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Police Powers in a Pandemic

Investment Treaty Interpretation and the Customary Presumption of Reasonable Regulation

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1 Introduction

In 1634, amid waves of bubonic plague, the governor of Ancona suspected that the Venetian consul had spread information detrimental to local commerce. The governor seized the consul's possessions and banished him 'under pretence that, contrary to public prohibition, he had caused goods to be unloaded in a time of contagion'.[1] An imbroglio of infectious disease and economic insecurity thus occasioned the arbitrary treatment of a foreign national and his property. In the realm of diplomatic protection, Emer de Vattel advised that the 'surest way' to settle such matters was by 'commercial treaty'; otherwise, 'custom is to be the rule'.[2] Four centuries later, thousands of treaties provide substantive standards and consent to arbitration in the cognate realm of investment protection. But these treaties have not supplanted the customary rule that there is no State responsibility for reasonable regulation of foreign investment. Effectively a presumption derived from territorial sovereignty, this rule has manifested in investment jurisprudence through the police powers doctrine, the right to regulate, and a margin of appreciation. Foregrounding the presumption of reasonable regulation helps to situate these arbitral trends from a generalist perspective and provides the baseline for interpretation

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[1] E de Vattel, *The Law of Nations; or, Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns* (first published 1758, Joseph Chitty ed, 6th edn, Johnson 1844) book II, ch II, [34].

[2] ibid.

of investment treaties in another time of contagion: the COVID-19 pandemic and its economic aftermath.[3]

Section 2 reviews the demand for governments to impose a moratorium on investment treaty arbitration amid the COVID-19 pandemic. Modern treaty practice, however, already recognises the right to regulate as an affirmation of the customary position that each State may reasonably regulate foreign investment without violating international obligations. Section 3 recalls how this regulatory dimension of territorial sovereignty endured throughout the mid-century debate over the standard of compensation for nationalisation and the rise of investment treaty arbitration. The police powers doctrine is singled out as a formulation through which tribunals impose the burden on claimants to prove that a regulatory measure was unreasonable before it may be addressed as an alleged expropriation. By recognising the link between police powers and territorial sovereignty, we may realise the potential scope of the customary presumption of reasonable regulation. Section 4 identifies how this presumption may be integrated in the interpretation of investment treaties, addressing whether modern treaties may operate as *leges specialis*. Reasonable regulation is nevertheless presumed under the standard of fair and equitable treatment (FET) by determining legitimate expectations in light of the State's right to regulate or by applying a margin of appreciation. Section 5 reviews classical practice on the treatment of alien property in times of infectious disease and its contemporary lessons for investment treaty arbitration alongside the international health regulations of the World Health Organization (WHO), concluding that it should be very difficult to establish that an investment obligation has been violated by regulatory measures designed to mitigate the chronic character of today's entwined crises.

2 Treaty and Custom in the COVID-19 Pandemic

From the outset of the COVID-19 pandemic, public health measures threatened to undermine the ordinary conditions for private enterprise; the Spanish government, for example, empowered the Minister of Health

[3] COVID-19 describes the disease caused by a coronavirus, provisionally named 2019-nCoV and renamed SARS-CoV-2, which emerged in December 2019. On 11 March 2020, the Director-General of the World Health Organization described the outbreak as a pandemic: WHO, 'WHO Director-General's opening remarks at the media briefing on COVID-19' (*World Health Organization*, 11 March 2020) <www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> accessed 10 May 2021.

to requisition industrial property.[4] Rapidly, it became apparent that markets could not 'self-regulate in relation to all conceivable social and economic shocks', leading to 'interventions on a scale last seen in World War II'.[5] Scholars and practitioners published bulletins on whether such measures might trigger obligations to compensate foreign investors.[6] In light of the mounting crises, however, NGOs called on States to address proactively their exposure to costly claims. The Columbia Center on Sustainable Investment (CCSI), for instance, recommended an immediate moratorium on investment treaty arbitration and a permanent restriction on claims related to 'measures targeting health, economic, and social dimensions of the pandemic and its effects'.[7] The proposed moratorium would last until governments had agreed on principles to safeguard 'good faith recovery efforts'.[8]

CCSI's proposal was consistent with past demands for States to protect their right to regulate in the public interest.[9] Yet, the concerns of civil society, like much of the scholarly literature, have concentrated on perceived pitfalls of investment treaties and arbitral institutions rather than the customary foundations for investment regulation.[10] The intergovernmental reform agenda, moreover, has focused on procedural and institutional aspects of investment treaty arbitration.[11] In other words, efforts to suspend or recalibrate the practice of investment treaty arbitration have oddly illustrated the normative resilience of substantive investment law,[12] while overlooking sources of applicable law that reinforce the international lawfulness of health, social, and economic measures. A more

[4] Real Decreto 463/2020, de 14 de marzo, por el que se declara el estado de alarma para la gestión de la situación de crisis sanitaria ocasionada por el COVID-19, Art 13.

[5] A Tooze, *Shutdown: How Covid Shook the World's Economy* (Allen Lane 2021) 13.

[6] See, eg F Paddeu & K Parlett, 'COVID-19 and Investment Treaty Claims' (*Kluwer Arbitration Blog*, 30 March 2020) <http://arbitrationblog.kluwerarbitration.com/2020/03/30/covid-19-and-investment-treaty-claims> accessed 10 May 2021.

[7] P Bloomer & ors, 'Call for ISDS Moratorium During COVID-19 Crisis and Response' (*Columbia Center on Sustainable Investment*, 6 May 2020) <http://ccsi.columbia.edu/2020/05/05/isds-moratorium-during-covid-19> accessed 10 May 2021.

[8] ibid.

[9] See, eg G Van Harten & ors, 'Public Statement on the International Investment Regime' (*Osgoode Hall Law School*, 31 August 2010) <www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010> accessed 10 May 2021.

[10] cf JE Viñuales, 'Customary Law in Investment Regulation' (2014) 23(1) IYIL 23.

[11] UNCITRAL, 'Working Group III: Investor-State Dispute Settlement Reform' (*UNCITRAL*, 2021) <https://uncitral.un.org/en/working_groups/3/investor-state> accessed 10 May 2021.

[12] J Kurtz, JE Viñuales & M Waibel, 'Principles Governing the Global Economy' in JE Viñuales (ed), *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law* (CUP 2020) 359–60.

constructive intervention than CCSI's proposed moratorium, therefore, would be to equip vulnerable polities with defence arguments derived from customary international law that might accommodate the dynamic character of regulatory measures amid chronic crises.[13]

While acknowledging that regulatory powers originate in custom, Catharine Titi argues that the right to regulate should be understood narrowly as an express treaty provision permitting a State to regulate in derogation of its commitments.[14] But one should resist the reflex to rely on treaty exceptions, which reproduces the popular perception that investment obligations normally forbid ambitious regulation.[15] In reality, the basic aim of CCSI's moratorium has long formed part of customary international law; by virtue of the police powers doctrine, governments may indeed adopt regulatory measures in good faith without compensating investors.[16] In modern treaties, moreover, parties have secured the presumptive lawfulness of their regulatory measures not by fashioning an exceptional right under treaty law, but by 'reaffirm[ing] their right to regulate within their territories to achieve legitimate policy objectives'.[17] As governments struggle to confront the pandemic and its aftermath, it is timely to review the enduring relevance of custom as the wellspring of investment regulation.

3 Investment Regulation under Customary International Law

To unearth the customary roots of regulatory power, it helps to survey some historical foundations of investment treaty arbitration. Modern standards of treatment, enforceable originally through diplomatic protection, emerged out of transitions from formal empire towards post-colonial

[13] This chapter does not consider exceptions reserved for acute emergency, such as jurisdictional carve-outs for measures protecting essential security interests or the customary plea of necessity as a circumstance precluding wrongfulness. On these modalities, see JE Viñuales, 'Defence Arguments in Investment Arbitration' (2020) 18 ICSID Rep 9. See also Chapter 7 of this volume.

[14] A Titi, *The Right to Regulate in International Investment Law* (Nomos 2014) 32–3. Cf LW Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective* (Routledge 2016) 8.

[15] J Arato, K Claussen & JB Heath, 'The Perils of Pandemic Exceptionalism' (2020) 114 AJIL 627, 631.

[16] See, eg, J Lee, 'Note on COVID-19 and the Police Powers Doctrine: Assessing the Allowable Scope of Regulatory Measures During a Pandemic' (2020) 13 CAAJ 229. Cf Section 5 below.

[17] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the One Part, and the European Union and its Member States, of the Other Part (adopted 30 October 2016, provisionally entered into force 21 September 2017) [2017] OJ L11/23 Art 8.9.1.

independence and from coercive intervention towards peaceful means of dispute settlement.[18] Digging through juridical strata, three layers underpin the importance of custom in the regulation of foreign investment. First, the mid-century debate over the standard of compensation for nationalisation situates investment treaty arbitration as a relatively recent exception to the customary principle of permanent sovereignty over natural resources (PSNR). Secondly, before and during that debate, the regulatory dimension of territorial sovereignty was reaffirmed through instruments acknowledging the State's right to regulate and judicial dicta that investors bear the risk of regulatory change. Finally, the police powers doctrine is identified as an expression of territorial sovereignty by which investment tribunals may distinguish non-compensable regulation from compensable expropriation. By recognising the imbrication of police powers and territorial sovereignty, we may appreciate the general application of the customary presumption that reasonable regulation does not engage State responsibility to compensate foreign investors.

3.1 *Exceptional Character of Investment Treaty Arbitration*

A debate over compensation for nationalisation flared up in the era of decolonisation, framed by newly independent States as a manifestation of their PSNR.[19] Now a recognised principle of customary international law,[20] PSNR was a 'linchpin' of the movement for a New International Economic Order.[21] Through the 1974 Charter of Economic Rights and Duties of States (CERDS), the movement sought to fortify the economic content of self-determination by embedding a standard of 'appropriate compensation' in domestic jurisdiction.[22] But an earlier formulation of PSNR in the widely supported General Assembly resolution 1803 included

[18] OT Johnson & J Gimblett, 'From Gunboats to BITs: The Evolution of Modern International Investment Law' in KP Sauvant (ed), *Yearbook on International Investment Law & Policy 2010–2011* (OUP 2012).

[19] FV García-Amador, 'The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation' (1980) 12 LawAmer 1, 20 ff.

[20] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2015] ICJ Rep 168 [244].

[21] U Özsu, 'Neoliberalism and the New International Economic Order: A History of "Contemporary Legal Thought"' in J Desautels-Stein & C Tomlins (eds), *Searching for Contemporary Legal Thought* (CUP 2017) 339–40.

[22] UNGA, 'Charter of Economic Rights and Duties of States' (12 December 1974) UN Doc A/RES/3281(XXIX), Art 2(2)(c) (CERDS).

the requirement of compensation 'in accordance with international law',[23] often decoded as 'prompt, adequate and effective payment'.[24] Capital-exporting States defended this standard during the drafting of CERDS, opposing its ultimate adoption.[25] Subsequent awards reaffirmed that nationalisation remained subject to an international standard of compensation and the fundamental principle of *pacta sunt servanda*.[26] Indeed, resolution 1803 provided that '[f]oreign investment agreements freely entered into by or between sovereign States shall be observed in good faith';[27] and that disputes over compensation should be settled 'through arbitration or international adjudication'.[28] Consistent with their right of entering into international agreements,[29] States consented to prospective arbitration of investment disputes under contract, statute, or treaty.[30] By the 1990s, investment treaty arbitration had emerged as an overgrown exception to the principle of PSNR.[31] Yet, it must not be overlooked that the nationalisation debate generated a variegated grammar of sovereign rights.[32] While the right to expropriate is one dimension of sovereignty, its bounds often blur with the State's right to regulate.[33]

3.2 *Regulatory Dimension of Territorial Sovereignty*

Regulatory authority over foreign investment is an extension of the State's plenary competence under customary international law to determine its internal priorities, often formulated as an expression of PSNR or the sovereign right freely to choose and develop an economic system.[34]

[23] UNGA, 'Permanent Sovereignty Over Natural Resources' (14 December 1962) UN Doc A/5217 [4] (PSNR).
[24] cf AJIL, 'Mexico – United States: Expropriation by Mexico of Agrarian Properties Owned by American Citizens' (1938) 32 AJIL Supp 181, 193.
[25] CN Brower & JB Tepe, 'The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?' (1975) 9(2) Intl Law 295, 304–9.
[26] See, eg *Texaco Overseas Petroleum et al v Libya* (Award on the Merits) (1977) 53 ILR 422 [58–91].
[27] PSNR (n 23) [8].
[28] ibid [4].
[29] *SS 'Wimbledon' (UK & ors v Germany)* (Judgment) [1923] PCIJ Series A No 1, 25.
[30] See J Paulsson, 'Arbitration Without Privity' (1995) 10 ICSID Rev 232.
[31] Kurtz & ors (n 12) 351–5.
[32] N Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (CUP 1997) ch 9.
[33] J Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 604.
[34] See PSNR (n 23) [2–3]; UNGA, 'Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations' (24 October 1970) UN Doc A/RES/2625(XXV) Annex, The principle

Manifestations of regulation, as activities performed *à titre de souverain*, are often decisive in territorial disputes.[35] Indeed, the exclusive right to regulate, opined Max Huber in the *Island of Palmas case*, entails a corollary duty to regulate 'in a manner corresponding to circumstances'.[36] This notion of correspondence implies that measures must be reasonable, reflected in contextual gradations of deference.[37] In *Spanish Zone of Morocco Claims*, given the State's duty to maintain social order, responsibility for injury to foreign nationals was engaged only if local authorities acted in manifest abuse of their discretion; that is, beyond a margin of appreciation.[38] In the *North Atlantic Coast Fisheries Case*, moreover, Great Britain had a 'duty of preserving and protecting the fisheries' in its territorial waters, even though the United States had secured liberties for its nationals to exploit that resource.[39] British authorities enjoyed 'the right to make reasonable regulations' and the burden fell on the United States to prove that its liberties were violated by such measures.[40] These days, a State's duty to regulate may be triggered by treaties and customary principles requiring the protection of human rights and the prevention of environmental harm, even beyond its territory.[41] The basic right and manifold duties to adopt reasonable regulations in the circumstances, however, derive fundamentally from territorial sovereignty over internal affairs, which vastly predates the articulation of PSNR.[42]

In the *Oscar Chinn Case*, the Permanent Court of Justice held that '[f]avourable business conditions and goodwill are transient circumstances, subject to inevitable changes,' including 'the general trade depression and the measures taken to combat it'.[43] Throughout the

of sovereign equality of States [e]; CERDS (n 22) Art 2(2)(a); *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14 [263–4]; G Abi-Saab, 'Permanent Sovereignty over Natural Resources and Economic Activities' in M Bedjaoui (ed), *International Law: Achievements and Prospects* (UNESCO 1991) 597–615.

[35] *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Judgment) [2012] ICJ Rep 624 [80–4].

[36] *Island of Palmas case (Netherlands v USA)* (1928) 2 RIAA 829, 839.

[37] cf E Shirlow, 'Deference and Indirect Expropriation Analysis in International Investment Law: Observations on Current Approaches and Frameworks for Future Analysis' (2014) 29 ICSID Rev 595.

[38] *Biens britanniques au Maroc espagnol* (Spain v GB) (1925) 2 RIAA 615, 645.

[39] *North Atlantic Coast Fisheries Case (GB v USA)* (1910) 11 RIAA 167, 187.

[40] ibid 180, 188.

[41] See *The Environment and Human Rights* (Advisory Opinion OC-23/17 of 15 November 2017) IACHR Series A 23 [141] ff.

[42] P Juillard, 'L'Évolution des Sources du Droit des Investissements' (1994) 250 RdC 9 [52–3].

[43] *Oscar Chinn Case (Britain v Belgium)* (Judgment) PCIJ Series A/B No 63, 88.

nationalisation debate, moreover, Third World initiatives to establish an international regulatory regime for multinational corporations were resisted by capital-exporting States, which insisted that regulation was strictly for domestic jurisdiction.[44] The range of compensable expropriations, therefore, never encompassed any deprivation of property or economic disadvantage resulting merely from taxation, monetary reform, or regulatory measures.[45] Commentary to the 1967 Organisation for Economic Cooperation and Development (OECD) Draft Convention on the Protection of Foreign Property, for instance, acknowledged 'the sovereign right of a State, under international law, to deprive owners, including aliens, of property which is within its territory in the pursuit of its political, social or economic ends' and that to 'deny such a right would be to … interfere with its powers to regulate'.[46] The power to regulate may include placing limits on activities, including their wholesale prohibition for legitimate purposes such as environmental protection.[47] The financial risk of such measures is accordingly borne by foreign nationals.[48] The customary position that any loss arising from reasonable regulation does not violate international law remains salient in contemporary investment jurisprudence, including through the police powers doctrine.

3.3 *Development of the Police Powers Doctrine*

While some depict the police powers doctrine as a recent innovation,[49] others have traced its deeper genealogy.[50] Derived from the Greek *politeia*, the notion of police as prudent regulation originated in administrative manuals of France and Germany, later adopted by William Blackstone

[44] S Pahuja & A Saunders, 'Rival Worlds and the Place of the Corporation in International Law' in J von Bernstorff & P Dann (eds), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (OUP 2019) 156.

[45] LB Sohn & RR Baxter, 'Responsibility of States for Injuries to the Economic Interests of Aliens' (1961) 55 AJIL 545, 551–3. See also *Kügele v Polish State* (1932) 6 ILR 69 (on taxation); *Furst Claim* (1960) 42 ILR 153 (on monetary reform).

[46] OECD, 'Draft Convention on the Protection of Foreign Property' (1967) 7 ILM 117, 125. cf CERDS (n 22) Art 2(2)(a).

[47] *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep 213 [126–8].

[48] See, eg, *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers* (1926) 2 RIAA 777, 794; *USA (Dickson Car Wheel Company) v Mexico* (1931) 4 RIAA 669, 681–82.

[49] See eg A Pellet, 'Police Powers or the State's Right to Regulate: *Chemtura v Canada*' in M Kinnear & ors (eds), *Building International Investment Law: The First 50 Years of the ICSID Convention* (Kluwer 2015).

[50] See eg S Legarre, 'The Historical Background of the Police Power' (2007) 9 UPaJConstL 745.

and Adam Smith.[51] By the influence of Vattel,[52] police power as the conceptual basis for public regulation of private property evolved through the United States constitutional law and migrated to Argentina.[53] On the international stage, the concept featured in significant developments towards property protection: the jurisprudence of mixed claims commissions;[54] the 1930 Hague Conference;[55] the 1961 Harvard Draft;[56] scholarly debates;[57] the Restatements of Foreign Relations Law;[58] and the jurisprudence of the Iran-United States Claims Tribunal.[59] The police powers doctrine then entered investment treaty arbitration to shield measures from claims of indirect expropriation,[60] including health,[61] licensing,[62] environmental,[63] bankruptcy,[64] and financial regulation.[65]

For two decades, investment tribunals have recognised the police powers doctrine as custom.[66] States reiterate that customary status in their submissions as respondents and non-disputing parties.[67] The resulting

[51] ibid 748–61.
[52] ibid 753.
[53] See respectively JL Sax, 'Takings and the Police Power' (1964) 74 YLJ 36; S Berensztein & H Spector, 'Business, Government, and Law' in G della Paolera & AM Taylor (eds), *A New Economic History of Argentina* (CUP 2003) 339–41.
[54] See, eg *Poggioli Case* (1903) 10 RIAA 669, 691.
[55] S Rosenne (ed), *League of Nations Conference for the Codification of International Law (1930)*, Vol 2 (Oceana 1975) 684–5.
[56] Sohn & Baxter (n 45) 551–3.
[57] See eg JF Williams, 'International Law and the Property of Aliens' (1928) 9 BYBIL 1, 23–8; AP Fachiri, 'International Law and the Property of Aliens' (1929) 10 BYBIL 32, 51–4.
[58] American Law Institute, *Restatement (Second) of Foreign Relations Law* (American Law Institute 1965) [197]; American Law Institute, *Restatement (Third) of Foreign Relations Law* (American Law Institute 1987) [712].
[59] *Sedco, Inc v National Iranian Oil Company and Islamic Republic of Iran* (Award of 17 September 1985) IUSCT Case Nos 128 and 129 [90]; *Too v Greater Modesto Insurance Associates and United States of America* (Award of 29 December 1989) IUSCT Case No 880 [26–9].
[60] For the first known reference, see *SD Myers, Inc v Canada* (Statement of Defence of 18 June 1999) UNCITRAL [55].
[61] Eg *Methanex Corporation v USA* (Final Award of the Tribunal on Jurisdiction and Merits of 3 August 2005) pt IV, ch D [15].
[62] Eg *UAB E energija (Lithuania) v Republic of Latvia* (Award of 22 December 2017) ICSID Case No ARB/12/33 [1067–101].
[63] Eg *Chemtura Corporation (formerly Crompton Corporation) v Canada* (Award of 2 August 2010) UNCITRAL [266].
[64] Eg *AMF Aircraftleasing Meier & Fischer GmbH & Co KG, Hamburg (Germany) v Czech Republic* (Final Award of 11 May 2020) PCA Case No 2017–15 [624].
[65] Eg *Marfin v Cyprus* (Award of 26 July 2018) ICSID Case No ARB/13/27 [825–30].
[66] Eg *Feldman v Mexico* (Award of 16 December 2002) ICSID Case No ARB(AF)/99/1 [103–6].
[67] Eg *Lone Pine Resources Inc v Canada* (Gouvernement du Canada Contre-Mémoire of 24 July 2015) ICSID Case No UNCT/15/2 [491–528].

decisions, as 'subsidiary means for the determination of rules of law',[68] have further developed the 'scope, content and conditions' of police powers.[69] The doctrine effectively is a screening mechanism between the right to expropriate with compensation and the right to regulate without compensation.[70] While few treaties refer explicitly to police powers,[71] many now reflect the content of custom in interpretative annexes.[72] The Tribunal in *Philip Morris v Uruguay* rendered a typical formulation in its finding that branding restrictions and health warnings on cigarette packaging did not constitute indirect expropriation of intellectual property: 'the State's reasonable *bona fide* exercise of police powers in such matters as the maintenance of public order, health or morality, excludes compensation even when it causes economic damage to an investor'.[73]

As Jorge Viñuales explained, 'the lack of public purpose, discrimination, arbitrariness, due process, effects and/or prior specific assurances' should be understood as 'considerations of good faith', which serve not as 'cumulative requirements' of the police powers doctrine but rather as 'indicia guiding a broader assessment of regulatory reasonableness' by reference to circumstances of the case and the applicable treaty standard.[74] While the standard of reasonableness gives leeway to arbitral discretion,[75] tribunals have applied that standard in a broadly deferential manner by

[68] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 993, Art 38(1)(d).

[69] *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products SA (Switzerland) and Abal Hermanos SA (Uruguay) v Uruguay* (Award of 8 July 2016) ICSID Case No ARB/10/7 [295] (*Philip Morris v Uruguay*).

[70] *Suez & Interagua v Argentina* (Decision on Liability of 30 July 2010) ICSID Case No ARB/03/17 [128] (*Suez v Argentina*).

[71] cf Investment Agreement for the COMESA Common Investment Area (adopted 23 May 2007, not yet in force) Art 20(8) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3092/download> accessed 10 May 2021.

[72] Eg, Comprehensive and Progressive Agreement for Trans-Pacific Partnership (adopted 9 March 2018, entered into force 30 December 2018) [2018] ATS 23, annex 9-B. cf Section 4.2 below. Notably, an interpretative protocol to the very first bilateral investment treaty provided that 'measures taken for reasons of public security and order, public health or morality shall not be deemed as discrimination': Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (Germany & Pakistan) (adopted 25 November 1959, entered into force 28 April 1962) 457 UNTS 24, protocol [2].

[73] *Philip Morris v Uruguay* [295].

[74] Viñuales (n 13) [93].

[75] C Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (CUP 2015) 119.

requiring the absence of arbitrariness through some link between a rational policy and the adopted measure.[76]

Not to be conflated with its domestic expression,[77] the police powers doctrine under customary international law is an operative formulation of the regulatory dimension of territorial sovereignty.[78] This nexus is evident in the *Iron Rhine Arbitration*, wherein the Netherlands 'forfeited no more sovereignty than that which is necessary' for Belgium to exercise it treaty rights and, thus, 'retain[ed] the police power throughout that area,' including the power to establish health, safety and environmental standards.[79] The Tribunal effectively presumed no derogation from territorial sovereignty, albeit conditioned by good faith and reasonableness.[80] While such presumptions have eroded in some contexts,[81] reaffirmation of regulatory powers in recent treaties has reinforced a general presumption that 'investment treaties were never intended to do away with their signatories' right to regulate'.[82]

3.4 *Customary Presumption of Reasonable Regulation*

The principled starting point under customary international law, reflected in the police powers doctrine, is to presume that regulation is a reasonable manifestation of territorial sovereignty. 'Presumptively', recalled James Crawford, 'the ordering of persons and assets is an aspect of the domestic jurisdiction of a state and an incident of its territorial sovereignty'.[83] In the *Brewer, Moller and Co Case*, moreover, the German-Venezuelan Commission endorsed the 'uniform presumption of the regularity and validity of all acts of public officials'.[84] Rosalyn Higgins further referred to a 'weighty presumption' when measures are introduced by 'normal

[76] See, eg *AES Summit Generation Limited and AES–Tisza Erömü Kft v Hungary* (Award of 23 September 2010) ICSID Case No ARB/07/22 [10.3.9].
[77] *Suez v Argentina* [150].
[78] JE Viñuales, 'Sovereignty in Foreign Investment Law' in Z Douglas, J Pauwelyn & JE Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 329–36.
[79] *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands* (Decision of 24 May 2005) 27 RIAA 35 [87].
[80] ibid [163].
[81] *Dispute regarding Navigational and Related Rights* (n 47) [48].
[82] *Invesmart, BV v Czech Republic* (Award of 26 June 2009) UNCITRAL [498].
[83] Crawford (n 33) 596.
[84] *Brewer, Moller & Co Case (Germany v Venezuela)* (1903) 10 RIAA 423, 423.

legislative processes of a democratic parliament'.[85] This presumption's contemporary relevance was reaffirmed by the partially dissenting arbitrator in *Philip Morris v Uruguay*, Gary Born, who endorsed: 'the presumptive lawfulness of governmental authority under customary international law, as well as respect for a state's sovereignty, particularly with regard to legislative and regulatory judgments regarding its domestic matters'.[86]

Plainly, this presumption would be rebutted if a claimant proved that an impugned regulation was adopted in bad faith.[87] Several tribunals have also found that a State's failure to comply with requirements of domestic law prevented its reliance on the police powers doctrine.[88] But the presumptive character of the police powers doctrine has significant implications for the burden of proof, given the party who asserts must prove.[89] If the doctrine was pleaded as an exception, tribunals might wrongly require the State to justify its regulatory measures.[90] In *Servier v Poland*, however, the Tribunal dismissed the claimant's submission that the police powers doctrine was an 'affirmative defence' for which the respondent had to 'prove the negative' by demonstrating 'an absence of bad faith and discrimination, or the lack of disproportionateness in the measures taken'.[91] The respondent had shown the domestic legal basis for its decisions not to renew marketing authorisations for pharmaceutical products.[92] The claimant thus had to prove that those decisions were inconsistent with a legitimate exercise of police powers.[93] While this burden allocation is surely correct, its basis is not merely evidential but rather reflects the customary presumption that each State is entitled to regulate in the reasonable pursuit of its priorities and may indeed be

[85] R Higgins, 'International Law and the Reasonable Need of Governments to Govern' in R Higgins (ed), *Themes and Theories: Selected Essays, Speeches and Writings in International Law* (OUP 2009) 791.

[86] *Philip Morris v Uruguay* (Concurring and Dissenting Opinion of Gary Born of 8 July 2016) ICSID Case No ARB/10/7 [141] (hereinafter *Philip Morris* Dissent).

[87] Eg, *Deutsche Bank AG v Sri Lanka* (Award of 31 October 2012) ICSID Case No ARB/09/02 [483–4, 522–4].

[88] Eg, *Quiborax v Bolivia* (Award of 16 September 2015) ICSID Case No ARB/06/2 [201–27].

[89] *Karkey Karadeniz Elektrik Uretim AS v Islamic Republic of Pakistan* (Award of 22 August 2017) ICSID Case No ARB/13/1 [497].

[90] Eg, *Bahgat v Arab Republic of Egypt* (Final Award of 23 December 2019) PCA Case No 2012–07 [230].

[91] *Les Laboratoires Servier, SAS, Biofarma, SAS and Arts et Techniques du Progres SAS v Republic of Poland* (Final Award of 14 February 2012) UNCITRAL [579, 583].

[92] ibid [582].

[93] ibid [584].

required to regulate in the circumstances, such as a duty to adopt legislation for the 'protection of health and life of humans'.[94]

Beyond the context of expropriation, the presumption of reasonable regulation is apparent in other customary rules, foremost the minimum standard of treatment.[95] The well-known *Neer* standard provides that 'an unsatisfactory use of power included in national sovereignty' amounts to 'an international delinquency' when conduct amounts 'to an outrage, to bad faith, to wilful neglect of duty' or 'to an insufficiency so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency'.[96] This formulation is often adopted to determine the content of the customary minimum standard or the related treaty standard of FET.[97] In *Al Tamimi v Oman*, moreover, the Tribunal observed that the 'high threshold' for breach of the minimum standard requires a claimant to 'confront' the State's 'margin of discretion in exercising its police powers to enforce its existing laws'.[98] Weaving together these strands, we may say there is a general presumption that a State is not responsible for loss suffered by a foreign investor as a result of reasonable regulation.

4 Integrating Custom through Investment Treaty Interpretation

This chapter has thus far bracketed the matter of how custom forms a part of applicable law in investment treaty arbitration. Most investment treaties require disputes to be determined in accordance with the treaty simpliciter or alongside rules of international law.[99] No treaty is a 'self-contained closed legal system'; however, each must be 'envisaged within a wider juridical context' through the integration of 'rules from other sources'.[100] This section explores how the police powers doctrine has been incorporated in arbitral reasoning through the principle of systemic integration, which permits the customary presumption of reasonable

[94] ibid [39].

[95] For property protection as an element of the minimum standard involving an inquiry of 'deferential reasonableness', see M Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013) 218–28. See further Section 5.1 below.

[96] *USA (LFH Neer) v Mexico* (1926) 4 RIAA 60 [4].

[97] See, eg *Glamis Gold, Ltd v United States* (Award of 8 June 2009) UNCITRAL [598–626].

[98] *Al Tamimi v Oman* (Award of 3 November 2015) ICSID Case No ARB/11/33 [443–7].

[99] Y Banifatemi, 'The Law Applicable in Investment Treaty Arbitration' in K Yannaca-Small (ed), *Arbitration under International Investment Agreements* (2nd edn, OUP 2018) [19.10].

[100] *Asian Agricultural Products Ltd v Republic of Sri Lanka* (Final Award of 27 June 1990) ICSID Case No ARB/87/3 [21].

regulation to be taken into account generally in treaty interpretation. Modern treaties include bespoke protection of the State's regulatory powers, which could operate as *leges specialis*. Arbitral recognition of the State's right to regulate and a margin of appreciation, however, hints at the tacit integration of the customary presumption within the FET standard.

4.1 Systemic Integration of the Customary Presumption

One way of bringing custom into the interpretative process is by referencing a customary concept as the 'ordinary meaning' under Art 31(1) or as a 'special meaning … the parties so intended' under Art 31(4) of the Vienna Convention on the Law of Treaties (VCLT).[101] But, consider the obligation not to 'take any measures depriving, directly or indirectly, investors … of their investments'.[102] The ordinary meaning of 'measures' is 'wide enough to cover any act' and 'imposes no particular limit on their material content or on the aim pursued thereby'.[103] In *Saluka v Czech Republic*, however, the Tribunal considered that 'the concept of deprivation' allowed for integration of the 'customary international law notion that a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order'.[104] The Tribunal in *El Paso v Argentina* similarly interpreted an expropriation standard in light of custom, requiring the claimant to show that 'general regulations are unreasonable, that is, arbitrary, discriminatory, disproportionate or otherwise unfair' before determining whether they neutralised property rights to constitute indirect expropriation.[105] Rather than direct reference to custom, these tribunals interpreted the obligation in light of the distinction between compensable expropriation and non-compensable regulation embodied in the police powers doctrine,

[101] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

[102] Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of The Netherlands and the Czech and Slovak Federal Republic (Netherlands & Czech Republic) (adopted 29 April 1991, entered into force 1 October 1992) 2242 UNTS 205, Art 5.

[103] *Fisheries Jurisdiction (Spain v Canada) (Jurisdiction)* (Judgment) [1998] ICJ Rep 432 [66].

[104] *Saluka Investments BV v Czech Republic* (Partial Award of 17 March 2006) UNCITRAL [254].

[105] *El Paso Energy International Company v Argentina* (Award of 31 October 2011) ICSID Case No ARB/03/15 [240–1] (*El Paso v Argentina*). Many tribunals improperly invert this inquiry: see, eg *Windstream Energy LLC v Canada* (Award of 27 September 2016) PCA Case No 2013–22 [284].

which served as an organising principle around which to structure the applicable standard and burden of proof.

The principle of systemic integration applied in *Saluka* and *El Paso* is the chief means by which the customary presumption of reasonable regulation may be incorporated in arbitral practice.[106] Under Art 31(3)(c) of the VCLT, an interpreter must take into account, together with context, 'any relevant rules of international law applicable in the relations between the parties', including customary rules.[107] But tribunals seldom formulate precisely the rule, its relevance, or its applicability between the parties.[108] For clarity, therefore, the presumption of reasonable regulation may be formulated as the rule that there is *no State responsibility to compensate for reasonable regulation of foreign investment*. The elastic element of reasonableness might provoke the complaint that norms of investment law are too nebulous to qualify as custom.[109] But the 'inchoate character' of a rule is 'by no means fatal to its legal character' so long as it generates 'an adequate apparatus of precise principles'.[110] Investment treaty arbitration may well serve as that apparatus, transforming the customary criterion of reasonableness into determinate standards of review.[111] Tribunals need not address the elements of *opinio juris* and concordant practice, in any event, when investment disputes tend to concern the evolving content of custom rather than its formation.[112] Moreover, the presumption of reasonable regulation is a well-established expression of territorial sovereignty, for which general practice accepted as law is axiomatic. As a customary rule, therefore, it is applicable in relations among all States and would doubtless be relevant to any investment treaty standard.[113]

[106] See generally, C McLachlan, 'Investment Treaties and General International Law' (2008) 57 ICLQ 361, 369–74.

[107] *Oil Platforms (Iran v USA)* (Judgment) [2003] ICJ Rep 161 [40–2].

[108] P Ranjan, 'Police Powers, Indirect Expropriation in International Investment Law, and Article 31(3)(c) of the VCLT: A Critique of *Philip Morris v Uruguay*' (2019) 9 AsianJIL 98, 107–20.

[109] cf J d'Aspremont, 'International Customary Investment Law: Story of a Paradox' in T Gazzini & E de Brabandere (eds), *International Investment Law: The Sources of Rights and Obligations* (Martinus Nijhoff 2012).

[110] I Brownlie, 'Legal Status of Natural Resources in International Law (Some Aspects)' (1979) 162 RdC 245, 270–1.

[111] cf O Corten, 'The Notion of "Reasonable" in International Law: Legal Discourse, Reason and Contradictions' (1999) 48 ICLQ 613, 620–4.

[112] *Mondev International Ltd v USA* (Award of 11 October 2002) ICSID Case No ARB(AF)/99/2 [113].

[113] Ranjan (n 108) 117–18.

4.2 *Investment Treaties as* Leges Specialis

The chapeau of Art 31(3) of the VCLT provides that an interpreter must take into account any relevant rules 'together with the context'. Some argue that the sparse context of investment obligations supports the operation of investment treaties as *leges specialis* in respect of the police powers doctrine.[114] This view might support the 'sole effect' approach to indirect expropriation, which focuses on the deprivation caused by a measure regardless of regulatory intent.[115] But 'the persistence of the regulatory powers of the host State is not the accidental result of the failure of investment treaties to eliminate them', observed Vaughan Lowe; such powers remain 'an essential element of the permanent sovereignty of each State over its economy'.[116]

Given the reaffirmation of the right to regulate in modern treaties, the context of investment treaty standards should generally permit systemic integration of the customary rule that there is no State responsibility for reasonable regulation.[117] In *Bear Creek v Peru*, however, the Tribunal held that an express provision for general exceptions – modelled on Art XX of the General Agreement on Tariffs and Trade (GATT) – was 'an exclusive list' precluding the application of 'other exceptions from general international law', including 'the police powers exception [sic]'.[118] The provision stated that 'nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary … to protect human, animal or plant life or health'.[119] While these terms arguably imply a presumption in favour of such measures, the Tribunal imposed the burden of proving their necessity on the respondent.[120] That treaty exception, therefore, should not have precluded the presumptive operation of the police powers doctrine, given a *lex generalis* and a *lex specialis* should have the same character as either a device limiting the scope of a treaty obligation (by distinguishing a regulatory

[114] ibid 121–4.
[115] R Dolzer, 'Indirect Expropriations: New Developments?' (2002) 11 NYU Envtl LJ 64, 79 ff.
[116] V Lowe, 'Regulation or Expropriation?' (2002) 55(1) CLP 447, 450.
[117] cf *Philip Morris v Uruguay* [300–1].
[118] *Bear Creek Mining Corporation v Perú* (Award of 30 November 2017) ICSID Case No ARB/14/21 [472–3] (*Bear Creek v Peru*).
[119] Free Trade Agreement between Canada and the Republic of Peru (Canada & Peru) (adopted 29 May 2008, entered into force 1 August 2009) Can TS 2009 No 15, Art 2201.1(3)(a) (Canada–Peru FTA).
[120] *Bear Creek v Peru* [477].

measure from an alleged expropriation) or an affirmative defence (for which a State bears the burden).[121]

Another ground on which the *Bear Creek* Tribunal excluded the police powers doctrine was the 'very detailed provisions' on expropriation.[122] An interpretative annex materially provided:

> Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.[123]

Yet, these terms reflect custom, incorporating typical indicia of police powers and imposing upon claimants the burden of proving such measures are disproportionate.[124] Indeed, in *Eco Oro v Colombia*, the Tribunal held that an identical annex did not exclude but rather 'reflect[ed] the more general doctrine of police powers in customary international law', such that 'awards on the police powers doctrine … may provide some guidance (by analogy)' in 'interpreting and applying the provisions'.[125] By entering investment treaties, States may well agree to transform the customary presumption into a more determinate test by specifying factors that arbitrators must address in their assessment of a measure's proportionality in light of its purpose.[126] While an interpretative annex could thus operate as *lex specialis* in regard to indirect expropriation, the customary presumption would remain relevant in the interpretation of other standards, including full protection and security[127] and protection against

[121] C Henckels, 'Scope Limitation or Affirmative Defence? The Purpose and Role of Investment Treaty Exception Clauses' in L Bartels & F Paddeu (eds), *Exceptions in International Law* (OUP 2020) 367.

[122] *Bear Creek v Peru* [473].

[123] Canada–Peru FTA (n 119) annex 812.1(3).

[124] C Titi, 'Police Powers Doctrine and International Investment Law' in A Gattini, A Tanzi & F Fontanelli (eds), *General Principles of Law and International Investment Arbitration* (Brill 2018) 338–9.

[125] *Eco Oro Minerals Corp v Colombia* (Decision on Jurisdiction, Liability and Directions on Quantum of 9 September 2021) ICSID Case No ARB/16/41 [626].

[126] cf *Military and Paramilitary Activities in and Against Nicaragua* [178] (treaties may establish 'mechanisms to ensure implementation' of customary rules); *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [25] ('[t]he test … falls to be determined by the applicable *lex specialis*').

[127] This standard of due diligence requires governments 'to take reasonable acts within their power to prevent the injury … when states are, or should be, aware of a risk of injury': N Junngam, 'The Full Protection and Security Standard in International Investment Law: What

unreasonable and discriminatory measures.[128] Let us now consider the most frequently violated of all investment obligations.[129]

4.3 *Tacit Integration Through Fair and Equitable Treatment*

The FET standard has long been criticised for arbitral expansion beyond textual warrant.[130] Tribunals adopted the framework of legitimate expectations, for instance, to determine whether a State acted unfairly.[131] Modern treaties have since narrowed the notion of FET to the customary minimum standard and thus the circumstances in which interference with expectations may violate investment obligations.[132] It is through the framework of legitimate expectations, however, that we witness further expression of the customary presumption of reasonable regulation as alpha and omega of the FET standard in the respective guises of the right to regulate and a margin of appreciation.

To establish that an expectation has been defeated, tribunals typically require a claimant to prove three interlocking elements: an unfulfilled commitment; reliance when the investment was made; and reasonableness of that reliance, allied to the first element where the commitment was implicit.[133] In *El Paso*, the Tribunal held that there can be 'no legitimate expectation for anyone that the legal framework will remain unchanged in the face of an extremely severe economic crisis'.[134] Seldom do tribunals spell out the customary roots of such reasoning, treating the State's regulatory authority as a matter of fact rather than a legal presumption. In *Suez v Argentina*, however, the Tribunal recognised that the police powers doctrine and the State's right to regulate under the FET standard were in

and Who is Investment Fully[?] Protected and Secured From?' (2018) 7 AUBLR 1, 54. Notably, the classical practice points to a 'presumption against responsibility' of a State for injuries to foreign investors caused by non-State actors: FV García-Amador, LB Sohn & RR Baxter, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (Oceana 1974) 27.

[128] This non-impairment standard largely overlaps with FET: A Reinisch & C Schreuer, *International Protection of Investments: The Substantive Standards* (CUP 2020) 846–51.

[129] J Bonnitcha, LN Skovgaard Poulsen & M Waibel, *The Political Economy of the Investment Treaty Regime* (OUP 2017) 94.

[130] M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015) ch 5.

[131] M Potestà, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and Limits of a Controversial Concept' (2013) 28 ICSID Rev 88.

[132] See, eg CETA (n 17) Art 8.9.2.

[133] C McLachlan, L Shore & M Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edn, OUP 2017) [7.184].

[134] *El Paso v Argentina* [373–4].

fact 'duplicative' inquiries.[135] In other words, each inquiry is a reformulation of the customary presumption tailored to a different standard.[136] Acknowledging the common source of the police powers doctrine and the right to regulate helps us better to understand the customary drivers of arbitral convergence on contextual inquiries into the reasonableness of government conduct, regardless of the applicable treaty standard.[137]

An emerging consensus that the FET standard preserves the State's right to regulate was complicated by disputes regarding fiscally prudent adjustments to renewable energy incentives.[138] The jurisprudence divided into 'two schools of thought' as to whether legislative regimes constituted specific commitments that guaranteed tariffs would not change.[139] Arguments based on the State's right to regulate 'miss the point', quipped the majority in *Greentech v Italy*, when there were 'repeated and precise assurances to specific investors' that tariffs would remain fixed for two years.[140] In *RREEF v Spain*, however, the majority recalled that the absence of an express reference to the State's right to regulate under the Energy Charter Treaty did not mean it was excluded from applicable law.[141] As a matter of principle, 'an international obligation imposing on the State to waive or decline to exercise its regulatory power cannot be presumed' absent an 'unequivocal' commitment; 'more so when it faces a serious crisis'.[142] In the majority's view, 'there can be no doubt that States enjoy a margin of appreciation in public international law'.[143]

The margin of appreciation is an established principle of the European Court of Human Rights (ECtHR) that has been adopted by several tribunals applying the FET standard.[144] The majority in *Philip Morris v Uruguay* held

[135] *Suez v Argentina* [148].
[136] cf JE Alvarez, 'The Public International Law Regime Governing International Investment' (2011) 344 RdC 193, 423.
[137] F Ortino, *The Origin and Evolution of Investment Treaty Standards: Stability, Value, and Reasonableness* (OUP 2020) ch 3.
[138] YS Selivanova, 'Changes in Renewables Support Policy and Investment Protection under the Energy Charter Treaty: Analysis of Jurisprudence and Outlook for the Current Arbitration Cases' (2018) 33 ICSID Rev 433.
[139] *Masdar Solar v Spain* (Award of 16 May 2018) ICSID Case No ARB/14/1 [490].
[140] *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v Italy* (Final Award of 23 December 2018) SCC Case No V 2015/095 [450].
[141] *RREEF v Spain* (Decision on Responsibility and on the Principles of Quantum of 30 November 2018) ICSID Case No ARB/13/30 [241] (*RREEF v Spain*).
[142] ibid [244].
[143] ibid [242].
[144] Viñuales (n 13) [94–8].

that such a margin required 'great deference to governmental judgments of national needs in matters such as the protection of public health'.[145] Due to the complexity of scientific and policy assessments, the 'sole inquiry' was whether the measures were adopted with 'manifest lack of reasons' or 'in bad faith'.[146] Partially dissenting arbitrator Born believed such a margin was 'neither mandated nor permitted' under international law, finding instead that treaty and custom required a 'minimum level of rationality and proportionality'.[147] Yet, the concept may be viewed as another iteration of the customary presumption that Born himself endorsed.[148] A margin of appreciation serves as the final layer of deference in determining the reasonableness or proportionality of regulatory measures,[149] reflecting the epistemic advantage of local authorities and their relative proximity to mechanisms of accountability.[150] These practical and normative factors assumed real significance in the COVID-19 pandemic, which transpired as 'a collection of national epidemics' shaped by interwoven social and biological factors.[151]

5 Reasonable Regulation in a Pandemic

Since the outbreak of COVID-19, the *Bischoff Case* has become a salient authority.[152] In 1898, Caracas police detained the carriage of a foreign national, which they supposed to have transported persons infected with smallpox. The police had acted on false information and eventually offered to return the carriage. Reflecting the customary presumption of reasonable regulation, the German-Venezuelan Commission held: 'Certainly during an epidemic of an infectious disease there can be no liability for the reasonable exercise of police power, even though a mistake is made.'[153] This final section fleshes out that prescient dictum by reviewing the classical practice on diplomatic protection in times of contagion and its contemporary lessons for investment treaty arbitration, highlighting how tribunals may interpret treaty standards in light of another codification

[145] *Philip Morris v Uruguay* [399].
[146] ibid [399–401].
[147] *Philip Morris* Dissent (n 86) [87], [139]. See also, G Born, D Morris & S Forrest, '"A Margin of Appreciation": Appreciating Its Irrelevance in International Law' (2020) 61 HarvILJ 65.
[148] See fn 86.
[149] See, eg *RREEF v Spain* [468].
[150] cf *Jahn and others v Germany* ECHR 2005-/VI 55 [91].
[151] F Paddeu & M Waibel, 'The Final Act: Exploring the End of Pandemics' (2020) 114 AJIL 698, 700.
[152] *Bischoff Case* (1903) 10 RIAA 420.
[153] ibid 420.

of reasonable regulation – the proportionality inquiry under Art 43 of the International Health Regulations (IHR).[154] The inherent limits of the IHR, however, mean that many claims arising from the COVID-19 pandemic and its economic aftermath should be resolved by integrating the customary presumption of reasonable regulation through the police powers doctrine, the right to regulate, or a margin of appreciation.

5.1 Classical Practice

The eminent digests contain a cluster of cases in which the British Foreign Office and the United States Department of State held that injury to property during an epidemic did not entitle a foreign national to compensation. In 1875, the destruction of property by Turkish authorities to combat plague entitled British nationals to compensation only if local subjects were compensated.[155] Similarly, in 1894, Brazilian authorities destroyed the watermelon crop of the US nationals to prevent the spread of cholera.[156] The State Department found such measures were 'justified under the circumstances' and accepted the Brazilian view that any claims must go before local courts.[157] The apparent standard of national treatment reflected the ubiquity of epidemics and the reciprocal need to maintain discretion without hypocrisy.[158] There was nevertheless a reasonableness requirement. In the 1893 case of *Lavarello*, Italy was awarded partial indemnity of a trader's travelling expenses and spoilage of his merchandise because Cape Verdean sanitary authorities had exceeded their powers and arbitrarily withdrew an initial order permitting him to unload.[159] In *Bischoff*, moreover, the State was 'liable for damages for the detention of the property for an unreasonable length of time and injuries to the same during that period'.[160] The unlawful conduct of injured foreigners was also a relevant factor in the reasonableness inquiry.[161]

[154] International Health Regulations (adopted 23 May 2005, entered into force 15 June 2007) 2509 UNTS 79 (IHR).

[155] C Parry (ed), *A British Digest of International Law*, Vol 6 (Stevens & Sons 1965) 350.

[156] JB Moore, *A Digest of International Law*, Vol 6 (US GPO 1906) 751–2.

[157] ibid 751.

[158] In 1892, the State Department refused to request the relaxation of Colombia's quarantine because the United States had also imposed rigid measures: JB Moore, *A Digest of International Law*, Vol 2 (US GPO 1906) 146.

[159] MM Whiteman, *Damages in International Law*, Vol 2 (US GPO 1937) 879–82.

[160] *Bischoff Case* 420.

[161] In 1885, the Foreign Office refused to entertain the claims of injured companies that had flouted sanitary regulations: Moore (n 156) 144.

The limits of reasonable regulation in the time of cholera were well articulated in the 1861 case of the *Azorian*, a British vessel that was ordered by local authorities in Tenerife to perform quarantine despite its clean bill of health upon departure. The Queen's Advocate complained:

> The fact of the 'Azorian' (alone) being treated in this unjust manner without any *bonâ fide* reason, and whilst free communication was taking place between London and all Parts of Spain, by land and sea, is so unreasonable, and *primâ facie* indefensible, that the mere assertion of the technical legal power of the Board of Health to do as it did will not satisfy the British Government.[162]

There had been no 'symptom of disease on board during the voyage'; Spain did not even pretend that the 'arbitrary and unjustifiable' quarantine measure was 'necessary to prevent infection, or that it was done in every (or any) other case'.[163] In a neglected passage of his leading monograph, Martins Paparinskis addressed the *Azorian* as an exemplary case of the distinction between compensable and non-compensable measures in State practice of the nineteenth century.[164] He accordingly adopted the *Azorian* case as a yardstick of classical customary law in his assessment of the modern jurisprudence on property rights in the ECtHR[165] and the Inter-American Court of Human Rights,[166] which he further linked to the formulation of arbitrariness by the International Court of Justice in the *ELSI* case[167] and arbitral interpretation of the FET standard in *Saluka*.[168] Following the grain of the *Azorian* case, Paparinskis believed these authorities point towards a consistent method of examining regulatory measures that are alleged to have breached international law: deference to 'the legitimacy of the purpose and means chosen to pursue it as such (unless they are entirely indefensible)' coupled with 'formal and procedural safeguards against abuse in their

[162] Parry (n 155) 292.
[163] ibid.
[164] Paparinskis (n 95) 224.
[165] Eg *Sporrong and Lönnroth v Sweden* IHRL 36 (ECHR 1982) [66–74].
[166] Eg *Chaparro Álvarez and Lapo Íñiguez v Ecuador* (Preliminary Objections, Merits, Reparations, and Costs, Judgment of 21 November 2007) IACHR Series C No 170 [183–218].
[167] *Elettronica Sicula SpA (ELSI) (USA v Italy)* (Judgment) [1989] ICJ Rep 15 [128] ('a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety').
[168] See ELSI [128] ('a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety'); *Saluka v Czech Republic* [307] (requiring conduct 'reasonably justifiable by public policies' which 'does not manifestly violate the requirements of consistency, transparency, even-handedness and nondiscrimination').

implementation (the absence of which permits a more critical engagement with the ends and means)'.[169]

Tracing the classical practice concerning past pandemics through to modern customary law, therefore, strengthens the presumption of reasonable regulation; rebutted when a claimant proves that government conduct was unreasonable because, for instance, requirements of domestic law were arbitrarily applied, discriminatory, or knowingly violated.[170] A mid-century study observed that State responsibility would be engaged only 'if health or quarantine regulations are imposed not *bona fide* to protect public health, but with the real, though unavowed, purpose of ruining a foreign trader'.[171] As Born would later put it, each State 'possesses broad and unquestioned sovereign powers to protect the health of its population'.[172] As a further corollary of territorial sovereignty, however, Hersch Lauterpacht (in his work for the United Nations Secretariat) underscored each State's 'obligation to take measures both of a preventive nature and of active co-operation with other States against the spread of disease and epidemics'.[173] The pioneering instance of such cooperation was the 1851 International Sanitary Conference of a dozen European States on the 'standardization of quarantine regulations',[174] followed by six conferences before the first binding convention on infectious disease.[175] The World Health Assembly, composed of WHO Members, is the contemporary forum for intergovernmental cooperation, authorised to adopt regulations 'designed to prevent the international spread of disease'.[176] Given that there are 196 parties to the IHR, it is highly likely that a tribunal would take into account any relevant rules in investment treaty claims arising from the COVID-19 pandemic, notably the restriction on additional health measures.

[169] Paparinskis (n 95) 242.

[170] cf measures adopted in a 'rapidly developing public health emergency' may be *ultra vires* but 'nevertheless reasonable, necessary and proportionate': *Borrowdale v Director-General of Health* [2020] NZHC 2090 [290].

[171] BA Wortley, *Expropriation in Public International Law* (CUP 1959) 110.

[172] *Philip Morris* Dissent (n 86) [90].

[173] ILC, 'Survey of International Law in Relation to the Work of Codification of the International Law Commission' (10 February 1949) UN Doc A/CN.4/1/Rev.1 [58] citing *Trail Smelter (United States, Canada)* (1941) 3 RIAA 1905.

[174] N Howard-Jones, *The Scientific Background of the International Sanitary Conferences 1851–1938* (WHO 1975) 12.

[175] International Sanitary Convention (adopted 30 January 1892, entered into force 1 November 1893). See further S Murase, 'Epidemics and International Law' (2021) 81 Annuaire de l'Institut de Droit International 37, 45–7.

[176] Constitution of the World Health Organization (adopted 22 July 1946, entered into force 7 April 1948) 14 UNTS 185, Art 21(a).

5.2 *Current Prognosis*

Two broad categories of regulatory response to the COVID-19 pandemic might give rise to an investment treaty claim: overreach and underreach.[177] Given the fear of regulatory chill animating CCSI's proposed moratorium,[178] responsibility for alleged overreach has been our focus in this chapter.[179] It is nevertheless worth observing how the IHR sets both a floor and a ceiling for internationally lawful health measures. Parties are required to share information with WHO so the Director-General may determine whether an extraordinary event constitutes a 'public health emergency of international concern' (PHEIC),[180] posing 'a public health risk to other States through the international spread of disease' and 'potentially requir[ing] a coordinated international response'.[181] Subject to procedural requirements,[182] the Director-General issues 'temporary recommendations', which may include 'health measures' to be implemented by a party experiencing the PHEIC or by other parties 'without delay' and 'in a transparent and non-discriminatory manner'.[183] The obligation to implement recommended health measures thus serves as the regulatory floor.[184] Reflecting 'the principles of international law', however, the IHR reaffirms 'the sovereign right to legislate and to implement legislation in pursuance of their health policies' while 'uphold[ing] the purpose' of the IHR.[185] That purpose is, in a word, proportionality: the IHR were designed not merely 'to prevent, protect against, control and provide a public health response to the international spread of disease' but to do so in ways that are 'commensurate with and restricted to public health risks' and 'avoid unnecessary interference with international traffic and trade'.[186]

[177] cf DE Pozen & KL Scheppele, 'Executive Underreach, in Pandemics and Otherwise' (2020) 114 AJIL 608.
[178] See Section 2 above.
[179] Whether underreach could breach the standard of full protection and security falls beyond this chapter. See fn 127.
[180] IHR (n 154) Arts 5–12.
[181] ibid Art 1.
[182] ibid Art 49.
[183] ibid Arts 15(2) & 42.
[184] See, eg WHO, 'Statement on the Fourth Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Coronavirus Disease (COVID-19)' (*WHO*, 1 August 2020) <www.who.int/news/item/01-08-2020-statement-on-the-fourth-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-coronavirus-disease-(covid-19)> accessed 27 April 2021.
[185] IHR (n 154) Art 3(4).
[186] ibid Art 2.

Elaborating upon the ceiling of proportionality, Art 43(1) provides that the IHR 'shall not preclude' parties from implementing 'additional health measures' in accordance with their domestic law and international obligations in order to achieve a 'greater level of health protection than WHO recommendations'. Additional health measures, however, 'shall not be more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection'. In determining whether to implement additional health measures, parties are required by Art 43(2) to base their determinations upon scientific principles; available scientific evidence of a risk to human health, or where such evidence is insufficient, the available information including from WHO and other relevant intergovernmental organisations and international bodies; and any available specific guidance or advice from the WHO. The IHR also must be implemented 'with full respect for the dignity, human rights and fundamental freedoms of persons'.[187]

Article 43 of the IHR bears a striking resemblance to Art 5.6 of the SPS Agreement,[188] under which a complaining member of the World Trade Organization (WTO) must establish that there is a reasonably available measure that achieves the responding member's appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.[189] Without digressing into how WTO law should inform its interpretation,[190] it suffices to note that Art 43 of the IHR could be considered more relevant than custom in the interpretation of investment treaty standards.[191] Like the interpretative annex on indirect expropriation in *Bear Creek* and *Eco Oro*, the proportionality inquiry under Art 43 of the IHR is

[187] ibid Art 3(1). cf International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, Art 12(2)(c) (on 'prevention, treatment and control of epidemic' as 'steps to be taken … to achieve the full realization' of 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health').

[188] Agreement on the Application of Sanitary and Phytosanitary Measures (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 493. See DP Fidler, 'From International Sanitary Conventions to Global Health Security: The New International Health Regulations' (2005) 4 Chin J Int Law 325, 382–3.

[189] WTO, *India – Measures Concerning the Importation of Certain Agricultural Products – Report of the Appellate Body* (4 June 2015) WT/DS430/AB/R [5.203].

[190] cf R Habibi & ors, 'The Stellenbosch Consensus on Legal National Responses to Public Health Risks: Clarifying Article 43 of the International Health Regulations' (2022) 19 IOLR 90, 45–51.

[191] See eg *Continental Casualty v Argentina* (Award of 5 September 2008) ICSID Case No ARB/03/9 [192].

the applicable *lex specialis* for the regulation of infectious disease, setting a floor of recommendations and a ceiling of proportionality.[192] If WHO were to advance this position in an *amicus* brief,[193] a tribunal may be persuaded that the IHR determine the parameters of reasonable regulation during a PHEIC.[194]

Yet there are limits to the relevance of the IHR. As defined under Art 1.1, 'health measure' means 'procedures applied to prevent the spread of disease or contamination', but excludes 'law enforcement or security measures'. Restrictions on additional health measures are determined by reference to temporary recommendations during a PHEIC, which expire automatically after three months unless extended.[195] The proportionality inquiry under Art 43, moreover, balances additional health measures against restrictions on 'international traffic', defined under Art 1.1 as 'the movement of persons, baggage, cargo, containers, conveyances, goods or postal parcels across an international border, including international trade'. This definition notably excludes cross-border flows of capital and financial instruments, let alone assets owned by foreign investors within a State's territory; the IHR does even not cover the same subject matter as investment treaty arbitration.[196] Given these temporal and material limitations, the proportionality inquiry under Art 43 has minimal relevance for claims arising from the full gamut of regulatory responses to the social and economic disruptions caused by the COVID-19 pandemic.

In addition to the inbuilt limits of the IHR, it is important to recall that the principle of systemic integration is directed to the interpretation of investment treaties, not to the application of conflicting rules.[197] While the IHR may take general priority over custom in the regulation of infectious disease, an investment treaty is the product of (usually) bilateral negotiation in respect of investment promotion and protection, which may be considered a *lex specialis* in respect of the multilateral IHR.[198]

[192] See fn 123–6.

[193] cf *Philip Morris v Uruguay* (n 69) [37–9].

[194] On the potential significance of WHO's scientific evidence and legal submissions, see CE Foster, 'Respecting Regulatory Measures: Arbitral Method and Reasoning in the *Philip Morris v Uruguay* Tobacco Plain Packaging Case' (2017) 26(3) RECIEL 287.

[195] IHR (n 154) Art 15.3.

[196] See M Waibel, 'Subject Matter Jurisdiction: The Notion of Investment' (2021) 19 ICSID Rep 25.

[197] R Yotova, 'Systemic Integration: An Instrument for Reasserting the State's Control in Investment Arbitration?' in A Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (CUP 2016) 185.

[198] cf *Continental Casualty v Argentine Republic* [244–5].

Modern investment treaties increasingly make express provision for health measures and future treaties could actively seek to harness private capital towards public health goals through specialised mechanisms for settling health-related investment disputes.[199] In general, however, the proportionality inquiry under Art 43 of the IHR may be considered in certain claims arising from health measures during a PHEIC, but it does not supplant the customary presumption of reasonable regulation defended throughout this chapter and its manifestations in investment jurisprudence: the police powers doctrine, the right to regulate, and a margin of appreciation.

From its microscopic origin, the COVID-19 pandemic has spawned planetary crises of a social, economic, and fiscal character. Yet the State remains the locus of regulatory power in an international legal system founded on the rights and duties of territorial sovereignty. While all States are equal in their sovereignty, the asymmetric impact of the pandemic has exposed unequal institutional capacities. Past tribunals have accommodated local circumstances in determining the reasonableness of government conduct; 'the heritage of the past as well as the overwhelming necessities of the present and future'.[200] In *Philip Morris v Uruguay*, the majority was satisfied that the FET standard did not 'preclude governments from enacting novel rules', even if these were 'in advance of international practice', provided they had 'some rational basis' and were 'not discriminatory'.[201] Conversely, the Tribunal in *Genin v Estonia* found that procedures adopted by a central bank that fell short of 'generally accepted banking and regulatory practice' did not violate the FET standard in light of Estonia's transition status and 'the emergence of state institutions responsible for overseeing and regulating areas of activity perhaps previously unknown'.[202] Such factors must likewise inform how a diligent investor would reasonably expect governments to address the economic recession and social dislocation caused by the COVID-19 pandemic.[203] It should be very difficult for claimants to rebut the customary presumption of reasonable regulation without

[199] F Baetens, 'Protecting Foreign Investment and Public Health Through Arbitral Balancing and Treaty Design' (2022) 71 ICLQ 139.

[200] *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme SA v Albania* (Award of 30 March 2015) ICSID Case No ARB/11/24 [629].

[201] *Philip Morris v Uruguay* [430].

[202] *Genin, Eastern Credit Limited, Inc and AS Baltoil v Estonia* (Award of 25 June 2001) ICSID Case No ARB/99/2 [348, 364].

[203] Eg, *Teinver v Argentina* (Award of 21 July 2017) ICSID Case No ARB/09/1 [668–78].

clear evidence of bad faith or discriminatory treatment, more so when threats to human rights convert the State's right to regulate into a duty to regulate.[204]

6 Conclusion

At the time of writing, the annulment committee in *Tethyan Copper Company v Pakistan* found that enforcement of an award of USD 5.9 billion would not compromise the 'capacity to respond promptly and effectively to a pandemic' despite Pakistan's reliance on loans from the International Monetary Fund 'to address the economic impact of the COVID-19 shock'.[205] If the committee's insouciance were reflected in an award on the merits, that would surely provoke more calls for a moratorium or broader exceptions to investment treaty arbitration. The police powers doctrine, the right to regulate, and a margin of appreciation, however, are all examples of an ostensibly 'new jurisprudence' focused on finding 'space for flexibility within the primary rules themselves'.[206] The customary presumption of reasonable regulation, as a longstanding expression of territorial sovereignty, is the underlying driver of these doctrines. While Art 43 of the IHR may have some relevance in determining the proportionality of health measures during a PHEIC, the economic aftermath of the pandemic presents a broader opportunity for governments, counsel and arbitrators to revive the general rule that there is no State responsibility for reasonable regulation of foreign investment. Investment treaty arbitration, rather than acting as an unmitigated constraint on regulatory powers, may both guard against arbitrary treatment by governments and transform the ambitious measures of successful respondents into lasting legal principle in the face of overbearing investors.

[204] cf *Urbaser v Argentina* (Award of 8 December 2016) ICSID Case No ARB/07/26 [1205–10]. See fn 187.

[205] *Tethyan Copper v Pakistan* (Decision on Stay of Enforcement of the Award of 17 September 2020) ICSID Case No ARB/12/1 [155–7].

[206] Arato, Claussen & Heath (n 15) 635.