Chapter 4
Regulating Public Services and International Investment Law

Francesco Costamagna

Abstract International investment law is increasingly becoming an important reference field of international economic law. The chapter examines if, and the extent to which, investment arbitral tribunals sought to meet the need to respect host State's capacity to regulate in the public interest. Preliminarily, the chapter deals with the notion of regulation in the public service sector, by exploring its categorization as a right and as a duty of States. Subsequently, it assesses whether the regulation of public services is a matter falling within international investment law's scope of application and whether all regulatory measures used to govern public services' provision may fall under international arbitral tribunals' scrutiny. It then analyses the controversial distinction between lawful regulation and regulatory expropriation under international investment law. To this purpose, the chapter takes into consideration the different approaches adopted by arbitral tribunals, in order to evaluate their capacity to meaningfully contribute to find a balance between investors' and States' competing interests with regard to public services. Lastly, the analysis turns to the increasingly important role played by the fair and equitable treatment standard in arbitral practice, also with regard to public services' cases. In particular, this part of the chapter looks at the difficulties in finding an equilibrium between stability and regulatory change in the public services' sector, by examining the impact of the legitimate expectations doctrine upon host States' regulatory autonomy.

Contents

4.1 Introduction 78
4.2 Public Services' Regulation as State's Right (or as a Duty?) 79
4.3 The Regulation of Public Services and the Scope of Application of International Investment Law 83

F. Costamagna (✉)
Associate Professor of European Union Law, University of Turin, Turin, Italy
e-mail: francesco.costamagna@unito.it

© T.M.C. Asser Press and the authors 2015

M. Krajewski (ed.), *Services of General Interest Beyond the Single Market*, Legal Issues of Services of General Interest,
DOI 10.1007/978-94-6265-063-3_4

4.3.1 Public Services and the Substantive Scope of International Investment Agreements 83
4.3.2 Public Services' Regulatory Measures and International Arbitral Tribunals Jurisdiction: The Case of ICSID 84
4.4 Legitimate Regulation or Regulatory Expropriation? Looking for an Elusive Answer in the Context of Public Services 86
4.4.1 Regulatory Expropriation: An Overview 86
4.4.2 The Distinction Between Regulation and Expropriation from a Quantitative Perspective: The Sole-Effect Doctrine 88
4.4.3 Beyond the Quantitative Perspective: Police-Power Exception and Proportionality Analysis 90
4.5 Regulatory Change and Stability of the Regulatory Framework in the Context of Public Services: The Role of the Fair and Equitable Treatment Standard 94
4.5.1 Fair and Equitable Treatment, Stability and Investors' Legitimate Expectations 94
4.5.2 Making Investors' Expectations Prevail Over States' Regulatory Autonomy in the Context of Public Services: The Early Argentine Cases 96
4.5.3 Looking for a Better Definition of the Legitimacy of Expectations: Is There a Need for Specific Commitments? 98
4.5.4 Balancing Investors' Expectations and States' Regulatory Purpose 101
4.6 Conclusion 105
References 106

4.1 Introduction

The international regime for the protection of foreign investments has gained unprecedented visibility over the last decade, thanks to the growth in the number of international investment agreements and, more importantly, the boom of investor-State arbitration. This evolution has raised concerns because of its impact on States' regulatory autonomy. Indeed, the reach of these disputes goes well beyond mere commercial matters, touching upon key aspects of host States' socio-economic order.

The regulation of public services[1] represents one of the main examples in this regard. Over the last few years there has been a growing number of cases concerning measures taken by host States to regulate foreign investments in this sector. This evolution has been aided and abetted by liberalization and privatization policies that, starting from the late-'70s, have spread all over the world. The process opened up new spaces for the participation of private actors in a sector that had been traditionally dominated by State-owned or State-controlled entities. However, the relationship between the private party and the public authority has often

[1]The term has not a uniform definition under international law. This paper will use it as indicating all those activities that States subject to specific obligations in order to meet objectives of general interest. The term will mostly, albeit not exclusively, cover services provided through network industries, such as electricity, gas and water. On the definition of the notion of "public service" see below Sect. 4.2.

proven difficult, because of both technical and socio-political reasons, often ending up in front an international arbitral panel.

The analysis of these cases shows the potentially deep impact that international investment law may have on States' regulatory autonomy with regard to public services. Much depends on the approach taken by international arbitrators to define international agreements' vaguely worded provisions and, in particular, to their capacity and willingness to pay due regard to the fact that these activities are not ordinary business operations, as they are functional to the pursuit of fundamental social objectives. Therefore, in assessing whether national regulatory interventions comply with international protection standards, there is the need to respect host State's capacity to regulate in the public interest.

This chapter examines if, and the extent to which, arbitral tribunals sought to meet this need, by focusing on some key aspects. Preliminarily, the paper deals with the notion of regulation in the public service sector, by exploring its categorization as a right and as a duty of States. Subsequently, it assesses whether the regulation of public services is a matter falling within international investment law's scope of application and whether all regulatory measures used to govern public services' provision may fall under international arbitral tribunals' scrutiny. The following paragraph analyses the controversial distinction between lawful regulation and regulatory expropriation under international investment law. To this purpose, it takes into consideration the different approaches adopted by arbitral tribunals, in order to evaluate their capacity to meaningfully contribute to find a balance between investors' and States' competing interests with regard to public services. Lastly, the analysis turns to the increasingly important role played by the fair and equitable treatment standard in arbitral practice, also with regard to public services' cases. In particular, this part of the chapter looks at the difficulties in finding an equilibrium between stability and regulatory change in the public services' sector, by examining the impact of the legitimate expectations doctrine upon host States' regulatory autonomy.

4.2 Public Services' Regulation as State's Right (or as a Duty?)

The role of the State in the provision of public services has markedly changed over the last decades, mainly because of the impact of liberalization and privatization policies that have been variously adopted and implemented by several countries around the world. Some of the functions traditionally exercised by States' authorities have been progressively transferred to private or mixed actors. However, public authorities are still expected to intervene in order to ensure that public services are organized and provided in a way that preserves their specific function. Indeed, these services cannot be fully equated to other economic activities, as they are vital to fulfil peoples' daily needs, to enhance social cohesion and to foster economic growth. For all these reasons, today ensuring (universal) access to high-quality public services is to be regarded as one of the key aims of the State.

Especially in those cases where public services have been liberalized or privatized, regulation represents the main instrument at the disposal of public authorities to achieve this aim. Before proceeding with the analysis, it is worth observing that the notion of 'regulation' has an uncertain legal meaning, at least under international law. This chapter will use the term in a broad sense, encompassing all the measures taken by public authorities in order to "influenc[e], control[…] and guid[e] economic or other private activities with impact on others",[2] with the aim of achieving specific socio-economic policy objectives.[3] It must be highlighted that the term 'public authorities' is meant to cover not just central authorities, but also independent agencies or bodies, as well as local authorities, which, as it will be seen later on, play a major role in the regulation of public services.

A distinction is often made between economic and social regulation, depending on the objectives it pursues.[4] Economic regulation mainly aims at correcting market failures[5] that, according to the neo-classical economic theory, may lead to an inefficient allocation of resources if not properly regulated. Some of these failures[6] are particularly relevant with regard to public services, as it is the case of natural monopolies. Indeed, the supply of public services often require the existence of expensive network infrastructure that cannot be duplicated so to allow the entry of new competitors. Therefore, there is the need to avoid that the provider could exploit its monopolistic power, by, for instance, charging excessive fees to end-users.

Regulation performs functions that go beyond the correction of market failures, as it may address distortions that occur even in cases where the market works properly. Indeed, economic efficiency does not ensure a fair distribution of costs and benefits and, consequently, there is the need for the State to intervene in order to ensure that public services might contribute to the achievement of fundamental social objectives.[7] This may occur through the imposition of public service obligations upon the provider or the providers. These obligations, which may take different forms and which may have different scopes, are generally geared toward ensuring affordability, geographical coverage and quality of public services' supply.[8]

---

[2]Krajewski 2003a, p. 4.

[3]The *Glossary of Industrial Organisation Economics and Competition Law*, compiled by R.S. Khemani and D.M. Shapiro, commissioned by the Directorate for Financial, Fiscal and Enterprise Affairs, OECD, 1993 defines regulation as the "imposition of rules by government, backed by the use of penalties that are intended specifically to modify the economic behaviour of individuals and firms in the private sector". An equally broad definition is used by Mitnick 1980, 1. The A. defines regulation as "[…] the intentional restriction of a subject's choice of activity by an entity not directly party or involved in that activity".

[4]This distinction is not to be taken too rigidly, as regulatory measures normally pursue different types of objectives simultaneously. See Krajewski 2003a, p. 18.

[5]Baldwin and Cave 1999, Chap. 2. Conversely, according to the private interest theories of regulation, regulatory functions are not meant to serve the public interest, as they are captured by powerful private groups. See Stigler 1971, pp. 122–126.

[6]Baldwin and Cave 1999, p. 9.

[7]Palast et al. 2003.

[8]Houben 2008, pp. 7–27.

Public services are by no mean the only economic sector where States exercise their regulatory functions. However, in this context regulation plays a role that is far more important than in other economic sectors, having a 'constitutive' value. Indeed the exercise of regulatory functions by public authorities, through the imposition of specific obligations on the supply of the service, is key to identify the existence of a 'public service' and to distinguish it, also with regard to its legal status, from other economic activities. This approach goes beyond the traditional 'subjective' understanding of the notion, which derives from the French doctrine of *service public* and tends to consider public services only those directly provided by State's entities.[9] The objective definition of public services has gained increasing recognition in recent times, as it better reflects the evolution of the role of the State in the provision of public services. For instance, this approach has been constantly employed by the European Union to define the notion of services of general economic interest, which is used in the attempt to avoid the ambiguities of 'public services'.[10] For instance, in 2003 the European Commission explained that the concept, which can be found in Article 106.2 TFEU, refers to "services of an economic nature which the Member States or the Community subject to specific public service obligations by virtue of a general interest criterion".[11]

As observed by Lowe with regard to regulation in general, the exercise of regulatory functions is "an essential element of the permanent sovereignty of each State over its economy"[12] and it has, thus, to be considered as a sovereign right. The existence of such a right has been recalled by the GATS, whose Preamble reiterates the need to respect "the right of members to regulate, and to introduce new regulation, on the supply of services within their territories in order to meet national policy objectives".[13]

This is even truer with regard to public services, as their provision represents one of State's core sovereign functions and, ultimately, its very *raison d'être*. The role of public services as constitutive elements of the State had already been emphasised in the early XIX century, by the so-called School of Bordeaux. In particular Leon Duguit, the founder of the School, criticized the assimilation of the

[9]See Hauriou 1927; Jèze 1926, pp. 171–172.

[10]But these efforts seems to be to no avail, as the notion of services of general economic interest, as well as its relationship with other related concepts, such as that of services of general interest, is still uncertain and it has generated much confusion. See generally Neergaard 2009, pp. 17–50.

[11]European Commission, *Green Paper on Services of General Interest*, COM(2003) 270 final, 21 May 2003, para 17.

[12]Lowe 2002, pp. 450–451.

[13]The recognition of this right sought to respond to the concerns that the adoption of GATS could jeopardise States' capacity to regulate services and, in particular, public services. The WTO website also features a section devoted to "Misunderstanding and scare stories: The right to regulate" (http://www.wto.org/english/tratop_e/serv_e/gats_factfiction11_e.htm). On the relationship between trade and public services see Arena 2011, pp. 489–528; Krajewski 2003b, pp. 341–367; Adlung 2006, pp. 455–485.

State to the concept of *puissance public*,[14] instead conceiving it as a "cooperation de services publics organisés et controlés par des gouvernants".[15] This approach still retains its value, as public services keep on being "a key element of the modern social and welfare state"[16] and a building block of its legitimacy.

The adoption of a less State-centric vision has opened up new perspectives on the regulation of public services, which has been conceived, albeit only tentatively, as a duty of the State and not just as a sovereign right.[17] This evolution has mainly taken place with regard to human rights, and, in particular, social and economic rights. It is worth observing, due to its relevance for this inquiry, that the debate mostly centred on States' responsibilities in those cases where the supply of essential services has been entrusted with private operators.[18] There is now consensus on the fact that the choice to outsource public services' provision to private actors does not relieve the State from the realization of rights and, hence, from making use of all the regulatory tools at their disposal to this end. For instance, in 2007 the UN High Commissioner for Human Rights, after having recalled that international human rights law is neutral with respect to the economic model for the provision of services, confirmed that "Governments and public officials remain primary responsible for ensuring progress toward the realization of rights" and, consequently, they "must take measures to ensure that limited resources, public as well as private, are used in the most effective manner to promote the realization of rights, giving particular attention to improving the situation of those most in need".[19] This argument has been reiterated and further specified with particular regard to the right to water and sanitation. The Human Rights Council, in a Resolution adopted in 2010, reaffirmed that "the delegation of the delivery of safe drinking water and/or sanitation services to a third party does not exempt the State from its human rights obligations" and called upon States to adopt a detailed series of measures to fulfil their duties. Inter alia, States are urged to develop appropriate tools and mechanisms "to achieve progressively the full realization of human rights obligations related to safe drinking water and sanitation, including in

[14]See Hariou 1901, pp. 26–27.

[15]Duguit 1925, p. 55.

[16]M. Krajewski, Investment Law and Public Services http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038514. 1 April 1 2012. Accessed 20 November 2014.

[17]See High Commissioner for Human Rights, *Economic, Social and Cultural Rights. Handbook for National Human Rights Institutions*, United Nations: New York—Geneva (2005), 18 where it says that "[t]he obligation to fulfil economic, social and cultural rights [...] can entail issues such as [...] the provision of basic public services and infrastructures".

[18]Graham 2005, pp. 33–56.

[19]UN Economic and Social Council, Report of the United Nations High Commissioner for Human Rights (focusing on the concept of progressive realization of economic, social and cultural rights), E/2007/82, 25 June 2007, paras 34–36.

currently unserved and underserved areas" and "to adopt and implement effective regulatory frameworks for all service providers in line with the human rights obligations of States".[20]

4.3 The Regulation of Public Services and the Scope of Application of International Investment Law

4.3.1 Public Services and the Substantive Scope of International Investment Agreements

The assessment of the impact of international investment law upon States' capacity to regulate public services needs, first of all, to determine whether these activities fall within international investment agreements' substantive scope of application. The answer to this question must be a resounding "yes", barring few exceptional cases.

On the one side, international agreements tends to define their substantive scope of application quite loosely, by incorporating open-ended asset-based definitions of what can be considered as an "investment".[21] Arbitral tribunals have contributed to consolidate and even amplify this tendency, by interpreting this notion in an over-extensive manner. On the other side, investment agreements, unlike trade agreements, rarely contains so-called "public services exemptions clauses", i.e. "provisions […] which exempt public services or aspects of their provision, financing and regulation from all or some disciplines of [the] agreements".[22]

However, the situation is progressively changing, also in response to the stance adopted by arbitral tribunals. In a limited (but growing) number of cases, States have introduced in their investment agreements exemption clauses, aimed at safeguarding or restoring their regulatory capacity also with regard to public services. One of the earliest examples in this regard is NAFTA. Indeed, in this context Canada, Mexico and the US all reserved, with regard to both cross-border services and investment, to adopt and maintain "any measure" with regard to the provision of services "established or maintained for a public purpose" such as, inter alia, social security and insurance, social welfare, public education, health and child

[20]UN General Assembly, Resolution adopted by the Human Rights Council. Human Rights and Access to Safe Drinking Water and Sanitation, A/HRC/RES/15/9, 6 October 2010.

[21]UNCTAD, Scope and Definition, Series on Issues in International Investment Agreements II. UN Publication, 2011, pp. 7–12. New York, Geneva.

[22]M. Krajewski, Public Services in Bilateral Free Trade Agreements of the EU http://www.epsu.org/IMG/pdf/PublicServicesFTAs_FinalVersion.pdf, p. 7. Accessed 20 November 2014. See also Arena 2011, pp. 495–496.

care.[23] The very same provision can be found in a number of FTA concluded by the US with countries such as Australia[24] and Colombia.[25]

In the Korus FTA[26] this very broad exemption clause applies to investments "to supply a service in the exercise of governmental authority". The provision reproduces the wording of Article I:3(b) GATS, without, however, making any reference to the clarification contained in letter (c) of the same provision. Therefore, it is not clear whether this clause is meant to allow the concerned States to adopt any measure with regard to "any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers". If this is the case, the effect of the clause would be fairly limited, at least with regard the preservation of State's capacity to exercise its regulatory functions in the public services sector. Despite some uncertainties concerning the definition of the requirements set by the provisions,[27] it has been convincingly demonstrated that public services sit mostly outside the scope of the clause.[28] This is even more the case in the context at hand, as the existence of an investment, which presupposes the presence of subject acting for profit, make it difficult, if not impossible, to argue that the service is not supplied on a commercial basis. On the other side, it could be argued that the absence of the clarification contained in Article I:3(c) GATS paves the way for a broader interpretation of the clause, so to allow national authorities to adopt any measure also with regard to activities that, albeit supplied on a commercial basis or in competition with other suppliers, represent an exercise of governmental authority. However, the adoption of this reading is potentially problematic, due to the uncertainty on what can be considered as an exercise of governmental authority in the absence of any meaningful guidance in the text of the agreement.

4.3.2 *Public Services' Regulatory Measures and International Arbitral Tribunals Jurisdiction: The Case of ICSID*

Public services' regulatory frameworks often have a multi-tiered structure, as the conditions for their supply are set in different legal instruments, such as constitutional norms, legislative acts, administrative regulations and contractual agreements stipulated between the competent authority and the provider. Doubts have

---

[23]*North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 12 December 1992, Annex II.

[24]*Australia—United States Free Trade Agreement*, 18 May 2004, Annex II.

[25]*Colombia—United States Free Trade Agreement*, 22 November 2006, Annex II.

[26]*Republic of Korea—United States Free Trade Agreement*, 30 June 2007, Annex II.

[27]On the different interpretation of the words "on a commercial basis" see Arena 2011, p. 502.

[28]Krajewski 2003b, p. 350.

arisen as to whether arbitral tribunals can exercise their scrutiny over all these regulatory measures, in order to assess their compatibility with norms and standards contained in international investment agreements. These doubts mainly concerned those measures having a general character, i.e. aiming at implementing general policy choices and not just directed toward a specific investment.

The issue has been raised and discussed in most of the so-called Argentine cases,[29] concerning the measures adopted by Argentina in response to the dramatic economic crisis that hit the country at the end of the '90s and that led to a substantial modification of the regulatory framework governing private investments in public services.[30] Indeed, Argentina challenged the competence of ICSID tribunals to hear these cases by contending that a controversy concerning the application of measures having a general nature cannot be said to be "a dispute arising directly out of an investment", as required by Article 25 ICSID Convention.[31] The Respondent State read the word "directly" as meaning "specifically" and, thus, restricting the competence of arbitral tribunals to those measures that, according to the *Methanex* decision,[32] have "a legally significant connection" with the investment or the investor. Conversely, admitting the possibility to deal with measures having a wider focus would allow an international adjudicatory body to put under scrutiny "the wisdom of general economic measures taken by the government".

Arbitral tribunals have constantly rejected Argentina's interpretation of Article 25 ICSID Convention and, consequently, the possibility to exclude regulatory measures having a general character from the scope of application of international investment law. Their reasoning rested on the distinction between, on the one side, the measures and, on the other, their effects on the investment. In the *CMS* case, for instance, the Tribunal conceded that it "does not have jurisdiction over measures of general economic policy adopted by the Republic of Argentina and cannot pass judgement on whether they are right or wrong", but, at the same time, it forcefully claimed to have "jurisdiction to examine whether […] measures of general economic policy having a direct bearing on such investment have been adopted in violation of legally binding commitments made to the investor in

[29]See generally Burke-White 2010, pp. 407–432.

[30]In the second half of the '90s the growth of public debt drove the country into recession that caused massive protests and social rests, as most of Argentina's households were no longer able to cope with everyday life expenses. In order to guarantee the access to basic public services, the Government first forced private investors to accept a temporary tariffs' freezing. Subsequently, in January 2002, it adopted the *Ley de Emergencia*, which terminated tariffs' automatic adjustment mechanism, based on the US Producer Price Index (PPI), as well as the peso-to-dollar 1-to-1 peg.

[31]Schreuer 1996, pp. 318–492.

[32]*Methanex Corp. v. United States of America*, UNCITRAL Case, Award on Jurisdiction and Admissibility of 7 August 2002, para 139. This notwithstanding the fact that Article 1101 NAFTA only speaks of measures "relating to" investments or investors of another party.

treaties, legislation or contracts".[33] This distinction aimed at ensuring a proper balance between the conflicting interests at stake. Indeed, as observed in *AES*, while a State has "a right to adopt its economic policies; […] this does not mean that the foreign under a system of guarantees and protection could be deprived of their respective rights".[34]

However, while theoretically clear, the distinction between the measure and its effects might be more difficult to draw in practice. Admittedly, the recourse to other criteria, such as the nature of the measure, could be equally problematic, giving the possibility to national authorities to easily evade international obligations by resorting to measures having a general character. At the same time, this approach ends up widening the jurisdiction of international arbitral tribunals, allowing them to exercise their scrutiny virtually over any type of regulatory measure, irrespective of its nature and status. In this sense, there is little doubt that this regime "obliging States to arbitrate dispute arising from sovereign acts, [it] establish[es] […] a mechanism to control the exercise of public authority",[35] imposing potentially far-reaching constraints to their regulatory autonomy.

4.4 Legitimate Regulation or Regulatory Expropriation? Looking for an Elusive Answer in the Context of Public Services

4.4.1 Regulatory Expropriation: An Overview

The exercise of regulatory functions by the host State may have adverse economic effects on investments. This is very much evident with regard to public services where the profitability of the activity carried out by the investor is heavily dependent on the regulatory choices adopted by competent authorities with regard, for instance, the obligations that must be fulfilled in supplying of the service or the mechanism for the calculation of tariffs.

---

[33]*CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction of 7 July 2003, para 33. See also *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Objections to Jurisdiction of 25 August 2006, para 59; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi International S.S. v. The Argentine Republic*, ICSID Case No. ARB/03/19 and *AWG Group Ltd. v. The Argentine Republic*, UNCITRAL Case, Decision on Jurisdiction of 3 August 2006, paras 27–31; *Telefonica S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction of 25 May 2006; paras 62–67; *Gas Natural SDG S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Preliminary Questions on Jurisdiction of 17 July 2005, paras 37–39.

[34]*AES Corp. v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction of 26 April 2005, para 57.

[35]Van Harten and Loughlin 2006, p. 146.

In certain cases, the impact of regulation may be as severe as to amount to an expropriatory act, which is usually identified as 'regulatory expropriation'. Investment treaties do not contain any explicit reference to this notion. In the *Suez* case it has been defined as follows: "[i]n case of an indirect expropriation, sometimes referred to as a 'regulatory taking', host States invoke their legislative and regulatory powers to enact measures that reduce the benefits that investors derive from their investments but without actually changing or cancelling investors' legal title to their assets or diminishing their control over them".[36] The relationship between regulatory expropriation and indirect expropriation[37] is still uncertain, despite having being extensively discussed in literature[38] and case-law. However, clarifying and differentiating between these and other related concepts is essentially a terminological problem, having little relevance from a legal perspective. Indeed, any expropriation—be it direct, indirect, regulatory, de facto, creeping or consequential—to be lawful under international law must fulfil the same conditions, i.e. it must be in the public interest, non-discriminatory, in accordance with due process of law and accompanied by the payment of a prompt, adequate and effective compensation.[39] The assimilation, which is explicitly provided for by many international investment agreements,[40] had already been sanctioned by the Permanent Court of Arbitration,[41] the Permanent Court of International Justice,[42] the Iran-US Claims Tribunal[43] and it has been subsequently confirmed by several arbitral tribunals.

---

[36]*Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi International S.S. v. The Argentine Republic,* ICSID Case No. ARB/03/19 and *AWG Group Ltd. v. The Argentine Republic,* UNCITRAL Case, Decision on Liability of 30 July 2010, para 132.

[37]One of the best-know definitions of indirect expropriation is that elaborated by the Iran-US Claims Tribunal in the *Starrett Housing* decision, where it has been observed that "[…] it is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with original owner" (*Starret Housing Corp. v. Government of the Islamic Republic of Iran*, Award No. ITL 32-24-1 of 19 December 1983, Iran-US CTR, 4, 154).

[38]See generally, Newcombe 2005, pp. 1–57; Coe and Rubins 2005, pp. 597–667.

[39]See Sacerdoti 1997, p. 381; Higgins 1983, p. 324; Christie 1962, pp. 310–311.

[40]For an overview of these references in some international investment agreements, see UNCTAD, Expropriation. A Sequel, Series on Issues in International Investment Agreements II. UN Publication, 2012, pp. 8–12. New York, Geneva.

[41]*Norwegian Shipowners Claims*, 13 October 1922, UNRIAA, I, 1922, 334.

[42]*Case concerning certain German interests in Polish Upper Silesia (The Merits)*, 25 May 1925, PCIJ, Ser. A, 7, 1926; *Interpretation of Judgements Nos. 7 and 8 (The Chorzów Factory)*, 16 December 1927, PCIJ, Ser. A, 13, 1927; *The Oscar Chinn Case*, 12 December 1934, PCIJ, Ser. A, 63, 1934.

[43]*Starrett Housing*, above n 37, para 154. The Iran-US Claims Tribunal's contribution to the development of the legal notion of indirect expropriation has been substantial, also from a quantitative perspective as this issue has been dealt with in more than 60 cases. See Brower and Brueschke 1998.

4.4.2 *The Distinction Between Regulation and Expropriation from a Quantitative Perspective: The Sole-Effect Doctrine*

In the case of regulatory expropriation, the main issue is not the respect of the conditions seen above, but rather the distinction between instances of legitimate regulation and cases of compensable expropriation.[44] This distinction remains fairly obscure,[45] as demonstrated by the divergent solutions adopted, in public services' cases, by different arbitral tribunals dealing with same factual scenario. In the *AWG/Suez* case, the arbitral tribunal admitted that is unclear "when governmental action that interferes with broadly-defined property rights…crosses the line from valid regulation to a compensable taking, and it is fair to say that no one has come up with a fully satisfactory means of drawing this line".[46]

The approach traditionally adopted by arbitral tribunals has a distinct quantitative nature, focusing primarily, and almost exclusively, on the effects of the regulatory measure upon the investment and the investor. As observed in several decisions, "[e]xpropriation tends to involve the deprivation of ownership rights, regulation a lesser interference".[47] The elements taken into consideration to determine the impact of the regulatory measure on the investment are both legal and economic. As for the first dimension, in a decision concerning gas distribution,[48] the arbitral Tribunal clarified that expropriation may result, inter alia,[49] "from depriving the investor of the control on the investment, managing the day-to-day operations of the company, arresting and detaining company officials or employees, supervising the work of officials, interfering in administration, impeding the distribution of dividends, interfering in the appointment of officials or managers, or depriving the company of its property or control in whole or in part".[50] As for the second dimension, the main item taken into consideration is the impact on the investment's economic viability and profitability. In a number of cases, even concerning public services, arbitral tribunals have seemingly given priority to the first dimension over the second one. In *CMS*, for instance, the tribunal opined that "[t]he essential question is therefore whether the enjoyment of property has been

[44] See Lowe 2002, pp. 457–460.

[45] Reinisch 2008, p. 432.

[46] *AWG/Suez,* above n 36, para 132.

[47] *S.D. Mayers Inc. v. Government of Canada*, UNCITRAL, Partial Award of 13 November 2000, para 282.

[48] *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award of 28 September 2007, para 284.

[49] The same paragraph pointed out that "[t]he list of measures could be expanded significantly".

[50] See also *PSEG Global Inc., The North American Coal Corp., and Konya Ilgin Elektrik Üritim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/25, Award of 19 January 2007, para 278.

effectively neutralized".[51] Correspondingly, in *LG&E* the arbitral panel concluded that no expropriation had occurred, since the measures, despite having an "impact on Claimants' investment, especially regarding the earnings that the Claimants expected", did not "deprive the investors of the right to enjoy their investment".[52] Conversely, in other cases the economic items played a more prominent role. In a case concerning the privatization of water and sanitation services in the Argentina's Province of Tucmán, the arbitral tribunal found that the regulatory measures had to be considered as an act of expropriation, as they deprived Claimants "of the economic use and enjoyment of their investment, the benefits of which (i.e. the right to be paid for services provided) had been effectively neutralised and rendered useless".[53]

This line of reasoning, aptly dubbed as the "sole-effects doctrine",[54] gives little, if any, relevance the regulatory intent or purpose. In most public services cases, Respondent States sought to justify their measures by recalling their fundamental social functions, such as ensuring universal access to essential services. However, arbitral tribunals have constantly adopted an agnostic approach,[55] remaining indifferent to these considerations. While incidentally recognizing that a "State has the right to adopt measures having a social or general welfare purpose",[56] in fact they stuck to the idea that "State's intent, or its subjective motives are at most a secondary consideration", as "the effect of the measure on the investor, not the State's intent, is the critical factor".[57]

Such a rigidly objective approach reflects the perception of State's regulation more as a risk than as the exercise of a fundamental sovereign function. This perception is particularly acute with regard to public services, due to the high incidence that this form of risk, commonly known as 'regulatory risk', has in this context. This is due to the high political sensitivity of the objectives pursued though the provision of these services, as well as to the fact that they mostly require extensive network infrastructures entailing high levels of fixed capital and long payback periods.[58]

---

[51] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Final Award of 12 May 2005, para 262.

[52] *LG&E Energy Corp., LG&E Capital Corp. And LG&E International Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006, para 199.

[53] *Compañia de Aguas del Aconquijia S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/97/3, Award of 20 August 2007, para 7.5.34.

[54] Dolzer 2003, p. 78.

[55] Arena 2011, pp. 515–516. The author uses the concept to describe GATS approach toward public services.

[56] *LG&E*, above n 52, para 195.

[57] *Vivendi II*, above n 53, para 7.5.20. The same approach has been consistently adopted also by the Iran-US Claims Tribunal: see, for instance, *Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, Award No. 141-7-2 of 29 June 1984, Iran-US CTR, 21, para 115.

[58] See Wälde and Dow 2000, pp. 1–61; Sacerdoti 1999.

The sole-effect doctrine, if taken in absolute terms, raises issues of compatibility with the idea of a right to regulate. Indeed, corollary of this idea is the principle according to which a lawful exercise of State's regulatory authority cannot amount to expropriation even if it affects foreign investments considerably.[59] As duly observed in *Azurix*, "[i]n the exercise of their public policy function, governments take all sort of measures that may affect the economic value of investments without such measures giving rise to a need to compensate".[60] Conversely, when applying the sole-effect doctrine international arbitrators may well end up imposing upon host States a duty to compensate even for measures adopted in the exercise of public policy functions, by looking only to the material consequences of the action.

The impact of the doctrine has been partially softened by looking at the degree and intensity of the interference. Indeed, as expounded in several cases, "[t]he impact must be substantial in order that compensation may be claimed for the expropriation".[61] In order to be 'substantial' the interference must be "more than adverse effect", requiring that "the investor no longer be in control of its business operation, or that the value of the business has been virtually annihilated".[62] Such a severe reading of the 'substantial impact' criterion represents a constant feature of arbitral decisions concerning public services,[63] contributing much to the limited number of cases in which States' regulatory measures have been considered as an expropriatory act.[64]

4.4.3 Beyond the Quantitative Perspective: Police-Power Exception and Proportionality Analysis

The solution seen above solution fails to address the main lacuna of the sole-effect doctrine, as it does not allow for adequate consideration of the reasons that justify States' regulatory intervention. To fill it, some authors[65] proposed to rely on the

---

[59]Reisman and Sloane 2004, p. 129; Brownlie 2003, p. 509.

[60]*Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006, para 310.

[61]*LG&E*, above n 52, para 191.

[62]*Sempra*, above n 48, paras 284–285.

[63]*Vivendi II*, above n 53, para 7.5.11; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award of 22 May 2007, 245; *CMS*, above n 51, para 262. In this regard Coe and Rubins 2005, p. 621 observe that "the sense often conveyed is that interference must approach total impairment".

[64]This leniency would represent a counterbalance to the far stricter interpretative stance adopted with regard to the fair and equitable treatment. In this manner, arbitral tribunals would seek to "comfort loosing respondents—"giving them something"—by declaring that there was no expropriation". See Paulsson 2006, p. 7.

[65]See Christie 1962, p. 388; White 1961, p. 145.

police power doctrine in order to identify a cluster of measures that, due to their nature and objectives, are in any case exempted from compensation. This doctrine has been originally elaborated by the US Supreme Court in its takings jurisprudence[66] and, subsequently, it has progressively made its way in some international normative instruments and judicial decisions. The exception is explicitly recognized in the US Third Restatement, which speaks about "[…] actions of the kind that is commonly accepted as within the police powers of States".[67] Other instruments, while not expressly using the concept, follow the same path as they try to identify those measures that cannot be considered as an act of expropriation. For instance, the Article 11(a)(iii) MIGA Convention[68] excludes from the notion of expropriation "non-discriminatory measures of general application which governments take for the purpose of regulating economic activity in their territories". Likewise, Annex B of the 2012 US Model BIT establishes that "[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".

The police power doctrine remains a controversial tool for the identification of non-compensable regulatory measures. Indeed, there is not an internationally-accepted definition of this notion, which has been often stretched as an accordion. According to a narrower understanding, the exception only "allows the State to protect essential public interests from certain types of harms".[69] Conversely, other scholars see it as covering not only 'traditional' non-economic interests, such as health, safety, social welfare or the environment, but also competition, consumer protection, securities and land planning.[70] This situation of uncertainty is particularly acute with regard to public services, being it a context in which States pursue a disparate set of socio-economic objectives through several different instruments. Therefore, the scope of the exception should be wide enough to include all the different measures that may be functional to achieve these objectives and flexible enough to accommodate 'future' measures to be necessarily adopted in a context that is subject to a continuous process of change and adaptation. The risk is that this process might end up diluting too much the normative value of the exception, making it impossible to identify its boundaries.

Furthermore—and, to some extent, more importantly—the transposition of this doctrine in the international legal order poses problems of compatibility with the customary principle according to which the fact that a measure has been adopted

---

[66]See recently Karkkainen 2006.

[67]American Law Institute 1987, para 712(1).

[68]*Convention Establishing the Multilateral Investment Guarantee Agency*, 12 April 1988.

[69]Newcombe 2005, p. 26.

[70]H. Mann, The Final Decision on Methanex v. United States: Some New Wine in Some New Bottles. International Institute for Sustainable Development http://www.iisd.org/pdf/2005/commentary_methanex.pdf. August 2005. Accessed 20 November 2014; Freeman 2003, p. 208. See also Clough 2005, p. 563.

for a public purpose does not exclude compensation.[71] This point has been raised in the *Azurix* case, which concerned the privatization of water and sewage services in the Province of Buenos Aires. The arbitral tribunal, after having found the police power criterion contradictory and uncertain, proposed to move beyond it and take into account additional elements.[72] Among the others, it proposed to look at the proportionality of the relationship between the regulatory measure, as well as its impact upon the investment, and the aim to be achieved. In so doing, the tribunal referred to the jurisprudence of the European Court of Human Rights[73] and to the *Tecmed* case,[74] which, at that time, was the only arbitral decision that had applied, or at least made a passing reference to, the proportionality test. Subsequently, this approach has progressively made its way in the international arbitral practice,[75] albeit at a pace that is far less impressive than the attention that this evolution has gained in the literature.[76]

Far from representing "a magical formula, susceptible of mechanical application",[77] proportionality analysis is a judicial technique that may contribute at "managing disputes between rights involving an alleged conflict between two rights claims, or between a rights provision and a legitimate state or public interest".[78] The analysis can, thus, represent a tool that can help to draw a line between legitimate regulation and compensable expropriation,[79] going beyond the rigidities that affect the effect doctrine/police powers exception dichotomy. Indeed, rather than pitting quantitative against qualitative considerations, the proportionality test brings both these sets of factors within the same analytical framework, allowing for a case-by-case balancing exercise.[80] This may lead to exempt from compensation regulatory measures having a negative effect on foreign investments, when the burden is justified in the light of the objective pursued. At the same time, it avoids

---

[71]Schreuer 2005a, p. 28.

[72]*Azurix*, above n 60, paras 310–311. See Costamagna 2006.

[73]Cross-regime comparison has been often advocated as a way to increase the capacity of international arbitral tribunals to deal with non-economic values and, implicitly, enhance their legitimacy. However, this approach has been criticized, highlighting that boundary crossing is not always desiderable and that, in any case, international arbitrators engaging in it should pay greater attention to the context. In this sense see J.E. Alvarez, Beware: Boundary Crossing. http://www.law.yale.edu/documents/pdf/sela/Bewareboundarycrossings_nofootnotes_%282%29.pdf. 19 March 2013. Accessed 20 November 2014.

[74]*Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003, paras 121–122.

[75]See Henckels 2012, pp. 234–237.

[76]See, *ex multis*, Schill 2012, pp. 87–119; Leonhardsen 2012, pp. 95–136, Stone Sweet 2010, pp. 47–76; Kingsbury and Schill 2010, pp. 75–104.

[77]Paulsson 2006, p. 2.

[78]Stone Sweet and Matthews 2008, p. 83. See also Wälde and Kolo 2001, pp. 827–835.

[79]Contra Burke-White and von Staden 2010, p. 287.

[80]Henckels 2012, p. 239; Kingsbury and Schill 2010, p. 79.

creating a loophole that states might exploit by simply claiming that their measures pursue a legitimate objective.

It has been rightly pointed out that "proportionality analysis is only half of the story",[81] as the result will mostly depend on the standard of review adopted by tribunals in distinguishing between a regulatory measure and an act of expropriation. Proportionality analysis is a flexible tool, whose impact varies according to the intensity of review, i.e. to the degree of scrutiny applied by arbitral tribunals in evaluating regulatory measures compatibility with international investment rules. This can go from complete deference to the arguments put forward by a State in order to justify its regulatory measure to de novo review of the adopted measures by the adjudicatory body.[82] Given the structure of international investment arbitration, it is far from surprising that arbitral tribunals are yet to develop a coherent standard of review[83] reflecting the eminently public nature of disputes that touch upon key aspects of States' socio-economic constitution.[84] In some cases, they have adopted a very permissive standard: the *LG&E* tribunal stated that measures having a social or general welfare purpose must be "accepted without any imposition of liability, except in cases where the State's action is obviously disproportionate to the need being addressed".[85] Conversely, in other cases, they went as far to second-guess the necessity of the measures adopted by the respondent State.

It can be safely argued that arbitral tribunals should opt for an adequately deferential approach "in their assessment of matters that are more appropriately in the province of national decision-makers".[86] The need for a high degree of deference rests upon various considerations, such as national authorities' greater democratic legitimacy and proximity to the polity or their superior expertise and competence in dealing with complex matters. Furthermore, deference is also considered as a proxy of the separation of powers principle, contributing to a correct allocation of power between primary decision-makers and their adjudicators.[87]

The adoption of a lenient standard of review is all the more necessary with regard to public services. Indeed, "the provision and regulation of public services is intrinsically linked to democratic autonomy"[88] and it is, thus, a field in which national decision-makers should enjoy broad discretionary power.

[81] Henckels 2012, p. 238.

[82] Kavanagh 2008, p. 186.

[83] Henckels 2012, p. 240.

[84] Burke-White and von Staden 2010, pp. 287–295.

[85] *LG&E*, above n 52, para 195.

[86] Henckels 2012, p. 255.

[87] S. Schill, Deference in Investment Treaty Arbitration: Re-Conceptualizing the Standard of Review through Comparative Public Law. http://ssrn.com/abstract=2095334. 28 June 2012, p. 27. Accessed 20 November 2014.

[88] Krajewski, above n 16, p. 3.

Furthermore, regulating public services is one of States' core sovereign functions, which is essential for the well-being of their population and for the enjoyment of fundamental human rights. Therefore, arbitral tribunals should adjust the intensity of review in order to fully respect national authorities' regulatory autonomy in this context.

4.5 Regulatory Change and Stability of the Regulatory Framework in the Context of Public Services: The Role of the Fair and Equitable Treatment Standard

4.5.1 Fair and Equitable Treatment, Stability and Investors' Legitimate Expectations

The fair and equitable treatment (FET) standard has acquired an increasingly important role in the debate on the balance between hosts States' regulatory flexibility and foreign investors' need for regulatory stability under international investment law, progressively taking the precedence over the discipline of expropriation. The standard has long been "a sleeping beauty"[89] in the international regime for the protection of foreign investors, as arbitral tribunals 'discovered' it only in the 2000s. However, in few years it has become the most frequently invoked standard in investment disputes[90] or, as pretentiously stated in *AWG/Suez*, "the *Grundnorm* or basic norm of international investment law".[91]

There are two main reasons for its success. First, the standard is politically less burdensome, as "it provides a more supple way of providing a remedy appropriate to the particular situation as compared to the more drastic determination and remedy inherent in the concept of regulatory expropriation".[92] Second, the intrinsic vagueness[93] of an "amorphous concept"[94] enabled international arbitrators to progressively broaden the scope of application of the standard to foreign investors' advantage. This contributed to make the clause a sort of "catch all provision which may embrace a very broad number of governmental

[89]Schreuer 2007, p. 92.

[90]Dolzer 2005, p. 87.

[91]*AWG/Suez*, above n 36, para 188.

[92]*International Thunderbird Gaming v. The United Mexican States*, UNCITRAL (NAFTA), Arbitral Award of 26 January 2006, Separate Opinion of Prof. T. Wälde. See also *Sempra*, above n 48, para 301.

[93]S. Schill, Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law. Global Administrative Law Series, IILJ Working Paper 2006/6, p. 5.

[94]Choudhury 2005, p. 297.

acts",[95] having a potentially considerable impact on the freedom of a government to regulate its economy.[96]

One of the elements included in the FET standard is host States' obligation to respect and protect foreign investors' legitimate expectations with respect to the investment they have made. Quite surprisingly, there is still a considerable amount of uncertainty as to the justification for the inclusion of this element in the standard.[97] Some arbitral tribunals referred to the good faith principle as the element requiring "the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment".[98] Other relied on a purposive reading of the notion of fair and equitable treatment, as the preamble of some BITs recognizes "that the fair and equitable treatment is desirable in order to maintain a stable framework for investments".[99] In many cases, arbitral tribunals have not even tried to offer a convincing justification, as they simply pointed to the existence of "an overwhelming jurisdictional trend" going in that direction.[100]

This notwithstanding, this aspect has rapidly gained a prominent role in the definition of FET, becoming one of its major component[101] and even "the dominant element of that standard".[102] Furthermore, the use of legitimate expectations in this context is "highly relevant to the need for reconciling the competing interests of legal predictability and regulatory flexibility".[103] Indeed, as aptly observed in a recent UNCTAD report on FET, "[t]he concept of legitimate expectations is

[95]Dolzer 2005, p. 88.

[96]Lowe 2002, p. 455. See also Haynes 2013, pp. 114–146.

[97]See Potestà 2013, pp. 90–93. See also *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi International S.S. v. The Argentine Republic,* ICSID Case No. ARB/03/19 and *AWG Group Ltd. v. The Argentine Republic,* UNCITRAL Case, Decision on Liability of 30 July 2010, Dissenting Opinion of Arbitrator Pedro Nikken, para 3, arguing against the possibility of including this item in the FET.

[98]*Tecmed*, above n 74, para 154. See also *Sempra*, above n 48, para 299. *Contra* Gazzini 2009, p. 117.

[99]*Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment*, 14 November 1991.

[100]*El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award of 31 October 2011, para 355. See also *AWG/Suez*, above n 36, para 222. In this case, the Tribunal simply observed that "[i]n an effort to develop an operational method for determining the existence or non-existence of fair and equitable treatment, arbitral tribunals have increasingly taken into account the legitimate expectations that a host country has created in the investor and the extent to which conduct by the host government subsequent to the investment has frustrated those expectations".

[101]*EDF v. Romania*, ICSID Case No. ARB/05/13, Award of 8 October 2009, para 216.

[102]*Saluka v. Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, para 301.

[103]Hirsch 2011, p. 786.

connected to the phenomenon of 'change'"[104] and, in particular, to the possibility for national authorities to exercise their regulatory power in a way that modifies, even substantially, the legal environment in which the investment was decided and made.

4.5.2 *Making Investors' Expectations Prevail Over States' Regulatory Autonomy in the Context of Public Services: The Early Argentine Cases*

Striking a balance between the protection of investors' legitimate expectations and the respect of host States' regulatory autonomy is a key concern in the context of public services. As seen above, regulatory changes may sensibly affect the economic profitability of projects that normally presuppose the existence of large network infrastructures and, consequently, entail high levels of sunk costs and payback periods, while assets cannot be moved elsewhere. These investments are particularly exposed to the so-called obsolescing bargain phenomenon,[105] which may occur after the bulk of the investment has been made and the host government, mostly for political reasons, seeks to force a revision of the terms of the agreement with the investor by resorting to its sovereign powers. This is what happened in the *Vivendi II* case, where the newly elected authorities of the Province of Tucumán did all what in their power to undermine the privatization of water and sewage services. To this purpose, they mounted what the arbitral tribunal defined "an illegitimate campaign against the concession",[106] by using their regulatory powers to put pressure on the concessionaire.

On the other hand, there is the need to ensure an adequate regulatory space to national authorities, so that they may continuously exercise their sovereign function by adapting the regulatory framework to ever-changing needs and challenges. The case of Argentina represented an extreme example in this regard, as arbitral tribunals have been called upon to evaluate the legitimacy of far-reaching regulatory changes that had been taken in response to a crisis that was excluding large sectors of the population from having access to basic services.

The need to find a balance between these competing interests has been recognized in all cases concerning public services. All arbitral decisions acknowledge that the duty to ensure stability and predictability of the regulatory framework does not entail the immutability of the legal order. Or, as said in *CMS*, "[i]t is not a question whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether

[104] UNCTAD, Fair and Equitable Treatment. A Sequel. Series on Issues in International Investment Agreements II. UN Publication, 2012, p. 63. New York, Geneva.

[105] See Vernon 1967, pp. 81–89. See more recently, Woodhouse 2006, pp. 121–219.

[106] *Vivendi II*, above n 53, para 7.4.19.

the framework can be dispensed with altogether when specific commitments to the contrary have been made".[107] This dictum has progressively acquired an iconic status, being constantly recalled in all subsequent decisions dealing with the matter. However, in many cases it turned out to be an empty formula, or, as purposely observed in *El Paso* with regard to *CMS*, "a general statement of principle with no legal consequences on the settlement of the case".[108]

Although quite harsh in its tone, this remark reflects the criticisms levelled against an early line of decisions that adopted a markedly pro-investor stance, paying little attention to host State's capacity to adapt the legal framework governing the provision of public services to a deteriorating economic situation. All these cases concerned the measures taken by Argentina to deal with the dramatic economic crisis that hit the country at the end of the'90s and that led to a substantial modification of the legal framework devised in the early-'90s to support public utilities' privatization programme. Prospective investors were encouraged to participate by offering them extremely favourable conditions, such as tariffs calculated in U.S. dollars, automatic and periodic adjustments to the tariffs based on the US Producer Price Index (PPI) and a clear legal framework that could not be unilaterally modified. In the aftermath of the crisis, the Argentine government intervened by first forcing private investors to negotiate a temporary tariffs' freezing[109] and, then, with the Emergency Law in 2002,[110] establishing that tariffs and prices for public services were to be calculated in pesos, abolishing all clauses calling for tariff adjustments in U.S. dollars or other foreign currencies, eliminating all indexing mechanisms and directing the executive branch to renegotiate all public service contracts.

Private investors challenged these measures in front of different international arbitral tribunals, by arguing, inter alia, that they violated the FET standard, as they frustrated the expectations created by the guarantees on which private investors relied when deciding to invest in Argentina's public service sector. Early arbitral decisions, such as *CMS*, *LG&E*, *Sempra* and *Enron*, were swift to side with claimants, as they adopted a far-reaching understanding of host States' duty to ensure the stability of the environment in which foreign investment operate.

In *CMS*, the arbitral tribunal held that Argentina's measures resulted in a breach of the FET standard as they "in fact entirely transform and alter the legal and business environment under which the investment was decided and made".[111] This conclusion rests on a purposive reading of the notion of FET, as the tribunal noted that the Preamble of the applicable BIT recognize the close link between this standard and the maintenance of "a stable framework for investments and

[107] *CMS*, above n 51, para 277. See also Schreuer 2005b, p. 374.

[108] *El Paso*, above n 100, para 371.

[109] Doak Bishop and Aguirre Luzi 2005, p. 432.

[110] Law No 25.561 of 6 January 2002.

[111] *CMS*, above n 51, para 275.

maximum effective use of resources". Therefore, "there can be no doubt" that ensuring the stability of the legal and business framework is "an essential element" of the standard.[112] Subsequent decisions adopted the same line of reasoning, as they considered it "an emerging standard of fair and equitable treatment in international law".[113] The *LG&E* decision stands for the same proposition, while further adding that "the fair and equitable standard consists of the host State's consistent and transparent behaviour, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfil the justified expectations of the foreign investor".[114] Likewise, in *Enron*, the tribunal found "an objective breach" of FET, since "the guarantees of the tariff regime that had seduced so many foreign investors were dismantled" and "the stable legal framework that induced the investment is no longer in place".[115]

The focus of these decisions was firmly on investors' position and on their expectations, while paying little consideration to the position of the host State and its right to regulate.[116] Such a bias clearly emerges from 'incomplete' reference to the Preamble of the BIT made by the *CMS* and *LG&E* decisions. In both cases, tribunals only retained the first prong of the provision, being it functional to demonstrate that stability is a constitutive element of FET, while dropping the second one, which would have called for greater consideration of State's capacity to guarantee to its population maximum effective use of its resources. This one-sided sided approach appears to be ill suited to define the content of a standard "entailing reasonableness and proportionality".[117]

4.5.3 *Looking for a Better Definition of the Legitimacy of Expectations: Is There a Need for Specific Commitments?*

Subsequent decisions tried to distance themselves from this over-expansive reading of the FET standard, by tentatively working out a more balanced definition of

[112]Ibid., para 274.

[113]*LG&E*, above n 52, para 125.

[114]Ibid., para 131. This conclusion echoes the very demanding, and much criticized, standard developed in *Tecmed* (para 154). Douglas observed that "[t]he Tecmed 'standard' is not a standard at all; it is rather a description of perfect public regulation in a perfect world, to which all States should aspire but very few (if any) will ever attain". See Douglas 2006, p. 28.

[115]*Enron*, above n 63, paras 266–268.

[116]This approach seems to reflect what Crema convincingly described as the international investment regime's cultural bias against domestic regulation. Indeed in this framework "excessive domestic regulation, discriminatory or not, unfair or not, is in any case problematic: it is a local, particularistic obstacle to the bigger game of reallocating resources in a better way for the good of a greater number of persons". See Crema 2014, pp. 60–61.

[117]*El Paso*, above n 100, para 373.

the concept of legitimate expectations and of the related duty to ensure the stability of the regulatory framework. To this purpose, arbitral tribunals sought to identify a number of qualifying requirements to determine whether an expectation may be said 'legitimate' and, thus, subject to protection under the FET standard. One of the most delicate issues in this regard is the definition of the sources from which legitimate expectations may arise.

The question is whether private investors can claim to have enforceable expectations by simply relying on legislative or regulatory instruments having a general character or whether they have to show the existence of more specific promises by the host State.[118] The answer is key to strike a balance between regulatory stability and change, as it determines the scope of host State' duty to maintain 'a stable legal environment'. Indeed, if investors can claim to have *legitimate* expectations by simply relying on the general legislative and regulatory framework in force when they made the investment, any modification of such a framework may entail a violation of FET. This would transform the standard in a sort of general stabilization clause,[119] fettering States' capacity to regulate their economy and going "beyond what the investor could legitimately expect".[120]

It is worth observing that, by adopting this approach, international arbitral tribunals end up ensuring private investors a higher level of protection than national judges. Indeed, the latter have traditionally been extremely cautious in this regard, as "only exceptionally has the concept of legitimate expectations been the basis of redress when legislative action by a State was at stake".[121] As observed by Steele with regard to the English legal system, "it seems likely that protecting an expectation in a 'change of policy' scenario will have more wideranging implications for decisions-maker's freedom of action".[122] This proposition finds support in the case law of the Court of Justice of the European Union, which has constantly held that "traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained".[123]

Conversely, early public services' arbitral decisions took a different path. In *LG&E*, for instance, the tribunal established that Argentina acted unfairly and

---

[118]See generally Potestà 2013, pp. 100–117; Hirsch 2011, pp. 787–797.

[119]See recently Bertoli and Crespi Reghizzi 2014, p. 36.

[120]Schreuer 2005b, p. 374. *Contra* Boute 2011, pp. 523–526.

[121]*Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability of 27 December 2010, para 129.

[122]Steele 2005, p. 303.

[123]CJEU, Case C-245/81, *Edeka Zentrale AG v Germany* [1982], ECR 2745, para 27; CJEU, Case C-52/81, *Offene Handelsgesellschaft in Firma Werner Faust v Commission*, [1982], ECR 3745, para 27; CJEU, Joined Cases 424-425/85, *Cooeperative Melkproducentenbedrijven Noord-Nederland BA (Frico) and Others v Voedselvoorzienings In—en Verkoopbureau* [1987], ECR 2755, para 33. See generally Craig 2006, pp. 635–639; Tridimas 2006, pp. 273–280.

inequitably by frustrating Claimant's reliance upon "certain key guarantees in the Gas Law and implementing regulation".[124] Likewise, in *Enron*, the arbitral tribunal found that the dismantling of the tariff regime amounted to a violation of the FET standard, as "it was in reliance upon the conditions established by the Respondent in the regulatory framework for the gas sector that Enron embarked on its investment in TGS. Given the scope of Argentina's privatization process, its international marketing, and the statutory enshrinement of the tariff regime, Enron had reasonable grounds to rely on such conditions".[125] Despite some passing reference to the need for "specific commitments",[126] these dicta convey the idea that guarantees included in domestic legislative and regulatory acts of general application may be sufficient to create legitimate expectations.[127] According to this line of cases, the decisive element to assess the legitimacy of the expectations is not the origin or the nature of the guarantees, but the fact that investors relied upon them when deciding to invest.

Subsequent arbitral decisions tried to work out a less investor-centred and more principled approach to the issue. In *Continental Casualty*, a case concerning Argentina's insurance market, the tribunal tried to shed more light on the link between the source of the expectation and its legitimacy. To this purpose, it distinguished between different types of expectations, by pointing out that general legislative statements engender only reduced expectations, while "unilateral modification of contractual undertakings by government […] deserve clearly more scrutiny".[128] The key element to establish the legitimacy or, *rectius*, the legal strength of the expectation is the specificity of the undertaking relied upon by the investor. The *El Paso* decision tried to further clarify the point, by arguing that a commitment is to be considered 'specific' when it is directly made to the investor, "for example in a contract or in a letter of intent, or even through a specific promise in a person-to-person business meeting" and "its precise object was to give a real guarantee of stability to the investor".[129]

This approach has gradually made its way also in decisions concerning public services. The *Total* decision represents a good case in point, concerning an investor that had no contractual relationship with the host country, as it invested after the original privatization process by acquiring and indirect share in the Argentinian gas transportation company (Transportadora de Gas del Norte) from another investor in 2001. To determine whether Argentina's modification of the tariff regime violated Total's legitimate expectations, the arbitral tribunal started by making clear that signing a BIT cannot be a taken a sign of States' will to

[124]*LG&E*, above n 52, para 133.

[125]*Enron*, above n 63, para 265.

[126]*CMS*, above n 51, para 277.

[127]Potestà 2013, p. 112. *Contra* Hirsch 2011, pp. 789–790.

[128]*Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award of 5 September 2008, para 261.

[129]Ibid., paras 376–377 (emphasis in the original).

"relinquish their regulatory powers [or] limit their responsibility to amend their legislation". Therefore, "in the absence of some 'promise' by the host State or a specific provision in the treaty itself, the legal regime in force in the host country at the time of making the investment is not automatically subject to a "guarantee" of stability". According to the tribunal, expectations are "undoubtedly legitimate" when based upon contracts, concessions or stabilization clauses "on which the investor is […] entitled to rely as a matter of law".[130] The same holds true with other types of representations, albeit less formal, provided that they are sufficiently clear and specific.[131]

However, the tribunal also acknowledges that problems may arise with regard to certain specific sectors, such as "operation of utilities under a licence", where expectations "rooted in regulation of a normative and administrative nature that is not specifically addressed to the relevant investor" may be legitimate, due to the "inherently prospective nature of the regulation at issue aimed at providing a defined framework for future operations".[132] In fact, unilateral modifications to the guarantees contained therein cannot be considered irrelevant when assessing whether the host State acted equitably and fairly. Only, as duly warned by the *Total* tribunal, there is the need for greater caution, as these expectations are inherently weaker that those originating from more specific undertakings. This element is, thus, to be taken into account when weighting investors' expectations and host State's regulatory interest in order to determine whether there has been a breach of the FET standard.

4.5.4 Balancing Investors' Expectations and States' Regulatory Purpose

Early public services cases excluded that the reasons behind host States' regulatory intervention could be an element to be taken into account when assessing whether the frustration of investors' expectations amounts to a violation of the FET. Once again, in these cases arbitral tribunal adopted an agnostic approach,[133] showing a "deplorable lack of sensitivity with regards to regulatory issues".[134] Indeed, they focused exclusively on the effects of regulatory changes on investors' position, while disregarding host State' legitimate interest to adopt such measures. For instance, the *Enron* and *Sempra* decisions curtly observed that "[e]ven assuming that the Respondent was guided by the best of intentions, what the Tribunal

[130] *Total*, above n 121, para 117.

[131] Ibid., para 121.

[132] Ibid., para 122.

[133] Arena 2011, pp. 515–516.

[134] Krajewski 2012, p. 366.

has no reason to doubt, there has here been an objective breach of the fair and equitable treatment due under the Treaty".[135]

Even a cursory comparative analysis demonstrates that his approach is at odd with the line of reasoning traditionally followed in domestic and other supranational jurisdictions. Weighting individual expectations with the public interest pursued through the challenged measures represents a constant feature of the EU Court of Justice case law on this matter. This is well exemplified by *Dieckmann & Hansen*,[136] a judgement of the then Court of First Instance concerning an importation ban of fishery product from Kazakhstan, in view of the systemic deficiencies with the general regime of health supervision. A German company, which had concluded a contract to import caviar from that country, brought an annulment action against this decision, arguing that the act violated its legitimate expectations by not including transitional provisions in the decision to remove a country from the list of third countries from which the import of fishery products is authorised. The Court dismissed this claim, as it held that the choice was then taken to protect consumers' health, which is an overriding public interest within the meaning of the case law.[137] This is a way to recognise that the legitimate expectations doctrine is not absolute as it "must give way where [its] application becomes incompatible with the free and proper exercise of an authority's powers on the due performance of its duties in the public interest".[138]

More recent arbitral awards have progressively abandoned the agnostic approach, by emphasising the need to balance investors' expectations against the regulatory goals of the host country. Interestingly enough, the *Total* decision motivated the adoption of this approach by referring to the fact that "TGN's gas transportation is not an ordinary business operation but it is qualified as a 'national public service'".[139] Consequently, the assessment of whether the modification of the regulatory framework constitutes a breach of investor's legitimate expectations and, thus, a violation of the FET standard must take into account "the purposes, nature and objectives of the measures challenged", so to determine that they are "reasonable and proportionate".[140] In the same vein, the *AWG/Suez* tribunal, ruling on a case concerning "one of the world's largest water distribution and waste water treatment privatizations in a great city" such as Buenos Aires, held that to interpret

---

[135] *Sempra*, above n 48, para 304; *Enron*, above n 63, para 268. The only exception in this regard is the *LG&E* decision, which recognized the economic hardship and "certain political and social realities that may have influenced the Government's response to the growing economic difficulties", but considered that Argentina "went too far" (para 139).

[136] CFI, Case T-155/99, *Dieckmann & Hansen* [2001], ECR II-3143; See Craig 2006, pp. 639–641.

[137] Ibid., para 81.

[138] Wade and Forsyth 2000, p. 242.

[139] *Total*, above n 121, para 160.

[140] Ibid., para 162.

the FET standard it "must balance the legitimate and reasonable expectations of the Claimants with Argentina's right to regulate the provision of a vital public service".[141]

The recourse to a balancing test as a tool to reconcile investors' expectations and States' right to adapt the regulatory framework to changing need and circumstances may allow a more flexible and comprehensive evaluation of all the interests at stake. However, as already noticed with regard to regulatory expropriation, the balancing test is just part of the story. Indeed the decisive factor is the level of scrutiny that arbitral tribunals apply in carrying out this balancing exercise. In particular, the key question is determining where the standard of review will stand on the sliding scale that goes from complete deference to de novo reconsideration of the choices made by national authorities.[142]

The analysis of the arbitral case-law on public services does not show the existence of a coherent pattern in this regard. In some cases, such as *Total*, the arbitral tribunal afforded a high degree of deference to the national decision makers, by applying a loose reasonability test to evaluate the legitimacy of the contested measures. Accordingly the tribunal found that the measures adopted by Argentina to respond to the crisis. i.e. the de-dollarization of tariffs and the abolition of mechanisms for automatic adjustment, were neither unfair not inequitable, as they reflected "a legitimate exercise of the host State's governmental power".[143] Conversely, in the *AWG/Suez* case the tribunal resorted to a strict necessity test, as it found that Argentina's could have "employed more flexible means" to achieve the stated ends. It even went as far as to put forward some alternative measures that Argentina could have taken instead than altering the legal framework and the concession. In particular, the tribunal opined that to protect the poor from increased tariffs, national authorities "might have allowed tariff increases for other consumers while applying a social tariff or a subsidy to the poor". In so doing, it intruded into matters that lie at the heart of States' regulatory space, entailing delicate political choices over the allocation of scarce resources.

A comparative analysis of domestic and supranational legal systems protecting legitimate expectations may provide useful guidance to work out a more principled approach for the development of a correct and coherent standard of review in this context. It is worth noting that national and supranational courts tend to use different types of balancing tests, which may go from the manifest unreasonableness test to a proper "weighting [of] the requirements of fairness against an

[141]*AWG/Suez*, above n 36, para 236. See Tanzi 2013, pp. 592–596. See also Tanzi 2014, pp. 318–335.

[142]See above para 4.4.3.

[143]*Total*, above n 121, para 164. This conclusion is opposite to the one reached in *CMS*, despite the fact that these two cases concerned the very same measures and the very same situation, as both Total and CMS we shareholders of TGN.

overriding interest”,[144] according to a variety of factors. Among the others, two of these factors are worth to be briefly taken into consideration, because of their potential relevance with regard to future investment disputes concerning public services.

The first element is the origin of the expectations. National and supranational courts tend to adopt a more deferential approach when general measures are at stake. As for the English legal system, in the *Begbie* case the Court of Appeal pointed out that “[t]he more the decision challenges in what may inelegantly be called the macro-political field, the less intrusive will be the court’s supervision. More than this: […] changes of policy […] may more readily be accepted as taking precedence over the interests of groups which enjoyed expectations generated by an earlier policy”.[145] A similar attitude can also be found in the EU legal order.[146] Schønberg noted that the EU Court of Justice “will be more reluctant to interfere with general changes of policy embodied in the shift from one regulatory scheme to another”.[147] In these circumstances the Court tends to make the expectation prevail only when there is a significant imbalance between the interests of those involved and the policy considerations behind the regulatory change.[148]

The other element that is potentially relevant in this regard is the importance of the public interest at stake. For instance, the European Court of Human Rights grants a wider margin of appreciation to national authorities when the State is performing one of its core sovereign functions, such as the protection of the environment and fiscal policy. In *Gorraiz Lizarraga* acknowledged that “[u]rban and regional planning policies are, *par excellence*, spheres in which the State intervene, particularly through control of property in the general or public interest” and thus its “margin of appreciation is greater than when exclusively civil rights are at stake”.[149] A similar stance has also been adopted by the EU Court of Justice. In the above-mentioned *Dieckmann & Hansen* judgement, the Court took the view that it had to afford a wide margin of discretion to the Commission in this case, due to the importance of the public interest at stake, which was ensuring a high level of protection of human health.[150]

---

[144] *R. v. North and East Devon Authority ex p. Coughlan*, 1999, LGR703, para 57. Clayton 2003, pp. 98–102 which highlights that the categorization may result over simplistic in the light of a much more complex reality. See also Craig 2006, p. 650 which observes that “[t]he ECJ and the CFI have been rather reluctant to assign a discrete legal label to this exercise. It has therefore been left to commentators to divine the legal test for the courts’ reasoning”.

[145] *R. v. Secretary of State for Education and Employment, ex p. Begbie*, 2000, 1 WLR 1115, para 82.

[146] See Quinot 2004, p. 72, which notes that “the ECJ is generally as deferential to administrative discretion, especially in matters regarding policy, as its English counterparts”.

[147] Schømberg 2001, p. 150.

[148] See Craig 2006, pp. 649–652.

[149] *Gorraiz Lizarraga et al. v. Spain*, Judgment of 27 April 2004, Ap. No. 62543/00 (emphasis added).

[150] *Dieckmann & Hansen*, above n 136, paras 47–56.

If these criteria were to be employed in international investment disputes concerning the provision of public services, they would lead to the adoption of a deferential approach by arbitral tribunals. This holds especially true in those cases, as in *Total*, where expectations are rooted in general legislative or regulatory instruments not directly addressed to the investor. The existence of more specific undertakings, especially if in the form of a contract concluded between the host State and the investor, would seemingly militate for the adoption of a more intrusive standard of review. However, other factors would still suggest a softer approach. Among the others already seen above, international arbitrators should pay due consideration to the fact that is one of State' core sovereign functions, as it is key to pursuit of fundamental social objectives.

4.6 Conclusion

The international regime for the protection of foreign investments has the potential to fetter host States' autonomy in regulating public services.[151] In this sector, regulation represents the main tool for public authorities to pursue fundamental social objectives by ensuring to their population access to high-quality services. Indeed, over the last decades many States have privatized or liberalized the provision of public services, by progressively transferring to private actors some of the functions traditionally performed by public entities. However, the choice to move along this path does not deprive States of their right to regulate the organization and the supply of public services, nor it relieves them from their duty to guarantee the continuous realization of the rights that depend on the provision of these services.

In exercising these functions, States resort to a variety of regulatory tools, which are often contained in different legal instruments, such as constitutional norms, legislative acts, administrative regulations and contractual agreements stipulated with the private provider. Foreign operators investing in this sector may challenge in front of an international arbitral tribunal any regulatory measure taken by the host State if it violates rules or standards contained in an international investment agreement. In several public services cases, host States sought to exclude from arbitral tribunals' jurisdiction those measures having a general character, arguing that this would amount to put under scrutiny the wisdom of measures of general economic policy taken by competent domestic authorities. Arbitral tribunals have constantly rejected the plea, taking the view that their jurisdiction extends over any measure having a direct bearing on an investment, no matter its legal form.

The impact of international investment law on States' regulatory autonomy in the field of public services depends on the definition of vaguely worded provisions and, in particular, on arbitral tribunals' willingness to pay due regard to the

[151] *Contra*, although not with regard to the public services sector, see De Luca 2014, pp. 151–152.

specific social value of these activities. Early arbitral decisions adopted an agnostic approach, by showing a deplorable lack of sensitivity in this regard. This was the case with regard to the discipline of expropriation, as arbitral tribunals tended to focus exclusively on the quantitative impact of host States' regulatory measures upon the investment's legal viability and economic profitability. The approach, aptly dubbed as the "sole effect doctrine", excludes that State's regulatory intent can play any role in distinguishing between legitimate regulation and regulatory expropriation.

A similar approach has also been adopted with regard to the FET standard, as arbitral tribunals sought to progressively broaden its scope. In particular, they have taken the view that one of the FET's main components is hosts States' duty to ensure the stability of the investment's regulatory framework, by avoiding any modification that may frustrate investor's legitimate expectations. If taken to rigidly, this duty may fetter host States' capacity to adapt the legislative environment to ever changing needs and challenges. Despite acknowledging the need to guarantee an adequate regulatory space to national authorities, especially in a sector such as public services, some early decisions adopted an over-broad reading of the duty to protect investor's expectations, paying little attention to States' regulatory purposes.

More recent decisions have shown a bit more sensitivity towards these concerns. Both with regard to the definition of regulatory expropriation and the protection of legitimate expectations under the FET, arbitral tribunals have started to rely upon balancing techniques to accommodate host States' and investors' competing interests. Far from being a panacea, these tools could help international arbitrators to pay greater regard to hosts States' regulatory purposes when assessing whether their measures violated foreign investors' rights. In some cases, arbitral tribunals motivated the shift toward a more balanced approach by making reference to the fact that the activity was not an ordinary commercial one, but a public service.

There is still the need to elaborate a more principled and coherent approach for the determination of the standard of review to be adopted by arbitral tribunals when applying these balancing techniques. As for public services, the analysis has shown the existence of various elements that call for the adoption of a deferential approach in weighting regulatory measures against their impact upon investor's rights. Above all, international arbitrators should pay due consideration to the fact that regulating public services is a core sovereign function which is essential for the well-being of the population and which touches upon key aspects of States' democratic autonomy and legitimacy.

References

Adlung R (2006) Public services and the GATS. J Int Econ Law 9(2):455–485

American Law Institute (1987) Restatement (third) of the foreign relations law of the United States. American Law Institute Publishers, Saint Paul

Arena A (2011) The GATS notion of public services as an instance of intergovernmental agnosticism: comparative insights from the EU's supranational dialectic. J World Trade 45(3):489–528

Baldwin R, Cave M (1999) Understanding regulation—theory, strategy and practice. OUP, Oxford

Bertoli P, Crespi Reghizzi Z (2014) Regulatory measures, standards of treatment and the law applicable to investment disputes. In: Treves T, Seatzu F, Trevisanut S (eds) Foreign investment, international law and common concerns. Routledge, London, pp 26–49

Boute A (2011) Challenging the re-regulation of liberalized electricity prices under investment arbitration. Energy Law J 32(2):497–539

Brower CH, Brueschke JD (1998) The Iran-United States Claims Tribunal. Martinus Nijhoff, The Hague

Brownlie I (2003) Principles of public international law, 6th edn. OUP, Oxford

Burke-White WW (2010) The argentine financial crisis: state liability under BITs and the legitimacy of the ICSID system. In: Waibel M (ed) The backlash against investment arbitration: perceptions and reality. Kluwer Law International, The Hague, pp 407–432

Burke-White WW, von Staden A (2010) Private litigation in a public sphere: the standard of review in investor-state arbitrations. Yale J Int Law 35(2):283–346

Coe J Jr, Rubins N (2005) Regulatory expropriation and the Tecmed case: context and contributions. In: Weiler T (ed) International investment law and arbitration: leading cases from ICSID, NAFTA, bilateral treaties and customary international law. Cameron May, London, pp 597–667

Choudhury B (2005) Evolution or devolution? Defining fair and equitable treatment in international investment law. J World Invest Trade 6(2):297–320

Christie GC (1962) What constitutes a taking under international law? Br Yearb Int Law 38:310–311

Clayton R (2003) Legitimate expectations, policy and the principle of consistency. Camb Law J 62(1):93–105

Clough D (2005) Regulatory expropriation and competition under NAFTA. J World Invest Trade 6(4):553–584

Costamagna F (2006) Legitimate regulation vs regulatory expropriation in public infrastructure investments after Azurix. Transnatl Dispute Management 4(2)

Craig P (2006) EU administrative law. OUP, Oxford

Crema L (2014) Investors' rights and well-being. Remarks on the interpretation of investment treaties in light of other rights. In: Treves T, Seatzu F, Trevisanut S (eds) Foreign investment, international law and common concerns. Routledge, London, pp 50–70

De Luca A (2014) Non trade values protection and investment protection in EU investment policy. In: Treves T, Seatzu F, Trevisanut S (eds) Foreign investment, international law and common concerns. Routledge, London, pp 137–153

Doak Bishop R, Aguirre Luzi R (2005) Investment claims: first lessons from Argentina. In: Weiler T (ed) International investment law and arbitration: leading cases from the ICSID, NAFTA, bilateral treaties and customary international law. Cameron May, London, pp 425–469

Dolzer R (2003) Indirect expropriation: new developments? NYU Environ Law J 11(1):64–93

Dolzer R (2005) Fair and equitable treatment: a key standard in investment treaties. Int Lawyer 39(1):87–106

Douglas Z (2006) Nothing if not critical for investment treaty arbitration. Arbitr Int 22(1):27–51

Duguit L (1925) Traité de droit constitutionel. Vol 5, Les libertés publiques, 2nd edn. Ancienne Librairie Fontemoing, Paris

Freeman EM (2003) Regulatory expropriation under NAFTA chapter 11: some lessons from the European Court of Human Rights. Columbia J Transnatl Law 42:177–215

Gazzini T (2009) General principles of law in the field of foreign investment. J World Invest Trade 10(1):103–119

Graham C (2005) Human rights and the privatization of public utilities and essential services. In: De Feyter K, Gómez Isa F (eds) Privatization and human rights in the age of globalization. Intersentia, Antwerp, pp 33–56

Haynes J (2013) The evolving nature of the fair and equitable (FET) standard: challenging its increasing pervasiveness in light of developing countries' concerns: the case for regulatory rebalancing. J World Invest Trade 14(1):114–146
Hauriou M (1927) Précis de droit administratif et de droit public, 11th edn. Sirey, Paris
Henckels C (2012) Indirect expropriation and the right to regulate: revisiting proportionality analysis and the standard of review in investor-state arbitration. J Int Econ Law 15(1):223–255
Higgins R (1983) The taking of property by the state: recent developments in international law. Recueil des Courses—Hague Acad Int Law 176:259–391
Hirsch M (2011) Between fair and equitable treatment and stabilization clause: stable legal environment and regulatory change in international investment law. J World Invest Trade 12(6):783–806
Houben I (2008) Public services obligations: moral counterbalance of technical liberalization legislation. Eur Rev Private Law 16(1):7–27
Jèze G (1926) Le service public. Revista de Drept Public, pp 167–179
Karkkainen BC (2006) The Police power revised: phantom incorporation and the roots of takings "muddle". Minn Law Rev 90:826–913
Kavanagh A (2008) Deference or defiance? The limits of the judicial role in constitutional adjudication. In: Huscroft G (ed) Expounding the constitution: essays in constitutional theory. OUP, Oxford, pp 184–216
Kingsbury B, Schill S (2010) Public law concepts to balance investor's rights with state regulatory actions in the public interest—the concept of proportionality. In: Schill S (ed) International investment law and comparative public law. OUP, Oxford, pp 75–104
Krajewski M (2003a) National regulation and trade liberalization in services—the legal impact of the general agreement on trade in services (GATS) on national regulatory autonomy. Kluwer Law International, The Hague
Krajewski M (2003b) Public services and trade liberalization: mapping the legal framework. J Int Econ Law 6(2):341–367
Krajewski M (2012) The impact of international investment agreements on energy regulation. Eur Yearb Int Econ Law 3:343–369
Leonhardsen E (2012) Looking for legitimacy: exploring proportionality analysis in investment treaty arbitration. J Int Dispute Settl 3(1):95–136
Lowe V (2002) Regulation or expropriation? Curr Legal Prob 55:447–466
Mitnick BM (1980) The political economy of regulation. Columbia University Press, New York
Neergaard U (2009) Services of general economic interest: the nature of the beast. In: Krajewski M, Neergaard U, van de Gronden J (eds) The changing legal framework for services of general interest in Europe. TMC Asser Press, The Hague, pp 17–50
Newcombe A (2005) The boundaries of regulatory expropriation in international law. ICSID Rev Foreign Invest Law J 20(1):1–57
Palast G, Oppenheimer J, MacGregor T (2003) Democracy and regulation: how the public can govern essential services. Pluto Press, London-Sterling
Paulsson J (2006) Indirect expropriation: is the right to regulate at risk? Transnatl Dispute Manage 3(2):8–9
Potestà M (2013) Legitimate expectations in investment treaty law: understanding the roots and the limits of a controversial concept. ICSID Rev Foreign Invest Law J 28(1):88–122
Quinot G (2004) Substantive legitimate expectations in South African and European administrative law. Ger Law J 5(1):65–85
Reinisch A (2008) Expropriation. In: Muchlinski P, Ortino F, Schreuer C (eds) The Oxford handbook of international investment law. OUP, Oxford, pp 407–458
Reisman RW, Sloane RD (2004) Indirect expropriation and its valuation in the BIT generation. Br Yearb Int Law 74:115–150
Sacerdoti G (1997) Bilateral treaties and multilateral instruments on investment protection. Recueil des Courses Hague Acad Int Law 269:251–460

Sacerdoti G (1999) The source and evolution of international legal protection for infrastructure investments confronting political and regulatory risk. CEPMLP On-Line J 5(3):7

Schill S (2012) Cross-regime harmonization through proportionality analysis; the case of international investment law, the law of state immunity and human rights. ICSID Rev Foreign Invest Law J 27(1):87–119

Schømberg S (2001) Legitimate expectations in administrative law. OUP, Oxford

Schreuer C (1996) Commentary on the ICSID convention. Article 25. ICSID Rev Foreign Invest Law J 11(2):318–492

Schreuer C (2005a) The concept of expropriation under the ECT and other investments protection treaties. Transnatl Dispute Manage 2(5)

Schreuer C (2005b) Fair and equitable treatment in arbitral practice. J World Invest Trade 6(3):357–386

Schreuer C (2007) Fair and equitable treatment in investment treaty law. In: Ortino F, Liberti L, Sheppard A, Warner H (eds) Investment treaty law, current issues II. British Institute on International and Comparative Law, London, pp 92–96

Steele I (2005) Substantive legitimate expectations: striking the rights balance. Law Q Rev 121:300–328

Stigler G (1971) The theory of economic regulation. Bell J Econ Manage Sci 2(1):3–21

Stone Sweet A (2010) Investor-state arbitration: proportionality's new frontier. Law Ethics Hum Rights 4(1):47–76

Stone Sweet A, Matthews J (2008) Proportionality balancing and global constitutionalism. Columbia J Transnatl Law 47:72–164

Tanzi A (2013) Recent trends in international investment arbitration and the protection of human rights in the public services sector. In: Boschiero N, Scovazzi T, Pitea C, Ragni C (eds) International courts and the development of international law. Essays in Honour of Tullio Treves, TMC Asser Press, The Hague, pp 587–598

Tanzi A (2014) Public interest concerns in international investment arbitration in the water services sector. Problems and prospects for an integrated approach. In: Treves T, Seatzu F, Trevisanut S (eds) Foreign investment, international law and common concerns. Routledge, London, pp 318–335

Tridimas T (2006) General principles of EU law, 2nd edn. OUP, Oxford

Van Harten G, Loughlin M (2006) Investment treaty arbitration as a species of global administrative law. Eur J Int Law 17(1):121–150

Vernon R (1967) Long-run trends in concession contracts. Proc Am Soc Int Law 61:81–89

Wade W, Forsyth C (2000) Administrative law, 8th edn. OUP, Oxford

Wälde T, Dow S (2000) Treaties and regulatory risk in infrastructure investment. J World Trade 34(2):1–61

Wälde T, Kolo A (2001) Environmental regulation, investment protection and 'regulatory taking' in international law. Int Comp Law Q 50:827–835

White G (1961) Nationalization of foreign property. Praeger, London

Woodhouse EJ (2006) The obsolescing bargain redux? Foreign investment in the electric power sector in developing countries. New York J Int Law Policy 38:121–219