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1. Introduction

In the Fourth Intersessional Meeting on Investor-State Dispute Settlement ('ISDS') Reform organised by the Republic of Korea on 2–3 September 2021, some states took the floor and expressed their concern about the perceived inadequate protection of the right to regulate in the international investment law regime. Strictly speaking, the right to regulate is a substantive standard and does not directly relate to investment treaties' dispute settlement clauses. However, the intersessional meeting discussion included this topic in order to provide the UNCITRAL Secretariat with guidance for prospective working papers that it may prepare with a view to addressing it as a standalone topic in a regular session. In this context, the Academic Forum undertook the commitment to provide a short concept paper outlining the core issues arising in relation to the right to regulate and explaining the principal policy options states have in this context when drafting their investment treaties. This concept paper will address the definition or definitions of the right to regulate in the context of international investment law, recent IIA practice concerning the right to regulate, and investment tribunal interpretations of the right to regulate.

2. Defining the Right to Regulate in the Context of International Investment Law

Discussions in the context of UNCITRAL WGIII reform efforts have revealed that different states may have different understandings about the contours and definition of the right to regulate in international investment law. Such different understandings reflect the legal literature on the topic and impact expectations concerning how the right should operate and the extent to which it is sufficiently incorporated in investment treaties. An important discrepancy between competing understandings of the right to regulate has to do with whether it is equated

with the general freedom of states under international law to regulate within their borders,[1] or whether it is discussed as something apart from this general regulatory freedom that states uncontestably have.[2] If the term 'right to regulate' simply refers to states' general regulatory freedom, then it needs no incorporation in treaty text. States can engage in legislation and other regulation as they see fit. It has been argued that it is precisely this general regulatory freedom of states that allows them to enter into binding international investment agreements ('IIAs'), thus voluntarily limiting their general regulatory freedom.[3] Nevertheless, this general regulatory freedom tells us little about the need to compensate foreign investors whose rights under an investment treaty have been violated. While it is clear that states always have the right to regulate activity within their borders under public international law, the consequences of regulatory activity in light of a state's international legal commitments under IIAs are not always evident. This particularly concerns the extent to which host states may regulate without incurring a duty to compensate adversely affected investors and it is precisely this issue that is often the narrower focus of debates concerning the right to regulate in the context of international investment law.

Defining the right to regulate in this narrower context, the general regulatory freedom of states is not contested. Instead, questions concerning the right to regulate aim to address situations where states have undertaken commitments vis-à-vis foreign investors via IIAs in order to resolve whether there exists a duty to compensate investors adversely impacted by regulatory activity. This frame of reference is the focus of this concept paper. Thus, one definition of the right to regulate in this context is that it consists of 'the legal right exceptionally permitting the host state to regulate in derogation of international commitments it has undertaken by means of an investment agreement without incurring a duty to compensate'.[4] This definition identifies

[1] *See, e.g.*, Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration* (Cambridge University Press 2015) *passim*, referring broadly to 'the right to regulate at *international law*'.
[2] *E.g.,* Catharine Titi, *The Right to Regulate in International Investment Law (Revisited)* (open access, International and Comparative Law Research Center 2022) 18-19; Catharine Titi, *The Right to Regulate in International Investment Law* (Nomos and Hart 2014) 32-33. Yulia Levashova, *The Right of States to Regulate in International Investment Law: The Search for Balance Between Public Interest and Fair and Equitable Treatment* (Wolters Kluwer 2019) 25, 26.
[3] States limit this freedom all of the time, e.g., by undertaking to reduce greenhouse gas emissions, signing double taxation treaties, etc., Catharine Titi, *The Right to Regulate in International Investment Law (Revisited)* (open access, International and Comparative Law Research Center 2022) 19; Yulia Levashova, *The Right of States to Regulate in International Investment Law: The Search for Balance Between Public Interest and Fair and Equitable Treatment* (Wolters Kluwer 2019) 25, 26; Yves Nouvel, 'Les mesures équivalant à une expropriation dans la pratique récente des tribunaux arbitraux' (2002) 106 Revue générale de droit international public 1.
[4] Catharine Titi, *The Right to Regulate in International Investment Law* (Nomos and Hart 2014) 33.

two aspects of the right to regulate as important: it is a legal (as opposed to a legitimate) right and it means that, where it exists, there is no duty to compensate foreign investors.[5] Another definition considers the right to regulate from a human rights' perspective and describes it as the 'affirmation of the sovereign right for states to choose their political, social and economic priorities – within certain limits – through the adoption of legislation and administrative practices without violating international rules protecting foreign investments'.[6] It is this frontier between a state's general regulatory powers and the constraints placed upon such powers by IIA commitments that generates significant debate.

A question closely related to the definition of the right to regulate is which host state interests are subject to the right to regulate. The right to regulate is closely linked to a variety of public interest objectives such as the environment, labour, public health, human rights, climate change, the protection of public order, essential security interests, and cultural diversity. Perspectives may differ between states regarding which public interests are covered by the right to regulate beyond these common examples (i.e., some additional public welfare objectives may be perceived as reflecting the interests of the so-called 'developing' world).[7] Should certain regulatory interests be of greater importance to some states than to others, the best approach to safeguard them is to expressly include them in IIAs. By way of a recent example, the 2021 Canadian Model BIT affirms the parties' right to regulate to achieve legitimate policy objectives, and expressly includes in these objectives the 'rights of Indigenous peoples' and gender parity.[8] The question of which interests are covered by the right to regulate in the IIA is often moot, in the sense that the IIA identifies the interests in question.

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[5] *See* also William W Burke-White and Andreas von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' (2008) 48 Virginia Journal of International Law 307, 388; *cf* Charalampos Giannakopoulos, 'The Right to Regulate in International Investment Law and the Law of State Responsibility: a Hohfeldian Approach', in Photini Pazartzis and Panos Merkouris (eds), *Permutations of Responsibility in International Law* (Brill 2019).

[6] Lone Wandahl Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective* (Routledge 2016) 8.

[7] Such opinions were expressed in UNCITRAL WGIII during the Fourth Intersessional Meeting on Investor-State Dispute Settlement Reform, organized by the Republic of Korea on 2-3 September 2021, e.g., the example of post-apartheid regulation in South Africa.

[8] Canadian Model BIT (2021) Art. 3.

3. Recent IIA Practice and the Right to Regulate

The principal means by which states can safeguard the right to regulate is by incorporating express treaty language to that effect in their IIAs. Accordingly, states have been increasingly incorporating the right to regulate in their IIAs. To do so, states have followed various approaches, often used in combination, including incorporating exceptions clauses, including exceptions on essential security interests, inserting the right in a treaty's preamble, drafting standalone clauses that expressly refer to the right, and clauses preserving state police powers. Each of these approaches will be briefly addressed below. The section will also consider in passing the so-called 'declaratory' right to regulate.

3.1. Exceptions Clauses

The right to regulate is primarily safeguarded in IIAs through the use of exceptions clauses.[9] These clauses can be either standard specific (e.g., applicable to a given treaty standard, such as the prohibition of performance requirements)[10] or general exceptions applicable to the entire treaty. It is often the latter type of exception that has a broader impact on preserving the right to regulate, for it concerns all investment protection standards.

General exceptions clauses are common in IIA practice, and usually take one of two forms. The first type of, loosely modelled on GATT Art. XX and GATS Art. XIV, is often (although not always) subject to a chapeau requiring that any measures subject to the exception do not constitute a disguised restriction on investment, and are applied in a good-faith, non-discriminatory manner. These clauses are typically designed to preserve regulatory space for

[9] Catharine Titi, *The Right to Regulate in International Investment Law* (Nomos and Hart 2014); Yulia Levashova, *The Right of States to Regulate in International Investment Law: The Search for Balance Between Public Interest and Fair and Equitable Treatment* (Wolters Kluwer 2019) 27; Catharine Titi, *The Right to Regulate in International Investment Law (Revisited)* (open access, International and Comparative Law Research Center 2022) 40. *See* also William W Burke-White and Andreas von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' (2008) 48 Virginia Journal of International Law 307.

[10] *E.g.*, China-France BIT (2007) Art. 4; *See also* USMCA (2018) Art. 14.10(3)(c) relating to the prohibition of performance requirements stating: '[p]rovided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment' the prohibition of specific performance requirements identified in the article will not be interpreted so as to prevent a party from taking measures, *inter alia*, 'necessary to protect human, animal or plant life or health' or 'related to the conservation of living or non-living exhaustible natural resources.' An additional example includes introduction of a mitigated form of police powers doctrine related to indirect expropriation. *E.g.*, CETA (2016) Annex 8-A(2); Australia-Uruguay BIT (2019) Annex B(3)(b); Indonesia-Singapore BIT (2018) Annex II; Canada-Colombia FTA (2008) Annex 811(2)(b).

public interests such as, *inter alia*, the protection of human, animal or plant life or health, protecting public order, and the conservation of exhaustible natural resources.[11] An interesting example is found in the Colombian Model BIT of 2017, which provides in an unnumbered article:

> 'Provided that such Measures are not applied in a manner that would constitute means of arbitrary and discriminatory treatment against a Covered Investor or Investment, nothing in this Agreement shall preclude a Contracting Party from adopting, maintaining or enforcing Measures that such Contracting Party deems necessary for:
>
> a. protecting human rights;
>
> b. protecting human, animal or vegetable life and health;
>
> c. protecting the environment;
>
> d. preserving and protecting natural resources;
>
> e. protecting consumer rights; …'

This clause is unusual in that the exception is drafted as 'self-judging', providing exceptions in the outlined policy areas for 'measures that the state deems necessary'. This allows the state broad discretion to decide or judge whether an exception applies.[12] To the contrary, the typical GATT/GATS-style general exceptions clause is not self-judging, but instead provides exceptions in situations whereby states enact 'measures necessary for' identified policy areas, leaving room for debate concerning whether an at-issue measure is in fact necessary.

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[11] Recent examples include, *inter alia*, *e.g.*, Bahrain-Japan BIT (2022) Art. 18; Indonesia-Switzerland BIT (2022) Art. 41; Mauritius-India Comprehensive Economic and Partnership Agreement ('CECPA') (2021) Art. 6.20; China-EU Comprehensive Agreement on Investment ('CAI') (2021) Art. 4; RCEP (2020) Art. 17.12; Israel-UAE BIT (2020) Art. 14; Brazil-India CFIA (2020) Art. 23; Japan-Morocco BIT (2020) Art. 21; India-Kyrgyz Republic BIT (2019) Art 32.1; Armenia-Singapore Agreement on Trade in Services and Investment ('ATSI') (2019) Art. 3.26; Myanmar-Singapore BIT (2019) Art. 29; Australia-Hong Kong Investment Agreement (2019) Art. 18; Australia-Uruguay BIT (2019) Art. 15.1; Burkina Faso-Turkey BIT (2019) Art. 5.1; Korea-Uzbekistan BIT (2019) Art. 17.1; EU-Vietnam IPA (2019) Art. 4.6; Argentina-Japan BIT (2018) Art. 15; Japan-Jordan BIT (2018) Art. 15.1; CETA (2016) Art. 28.3.

[12] William W Burke-White and Andreas von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' (2008) 48 Virginia Journal of International Law 307, 370ff; Jürgen Kurtz, 'Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis' (2010) 59 International & Comparative Law Quarterly 325.

The second, more common type of general exceptions clause concerns essential security interests (and the maintenance of international peace and security), and is not subject to a chapeau.[13] Security interests have been broadly interpreted to include not only military, terrorism and other similar threats, but also economic, environmental and health crises.[14] These clauses are typically designed to permit host states to take measures required to deal with crisis or emergency situations, and are often self-judging.[15] For example, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ('CPTPP') provides:

> 'Nothing in this Agreement shall be construed to:
>
> (a) require a Party to furnish or allow access to any information the disclosure of *which it determines* to be contrary to its essential security interests; or
>
> (b) preclude a Party from applying measures *that it considers necessary* for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.' (*emphasis* added)[16]

This self-judging language provides states with significant latitude to determine when such exceptions apply.

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[13] Recent examples include, e.g., Bahrain-Japan BIT (2022) Art. 18(2); India-Mauritius CECPA (2022) Art. 6.21; Georgia-Japan BIT (2021) Art. 15(2); China-EU CAI (2021) Art. 10; RCEP (2020) Art. 10.15; Israel-UAE BIT (2020) Art. 14(4); Brazil-India CFIA (2020) Art. 24, Annex I; Japan-Morocco BIT (2020) Art. 21(2); China-Mauritius FTA (2019) Art. 8.18; Armenia-Singapore ATSI (2019) Art. 6.8; Brazil-Ecuador CFIA (2019) Art. 13; Belarus-Uzbekistan BIT (2019) Art. 7(2); EU-Vietnam IPA (2019) Art. 9.3(1); Hungary-Cabo Verde BIT (2019) Art. 15(3); Hungary-Belarus BIT (2019) Art. 16(3); CARIFORUM States Economic Partnership Agreement (2019) Art. 225; India-Kyrgyzstan BIT (2019) Art. 33; Korea-Uzbekistan BIT (2019) Art. Art. 17; Iraq-Saudi Arabia BIT (2019) Art. 22; Australia-Uruguay BIT (2019) Art. 15(2); EU-Singapore IPA (2018) Art. 4.5; Japan-Argentina BIT (2018) Art. 16; EFTA-Indonesia Comprehensive Economic Partnership Agreement (2018) Art. 4.12; CETA (2016) Art. 28.6.

[14] UNCTAD, 'The Protection of National Security in IIAs' (2009) UNCTAD Series on International Investment Policies for Development 7ff.

[15] *E.g.*, RCEP (2020) takes a common approach to giving state parties discretion in determining when their own security interests are implicated in Art. 10.15(b) stating: '…nothing in this Chapter shall be construed to… preclude a Party from applying measures that *it* considers necessary for: (i) the fulfilment of *its* obligations with respect to the maintenance or restoration of international peace or security; or (ii) the protection of *its* own essential security interests.' (*emphasis* added)

[16] Trans-Pacific Partnership (TPP) art 29.2 as incorporated in the CPTPP.

3.2.Preamble References to the Right to Regulate

Many IIAs, particularly in recent years, use preamble language in an attempt to preserve the right to regulate by expressly referring to the right to regulate and/or regulatory interests.[17] Preamble language does not create independent rights for states, however it can be important in preserving regulatory flexibility, since a preamble reveals an IIA's object and purpose, and therefore it can have an important impact on treaty interpretation.[18] While tribunals may face difficulties in balancing preambular language preserving the right to regulate with competing language related to investment protection,[19] the value of the preamble as a tool for the interpretation of the IIA should not be ignored.

3.3.Standalone Clauses Expressly Preserving the Right to Regulate

Alongside referencing the right to regulate or regulatory interests in IIA preambles, states are increasingly drafting treaty language which expressly states that the parties safeguard their right to regulate. An example of this type of clause can be found in the EU-Canada Comprehensive Economic and Trade Agreement ('CETA'), which stipulates that 'the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or

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[17] *See, e..g.,* New Zealand-United Kingdom Free Trade Agreement ('FTA') (2022) '[r]ecognising the Parties' respective autonomy and right to regulate within their territories in order to achieve legitimate public policy objectives…'; Colombia-Spain Bilateral Investment Treaty ('BIT') '[r]eaffirming the right of each Contracting Party to regulate investments made in its Territory to meet legitimate public welfare objectives'; Brazil-India Cooperation and Facilitation Investment Agreement ('CFIA') (2020) affirming 'the right of Parties to regulate investments in their territory in accordance with their law and policy objectives'; The Regional Comprehensive Economic Partnership ('RCEP') (2020) '[r]eaffirming the right of each Party to regulate in pursuit of legitimate public welfare objectives'; Brazil-UAE CFIA (2019) establishing that the parties affirm 'their regulatory autonomy and policy space'; United States-Mexico-Canada Agreement ('USMCA') (2018) recognizing an 'inherent right to regulate' and resolving 'to preserve the flexibility of the Parties to set legislative and regulatory priorities…'; 'Intra-MERCOSUR Cooperation and Facilitation Investment Protocol (2017) 'guaranteeing the inherent right of the State Parties to regulate their public policies'. Additional recent examples of similar preambular language can be found in agreements including, but not limited to, Japan-Morocco BIT (2020); Myanmar-Singapore BIT (2019); China-Mauritius FTA (2019); Australia-Uruguay BIT (2019); Australia-Hong Kong BIT (2019); Hong Kong-UAE BIT (2019); EU-Singapore Investment Protection Agreement ('IPA') (2018); Australia-Peru (2018) FTA; CETA (2016).

[18] *See* Vienna Convention on the Law of Treaties, (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 31.

[19] *See, e.g., Eco Oro Minerals Corp* v. *Republic of Colombia,* ICSID ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, para 748. The Tribunal's analysis was based on relevant language in the preamble stating that the purpose of the IIA (Canada-Colombia FTA) was, *inter alia*, to 'ensure a predictable commercial framework for business planning and investment' and 'enhance and enforce environmental laws and regulations, and to strengthen cooperation on environmental matters'. The Tribunal found that 'neither investment protection nor environmental protection takes precedence' and that a complex series of regulatory action prohibiting mining in high-altitude Colombian páramo ecosystems breached the IIA.

consumer protection or the promotion and protection of cultural diversity'.[20] The CETA clause continues: 'the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation'.[21] Versions of the above-cited CETA clause continue to find expression in recent treaties,[22] although various IIAs limit this language to the first part of the aforementioned language.[23]

3.4.Clauses Incorporating Police Powers in IIAs

The right to regulate is inherently linked to the state police powers doctrine,[24] which refers to the state's authority to exercise sovereign powers related to public policy, including issues such as public health, the environment, the maintenance of public order, and taxation.[25] The police powers doctrine has also appeared in recent IIAs, typically through clauses which, although they may not directly mention police powers, nonetheless establish a presumption in favour of applying the doctrine, often subject to the qualifier 'except in rare circumstances'.[26] Nevertheless, these clauses seemingly seek balance by attempting to preserve police powers while at the same time providing investment protection in the traditional sense. Such clauses generally state that any non-discriminatory measures designed and applied to protect public interest objectives such as public health, safety and the environment do not constitute indirect expropriation. At the same time, while the scope of state police powers is not precisely defined,

[20] CETA (2016) Art 8.9(1).
[21] CETA (2016) Art 8.9(2).
[22] *See, e.g.*, Indonesia-Switzerland BIT (2022) Art. 12; Colombia-Spain BIT (2021) Art. 14; Hungary-Kyrgyzstan BIT (2020) Art. 3; Hungary-Cabo Verde BIT (2019) Art. 3; Belarus-Hungary (2019) Art. 3; EU-Singapore IPA (2018) Art. 2.2; Lithuania-Turkey BIT (2018) Art. 3; Argentina-Chile FTA (2017) Arts. 8.2(4), 8.4; *see also* Canadian Model BIT (2021) Art 3.
[23] *See, e.g.* Hong-Kong-Mexico BIT (2020) Art. 12; Argentina-UAE BIT (2018) Art 11; Rwanda-UAE (2017) BIT Art. 9; Art. 10; Brazil-Chile FTA (2018) Arts.16.3 (labour), 17.2 (environment), etc.; Argentina-Qatar BIT (2016)
[24] Alain Pellet, 'Police Powers or the State's Right to Regulate' in Meg Kinnear and others (eds) *Building International Investment Law – The First 50 Years of ICSID* (Kluwer Law International 2016) 447.
[25] Catharine Titi, 'Police Powers Doctrine and International Investment Law' in Andrea Gattini, Attila Tanzi and Filippo Fontanelli (eds), *General Principles of Law and International Investment Arbitration* (Brill Nijhoff 2018) 324.
[26] *See, e.g.*, Indonesia-Switzerland BIT (2022) Annex A; Colombia-Spain BIT (2021) Art. 11(5); Hong Kong-Mexico BIT (2020) Annex to Art. 7; Japan-Morocco BIT (2019) Annex; China-Mauritius FTA (2019) Annex 8-B; EU-Vietnam IPA (2019) Annex 4; Australia-Indonesia Comprehensive Economic Partnership Agreement ('CEPA') (2019) Annex 14-B; Australia-Hong Kong Investment Agreement (2019) Annex II; Australia-Uruguay BIT (2019) Annex B; Cabo Verde- Hungary BIT (2019) Art. 6; Belarus-Hungary BIT (2019) Art. 6; Burkina Faso-Turkey BIT (2019) Art. 6.2; Korea- Uzbekistan BIT (2019) Annex I Art. 3.b; EU-Singapore IPA (2018) Annex 1;CPTPP (2018) Annex 9-B; USMCA (2018) Annex 14-B; Japan-Argentina BIT (2018) Art. 11.3.b; CETA (2016) Annex 8-A.

they are not unlimited. Instead, it is generally accepted that a valid exercise of police powers must be reasonable, in good faith, and nondiscriminatory. Thus, where a tribunal is satisfied that a regulatory measure is a legitimate exercise of a state's police powers, such a clause would result in the finding that no indirect expropriation has taken place and therefore no compensation is owed to an investor,[27] notwithstanding the potential for host state liability based on other legal claims.[28] In general, arbitral jurisprudence in recent years has also engaged in attempts to balance the interests involved in such disputes (a 'mitigated' application of police powers) taking into consideration the concept of proportionality.[29]

3.5.Clauses Establishing a Declaratory Right to Regulate

Some IIAs contain provisions that are entitled 'right to regulate' containing language such as:

> 'Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns'.[30]

Language of this nature appears in a variety of IIAs.[31] At the same time, such clauses are often limited to state measures specifically adopted to ensure that investment activity is taken in a manner sensitive to particular interests and they are drafted with the qualification that the measures at issue be consistent with the IIA. Yet the host state does not bear responsibility or financial liability for measures that are consistent with the IIA, so this type of provision shows that the state is sensitive to, *e.g.*, environmental concerns, but does not concretely offer the

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[27] *See, e.g.*, *Saluka Investments B.V.* v. *The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para 255; *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft* v. *Argentine Republic*, ICSID Case No ARB/14/32, Award, 5 November 2021, para 332.
[28] *Eco Oro Minerals Corp v. Republic of Colombia,* ICSID ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, para 626.
[29] *E.g.*, *Técnicas Medioambientales Tecmed SA* v. *Mexico*, ICSID Case No. ARB (AF)/00/2 Award, 29 May 2003, para 122; *Burlington Resources Inc.* v. *Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, para 504; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Uruguay* (Award, 8 July 2016) ICSID Case No. ARB/10/7, *passim*.
[30] Canada-Costa Rica BIT (1998) annex I(III).
[31] *See* Australia-UK FTA (2021) Art. 13.17; Brazil-India CFIA (2020) Arts 3 and 22; Australia-Hong Kong BIT (2019) Art. 15; Australia-Indonesia CEPA (2019) Art. 14.16; USMCA (2018) Art. 14.16; CPTPP (2018) Art. 9.16; Central America – Korea FTA (2018) Art. 9.11; Australia-Peru FTA (2018) Art. 8.16; Pacific Agreement on Closer Economic Relations (2017) Art. 19; Belarus-Georgia BIT (2017) Art. 11; Morocco-Nigeria (BIT) Art. 13; Chile-Hong Kong Investment Agreement (2016) Art. 15; Korea-New Zealand FTA (2015) Art. 10.13; Canada-Romania BIT (2009) Art. XVII; Rwanda-US BIT (2008) Art. 12; Norwegian Model BIT (2015) Art. 12.

state any freedom it does not already have, that is, the freedom to take measures consistent with the IIA. For this reason, some authors do not consider that this type of provision offers a genuine right to regulate, and it has been dubbed a 'declaratory' right to regulate.[32] Moreover, IIAs also commonly have provisions that lay out the states' obligation not to relax domestic environmental, labour, and other standards.[33] While such clauses may be meaningful in their own right, they should not be confused with clauses preserving a right to regulate, since they impose obligations on states, rather than create rights.

4. Investment Tribunal Interpretations and Questions of Balance

Some authors have suggested that it is not necessary to include the right to regulate in treaties,[34] while others take the view that unless expressly incorporated in the treaty text, there is no guarantee that the right to regulate will be respected, and sometimes even then it is not always taken into account.[35] More recently, it has been suggested that the reason for this might be that in guaranteeing the right to regulate, some treaties go so far that they may be perceived to negate investment protections and as a result tribunals may have trouble giving effect to the right to regulate.[36] That said, certain tribunals have taken the state's right to regulate into consideration in cases where the applicable investment treaty did not contain a relevant, express provision concerning the right to regulate.[37] In other cases, tribunals have appeared to

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[32] Lars Markert, 'The Crucial Question of Future Investment Treaties: Balancing Investors' Rights and Regulatory Interests of Host States', in Marc Bungenberg, Jörn Griebel and Steffen Hindelang (eds), *European Yearbook of International Economic Law 2011, Special Issue: International Investment Law and EU Law* (Springer 2011) 150; Catharine Titi, *The Right to Regulate in International Investment Law* (Nomos and Hart 2014) 111-115; Sabrina Robert-Cuendet, *Droits de l'investisseur étranger et protection de l'environnement* (Martinus Nijhoff 2010)160; Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties* (Kluwer Law International 2009) 509.

[33] The extent of the obligation can vary from states simply recognizing that it is inappropriate to lower standards, to binding commitments stating that states shall not lower standards. Recent examples include Bahrain-Japan BIT (2022) Art. 24; Colombia-Spain BIT (2022) Art. 16; EU-Organisation of African, Caribbean and Pacific States Partnership Agreement (2021) Art. 49; Georgia-Japan BIT (2021) Art. 20; Moldova, Republic of - United Kingdom Strategic Partnership, Trade and Cooperation Agreement (2020) Art. 338; Japan-UK CEPA (2020) Art. 16.2; Hungary-Kyrgyzstan BIT (2020) Art. 2.7; Brazil-India BIT (2020) Art. 22.2; Japan-Morocco BIT (2020) Art. 19.

[34] *E.g.* Andrew Newcombe, 'General Exceptions in International Investment Agreements', in M.-C. Cordonier Segger, M. W. Gehring and A. Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2011) 357; José E. Alvarez, *The Public International Law Regime Governing International Investment* (Hague Academy of International Law 2011) 221-222, 322ff.

[35] *E.g.* Catharine Titi, *The Right to Regulate in International Investment Law* (Nomos and Hart 2014) 275-297.

[36] Catharine Titi, *The Right to Regulate in International Investment Law (Revisited)* (open access, International and Comparative Law Research Center 2022) 58-63.

[37] *E.g.*, the *Philip Morris v. Uruguay* Tribunal considered the host-state's police powers even though it was interpreting an old generation BIT which was silent on the issue. The Tribunal stated that police powers reflect general international law and new treaties are incorporating police power provisions out of an abundance of

disregard or have narrowly interpreted expressly drafted exceptions.[38] Ultimately, the case law seemingly indicates that in practice, the deference afforded a state in regulatory disputes, at least absent express provisions in the IIA, is at the interpretative discretion of a given tribunal.[39] If a state intends to safeguard the right to regulate, express language in treaty practice should allow for its greater preservation. Two important considerations in a reform context appear pertinent here. The first concerns the actual drafting of investment treaties. While a treaty that does not incorporate the right to regulate may be inadequate, a treaty that goes to extremes, trying to shield every possible kind of state measure from ever constituting a treaty violation, may prove just as inadequate. A balanced treaty may prove to be essential when it comes to guaranteeing the right to regulate. Second, more than once, failure to give effect to the right to regulate, especially in the presence of a specifically-drafted treaty clause concerning the right to regulate, was the result of faulty treaty interpretation that did not follow the interpretation rule of the Vienna Convention on the Law of Treaties of 1969.[40] In this respect, the choice of adjudicators with a public international law background may be crucial, thus indicating that despite being a substantive concern of international investment law, interpretation of the right to regulate can be impacted by the procedural mechanisms it is subjected to in IIA practice.

The international investment law regime continues to evolve in search of balance.[41] A possible example concerns the interpretation of the police powers doctrine by arbitral tribunals. Arbitral approaches to the police powers doctrine have evolved alongside the investment law regime. Various cases in the 1990s and early 2000s initially chipped away at state police powers.[42]

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caution (*ex abundanti cautela*). *Philip Morris Brans Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A.* v. *Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, para. 301.

[38] Howard Mann, 'Reconceptualizing International Investment Law: Its Role in Sustainable Development' (2013) 17 Lewis & Clark Law Review 521, 540; Catharine Titi, *The Right to Regulate in International Investment Law (Revisited)* (open access, International and Comparative Law Research Center 2022) 58-63. E.g., *Bear Creek Mining Corporation v. Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 [471]-[478].

[39] *See* Lars Markert, 'The Crucial Question of Future Investment Treaties: Balancing Investors' Rights and Regulatory Interests of Host States', in Marc Bungenberg, Jörn Griebel and Steffen Hindelang (eds), *European Yearbook of International Economic Law 2011, Special Issue: International Investment Law and EU Law* (Springer 2011) 158.

[40] E.g., see the criticism of the *CMS* award in *CMS Gas Transmission Company* v. *Argentina*, ICSID Case No. ARB/01/8, Annulment decision, 8 September 2005.

[41] *See e.g.* David Gaukrodger, 'The Balance between Investor Protection and the Right to Regulate in Investment Treaties: A Scoping Paper' (2017) OECD Working Papers on International Investment, No. 2017/02.

[42] *See, e.g., Biloune, et al.* v. *Ghana Investment Centre*, et al., 95 I.L.R.183, 207-10 (1993), paras 207-210; *Metalclad* v. *Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, paras 77, 103, 111; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A.* v. *Republic of Argentina*, ICSID Case No. ARB/97/3, Award in Resubmitted Proceeding, 20 August 2007, paras 7.5.20, 7.5.21; *Pope & Talbot* v. *Canada*, UNCITRAL, Interim Award, 26 June 2000, para 100.

During this period, the 'sole effects doctrine' emerged as a tool for determining whether indirect expropriation occurred in cases involving regulatory takings. This doctrine focused on the effect of a challenged public interest measure on an investment in determining whether compensation was due to an aggrieved investor, in essence ignoring a state's intent in adopting a challenged measure, even if in the public interest.[43] However, this approach was never uniformly adopted, as the fragmented and ad hoc nature of the ISDS mechanism saw other cases of the era rule that regulatory takings need not be compensated, particularly in an environmental context.[44] More recently, a middle way appears to be emerging. Various tribunals have engaged in some form of proportionality analysis by balancing the interests involved in a particular dispute,[45] which may be perceived as a return of the police powers doctrine in a mitigated form. Such an approach recognizes investment as an important element of tackling global concerns, but also expressly reserves regulatory policy space.

5. Conclusions

This concept paper has considered the right to regulate in the context of international investment law. It has commented on the debate surrounding the definition of the concept and it has considered recent IIA practice on the right to regulate. In that context, the paper focused in particular on treaty exceptions, the inclusion of the right to regulate in the preamble, references to it in the body of the treaty, the police powers doctrine, and it briefly discussed the so-called 'declaratory' right to regulate, which it argued does not genuinely safeguard the states' right to regulate. The concept paper closed with some brief reflections on the interpretation of IIAs by investment tribunals.

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[43] OECD, '"Indirect Expropriation" and the "Right to Regulate" in International Investment Law', vol 2004/04 (2004) OECD Working Papers on International Investment 2004/04, 15; *see also Compania del Desarrollo de Santa Elena SA* v. *Costa Rica*, ICSID Case No. ARB/96/1, Award, 8 June 2000, para 77; *Biloune, et al.* v. *Ghana Investment Centre*, et al., 95 I.L.R.183, 207-10 (1993), paras 207–210; *Metalclad* v. *Mexico*, ICSID Case No. ARB(AF)/97/1, Award , 30 August 2000), paras 77, 103, 111; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A.* v. *Republic of Argentina*, ICSID Case No. ARB/97/3, Award in Resubmitted Proceeding, 20 August 2007, paras 7.5.20, 7.5.21; *Spyridon Roussalis* v. *Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011, para 328; *Pope & Talbot* v. *Canada*, UNCITRAL, Interim Award, 26 June 2000, para 100; *Azurix* v. *Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, paras 308 et seq.

[44] *E.g.*, *Methanex Corporation* v. *United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV, Chapter D, page 4, para 7.

[45] *See, e.g.*, *Tecmed* v. *Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para 122; *Saluka Investments B.V.* v. *The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para 262; *Burlington Resources Inc.* v. *Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, para 504; *Philip Morris* v. *Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, *passim*. *See* also Ursula Kriebaum, 'Regulatory Takings: Balancing the Interests of the Investor and the State' (2007) 8 Journal of World Investment & Trade 717.

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