [Second Partial Award on Track II] (30 August 2018) PCA Case No 2009-23
696	*Unión Fenosa Gas, SA v Egypt* [Award] (31 Aug 2018) ICSID Case No ARB/14/4
697	*Unión Fenosa Gas, SA v Egypt* [Dissenting Opinion of M Clodfelter] (31 Aug 2018) ICSID Case No ARB/14/4
698	*Vattenfall AB & ors v Germany* [Decision on the *Achmea* Issue] (31 Aug 2018) ICSID Case No ARB/12/12
699	*David R Aven & ors v Costa Rica* [Final Award] (18 Sep 2018) UNCT/15/3
700	*AS Norvik Banka & ors v Latvia* [Ruling on Provisional Measures] (24 Sep 2018) ICSID Case No ARB/17/47
701	*United Utilities (Tallinn) BV and Aktsiaselts Tallinna Vesi v Estonia* [Decision on Intervention] (2 Oct 2018) ICSID Case No ARB/14/24
702	*UP and CD Holding Internationale v Hungary* [Award] (9 Oct 2018) ICSID Case No ARB/13/35
703	*Cortec Mining Kenya Ltd, Cortec (Pty) Ltd and Stirling Capital Ltd v Kenya* [Award] (22 Oct 2018) ICSID Case No ARB/15/29
704	*Foresight Luxembourg Solar 1 SÁRL & ors v Spain* [Final Award] (14 Nov 2018) SCC Case No V 2015/150
705	*Bernhard von Pezold & ors and Border Timbers & ors v Zimbabwe* [Decision on Annulment] (21 Nov 2018) ICSID Case Nos ARB/10/15 and ARB/10/25
706	*South American Silver Ltd (Bermuda) v Bolivia* [Award] (22 Nov 2018) PCA Case No 2013-15
707	*South American Silver Ltd (Bermuda) v Bolivia* [Dissenting Opinion of OC Guglielmino] (22 Nov 2018) PCA Case No 2013-15
708	*South American Silver Ltd (Bermuda) v Bolivia* [Separate Opinion of F Orrego Vicuña] (22 Nov 2018) PCA Case No 2013-15
709	*Mera Investment Fund Ltd v Serbia* [Decision on Jurisdiction] (30 Nov 2018) ICSID Case No ARB/17/2
710	*RREEF Infrastructure (GP) Ltd and RREEF Pan-European Infrastructure Two Lux SÀRL v Spain* [Decision on Responsibility and Quantum] (30 Nov 2018) ICSID Case No ARB/13/30
711	*RREEF Infrastructure (GP) Ltd and RREEF Pan-European Infrastructure Two Lux SÀRL v Spain* [Dissenting Opinion of R Volterra] (30 Nov 2018) ICSID Case No ARB/13/30
712	*Greentech Energy Systems AS & ors v Italy* [Dissenting Opinion of G Sacerdoti] (5 Dec 2018) SCC Case No V 2015/095
713	*OI European Group BV v Venezuela* [Decision on Annulment] (6 Dec 2018) ICSID Case No ARB/11/25
714	*Mercer International Inc v Canada* [Supplementary Decision] (10 Dec 2018) ICSID Case No ARB(AF)/12/3
715	*Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v Argentina* [Decision on Annulment] (14 Dec 2018) ICSID Case No ARB/03/17
716	*Anglo American PLC v Venezuela* [Dissenting Opinion of GS Tawil] (18 Dec 2018) ICSID Case No ARB(AF)/14/1
717	*Greentech Energy Systems AS & ors v Italy* [Final Award] (23 Dec 2018) SCC Case No V 2015/095

Table 3: Decisions of Iran-United States Claims Tribunal comprising corpus of arbitral practice (sorted chronologically)

No	Case name	Decision	Date	Citation
1	*Iran-United States*	[Decision]	(13 Jan 1982)	01 IUSCTR 101
2	*Re Mangård*	[Decision]	(15 Jan 1982)	01 IUSCTR 111
3	*Aeromaritime Inc v Iran*	[Award]	(13 May 1982)	01 IUSCTR 135
4	*Iran-United States*	[Decision]	(14 May 1982)	01 IUSCTR 144
5	*White Westinghouse International Co v Bank Sepah-Iran*	[Award]	(25 Jun 1982)	01 IUSCTR 169
6	*Granite State Machine Co Inc v Iran*	[Partial Award]	(29 Jul 1982)	01 IUSCTR 185
7	*Iran-United States*	[Decision]	(30 Jul 1982)	01 IUSCTR 189
8	*General Atomic Co v Atomic Energy Organization of Iran*	[Award]	(30 Sep 1982)	01 IUSCTR 223
9	*Gibbs and Hill Inc v Iran Power and Transmission Co*	[Interlocutory Award]	(5 Nov 1982)	01 IUSCTR 236
10	*Halliburton Co v IMCO*	[Interlocutory Award]	(5 Nov 1982)	01 IUSCTR 242
11	*Howard, Needles, Tammen and Bergendorf v Iran*	[Interlocutory Award]	(5 Nov 1982)	01 IUSCTR 248
12	*Drucker v Foreign Transaction Co*	[Interlocutory Award]	(5 Nov 1982)	01 IUSCTR 252
13	*TCSB Inc v Iran*	[Interlocutory Award]	(5 Nov 1982)	01 IUSCTR 261
14	*Ford Aerospace and Communications Corp v Air Force of the Islamic Republic of Iran*	[Interlocutory Award]	(5 Nov 1982)	01 IUSCTR 268
15	*Zokor International Inc v Iran*	[Interlocutory Award]	(5 Nov 1982)	01 IUSCTR 271
16	*Stone and Webster Overseas Group v National Petrochemical Co*	[Interlocutory Award]	(5 Nov 1982)	01 IUSCTR 274
17	*Dresser Industries Inc v Iran*	[Interlocutory Award]	(5 Nov 1982)	01 IUSCTR 280
18	*Forum Selection Cases*	[Concurring and Dissenting Opinions of HM Holtzmann with respect to Interlocutory Awards on Jurisdiction]	(5 Nov 1982)	01 IUSCTR 284
19	*Forum Selection Cases*	[Concurring and Dissenting Opinions of RM Mosk on the Issues of Jurisdiction]	(5 Nov 1982)	01 IUSCTR 305
20	*Forum Selection Cases*	[Dissenting Opinion of of HM Holtz-	(6 Jul 1982)	01 IUSCTR 320

		mann, GH Aldrich and RM Mosk]		
21	*Oil Field of Texas v Iran*	[Interlocutory Award]	(8 Dec 1982)	01 IUSCTR 347
22	*Reliance Group Inc v NIOC*	[Award]	(8 Dec 1982)	01 IUSCTR 384
23	*Raygo Wagner Equipment Co v Star Line Iran Co*	[Award]	(15 Dec 1982)	01 IUSCTR 411
24	*Granite State Machine Co Inc v Iran*	[Award]	(15 Dec 1982)	01 IUSCTR 442
25	*Phillips Petroleum Co v Iran*	[Interlocutory Award]	(30 Dec 1982)	01 IUSCTR 487
26	*Amoco Iran Oil Co v Iran*	[Interlocutory Award]	(30 Dec 1982)	01 IUSCTR 493
27	*Harza Engineering Co v Iran*	[Award]	(30 Dec 1982)	01 IUSCTR 499
28	*Rexnord Inc v Iran*	[Award]	(10 Jan 1983)	02 IUSCTR 006
29	*Haji-Bagherpour v United States*	[Award]	(2 Jan 1983)	02 IUSCTR 038
30	*Hoffland Honey Co v NIOC*	[Award]	(26 Jan 1983)	02 IUSCTR 041
31	*E-Systems Inc v Iran*	[Interim Award]	(4 Feb 1983)	02 IUSCTR 051
32	*Harza v Iran*	[Interlocutory Award]	(17 Feb 1983)	02 IUSCTR 068
33	*Grimm v Iran*	[Award]	(18 Feb 1983)	02 IUSCTR 078
34	*QuesTech Inc v Iran*	[Interim Award]	(1 Mar 1983)	02 IUSCTR 096
35	*Ultrasystems Inc v Iran*	[Award]	(4 Mar 1983)	02 IUSCTR 100
36	*Raygo Wagner Equipment Co v Iran Express Terminal Corp*	[Award]	(18 Mar 1983)	02 IUSCTR 141
37	*Esphahanian v Bank Tejarat*	[Award]	(29 Mar 1983)	02 IUSCTR 157
38	*Golpira v Iran*	[Award]	(29 Mar 1983)	02 IUSCTR 171
39	*Esphahanian v Bank Tejarat; Golpira v Iran*	[Dissenting Opinion of S Shafeiei on the Issue of Dual Nationality]	(29 Mar 1983)	02 IUSCTR 178
40	*Haroonian v Iran*	[Award]	(29 Mar 1983)	02 IUSCTR 226
41	*Isaiah v Bank Mellas*	[Award]	(30 Mar 1982)	02 IUSCTR 232
42	*Morris v Iran*	[Award]	(11 Apr 1983)	02 IUSCTR 241
43	*Queens Office Tower Associates v Iran Natioanl Airlines Corp*	[Award]	(15 Apr 1983)	02 IUSCTR 247
44	*Ford Aerospace and Communications Corp v Air Force of the Islamic Republic of Iran*	[Interim Award]	(27 Apr 1983)	02 IUSCTR 281
45	*Alcan Aluminium Ltd v Ircable Corp*	[Award]	(3 May 1983)	02 IUSCTR 294
46	*French American Banking Corp v Iranit SA*	[Award]	(5 May 1983)	02 IUSCTR 303
47	*Rockwell International Systems Inc v Iran*	[Interim Award]	(5 May 1983)	02 IUSCTR 310
48	*Owens-Corning Fiberglass Corp v Iran*	[Interlocutory Award]	(13 May 1983)	02 IUSCTR 322
49	*Kimberly-Clark Corp v Bank Markazi Iran*	[Award]	(25 May 1983)	02 IUSCTR 334

50	*Watkins-Johnson Co v Iran*	[Interim Award]	(26 May 1983)	02 IUSCTR 362
51	*Rockwell International Systems Inc v Iran*	[Interim Award]	(6 Jun 1983)	02 IUSCTR 369
52	*Pomeroy v Iran*	[Award]	(8 Jun 1983)	02 IUSCTR 372
53	*Pomeroy Corp v Iran*	[Award]	(8 Jun 1983)	02 IUSCTR 391
54	*Reading and Bates Corp v Iran*	[Interim Award]	(9 Jun 1983)	02 IUSCTR 401
55	*Dallal v Iran*	[Award]	(10 Jun 1983)	03 IUSCTR 010
56	*Dallal v Iran*	[Dissent of H M Holtzmann]	(10 Jun 1983)	03 IUSCTR 017
57	*Economy Forms Corp v Iran*	[Award]	(13 Jun 1983)	03 IUSCTR 042
58	*Economy Forms Corp v Iran*	[Concurring Opinion of H M Holtzmann]	(13 Jun 1983)	03 IUSCTR 055
59	*Touche Ross and Co v Iran*	[Interim Award]	(13 Jun 1983)	03 IUSCTR 059
60	*JI Case Co v Iran*	[Award]	(15 Jun 1983)	03 IUSCTR 062
61	*Gruen Associates Inc v Iran Housing Co*	[Award]	(27 Jul 1983)	03 IUSCTR 097
62	*Intrend International Inv v Imperial Iranian Air Force*	[Award]	(27 Jul 1983)	03 IUSCTR 110
63	*Cases Nos 83, 188, 220, 449*	[Reasons of Shafeiei for not signing Awards]	(9 Aug 1983)	03 IUSCTR 124
64	*Gould Marking Inc v Ministry of National Defense of Iran*	[Interlocutory Award]	(27 Jul 1983)	03 IUSCTR 147
65	*Chas T Main International Inc v Khuzestan Water and Power Authority*	[Interlocutory Award]	(27 Jul 1983)	03 IUSCTR 156
66	*Behring International Inc v Islamic Republic Iranian Air Force*	[Interim Award]	(10 Aug 1983)	03 IUSCTR 173
67	*World Farmers Trading Inc v Government Trading Corp*	[Partial Award]	(16 Aug 1983)	03 IUSCTR 197
68	*Touche Ross and Co v Iran*	[Interim Award]	(17 Aug 1983)	03 IUSCTR 200
69	*Ram International Industries Inc v Air Force of the Islamic Republic of Iran*	[Award]	(19 Aug 1983)	03 IUSCTR 203
70	*Blount Bros Corp v Ministry of Housing and Urban Development*	[Award]	(2 Sep 1983)	03 IUSCTR 225
71	*Woodward-Clyde Consultants v Iran*	[Award]	(2 Sep 1983)	03 IUSCTR 239
72	*Warnecke and Associates v Bank Mellat*	[Award]	(2 Sep 1983)	03 IUSCTR 256
73	*Chas T Main International Inc v Mahab Consulting Engineers Inc*	[Award]	(2 Sep 1983)	03 IUSCTR 270
74	*Alan Craig v Minsitry of Energy*	[Award]	(2 Sep 1983)	03 IUSCTR 280

75	*Alan Craig v Minsitry of Energy*	[Concurring Opinion of RM Mosk]	(2 Sep 1983)	03 IUSCTR 293
76	*Amoco Iran Oil Co v Iran; Phillips Petroleum Co v Iran*	[Dissenting Opinion of S Shafeiei]	(2 Sep 1983)	03 IUSCTR 297
77	*Continental Grain Export Corp v Government Trading Corp*	[Partial Award]	(5 Sep 1983)	03 IUSCTR 319
78	*Continental Grain Export Corp v Government Trading Corp*	[Concurring Opinion of M Kashani]	(5 Sep 1983)	03 IUSCTR 323
79	*Continental Grain Export Corp v Government Trading Corp*	[Concurring Opinion of HM Holtzmann]	(5 Sep 1983)	03 IUSCTR 325
80	*United States (Shipside Packing Co Inc) v Iran*	[Interim Award]	(6 Sep 1983)	03 IUSCTR 331
81	*Dresser Industries Inc v Iran*	[Award]	(8 Sep 1983)	03 IUSCTR 332
82	*United Technologies International Inc v Telecommunications Company of Iran*	[Award Dismissing Claim and Counterclaim]	(8 Sep 1983)	03 IUSCTR 334
83	*Ford Aerospace and Communications Corp v Air Force of the Islamic Republic of Iran*	[Interim Award]	(20 Oct 1983)	03 IUSCTR 384
84	*Ford Aerospace and Communications Corp v Air Force of the Islamic Republic of Iran*	[Concurring Opinion of RM Mosk]]	(20 Oct 1983)	03 IUSCTR 387
85	*RCA Global Communications Inc v Iran*	[Interim Award]	(31 Oct 1983)	04 IUSCTR 005
86	*RCA Global Communications Inc v Iran*	[Interim Award]	(31 Oct 1983)	04 IUSCTR 009
87	*RCA Global Communications Inc v Iran*	[Dissent of H M Holtzmann]	(31 Oct 1983)	04 IUSCTR 012
88	*CBA International Development Corp v Iran*	[Interim Award]	(18 Nov 1983)	04 IUSCTR 053
89	*Ministry of National Defence v United States*	[Award Dismissing Part of Claim]	(6 Dec 1983)	04 IUSCTR 074
90	*Ultrasystems Inc v Iran*	[Final Award]	(7 Dec 1983)	04 IUSCTR 077
91	*Behring International Inc v Islamic Republic Iranian Air Force*	[Decision]	(19 Dec 1983)	04 IUSCTR 089
92	*Behring International Inc v Islamic Republic Iranian Air Force*	[Dissent of RM Mosk]	(19 Dec 1983)	04 IUSCTR 093
93	*American International Group Inc v Iran*	[Award]	(19 Dec 1983)	04 IUSCTR 096
94	*American International Group Inc v Iran*	[Concurring Opinion of RM Mosk]	(19 Dec 1983)	04 IUSCTR 111
95	*Starrett Housing Corp v Iran*	[Interlocutory Award]	(19 Dec 1983)	04 IUSCTR 122
96	*Starrett Housing Corp v Iran*	[Concurring Opinion of	(19 Dec 1983)	04 IUSCTR 159

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97	*Parguin Co v United States*	[Decision]	(20 Dec 1983)	04 IUSCTR 210
98	*Dames and Moore v Iran*	[Award]	(20 Dec 1983)	04 IUSCTR 212
99	*Dames and Moore v Iran*	[Dissent of RM Mosk]	(20 Dec 1983)	04 IUSCTR 229
100	*CMI International Inc v Ministry of Roads and Transportation*	[Award]	(27 Dec 1983)	04 IUSCTR 263
101	*Morgan Equipment Co v Iran*	[Award]	(27 Dec 1983)	04 IUSCTR 272
102	*Morgan Equipment Co v Iran*	[Dissent of GH Aldrich]	(27 Dec 1983)	04 IUSCTR 279
103	*United States v Iran; Bank Mellat v United States, Manufacturers Hanover Trust; Bank Mellat v United States and Crocker National Bank*	[Award]	(27 Dec 1983)	05 IUSCTR 057
104	*Woodward-Clyde Consultants v Iran*	[Decision]	(30 Dec 1982)	05 IUSCTR 073
105	*Dallal v Iran*	[Decision]	(10 Jan 1984)	05 IUSCTR 074
106	*Kiddle Inc v Iran National Airlines*	[Decision]	(12 Jan 1984)	05 IUSCTR 078
107	*Lianosoff v Iran*	[Award]	(17 Jan 1984)	05 IUSCTR 090
108	*Iranian Customs Administration v United States*	[Award]	(18 Jan 1984)	05 IUSCTR 094
109	*United States v Iran*	[Award]	(18 Jan 1984)	05 IUSCTR 097
110	*United States v Iran*	[Concurring and Dissenting Opinion of HM Holtz-mann]	(18 Jan 1984)	05 IUSCTR 101
111	*Department of the Environment of Iran v United States*	[Award]	(18 Jan 1984)	05 IUSCTR 105
112	*Department of the Environment of Iran v United States*	[Concurring Opinion of HM Holtz-mann]	(18 Jan 1984)	05 IUSCTR 111
113	*Technology Enterprises Inc v Foreign Transaction Co*	[Award]	(31 Jan 1983)	05 IUSCTR 118
114	*RCA Global Communications Inc v Iran*	[Dissenting Opinion of M Kashani]	(31 Jan 1984)	05 IUSCTR 121
115	*Iran v United States*	[Interlocutory Award]	(1 Feb 1984)	05 IUSCTR 131
116	*Mackay v Iran Beverages Co*	[Award]	(3 Feb 1984)	05 IUSCTR 134
117	*Boeing Co v Iran*	[Interim Award]	(17 Feb 1984)	05 IUSCTR 152
118	*TCSB Inc v Iran*	[Award]	(16 Mar 1984)	05 IUSCTR 160
119	*TCSB Inc v Iran*	[Concurring Opinion of S Shafeiei]	(16 Mar 1984)	05 IUSCTR 175
120	*CBA International Development Corp v Iran*	[Award]	(16 Mar 1984)	05 IUSCTR 177

121	*CBA International Development Corp v Iran*	[Dissenting Opinion of RM Mosk]	(16 Mar 1984)	05 IUSCTR 181
122	*Chas T Main International Inc v Khuzestan Water and Power Authority*	[Interlocutory Award]	(16 Mar 1984)	05 IUSCTR 185
123	*Aeronutronic Overseas Services Inc v Iran*	[Interlocutory Award]	(16 Mar 1984)	05 IUSCTR 187
124	*Aeronutronic Overseas Services Inc v Iran*	[Dissenting Opinion of P Ansari]	(16 Mar 1984)	05 IUSCTR 193
125	*William L Pereira Associates v Iran*	[Award]	(17 Mar 1984)	05 IUSCTR 198
126	*William L Pereira Associates v Iran*	[Concurring Opinion of RM Mosk]	(17 Mar 1984)	05 IUSCTR 230
127	*American Housing International Inc v Housing Cooperative Society*	[Award]	(17 Mar 1984)	05 IUSCTR 235
128	*American Housing International Inc v Housing Cooperative Society*	[Dissenting Opinion of RM Mosk]	(17 Mar 1984)	05 IUSCTR 242
129	*Iran-United States*	[Decision]	(6 Apr 1984)	05 IUSCTR 251
130	*Iran-United States*	[Concurring Opinion of HM Holtzmann and GH Aldrich]	(6 Apr 1984)	05 IUSCTR 267
131	*Iran-United States*	[Concurring Opinion of RM Mosk]	(6 Apr 1984)	05 IUSCTR 269
132	*Iran-United States*	[Concurring Opinion of W Riphagen]	(6 Apr 1984)	05 IUSCTR 273
133	*Iran-United States*	[Dissenting Opinion of M Kashani, S Shafeiei and P Ansari]	(6 Apr 1984)	05 IUSCTR 275
134	*International Schools Services Inc v National Iranian Copper Company*	[Interlocutory Award]	(6 Apr 1984)	05 IUSCTR 338
135	*International Schools Services Inc v National Iranian Copper Company*	[Dissenting Opinion of G Lagergren]	(6 Apr 1984)	05 IUSCTR 348
136	*Telecommunications Co v NASA*	[Award]	(10 Apr 1984)	05 IUSCTR 357
137	*Schering Corp v Iran*	[Award]	(13 Apr 1984)	05 IUSCTR 361
138	*Schering Corp v Iran*	[Dissenting Opinion of RM Mosk]	(13 Apr 1984)	05 IUSCTR 374
139	*General Dynamics Corp v Iran*	[Award]	(13 Apr 1984)	05 IUSCTR 386
140	*United States v Iran*	[Award]	(1 May 1984)	06 IUSCTR 012

141	*Behring International Inc v Islamic Republic Iranian Air Force*	[Amendment to Decision]	(3 May 1984)	06 IUSCTR 030
142	*Boeing Co v Iran*	[Interim Award]	(25 May 1984)	06 IUSCTR 043
143	*Boeing Co v Iran*	[Concurring Opinion of HM Holtzmann]	(25 May 1984)	06 IUSCTR 047
144	*Cal-Main Foods Inc v Iran*	[Award]	(31 May 1984)	06 IUSCTR 052
145	*Cal-Main Foods Inc v Iran*	[Concurring Opinion of RM Mosk]	(31 May 1984)	06 IUSCTR 064
146	*Cal-Main Foods Inc v Iran*	[Concurring and Dissenting Opinion of P Ansari]	(31 May 1984)	06 IUSCTR 066
147	*American Bell International Inc v Iran*	[Interlocutory Award]	(31 May 1984)	06 IUSCTR 074
148	*American Bell International Inc v Iran*	[Concurring and Dissenting Opinion of RM Mosk]	(31 May 1984)	06 IUSCTR 095
149	*Ford Aerospace and Communications Corp v Air Force of the Islamic Republic of Iran*	[Interim Award]	(4 June 1984)	06 IUSCTR 104
150	*Ford Aerospace and Communications Corp v Air Force of the Islamic Republic of Iran*	[Dissenting Opinion of P Ansari]	(4 June 1984)	06 IUSCTR 111
151	*M&M Productions Inc v Iran*	[Award]	(7 June 1984)	06 IUSCTR 125
152	*Bendome-Derossi International v Iran*	[Interim Award]	(7 June 1984)	06 IUSCTR 130
153	*Bendome-Derossi International v Iran*	[Concurring Opinion of HM Holtzmann]	(7 June 1984)	06 IUSCTR 133
154	*Atomic Energy Organization of Iran v United States*	[Partial Award]	(8 Jun 1984)	06 IUSCTR 141
155	*Sea-Land Service Inc v Iran*	[Award]	(20 Jun 1984)	06 IUSCTR 149
156	*Sea-Land Service Inc v Iran*	[Concurring and Dissenting Opinion of HM Holtzmann]	(20 Jun 1984)	06 IUSCTR 175
157	*Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA*	[Award]	(22 Jun 1984)	06 IUSCTR 219
158	*Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA*	[Reasons for Not Signing Award of S Shafeiei]	(22 Jun 1984)	06 IUSCTR 230
159	*Gould Marking Inc v Ministry of National Defense of Iran*	[Award]	(22 Jun 1984)	06 IUSCTR 272
160	*Gould Marking Inc v Ministry of National Defense of Iran*	[Concurring and Dissenting	(22 Jun 1984)	06 IUSCTR 288

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161	*Bikoff and Eisenpresser v Iran*	[Award]	(22 Jun 1984)	07 IUSCTR 001
162	*Time Inc v Iran*	[Award]	(22 Jun 1984)	07 IUSCTR 008
163	*Lichem Corp v Atomic Energy Organization of Iran*	[Award]	(22 Jun 1984)	07 IUSCTR 018
164	*Rondu Holdings Inc v Iran*	[Award]	(22 Jun 1984)	07 IUSCTR 026
165	*Itel International Corp v Social Security Organization of Iran*	[Interlocutory Award]	(22 Jun 1984)	07 IUSCTR 031
166	*Hood Corp v Iran*	[Award]	(13 Jul 1984)	07 IUSCTR 036
167	*Hood Corp v Iran*	[Dissenting Opinion of RM Mosk]	(13 Jul 1984)	07 IUSCTR 048
168	*Morrison-Knudsen Pacific Ltd v Ministry of Roads and Transportation*	[Award]	(13 Jul 1984)	07 IUSCTR 054
169	*Harnischfeger Corp v Ministry of Roads and Transportation*	[Partial Award]	(13 Jul 1984)	07 IUSCTR 090
170	*Starrett Housing Corp v Iran*	[Dissenting Opinion of M Kashani]	(16 Jul 1984)	07 IUSCTR 119
171	*RJ Reynolds Tobacco Co v Iran*	[Award]	(31 Jul 1984)	07 IUSCTR 181
172	*RJ Reynolds Tobacco Co v Iran*	[Concurring Opinion of RM Mosk]	(31 Jul 1984)	07 IUSCTR 201
173	*Aeronutronic Overseas Services Inc v Iran*	[Interim Award]	(24 Aug 1984)	07 IUSCTR 217
174	*McHarg, Roberts, Wallace & Todd v Iran*	[Decision]	(13 Jun 1983)	07 IUSCTR 277
175	*Haddadi v United States*	[Award]	(31 Jan 1985)	08 IUSCTR 020
176	*Haddadi v United States*	[Concurring Opinion of CN Brower]	(31 Jan 1985)	08 IUSCTR 022
177	*Moussavi v United States*	[Award]	(31 Jan 1985)	08 IUSCTR 024
178	*Chas T Main International Inc v Khuzestan Water and Power Authority*	[Interlocutory Award]	(8 Feb 1985)	08 IUSCTR 041
179	*Behring International Inc v Islamic Republic Iranian Air Force*	[Interim Award]	(22 Feb 1985)	08 IUSCTR 044
180	*Western Dynamics Corp v Iran and Etka Organization*	[Award]	(28 Feb 1985)	08 IUSCTR 049
181	*Hood Corp v Iran*	[Decision]	(1 Mar 1985)	08 IUSCTR 053
182	*RJ Reynolds Tobacco Co v Iran*	[Award]	(1 Mar 1985)	08 IUSCTR 055
183	*Iran v United States*	[Decision]	(5 Mar 1985)	08 IUSCTR 063
184	*Iran v United States*	[Separate Opinion of SM Mostafavi, H Bahrami and P Ansari]	(5 Mar 1985)	08 IUSCTR 065
185	*Aeronutronic Overseas Services Inc v Iran*	[Interim Award]	(13 Mar 1985)	08 IUSCTR 075

186	*United States (Linen, Fortinberry and Associates Inc) v Iran*	[Interim Award]	(10 Apr 1985)	08 IUSCTR 085
187	*Iranian Customs Administration v United States*	[Award]	(17 Apr 1985)	08 IUSCTR 089
188	*Iranian Customs Administration v United States*	[Award]	(17 Apr 1985)	08 IUSCTR 093
189	*Computer Sciences Corp v Iran*	[Interlocutory Award]	(18 Apr 1985)	08 IUSCTR 099
190	*Dames and Moore v Iran*	[Decision]	(17 Apr 1985)	08 IUSCTR 107
191	*Harnischfeger Corp v Ministry of Roads and Transportation*	[Final Award]	(26 Apr 1985)	08 IUSCTR 119
192	*Harnischfeger Corp v Ministry of Roads and Transportation*	[Dissenting Opinion of RM Mosk]	(26 Apr 1985)	08 IUSCTR 134
193	*Dic of Delaware Inc v Tehran Redevelopment Corp*	[Award]	(26 Apr 1985)	08 IUSCTR 144
194	*Atlantic Richfield Co v Iran*	[Interim Award]	(8 May 1985)	08 IUSCTR 179
195	*United States v Iran*	[Decision]	(13 May 1985)	08 IUSCTR 189
196	*United States v Iran*	[Concurring and Dissenting Opinion of K-H Boeckstiegel, M Mostafavi, H Bahrami and P Ansari]	(13 May 1985)	08 IUSCTR 203
197	*United States v Iran*	[Concurring Opinion of CN Brower and HM Holtzmann]	(13 May 1985)	08 IUSCTR 206
198	*Component Builders Inc v Iran*	[Interim and Interlocutory Award]	(27 May 1985)	08 IUSCTR 216
199	*Component Builders Inc v Iran*	[Concurring and Dissenting Opinion of P Ansari]	(27 May 1985)	08 IUSCTR 228
200	*Behring International Inc v Islamic Republic Iranian Air Force*	[Interim and Interlocutory Award]	(21 Jun 1985)	08 IUSCTR 238
201	*Marks and Umann v Iran*	[Interlocutory Award]	(26 Jun 1985)	08 IUSCTR 290
202	*Sylvania Technical Systems Inc v Iran*	[Award]	(27 Jun 1985)	08 IUSCTR 298
203	*Sylvania Technical Systems Inc v Iran*	[Separate Opinion of HM Holtzmann]	(27 Jun 1985)	08 IUSCTR 329
204	*Sylvania Technical Systems Inc v Iran*	[Dissenting Opinion of SM Mostafavi]	(27 Jun 1985)	08 IUSCTR 336

205	*Universal Enterprises Ltd v NIOC*	[Decision]	(23 Jul 1985)	08 IUSCTR 368
206	*INA Corp v Iran*	[Award]	(12 Aug 1985)	08 IUSCTR 373
207	*INA Corp v Iran*	[Separate Opinion of G Lagergren]	(12 Aug 1985)	08 IUSCTR 385
208	*INA Corp v Iran*	[Separate Opinion of HM Holtzmann]	(12 Aug 1985)	08 IUSCTR 391
209	*INA Corp v Iran*	[Dissenting Opinion of KH Ameli]	(12 Aug 1985)	08 IUSCTR 403
210	*International Technical Products Corp v Iran*	[Award]	(19 Aug 1985)	09 IUSCTR 010
211	*Futura Trading Inc v Khuzestan Water and Power Authority*	[Award]	(19 Aug 1985)	09 IUSCTR 046
212	*Marks and Umann v Iran*	[Final Award]	(12 Sep 1985)	09 IUSCTR 069
213	*Hyatt International Corp v Iran*	[Interlocutory Award]	(17 Sep 1985)	09 IUSCTR 072
214	*United States v Iran*	[Dissenting Opinion of P Ansari]	(24 Sep 1985)	09 IUSCTR 097
215	*Questech Inc v Iran*	[Award]	(20 Sep 1985)	09 IUSCTR 107
216	*Questech Inc v Iran*	[Separate Opinion of HM Holtzmann]	(20 Sep 1985)	09 IUSCTR 138
217	*General Dynamics Telephone Systems Center Inc v Iran*	[Award]	(4 Oct 1985)	09 IUSCTR 153
218	*General Dynamics Telephone Systems Center Inc v Iran*	[Dissenting Opinion of H Bahrami]	(4 Oct 1985)	09 IUSCTR 169
219	*International Schools Services Inc v National Iranian Copper Company*	[Award]	(10 Oct 1985)	09 IUSCTR 187
220	*International Schools Services Inc v National Iranian Copper Company*	[Separate Opinion of HM Holtzmann]	(10 Oct 1985)	09 IUSCTR 200
221	*International Technical Products Corp v Iran*	[Award]	(24 Oct 1985)	09 IUSCTR 206
222	*International Technical Products Corp v Iran*	[Concurring and Dissenting Opinion of CN Brower]	(24 Oct 1985)	09 IUSCTR 243
223	*Sedco Inc v NIOC*	[Interlocutory Award]	(24 Oct 1985)	09 IUSCTR 248
224	*Sedco Inc v NIOC*	[Concurring Opinion of CN Brower]	(24 Oct 1985)	09 IUSCTR 280
225	*Touche Ross and Co v Iran*	[Award]	(11 Oct 1985)	09 IUSCTR 284
226	*United States (Tadjer-Cohen Associates Inc) v Iran*	[Interim Award]	(11 Nov 1985)	09 IUSCTR 302

227	*Housing and Urban Services International Inc v Tehran Redevelopment Corp*	[Award]	(22 Nov 1985)	09 IUSCTR 313
228	*Middle East Management and Construction Corp (MEMCCO) v Iran*	[Award]	(25 Nov 1985)	09 IUSCTR 340
229	*Mahmoud v Iran*	[Award]	(27 Nov 1985)	09 IUSCTR 350
230	*Mahmoud v Iran*	[Dissenting Opinion of GH Aldrich]	(27 Nov 1985)	09 IUSCTR 356
231	*First Travel Corp v Iran*	[Award]	(3 Dec 1985)	09 IUSCTR 360
232	*First Travel Corp v Iran*	[Dissenting Opinion of SM Mostafavi]	(3 Dec 1985)	09 IUSCTR 377
233	*Shannon & Wilson Inc v Atomic Energy Organisation of Iran*	[Award]	(5 Dec 1985)	09 IUSCTR 397
234	*Component Builders Inc v Iran*	[Decision]	(18 Dec 1985)	09 IUSCTR 404
235	*International Schools Services Inc v Iran*	[Interlocutory Award]	(30 Jan 1986)	10 IUSCTR 006
236	*International Schools Services Inc v Iran*	[Dissenting Opinion of SM Mostafavi]	(30 Jan 1986)	10 IUSCTR 016
237	*Chas T Main International Inc v Khuzestan Water and Power Authority*	[Interlocutory Award]	(6 Feb 1986)	10 IUSCTR 021
238	*HA Spalding Inc v Ministry of Roads and Transport*	[Award]	(24 Feb 1986)	10 IUSCTR 022
239	*HA Spalding Inc v Ministry of Roads and Transport*	[Concurring Opinion of CN Brower]	(24 Feb 1986)	10 IUSCTR 034
240	*HA Spalding Inc v Ministry of Roads and Transport*	[Concurring Opinion of P Ansari]	(24 Feb 1986)	10 IUSCTR 035
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242	*Blount Bros Corp v Iran*	[Award]	(28 Feb 1986)	10 IUSCTR 056
243	*Blount Bros Corp v Iran*	[Concurring Opinion of RM Mosk]	(28 Feb 1986)	10 IUSCTR 081
244	*Blount Bros Corp v Iran*	[Dissenting Opinion of SM Mostafavi]	(28 Feb 1986)	10 IUSCTR 085
245	*Blount Bros Corp v Iran*	[Award]	(28 Feb 1986)	10 IUSCTR 095
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248	*Phelps Dodge Corp v Iran*	[Award]	(19 Mar 1986)	10 IUSCTR 121
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250	*Phelps Dodge International Corp v Iran*	[Award]	(19 Mar 1986)	10 IUSCTR 157
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252	*Sedco Inc v NIOC*	[Interlocutory Award]	(27 Mar 1986)	10 IUSCTR 180
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254	*Iran v United States*	[Interlocutory Award]	(4 Apr 1986)	10 IUSCTR 207
255	*Iran v United States*	[Dissenting Opinion of HM Holtzmann]	(4 Apr 1986)	10 IUSCTR 219
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258	*Foremost Tehran Inc v Iran*	[Dissenting Opinion of HM Holtzmann]	(10 Apr 1986)	10 IUSCTR 258
259	*Computer Sciences Corp v Iran*	[Award]	(16 Apr 1986)	10 IUSCTR 269
260	*United States (Trustees of Columbia University) v Iran*	[Award]	(15 Apr 1986)	10 IUSCTR 319
261	*United States (Trustees of Columbia University) v Iran*	[Dissenting Opinion of SM Mostafavi]	(15 Apr 1986)	10 IUSCTR 328
262	*United States (Koehler) v Iran*	[Award]	(15 Apr 1986)	10 IUSCTR 333
263	*United States (Koehler) v Iran*	[Dissenting Opinion of SM Mostafavi]	(15 Apr 1986)	10 IUSCTR 348
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265	*McCollough & Co v Ministry of Post, Telegraph and Telephone*	[Award]	(22 Apr 1986)	11 IUSCTR 003
266	*McCollough & Co v Ministry of Post, Telegraph and Telephone*	[Concurring and Dissenting Opinion of CN Brower]	(22 Apr 1986)	11 IUSCTR 035
267	*McCollough & Co v Ministry of Post, Telegraph and Telephone*	[Separate Opinion of P Ansari]	(22 Apr 1986)	11 IUSCTR 045
268	*Logos Development Corp v Information Systems Iran*	[Award]	(30 Apr 1986)	11 IUSCTR 053
269	*Cyrus Petroleum Ltd v Iran*	[Award]	(2 May 1986)	11 IUSCTR 070
270	*United States (Baygell) v Iran*	[Award]	(2 May 1986)	11 IUSCTR 072
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274	*United States (Lauth) v Iran*	[Separate Opinion of P Ansari]	(8 May 1986)	11 IUSCTR 165
275	*AHFI Planning Associates Inc v Iran*	[Award]	(8 May 1986)	11 IUSCTR 168
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277	*International Technical Products Corp v Iran*	[Decision]	(16 Jun 1986)	11 IUSCTR 182
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296	*Howard Needles Tammen & Bergendoff v Iran*	[Award]	(8 Aug 1986)	11 IUSCTR 302

297	*Howard Needles Tammen & Bergendoff v Iran*	[Concurring Opinion of GH Aldrich]	(8 Aug 1986)	11 IUSCTR 345
298	*Howard Needles Tammen & Bergendoff v Iran*	[Dissenting Opinion of H Bahrami]	(8 Aug 1986)	11 IUSCTR 346
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300	*Payne v Iran*	[Dissenting Opinion of H Bahrami]	(8 Aug 1986)	12 IUSCTR 017
301	*Atomic Energy Organization of Iran v United States*	[Award]	(14 Aug 1986)	12 IUSCTR 025
302	*Atomic Energy Organization of Iran v United States*	[Concurring Opinion of SM Mostafavi]	(14 Aug 1986)	12 IUSCTR 030
303	*Ministry of National Defence v United States*	[Award]	(14 Aug 1986)	12 IUSCTR 033
304	*Ministry of National Defence v United States*	[Dissenting Opinion of SM Mostafavi]	(14 Aug 1986)	12 IUSCTR 038
305	*Iran v United States*	[Interlocutory Award]	(20 Aug 1986)	12 IUSCTR 040
306	*Iran v United States*	[Dissenting Opinion of HM Holtzmann, GH Aldrich and CN Brower]	(20 Aug 1986)	12 IUSCTR 064
307	*Iran v United States*	[Separate Opinion of SM Mostafavi]	(20 Aug 1986)	12 IUSCTR 080
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309	*Iran v United States*	[Separate Opinion of P Ansari]	(20 Aug 1986)	12 IUSCTR 088
310	*Ammann & Whitney v Khuzestan Urban Development Organization*	[Award]	(22 Aug 1986)	12 IUSCTR 094
311	*Ammann & Whitney v Khuzestan Urban Development Organization*	[Dissenting Opinion of SM Mostafavi]	(22 Aug 1986)	12 IUSCTR 108
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546	*Component Builders Inc v Iran*	[Final Award]	(10 Aug 1989)	23 IUSCTR 003
547	*Component Builders Inc v Iran*	[Concurring and Dissenting	(10 Aug 1989)	23 IUSCTR 078

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548	*Component Builders Inc v Iran*	[Dissenting Opinion of P Ansari]	(22 Sep 1989)	23 IUSCTR 090
549	*United States (Teledyne Industries Inc) v Iran*	[Award]	(29 Aug 1989)	23 IUSCTR 126
550	*United States (Teledyne Industries Inc) v Iran*	[Concurring Opinion of R C Allison]	(29 Aug 1989)	23 IUSCTR 130
551	*United States (Haber) v Iran*	[Award]	(4 Sep 1989)	23 IUSCTR 133
552	*Rockwell International Systems Inc v Iran*	[Award]	(5 Sep 1989)	23 IUSCTR 150
553	*Rockwell International Systems Inc v Iran*	[Concurring and Dissenting Opinion of HM Holtzmann]	(5 Sep 1989)	23 IUSCTR 217
554	*United States (Leach) v Iran*	[Award]	(6 Oct 1989)	23 IUSCTR 233
555	*United States (Leach) v Iran*	[Separate Opinion of A Noori]	(6 Oct 1989)	23 IUSCTR 239
556	*Protiva v Iran*	[Interlocutory Award]	(12 Oct 1989)	23 IUSCTR 259
557	*Creditcorp International Inc and Dorian International Credit Co Inc v Iran Carton Co*	[Award]	(12 Oct 1989)	23 IUSCTR 265
558	*Diba and Gaulin v Iran*	[Award]	(31 Oct 1989)	23 IUSCTR 268
559	*United States (Hollyfield) v Iran*	[Award]	(3 Nov 1989)	23 IUSCTR 276
560	*Harounian v Iran*	[Award]	(27 Nov 1989)	23 IUSCTR 282
561	*Abrahamian v Iran*	[Interlocutory Award]	(1 Dec 1989)	23 IUSCTR 285
562	*Abrahamian v Iran*	[Dissenting Opinion of P Ansari]	(1 Dec 1989)	23 IUSCTR 288
563	*Edwards v Iran*	[Award]	(5 Dec 1989)	23 IUSCTR 290
564	*Ocean-Air Cargo Claims v Iran*	[Award]	(15 Dec 1989)	23 IUSCTR 296
565	*United States (Ocean-Air Cargo Claims) v Iran*	[Award]	(15 Dec 1989)	23 IUSCTR 303
566	*Z A and G Nourafchan v Iran*	[Interlocutory Award]	(15 Dec 1989)	23 IUSCTR 307
567	*Z A and G Nourafchan v Iran*	[Dissenting Opinion of P Ansari]	(15 Dec 1989)	23 IUSCTR 315
568	*Telecommunications Co v United States*	[Award]	(19 Dec 1989)	23 IUSCTR 320
569	*Telecommunications Co v United States*	[Concurring and Dissenting Opinion of HM Holtzmann]	(25 Jan 1990)	23 IUSCTR 320
570	*United States (United Painting Co Inc) v Iran*	[Award]	(20 Dec 1989)	23 IUSCTR 351

571	*Too v Greater Modesto Insurance Associates*	[Award]	(29 Dec 1989)	23 IUSCTR 378
572	*Too v Greater Modesto Insurance Associates*	[Separate Opinion of SK Khalilian]	(29 Dec 1989)	23 IUSCTR 389
573	*Rockwell International Systems Inc v Iran*	[Dissenting Opinion of A Noori]	(26 Nov 1990)	24 IUSCTR 003
574	*Khosrowshahi v Iran*	[Interlocutory Award]	(22 Jan 1990)	24 IUSCTR 040
575	*International Systems and Controls Corp v Iran*	[Award]	(23 Jan 1990)	24 IUSCTR 047
576	*International Systems and Controls Corp v Iran*	[Concurring and Dissenting Opinion of CN Brower]	(23 Jan 1990)	24 IUSCTR 085
577	*Stanwick Corp v Iran*	[Award]	(31 Jan 1990)	24 IUSCTR 102
578	*United States (Stewart) v Iran*	[Award]	(9 Feb 1990)	24 IUSCTR 116
579	*TME International Inc v Iran*	[Award]	(12 Mar 1990)	24 IUSCTR 121
580	*TME International Inc v Iran*	[Separate Opinion of HM Holtzmann]	(12 Mar 1990)	24 IUSCTR 156
581	*TME International Inc v Iran*	[Concurring and Dissenting Opinion of A Noori]	(23 Apr 1990)	24 IUSCTR 162
582	*Schott v Iran*	[Award]	(14 Mar 1990)	24 IUSCTR 203
583	*Schott v Iran*	[Separate Opinion of HM Holtzmann]	(14 Mar 1990)	24 IUSCTR 227
584	*United States (Asghar) v Iran*	[Award]	(14 Mar 1990)	24 IUSCTR 238
585	*United States (Asghar) v Iran*	[Separate Opinion of HM Holtzmann]	(14 Mar 1990)	24 IUSCTR 248
586	*United States (David) v Iran*	[Award]	(19 Mar 1990)	24 IUSCTR 252
587	*United States (David) v Iran*	[Separate Opinion of HM Holtzmann]	(19 Mar 1990)	24 IUSCTR 252
588	*Abboud v Iran*	[Award]	(16 May 1990)	24 IUSCTR 265
589	*Hakim v Iran*	[Award]	(16 May 1990)	24 IUSCTR 269
590	*Itel International Corp v Social Security Organization of Iran*	[Award]	(23 May 1990)	24 IUSCTR 272
591	*Varo International Corp v Iran*	[Award]	(21 Jun 1990)	25 IUSCTR 003
592	*Orton/McCullough Crane Co v Iranian State Railways*	[Award]	(25 Jun 1990)	25 IUSCTR 015
593	*Development and Resources Corp v Iran*	[Award]	(25 Jun 1990)	25 IUSCTR 020
594	*Development and Resources Corp v Iran*	[Dissenting Opinion of P Ansari]	(18 Jan 1991)	25 IUSCTR 112

595	*CBS Inc v Iran*	[Award]	(28 Jun 1990)	25 IUSCTR 131
596	*Nemazee v Iran*	[Award]	(10 Jul 1990)	25 IUSCTR 153
597	*Nemazee v Iran*	[Separate Opinion of P Ansari]	(10 Jul 1990)	25 IUSCTR 162
598	*Chamness v Iran*	[Award]	(9 Aug 1990)	25 IUSCTR 172
599	*Ghaffari v NIOC*	[Award]	(10 Sep 1990)	25 IUSCTR 178
600	*World Farmers Trading Inc v Government Trading Corp*	[Decision]	(3 Oct 1990)	25 IUSCTR 186
601	*Ainsworth v Iran*	[Decision]	(4 Oct 1990)	25 IUSCTR 188
602	*Lawrence v Iran*	[Interlocutory Award]	(5 Oct 1990)	25 IUSCTR 190
603	*Mohajer-Shojaee v Iran*	[Award]	(5 Oct 1990)	25 IUSCTR 196
604	*Mohajer-Shojaee v Iran*	[Concurring and Dissenting Opinion of HM Holtz-mann]	(5 Oct 1990)	25 IUSCTR 201
605	*Highlands Insurance Co v Iran*	[Award]	(12 Oct 1990)	25 IUSCTR 212
606	*Sovereign International Corp v Iran*	[Award]	(9 Nov 1990)	25 IUSCTR 229
607	*Sovereign International Corp v Iran*	[Award]	(9 Nov 1990)	25 IUSCTR 235
608	*Sovereign International Corp v Iran*	[Award]	(9 Nov 1990)	25 IUSCTR 241
609	*Iran v United States*	[Interlocutory Award]	(12 Nov 1990)	25 IUSCTR 247
610	*Etezadi v Iran*	[Award]	(15 Nov 1990)	25 IUSCTR 264
611	*Mohajer-Shojaee v Iran*	[Decision]	(26 Dec 1990)	25 IUSCTR 273
612	*Berookhim v Iran*	[Award]	(27 Dec 1990)	25 IUSCTR 278
613	*Bakhtiari v Iran*	[Award]	(27 Dec 1990)	25 IUSCTR 289
614	*Uiterwyk Corp v Iran*	[Final Award]	(8 Jan 1991)	26 IUSCTR 003
615	*Uiterwyk Corp v Iran*	[Statement of K-H Boeck-stiegel and HM Holtz-mann]	(8 Jan 1991)	26 IUSCTR 005
616	*Nazari v Iran*	[Interlocutory Award]	(15 Jan 1991)	26 IUSCTR 007
617	*Phibro Corp v Ministry of War-Etka Co Ltd*	[Award]	(18 Jan 1991)	26 IUSCTR 015
618	*Phibro Corp v Ministry of War-Etka Co Ltd*	[Concurring and Dissenting Opinion of P Ansari]	(31 Jan 1991)	26 IUSCTR 031
619	*Khajetoorians v Iran*	[Award]	(25 Jan 1991)	26 IUSCTR 037
620	*Samrad v Iran*	[Award]	(4 Feb 1991)	26 IUSCTR 044
621	*Samrad v Iran*	[Separate Opinion of GH Aldrich]	(4 Feb 1991)	26 IUSCTR 058
622	*Combustion Engineering Inc v Iran*	[Award]	(18 Feb 1991)	26 IUSCTR 060

623	*Combustion Engineering Inc v Iran*	[Concurring and Dissenting Opinion of SK Khalilian]	(18 Feb 1991)	26 IUSCTR 129
624	*General Electric Co v Iran*	[Award]	(15 Mar 1991)	26 IUSCTR 148
625	*Uiterwyk Corp v Iran*	[Decision]	(17 Apr 1991)	26 IUSCTR 186
626	*Arjad v Iran*	[Award]	(22 Apr 1991)	26 IUSCTR 190
627	*Carlson v Iran*	[Award]	(1 May 1991)	26 IUSCTR 193
628	*Carlson v Iran*	[Dissenting Opinion of HM Holtz-mann]	(1 May 1991)	26 IUSCTR 216
629	*Ram International Industries Inc v Iran*	[Award]	(9 May 1991)	26 IUSCTR 228
630	*Consortium for International Development*	[Award]	(15 May 1991)	26 IUSCTR 244
631	*Phibro Corp v Ministry of War-Etka Co Ltd*	[Decision]	(17 May 1991)	26 IUSCTR 254
632	*Development and Resources Corp v Iran*	[Decision]	(30 May 1991)	26 IUSCTR 256
633	*Eastman Kodak Co v Iran*	[Award]	(1 Jul 1991)	27 IUSCTR 003
634	*Eastman Kodak Co v Iran*	[Concurring and Dissenting Opinion of CN Brower]	(1 Jul 1991)	27 IUSCTR 024
635	*Eastman Kodak Co v Iran*	[Dissenting Opinion of P Ansari]	(8 Jul 1991)	27 IUSCTR 032
636	*Gabay v Iran*	[Award]	(10 Jul 1991)	27 IUSCTR 040
637	*Pointon v Iran*	[Award]	(23 Jul 1991)	27 IUSCTR 049
638	*Petrolane Inc v Iran*	[Award]	(14 Aug 1991)	27 IUSCTR 064
639	*Merrill Lynch & Co Inc v Iran*	[Award]	(19 Aug 1991)	27 IUSCTR 122
640	*Levitt v Iran*	[Award]	(29 Aug 1991)	27 IUSCTR 145
641	*Levitt v Iran*	[Concurring and Dissenting Opinion of RC Allison]	(29 Aug 1991)	27 IUSCTR 187
642	*Gabay v Iran*	[Decision]	(24 Sep 1991)	27 IUSCTR 194
643	*General Petrochemicals Corp v Iran*	[Award]	(21 Oct 1991)	27 IUSCTR 196
644	*Behring International Inc v Islamic Republic of Iran Air Force*	[Award]	(29 Oct 1991)	27 IUSCTR 218
645	*Saboonchian v Iran*	[Award]	(15 Nov 1991)	27 IUSCTR 248
646	*Ministry of National Defence v United States*	[Decision]	(22 Nov 1991)	27 IUSCTR 256
647	*Ministry of National Defence v United States*	[Dissenting Opinion of GH Aldrich]	(22 Nov 1991)	27 IUSCTR 258
648	*Ministry of National Defence v United States*	[Dissenting Opinion of HM Holtz-mann and RC Allison]	(22 Nov 1991)	27 IUSCTR 259

649	*Petrolane Inc v Iran*	[Decision]	(25 Nov 1991)	27 IUSCTR 264
650	*Petrolane Inc v Iran*	[Dissenting Opinion of SK Khalilian]	(12 Dec 1991)	27 IUSCTR 265
651	*Eastman Kodak Co, United States v Iran*	[Decision]	(30 Dec 1991)	27 IUSCTR 269
652	*Petrolane Inc v Iran*	[Concurring and Dissenting Opinion of SK Khalilian]	(18 Mar 1992)	28 IUSCTR 003
653	*Collins Systems International Inc v Islamic Republic of Iran Navy*	[Award]	(20 Jan 1992)	28 IUSCTR 021
654	*Saboonchian v Iran*	[Decision]	(13 Feb 1992)	28 IUSCTR 051
655	*Buckamier v Iran*	[Award]	(6 Mar 1992)	28 IUSCTR 053
656	*Iran v United States*	[Award]	(6 May 1992)	28 IUSCTR 112
657	*Iran v United States*	[Separate Opinion of HM Holtz-mann, GH Al-drich and RC Allison]	(6 May 1992)	28 IUSCTR 142
658	*Itel International Corp v Iran*	[Award]	(8 Jun 1992)	28 IUSCTR 159
659	*Riahi v Iran*	[Interlocutory Award]	(10 Jun 1992)	28 IUSCTR 176
660	*Riahi v Iran*	[Statement of A Noori]	(10 Jun 1992)	28 IUSCTR 189
661	*Nazari v Iran*	[Decision]	(16 Jun 1992)	28 IUSCTR 192
662	*Collins Systems International Inc v Islamic Republic of Iran Navy*	[Decision]	(16 Jun 1992)	28 IUSCTR 195
663	*SeaCo Inc v Iran*	[Award]	(25 Jun 1992)	28 IUSCTR 198
664	*Cherafat v Iran*	[Decision]	(25 Jun 1992)	28 IUSCTR 216
665	*Karim-Panahi v United States*	[Award]	(26 Jun 1992)	28 IUSCTR 225
666	*Monemi v Iran*	[Partial Award]	(1 Jul 1992)	28 IUSCTR 232
667	*Monemi v Iran*	[Statement of A Noori]	(1 Jul 1992)	28 IUSCTR 243
668	*Malek v Iran*	[Award]	(11 Aug 1992)	28 IUSCTR 246
669	*Malek v Iran*	[Concurring and Dissenting Opinion of RC Allison]	(11 Aug 1992)	28 IUSCTR 292
670	*Malek v Iran*	[Separate Opinion of M Aghahosseini]	(11 Aug 1992)	28 IUSCTR 303
671	*Buckamier v Iran*	[Decision]	(22 Sep 1992	28 IUSCTR 307
672	*Plicoflex Inc v Iran*	[Award]	(10 Oct 1992)	28 IUSCTR 309
673	*Karim-Panahi v United States*	[Decision]	(27 Oct 1992)	28 IUSCTR 318
674	*Anaconda-Iran Inc v Iran*	[Award]	(29 Oct 1992)	28 IUSCTR 320
675	*Tchacosh Co Inc v Iran*	[Award]	(9 Dec 1992)	28 IUSCTR 371
676	*Allen v Iran*	[Award]	(11 Dec 1992)	28 IUSCTR 382

677	*Malekzadeh v Iran*	[Partial Award]	(21 Jan 1993)	29 IUSCTR 003
678	*Malekzadeh v Iran*	[Statement of A Noori]	(21 Jan 1993)	29 IUSCTR 014
679	*Malekzadeh v Iran*	[Separate Opinion of HM Holtz-mann]	(21 Jan 1993)	29 IUSCTR 016
680	*Saghi v Iran*	[Award]	(22 Jan 1993)	29 IUSCTR 020
681	*Saghi v Iran*	[Concurring Opinion of GH Aldrich]	(22 Jan 1993)	29 IUSCTR 056
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683	*Boroumand v Iran*	[Statement of A Noori]	(3 Feb 1993)	29 IUSCTR 065
684	*Nikpour v Iran*	[Interlocutory Award]	(18 Feb 1993)	29 IUSCTR 067
685	*Nikpour v Iran*	[Statement of A Noori]	(18 Feb 1993)	29 IUSCTR 075
686	*Golshani v Iran*	[Final Award]	(2 Mar 1993)	29 IUSCTR 078
687	*Golshani v Iran*	[Concurring and Dissenting Opinion of RC Allison]	(2 Mar 1993)	29 IUSCTR 117
688	*Golshani v Iran*	[Separate Opinion of M Aghahosseini]	(2 Mar 1993)	29 IUSCTR 122
689	*Marine Midland Bank v Iran*	[Decision]	(23 Apr 1993)	29 IUSCTR 185
690	*Irving Trust Co v Iran*	[Decision]	(23 Apr 1993)	29 IUSCTR 189
691	*Manufacturers Hanover Trust Co v Iran*	[Decision]	(23 Apr 1993)	29 IUSCTR 193
692	*Mellon Bank v Iran*	[Decision]	(23 Apr 1993)	29 IUSCTR 197
693	*First National Bank of Chicago v Iran*	[Decision]	(23 Apr 1993)	29 IUSCTR 201
694	*First Interstate Bank of Califor-nia v Iran*	[Decision]	(23 Apr 1993)	29 IUSCTR 205
695	*American Express International Banking Corp v Iran*	[Decision]	(23 Apr 1993)	29 IUSCTR 209
696	*Iran v United States*	[Decision]	(18 May 1993)	29 IUSCTR 214
697	*Iran v United States*	[Separate Statement of HM Holtz-mann and RC Allison]	(18 May 1993)	29 IUSCTR 221
698	*Kaysons International Corp v Iran*	[Award]	(28 Jun 1993)	29 IUSCTR 222
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700	*Birnbaum v Iran*	[Award]	(6 Jul 1993)	29 IUSCTR 260
701	*Birnbaum v Iran*	[Supplemental Decision]	(20 Oct 1993)	29 IUSCTR 293
702	*Z A and G Nourafchan v Iran*	[Final Award]	(19 Oct 1993)	29 IUSCTR 295
703	*Unidyne Corp v Iran*	[Award]	(10 Nov 1993)	29 IUSCTR 310

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705	*Unidyne Corp v Iran*	[Supplemental Opinion of G Arangio-Ruiz and RC Allison]	(10 Nov 1993)	29 IUSCTR 364
706	*Ladjevardi v Iran*	[Award]	(8 Dec 1993)	29 IUSCTR 367
707	*Ladjevardi v Iran*	[Statement of A Noori]	(8 Dec 1993)	29 IUSCTR 367
708	*Ram International Industries Inc v Iran Air Force*	[Decision]	(28 Dec 1993)	29 IUSCTR 383
709	*Continental Illinois National Bank and Trust Company of Chicago v Iran*	[Decision]	(20 Jan 1994)	30 IUSCTR 003
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711	*Security Pacific National Bank v Bank Markazi Iran*	[Decision]	(20 Jan 1994)	30 IUSCTR 013
712	*Unidyne Corp v Iran*	[Decision]	(9 Mar 1994)	30 IUSCTR 019
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716	*Moin v Iran*	[Award]	(24 May 1994)	30 IUSCTR 070
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718	*Nazari v Iran*	[Award]	(24 Aug 1994)	30 IUSCTR 123
719	*Nazari v Iran*	[Separate Opinion of HM Holtzmann]	(24 Aug 1994)	30 IUSCTR 163
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722	*Khatami v Iran*	[Award]	(13 Dec 1994)	30 IUSCTR 267
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724	*Sobhani v Iran*	[Award]	(4 May 1995)	31 IUSCTR 026
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728	*Protiva v Iran*	[Award]	(14 Jul 1995)	31 IUSCTR 089
729	*Ghaffari v Iran*	[Decision]	(30 Oct 1995)	31 IUSCTR 124
730	*Dadras International v Iran*	[Award]	(7 Nov 1995)	31 IUSCTR 127
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732	*Birnbaum v Iran*	[Decision]	(14 Dec 1995)	31 IUSCTR 286
733	*Karubian v Iran*	[Award]	(6 Mar 1996)	32 IUCSTR 003
734	*Kiaie v Iran*	[Award]	(15 May 1996)	32 IUCSTR 042
735	*Khosravi v Iran*	[Award]	(20 Jun 1996)	32 IUCSTR 073
736	*Iran Railway v United States*	[Award]	(9 Oct 1996)	32 IUCSTR 092
737	*Iran v United States*	[Decision]	(11 Oct 1996)	32 IUCSTR 115
738	*Mohtadi v Iran*	[Award]	(2 Dec 1996)	32 IUCSTR 124
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740	*United States v Iran*	[Award]	(3 Dec 1996)	32 IUCSTR 162
741	*Nemazee v Iran*	[Award]	(10 Dec 1996)	32 IUCSTR 184
742	*Mohtadi v Iran*	[Dissenting Opinion of M Aghahosseini]	(25 Feb 1997)	33 IUSCTR 003
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744	*United States v Iran*	[Decision]	(17 Mar 1997)	33 IUSCTR 056
745	*Westinghouse Electric Corp v Iran*	[Final Award]	(20 Mar 1997)	33 IUSCTR 060
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747	*Westinghouse Electric Corp v Iran*	[Decision]	(23 Apr 1997)	33 IUSCTR 204
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751	*United States v Iran*	[Decision]	(23 May 1997)	33 IUSCTR 346
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755	*M Aryeh*	[Award]	(25 Sep 1997)	33 IUSCTR 368
756	*M Aryeh*	[Dissenting Opinion of M Aghahosseini]	(25 Sep 1997)	33 IUSCTR 401
757	*O & E Aryeh*	[Award]	(25 Sep 1997)	33 IUSCTR 460
758	*G E Davidson (Homayounjah) v Iran*	[Award]	(5 Mar 1998)	34 IUSCTR 003
759	*Iran v United States*	[Award]	(5 Jun 1998)	34 IUSCTR 039
760	*Iran v United States*	[Concurring Opinion of KH Ameli]	(5 Jun 1998)	34 IUSCTR 062
761	*Iran v United States*	[Separate Opinion of A	(5 Jun 1998)	34 IUSCTR 064

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764	*Ford Aerospace & Communications Corp v Iran*	[Final Award]	(16 Nov 1998)	34 IUSCTR 102
765	*Iran v United States*	[Partial Award]	(28 Dec 1998)	34 IUSCTR 105
766	*Iran v United States*	[Separate Opinion of GH Aldrich, RC Allison and CT Duncan]	(28 Dec 1998)	34 IUSCTR 169
767	*Iran v United States*	[Concurring and Dissenting Opinion of B Broms]	(28 Dec 1998)	34 IUSCTR 177
768	*Sabet v Iran*	[Partial Award]	(29 Jun 1999)	35 IUSCTR 003
769	*Gulf Associates Inc v Iran*	[Award]	(7 Oct 1999)	35 IUSCTR 045
770	*Bank Markazi Iran v Federal Reserve Bank of New York*	[Award]	(16 Nov 1999)	35 IUSCTR 086
771	*Bank Markazi Iran v Federal Reserve Bank of New York*	[Concurring Opinion of RM Mosk]	(16 Nov 1999)	35 IUSCTR 112
772	*Ministry of Industries of Iran v United States*	[Interlocutory Award]	(30 Mar 1999)	35 IUSCTR 145
773	*United States v Iran*	[Decision]	(19 Dec 2000)	36 IUSCTR 005
774	*United States v Iran*	[Statement of A Noori]	(19 Dec 2000)	36 IUSCTR 032
775	*United States v Iran*	[Concurring and Dissenting Opinion of B Broms]	(19 Dec 2000)	36 IUSCTR 033
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782	*Iran v United States*	[Separate Opinion of RM Mosk]	(7 Apr 2000)	36 IUSCTR 162

783	*Iran v United States*	[Concurring and Dissenting Opinion of B Broms]	(7 Apr 2000)	36 IUSCTR 176
784	*Bank Markazi Iran v Federal Reserve Bank of New York*	[Dissenting Opinion of M Aghahosseini]	(13 Jun 2000)	36 IUSCTR 183
785	*Sabet v Iran*	[Final Award]	(28 Nov 2000)	36 IUSCTR 203
786	*Sheibani, Hamedani and Baghani v United States*	[Decision]	(11 Jun 2003)	37 IUSCTR 003
787	*Riahi v Iran*	[Award]	(27 Feb 2003)	37 IUSCTR 011
788	*Riahi v Iran*	[Concurring and Dissenting Opinion of CN Brower]	(27 Feb 2003)	37 IUSCTR 158
789	*Riahi v Iran*	[Concurring and Dissenting Opinion of A Noori]	(18 Sep 2003)	37 IUSCTR 305
790	*United States v Iran*	[Decision]	(9 Sep 2004)	38 IUSCTR 005
791	*Riahi v Iran*	[Decision]	(17 Nov 2004)	38 IUSCTR 019
792	*Riahi v Iran*	[Dissenting Opinion of CN Brower]	(17 Nov 2004)	38 IUSCTR 039
793	*Iran v United States*	[Interlocutory Award]	(9 Sep 2004)	38 IUSCTR 077
794	*United States v Iran*	[Concurring and Dissenting Opinion of A Noori]	(9 Sep 2004)	38 IUSCTR 135
795	*Iran v United States*	[Decision]	(1 May 2007)	38 IUSCTR 177
796	*Iran v United States*	[Partial Award]	(17 Jul 2009)	38 IUSCTR 197
797	*Iran v United States*	[Separate Opinion of KH Ameli]	(17 Jul 2009)	38 IUSCTR 268
798	*Iran v United States*	[Dissenting Opinion of M Aghahosseini]	(20 Jul 2009)	38 IUSCTR 340
799	*Iran v United States*	[Dissenting Opinion of HRO Yazdi]	(20 Jul 2009)	38 IUSCTR 359
800	*Iran v United States*	[Award]	(2 Jul 2014)	Award No 602-A15(IV/A24-FT
801	*Iran v United States*	[Concurring and Dissenting Opinion of CN Brower]	(2 Jul 2014)	Award No 602-A15(IV/A24-FT
802	*Iran v United States*	[Joint Separate Opinion of M-H Abedian, HRN Fini, J Seifi]	(23 Jun 2014)	Award No 602-A15(IV/A24-FT

803	*Iran v United States*	[Separate Opinion of GK McDonald]	(2 Jul 2014)	Award No 602-A15(IV/A24-FT
804	*Iran v United States*	[Separate Opinion of OT Johnson]	(2 Jul 2014)	Award No 602-A15(IV/A24-FT
805	*Iran v United States*	[Correction to Award and Decision on Request for Additional Award]	(5 Mar 2015)	Decision No 136-A15(IV/A24-FT