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State Practice and the (Purported) Obligation under Customary International Law to Provide Compensation for Regulatory Expropriations

Matthew C. Porterfield

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Cover Page Footnote

International Law; Commercial Law; Law

**State Practice and the (Purported) Obligation under
Customary International Law to Provide Compensation for
Regulatory Expropriations**

Matthew C. Porterfield†

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Senior Fellow and Adjunct Professor, Harrison Institute for Public Law, Georgetown University Law Center. Thanks to Nathalie Bernasconi, Peter Byrne, Bob Stumberg and Gus Van Harten for helpful comments on earlier drafts of this article.

I. Introduction

Almost half a century ago, the U.S. Supreme Court noted that “there are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state’s power to expropriate the property of aliens.”¹ A similar observation could be made today with regard to the question of which types of government measures constitute acts of “indirect expropriation” of foreign investment requiring compensation under international investment agreements (hereinafter “IIAs”). The debate has focused largely on the appropriate standard for determining when regulatory measures that adversely affect the value of an investment but do not actually transfer its ownership or control to the government may nonetheless entitle the investor to compensation from the host government.²

The expropriation provisions of IIAs—which include both bilateral investment treaties (hereinafter “BITs”) and the investment chapters of free trade agreements (hereinafter “FTAs”)—typically require compensation for both direct and “indirect” expropriation.³ The analysis of whether a regulatory measure results in an indirect expropriation is primarily concerned with the extent to which the measure adversely affects an investment, an approach known as the “sole effect doctrine.”⁴

Another provision in IIAs has been interpreted to grant similar—and arguably greater—protection from regulatory measures that adversely affect the value of foreign investments. Many IIAs contain language guaranteeing foreign investors a right

¹ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

² See *infra* Part II.B.

³ See, e.g., Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uru., art. 6, ¶ 1, Nov. 4, 2005 (“Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization.”) (emphasis added).

⁴ See ANDREW NEWCOMBE & LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES—STANDARDS OF TREATMENT 325-26 (2009).

No matter how the [indirect] expropriation is described, the international law looks to the effect of the government measures on the investor’s property. This approach . . . has been referred to as the “sole effect doctrine” because the focus of the analysis is the effect of the state measure on the investment.

Id.

to “fair and equitable treatment” as an element of the minimum standard of treatment.⁵ This language has been interpreted by tribunals to include a right to a “stable and predictable regulatory environment” that does not frustrate investors’ expectations concerning the profitability or value of their investments.⁶

The right under IIAs to compensation for regulations that adversely affect the value of an investment is widely portrayed as reflecting the relevant standard of protection under customary international law (hereinafter “CIL”) regardless of whether the government has actually acquired any economic right or interest for its own use.⁷ Yet, despite the significant debate over the scope and contours of this right,⁸ there has been surprisingly little attention paid to the fundamental question of whether such a right can be demonstrated to exist at all under the traditional definition of CIL—*i.e.*, is it the general and consistent practice of states, based on a perception of legal obligation (*opinio juris*), to compensate investors for regulatory measures that have some requisite level of adverse effect on the value of their investments?⁹

One obvious source of state practice can be found in the domestic standards of protection for property rights that are applicable to both domestic and foreign investors.¹⁰ An

⁵ See *infra* Part II.B.

⁶ See *infra* Part II.B.

⁷ This is reasonably clear at least with regard to the standard for indirect expropriation. There is less agreement on the relationship between CIL and the standard for fair and equitable treatment. See *infra* Part IV.C.

⁸ See *infra* Part III.

⁹ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (“Customary international law results from a general and consistent practice followed by [states] from a sense of legal obligation.”).

¹⁰ Int’l L. Ass’n Comm. of Formation of Customary (Gen.) Int’l L., *Final Report of the Committee*, at 18, (London Conf., 2000), <http://www.ila-hq.org/en/committees/index.cfm/cid/30>, [hereinafter *ILA Report*]. “The practice of States and international tribunals shows that a State’s legislation . . . including its constitution . . . can . . . be regarded as a manifestation of its practice.” *Id.* See also Moshe Hirsch, *Sources of International Investment Law* 10 (International Law Association Study Group on the Role of Soft Law Instruments in International Investment Law, Working Paper No. 05-11, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1892564 (“international tribunals often consider various non-physical acts as ‘[state] practice.’ Such acts include . . . domestic legislation.”); Jose E. Alvarez, *A BIT on Custom*, 42 N.Y.U. J. INT’L L. & POL. 17, 54 n.127 (2009) (noting that examining relevant domestic law for evidence of state

examination of relevant domestic law, however, indicates that there is no general and consistent practice in this area.¹¹ The issue of whether property owners should receive compensation under domestic law for regulatory measures that significantly decrease the value of their property has received the most attention in the context of the “regulatory takings” debate in the United States, where a relatively narrow right to compensation is recognized that primarily addresses land use regulations that destroy all or nearly all of the value of real property.¹² Some developed countries similarly recognize a right to compensation for certain measures (again, principally in the context of land use regulation), but the approaches vary significantly.¹³ Developing countries, in contrast, are more likely to categorically reject the concept of regulatory takings.¹⁴ Accordingly, there does not appear to be support in state

practice giving rise to CIL “is, of course, sanctioned by long-standing practice.”).

See also F.A. Mann, *State Contracts and State Responsibility*, 54 AM. J. INT'L L. 572, 583 (1960) (“No state can be fixed with responsibility for expropriation unless the act complained of can fairly be said to involve the taking of property within the meaning attributed to that conception by the general principles of law recognized by civilized nations. These principles cannot be ascertained otherwise than by comparative law.”). Mann refers to the conceptually distinct category of “general principles of law” rather than CIL. He appears, however, to view general principles of law as performing a function similar to CIL in establishing international legal norms, rather than the merely “supplementary” role with which they are usually ascribed. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(4) (“General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate.”). Rudolph Dolzer has similarly argued for reference to general principles of law derived from domestic law as a means of identifying the standard for indirect expropriation. *See* Rudolph Dolzer, *Indirect Expropriation of Alien Property*, 1 ISCID REV. 41, 59-64 (1986) (“[I]n the absence of relevant primary sources of law, a secondary source must come into play [General] principles [of law] must be searched for and established on the basis of parallel notions and rules in domestic legal orders.”).

¹¹ Rudolph Dolzer reached a similar conclusion after reviewing various other sources of state practice and the decisions of international tribunals, observing that “[c]lear state practice [regarding indirect expropriation] which would permit generalizations cannot be discerned; opinio juris is even more difficult to detect.” Dolzer, *supra* note 10, at 58.

¹² *See infra* Part III.A.1.

¹³ *See Regulatory Takings and the Role of Comparative Research*, in RACHELLE ALTERMAN ET AL., TAKINGS INTERNATIONAL: A COMPARATIVE PERSPECTIVE ON LAND USE REGULATIONS AND COMPENSATION RIGHTS 13-14 (Rachelle Alterman ed. 2010).

¹⁴ *See infra* notes 50-52 and accompanying text.

practice for a CIL right to compensation for regulatory expropriations based upon their adverse effects on the value of investments and without regard to whether the government has actually acquired ownership or control of the asset.

Section II of this article provides a brief overview of the arbitral jurisprudence on regulatory expropriation under both the indirect expropriation and the fair and equitable treatment provisions of IIAs. Section III examines the domestic practice of nations with regard to regulatory takings doctrine with a particular emphasis on the major capital exporting states in North America and Western Europe. Section IV discusses several potential alternative arguments for a right under international law to compensation for regulatory expropriations and concludes that none of them are persuasive.

II. Regulatory Expropriation Doctrine and IIAs

The debate over the standard for regulatory expropriations under IIAs has, understandably, focused on how to interpret “indirect” expropriation provisions.¹⁵ Yet as discussed below, a similar and apparently more expansive regulatory takings doctrine has been developing under the fair and equitable treatment component of the minimum standard of treatment.

A. Indirect Expropriation

There is broad agreement that the focus of the inquiry concerning indirect expropriation should be on the effect of a measure on an investment,¹⁶ although tribunals interpreting IIAs have failed to articulate a clear or consistent standard concerning

¹⁵ See *infra* Part II.A.

¹⁶ As an alternative to the sole effect test, some tribunals have indicated that the adverse effects on the investment must be evaluated against the governmental interests involved to determine the relevant measure’s “proportionality.” This approach, however, still turns in large part on the regulatory measure’s impact on the investment. See, e.g., *Tecnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of the Tribunal, ¶ 122 (May 29, 2003), <http://icsid.worldbank.org/ICSID/FrontServlet> (follow “Cases” hyperlink; then follow “Search Cases” hyperlink; then follow “Advanced Search” hyperlink and enter Case No.) (noting that the proportionality test requires an evaluation of “whether [the relevant] actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality”).

the level of adverse economic effect a regulatory measure must have to be considered expropriatory.¹⁷ Some arbitral decisions have suggested that a measure can constitute an act of indirect expropriation if it has an adverse effect on the value of an investment that is merely “significant”¹⁸ or “substantial.”¹⁹ Other tribunals have indicated that a regulatory measure must result in something approaching the complete destruction of the value of an investment for it to be considered an indirect expropriation.²⁰

There is also some support for the position that there is a police power exception to the compensation requirement—*i.e.*, that a nondiscriminatory regulatory measure cannot constitute an act of expropriation regardless of its adverse economic impact.²¹

¹⁷ See Jack Coe, Jr. & Noah Rubins, *Regulatory Expropriation and the Tecmed Case: Context and Contributions*, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION, LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 621 (Todd Weiler ed. 2005) (“The international threshold for compensation is somewhere between total deprivation of ownership rights and mere interference.”); Catherine Yannaca-Small, “*Indirect Expropriation*” and the “*Right to Regulate*” in *International Investment Law* 5 (Org. for Econ. Co-operation and Dev. Working Papers on International Investment No. 2004/4, 2004), <http://www.oecd.org/dataoecd/22/54/33776546.pdf> (“There is no generally accepted and clear definition of the concept of indirect expropriation and what distinguishes it from non-compensable regulation.”).

¹⁸ See *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB (AF)/97/1, Award of the Tribunal, ¶ 103 (Aug. 30, 2000), <http://icsid.worldbank.org/ICSID/FrontServlet> (follow “Cases” hyperlink; then follow “Search Cases” hyperlink; then follow “Advanced Search” hyperlink and enter Case No.) (“[E]xpropriation . . . includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour [sic] of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property.”) (emphasis added).

¹⁹ See *Pope & Talbot Inc. v. Canada*, Interim Award, ¶ 102 (NAFTA Arbitration Trib. 2000), <http://www.naftaclaims.com/Disputes/Canada/Pope/PopelInterimMeritsAward.pdf> (“under international law, expropriation requires a ‘substantial deprivation’”).

²⁰ See *Tecnicas Medioambientales* ¶ 116 (indirect expropriation occurs when “the economic value of the use, enjoyment or disposition of the assets or rights affected by the [government measure] have been neutralized or destroyed.”); see also Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20:1 ICSID Review–FILJ 4 (2005) (“[U]nder the ‘orthodox approach’ [a regulatory] expropriation occurs when a foreign investor is deprived of the use, benefit, management or enjoyment of all or substantially all of its investment.”).

²¹ See *Methanex Corp. v. United States*, Final Award, Part IV, Ch. D, ¶ 7 (NAFTA

This appears, however, to be a minority view.²²

The concept of indirect expropriation under investment agreements applies to a broad range of government actions, including not only regulatory measures but taxation as well.²³ The scope of covered “investment” is similarly broad, and typically covers not only property as defined under domestic law, but also a wide range of economic interests resulting from the commitment of capital to economic activity in the host state.²⁴

Arbitration Trib. 2005), <http://www.state.gov/documents/organization/51052.pdf> (“[A] non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.”); see also *Saluka Investments BV (The Netherlands) v. Czech Republic, Partial Award*, ¶ 262 (UNCITRAL Arbitration Trib. 2006), <http://www.pca-cpa.org/upload/files/SAL-CZ%20Partial%20Award%20170306.pdf> (“[T]he principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are ‘commonly accepted as within the police power of States’ forms part of customary international law today.”).

²² See *Técnicas Medioambientales* ¶ 121:

[W]e find no principle stating that regulatory administrative actions are per se excluded from the scope of the Agreement, even if they are beneficial to society as a whole—such as environmental protection—particularly if the negative economic impact of such actions on the financial position of the investor is sufficient to neutralize in full the value, or economic or commercial use of its investment without receiving any compensation whatsoever.

See also *Pope & Talbot*, ¶ 99 (arguing that “a blanket exception for regulatory measures would create a gaping loophole in international protections against expropriation”).

²³ See generally Thomas W. Wälde & Abba Kolo, *Taxation and Modern Investment Treaties*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 347-52 (Peter Muchlinski et al. eds., 2008) (describing recent arbitration decisions that apply the concept of indirect expropriation to taxes).

²⁴ See Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 *HARV. INT’L L.J.* 67, 80 (2005) (“Most BITs define the concept of investment broadly so as to include various investment forms: tangible and intangible assets, property, and rights. Their approach is to give the term ‘investment’ a broad, non-exclusive definition, recognizing that investment forms are constantly evolving in response to the creativity of investors and the rapidly changing world of international finance. The effect is to provide an expanding umbrella of protection to investors and investments.”); see also Ursula Krienbaum & Christoph Schreuer, *The Concept of Property in Human Rights Law and International Investment Law*, in *HUMAN RIGHTS, DEMOCRACY AND THE RULE OF LAW, LIBER AMICORUM LUZIUS WILDHABER* 760 (Stephen Breitenmoser et al. eds., 2007) (“When determining the existence of an ‘investment,’ tribunals have emphasized

B. 'The Right to a "Stable and Predictable Legal Environment" as an Element of Fair and Equitable Treatment

In addition to indirect expropriation provisions, during the last decade tribunals have also interpreted the minimum standard of treatment articles of IIAs to include a right to compensation in some instances where government measures adversely affect the value of a foreign investor's assets.²⁵ Many IIAs define the minimum standard of treatment to include a right to "fair and equitable treatment."²⁶ The right to fair and equitable treatment is "the most relied upon and successful basis for [an investment] treaty claim."²⁷

Tribunals have interpreted this language as providing foreign

repeatedly that what mattered was not so much ownership of specific assets but rather the combination of rights that were necessary for the economic activity at issue.").

Current United States practice takes a somewhat more constrained approach to the scope of investment that may be the subject of an indirect expropriation claim. Although recent U.S. IIAs contain typically broad definitions of investment that include, but are not limited to, property they also include language limiting expropriation claims to instances in which property has been adversely affected. *See, e.g.,* United States-Peru Trade Promotion Agreement Implementation Act, Pub. L. No. 110-137, 121 Stat. 1455 (2007), Annex 10-B, ¶ 1, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>, [hereinafter *U.S.-Peru TPA*] ("The Parties confirm their shared understanding that . . . [a]n action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment."). It remains to be seen, however, whether tribunals will use domestic law to determine the scope of "property" that is covered under these provisions, or how tribunals will differentiate between the terms "property right" and "property interest."

²⁵ *See* Newcombe, *supra* note 20, at 51 (describing the development of the right to compensation).

²⁶ *See, e.g.,* Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uru., art. 5, ¶ 1, Nov. 4, 2005 (Minimum Standard of Treatment) ("Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.").

²⁷ United Nations Conference on Trade and Development, *Latest Developments in Investor-State Dispute Settlement*, IIA MONITOR No. 1 at 6 (2009), *available at* http://www.unctad.org/en/docs/webdiaeia20096_en.pdf. Seven of the thirteen claims based on fair and equitable treatment decided in 2008 were successful, as compared with only two successful expropriation claims out of seven decided the same year. *See id.* at 6, 8-9.

investors with a right to a “stable” legal and business environment that does not “frustrate their legitimate expectations.”²⁸ Although there is some dispute as to whether this standard (or the right to fair and equitable treatment in general) provides greater protection than the minimum standard of treatment for aliens and their investments under customary international law,²⁹ tribunals have generally taken the position that the right to a stable and predictable business environment is consistent with the standard

²⁸ See, e.g., *Duke Energy Electroquil Partners & Electroquil SA v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, ¶ 339 (Aug. 18, 2008), <http://icsid.worldbank.org/ICSID/FrontServlet> (follow “Cases” hyperlink; then follow “Search Cases” hyperlink; then follow “Advanced Search” hyperlink and enter Case No.) (“[A] stable and predictable legal and business environment is considered an essential element of the fair and equitable treatment standard.”); *PSEG Global, Inc. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, ¶ 240 (Jan. 19, 2007), <http://icsid.worldbank.org/ICSID/FrontServlet> (follow “Cases” hyperlink; then follow “Search Cases” hyperlink; then follow “Advanced Search” hyperlink and enter Case No.) (the right to fair and equitable treatment includes the right to “a predictable and stable environment [including] treatment that does not detract from the basic expectations on the basis of which the foreign investor decided to make the investment”) (internal quotation marks omitted); *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 131 (Oct. 3, 2006), <http://icsid.worldbank.org/ICSID/FrontServlet> (follow “Cases” hyperlink; then follow “Search Cases” hyperlink; then follow “Advanced Search” hyperlink and enter Case No.) (“the fair and equitable standard consists of the host State’s consistent and transparent behavior, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor.”); *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, ¶ 274 (May 12, 2005), <http://icsid.worldbank.org/ICSID/FrontServlet> (follow “Cases” hyperlink; then follow “Search Cases” hyperlink; then follow “Advanced Search” hyperlink and enter Case No.) (“There can be no doubt . . . that a stable legal and business environment is an essential element of fair and equitable treatment.”); see also *Occidental Exploration & Prod. Co. v. Republic of Ecuador*, Case No. UN 3467, Final Award, ¶ 191 (July 1, 2004), 12 ICSID Rep. 94 (2007) (under fair and equitable treatment “there is certainly an obligation not to alter the legal and business environment in which the investment has been made”); *Tecnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 154 (May 23, 2003), <http://icsid.worldbank.org/ICSID/FrontServlet> (follow “Cases” hyperlink; then follow “Search Cases” hyperlink; then follow “Advanced Search” hyperlink and enter Case No.) (fair and equitable treatment requires the government “to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments”).

²⁹ See *infra* Part IV.C; see also Matthew C. Porterfield, *An International Common Law of Investor Rights?*, 27 U. PA. J. INT’L ECON. L. 79, 81-96 (2006).

under CIL.³⁰

This formulation of fair and equitable treatment functions as a particularly broad version of regulatory takings doctrine: the investor's "legitimate expectations" define the economic interests that are entitled to protection from "frustration" or impairment by regulatory or tax measures.³¹ Accordingly, changes in regulatory or tax standards that affect the investor's expectations concerning the value or profitability of the investment could be found to breach the relevant standard of protection, even if the impairment of the investment's value does not reach the level that the tribunal determines is necessary to constitute an act of indirect expropriation.

The tribunal's decision in *LG&E Energy Corp. v. Argentine Republic*³² provides an example of the relatively low threshold for

³⁰ See, e.g., *CMS Gas* ¶ 284 ("[T]he Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law."); *Occidental Exploration*, 12 ICSD Rep. ¶ 190 ("[T]he Tribunal is of the opinion that in the instant case the Treaty standard is not different from that required under [customary] international law concerning both the stability and predictability of the legal and business framework of the investment."). But see *Glamis Gold v. United States*, ICSID Case, Award, ¶¶ 619-22 (June 8, 2009), <http://icsid.worldbank.org/ICSID/FrontServlet> (follow "Cases" hyperlink; then follow "Search Cases" hyperlink; then follow "Advanced Search" hyperlink and enter Case No.) (holding that the CIL standard for fair and equitable treatment protects only reasonable expectations that are based on specific assurances made by the host country to induce the investment).

³¹ The prohibition on uncompensated expropriation has traditionally been considered to be a component of the minimum standard of treatment under customary international law. See M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 329-30 (2d ed. 2004). The interpretation of fair and equitable treatment as providing a right to a stable and predictable legal environment, however, appears to have developed independently, based on treaty text and citation to other arbitral decisions. See *Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, (August 30, 2000), <http://icsid.worldbank.org/ICSID/FrontServlet> (follow "Cases" hyperlink; then follow "Search Cases" hyperlink; then follow "Advanced Search" hyperlink and enter Case No.). This was one of the first awards to adopt this approach to fair and equitable treatment, and the tribunal cited language in NAFTA indicating that the agreement was intended to increase transparency and cross-border investment in concluding that NAFTA's fair and equitable treatment provision created a right to "a transparent and predictable framework for . . . business planning and investment." See *id.* at ¶¶ 70, 75-76, 99.

³² *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3 2006), <http://icsid.worldbank.org/ICSID/FrontServlet>

establishing a violation of fair and equitable treatment as compared with proving an indirect expropriation claim. The tribunal rejected LG&E's claim that certain measures taken by Argentina in response to its financial crisis—including changes in the laws governing the rates charged to Argentine consumers of gas provided by distribution companies in which LG&E had invested—resulted in an indirect expropriation of LG&E's investment.³³ The tribunal noted that although LG&E's earnings had been adversely affected, LG&E had still maintained its shares in the company. Accordingly, “[w]ithout a permanent, severe deprivation of LG&E's rights with regard to its investment, or almost complete deprivation of the value of LG&E's investment . . . these circumstances do not constitute expropriation.”³⁴ The tribunal, however, found that LG&E had been denied its right to “the stability and predictability underlying the standard of fair and equitable treatment.”³⁵

Similarly, the tribunal in *PSEG v. Turkey*³⁶ indicated that measures that failed to rise to the level of an indirect expropriation could nonetheless violate a foreign investor's right to a stable legal environment.³⁷ The tribunal found that the government of Turkey violated the fair and equitable treatment provision of the United States-Turkey Bilateral Investment Treaty³⁸ when it denied a United States corporation developing a power plant a stable and predictable legal environment by changing relevant regulatory standards affecting the project.³⁹ The same conduct, however, did

(follow “Cases” hyperlink; then follow “Search Cases” hyperlink; then follow “Advanced Search” hyperlink and enter Case No.).

³³ See *id.* ¶¶ 178-80.

³⁴ *Id.* ¶ 200.

³⁵ *Id.* ¶ 133.

³⁶ PSEG Global Inc. v. Republic of Turkey, ICSID Case No. ARB/02/5, Award (Jan. 17, 2007) <http://icsid.worldbank.org/ICSID/FrontServlet> (follow “Cases” hyperlink; then follow “Search Cases” hyperlink; then follow “Advanced Search” hyperlink and enter Case No.).

³⁷ See *id.* ¶¶ 250-56.

³⁸ Turkey Bilateral Investment Treaty, U.S.-Turk., Dec. 3, 1985, S. TREATY DOC. No. 99-19 (1990).

³⁹ See *PSEG* ¶¶ 250-56. The tribunal suggested that the vague nature of the standard for fair and equitable treatment enables it to be used as a basis for finding liability when no violation of other standards of protection (such as the prohibition on uncompensated expropriation) can be found. See *id.* ¶¶ 238-39:

not rise to the level necessary to support a finding of indirect expropriation.⁴⁰ The tribunal suggested that the standard for a breach of fair and equitable treatment is easier for an investor to satisfy than the standard for indirect expropriation with regard to both the degree of adverse effect and the specificity of the relevant economic interests.⁴¹ An investor is required only to show that “legitimate expectation(s)” were “affected,” rather than the “strong interference” with “clearly defined . . . rights” required to find indirect expropriation.⁴²

The standard of fair and equitable treatment has acquired prominence in investment arbitration as a consequence of the fact that other standards traditionally provided by international law might not in the circumstances of each case be entirely appropriate. This is particularly the case when the facts of the dispute do not clearly support the claim for direct expropriation, but when there are notwithstanding events that need to be assessed under a different standard to provide redress in the event that the rights of the investor have been breached.

Because the role of fair and equitable treatment changes from case to case, it is sometimes not as precise as would be desirable. Yet, it clearly does allow for justice to be done in the absence of the more traditional breaches of international law standards. This role has resulted in the concept of fair and equitable treatment acquiring a standing on its own, separate and distinct from that of other standards, albeit many times closely related to them, and thus ensuring that the protection granted to the investment is fully safeguarded.

Id.

⁴⁰ *See id.* ¶¶ 272-80.

⁴¹ *See id.* ¶ 279.

⁴² *See* PSEG Global Inc. v. Republic of Turkey, ICSID Case No. ARB/02/5, Award, ¶ 279 (Jan. 17, 2007), <http://icsid.worldbank.org/ICSID/FrontServlet> (follow “Cases” hyperlink; then follow “Search Cases” hyperlink; then follow “Advanced Search” hyperlink and enter Case No.); *see also id.* ¶ 245 (stating that “the role of fair and equitable treatment in this case does not bring the standard near to expropriation or other forms of taking”). Other tribunals have similarly found that government measures that did not have sufficiently adverse effects on an investment to constitute acts of indirect expropriation nonetheless violated the investors’ right to a stable and predictable legal environment. *See, e.g.,* Occidental Exploration & Prod. Co. v. Republic of Ecuador, Case No. UN 3467, Final Award, ¶¶ 80-92 (July 1, 2004), 12 ICSID Rep. 54 (2007) (denying Occidental’s claim that Ecuador had indirectly expropriated its right to a refund of value added taxes that Occidental had paid on purchases it made related to its oil production contract with a state-owned oil company); *id.* ¶¶ 180-92 (holding that Ecuador’s change in policy regarding Value-Added Tax violated Occidental’s rights to a stable and predictable legal environment); *see also* CMS Gas Transmission Co. v. Argentine Republic, Case No. ARB/01/8, Award, ¶¶ 252-64 (May 12, 2005), <http://icsid.worldbank.org/ICSID/FrontServlet> (follow “Cases” hyperlink; then follow “Search Cases” hyperlink; then follow “Advanced Search” hyperlink and enter Case

This broad—if vaguely defined—right to compensation for regulatory measures that infringe on an investor’s expectations concerning the value or profitability of an investment has emerged as arguably the most powerful right conferred on investors under IIAs. As discussed below, however, this right, which is frequently characterized as the relevant standard under customary international law, is not rooted in state practice and is significantly more expansive than comparable doctrines under the domestic laws of most nations.

III. State Practice and International Regulatory Takings Doctrine

A. *The Practice of States Regarding Regulatory Expropriation*

In order to constitute CIL, the purported international law prohibition on uncompensated regulatory takings would need to be rooted in the general and consistent practice of states. It is fairly clear, however, that it is *not* the general and consistent practice of states to compensate investors when government measures adversely affect the value of their property or frustrate their investment-backed expectations.⁴³ In fact, there is not *any* “general and consistent practice” on this issue. The lead author of a comparative study of regulatory takings doctrine in thirteen countries noted the following:

[T]here is no universally consensual approach, nor even a

No.) (rejecting the claim that Argentina had indirectly expropriated the claimant’s investment in a gas transmission company by modifying the legal framework governing the assessment of tariffs); *id.* ¶¶ 266-84 (finding that the same actions by Argentina constituted a breach of the claimant’s right to a stable legal framework); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶¶ 306-22 (July 14, 2006), <http://icsid.worldbank.org/ICSID/FrontServlet> (follow “Cases” hyperlink; then follow “Search Cases” hyperlink; then follow “Advanced Search” hyperlink and enter Case No.) (rejecting the claim that an Argentine province’s actions with regard to a water services company owned by a U.S. corporation—including restricting rates that could be charged for the services—constituted an expropriation under the terms of the 1991 Treaty Concerning the Reciprocal Encouragement and Protection of Investment between Argentina and the United States); *id.* ¶¶ 358-378 (finding that the same conduct violated the investor’s right to fair and equitable treatment).

⁴³ See Alterman, *supra* note 13, at 13-14.

dominant approach. Different countries at different times have adopted varying approaches to dealing with the property-values dilemmas. The diversity is great: No two countries have the same law on regulatory takings—not even countries with ostensibly similar legal and administrative traditions. The differences among the countries are significant and often unpredictable on the basis of other attributes known about these countries.⁴⁴

Moreover, to the extent that there is a “majority rule” concerning a right to compensation for government measures that have significant adverse effects on the value of investments, it is that such measures are *not* compensable.⁴⁵ A.J. Van der Walt, in his groundbreaking treatise on constitutional property clauses, concluded that “the distinction between police-power regulation of the use of property and eminent-domain expropriation of property is fundamental to all property clauses, because only the latter is compensated as a rule. Normally, there will be no provision for compensation for deprivations or losses caused by police-power regulation of property.”⁴⁶

Although CIL is formed by the “general” practice of states, there is no specific quantitative threshold of nations that must adhere to a practice in order for it to become CIL.⁴⁷ Instead, the practice must be shared by a sufficiently representative number of states, particularly those that have a specific interest in the subject matter of the purported rule—*i.e.*, “specially affected States.”⁴⁸ Conversely, rejection of a practice by specially affected States can prevent the formation of a rule of CIL.⁴⁹ Accordingly, in determining the content of CIL with regard to the treatment of

⁴⁴ *Id.*

⁴⁵ A.J. VAN DER WALT, CONSTITUTIONAL PROPERTY CLAUSES: A COMPARATIVE ANALYSIS 15-17 (1999).

⁴⁶ *Id.* at 17. F.A. Mann reached a similar conclusion over 50 years ago. See Mann, *supra* note 10, at 583 n.53 (1960) (“The distinction between regulation and taking is both fundamental and universal.”).

⁴⁷ See *ILA Report*, *supra* note 10, at 25 (stating that no “precise number or percentage of States is required” to demonstrate general practice).

⁴⁸ *Id.* at 26.

⁴⁹ See *id.* (noting that “if important actors do *not* accept the practice, it cannot mature into a rule of general customary law”).

foreign investment, it is appropriate to focus on the practices of the major capital importing and exporting countries, which presumably constitute the relevant “specially affected States.”

With regard to developing countries, the approaches of two leading recipients of foreign direct investments (hereinafter “FDI”)—India and China—are illustrative. China has recently enacted constitutional reforms and a property rights law that require compensation for government acquisitions of private property but that do not address “regulatory” takings.⁵⁰ India’s Constitution provides even less protection against expropriations, requiring only that deprivations of property rights—including regulatory deprivations—be legally authorized.⁵¹

Although the rejection of regulatory takings doctrine has been most prevalent among developing countries,⁵² even the domestic practice of the major capital exporting states (which are also

⁵⁰ See Wallace Wen-Yeu Wang & Jian-Lin Chen, *Bargaining for Compensation in the Shadow of Regulatory Giving: The Case of Stock Trading Rights Reform in China*, 20 COLUM. J. ASIAN L. 298, 323 (2006) (“[T]he latest amended Constitution expressly states that the government can acquire the citizen’s private property if required by public interest and with compensation. This provision only expressly provides for compensation under actual property acquisition or requisition. Currently, there is certainly no equivalent Chinese doctrine of regulatory takings.”); Li Ping, *The Impact of Regulatory Takings by the Chinese State on Rural Land Tenure and Property Rights*, LANDESA AND RIGHTS AND RESOURCES INITIATIVE, at 9 (Rights and Resources Initiative, 2007), http://www.rightsandresources.org/documents/files/doc_322.pdf (“Currently, China does not have a regulatory takings law. As a result, the government is not required to pay compensation . . . for its regulatory actions that benefit the public as a whole.”); see also Gebhard M. Rehm & Hinrich Julius, *The New Chinese Property Rights Law: An Evaluation From a Continental Perspective*, 22 COLUM. J. ASIAN L. 177, 222 (2009) (discussing expropriation provisions of China’s 2007 property rights law and concluding that it “does not strengthen the rights of the owner as against the previous legal position”).

⁵¹ See VAN DER WALT, *supra* note 45, at 215-16. The Indian Parliament repeatedly amended the property clauses of the 1950 Constitution in response to judicial decisions interpreting the clauses to limit the government’s authority to pursue social and economic reforms. See *id.* at 192-202. Eventually, Parliament repealed the property clauses and replaced them with a provision stating merely that “no person shall be deprived of his property save by authority of law.” See *id.* at 203.

⁵² See Wang & Chen, *supra* note 50, at 332 (“[M]any . . . countries, particularly developing countries, have yet to extend private property rights protection to regulatory takings.”); see also Alterman, *supra* note 13, at 10 (noting that in most non-democratic countries without developed economies “planning laws often are irrelevant (because of corruption or widespread noncompliance), and regulatory takings law is either dormant (no claims filed) or nonexistent”).

among the leading recipients of FDI) does not support the existence of a CIL prohibition on uncompensated regulatory takings. As demonstrated by the discussion below of the approach to regulatory expropriation doctrine in several leading exporters of FDI, the most that can be said regarding state practice in this area is that *some* states provide compensation under certain circumstances for regulatory measures. Moreover, the states that recognize regulatory expropriations almost always limit the right to compensation to land use regulations⁵³ and usually require that the measure have a dramatically adverse impact on property rights, such as eliminating a development right that had already vested or rendering real property essentially valueless.⁵⁴

1. The United States

United States jurisprudence under the takings clause of the Fifth Amendment has been the most influential source of state practice in the development of international regulatory expropriation doctrine.⁵⁵ Nonetheless, U.S. regulatory takings doctrine does not provide as broad a right to compensation as the purported international standard—particularly with regard to the scope of economic interests that are covered and the degree of adverse economic impact that is required to find a regulatory expropriation.⁵⁶

United States jurisprudence does not support the purported international standard for regulatory takings on the significant issue of the scope of economic interests to which the right of

⁵³ See Rachel Alterman, *Comparative Analysis: A Platform for Cross-National Learning*, in TAKINGS INTERNATIONAL: A COMPARATIVE PERSPECTIVE ON LAND USE REGULATIONS AND COMPENSATION RIGHTS, *supra* note 13, at 78.

[I]n most countries (with few exceptions), regulatory takings—especially partial takings—are not an open-ended concept; a statute usually defines a limited set of government decisions that may entail compensation. The historic as well as the current core of compensable decisions in most countries revolves around classic land use planning and zoning (not even all types of potential[ly] injurious decisions are necessarily included).

Id.

⁵⁴ See *id.*

⁵⁵ See SORNARAJAH, *supra* note 31, 353-55 (discussing the influence of U.S. law on the development of international takings doctrine).

⁵⁶ See *id.* at 355-56.

compensation applies.⁵⁷ Unlike the broad approach to defining covered “investment” under IIAs,⁵⁸ the takings clause of the U.S. Constitution applies only to property rights, which the U.S. Supreme Court has indicated must be “created and their dimensions . . . defined” by an independent source (typically state law).⁵⁹ As Justice Antonin Scalia has noted, “business in the sense of the activity of doing business, or the activity of making a profit is not property” and therefore is not entitled to the same constitutional protection.⁶⁰

Accordingly, in order to assert a takings claim, a plaintiff must demonstrate that the economic interest that she claims has been taken constitutes “property” as defined by some relevant source of law.⁶¹ Moreover, *regulatory* takings claims—as opposed to claims based on the actual appropriation of an asset—generally must be based on an interest in real property.⁶² The Court has indicated

⁵⁷ See *id.* at 356-58.

⁵⁸ See *id.* at 353-55.

⁵⁹ Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972).

⁶⁰ Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675 (1999).

⁶¹ See generally Matthew C. Porterfield, *International Expropriation Rules and Federalism*, 23 STANFORD ENV'T'L L.J. 3, 4-5 (2004) (describing takings in the context of the North American Free Trade Agreement).

⁶² For discussion of the role of real property, see *id.* at 11-16 (describing the role of real property in U.S. Supreme Court cases for regulatory takings). See also Eduardo Moisés Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 ECOLOGY L.Q. 227, 231 (2004) (“[I]t is almost beyond dispute that . . . the Court has focused overwhelmingly on regulations affecting land and that landowners bringing regulatory takings claims stand a greater chance of prevailing in the Supreme Court than the owners of other sorts of property.”); Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B.U. L. REV. 605, 655 (1996) (“Economic interests, such as personal property, trade secrets, copyright, and money, are all recognized by the Court as ‘property’ under the Fifth Amendment, but receive little protection against government regulation.”); J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89, 127 (1995) (“[T]he Supreme Court has shown absolutely no interest in applying the regulatory takings doctrine to assets other than land.”). See Michael A. Wolf, *Taking Regulatory Takings Personally: The Perils of (Mis)reasoning by Analogy*, 51 ALA. L. REV. 1355 (2000) for a discussion of the Supreme Court’s rare attempts to apply the regulatory takings analysis outside the context of real property. A four justice plurality (Sandra Day O’Connor, joined by William Rehnquist, Antonin Scalia and Clarence Thomas) did apply the regulatory takings analysis to broad economic interests in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), finding that the retroactive

that other forms of property—such as personal property or contract rights—typically may not be the basis of a successful regulatory takings claim.⁶³ Investment tribunals, in contrast, have found regulatory expropriations in forms of investment that would not even qualify as property under U.S. law.⁶⁴ The relationship of expropriation claims to specific property rights as defined by domestic law is even more attenuated under the fair and equitable treatment version of regulatory takings doctrine, which focuses on the effects of the government measures on the investor's "legitimate expectations" rather than on clearly defined rights.⁶⁵

United States takings jurisprudence also differs from the purported international standard in its approach to the degree of adverse effect that government measure must have on the relevant property in order to require compensation. Under the rule first announced by the Court in *Lucas v. South Carolina Coastal Council*,⁶⁶ regulatory measures that destroy all economic value of a property are generally considered to constitute per se takings.⁶⁷

imposition of liability on a former coal mine operator for the health benefits of retired miners constituted a regulatory taking. Justice Anthony Kennedy concurred with the judgment on due process grounds, but rejected the plurality's application of regulatory takings doctrine:

Until today . . . one constant limitation has been that in all of the cases where the regulatory taking analysis has been employed, a specific property right or interest has been at stake. . . . [T]he plurality's opinion disregards this requirement and, by removing this constant characteristic from takings analysis, would expand an already difficult and uncertain rule to a vast category of cases not deemed, in our law, to implicate the Takings Clause.

Id. at 541-42 (Kennedy, J., concurring in the judgment and dissenting in part).

⁶³ See *Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1027-28 (1992) ("[I]n the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless . . ."); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223-24 (1986) ("Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.").

⁶⁴ See SORNARAJAH, *supra* note 31, at 355-56.

⁶⁵ See Newcombe, *supra* note 20, at 292-93.

⁶⁶ See *Lucas*, 505 U.S. at 1015. Even a regulatory measure that completely destroys the value of a property, however, does not constitute a taking if it merely enforces some pre-existing limitation on the permissible uses of the land. See *id.* at 1029-30.

⁶⁷ See *id.* at 1029-30.

Measures that do not completely eliminate the value of property may also constitute regulatory takings under the “ad hoc balancing test” of *Penn Central Transportation Co. v. New York City*.⁶⁸ Although the *Penn Central* analysis does not amount to a “set formula,”⁶⁹ the Court has noted that—like the *Lucas* test—it “aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.”⁷⁰

In contrast, international investment tribunals, although by no means consistent on this point, have indicated that regulatory measures may constitute acts of expropriation even if they only have a “substantial” or “significant” adverse impact on the value of an investment.⁷¹ Moreover, there appears to be an even lower threshold of adverse economic impact required to support a claim

⁶⁸ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978). The *Penn Central* test focuses on three factors: “[1] The economic impact of the regulation on the claimant; . . . [2] the extent to which the regulation has interfered with distinct investment-backed expectations; . . . [and 3] the character of the governmental action.” *Id.* at 124.

⁶⁹ *Id.*

⁷⁰ *Lingle v. Chevron*, 544 U.S. 528, 539 (2005).

⁷¹ See Porterfield, *supra* note 61, at 7. This is another issue that recent U.S. IIAs have addressed by including language that attempts to harmonize the international standard with United States regulatory takings law in response to Congress’s “no greater rights” mandate. *Id.* Recent U.S. agreements reflect the high threshold for establishing regulatory takings, stating 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.” See *U.S.-Peru TPA*, *supra* note 24, Annex 10-B, ¶ 3(b). Although the references to “rare circumstances” is presumably taken from Justice Scalia’s observation in *Lucas* that the per se rule takings would only apply in “the relatively rare situations where the government has deprived a landowner of all economically beneficial uses,” it also accurately describes the extremely high threshold for regulatory takings under the *Penn Central* standard. *Id.* at 505 U.S. at 1018. See *Lingle*, 544 U.S. at 539 and accompanying text; see also Mark W. Cordes, *Takings Jurisprudence as Three-Tiered Review*, 20 J. NAT. RESOURCES & ENVTL. L. 1, 38 (2005-2006) (“[T]akings under *Penn Central* are to be relatively rare exceptions based on compelling facts.”). Supporters of broad international standards of protection, however, have objected that the reference to “rare circumstances” results in a standard for indirect expropriation that is more narrow than the international standard. See, e.g., Stephen M. Schwebel, *The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law*, TRANSNATIONAL DISPUTE MANAGEMENT, at 1, 6 (April 2006) (“Can it plausibly be maintained that the exception only for ‘rare circumstances’ is found in customary international law?”).

under the “stable regulatory environment” interpretation of fair and equitable treatment.⁷² Accordingly, even the jurisprudence of the United States does not provide evidence of state practice supporting the purported customary international standard for regulatory expropriation.

2. *Canada*

Canada provides an example of a major capital-exporting nation that has rejected regulatory takings doctrine in its domestic jurisprudence. Canadian constitutional law does not require compensation for actual expropriations of property, let alone “regulatory” expropriations.⁷³ Section Seven of the “Charter of Rights and Freedoms” of Canada’s 1982 Constitution contains some language similar to the due process clauses of the Fourth and Fourteenth Amendments of the U.S. Constitution,⁷⁴ but conspicuously does not refer to property rights or a right to compensation for takings. The drafters of the Charter intentionally omitted references to property rights in order to avoid language that could be used by the Canadian courts to invalidate economic regulations in a manner similar to that of the U.S. Supreme Court during the *Lochner* era.⁷⁵ The Canadian courts have accordingly rejected attempts to construe Section Seven broadly to apply to

⁷² See *supra* Part II.B.

⁷³ See Bryan P. Schwartz & Melanie R. Bueckert, *Canada*, in TAKINGS INTERNATIONAL: A COMPARATIVE PERSPECTIVE ON LAND USE REGULATIONS AND COMPENSATION RIGHTS, *supra* note 13, at 93 (“Canada’s constitutional framework lacks safeguards to protect property owners from governments that unjustifiably expropriate private property.”); L. Kinvin Wroth, *Lingle and Kelo: The Accidental Tourist in Canada and NAFTA-Land*, 7 VT. J. ENVTL. L. 62, 77 (2005-2006) (“In Canada . . . the law of expropriation lack[s] a constitutional basis”).

⁷⁴ Cr. Canadian Charter of Rights and Freedoms 1982, Part I of the Constitution Act of 1982, being Schedule B of the Canada Act 1982, cl. 11, § 7 (“Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”), with U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property without due process of law”), and U.S. CONST. amend. XIV, § 1 (“nor shall any State deprive any person of life, liberty, or property without due process of law”).

⁷⁵ See Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 INT’L J. CONST. L. 1, 16-27 (2004). The drafters of the Charter also used the term “principles of fundamental justice” rather than “due process” in section 7 in order to avoid *Lochner*-like judicial review of economic regulation. See *id.* at 21-24.

economic rights.⁷⁶

Property rights do receive some limited protection under the 1960 Canadian Bill of Rights, which is a statutory rather than constitutional provision.⁷⁷ Section One of the Bill of Rights states that individuals enjoy “the right . . . to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law.”⁷⁸ Section One, however, has been interpreted to require only procedural fairness and, consequently, does not provide a right to compensation for expropriation.⁷⁹

Instead, expropriation is addressed by statutory provisions at both the provincial and federal levels.⁸⁰ These statutes operate in the context of a common law presumption that compensation is required for actual expropriations of property, absent a clear expression to the contrary in the relevant legislation.⁸¹ The statutory expropriation provisions, however, have been interpreted to require compensation for regulatory measures only when the government has both eliminated essentially all rights associated with the ownership of property and appropriated a property interest for itself.⁸² The requirement that the government acquires

⁷⁶ See *Att’y Gen. of Quebec v. Irwin Toy Ltd.*, [1989] 1 S.C.R. 927, 1003 (Can.) (“The intentional exclusion of property from s. 7 . . . leads to a general inference that economic rights as generally encompassed by the term ‘property’ are not within the perimeters of the s. 7 guarantee.”).

⁷⁷ See VAN DER WALT, *supra* note 45, at 86.

⁷⁸ The Canadian Bill of Rights, S.C. 1960, c. 44, § 1(a).

⁷⁹ See *Authorson v. Canada (Att’y Gen.)*, [2003] 2 S.C.R. 40, ¶ 51 (Can.) (“The *Bill of Rights* does not protect against the expropriation of property by the passage of unambiguous legislation.”); see also Bryan P. Schwartz & Melanie R. Bueckert, *Regulatory Takings in Canada*, 5 WASH. U. GLOB. STUD. L. REV. 477, 479 (2006) (“[U]nder the Canadian Bill of Rights, measures infringing on property owners’ right to the enjoyment of property need only satisfy procedural fairness; no case holds that ‘due process of law’ also requires substantive fairness, such as just compensation.”). Even the limited procedural protections of the Bill of Rights apply only to federal law. See Schwartz & Bueckert, *supra*, at 479; VAN DER WALT, *supra* note 45, at 87.

⁸⁰ See Schwartz & Bueckert, *supra* note 73, at 478.

⁸¹ See Daniel H. Cole, *Political Institutions, Judicial Review, and Private Property: A Comparative Institutional Analysis*, 15 SUP. CT. ECON. REV. 141, 160 (2007) (discussing the presumption in favor of compensation for actual expropriations under the common law of the United Kingdom).

⁸² See Schwartz & Bueckert, *supra* note 73, at 487-88; see also *Att’y Gen. of Nova Scotia v. Mariner Real Estate Ltd.*, (1999), 177 D.L.R. 4th 696, 718 (Can.).

some property interest in order for a compensable taking to occur—regardless of what loss the property owner has suffered—distinguishes Canadian takings doctrine from both U.S. law and the purported CIL standard.

The Supreme Court of Canada applied the common law presumption in favor of compensation for expropriations in *Manitoba Fisheries v. Canada*.⁸³ The court in *Manitoba Fisheries* held that the Freshwater Fish Marketing Act's award of an exclusive right to market freshwater fish to a Crown corporation constituted a compensable taking of the goodwill of a company whose fish-selling business was consequently destroyed.⁸⁴ Although the Act did not provide for compensation, the court awarded compensation based on the "recognized rule . . . that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation."⁸⁵

In *British Columbia v. Tener*,⁸⁶ the Supreme Court of Canada similarly noted the "long standing presumption of a right to compensation"⁸⁷ in holding that British Columbia had expropriated the property of the holders of mineral rights in a provincial park by denying them access to the park to extract the minerals.⁸⁸ The court concluded that "[t]he denial of access to these lands . . . amounts to a recovery by the Crown of a part of the right [previously] granted to the respondents This acquisition by the Crown constitutes a taking from which compensation must flow."⁸⁹

Although *Manitoba Fisheries* and *Tener* have been cited as evidence that Canadian law provides property owners with a right to compensation for regulatory expropriations,⁹⁰ in both cases the

⁸³ [1979] 1 S.C.R. 101 (Can.).

⁸⁴ *Id.*

⁸⁵ *Id.* at 109 (quoting *Att'y Gen. v. De Keyser's Royal Hotel, Ltd.*, [1920] A.C. 508 at 542 (H.L.)).

⁸⁶ [1985] 1 S.C.R. 533 (Can.).

⁸⁷ *Id.* at 559.

⁸⁸ *See id.* at 533.

⁸⁹ *Id.* at 563.

⁹⁰ *See Att'y Gen. of Nova Scotia v. Mariner Real Estate Ltd.*, (1999), 177 D.L.R. 4th 696, 723 (Can.) ("Some cases have interpreted *Tener* and/or *Manitoba Fisheries* as standing for the proposition that the loss of virtually all economic value of land is the

court characterized the governmental action as involving an actual seizure of an asset. In *Tener*, the court noted that the denial of access to the park to exercise the mineral rights effectively constituted a reacquisition of those rights by the province.⁹¹ Similarly, in *Manitoba Fisheries*, the court concluded that the granting of the exclusive marketing rights to the government corporation effectively resulted in the compulsory transfer of the goodwill of the private company to that corporation.⁹²

The Nova Scotia Court of Appeals stressed this aspect of Canadian takings doctrine in *Mariner Real Estate v. Nova Scotia*,⁹³ which involved facts strikingly similar to those considered by the U.S. Supreme Court in *Lucas*⁹⁴—*i.e.*, a claim that the province's refusal to permit construction of houses on several waterfront lots constituted a compensable regulatory taking under the Nova Scotia Expropriation Act.⁹⁵ The court indicated that in order to constitute a compensable act of expropriation, a government measure must not only result in "the extinguishment of virtually all incidents of ownership" of the affected property, but must also involve "an acquisition of land by the expropriating authority."⁹⁶

Addressing the first criterion, the court noted that (as in *Lucas*) the trial court had concluded that the construction ban had deprived the plaintiffs of "virtually all economic value of their lands."⁹⁷ The court indicated, however, that under Canadian law, a measure must not only eliminate all economic value, it must

loss of an interest in land within the meaning of expropriation legislation."). See also Donna R. Christie, *A Tale of Three Takings: Taking Analysis in Land Use Regulation in the United States, Australia and Canada*, 32 BROOK. J. INT'L L. 343, 396 (2007) ("*Tener* is sometimes characterized as standing for the proposition that a taking occurs when the regulation leaves the land with virtually no economic value.").

⁹¹ See *British Columbia v. Tener*, [1985] 1 S.C.R. 533, 599 (Can.).

⁹² See *Manitoba Fisheries v. Canada*, [1979] 1 S.C.R. 101, 111 (Can.) ("Once it is accepted that the loss of the goodwill of the appellant's business which was brought about by the Act and by the setting up of the Corporation was a loss of property and that the same goodwill was by statutory compulsion acquired by the federal authority, it seems . . . to follow that the appellant was deprived of property which was acquired by the Crown.").

⁹³ See *Mariner Real Estate Ltd*, 177 D.L.R. 4th 696.

⁹⁴ See discussion of *Lucas*, 505 U.S. 1003.

⁹⁵ See *Mariner Real Estate*, 177 D.L.R. 4th 696.

⁹⁶ *Id.* at 718.

⁹⁷ *Id.* at 719.

destroy “virtually all rights associated with ownership.”⁹⁸ The court concluded that this standard had not been met because the property could still be used for various purposes, including camping and other recreational uses.⁹⁹

Moreover, the court noted, to constitute a compensable expropriation there must not only be denial of any uses of the property, but there must also be an acquisition of the property interest by the government.¹⁰⁰ Accordingly, the court rejected as inapplicable the U.S. Supreme Court’s analysis in *Lucas*, noting that

U.S. constitutional law has, on this issue, taken a fundamentally different path than has Canadian law concerning the interpretation of expropriation legislation. In U.S. constitutional law, regulation which has the effect of denying the owner all economically beneficial or productive use of land constitutes a taking of property for which compensation must be paid. Under Canadian expropriation law, deprivation of economic value is not a taking of land It follows that U.S. constitutional law cases cannot be relied on as accurately stating Canadian law on this point. Moreover, in U.S. constitutional law . . . deprivation of property through regulation for public purposes is sufficient to bring a case within the constitutional protection against taking for “public use”, unlike the situation under the *Expropriation Act* which requires the taking of land. It is not . . . necessary in U.S. constitutional law to show that the state acquires any title or interest in the land regulated. For these reasons . . . the U.S. takings clause cases are not of assistance in determining whether there has been an acquisition of land within the meaning of the Nova Scotia *Expropriation Act*.¹⁰¹

The requirement that the government acquire an interest in property in order for there to be a compensable taking not only distinguishes Canadian expropriation doctrine from U.S. law, it also precludes Canadian law as a source of state practice that

⁹⁸ *Id.* at 728.

⁹⁹ *Id.* at 728-29.

¹⁰⁰ See *Mariner Real Estate*, 177 D.L.R. 4th at 732.

¹⁰¹ *Id.*

supports the purported customary international law standard for regulatory takings based solely on the adverse impact of the government measures on the investment.

3. *Western Europe*

The nations of Western Europe—which collectively constitute the leading source of FDI¹⁰²—do not share a consistent doctrine on regulatory expropriation.¹⁰³ In general, however, the leading European exporters of FDI provide only narrow compensation rights targeted at specific types of land use regulations.¹⁰⁴

In the United Kingdom, for example, Parliament may actually seize property without compensation, although there is a “convention” under the United Kingdom’s unwritten constitution of providing compensation for such seizures, which has resulted in

¹⁰² U.N. Conference on Trade and Development, World Investment Report 2007, at 70, U.N. Doc. UNCTAD/WIR/2007, U.N. Sales No. E.07.II.D.9 (2007).

¹⁰³ See Alterman, *supra* note 53, at 77 (“[T]here is no European approach to regulatory takings. The nine European countries [examined] exhibit the full scale of legal (and public policy) approaches to regulatory takings, almost to the very extremes.”). Some harmonization of the practice of European states concerning regulatory expropriation could conceivably be achieved through the jurisprudence of the European Court of Human Rights interpreting the property rights provisions of Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Thus far, however, there is little evidence of such harmonization:

After decades of ECHR jurisprudence, the differences in approaches to regulatory takings among the European countries have remained almost as great as they were in the past . . . [although] ECHR decisions increasingly do place some limits on the more extreme expressions of the no-compensation side of the scale.

Id. at 27. The ECHR itself, as a treaty, does not constitute “state practice” for the purposes of determining CIL. See *infra* Part IV.B.

¹⁰⁴ See e.g., Harvey M. Jacobs, *The Future of the Regulatory Takings Issue in the United States and Europe: Divergence or Convergence?*, 40 URB. LAW. 51, 59-60 (2008). As one commentator has noted,

[I]n much of Europe, government has and continues to have the right to regulate property, often onerously from a United States perspective, under its presumed right of imperium. And some European constitutions further reinforce this tension by expressly noting the social obligations or social rights inherent in property (and thus the need for individual to curb their individualistic expectations). *What has not happened in Europe is something parallel to the 1922 Pennsylvania Coal decision.*

Id. (emphasis added).

a common law presumption in favor of compensation.¹⁰⁵ Accordingly, the United Kingdom has not recognized any general right to compensation for mere “regulatory” takings.¹⁰⁶ Instead, “rights to compensation in the U.K. are very limited and are largely related to the revocation or modification of a valid [land use] planning permission.”¹⁰⁷ Landowners may also seek inverse condemnation of their property in certain narrow circumstances,¹⁰⁸ however, “[t]he overriding principle . . . is that where the development of land is restricted in the name of the public interest, landowners do not have the right to compensation.”¹⁰⁹

France takes a similar approach and does not provide landowners with a broad right to compensation for regulatory measures that adversely affect the value of their property.¹¹⁰

¹⁰⁵ Cole, *supra* note 81, at 154-60.

¹⁰⁶ Philip A. Joseph, *The Environment, Property Rights, and Public Choice Theory*, 20 N.Z. UNIV. L. R. 408, 425 (2003) (“The common law has systematically avoided the concept of a regulatory taking. [For English courts,] a mere negative prohibition, though it involves interference with an owner’s enjoyment of property, does not . . . carry with it at common law any right to compensation.”).

¹⁰⁷ Michael Purdue, *United Kingdom*, in *TAKINGS INTERNATIONAL: A COMPARATIVE PERSPECTIVE ON LAND USE REGULATIONS AND COMPENSATION RIGHTS*, *supra* note 13, at 119.

¹⁰⁸ *Id.* A landowner may petition the government to purchase his property “where either (1) the land is zoned for public works that requires the land to be publicly owned, or (2) a development control decision renders the property incapable of any beneficial use.” *Id.* The latter category—elimination of any beneficial use—is similar to the categorical taking rule announced by the U.S. Supreme Court in *Lucas*. See note 66, *supra* and accompanying text; see also Cole, *supra* note 81, at 168 (concluding that the United States generally provides constitutional prohibition on uncompensated regulatory takings provides only marginally greater protections than the United Kingdom’s statutory compensation provisions). The United Kingdom’s system, however, is significantly less protective in several respects, including the standard of compensation — “existing use value” in the United Kingdom as compared with “fair market value” in the United States. See *id.* at 170.

Another interesting point of comparison is the treatment of regulations requiring the granting of public access to private property. The United States Supreme Court treats such compelled physical invasions of property as a form of taking requiring compensation. See Jerry L. Anderson, *Comparative Perspectives on Property Rights: The Right to Exclude*, 56 J. LEGAL EDUC. 539, 542 (2006). The British Parliament, in contrast, has enacted a law requiring private landowners to provide extensive public access to “open country” without any compensation. See *id.* at 546.

¹⁰⁹ Purdue, *supra* note 107, at 119.

¹¹⁰ Vincent A. Renard, *France*, in *TAKINGS INTERNATIONAL: A COMPARATIVE PERSPECTIVE ON LAND USE REGULATIONS AND COMPENSATION RIGHTS*, *supra* note 13, at

Compensation is only available under certain narrow exceptions to the “non-compensation principle,” such as when a building permit is revoked in a manner that extinguishes vested rights.¹¹¹

Germany provides more extensive compensation rights for overly burdensome land use regulations than either the United Kingdom or France, but the rights are restricted to certain statutorily defined situations and in some instances are time-limited.¹¹² Municipality-wide preparatory land use plans (“F-plans”) do not give rise to any compensation rights.¹¹³ Binding land use plans (“B-plans”) that are prepared based on the preliminary plans, however, may give rise to compensation rights.¹¹⁴ If, for example, private property is designated for a future public use such as a school, the owner may seek to compel the government to purchase the property if she can demonstrate that the property cannot be used in an economically reasonable manner in the period before the government purchases the property.¹¹⁵ Similarly, German law also requires compensation for land use plans that impose public easements on private property in a manner that significantly burdens the property.¹¹⁶

In addition to situations involving designation of property for public uses (which involve the eventual transfer of property interests to the government and are therefore arguably better

139 (“As opposed to the theory and practice of ‘takings’ developed in the United States, the land-use system in France is built on the opposite principle: no compensation has to be paid for the restriction of development rights resulting from urban regulations.”); see also Jacobs, *supra* note 104, at 68 (“Under French law, public authorities have both a broad and a strong set of authorities to manage privately owned land. Owners have no basis to claim a regulatory taking, and the public may preempt proposed private land sales.”).

¹¹¹ See Renard, *supra* note 110, at 140-41. Renard notes that these “exceptions to [the non-compensation] principle have proven to be relatively insignificant as interpreted by the courts.” *Id.* at 141.

¹¹² Gerd Schmidt-Eichstaedt, *The Federal Republic of Germany*, in TAKINGS INTERNATIONAL: A COMPARATIVE PERSPECTIVE ON LAND USE REGULATIONS AND COMPENSATION RIGHTS, *supra* note 13, at 271-72 (“German law clearly sets out several different planning situations and spells out the specific compensation rights that apply to each.”).

¹¹³ *Id.* at 272-73.

¹¹⁴ *Id.* at 273.

¹¹⁵ *Id.* at 273-74.

¹¹⁶ *Id.* at 275.

viewed as examples of conventional rather than “regulatory” expropriation), German law also provides for compensation when property is down-zoned.¹¹⁷ Generally, however, landowners must exercise their development rights within seven years of when the binding land use plan is adopted or they will lose their right to compensation for the down-zoning.¹¹⁸

Thus, German law on regulatory expropriation, although relatively robust when compared with other jurisdictions,¹¹⁹ is also highly specific to certain statutorily designated land use planning issues. Accordingly, it does not provide evidence of state practice supporting a broad right to compensation for government measures that have significant adverse effects on investments.

B. Is Domestic Law Regarding Expropriation Relevant to Identifying State Practice for Purposes of Defining CIL?

It could be argued that the domestic practice of states regarding property rights is irrelevant for purposes of identifying customary international law, since CIL is defined by reference to the practice of states “impinging upon their international legal relations.”¹²⁰ Domestic law, however, can constitute relevant state practice when it implicates international relations,¹²¹ and domestic expropriation standards do affect international relations given that they generally define the level of protection available to both foreign and domestic property owners.¹²²

Many states—such as those that follow the Calvo doctrine—explicitly define their legal obligations to foreign investors by reference to the standards of protection for their nationals under their domestic law,¹²³ demonstrating the requisite *opinio juris* to

¹¹⁷ See Schmidt-Eichstaedt, *supra* note 112, at 275.

¹¹⁸ *Id.* at 275-76. There are some exceptions to the seven-year time limit. For example, landowners may seek compensation for restrictions on existing, non-conforming uses even after the seven-year period has expired. See *id.* at 276-78.

¹¹⁹ See Alterman, *supra* note 13, at 23. Alterman classifies Germany as having among the highest standards of protection from regulatory takings. *Id.*

¹²⁰ *ILA Report*, *supra* note 10, at 8.

¹²¹ *Id.* at 9.

¹²² See discussion *supra* note 10.

¹²³ Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT'L L. 48, 52 (2008) (explaining that under the Calvo doctrine, “aliens [are] entitled only to the

establish their domestic law as relevant state practice. The United States, despite its long history as “one of the most vociferous critics of the Calvo doctrine,”¹²⁴ has similarly asserted that its domestic standard of protection for property rights delineates the limits of the standard applicable to foreign investors under international law. In the Trade Act of 2002, Congress asserted “that United States law on the whole provides a high level of protection for investment, consistent with or greater than the level required by international law,” and indicated that, accordingly, the investment provisions of U.S. trade agreements should not provide foreign investors with “greater substantive rights” than those available to U.S. investors under domestic law.¹²⁵ Specifically, with regard to expropriation, Congress directed USTR to “seek[] to establish standards for expropriation and compensation for expropriation, consistent with United States legal principles and practice.”¹²⁶ In response to Congress’s no greater rights mandate, USTR now includes language in U.S. IIAs defining the test for “indirect expropriation” as a case-by-case inquiry¹²⁷ involving criteria similar to those identified by the Supreme Court in the *Penn Central* decision.¹²⁸ More recently, pursuant to an agreement

same level of treatment that domestic nationals receive under the domestic laws and legal system”).

¹²⁴ Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 VA. J. INT’L L. 809, 891 (2005).

¹²⁵ Trade Act of 2002, Pub. L. No. 107-210, § 2102(b)(3), 116 Stat. 933.

¹²⁶ *Id.* § 2102(b)(3)(D).

¹²⁷ See, e.g., Free Trade Agreement, annex 10-D, U.S.-Chile, June 6, 2003, available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts (follow “Investment” hyperlink).

The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

- (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
- (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
- (iii) the character of the government action.

Id.

¹²⁸ *Cr.* Free Trade Agreement, *supra* note 127, with discussion *supra* note 68.

between Democratic leaders in the House of Representatives and the White House in May 2007,¹²⁹ the United States has included language in the preamble of trade agreements stating that foreign investors are not to be accorded greater substantive rights than provided for under the domestic law of the United States.¹³⁰ Thus for nations such as the United States that explicitly link their standard of treatment of foreign investors to their domestic standards of protection for property rights, it seems reasonable to conclude that domestic law regarding expropriation constitutes state practice for the purposes of identifying expropriation standards under CIL. Even for nations where there is no explicit linkage between their treatment of foreign and domestic investors, domestic expropriation standards are presumably at least *relevant* to identifying state practice with regard to foreign investors, absent any evidence that it is the state's practice to provide foreign investors with a higher standard of protection. Accordingly, the domestic practice of states regarding regulatory takings indicates that there is not a general and consistent practice of providing investors a right to compensation for regulatory expropriations, and therefore no such right exists under customary international law.

Proponents of broad standards of protection under IIAs, however, generally ignore domestic legal practice and instead rely on other theories in support of the existence of a right under international law to compensation for regulatory takings.¹³¹ Some of these alternative approaches are considered in the following section.¹³²

¹²⁹ See Bipartisan Agreement on Trade Policy: Investment section VI (May 2007), available at http://www.bilaterals.org/IMG/pdf/05_14_07.pdf.

¹³⁰ See, e.g., *U.S.- Peru TPA*, *supra* note 24, at Pmbl. ("foreign investors are not hereby accorded greater substantive rights with respect to investment protections than domestic investors under domestic law where, as in the United States, protections of investor rights under domestic law equal or exceed those set forth in this Agreement."). Peru obtained similar language in the Preamble of the Agreement referencing its Constitution's incorporation of the Calvo doctrine. *Id.* (noting that "Article 63 of Peru's Political Constitution provides that 'domestic and foreign investment are subject to the same conditions'").

¹³¹ See *generally supra* Part III (discussing a lack of foreign domestic compensation for government takings).

¹³² The proposition that IIAs themselves constitute state practice for the purposes of defining the CIL of expropriation is discussed and rejected *infra* Part IV.A.

IV. Alternative Arguments for a Right under International Law to Compensation for Regulatory Takings

As discussed above, the domestic law of states does not support the existence of a right under customary international law to compensation for regulatory measures that adversely affect the value of an investment.¹³³ There are, however, several other potential arguments for the existence of such a right under international law that merit brief discussion.

A. IAs as State Practice?

It could be argued that BITs either codify or even constitute state practice regarding regulatory expropriation.¹³⁴ There are, however, significant problems with this argument. The Committee on the Formation of Customary (General) International Law of the International Law Association, in its *Statement of Principles Applicable to the Formation of General Customary International Law*, rejected both the general theory that there is a “presumption that a succession of similar treaty provisions gives rise to a new customary rule with the same content”¹³⁵ and the application of that theory to IAs:

Some have argued that provisions of bilateral investment protection treaties (especially the arrangements about compensation or damages for expropriation) are declaratory of, or have come to constitute, customary law. But . . . there seems to be no special reason to *assume* that this is the case, unless it

¹³³ See *supra* notes 10-14 and accompanying text.

¹³⁴ This approach has been used to argue, under CIL, for the existence and broad interpretation of a right under CIL of foreign investors to a “minimum standard of treatment” by host governments. See Charles H. Brower, II, *Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105*, 46 VA. J. INT’L L. 347, 358 (2006) (“[T]o the extent that treaties codify existing custom, their content should influence the application of Article 1105 (1) [which describes NAFTA’s minimum standard of treatment] Alternatively, the widespread adoption of multilateral or bilateral treaties may reflect state practice sufficient to influence the development of custom”). See generally Porterfield, *supra* note 29, at 84-87 (discussing attempts to support the establishment of a minimum standard of treatment for foreign investors under customary international law by citing the widespread use of BITs as evidence of a desire to be bound by such a standard).

¹³⁵ *ILA Report*, *supra* note 10, at 45.

can be shown that these provisions demonstrate a widespread acceptance of the rules set out in these treaties *outside the treaty framework*. In short, there is no presumption that a series of treaties gives rise to a new rule of customary law, though this does not preclude such a metamorphosis occurring in particular cases.¹³⁶

Given that actual state practice “outside the treaty framework” does not support the existence of a norm requiring compensation for regulatory takings,¹³⁷ it is difficult to see how such a standard could “metamorphose” from IIAs into a rule of CIL without fundamentally altering the standard for identifying CIL.¹³⁸ Furthermore, because this new CIL standard based on IIAs could presumably be enforced only by foreign investors, it would require acceptance of the position that it is the general and consistent practice of countries to provide *greater* substantive rights to foreign investors. This position has been explicitly rejected, not only by nations that assert the Calvo doctrine, but also by the United States.¹³⁹

Moreover, even if IIAs could be used to establish rules of CIL, the terms of IIAs do not generally include language that describes the traditional regulatory takings standard. Although IIAs typically refer to “indirect expropriation” or “measures tantamount to expropriation,” they generally do not indicate that these terms refer to situations in which regulatory measures cause some level of adverse economic effect on investments rather than where there has been some actual appropriation of an asset by the government.¹⁴⁰ Thus, even if IIAs were accepted as state practice,

¹³⁶ *Id.* at 48.

¹³⁷ *See supra* Part III.A.

¹³⁸ Some commentators have in fact suggested that the definition of CIL needs to be altered so as to encompass obligations widely included in BITs. Andreas Lowenfeld, for example, argues that BITs create “something like customary law.” Andreas Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123, 130 (2003). If BITs fail to satisfy the requirement that state practice be undertaken out of a sense of legal obligation (*opinio juris*) in order to give rise to CIL, Lowenfeld suggests, “perhaps the traditional definition of customary law is wrong, or at least . . . incomplete.” *Id.*

¹³⁹ *See supra* Part III.B.

¹⁴⁰ *See* Newcombe, *supra* note 20, at 18-20 (arguing that treaty language referring to measures “equivalent” or “tantamount” to expropriation should not be read to broaden

proponents of this approach would need to rely on the decisions of tribunals to identify the content of this state practice.

Of course, if the reference to “indirect” expropriation in investment agreements does not refer to regulatory measures that adversely affect the value of investments without actually transferring their ownership or control, the term presumably must have some other meaning.¹⁴¹ The most obvious alternative interpretation would be that an indirect expropriation involves the actual appropriation of an investment by the government that is achieved through indirect means, rather than through a direct confiscation of the asset. Andrew Newcombe has argued that this approach is consistent with most arbitral decisions awarding compensation for indirect expropriation.¹⁴² An interpretation of indirect expropriation that required acquisition of the investment (albeit through indirect means) may also be consistent with state practice given the evidence of widespread support in the domestic law of states for a right to compensation for actual appropriations of property.¹⁴³ Under this approach, an appropriation would be

the concept of expropriation to cover measures that merely adversely affect the value of investments). The language that has been included in U.S. IIAs in response to Congress’s “no greater rights” mandate includes (like the *Penn Central* decision that it is based on) reference to the economic impact of the government action as relevant to the determination of whether there has been an indirect expropriation. See, e.g., Free Trade Agreement, U.S.-Chile, annex 10-D, ¶ 4(a)(i), June 6, 2003, 42 I.L.M. 1026. Even U.S. IIAs, however, note that “the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred.” *Id.*

¹⁴¹ See Vienna Convention on the Law of Treaties, art. 31, ¶ 1, May 23, 1969, 1155 U.N.T.S. 331 (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”).

¹⁴² Newcombe, *supra* note 20, at 6 (“[A]most all international expropriation cases can be viewed as cases of direct or indirect state appropriation.”).

¹⁴³ See *supra* Part III. For an early attempt to link a right to compensation under international law to the domestic standards of protection, see Chandler P. Anderson, *Basis of the Law Against Confiscating Foreign-Owned Property*, 21 AM J. INT’L L. 525 (July 1927). Anderson surveys the laws of the “elder members of the family of nations,” and finds that “in every instance the taking of private property in time of peace is prohibited unless for public uses and except upon the payment of adequate compensation.” *Id.* at 525. This principle, Anderson asserts, has become part of the “law of nations.” *Id.* at 526. Significantly, however, Anderson distinguishes the right to compensation for expropriation of property from situations involving the exercise of regulatory authority. *Id.* at 525.

considered “indirect” if the government acquired effective control and benefit of the foreign investment without actually seizing title. This was the case, for example, in the disputes addressed by the Iran-U.S. Claims tribunal in which the Iranian government appointed its own directors and executives to gain control of foreign owned companies.¹⁴⁴

B. Tribunal Decisions as Independent Sources of a Prohibition on Uncompensated Regulatory Expropriation?

It could also be argued that tribunal decisions—identified as a “subsidiary means for the determination of rules of law” under Article Thirty-Eight of the Statute of the International Court of Justice¹⁴⁵—support a right to compensation for regulatory takings.¹⁴⁶ Under this approach, foreign investors enjoy a right to

The right of a state to take or destroy private property under the so-called police powers of the state, in the regulation of the morals, health and safety of the community, presents a fundamentally different question from the confiscation of private property as a national policy, whether communistic, or anti-foreign, or merely for mercenary purposes, which is the only aspect of the question now under consideration.

Id. at 525.

¹⁴⁴ See *ITT Industries v. Iran*, 2 Iran-U.S. Cl. Trib. Rep. 348, 352 (1983) (stating that the Iranian government effectively expropriated the investment of a U.S. corporation within company by replacing members of board of directors); *Tippetts v. Iran*, 6 Iran-U.S. Cl. Trib. Rep. 219, 225-226 (1984) (finding that the Iranian government had indirectly expropriated the property of a U.S. company by appointing a new manager of its partnership with an Iranian firm).

¹⁴⁵ Article 38(1) states that the ICJ shall decide disputes in accordance with international conventions (treaties), customary law, general principles of law, and “judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.” Statute of the International Court of Justice, art. 38 ¶ 1, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993. The decisions of investment tribunals presumably fall within the scope of the “judicial decisions” referred to in Article 38. See *id.* Although the “teachings of the most highly qualified publicists” are accorded similar status as “subsidiary means” for determining international law and play a prominent role in arbitral jurisprudence, there appears to be less support for explicitly elevating them from “subsidiary means” for determining rules of law than there is for a similar promotion for arbitral awards. See Alvarez, *supra* note 10, at 45-46 (“In today’s world, states—and not merely fellow investor-state arbitrators—accord considerable more deference to the relevant decisions of supra-national dispute settlement bodies than they do to a law review article.”).

¹⁴⁶ See Alvarez, *supra* note 10, at 45 (arguing that “publicly available arbitral decisions, including those by investor-state arbitrators, are more than just ‘subsidiary

compensation for acts of regulatory expropriation largely because strong support for such a right can be found in the awards of investment tribunals.¹⁴⁷ From a legal realist perspective, this position is hard to dispute. Tribunals are vested with significant power to state what the relevant law is in investor-state disputes, including by articulating broad regulatory expropriation doctrines without regard to actual state practice (frequently citing only other tribunal awards and the writings of sympathetic commentators).¹⁴⁸

Tribunal awards, however, are generally viewed as only constituting evidence of international law, not as independent sources.¹⁴⁹ And to the extent that the decisions of tribunals assert that CIL contains rights that are not supported by state practice, they are of little evidentiary value.¹⁵⁰ Tribunals may enjoy the effective judicial *power* to “say what the [customary international]

means for the determination of rules of law”); Hirsch, *supra* note 10, at 27 (“An examination of decisions rendered by investment tribunals indicates that investment tribunals that pronounce various customary rules are inclined *not* to discuss the existence (or lack of) of the separate components of ‘practice’ and ‘*opinion juris*’, and that they frequently rely on decisions of international courts and tribunals . . .”).

¹⁴⁷ See Hirsch, *supra* note 10, at 18.

¹⁴⁸ *Id.* at 11-12.

¹⁴⁹ See *ILA Report*, *supra* note 10, part I § 2(viii) cmt.

[I]t is important . . . to distinguish between “formal” sources [of international law], which are those processes which, if they are observed, create rules of law (such as treaties and custom), and what Schwarzenberger called “law-determining agencies” (or, one might say more simply but more crudely, “evidential sources”). The latter are identified in Article 38(1)(d) of the Statute of the International Court of Justice as “judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

Id. See also *id.* Part II(B) § 10 (“Although international courts and tribunals ultimately derive their authority from States, it is not appropriate to regard their decisions as a form of State practice.”); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 rep. note 1 (1987) (“[T]he ‘judicial decisions and the teachings of the most highly qualified publicists of the various nations,’ mentioned in Article 38(1)(d) of the Statute of the Court. . . are not sources in the same sense because they are not ways in which law is made or accepted, but opinion-evidence as to whether some rule has in fact become or been accepted as international law.”).

¹⁵⁰ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103, cmt. a (1987) ([J]udicial and arbitral decisions and the writings of scholars constitute “secondary evidence. . . . [which] may be negated by primary evidence, for example, as to customary law, by proof as to what state practice is in fact.”).

law is”¹⁵¹ without regard to actual state practice, but this power, lacking any coherent and widely accepted theoretical basis, is not the same as the legitimate authority to do so.

C. Compensation for Regulatory Expropriation as a Treaty Obligation?

It could also be argued that even if IIAs cannot be used to demonstrate the existence of a CIL prohibition on uncompensated regulatory takings, they do establish such a right as a treaty obligation.¹⁵² Yet, as already noted, because IIAs typically do not explicitly state that regulatory measures adversely affecting the value of an investment constitute forms of indirect expropriation, proponents of this interpretation would need to rely on the decisions of tribunals to define the vague terms “indirect expropriation” and “fair and equitable treatment” in this manner.

Moreover, there is no indication that IIAs are intended to establish a treaty standard for indirect expropriation that confers greater rights on foreign investors than the standard under CIL.¹⁵³ To the contrary, some IIAs explicitly link the standard for expropriation to the CIL standard.¹⁵⁴

It is less clear whether the “fair and equitable treatment” component of the minimum standard of treatment—and specifically its interpretation to include a right to a “stable regulatory environment” that functions like a broad version of regulatory takings doctrine¹⁵⁵—is intended to expand upon customary international law. Some tribunals and commentators

¹⁵¹ *Cf. Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“[I]t is emphatically the duty of the Judicial Department to say what the law is.”).

¹⁵² *See Newcombe, supra* note 20, at 10-11 (citing W. M. Reisman and R.D. Sloane, *Indirect Expropriation and Its Valuation in the BIT Generation*, 74 BRIT. Y.B. INT'L L. 115 [2003]).

¹⁵³ *See id.* at 19.

¹⁵⁴ *See, e.g., Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uru., annex B, ¶ 1, Nov. 4, 2005, available at http://www.ustr.gov/sites/default/files/uploads/agreements/bit/asset_upload_file748_9005.pdf (The treaty’s expropriation article “is intended to reflect customary international law concerning the obligation of States with respect to expropriation.”); Free Trade Agreement, U.S.-Chile, annex 10-D, June 6, 2003, available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/ (follow “Investments” hyperlink).*

¹⁵⁵ *See supra* notes 26-29 and accompanying text.

have taken the position that “fair and equitable treatment” is intended to provide more expansive (or “additive”) protection beyond that which is provided for under CIL.¹⁵⁶ It does not appear, however, that any state has supported this approach.¹⁵⁷

Several countries, in fact, have explicitly rejected this view in their recent treaty practice, linking the minimum standard of treatment to the standard of protection under customary international law.¹⁵⁸ For example, the minimum standard of treatment article of the United States-Peru Trade Promotion Agreement indicates that it refers to the “customary international law minimum standard of treatment of aliens,” and further notes that “[t]he concept of ‘fair and equitable treatment’ . . . do[es] not require treatment in addition to or beyond that which is required by that standard, and do[es] not create additional substantive

¹⁵⁶ See generally Porterfield, *supra* note 29, at 89-90.

¹⁵⁷ See *Suez v. Argentine Republic*, ICSID Case No. ARB/03/19 ¶ 7, Separate Opinion of Arbitrator Pedro Nikken on the Decision on Liability (July 30, 2010), <http://italaw.com/documents/SuezVivendiAWGSeparateOpinion.pdf> (“[N]o . . . State has made any statement to the effect of giving fair and equitable treatment a meaning different from the international minimum standard (let alone linking it to the ‘legitimate expectations’ of investors and the stability of the legal environment for investment.)”).

¹⁵⁸ See Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, c. 11, art. 6(2)(c), Feb. 27, 2009, available at <http://www.dfat.gov.au/fta/aanzfta/chapters/chapter11.html#fr6> (“[T]he concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required under customary international law, and do not create additional substantive rights.”); Norway Draft Model Bilateral Investment Treaty, art. 5, 2007, available at <http://italaw.com/investmenttreaties.htm> (follow Norway 2007 Draft Model BIT link) (“Each Party shall accord to investors of the other Party, and their investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.”); Columbia Model Bilateral Investment Treaty, art. III (4) (a), 2007, available at http://italaw.com/documents/inv_model_bit_colombia.pdf (“The concept[] of ‘fair and equitable treatment’ . . . do[es] not require additional treatment to that required under the minimum standard of treatment of aliens in accordance with the standard of customary international law.”); Canada Model Bilateral Investment Treaty, art. 5.2, 2004, available at <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf> (“The concept... of “fair and equitable treatment” . . . do[es] not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.”); U.S. Model Bilateral Investment Treaty, art. 5.2, 2004, available at <http://www.ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf> (The concept... of “fair and equitable treatment” . . . do[es] not require treatment in addition to or beyond that which is required by [customary international law], and do[es] not create additional substantive rights”).

rights.”¹⁵⁹ Accordingly, at least with regard to IIAs that explicitly tie fair and equitable treatment to the customary international law standard of protection, there does not appear to be a basis for an international right—as a matter of either CIL or treaty law—to compensation for regulatory measures based solely on their adverse effects on the value of foreign investments.

V. Conclusion

The use of investor-state arbitration procedures under IIAs has accelerated dramatically: over half of known IIA arbitration cases have been filed within the last 5 years.¹⁶⁰ It seems likely that this increase in investor-state arbitration will bring increased scrutiny of the premise that IIAs—through both indirect expropriation and fair and equitable treatment provisions—entitle foreign investors to compensation for regulatory measures that have some requisite level of adverse impact on their investments. The argument that this standard of protection under IIAs merely reflects CIL growing out of the general and consistent practice of states is not supported by an examination of the actual practice of states with regard to the protection of property from regulatory expropriations. There is no general and consistent practice on this issue even among capital exporting states that presumably share a strong interest in robust standards of investor protection. Even those states that do recognize a right to compensation for regulatory takings in their domestic law tend to limit the right’s application to certain types of land use regulations.

Given the difficulty of demonstrating that foreign investors enjoy a right to compensation for “regulatory expropriations” as a matter of CIL, it seems likely that proponents of such a right increasingly will attempt to establish its existence based on

¹⁵⁹ Trade Protection Agreement, U.S.-Peru, Annex 10-B, Apr. 12, 2006, art. 10.5(2); see also U.S. Model Bilateral Investment Treaty, *supra* note 158, at Annex A (“[C]ustomary international law’ . . . results from a general and consistent practice of States that they follow from a sense of legal obligation.”). This policy dates back to 2001, when the United States, Canada and Mexico adopted an interpretive statement clarifying that NAFTA’s minimum standard of treatment provision was intended to reflect the CIL standard of protection. See Porterfield, *supra* note 29, at 91.

¹⁶⁰ See U.N. Conference on Trade and Development, Latest Developments in Investor-State Dispute Settlement, IIA Issues Note No. 1, U.N. Doc. UNCTAD/WEB/DIAE/IA/2010/3 (2010), available at http://www.unctad.org/en/docs/webdiaeia20103_en.pdf.

alternative theories, delinking the relevant provisions of IIAs from CIL, relying on them as a source of state practice, or elevating the status of tribunal decisions to independent sources of international law. Each of these approaches would require acceptance of a significant role for arbitral tribunals not only in applying international standards of investor protection but also in creating and defining those standards. Whether such a role for tribunals will be politically acceptable within the parties to IIAs remains to be seen.

