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на тему: **«ДОКТРИНА «POLICE POWERS» В ІНВЕСТИЦІЙНИХ СПРАВАХ ІНВЕСТОР-ДЕРЖАВА»**

«The Police Powers Doctrine In The Investor-State Investment Disputes»

англійською мовою

Виконала: студентка 2-го року навчання,

Спеціальності

081 Право

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Декларація доброчесності

Я, Іванців Софія Романівна, студентка 2 року навчання факультету правничих наук, спеціальність «081 Право», адреса електронної пошти s.ivantsiv@ukma.edu.ua:

– підтверджую, що написана мною кваліфікаційна/магістерська робота на тему «Доктрина «police powers» в інвестиційних справах інвестор-держава» відповідає вимогам академічної доброчесності та не містить порушень, передбачених пунктами 3.1.1-3.1.6 Положення про академічну доброчесність здобувачів НаУКМА від 07.03.2018 року, зі змістом якого ознайомлена;

– підтверджую, що надана мною електронна версія роботи є остаточною і готовою до перевірки;

– згодна на перевірку моєї роботи на відповідність критеріям академічної доброчесності, у будь-який спосіб, у тому числі порівняння змісту роботи та формування звіту подібності за допомогою електронної системи;

– даю згоду на архівування моєї роботи в репозиторіях та базах даних університету для порівняння цієї та майбутніх робіт.

01.05.2026р.	____________	Іванців С.Р.
Дата	*Підпис*	*Прізвище, ініціали*

CONTENTS

INTRODUCTION

Relevance of the research topic. The investor-state dispute resolution is constantly evolving and gaining its importance simultaneously with the development of the global economy and the popularisation of investments. States obviously benefit a lot from the investments and make great efforts to welcome investors by adopting investor-friendly regulations. When signing international investment treaties, the state undertakes the obligation to provide a healthy environment for the investors to conduct their business. The controversy stems from the concept of the state's sovereignty: by undertaking special obligations, the state retains its general authority to adopt measures and react in accordance with the current public needs. Still, it may seem that when the state, acting within its sovereign powers in the public interest, adopts a measure that deprives an investor of its investment, the state is obliged to pay compensation. So, does the state dismiss its powers to some extent by signing international investment treaties, and is the state always obliged to pay compensation, or does it retain an option for the defence in case an investment dispute arises? "Police powers" doctrine is a powerful attempt to solve this problem and to provide specific answers to the above questions.

Section 1 of this thesis provides an explanation of the meaning of the "police powers" doctrine and tries to define its status in investment arbitration by examining whether it is international customary law or not. It further develops the differentiation of the "police powers" doctrine from other concepts that may seem similar at first glance but have a completely different legal nature.

Section 2 of this thesis gets deeper into the question of balancing investor-state interest while preserving right of the state to regulate in public purpose and at the same time preserve investor's investment from being expropriated and subjected to treatment that does not meet the fair and equitable treatment standard.

Section 3 of this thesis brings theory into practice and contains a detailed analysis of three landmark investment arbitration cases to develop a consolidated summary and opinion on whether the state's strategy based on the "police powers" doctrine is effective.

Degree of scientific development of the study. Ukrainian scholars have developed a subsequent number of academic research and studies on the topic of the state's responsibility in international law, although the "police powers" doctrine remains an unexamined new concept. While arbitral tribunals have been making fairly active use of it in the reasoning of their decisions over the past twenty years, scholars and lawyers are attempting to define the legal nature of the "police powers" doctrine and to develop a unified conceptual approach to its practical application, which still has not resulted in a unanimous approach.

The object of the study is social relations between the states and the investors at the pre-investment stage, during active investment, and especially when the investment dispute arises.

The subject of the study is the "police powers" doctrine in the theory of international public law and in investment arbitration.

The purpose of the study is to explore the controversy of the legal nature of "police powers" doctrine and to develop the practical assessment of possible invoking "police powers" as a state's defence argument.

According to the purpose of the study, the objectives are:

- determine whether the "police powers" doctrine has already become customary international law;
- differentiate "police powers" doctrine from related concepts in international public law;
- develop the assessment on how to achieve a balance between the obligations that states undertake by signing international investment treaties and the need to act in accordance with the public purpose;
- examine the approach to defining measures as non-compensable legitimate exercise of 'police powers' that does not constitute expropriation or breach of fair and equitable treatment standard;

- to determine the effectiveness of a defence strategy based on the “police powers” doctrine.

Study methods: A range of general research methods were used, namely: the axiological, analytical, systemic-structural, functional, comparative-historical, statistical and hermeneutic methods, as well as specialised research methods (formal-legal; legal modelling), drawing on various worldview approaches, including axiological and praxeological ones.

The axiological method, within the framework of the eponymous worldview approach, plays a significant role in establishing the correspondence between generally recognised principles of law and the doctrine of ‘police powers’ under investigation, as well as in assessing compliance with the fundamental purpose of law – ensuring justice.

The praxeological approach finds its expression in the practical assessment of the optimality of applying this doctrine to the resolution of investment disputes.

The analytical method was applied in the examination of legislative acts, case law and academic literature. The application of this method also made it possible to examine all elements of the legitimate exercise of ‘police powers’, identify their characteristics and assess the specific nature of the unity of all elements as a whole. It also enabled the consideration of the “police powers” doctrine as part of international customary law.

The systemic-structural method was used to establish a link between the main value-based approaches in law and this specific provision, and to examine its place and functions within the system of international public law.

The functional method helped to establish the influence of the ‘police powers’ doctrine on the arbitration process and the resolution of investment disputes, as well as its impact on the refinement of the provisions of international investment treaties.

The comparative-historical method enabled a comparison of changes in the dynamics of applying the “police powers” doctrine in investment arbitration. When used in conjunction with statistical methods, it is possible to assess the dynamics of the doctrine's successful use in defence strategies and to provide practical recommendations to enhance positive trends.

The hermeneutic method was used to define the “police powers” doctrine based on a literal interpretation of concepts.

Among the specialised research methods, the formal-legal method was used in particular. Its application involved the study and logical interpretation of normative legal acts and arbitral awards.

The legal modelling method was applied to interpret the “police powers” doctrine as international customary law, with respect to its practical application, as well as to model specific real-life situations in which such practical application is appropriate.

SECTION 1. The concept of states' 'police powers'

1.1 'Police powers' as a norm of customary international law: status and controversy

The doctrine of "police powers" (or as sometimes referred to "regulatory powers") is well-established in international law and widely applied by arbitral tribunals, especially in investment cases, which broadly reflects the original purpose of the state as a form of social organisation – to regulate social relations within its territory.

The doctrine of 'police powers' therefore occupies a prominent place in modern investment arbitration, as it is through this doctrine that tribunals seek to reconcile two normative imperatives that are in constant tension: the state's obligation to respect the property and procedural guarantees of a foreign investor, and the state's right to maintain public order, protect public health, the environment, financial stability and other interests of public importance. In the broadest sense, this doctrine means that non-discriminatory, bona fide and proportionate regulatory measures taken by the state to achieve a legitimate public purpose do not, as a general rule, constitute expropriation and do not give rise to an obligation to pay compensation merely because they have adversely affected the economic value of the investment.

Although, in international investment law, this framework did not emerge as a result of a direct contractual arrangement, but as a result of the gradual convergence of arguments drawn from general international law, the constitutional traditions of states, the practice of arbitral tribunals and legal doctrine. Therefore, the debate surrounding its nature is entirely legitimate: are 'police powers' an independent norm of customary international law, or merely an interpretative principle that helps to establish the limits of expropriation, or, perhaps, is it rather a general term for several interrelated ideas – the state's right to regulate, the principle of proportionality, the inadmissibility of compensation for *bona fide* regulation, and the systematic interpretation of investment treaties.

It is precisely this issue that has not only theoretical but also practical significance. If one assumes that 'police powers' constitute a norm of customary international law, then their application will not depend entirely on the presence of a specific reservation in a bilateral investment treaty. In such a case, the tribunal may rely on it as part of general international law forming part of the law applicable to the dispute. If, however, it is considered that they have not attained customary status, their role will be more limited: as an element of the interpretation of provisions on expropriation, fair and equitable treatment, or the right to regulate, where the relevant treaty expressly or implicitly permits such an interpretation.[1]

'Police powers' are based on the concept of sovereignty and the need to ensure a balance between the protection of investors and the inalienable right of the state to enact and enforce laws to ensure public order, safety, health, morality and justice[2]. The Draft Convention on the International Responsibility of States for Injuries to Aliens recognizes the lawfulness of "valid exercise of belligerent rights[3]" which can be interpreted as 'police powers' in its very core. Although the Draft Convention was never signed or adopted by any state, tribunals and parties can still refer to it as to unofficial collection of international customary law, as it can be observed in, for example, *Saluka v. Czech Republic*. However, that is not unanimous opininion among tribunals and scholars.

It is logical to begin the analysis by defining the content of the doctrine. In its classical formulation, it means that the state has no obligation under international law to compensate for the consequences of general, non-discriminatory and bona fide measures taken to protect the public welfare, even if such measures have significantly affected the investment. In the context of investment law, this rule is most often contrasted with the logic of so-called de facto expropriation, where the central issue is not the form of intervention but its actual effect on the investor. The 'police powers'

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[1] UNCTAD. Expropriation: A Sequel. New York ; Geneva : United Nations, 2012. 194 p. URL: https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf
[2] Draft Convention on the International Responsibility of States for Injuries to Aliens, (1961) 55 Am. J. Int'l 548, p. 562, Article 10(5)
[3] same, art. 10(5)

doctrine allows one to avoid the conclusion that any serious regulatory intervention automatically amounts to compensated expropriation.[4]

The literature traditionally identifies several characteristics of the lawful exercise of such powers by the state. Firstly, the measure must pursue a legitimate public purpose: the protection of health, safety, the environment, public order, consumers, the stability of the financial system, and so on. Secondly, the measure must be of a regulatory nature, rather than purely confiscatory; in other words, it cannot be merely a disguised instrument for the seizure of assets for the benefit of the state or third parties. Thirdly, it must be non-discriminatory and applied within the framework of the general regulatory regime, rather than selectively against a particular foreign investor without objective justification. Fourthly, good faith, due process and proportionality of the intervention are of importance. It is the combination of these criteria that constitutes the normative content which some tribunals and scholars consider to reflect customary international law.[5]

The question of the customary status of this doctrine should be considered through the prism of the two classical elements of custom: the generalised practice of states and opinio juris, that is, the conviction of states in the legal binding nature of the relevant rule. It should be noted at the outset that the problem lies not in the complete absence of practice, but in its inconsistency and fragmentary nature. Historically, arguments regarding the special status of regulatory measures first emerged in the context of resolving disputes concerning state liability for harm caused to foreigners, and were later developed in decisions relating to expropriation and economic regulation. However, for a long time, these arguments were not formulated as a separate, self-contained rule of international investment law.[6]

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[4] Dolzer, Rudolf, and Christoph Schreuer, 'History, Sources, and Nature of International Investment Law', *Principles of International Investment Law*, 2nd Edition (2012; online edn, Oxford Law Pro), https://doi.org/10.1093/law/9780199651795.003.0001

[5] O. Barron. "The police powers doctrine and international investment law: dusting off an old concept in the pursuit of sustainable development" Victoria University of Wellington 2018 p. 39 URL: https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3397422_code3555653.pdf?abstractid=3397422&mirid=1

[6] Douglas Z. The International Law of Investment Claims. Cambridge : Cambridge University Press, 2009. p. 11-17, 136, 207-213

The key criteria for the application of the 'police powers' doctrine are summarised below, and their more precise consideration will be presented at a later point in section 2.1.

Table 1.

Criteria	Description
Legitimate public purpose	The measure must be aimed at protecting health, safety, the environment, public order or another interest of public importance.
General regulatory nature	The regulatory action must not be a disguised confiscation or an individual seizure of an asset.
Non-discriminatory	The measure must be applied within the general regime, rather than selectively against a particular investor without objective justification.
Good faith and procedure	Due process, the absence of arbitrariness and the connection between the aim and the means are taken into account.
Proportionality	The intensity of the intervention must not be manifestly excessive in relation to the legitimate public objective.

Proponents of the customary nature of 'police powers' draw attention primarily to the decisions of arbitral tribunals which explicitly or implicitly hold that bona fide regulation does not constitute compensated expropriation. One of the most frequently cited decisions is the award in the case *Saluka v. Czech Republic*, where the tribunal noted:

"In the opinion of the Tribunal, the 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.[7]*"*

This formulation has become almost canonical in subsequent practice, as it clearly delineated the autonomous weight of the public interest in determining the limits of expropriation.

No less significant is the case of Methanex v. United States, where the tribunal, in its analysis of environmental regulatory measures, stated that "it is a principle of customary international law that, where economic injury results from a bona fide regulation within the police powers of a State, compensation is not required[8]". That said it is a general matter of international law, non-discriminatory regulation with due process for a public purpose is not considered expropriation, provided that the state has not given the investor specific undertakings to refrain from such regulation. The significance of this case lies in the fact that the tribunal explicitly referred to 'international law', rather than merely to the specific provisions of NAFTA. For many authors, this became one of the most compelling confirmations that the rule in question is of a general, rather than a purely contractual, nature.

In subsequent practice, a similar line of reasoning can be observed in the cases of *Chemtura v. Canada*, *Philip Morris v. Uruguay*, *Electrabel v. Hungary*, *El Paso v. Argentina* and a number of other decisions, where tribunals proceeded on the basis that the state retains scope for regulation in matters of the environment, public health or the organisation of public markets. It is particularly significant that in the case of *Philip Morris v. Uruguay*, the tribunal not only recognised the state's right to anti-tobacco regulation, but also effectively confirmed that the exercise of sovereign regulatory functions in the field of public health does not constitute expropriation in

[7] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 URL: https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf, para 262

[8] *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005

the absence of arbitrariness or discrimination.[9] This case has become a symbol of a deferential approach to regulation in the sphere of public welfare, which will be further analysed in Section 3.

An additional argument in favour of customary status is the treaty practice of states. Although the mere fact of including reservations regarding the right to regulate or annexes on indirect expropriation in more recent BITs and FTAs does not automatically prove the existence of a custom, it may indicate a widespread belief among states that bona fide regulation must be distinguished from compensated expropriation. Standard provisions in the US, Canadian, CETA, the CPTPP and other recent treaties provide that non-discriminatory regulatory actions taken to achieve legitimate public policy objectives do not, as a general rule, constitute indirect expropriation, save in exceptional circumstances. In this sense, treaty practice constitutes important evidence regarding the existence of opinio juris or, at the very least, regarding the consolidation of the relevant norm.[10]

We have summarized the arguments regarding the customary law status of "police powers" doctrine as follows:

Table 2.

Issue	Arguments in favour of customary status	Arguments against undisputed customary status
Arbitration practice	A number of decisions recognise that bona fide, non-discriminatory regulation in the public interest does not constitute compensated expropriation.	Many decisions rely more on the interpretation of specific contracts than on the independent establishment of international custom.

[9] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016

[10] OECD. "Indirect Expropriation" and the "Right to Regulate" in International Investment Law. Paris : OECD Working Papers on International Investment, 2004. 26 p. DOI: https://doi.org/10.1787/780155872321

State practice	Modern BITs and FTAs often enshrine exceptions for public welfare measures, which may reflect opinio juris.	A specific contractual provision may also indicate the states' desire to remove uncertainty, rather than an already established custom.
Normative certainty	The core of the doctrine appears relatively stable: legitimate purpose, non-discrimination, and good faith.	The boundaries of the doctrine remain open to debate: the role of proportionality, legitimate expectations and the relationship with FET are not entirely settled.
Methodology	The doctrine is consistent with the broader logic of a state's sovereign right to regulate.	Courts rarely conduct a full analysis of the two elements of custom – state practice and opinio juris.

This position is reinforced by the work of international organisations and codification projects. OECD and UNCTAD documents have repeatedly emphasised that the classification of indirect expropriation cannot be based solely on the economic effect of the measure, but must take into account its purpose, nature and context. Although such texts do not in themselves create international custom, they reflect a significant level of normative stability and reflect how the professional community systematises existing practice.[11]

[11] Vandevelde K. J. Bilateral Investment Treaties: History, Policy, and Interpretation. Oxford : Oxford University Press, 2010.

At the same time, there are strong arguments against a hasty conclusion regarding the unquestionable customary nature of the doctrine. First and foremost, opponents note that most tribunal rulings on ‘police powers’ derive from the interpretation of specific treaty provisions or the facts of a particular case, rather than being the result of a rigorous establishment of the two elements of custom. Tribunals rarely conduct a systematic analysis of state practice and opinio juris in the manner required by the classical methodology for establishing customary international law. Instead, they often refer to previous arbitral awards, legal commentaries and general considerations regarding the balance of interests.[12]

Furthermore, critics emphasise that arbitral awards are not, in themselves, state practice in the strict sense. They may serve as an auxiliary means of determining legal norms, but do not replace the consolidated conduct of states. If, however, one turns specifically to state practice, the picture proves less clear-cut. States often include specific reservations regarding the right to regulate in new treaties precisely because they do not rely entirely on the existence of an established customary rule. In other words, contractual codification may indicate not only the confirmation of custom, but also a desire to avoid the uncertainty inherent in customary law.[13]

Another counterargument is that the doctrine's content remains too open-ended. It is not always clear whether proportionality is an indispensable condition for the exercise of ‘police powers’, or whether non-discrimination and a bona fide public purpose are sufficient. The question of the role of the investor’s legitimate expectations also remains unclear: can a measure, which in other circumstances would be a typical exercise of regulatory power, lose the protection afforded by ‘police powers’ if the state has previously provided specific assurances regarding the stability of the regime? Nor is there an absolute consensus as to whether this doctrine covers only the analysis of expropriation, or whether it may be relevant to the assessment of

[12] Sornarajah M. The International Law on Foreign Investment. 5th ed. Cambridge : Cambridge University Press, 2021. 535 p.
[13] Douglas Z. The International Law of Investment Claims. Cambridge : Cambridge University Press, 2009. p. 82

a fair and equitable regime. Such a vagueness of subject complicates the assertion of the existence of a precisely defined customary norm.[14]

Some authors propose a compromise approach. In their view, it is not the entire 'doctrine' of 'police powers' that has attained the status of common law, but only its core: the state has the right, inherent in sovereignty, to adopt non-discriminatory regulatory measures to protect legitimate public objectives without an automatic obligation to compensate for every economic loss suffered by an investor. However, specific tests (proportionality, reasonableness, connection with legitimate expectations, and the level of intensity of control) remain largely a matter of contractual interpretation and the evolution of arbitral practice. This approach appears convincing, as it explains why there is a significant degree of consensus on the general principle, yet disputes persist regarding its limits.[15]

That said, even tribunals which effectively apply the 'police powers' logic do not always describe its legal nature in the same way. Some refer to it as a norm of general international law, others as a general principle, and still others as a contextual element in the analysis of indirect expropriation. However, the practical outcome is similar in many cases: the state is granted a certain degree of regulatory discretion, and a negative economic effect on the investment in itself is not considered sufficient to establish a breach.[16]

It is also important to distinguish the question of the existence of a custom from the question of the source of a specific obligation to compensate for expropriation. Even if one assumes that the state's right to bona fide regulation is of a customary nature, this does not mean that any measure declared as such automatically falls outside the tribunal's scrutiny. On the contrary, the tribunal must assess whether the invocation of the public interest is merely a pretext for discrimination, covert

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[14] Henckels C. Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy. Cambridge : Cambridge University Press, 2015. 402 p. DOI: https://doi.org/10.1017/CBO9781316104378

[15]C. Titi, Police Powers Doctrine and International Investment Law. In Filippo Fontanelli, Andrea Gattini and Attila Tanzi (eds) General Principles of Law and International Investment Arbitration, Brill, 2018 p.16 SSRN: https://ssrn.com/abstract=3050417

[16] Kriebaum U. Regulatory Takings: Balancing the Interests of the Investor and the State. Journal of World Investment & Trade. 2007. Vol. 8. No. 5. P. 717–744. DOI: https://doi.org/10.1163/221190007X00152

expropriation of an asset, or an arbitrary breach of specific assurances given to the investor. Therefore, the doctrine does not absolve the state of liability, but merely delineates the boundaries within which regulatory intervention remains a legitimate exercise of sovereignty.[17]

The fact that arbitral tribunals are increasingly interpreting 'police powers' precisely as part of customary international law is evidenced by the manner in which they construct their arguments. They do not confine themselves to a literal reading of a specific BIT, but draw upon a broader range of sources: previous decisions, general international law, the treaty practice of other states, acts of international organisations, and sometimes even constitutional traditions. This does not constitute full proof in a methodologically flawless sense, but it demonstrates the tribunals' conviction that a state's right to bona fide regulation is of a supra-treaty, systemic nature.[18]

At the same time, it is of fundamental importance for academic discussion not to overstate the degree of establishedness of this rule. Whilst in classical international responsibility law, necessity and countermeasures have clearly codified frameworks in the Draft Articles of the International Law Commission on State Responsibility, 'police powers' have not undergone the same level of formalisation. This explains why some scholars consider it more accurate to speak not of a fully established customary norm, but of a doctrine that is in the process of consolidation through arbitral practice and modern treaty-making techniques.[19]

Thus, the following conclusion appears to be the most balanced. The doctrine of 'police powers' in international investment law is not yet an indisputable and fully defined norm of customary international law in all its elements. However, its normative core – the recognition of a state's inherent sovereign powers to adopt bona fide, non-discriminatory regulatory measures to achieve legitimate public objectives

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[17] Dolzer, Rudolf, and Christoph Schreuer, 'History, Sources, and Nature of International Investment Law', *Principles of International Investment Law*, 2nd Edition (2012; online edn, Oxford Law Pro), https://doi.org/10.1093/law/9780199651795.003.0001

[18] Schill S. W. The Multilateralization of International Investment Law. Cambridge: Cambridge University Press, 2009. 471 p. DOI: https://doi.org/10.1017/ CBO9780511605451

[19] Sornarajah M. The International Law on Foreign Investment. 5th ed. Cambridge: Cambridge University Press, 2021. 535 p.

without an obligation to provide automatic compensation – is increasingly perceived by tribunals precisely as a rule of general international law and applied by them as a component of the analysis of expropriation. Therefore, for the purposes of the theoretical section of this thesis, it is reasonable to assert that in contemporary arbitration practice there is a prevailing tendency to recognise this doctrine as at least quasi-customary, and in a significant number of decisions as a directly customary character, although the academic debate regarding its precise source and content remains open.

This position has a methodological advantage. It allows for the combination of an empirical description of arbitration practice with a critical reservation regarding the sources of law. On the one hand, it is impossible to ignore that tribunals do in fact rely on 'police powers' as an independent argument of general international law. On the other hand, academic integrity requires acknowledging that this practice does not yet dispel all doubts regarding the sufficiency of state practice and the unambiguity of opinio juris. This is precisely why the literature increasingly emphasises that it is more accurate to speak of the customary status of the core of the doctrine, rather than of each of its elements.[20]

In Ukrainian context, this discussion has additional significance. In investor-state disputes, the question of the limits of regulatory autonomy becomes particularly acute during periods of crisis, reform, war or post-war transformation, when the state is compelled to adopt intensive public-law measures. Whether such intervention is analysed solely through the prism of the economic impact on the investor, or also through the recognition of the customary nature of 'police powers', determines the very balance between investment protection and the preservation of scope for public policy.[21]

Further analysis of this issue shows that the customary status of 'police powers' should not be assessed in isolation, but within the context of the general evolution of

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[20] Douglas Z. The International Law of Investment Claims. Cambridge : Cambridge University Press, 2009. p. 599
[21] UNCTAD. Expropriation: A Sequel. New York ; Geneva : United Nations, 2012. 194 p. URL: https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf

investment law. Early investment disputes tended much more frequently towards a property-centric logic, where the central issue was the extent of interference in the investor's economic sphere. However, with the rise in the number of disputes relating to social, environmental, health and financial regulation, it became clear that the category of property protection alone could not adequately explain the full spectrum of conflicts between the investor and the state. It was in this historical context that the 'police powers' doctrine began to fulfil a system-defining function: it allowed the concept that the state's normal activities do not cease in the presence of foreign capital, but must be taken into account as a legally significant factor, to be incorporated into investment analysis.[22]

In practical terms, this means that the concept of 'police powers' helps to distribute regulatory risks between the parties to an investment relationship. The investor receives protection under international law against arbitrary, discriminatory or covertly confiscatory interference, but does not acquire the right to claim compensation for every significant change in the legal environment. The state, for its part, retains the ability to respond to new social, economic or security challenges, but only on condition that its response does not amount to an arbitrary shifting of public costs onto a specific investor. This is the key normative function of the doctrine: it does not eliminate the conflict between investment protection and sovereign regulation but gives it a legally managed form.[23]

Of particular importance is the question of which specific elements of this approach can be considered sufficiently established to be recognised as customary. Most likely, such an established element is not a detailed multi-stage test, but a general rule that non-discriminatory and bona fide measures of a general nature, aimed at protecting a legitimate public purpose, should not automatically qualify as compensated expropriation. However, questions regarding the intensity of scrutiny, the weight of the principle of proportionality, the role of the investor's legitimate

[22] Schill S. W. The Multilateralization of International Investment Law. Cambridge : Cambridge University Press, 2009. 471 p. DOI: https://doi.org/10.1017/ CBO9780511605451
[23] A. Newcombe, "Regulatory Expropriation, Investment Protection and International Law: When Is Government Regulation Expropriatory and When Should Compensation Be Paid?" pp. 73-80

expectations, or the criteria for identifying disguised discrimination remain more open. This is precisely why a significant portion of the contemporary literature speaks more of a consolidation of the 'core' of the doctrine than of a complete and fully codified rule of customary law.[24]

This conclusion is supported by the way in which states formulate modern investment agreements. Recent BITs and FTAs increasingly do not merely repeat classic standards of protection, but also describe in detail the conditions under which regulatory measures aimed at achieving public welfare objectives do not constitute indirect expropriation. Such treaty drafting can be interpreted in two ways: either as a confirmation of an existing custom, or as a conscious effort by states to provide greater certainty in an area where the custom is not yet entirely undisputed. However, in both cases the result is the same: the right to *bona fide* regulation is receiving an increasingly clear and positive enshrinement, and consequently, its universal international significance is gradually being strengthened.[25]

It is also significant that tribunals are increasingly approaching the doctrine not as an exception, but as a normal part of the analysis of the elements of a violation. This reveals its deeper methodological role. If a regulatory measure is *prima facie* perceived as a potential violation and is then merely 'justified' by reference to the public interest, the state finds itself in the position of a perpetual defender. If, however, police powers are regarded as an internal limit of the very concept of expropriation, the structure of the analysis changes: first, it is determined whether the measure falls within the ordinary sphere of sovereign regulation, and only if the answer is negative does the question of compensation arise.[26]

It is precisely this shift in analytical perspective that explains why the discussion regarding the customary status of the doctrine has not only theoretical but also direct practical significance.

[24] Sornarajah M. The International Law on Foreign Investment. 5th ed. Cambridge : Cambridge University Press, 2021. 535 p.
[25] OECD. "Indirect Expropriation" and the "Right to Regulate" in International Investment Law. Paris : OECD Working Papers on International Investment, 2004. 26 p. DOI: https://doi.org/10.1787/780155872321
[26] *Saluka Investments B.V. v. The Czech Republic*. Partial Award. 17 March 2006.

One cannot overlook the question of the limits of permissible judicial discretion when applying this concept. Since ‘police powers’ are not enshrined in a single universal code or convention containing an exhaustive list of criteria, tribunals inevitably have some scope for interpretation. But this scope is not unlimited. It is constrained by previous case law, treaty provisions, general principles of good governance, and the requirement to provide a convincing justification as to why a specific measure is deemed to be in good faith, non-discriminatory and aimed at a genuine public purpose. Thus, the doctrine does not dissolve the law into evaluative categories; on the contrary, it compels the tribunal to justify in greater detail the balance between private and public interests.[27]

In this sense, it is important to emphasise the evidential aspect. The state’s reference to ‘police powers’ will be convincing only if it is supported not by declarative statements, but by materials confirming the public purpose of the measure, the logic behind its adoption, the universal nature of its application, its conformity with the general regulatory framework, and the absence of targeted persecution of a specific investor. Thus, even if one accepts that the core of the “police powers” doctrine has the status of customary law, this does not imply a lowering of the standard of proof. On the contrary, the more broadly the state’s regulatory discretion is recognised, the more important it becomes to carefully verify whether the regulation in question is genuinely bona fide, rather than a mere imitation thereof.[28]

It should also be noted that the doctrine of ‘police powers’ has the potential to become particularly relevant in conditions of martial law, post-war reconstruction and large-scale market restructuring. In such circumstances, the state is often compelled to resort to measures that significantly interfere with the property and contractual rights of private individuals, including foreign investors. However, even under such extraordinary circumstances, not every intervention automatically falls under the

[27] Burke-White W. W., von Staden A. Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations. Yale Journal of International Law. 2010. Vol. 35. No. 2. P. 283–346. URL: https://papers.ssrn.com/sol3/ papers.cfm?abstract_id=1465899

[28] Hepburn J. Domestic Law in International Investment Arbitration. Oxford : Oxford University Press, 2017.376 p.

doctrine of necessity or other secondary norms[29]. Some of these measures can and should be analysed specifically through the prism of police powers, provided they form part of a general, non-discriminatory and publicly justified policy. This reaffirms that the doctrine occupies a special place between the classical norms of investment protection and the broader needs of state stability.

Thus, the final conclusion must be twofold. Firstly, 'police powers' can no longer be regarded as an incidental or purely rhetorical argument in arbitral practice; it is an established legal construct that has a real impact on the classification of state measures. Secondly, the most convincing position is that the 'core' of the doctrine has become customary in nature – namely, the recognition of the state's right to regulate in good faith, in a non-discriminatory manner and for a legitimate public purpose, without an automatic obligation to provide compensation. It is precisely in this measured yet conceptually clear form that this doctrine best explains the contemporary logic of investment arbitration.

At the same time, to complete the analysis, it is worth separately emphasising the significance of this doctrine for the future evolution of investment law. The more clearly international law recognises that investment activity takes place within the context of inevitable regulatory dynamics, the less convincing becomes the model whereby any significant change in the regulatory environment is automatically translated into a framework of compensation.[30] This is precisely why the 'police powers' doctrine has not only descriptive but also practical significance: it guides practice towards finding a reasonable balance between guarantees of stability for the investor and the state's ability to respond to constantly changing public needs. In this sense, recognition of its customary core is gradually becoming one of the key elements in the modernisation of the entire investment regime.

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[29] International Law Commission. Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries. New York : United Nations, 2001. Chapter V.
URL: https://www.refworld.org/legal/otherinstr/ilc/2001/20951

[30] UNCTAD. Expropriation: A Sequel. New York ; Geneva : United Nations, 2012.
URL: https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf

Equally important is that such modernisation does not undermine the system of international investment protection, but rather makes it more legitimate. Investment arbitration is perceived as fair only when it protects the investor from abuse but does not call into question the state's very ability to manage risks to health, the environment, financial stability and security. Therefore, the "police powers" doctrine in its contemporary understanding is not a sign of the weakening of investment law, but rather a condition for its survival in a world where public expectations regarding responsible state regulation are constantly growing.[31] It is for this very reason that further study of its customary status and scope of application constitutes not a peripheral but a central task of contemporary scholarship in international investment law.

It should be emphasised separately that the practical force of the doctrine is linked not only to the category of expropriation, but also to the broader issue of the systematic interpretation of investment treaties. In modern arbitration, the logic whereby investment protection standards are interpreted in isolation from other branches of international law and from the state's public law functions is increasingly viewed as unconvincing. On the contrary, tribunals are increasingly proceeding on the basis that provisions on expropriation, fair and equitable treatment or full protection and security must be interpreted in the context of general international law, including the principles of good faith, reasonableness, non-discrimination and recognition of the state's regulatory competence. It is within this systemic approach that the doctrine of police powers takes on particular significance, as it acts as a unique point of intersection between investment protection and public international law. It prevents the investment treaty from being reduced to a private-law instrument insuring the investor against all public risks, whilst not negating the state's duty to act lawfully, consistently and impartially.[32]

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[31] Schreuer C. The Concept of Expropriation under the ETC and Other Investment Protection Treaties. Journal of World Investment & Trade. 2005. Vol. 6.

[32] Schill S. W. The Multilateralization of International Investment Law. Cambridge : Cambridge University Press, 2009. 471 p. DOI: https://doi.org/10.1017/ CBO9780511605451

Furthermore, the doctrine has significant empirical value for assessing new generations of disputes related to the energy transition, climate policy, digital regulation, control over critical infrastructure, and heightened standards of due diligence for businesses in the field of human rights. In all these areas, state intervention is often intensive and capable of significantly affecting the profitability of an investment, but it cannot be adequately assessed solely in terms of the scale of economic losses. This is precisely why, the more the modern regulatory state develops, the greater the significance of the criteria embedded in police powers: the generality of the measure, its public purpose, non-discrimination, good faith, and proportionality to the objectives set. This confirms that the discussion regarding the customary status of the doctrine does not pertain solely to the history of arbitral practice; it directly concerns the future of how international investment law will respond to global transformations.[33]

In view of this, one further refined conclusion can be drawn. Even if individual elements of the doctrine remain contentious, its role as a principle of structural balancing between investment protection and public regulation can hardly be called into question. Indeed, it is precisely the recurrence of this balancing motif in tribunal practice, treaty provisions and doctrinal generalisations that constitutes the strongest argument in favour of the view that this is not a random series of decisions, but a rule that is gradually consolidating within general international law. For the purposes of this thesis, this allows us to reasonably formulate the thesis that in modern investment arbitration, ‘police powers’ should be understood as a doctrine with a high degree of normative stability, the core of which already effectively functions as a customary legal benchmark for assessing the legitimacy of a state’s regulatory measures.

This is where the practical value of the doctrine lies for the modern researcher. It makes it possible to explain why investor protection and the state’s regulatory

[33] Henckels C. Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy. Cambridge : Cambridge University Press, 2015. 402 p. DOI: https://doi.org/10.1017/CBO9781316104378

autonomy are not mutually exclusive principles, but coexist within a single, internally balanced international legal regime.

1.2 The difference of "police powers" doctrine from related concepts

Despite the widespread use of the term 'police powers', in practice it is often conflated with other categories of international investment law. This confusion is partly due to the fact that all these concepts arise in cases where the state intervenes in an investor's activities, and the tribunal must decide whether such intervention is lawful, whether it gives rise to compensation, or whether it might preclude unlawfulness.

However, the similarity of the functional context does not imply an identity of legal nature. On the contrary, for a correct analysis, it is necessary to clearly distinguish between 'police powers' and related concepts.

a) the "sole effects doctrine"

In the literature, the 'sole effect doctrine' is generally understood as an approach to defining indirect expropriation, whereby the decisive or even sole criterion is the actual economic effect of a state measure on the investment. If the consequence is so serious that the investor is deprived of the ability to use, control or derive benefit from the investment, then the measure qualifies as expropriation regardless of its purpose, form, or regulatory context.[34] This approach is primarily associated with the early formulations in the *Metalclad v. Mexico,* where the emphasis was placed on the effect of the intervention rather than on the state's intention[35].

The distinction between the 'sole effects doctrine' and 'police powers' is fundamental. The former concept places the greatest emphasis on the public purpose and nature of the measure; the latter, by contrast, insists that it is precisely these elements that are decisive for classification. If the logic of the 'sole effects doctrine'

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[34] Fortier L. Y., Drymer S. M. Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor. ICSID Review – Foreign Investment Law Journal. 2004. Vol. 19. No. 2. p. 293–327

[35] *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000

is applied consistently, then almost any intensive environmental, health or financial regulation that sharply reduces the value of an investment could be regarded as compensated expropriation. The "police powers" doctrine rejects such automaticity and proceeds from the premise that a significant effect in itself does not yet answer the question of whether expropriation has occurred.[36]

In modern practice, the absolute version of the 'sole effects doctrine' is increasingly taking a back seat. Most tribunals recognise that the effect is an important, but not the sole, factor. The analysis takes into account the nature of the measure, its purpose, duration, good faith, the investor's expectations and the systemic context. It is here that 'police powers' play the role of a corrective principle: they do not deny the significance of the effect but require consideration of whether the intervention was a normal and proper exercise of the state's regulatory authority.[37]

Thus, whilst the 'sole effect doctrine' focuses on the economic outcome for the investor, 'police powers' shift the focus to the normative quality of the state measure. The former answers the question 'what happened to the investment?', the latter – 'what was the nature of the state intervention and does it fall within the legitimate sphere of sovereign regulation?'. This is precisely why these two doctrines could be used in the arbitration strategy simultaneously, to strengthen the position that the actions of the state we legitimate exercise of 'police powers' and the results of such actions is not meeting high bar of expropriation claim. Or they can substitute one another. The right option for the defence strategy lies in the facts of the case and real assessment of all the option that could be used.

b) 'right to regulate'

The concept of the state's right to regulate is perhaps closest to 'police powers', but the two cannot be equated. The 'right to regulate' is a broader and more political-legal category. It expresses the general idea that, by entering into an investment treaty, the state does not relinquish its sovereign function to manage economic and social

[36] Schreuer C. The Concept of Expropriation under the ETC and Other Investment Protection Treaties. Journal of World Investment & Trade. 2005. Vol. 6.
[37] Vandevelde K. J. Bilateral Investment Treaties: History, Policy, and Interpretation. Oxford : Oxford University Press, 2010. 558 p

processes within its own territory. In recent investment treaties, this right is often formulated in preambles, general provisions or specific articles which affirm the possibility of adopting measures to protect health, the environment, labour rights, cultural heritage, security, etc.[38]

In contrast, 'police powers' is a narrower and more operational doctrine. It is used not so much to make a general declaration of regulatory sovereignty as to resolve a specific legal question: whether a particular measure constitutes indirect expropriation or another violation giving rise to compensation. In other words, the right to regulate is a broad framework concept, whereas 'police powers' is a specific instrument for its legal implementation in arbitral analysis.

The difference is particularly noticeable at the level of sources of law. The 'right to regulate' is often expressly enshrined in modern treaties; accordingly, its content is largely contractual. 'Police powers', as noted above, claim a broader, non-contractual status and are often derived from general international law or, at the very least, from established principles of interpretation of investment standards. Consequently, a situation may arise where a tribunal recognises the existence of police powers even in the absence of an explicit treaty clause on the right to regulate. Conversely, the presence of a provision on the right to regulate in a treaty does not mean that any measure will automatically be protected: it must still meet the criteria of good faith, non-discrimination and proportionality.[39]

Furthermore, the right to regulate does not necessarily serve as a complete defence against liability. It may provide a context for interpreting the FET, FPS or expropriation standards, but does not always lead to the conclusion that no breach has occurred. In contrast, the 'police powers' doctrine in its classical form is specifically aimed at explaining why a particular intervention is not expropriation at all, and therefore does not require compensation. It is therefore more accurate to say that

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[38] UNCTAD. Expropriation: A Sequel. New York ; Geneva : United Nations, 2012. 194 p. URL: https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf

[39] OECD. "Indirect Expropriation" and the "Right to Regulate" in International Investment Law. Paris : OECD Working Papers on International Investment, 2004. 26 p. DOI: https://doi.org/10.1787/780155872321

'police powers' are a specific manifestation of the right to regulate, but do not exhaust it.[40]

c) necessity and countermeasures

It is even more important to distinguish 'police powers' from necessity and countermeasures, as these involve an entirely different legal basis. Necessity and countermeasures fall within the scope of the law of international responsibility of states and are codified in the Draft Articles of the International Law Commission on the responsibility of states for internationally wrongful acts. Necessity, as enshrined in Article 25, is a circumstance which, under exceptional conditions, excludes the wrongfulness of an act that would otherwise breach an international obligation. Countermeasures, as provided for in Articles 22 and 49–54, allow the injured State to temporarily suspend the performance of certain international obligations towards the State in breach, with the aim of inducing it to cease the breach and fulfil its obligations.[41]

'Police powers' do not constitute a circumstance precluding unlawfulness. Their logic is prior and structurally different: the question is first raised as to whether a breach of the investment standard, primarily expropriation, has occurred at all. If the measure is classified as the proper exercise of police powers, the conclusion is not that a violation occurred but that its unlawfulness is excluded, but rather that no violation arose in the first place. In other words, necessity and countermeasures apply after establishing the prima facie incompatibility of the act with an international obligation, whereas 'police powers' operate at the level of the initial classification of the measure.

The scope of application also differs. Necessity is exceptional in nature and subject to strict conditions: the measure must be the only means of protecting a vital interest from a grave and imminent danger; it must not seriously infringe upon a vital interest of the State to which the obligation applies; the State must not itself have

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[40] Paparinskis M. The International Minimum Standard and Fair and Equitable Treatment. Oxford : Oxford University Press, 2013. p. 117, 296

[41] International Law Commission. Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries. New York : United Nations, 2001.

substantially contributed to the emergence of the state of necessity; furthermore, the international obligation itself must not preclude invoking necessity. Case law relating to the Argentine economic crisis has shown that these conditions are interpreted strictly and do not amount to a general right of the state to pursue policies in times of crisis.[42]

The "police powers" doctrine, by contrast, does not require proof of an extraordinary and imminent danger. It applies even under 'normal' conditions of state operation: when adopting sanitary, environmental, urban planning, banking, tax, or antitrust measures. Its purpose is not to justify deviations from the norm in an extraordinary situation, but to define the very scope of regulatory sovereignty.

Countermeasures are even further removed from 'police powers'. Firstly, they are of an inter-state nature and, by their very nature, are directed at the offending state. In their classical form, countermeasures are not intended to respond to the conduct of a private investor. Secondly, they are reactive and aimed at ensuring compliance with international law following a prior violation by another state. 'Police powers' are not a reaction to another state's internationally wrongful act; they constitute the ordinary exercise of a state's internal regulatory functions. Therefore, attempts to place these categories on the same footing are possible only at a superficial level, if viewed as different ways of avoiding liability; but from a legal perspective, their nature, conditions and consequences differ significantly.

In view of this, it is fundamentally important to emphasise in an academic text: necessity and countermeasures may be relevant in investment arbitration, but they are not varieties of 'police powers'. Whilst police powers explain the absence of a breach due to the very nature of the regulatory measure, necessity and countermeasures explain why the unlawfulness of an already established breach does not arise, either temporarily or conditionally. That is precisely why they should not be confused, even when the state invokes the public interest or crisis circumstances.

d) proportionality

[42] LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic. Decision on Liability. 3 October 2006. ICSID Case No. ARB/02/1

The principle of proportionality occupies a special place, as it is neither a complete alternative nor a full synonym for ‘police powers’. Proportionality is a method of legal analysis that helps to assess the relationship between the legitimate aim of a measure and the intensity of the interference with an individual’s rights. In various legal systems and areas of international law, it may involve examining the suitability of the measure, its necessity in the sense of the absence of less onerous alternatives, and proportionality in the strict sense, that is, the balance between the public benefit and the burden on the individual.[43]

In investor-state disputes, proportionality is sometimes used as a tool to distinguish regulation from indirect expropriation, sometimes for FET analysis, and sometimes as a general method of balancing interests. This is precisely why it often overlaps with ‘police powers’. If a tribunal asks whether a regulatory measure was excessive in relation to its public purpose, it is in effect determining whether that measure remained within the bounds of legitimate police powers.[44]

However, there is an important distinction between these categories. ‘Police powers’ address the question of the nature and scope of state authority: whether the measure falls within the ordinary sphere of sovereign regulation, which does not give rise to compensation. Proportionality, on the other hand, is a test used to verify the lawfulness or admissibility of a specific measure. It has no clearly defined source in investment law itself and is often imported from public law, EU law, the practice of the European Court of Human Rights, or general principles of law. Therefore, to say that police powers and proportionality are one and the same would be methodologically incorrect.[45]

A systematic comparison allows us to draw several conclusions. Firstly, the ‘single effect doctrine’ and ‘police powers’ move in opposite directions: the former absolutises the consequence for the investor, whilst the latter requires consideration

[43] Henckels C. Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy. Cambridge : Cambridge University Press, 2015. 402 p.
[44] B. Kingsbury and S.W. Schill Public Law Concepts to Balance Investors’ Rights with State Regulatory Actions in the Public Interest—the Concept of Proportionality. Oxford University Press, 2010. p.32
[45] Henckels C. Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy. Cambridge : Cambridge University Press, 2015. 402 p.

of the public purpose and nature of the measure. Secondly, the 'right to regulate' constitutes a broader normative framework, whereas 'police powers' represent its specific instrumental expression in disputes concerning expropriation and compensation. Thirdly, necessity and countermeasures belong to secondary norms of international responsibility, whereas police powers belong to the primary level of determining whether a breach exists at all. Fourthly, proportionality is not an independent alternative to police powers, but a method of assessment that can be integrated into the analysis of this doctrine, yet is not reducible to it.

For theory and practice, this distinction is fundamental. When a tribunal incorrectly conflates these concepts, there is a risk of analytical confusion: the right to regulate becomes an undefined political declaration, 'necessity' begins to be used instead of analysing the very nature of the violation, and proportionality is applied without a clear indication of the specific standard within which it is being applied. By contrast, a clear distinction allows to see that the 'police powers' doctrine fulfils a specific function: it prevents the investment treaty from becoming an instrument for 'freezing' public regulation, whilst at the same time not exempting the state from scrutiny regarding arbitrariness, discrimination or covert expropriation of assets.[46]

In conclusion, it is the 'police powers' doctrine that provides the most balanced answer to the central question of investment law: where does the line lie between proper regulation and compensated interference in the investor's property sphere? It does not supersede the right to regulate, proportionality, or circumstances precluding unlawfulness. Its autonomous significance lies in the fact that it creates a legal space within which the state may implement public policy without the presumption of an obligation to compensate for every significant change in the legal regime. This explains its special role in modern investment arbitration and the growing interest in the question of its customary legal status.

To conclude this comparative analysis, it is important to emphasise that the difference between the aforementioned concepts has not only a theoretical but also a

[46] Schill S. W. The Multilateralization of International Investment Law. Cambridge : Cambridge University Press, 2009. 471 p. DOI: https://doi.org/10.1017/ CBO9780511605451

purely procedural dimension. The structure of the evidence, the sequence of legal issues and even the scope of judicial discretion depend on which concept the tribunal considers central. If the doctrine of sole effect is placed at the centre, the focus shifts to the scale of economic losses and the degree of loss of control over the asset. If, however, the analysis is built around police powers, the tribunal must inevitably pay greater attention to the purpose of the measure, its general nature, the regulatory context, the absence of discrimination, and procedural correctness. Thus, the distinction between these concepts determines not only the terminology but also the very approach to legal reasoning in the case.[47]

In this regard, the relationship between police powers and the right to regulate is particularly revealing. It is often the right to regulate that is used by states as an 'umbrella' argument, intended at the level of general reasoning to demonstrate the legitimacy of state policy. However, such a reference in itself does not resolve a specific dispute. It does not answer the question of whether a specific intervention is so intensive, selective or unjustified that it crosses the line of legitimate regulation. Police powers, on the other hand, transform the broad concept of regulatory autonomy into a legally operational standard. Therefore, in a well-reasoned decision, the right to regulate should serve as a general backdrop, whilst police powers should serve as the direct qualifying criterion.

The specific nature of police powers is even more clearly evident in their relationship with necessity and countermeasures. In public discourse, these categories are often mistakenly perceived as interchangeable, as they all allow the state to justify severe interference in the property sphere of private individuals by public necessity.

However, in a legal sense, they answer different questions. Necessity asks: can an exceptional danger temporarily justify the non-fulfilment of an existing obligation? Police powers ask: does the relevant measure fall within the sphere of regulatory activity which, from the outset, does not constitute a breach of the standard of

[47] Burke-White W. W., von Staden A. Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations. Yale Journal of International Law. 2010. Vol. 35. No. 2. P. 283–346.
URL: https://papers.ssrn.com/sol3/ papers.cfm?abstract_id=1465899

expropriation? Countermeasures, in turn, are generally linked to a response to a prior internationally wrongful act by another entity and therefore rarely directly address ordinary investor-state disputes. Consequently, conflating these categories reduces the accuracy of the analysis and creates a risk of misapplying secondary norms to situations that should be resolved at the level of primary obligations.

Equally important is the distinction between police powers and proportionality in terms of the intensity of control. Proportionality, particularly in its expanded form, often entails a fairly thorough judicial weighing of public benefit against private burden. Such an approach can give the tribunal significant influence over the assessment of state policy. The doctrine of police powers, in its more restrained interpretation, does not always require such a thorough balancing; sometimes it is sufficient to establish that the measure is of a general regulatory nature, objectively linked to a public purpose, and non-discriminatory. Consequently, some tribunals treat proportionality as an integral part of the "police powers" doctrine, whilst others treat it as a separate, additional test. It is precisely this variability that requires doctrinal analysis to be particularly precise: not every reference to proportionality means that the tribunal is in fact abandoning the logic of police powers, and not every reference to police powers entails a detailed proportionality review.

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Summarising all the above, it is worth mentioning that the "police powers" doctrine is still a controversial topic. While there are all the reasons to state that it has already been established as customary international law through the tribunal's recognition, there still exist active, unresolved discussions that prove the "police powers" doctrine is at least semi-formed customary international law. In other words, the core of the doctrine has customary-law character, but its detailed criteria remain unsettled and continue to be shaped by treaty text and arbitral practice.

The "police powers" doctrine is being linked to the related concepts, namely 'sole effects doctrine', 'the right to regulate', necessity, countermeasures and proportionality, as discussed above, though it is completely distinguished from them in its legal nature and purpose.

SECTION 2. The balance between states' 'police powers' and their obligations under bilateral investment treaties

Over the past half-century, we have witnessed rapid development in industries and technologies, and alongside this, international companies have been actively emerging to create, implement and profit from these technologies. The world has long since moved beyond 'domestic' production, and the new reality is forcing companies to adopt effective forms of business structuring to safeguard their assets and comply with legal requirements. Consequently, companies are increasingly structuring their assets by establishing subsidiaries in various jurisdictions, which allows them to make effective use of local resources, optimise tax liabilities, and accumulate profits from the final product without wasting resources on unnecessary suppliers, as operations are conducted within a single group of companies. Countries in which new companies with foreign capital are registered derive significant benefits in the form of tax revenue, job creation and the development of a particular sector, often in the absence of 'domestic' resources to finance and support local businesses.

Although the term 'making an investment' is not limited solely to incorporation in a foreign jurisdiction, the concept of mutual benefit for the state and the investor applies to any form of investment.

This raises the obvious question of balancing the interests of the investor, who is interested in i) making a profit, ii) preserving their investment, and iii) the predictability of legal regulation and the stability of investment conditions, against the interests of the state, which in turn expects i) revenue for the state budget through the timely payment of taxes, ii) the conduct of business in compliance with current legislation, whilst reserving the right to respond to challenges and changes by introducing new legislative regulations.

No investor will agree to make an investment without receiving guarantees from the state; thus, the focus shifts to international investment agreements (IIAs), which may take the form of multilateral international conventions, but more often bilateral investment treaties (BITs) or, less commonly, direct investment contracts concluded directly between the investor and the state. Such agreements serve as a legal instrument to ensure a relative balance of interests between the state and investors, whereby the state, whilst providing guarantees to the investor, simultaneously undertakes to comply with them and to compensate for losses in the event of a breach of such an obligation.

However, it is obvious that no state is prepared to completely abandon its capacity to design and implement measures that safeguard legitimate public welfare objectives and fulfil the functions anticipated by its citizens.

Thus, the questions are where the 'red line' between the state's and investor's interest lies and how to distinguish crossing this 'red line' from the normal exercise of the state's regulatory powers?

2.1 'Police powers' and expropriation

Under international investment law, the property of foreign nationals located within the jurisdiction of another State is protected both under the minimum standard of treatment of foreigners at customary international law and under international investment agreements.

A. Newcombe mentions that respect for property rights is a principle generally acknowledged in international law, and therefore state is obliged to pay compensation for expropriation of property to foreign nationals.[48]

Usually, bilateral investment agreements (Ukraine, for instance, has entered 75 of such BITs with different countries[49]) contain a provision that prohibits the expropriation of investments with list of some exceptions, in example, "when such measures are taken in the public interest in accordance with the procedure laid down

[48] A. Newcombe, "*Regulatory Expropriation, Investment Protection and International Law: When Is Government Regulation Expropriatory and When Should Compensation Be Paid?*" citing F.V. García-Amador, "Fourth Report of the Special Rapporteur - Responsibility of the State for Injuries Caused in its Territory to the Persons or Property of Aliens - Measures Affecting Acquired Rights" (1959) 2 Y.B.Int'l Law Comm. 1 at 4. URL: https://www.researchgate.net/publication/268056452_Regulatory_Expropriation_Investment_Protection_and_International_Law_When_Is_Government_Regulation_Expropriatory_and_When_Should_Compensation_Be_Paid

[49] UNCTAD, Investment Policy Hub, International Investment Agreements Navigator, Ukraine URL: https://investmentpolicy.unctad.org/international-investment-agreements/countries/219/ukraine

by law and are not discriminatory"[50]; "measures are taken in the public interest and under due process of law and are not discriminatory"[51]; "except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation"[52]; "except for a public purpose, in a non-discriminatory manner, and in accordance with due process"[53]. Those exceptions though do not exclude state actions from being considered as expropriation, they merely provide that upon payment of prompt and adequate compensation such measures would not be in contrary to this specific treaty provision.

Under the Vienna Convention on the Law of Treaties, an agreement generally seen as codifying the customary international law on treaty interpretation, treaties must be interpreted by "taking into account, together with the context […] any relevant rules of international law applicable in the relations between the parties".[54] This reference includes not only provisions of treaty law in force between the parties, but customary international law, which, as observed above, includes the "regulatory powers" doctrine. Thus, the prohibition on expropriation under BIT provisions would have to be interpreted in light of the state's rights under the "police powers" doctrine.

More modern BITs are constructed in a way that incorporates the "police powers" doctrine. Such an approach does not resolve the controversy on the legal nature of the "police powers" doctrine, but significantly simplifies the discussion on how this doctrine should be applied. For example, the new Ukraine-Turkey BIT (signed in 2017) that replaced the older version (in force since 1996) contains Article 5, which lists general exceptions that apply to all provisions of the BIT.

Article 5 states that "Nothing in this Agreement shall be constructed to prevent a Contacting Party from adopting, maintaining or enforcing any non-discriminatory legal measures: (a) designed and applied for the protection of human, animal or plant life or health, or the environment; (b) related to the conservation of living or non-

[50] Belgium/Luxembourg - Russian Federation BIT (1989) Article 5 (translated into English from Russian)
[51] Netherlands-Czech Republic BIT (1991) Article 5 (terminated now)
[52] Ukraine-UK BIT (1993) Article 6
[53] Ukraine-Turkey BIT (2017) Article 6
[54] Vienna Convention on the Law of Treaties, 23 May 1969, Art. 31(3)(c).

living exhaustible natural resources"[55] and as well nothing shall be construed "to prevent any Contacting Party from taking any actions that it considers necessary for the protection of its essential security interest", including those adopted in the time of war, or aimed at non-proliferation of nuclear weapons.[56] With such explicit language of the BIT, the limitations of the guarantees given to the foreign investors are obvious. Ukraine or Turkey is obliged to provide to the investor the treatment in accordance with BIT provisions, although if it is a measure aimed, for example, at the protection of national security in times of war, the measure is justified under Article 5 and therefore will not be in breach of any other provisions of this treaty.

European Union Model Clauses for BITs adopted in 2023 also contains the provision reaffirming that the parties have "the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, the environment including climate change, public morals, social or consumer protection, privacy and data protection, or the promotion and protection of cultural diversity."[57] The non-stabilisation clause also provides that the treaty provisions do not preclude the party from changing the legal and regulatory framework, even if such changes negatively affect the investor's operations or expected income. As commentary to this provision explains, "there is no general duty on the Parties to compensate for changes in the regulatory framework that negatively affect the investors' economic interests or expectations associated with their investments."[58]

That being said, states have sovereign powers within their jurisdiction. They obviously have the right and the duty to enact laws and regulations that protect persons under their jurisdiction and frame social activity. At the same time, the

[55] Ukraine-Turkey BIT (2017) Article 5(1)
[56] Ukraine-Turkey BIT (2017) Article 5(2)
[57] European Union Model Clauses for BITs (2023) p.7 UNCTAD, Investment Policy Hub, Model Agreements URL: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/8390/download
[58] same, p. 7 , Commentary, para 3

principle of respect for property rights exists, although "property rights have inherent limitations – they are never absolute."[59]

So, while there is tension between expropriation of foreign property and the rules of investment law, expropriation may be lawful if it falls within the scope of the state's "police powers" at customary international law. Simplifying this statement: the state is not liable to pay compensation to a foreign investor for the losses that result from the legitimate exercise of 'police powers' as such actions do not amount to expropriation. This principle is known as the "regulatory powers" or "police powers" doctrine. While its existence is largely uncontroversial, the contours of this doctrine remain subject to dispute.

The "police powers" doctrine is an attempt to draw the 'red line' of what measures should be considered lawful and therefore are non-compensable. Though the approaches to defining so have not yet formed a single checklist that could be applied to any measures adopted by the state. As the *Saluka v. Czech Republic* Tribunal observed:

> *"international law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered "permissible" and "commonly accepted" as falling within the police or regulatory power of States and, thus, noncompensable. In other words, it has yet to draw a bright and easily distinguishable line between non-compensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law."*[60]

As mentioned above in the section 1.1, the list of exceptions when the taking of property will not be considered lawful is found in the text of the Draft Convention on the International Responsibility of States for Injuries to Aliens and in the *Saluka v. Czech Republic* Tribunal's opinion such exceptions "do not in any way, weaken the principle that certain takings or deprivations are non-compensable. They merely

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[59] A. Newcombe, "The Boundaries of Regulatory Expropriation in International Law", *ICSID Review - Foreign Investment Law Journal*, Volume 20, Issue 1, Spring 2005, p. 27
[60] Saluka, para 263

remind the legislator or, indeed, the adjudicator, that the so-called "police power exception" is not absolute."[61]

As to the expropriation claims, the BITs usually cover two kinds of expropriation: direct and indirect. The deprivation of the property of a national of another state could therefore give rise to the following claims:

• claim for direct expropriation, if title to the confiscated asset(s) is transferred to the host state;

• claim for indirect expropriation, if title has not been transferred to the host State but the factual circumstances may suggest permanent total or near-total deprivation in value of the investment.

Claims for indirect expropriation are far more frequently triggered than claims for direct expropriation, which could be explained by the fact that in the modern world, the state would quite rarely take such extraordinarily invasive measures (for example, military force interference with the property[62]) that they constitute direct expropriation. Thus, 'police powers' are more invoked in relation to the indirect expropriation claims, but states are also not precluded from invoking them to direct expropriation claims.

Quiborax v. Bolivia Tribunal agreed with the wording of the relevant standard for direct expropriation articulated in *Burlington* that "*a State measure constitutes expropriation under the Treaty if (i) the measure deprives the investor of its investment; (ii) the deprivation is permanent; and (iii) the deprivation finds no justification under the police powers doctrine.*"[63]

As discussed above, the *Philip Morris v. Uruguay* Tribunal has further developed the applicable test for the measures to be justified under the "police powers" doctrine, summarizing the earlier positions. Certain conditions have to be met in order for the state's action not to constitute indirect expropriation: "action must

[61] Saluka, para 256-258
[62] *Burlington*, para 543-545
[63] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, para 200

be taken bona fide for the purpose of protecting the public welfare, must be non-discriminatory and proportionate."[64]

Tecmed v. Mexico Tribunal concluded that it is "undisputable" that "the State's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its power as administrator without entitling them to any compensation whatsoever."[65]

In an attempt to distinguish what states' actions are covered by the "police powers" doctrine, we have also turned to the observations provided by the United Nations Conference on Trade and Development, which acknowledge the basic principle that not all actions will constitute expropriation:

> *"Although there is no universally accepted definition, in a narrow sense, this doctrine covers State acts such as (a) forfeiture or a fine to punish or suppress crime; (b) seizure of property by way of taxation; (c) legislation restricting the use of property, including planning, environment, safety, health and the concomitant restrictions to property rights; and (d) defence against external threats, destruction of property of neutrals as a consequence of military operations and the taking of enemy property as part payment of reparation for the consequences of an illegal war (Brownlie, 2008, p. 532; Wortley, 1959, p. 39). For example, if confiscation of property is effected as a sanction for a violation of domestic law by the property owner, this would not be an expropriation. The same would be the case if an establishment is shut down for violations of environmental or health regulations."*[66]

The general narrative is being formed: in the context of "police powers" doctrine, regulatory measures of the states, such as taxation, environmental and health regulations, matters of national security, etc., usually are addressed as measures that have a legitimate purpose indeed, and therefore are justified under "police powers" doctrine. That said, measures adopted by the state are *prima facie* lawful and may not amount to expropriation even if they adversely affect investors' property rights.[67]

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[64] *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, 8 July 2016, Award, para 305

[65] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States,* ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para 119

[66] UNCTAD, UNCTAD Series on issues in International Investment Agreements II, "Expropriation" (2012) p. 79

[67] J. Crawford, ed., *Brownlie's Public International Law*, Oxford University Press, 9th Edition, 2019, p. 904

The arbitration practice is crucial for understanding the 'police powers' concept, as the measures are examined on a case-by-case basis; arbitral tribunals are not unanimous on the matter, though the general narrative on the valid exercise of 'police powers' in the public interest could be examined.

For the measure to be justified under the "police powers" doctrine, it first of all has to be adopted for a public purpose (or protecting public welfare).

Public health reasoning. Such a justification preserves the state's sovereign powers to intervene in the normal course of events in emergencies, such as a pandemic, and the obligation to guarantee the well-being of its citizens by banning harmful products, etc.

The *Bischoff case* (1903) is the earliest practical use of 'police powers' reasoning in the arbitration practice. The case concerned measures taken during the smallpox epidemic. In dismissing a claim for damages in relation to a taking of property, the Claims Commission held that "certainly during an epidemic of an infectious disease there can be no liability for the reasonable exercise of police powers."[68]

Another case, *Methanex v. United States*, concerned claims of expropriation arising from measures adopted by the U.S. state of California that banned MTBE, a fuel additive harmful to public health. The tribunal dismissed the claim on the basis that "as a matter of general international law, 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."[69]

In *Chemtura v. Canada*, Canada prohibited the sale of lindane, an agricultural insecticide said to be harmful to human health and the environment, which gave rise to the claim for breach of NAFTA. The claim was rejected "irrespective of the existence of a contractual deprivation". The Tribunal expressly held:

> *"the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers. [...] took measures within its mandate, in a non-*

[68] German-Venezuelan Claims Commission, Bischoff case, United Nations Reports of International Arbitral Awards, Vol. X, p. 420.

[69] *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, para 7

discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation.”[70]

The *Philip Morris v. Uruguay* case was related to the packaging of cigarettes for health reasons and is a remarkable example of a wise state’s strategy with respect to ‘police powers’ as will be more expressly discussed in Section 3.1 of this thesis. The Tribunal here upheld ‘police powers’ for public health reasons and mentioned that the BIT “does not prevent Uruguay, in the exercise of its sovereign powers, from regulating harmful products in order to protect public health after investments have been admitted.”[71]

Environmental measures. Even though environmental measures are closely connected with those aimed at the protection of public health, they constitute another significant aspect of ‘protection of public lawfare’.

The *Eco Oro Minerals v. Colombia* dispute arose from measures taken regarding the páramo ecosystem in Santurbán. Eco Oro Minerals argued that these measures constituted indirect expropriation, as they deprived it of its mining rights under a concession contract for the exploration and exploitation of a deposit of valuable metals and minerals.[72] The Tribunal upheld the “police powers” doctrine, mentioning that “police powers” doctrine “clearly applies to the measures complained of as they were taken to protect the environment and were bona fide and not discriminatory”[73] and found no expropriation, but explicitly stated that this does not preclude the payment of compensation for breach of the ‘full protection and security’ provision of the applicable treaty.[74]

The *S.D. Myers v. Canada* case was another one related to an export ban for environmental reasons, where the Tribunal expressly upheld the ‘police powers’

[70] *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award, 2 August 2010, para 266
[71] *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, 8 July 2016, Decision on Jurisdiction, para 174
[72] *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, para 5-6
[73] same, para 601
[74] same, para 920

justification and stated that "regulatory actions by public authorities are generally not considered expropriation under NAFTA Article 1110"[75]

That said, the Tribunals recognise the wide range of regulatory powers of the states aimed at environmental protection, and subsequently justify such measures as adopted in public purpose.

Economic or financial crisis.

There were numerous cases concerning measures adopted in response to or in the context of economic or financial crises that gave rise to expropriation claims.

For example, *AWG Group v. Argentina* arose in the context of the Argentine crisis of the 1980s, when Argentina faced high inflation, currency devaluation, and severe budgetary deficits. The Tribunal upheld the "police powers" doctrine, stating that "given the nature of the severe crisis facing the country, those general measures were within the general police powers" and also found that it was not a permanent and substantial deprivation of the investment, even though the measures negatively affected the investor's profitability.[76]

War-related measures and sanctions.

Claims of deprivation of property in the context of international armed conflict were considered by the Eritrea–Ethiopia Claims Commission in 2004. Although the case is not directly linked to the topic of this thesis, the "police powers" doctrine, per se, was not invoked or upheld. However, the Tribunal noted that certain acts (e.g., seizure or destruction of property) might be lawful under the laws of war, even if they would be unlawful under normal peacetime international law.[77] This gives us the opportunity to further discuss whether the same exceptions under the "police power" doctrine apply to measures taken in the context of war or in the face of another explicit danger to national security.

In the earlier case *Sea-Land Service v. Iran*, the Tribunal mentioned that "restricting cargo to essential goods during civil unrest was a legitimate and non-

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[75] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 , para 281
[76] *AWG Group Ltd. v. The Argentine Republic*, Decision on Liability, 30 July 2010, para 140
[77] *Eritrea–Ethiopia Claims Commission*, Partial Award – Civilian Claims – Eritrea's Claims 15, 16, 23 & 27-32, 17 December 2004

discriminatory measure, and governments may lawfully exercise broad powers in crisis situations without incurring international responsibility."[78] This raises further questions about whether the state has broader powers in times of unrest or whether the regulatory powers remain the same, and the state will have to comply with all of the obligations under the BIT (with regular 'police powers' exception) even acting in extraordinary circumstances.

The questions are even more relevant in the current context of the Ukraine-Russia war, the USA-Iran military operation, the Palestine crisis, and other discrepancies around the world. For example, could Iran's blockage of the Strait of Hormuz give rise to an investment claim for deprivation of property? Potentially yes (although no such statements are publicly available), although Iran would probably argue that it was countermeasures.

Ukraine, the European Union, and many other countries have imposed sanctions on Russian individuals following Russia's invasion of Ukraine in 2014 and have significantly expanded the list of sanctioned persons since the full-scale Russian invasion in 2022. The EU Regulation No. 833/2014 was adopted directly in "response to the illegal annexation of Crimea and Sevastopol" and in relation to Russia's actions that undermine Ukraine's territorial integrity and independence.[79] The measures are considered to be justified under the Treaty on the Functioning of the European Union and fall within its scope; therefore, the Regulation applies in all Member States.

Sanctions, especially those adopted against Russian nationals, had already given rise to numerous lawsuits. The first logical move was to declare the sanctions unlawful and to revoke/annul them; such cases were considered by the ICJ and the Ukrainian national courts.[80] In the event of an unsuccessful contest of imposed

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[78] *Sea-Land Service, Inc. v. The Government of the Islamic Republic of Iran*, Iran-U.S. Claims Tribunal, Award No. 135-33-1, 22 June 1984, para 48
[79] Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine OJ L 229, 31.7.2014, p. 1
[80] Maya Lester KS, 'EU Court of Justice rejects 5 appeals of sanctioned Russian businesspeople', Global Sanctions. Law, Practice and Guidance, 27 March 2026 URL: EU Court of Justice rejects 5 appeals of sanctioned Russian businesspeople | Global Sanctions; ICJ case C-696/23 P - Pumpyanskiy v Council;
"Суддя Великої Палати Верховного Суду розповів про практику ВС у справах щодо оскарження санкцій, запроваджених РНБО України" Верховний суд. Прес-центр, 12 липня 2024 URL: Суддя Великої Палати Верховного Суду розповів про практику ВС у справах щодо оскарження санкцій, запроваджених РНБО України

sanctions, Russian oligarchs found a way to attempt to obtain compensation for losses resulting from the sanctions. Investor-state dispute resolution became a convenient option for doing so. As can be observed from publicly available sources, at least 24 investment cases directly connected to sanctions imposed on Russian individuals and entities were brought to arbitration against different states.[81] All the cases are at the preliminary stage, and the topic is so newly established that it is hard to predict how the course of events will develop.

The list of possible 'public interest' reasons is, though not limited to, the ones listed above. In any event, the Tribunal examines all the factual circumstances to establish that this condition was met.

Good faith. The measure adopted with a legitimate purpose must also be adopted in good faith. The *Eco Oro Minerals v. Colombia* Tribunal has stated:

> "The principle of good faith has various manifestations when considering the manner in which States are to treat foreign investors but in summary encompass a State's obligation not to act in a way that frustrates an investor's legitimate expectations, to ensure regulatory transparency with no arbitrariness or capricious in discretionary decision-making, of fairness, clarity, non-ambiguity and predictability."[82]

Thus, the two primarily interconnected elements must be preserved: legitimate expectations and the stability of regulatory framework. Furthermore, it has also been suggested that the concept of "legitimate expectations" that an investor's reasonable expectations as to what rules will apply to its investment activity in the host State and how these rules will be enforced has entered the law of indirect expropriation.[83]

UNCTAD analysis covers investor-state dispute resolution practice in evaluating general regulatory interference in the economic sector related to the investor's operations.[84] As an example, it illustrates the *Olguin v. Republic of Paraguay* case, in

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[81] M. Dupré, S. Kpenou, "Frozen Assets, Hot Claims: How Russian oligarchs and other investors sue over sanctions", Veblen Institute, December 2025 URL: [Frozen Assets, Hot Claims: how Russian oligarchs and other investors sue over sanctions]

[82] *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, para 541, citing T. J. Grierson-Weiler and I. A. Laird, "Chapter 8: Standards of Treatment" in: P. Mulchinski, F. Ortino and C. Schreuer (eds.), The Oxford Handbook of International Investment Law (2008)

[83] R. Dolzer, C. Schreuer, *Principles of International Investment Law*, 2nd edition, 2012, p. 115.

[84] UNCTAD, Investor-State Dispute Settlement and Impact on Investment Rulemaking, 2007, ISSN 1814-2001

which the Tribunal concluded that the investor, being an experienced banker and businessman, made a risky investment, even though he could have predicted (because of his extensive experience in the field) the measures taken by Paraguayan financial authorities that led to the bank's bankruptcy.[85]

Another case, *Metalclad v. Mexico*, illustrates the situation in which authorities granted authorisation to build the underground landfill and then issued a decree designating the land (where the landfill was supposed to be built) as a protected area. The Tribunal stated that the measure interfered with the property and deprived the owner of "reasonably-to-be-expected" economic benefit.[86]

Although there is no such demand in international law, 'good faith' will be examined with a strong emphasis on compliance with national law. That being said, the investor logically assumes that the host state will respect the national law, and, on top of that, the risk evaluation usually conducted prior to making an investment obviously involves an analysis of existing regulations as well as patterns of regulatory renewal.

As *Methanex v. USA* Tribunal noted, a measure is not tantamount to expropriation if the government did not provide any specific assurances to the potential foreign investor at the time, who was considering making an investment, that the government would refrain from introducing such regulations.[87]

Non-discrimination. This is also an important element of the 'police powers' test, as has been established by the arbitral tribunals – the "police powers" doctrine applies only to non-discriminatory measures. The core principle is that in like circumstances, the measures taken shall apply to any investor. Thus, 'general measures' are more likely to be justified under 'police powers' than those that concern the specific investor.[88]

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[85] Eudoro Armando Olguín v. Republic of Paraguay, ICSID Case No. ARB/98/5, Award, 26 July 2001
[86] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para 103
[87] *Methanex v. USA*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV, Chapter D, para 7
[88] A. Osman, "Police powers doctrine", Jus Mundi, 28 August 2025 URL: https://jusmundi.com/en/document/publication/en-police-powers-doctrine#

Proportionality. The proportionality test is a separate tool in investment arbitration, as was discussed above. Although in connection with the "police powers" doctrine, some tribunals use it as an essential element of the 'police powers' test. In the *Tecmed v. Mexico* case, the Tribunal was considering whether the "measures are proportional to the public interest presumably protected and to the protection legally granted to the investments."[89] That being said, the public interest itself will be examined through the lens of proportionality.

Due process. Some tribunals will also specifically examine whether due process was respected. For example, *the Methanex v. USA* Tribunal noted that the measure must be "enacted in accordance with due process."[90] Due process is generally seen as encompassing requirements of notice and jurisdiction, judicial impartiality and judicial independence, procedural equality and the right to be heard, condemnation of fraud and corruption, evidence and burdens of proof, and the principle of res judicata.[91] So, in instance, the availability of a domestic forum to challenge the measure could be considered as an essential due process element of the 'police powers' test.

The police powers doctrine does not specify the exact form, process, or targets of State actions. Before depriving someone of property, a State aiming to follow investment law must thoroughly evaluate, on a case-by-case basis, whether the measures and their application are reasonable, taken in good faith, proportionate, and non-discriminatory.

2.2 'Police powers' and fair and equitable treatment

Many investment agreements provide standards of protection, including a prohibition on discrimination, an obligation to award investments full protection and

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[89] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States,* ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para 122
[90] *Methanex v. USA*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV, Chapter D, para 7
[91] C.T. Kotuby, L.A. Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes*, Oxford University Press, 2007, chapter 2: Modern Applications of the Principles of International Due Process

security, and an obligation to grant investors and their investments fair and equitable treatment (FET), national treatment, and most-favoured-nation treatment. As Prof. Schreuer notes, these standards are "closely interrelated," as recognised by arbitral tribunals. The majority of them treat these standards as different ones, although to some extent overlapping.[92] For the objectives of this thesis, the distinctions of the aforementioned concepts are not very relevant and will not be closely examined.

The FET standard is one of the most significant investment protections granted by the host states. It is possible that a breach of FET will be found even if the treatment provided was the same as that provided to national investors or investors of other states, as the 'same treatment' does not necessarily mean fair and equitable. The FET obligation is generally accepted to include an obligation to accord due process and to act in good faith, with transparency, and in a reasonable and non-arbitrary manner.[93]

Parallel to a claim for expropriation, a claimant will often run claims for breaches of other treaty standards of treatment, especially FET claims. Invoking different treaty provisions within a single case creates more chances for the claimant to win and makes it more difficult for the state to object, as it will be further observed in the section 3.1.

The "police powers" doctrine could be applied to the FET claims as much as it applies to expropriation ones. It is not limited to expropriation and could be applied to any of the standards of investment protection. These standards coexist with, and do not substitute for or diminish, a state's police powers as a right to regulate in the public interest. Although it remains a contested point, it finds justification in investor-state arbitration practice.[94]

Although, on the other hand, the doctrine is most developed in indirect expropriation analysis, while not precisely invoked to alleged breaches of different BIT's provisions. In relation to FET claims, similar reasoning appears through

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[92] C. Schreuer, "Investments, International Protection", Max Planck Encyclopedia of Public International Law, 2013, para 49-50 URL: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1533#law-9780199231690-e1533-div1-5

[93] same, para 51-52

[94] *Addico Bank v. Montenegro*, ICSID Case No. ARB/17/35, Final Awards on Jurisdiction, Merits or Damages, 24 November 2021, para 558-560

concepts such as legitimate expectations, arbitrariness, transparency, due process, proportionality, and regulatory deference. So, "police powers" doctrine clearly informs FET analysis, but does not operate there in exactly the same doctrinal form as regarding expropriation.

As T. Weiler concluded that "the FET standard was never meant to prevent the good faith and non-discriminatory exercise of regulatory (aka "police") powers by the Host State unless the adoption, implementation or effects of a measure are manifestly arbitrary, grossly inequitable or patently unfair."[95]

The aforementioned point was confirmed by the *S.D. Myers v. Canada* Tribunal, which noted that the fair and equitable treatment standard is not meant to create an "open-ended mandate to second-guess government decision-making".[96] That said, it is obvious that the state would impose regulations within its sovereign regulatory powers, and the investor-state dispute resolution should not be a one-way option to shrink the state's powers to act within its territory.

It seems that the threshold is much higher (or at least to some scope different) for FET claims than for expropriation. Meaning that it would not be enough to object to the reasoning of bona fide exercise of regulatory powers with a legitimate purpose of protecting public welfare, and that due process was afforded. The Tribunals will also consider the matter of arbitrariness, unreasonableness, or discrimination.

T. Weiler carefully summarises the arbitration practice that has formed in this regard, saying that "tribunals will typically show appropriate deference to the sovereign right of States to make their own policy choices in furtherance of legitimate regulatory objectives."[97]

The question of the balance between the state's obligations under the bilateral investment treaties and its sovereign regulatory powers remains highly relevant. The Tribunal in Saluka v. Czech Republic has expressed its position on the matter:

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[95] T. Weiler, "Philip Morris vs. Uruguay: An Analysis of Tobacco Control Measures in the Context of International Investment Law", Physicians for a Smoke Free Canada, 28 July 2010, p. 22

[96] *S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Partial Award, 13 November 2000* , para 261

[97] T. Weiler, "Philip Morris vs. Uruguay: An Analysis of Tobacco Control Measures in the Context of International Investment Law", Physicians for a Smoke Free Canada, 28 July 2010, p. 22

"The Czech Republic, once it had decided to bind itself by the Treaty to accord "fair and equitable treatment" to investors of the other Contracting Party, was bound to implement its policies, including its privatisation strategies, in a way that did not lead to unjustified differential treatment unlawful under the Treaty."[98]

In our view, the state does not completely dismiss its sovereign powers, but signs under a list of limitations on those powers. Meaning that the government still remains in a position to implement any measures it believes are necessary, although if they are not justified under the BIT exceptions, the state will be obliged to provide adequate compensation for the losses it caused for breach of promise of fair and equitable treatment.

Even though the 'police powers' test will not be different from the same test applicable to expropriation claims, the Tribunals apply the 'police powers' test with particular caution and rely more on the provisions of the applicable BIT than on 'police powers' as a matter of customary international law or an applicable principle of public international law. S. El Boudouhi, though, observes that the tribunals are using 'right to regulate' and "police powers" doctrine together as if it were an "operational expression of the right to regulate", and thus she links 'right to regulate' with legitimate expectations and "omitting any link to the indirect-expropriation rule when referring to the police powers doctrine".[99]

For instance, *Total S.A. v. Argentina* Tribunal observed:

"*a bona fide regulatory measure of general application, which was reasonable in light of Argentina's economic and monetary emergency and proportionate to the aim of facing such an emergency. Therefore, the Tribunal has concluded that in the absence of specific stabilization promises to the Claimant, the pesification does not amount to a breach of Article 3 of the BIT.*"[100]

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[98] Saluka, para 337

[99] S. El Boudouhi, Symposium on International Investment Law & Contemporary Crises: The Police Powers Doctrine and the Right to Regulate in Banking and Finance Investment Disputes – Drawing the Line in International Investment Law, 19 February 2026, URL: https://opiniojuris.org/2026/02/19/symposium-on-international-investment-law-contemporary-crises-the-police-powers-doctrine-and-the-right-to-regulate-in-banking-and-finance-investment-disputes-drawing-the-line-in-international-inv/

[100] *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para 197

As can be observed, 'police powers' were upheld, although, with respect to the FET claim, the absence of "specific promises" was the key element to be established, alongside the measure being of "general application".

In *Parkerings v. Lithuania*, the Tribunal concluded that differential treatment is possible if reasonable grounds for such distinction exist.[101] This gives rise to further discussion of what reason would justify the differential treatment, and, with the explicit reference to section 2.1, the same reasoning could be invoked with respect to FET claims.

It was found in *British Petroleum v. Libya* that *a* violation of public international law had occurred "as it was made for purely extraneous political reasons and was arbitrary and discriminatory in character."[102]

Alongside the "police powers" doctrine, the Tribunals often give credit to the 'margin of appreciation', the doctrine that stems from the European Court of Human Rights practice and is considered to be a "standard of deference given to the national authorities to assess a situation because of their better position to understand it."[103] J. E. Viñuales introduces a new approach that acknowledges that "regulatory impropriety may arise from an abuse of the discretion afforded by the margin of appreciation doctrine, which is one criterion within the broader inquiry to determine whether a State has properly exercised its police powers."[104]

In relation to expropriation, it was argued with strong emphasis on "what was done" (regulatory measures within the 'police powers' and not expropriation itself); regarding FET claims, "how it was done" is more important. Thus, even though the applicable test is practically the same, the emphasis in the argumentation should differ. On top of that, the measures concerning an alleged breach of the FET provision

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[101] *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para 288

[102] *British Petroleum Exploration Co. (Libya) Ltd. v. Government of the Libyan Arab Republic*, Ad Hoc Arbitration, Award, 10 October 1973, para 111

[103] J. E. Viñuales, 'Defence Arguments in Investment Arbitration' (2020) *ICSID Reports*, 18, p 69-70 URL: https://www.cambridge.org/core/services/aop-cambridge-core/content/view/42BC4A0912FEE83BEEFDD2D129E5EFDF/S2633900500002447a.pdf/defence-arguments-in-investment-arbitration.pdf

[104] same, p. 72

could be different from those argued in relation to expropriation. Therefore, it is essential to examine, on a case-by-case basis, whether ‘police powers’ can cover the measures under dispute, not merely to prolong the ‘not expropriation’ test, but to specifically address the measures concerning the FET with additional arguments, invoking different tests if needed.

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The ‘red line’ that distinguishes the legitimate exercise of ‘police powers’ from unlawful expropriation and mala fide regulatory actions in breach of the FET standard promised under BIT provisions is not yet clearly drawn. The criteria for examining ‘police powers’ are broad and are always considered on a case-by-case basis, which allows us to formulate only a broad general conclusion.

Although the state does not waive its regulatory powers upon signing the BIT, it promises to act in a certain way. The measure shall be adopted in good faith with a reasonable, legitimate purpose, proportionate, non-discriminatory, and due process must be afforded – these criteria are probably the most specific ‘red line’ that could be presented in the present time. Though the investor-state dispute resolution practice is constantly evolving, as well as international public law doctrine is developing new approaches that reflect current challenges, and these criteria might be significantly improved and concretized in the near future.

SECTION 3. The "police powers" doctrine as a defence strategy for the respondent state in investment disputes

3.1 The state's defence strategy on the merits in investment disputes

a) burden of proof

The question of who bears the burden of proof is both technically important and strategically significant. Is the "police powers" doctrine an affirmative defence, and does the state have to prove reasonableness and lawfulness of its actions? Or the state simply possesses a presumption of reasonable regulation, to which the claimant (investor) must present evidence of the opposite?

In *Servier v Poland*, the tribunal explicitly dismissed the claimant's characterisation of 'police powers' as an affirmative defence for which the respondent had to prove the negative: demonstrating the absence of bad faith, discrimination, or disproportionality, saying

> *"it would be unreasonable to demand that Poland "prove the negative" in the sense of demonstrating an absence of bad faith and discrimination, or the lack of disproportionateness in the measures taken. Thus, the burden then falls onto the Claimants to show that Poland's regulatory actions were inconsistent with a legitimate exercise of Poland's police powers. If the Claimants produce sufficient evidence for such a showing, the burden shifts to Poland to rebut it."*[105]

The correct allocation of the burden is that the claimant must prove that the state's regulatory measure was unreasonable before it may be characterised as an alleged expropriation.

This allocation of the burden of proof has been derived from the doctrine's foundation in territorial sovereignty. As Oliver Hailes in "Police Powers in a Pandemic" has articulated "by recognising the link between police powers and

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[105] *Les Laboratoires Servier, S.A.A., Biofarma, S.A.S., and Arts et Techniques du Progrès S.A.S. v. Republic of Poland*, UNCITRAL Arbitration, Award, 14 February 2012 URL: https://jusmundi.com/en/document/pdf/decision/en-les-laboratoires-servier-s-a-s-biofarma-s-a-s-arts-et-techniques-du-progres-s-a-s-v-republic-of-poland-award-tuesday-14th-february-2012 para 583-584

territorial sovereignty, we may realise the potential scope of the customary presumption of reasonable regulation.[106]" States possess, as an incident of sovereignty, the inherent authority to regulate within their territory, and the investor who challenges that regulation bears the burden of displacing this presumption.

The *Chemtura v. Canada* Tribunal has also supported the position that the burden rests on the claimant to prove that the respondent's conduct does not constitute a legitimate exercise of its 'police powers'[107]. This stems from the fact that an impugned regulation, being an exercise of sovereignty, benefits from the presumption of validity.

In practice, however, respondent-states should not passively rely on the claimant to bear the burden of proof. Proactive documentation of the regulatory objective, the deliberative process, and the proportionality of the measure creates a compelling affirmative evidentiary record that reinforces the presumption and pre-empts challenges to the bona fide character of the state's action. The better practice is to come to the arbitration with a comprehensive regulatory record. That said administrative files, legislative history, substantive evidence, expert opinions make it impossible for the claimant to discharge the burden of demonstrating regulatory unreasonableness.

That being said, the most efficient strategy with respect to invoking 'police powers' defence would be to present the alternative narrative to the claimed storyline, and explicitly demonstrate to the Tribunal that the measures did not deprive the claimant's investments, were carried out in accordance with national law, on non-discriminatory basis, as well as presenting the absence of mistreating claimant's legitimate expectations. Then it will be the claimant's obligation to prove otherwise.

b) case analysis: defence strategy

[106] Hailes, O. and Turnbull, K. (2024) 'Police Powers in a Pandemic: Investment Treaty Interpretation and the Customary Presumption of Reasonable Regulation', in P. Merkouris et al. (eds.) *Custom and its Interpretation in International Investment Law*. Cambridge: Cambridge University Press (The Rules of Interpretation of Customary International Law), p 234

[107] *Chemtura Corporation v. Government of Canada*, PCA Case No. 2008-01, Award, 2 August 2010, para 137

While it is obvious that the defence strategy is developed on the case-to-case basis and shall depend on the factual circumstances of the case, evidence presented by the Claimant and the evidence that could possibly be provided by the Respondent-state, as well as on the general context of the dispute itself, we believe that the strategic concept of including “police powers” doctrine in the respondent’s line of argumentation could be observed by the analysis of concluded investment cases.
In this sub-Section we will be scrutinising three landmark cases i) *Saluka Investments B.V. v. The Czech Republic*, ii) *Burlington Resources Inc. v. Republic of Ecuador*, iii) *Philip Morris Brands Sàrl, Philip Morris Products S.A., and Abal Hermanos S.A. v. Oriental Republic of Uruguay* to develop the consolidated opinion on the practical implementation of “police powers” doctrine in the defence strategy.

Although *Saluka Investments B.V. v. The Czech Republic*[108] is usually cited in the regard for the jurisdiction and counterclaims matters and is considered to be “the most comprehensive consideration of arbitral jurisdiction over counterclaims in investor-state dispute settlement[109]” as well as in relation to ‘piercing of corporate vail’, the Tribunal held quite significant position regarding the implementation of ‘police powers’ doctrine in the scope of international investment arbitration, which made it probably the first comprehensive articulation of the “police powers” doctrine in modern investment arbitration.

Therefore, our main focus within the topic of this thesis will be evaluating the Czech Republic’s strategy and the Tribunal’s holding merely with regard to ‘police powers’.

To make a proper analysis, it is important to provide some general context of the dispute and relevant factual circumstances of the case first.

The general context of the dispute roots almost directly from the events of 1989-1990, when the Communist regime has fallen and the Czechoslovakia (which soon

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[108] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 URL: https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf

[109] Clodfelter, Mark A, and Diana Tsutieva, 'Counterclaims in Investment Treaty Arbitration', in Katia Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, 2nd Edition (2018; online edn, Oxford Law Pro), p. 419 URL: https://doi.org/10.1093/law/9780198758082.003.0017

divided into two independent states the Czech Republic and the Slovak Republic) turned to the market economy, which further resulted in broad privatisation of state-owned entities, including banks[110].

Following the 1989 transition, the Czech government privatised its banking sector through a series of transfers of state-owned banks to ostensibly private hands, often at nominal cost and without adequate capitalisation. Investiční a Poštovní Banka (IPB), the Czech Republic's third-largest commercial bank, was sold in 1998 to Nomura International plc, a Japanese investment bank. Nomura subsequently transferred its beneficial interest to Saluka Investments BV, a company incorporated in the Netherlands.

By 2000, IPB was experiencing severe liquidity problems attributable in large part to a portfolio of non-performing loans and mismanagement allegations. On 16 June 2000, the Czech National Bank placed IPB under forced administration and, within days, facilitated the sale of IPB's viable business to Československá obchodní banka (CSOB) for a symbolic price of one Czech crown. Saluka, whose entire investment comprised shares in IPB, became worthless overnight.[111]

Then the case was brought in 2001 by “Saluka Investments BV” (Saluka or Claimant) against the Czech Republic (Respondent-state) under the Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of The Netherlands and the Czech and Slovak Federal Republic signed on 29 April 1991 (Netherlands-Czech Republic BIT). Saluka claimed that the Respondent-state has violated articles 3 (fair and equitable treatment) and 5 (measures depriving investors of their investments) of the aforementioned Agreement[112].

Saluka argued that the Czech Republic deprived the Saluka of its shares in IPB by placing it under forced administration that further resulted in selling of these shares. It further alleged that these actions were in contrary to the article 5 of the

[110] *Saluk*a, para 30
[111] Saluka, para 25-50
[112] *Saluk*a, para 164

Netherlands-Czech Republic BIT, by being discriminatory, not taken in the public interest and under due process of law, and without proper compensation.

Though it is hard to assert the defence strategy in full without proper examining the Respondent's written pleadings, the Tribunal's overview provides us with the possibility to identify the main arguments that were used by the Czech Republic for its defence.

At first the Czech Republic tried to dismiss the claim entirely on the jurisdiction basis, using quite unusual method – filling the Notice of dismissal. The tribunal override this position on the reasoning that such objections should be raised not earlier than in the Statement of Defence. The further filled counterclaim was not successful for the Czech Republic as well, the Tribunal found that it lacks jurisdiction to consider it. Thus, the parties came to the merits phase of the proceeding. The Czech Republic needed to develop its defence strategy on the merits, which later turned out to be brilliant and disastrous at the same time.

The defence arguments as to the expropriation claims in the Tribunal's wrap of the parties' positions is as follows:

"*The Czech Republic denies that it has violated Article 5 of the Treaty. In essence, it submits that <u>the measures</u> which it resorted to in order to address the IPB situation in the spring of 2000 and which culminated in the decision by the CNB to put IPB into forced administration <u>were "permissible regulatory actions" which cannot be considered as expropriatory.</u>*[113]"

From what can be further observed from the award, the Respondent-state has also provided the Tribunal with the Czech National Bank's decision under which IPB was placed under forced administration, alongside the exhibits it was based on.

The strategy chosen here was simple in its nature: to present the Tribunal with documented reasoning of the state's actions. The forced administration of IPB and the subsequent facilitated sale to CSOB were measures taken in the normal exercise of the state's regulatory powers over the banking sector. The measures were non-discriminatory in that the Czech National Bank's mandate required it to act on

[113] *Saluka*, para 250

objective prudential triggers, and the intervention was a bona fide response to a genuine systemic risk to the Czech financial system. This was evidence supported by the Czech National Bank's decision, which the Tribunal considered well-founded under Czech law.

The Tribunal's holding in this regard is as follows:

"In the absence of clear and compelling evidence that the CNB erred or acted otherwise improperly in reaching its decision, which evidence has not been presented to the Tribunal, the Tribunal must in the circumstances accept the justification given by the Czech banking regulator for its decision[114]*".*

That said, the Tribunal considers 'police powers' defence as a presumption of reasonable regulation, therefore placed the burden of proof almost completely on the investor, being the claimant.

Even though the Tribunal agrees that the Saluka was indeed deprived of its investment, in the absence of evidence stating the opposite to the course of events and their reasoning, presented by the state, Tribunal held that actions of the Czech Republic in relation to the forced administration of the IPB constituted "*a lawful and permissible regulatory action by the Czech Republic aimed at the general welfare of the State, and does not fall within the ambit of any of the exceptions to the permissibility of regulatory action which are recognised by customary international law*[115]", and such deprivation does not fall within the scope of Article 5.

A win? While the "police powers" doctrine has been upheld and proved an effective argument in relation to the expropriation claim in the analysed case, regarding the FET claim, the Tribunal found a breach of Article 3 of the Netherlands-Czech Republic BIT.

Further question arises: why did the Czech government's defence not work for the FET claim? They failed to prove the justification for the different treatment provided to IPB compared to other Big Four Banks, as well as that the investor's legitimate expectations were preserved. Or, more accurately, the claimant managed

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[114] *Saluka*, para 273
[115] *Saluka*, para 275

to present their position and evidence of treatment that was indeed discriminatory towards them.

The focused argumentation on the absence of obligation to provide financial aid to the IPB and on the not knowing about financial troubles of the IPB resulted in Tribunal's holding:

> *"It was perfectly legitimate for the Government to sell its stakes in the remaining banks only after they had been relieved from the bad debt problem. This, however, did not at the same time relieve the Czech Government from complying with its obligation of non-discriminatory treatment of IPB.[116]"*

At first glance, it seems that 'police powers' defence is completely unworkable in relation to the FET claims; however, in our opinion, the evaluation of what has happened should be different. The measures that were under dispute in relation to the expropriation claim (and successfully rebutted by the Czech Republic based on 'police powers') and the measures claimed to be in contrary to the FET standard were completely different measures. The Czech Republic failed to present a strong defence on FET claims. The 'police powers' defence should have been expanded on the new measures or by invoking other defences, but FET claims should not have been left without proper objections.

The state has therefore to think thoroughly about presenting its narrative in a way that will explicitly show the non-discriminatory treatment. This could be possible only by using the complex strategy, which is not only based on 'police powers' but also includes the full defence regarding the FET standard.

The recent award in *Antonio del Valle Ruiz and others v. Kingdom of Spain* is an excellent example of the lessons learned from *Saluka*. The factual context to some point resembles *Saluka*: authorities did not provide support during the Bank's ensuing liquidity crisis in 2017, which led to forced resolution and sale to a Spanish bank for one euro[117]. The outcome, though, is a remarkable win for the state. Spain used complex defences objecting to FET claims, including arguments about reasonable

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[116] *Saluka*, para 337

[117] *Antonio del Valle Ruiz and others v. Kingdom of Spain*, PCA Case No. 2019-17, Final Award, 13 March 2023

expectations and non-discriminatory measures taken, and then dismissed the expropriation claims on the basis of 'police powers'. Indeed, the Tribunal found no breach of the FET provision and dismissed expropriation claims because the disputed measures are the same as under FET claims (that the Tribunal had already found lawful), and besides that, it is the 'police power' of Spain to impose such measures.

The next part of our analysis follows with the assessment of the state's strategy in another quite significant arbitration case, *Burlington Resources Inc. v. Republic of Ecuador*. The strategy turned out to be completely unworkable, and the final decision has been made in favour of the Claimants. Despite the unfavourable outcome, it brings another valuable lesson regarding the choice to rely on 'police powers' defence. In addition to that, the *Burlington v. Ecuador* Tribunal has further enhanced Saluka's incomplete articulation of the "police powers" doctrine, as we have mentioned above.

The *Burlington v Ecuador* dispute arose in the context of Ecuador's assertive exercise of resource sovereignty over its hydrocarbon sector during the mid-2000s commodity boom. Burlington Resources, an American oil company, held interests in two oil-producing blocks in the Ecuadorian Amazon (Blocks 7 and 21) under Production-Sharing Contracts (PSCs) concluded in 2001 with PetroEcuador, the state-owned oil company. The PSCs allocated operational costs and risks to Burlington in exchange for a share of oil production and included a tax absorption clause that required PetroEcuador to adjust the production-sharing formula to offset any future tax increases[118].

In April 2006, Ecuador enacted Law 42, imposing a 50 per cent tax on the 'extraordinary profits' earned by oil companies due to a surge in global oil prices above the levels prevailing at the time of the PSC's conclusion. In October 2007, the rate was increased to 99 per cent. Burlington paid the tax under protest, requesting that PetroEcuador apply the tax absorption clause, but its requests were ignored. Burlington ceased paying Law 42 in 2009, after which Ecuador seized and auctioned off Burlington's oil production shares. On 11 July 2009, Ecuador took physical

[118] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on liability, 14 December 2012

possession (by use of police and military force) of the production facilities and ultimately terminated the PSCs by ministerial decree[119].

Burlington filed its request for ICSID arbitration, claiming that four distinct measures being the adoption of Law 42, the seizure of production shares, the physical takeover of production facilities, and the termination of the PSCs, constituted expropriation[120] in breach of Article III of the United States-Ecuador Bilateral Investment Treaty[121].

Ecuador firmly argued that *coactiva measures* were taken in accordance with the Ecuadorian law and were therefore justified under the "police powers" doctrine, and with relation to the direct taking of the property, argued that it "intervened in the Blocks to enforce its laws within its police powers and to avoid the significant economic loss and damage to the Blocks.[122]"

Two complementary instruments reinforced Ecuador's position. The US-Ecuador BIT's tax carve-out in Article X excluded Law 42 from FET and related standards, channelling Burlington's challenge entirely into the higher-threshold expropriation framework. Ecuador's environmental counterclaims produced an award of USD 41.7 million against Burlington, which was the first significant respondent-state success with offensive environmental counterclaims, demonstrating that investor conduct may generate independent claims that reduce net exposure and reframe the dispute.

The tribunal recognised taxation as "an essential prerogative of State sovereignty," establishing a strong presumption of legitimacy. Law 42 at 50 per cent was not expropriatory: Burlington's profits declined by approximately 40 per cent, but the investment retained positive value, market participants were willing to acquire Burlington's interests, and Ecuador's purpose, which was equitable sharing of windfall profits, was facially consistent with sovereign resource management. Law 42 at 99

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[119] *Burlington,* p.7-10
[120] *Burlington*, para 96
[121] Treaty between the United States and Ecuador concerning the Encouragement and Reciprocal Protection of Investments of 11 May 1997 (US-Ecuador BIT)
[122] *Burlington*, para 169

per cent likewise did not cross the threshold. At paragraph 404 the tribunal held that a windfall profits tax, by definition, impacts only a portion of the profits, not the investment as a whole. Such a tax, by its very nature, is unlikely to amount to an expropriation of the investment as such. Deprivation must be assessed at the level of the investment as a whole, not at the level of the affected profit stream.[123]

The tribunal further held that Ecuador's acknowledged intent to pressure Burlington into renegotiation was not determinative: "the State's intent alone cannot make up for the lack of effects amounting to substantial deprivation.[124]"

The physical takeover of July 2009 was found to constitute unlawful expropriation[125]. Ecuador's statutory trigger for intervention required a production suspension of sufficient duration that had not been reached at the time of the takeover, and there was no evidence of imminent facility damage warranting emergency intervention. This finding draws the doctrine's absolute boundary: indirect regulation, such as taxation, licensing restrictions, and environmental controls, occupies a fundamentally different category from physical dispossession, and no public-interest justification can bring the latter within the doctrine's protection.

The *Burlington* tribunal's conclusion on the physical takeover of production facilities in July 2009 draws the boundary between tolerable regulatory intervention and compensable expropriation with equal clarity, but in the opposite direction. Ecuador's seizure of the facilities was found to constitute unlawful expropriation at paragraph 545 of the Decision on Liability[126].

The tribunal's reasoning is methodologically significant: it conducted a factual analysis of whether the physical takeover was justified under the specific conditions permitting state intervention in Ecuadorian law and found that those conditions were not met. Ecuador argued that the takeover was justified by Burlington's suspension of production, a trigger for state intervention under Ecuadorian energy legislation, but the tribunal found that the suspension was not of sufficient duration to activate that

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[123] Burlington, para 404
[124] *Burlington*, para 455
[125] *Burlington*, para 543-545
[126] *Burlington*, para 545

statutory power at the time Ecuador acted. Additionally, there was no evidence of imminent damage to the facilities or the Ecuadorian oil field that would have justified emergency intervention on public-interest grounds.

Burlington contributes several distinct insights. The substantial deprivation threshold for taxation measures is set at a high level, and a windfall profits tax that preserves the investment's operational and financial viability will not exceed it, even at extreme rates. However, states must exercise self-restraint: once the mode of state intervention transitions from fiscal to physical, the “police powers” doctrine no longer provides protection. Counterclaims and treaty carve-outs are valuable supplementary instruments that no respondent-state should overlook.

If the analysis of the two previous cases showed significant limitations as to the practical application of “police powers” doctrine to the state’s defence strategy, another case *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*[127] proves a completely different point of view. The case concerned ordinances related to packaging for health reasons, unlike tax measures or forced administration in the banking sector that were under dispute in two previously analysed cases, which gives us the opportunity to firmly state that the case bears a significant meaning to all the next cases that will arise from health-related regulations. Moreover, Uruguay has conducted a complete evaluation of the factual circumstances of the case, and therefore chose the most preferable strategy that turned out to be a win.

The factual circumstances over which the dispute has arose were as follows. Uruguay adopted two tobacco control measures to implement the WHO Framework Convention on Tobacco Control (FCTC): the Single Presentation Requirement (SPR), which restricts each brand family to one variant, and the 80/80 Regulation, which requires health warnings to cover 80 per cent of both sides of cigarette packaging. Philip Morris claimed that both measures constituted indirect expropriation and a breach of FET under the Switzerland-Uruguay BIT, alleging that the SPR had

[127] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016

eliminated seven of fourteen brand variants and that the 80/80 Regulation had substantially destroyed trademark value.

The tribunal dismissed the expropriation claim on two independent grounds. First, Philip Morris had not been substantially deprived of its investment: it continued to sell tobacco products in Uruguay throughout the period in question. Second, the tribunal held at paragraph 287 that “even assuming that the measures had resulted in a deprivation of a protected investment, Uruguay's adoption of the challenged measures was a valid exercise of the State's police powers, with the consequence of defeating the claim for expropriation.”[128] This formulation explicitly recognises the “police powers” doctrine as an independent ground for defeating expropriation claims.

The tribunal crystallised the conditions of justification measures under “police powers” doctrine: a bona fide exercise of regulatory powers for the purpose of protecting the public welfare; non-discriminatory; and proportionate[129]. Uruguay's FCTC compliance provided decisive external validation: measures adopted in fulfilment of international obligations benefit from a heightened presumption of legitimacy, in effect requiring the investor to challenge the consensus of the states that designed the framework. The tribunal applied a rational basis standard meaning that the measure was “directed to achieving that aim” and “capable of contributing to its achievement”. This substantially reduced the evidentiary burden. The measures were non-discriminatory as between all tobacco producers and proportionate because they were restrictions on marketing rather than total bans. The tribunal imported the doctrine into the BIT through Article 31(3)(c) of the Vienna Convention on the Law of Treaties, reading the expropriation clause through the lens of customary international law. Such methodology strengthens respondent-states under older treaties lacking explicit right-to-regulate clauses.

The majority dismissed the FET claims by invoking the margin of appreciation, applying a standard of whether there was “a manifest lack of reasons for the

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[128] *Philip Morris Brands,* para 287
[129] *Philip Morris Brands,* para 305

legislation" rather than whether the measures were optimal. On legitimate expectations, Philip Morris "could only expect progressively stricter regulation" in the tobacco sector, integrating the "police powers framework" into the FET analysis by reference to foreseeable regulatory trajectory. Arbitrator Born dissented on the SPR, contesting the transplant of the ECtHR's margin of appreciation into BIT arbitration and applying a stricter rationality-and-proportionality standard under which the SPR was manifestly arbitrary[130]. The dissent signals that deference remains contested; measures should be designed to satisfy even the stricter standard.

The outcome of the case and the Tribunal's holding prove that "police powers" doctrine can be successfully applied to the FET claims and the only limitation to that really is how the state argues its position. Simple statement 'these were execution of our police powers' would never work. The explicit, clear and coherent explanation of the state's position should be based on documented evidence that supports the very reason for implementing the measure, that would allow the Tribunal to see the narrative different from the one presented by the claimants, and with all the relevant facts to conclude fair and independent assessment whether the "police powers" conditions are met.

Together, these awards illustrate different regulatory contexts (emergency banking intervention, natural resource taxation, public health regulation), and produce materially different outcomes for the respondent-state. They thereby illuminate the true strengths and structural limitations of the police powers defence with a granularity that abstract doctrine alone cannot provide.

The three cases span the decade from 2006 to 2016 and collectively represent the most substantive jurisprudential engagement with the police powers doctrine in modern investment arbitration. Reading them in sequence reveals a discernible evolution: from the foundational but ultimately incomplete invocation in *Saluka*, through the nuanced taxonomy of regulatory and non-regulatory measures in

[130]*Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Concurring and Dissenting Opinion Co-Arbitrator Gary Born, 8 July 2016

Burlington, to the comprehensive and successful deployment in *Philip Morris*. Each award contributes a distinct lesson to the respondent-state's strategic toolkit.

The "police powers" doctrine is not a magical 'pill' to excuse the state from being liable for unlawful measures taken. The state cannot rely on the "police powers" defence if it cannot produce substantial reasoning for its actions. Even though the burden of proof lies on the claimant, the state bears the need to present its own explanations and firm objections to the allegations made by the claimant.

Across the three analysed awards and confirmed by the wider jurisprudence as could be observed from the aforementioned analysis in sections 1 and 2, four conditions have formed as criteria of a valid exercise of police powers: (a) bona fide pursuit of a legitimate public welfare objective; (b) non-discrimination; (c) proportionality; and (d) due process. The *Philip Morris* tribunal stated as three cumulative conditions: bona fide, non-discrimination, and proportionality, while other have added due process as a fourth dimension[131].

It is important, however, not to treat these conditions as a fixed checklist: "The lack of public purpose, discrimination, arbitrariness, due process, effects and/or prior specific assurances should be understood as considerations of good faith, serving not as cumulative requirements of the police powers doctrine but rather as indicia guiding a broader assessment of regulatory reasonableness by reference to the circumstances of the case and the applicable treaty standard[132]." This means that the failure to satisfy any single condition is not necessarily fatal to the defence if the overall assessment of reasonableness supports the state's position.

Practically, this means that the respondent-state should present a complete narrative of regulatory reasonableness, rather than a formalistic compliance exercise. The most persuasive defence will demonstrate that the measure was adopted by a

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[131] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, para 305

[132] Jorge E. Viñuales 'Defence Arguments in Investment Arbitration' (2020) *ICSID Reports*, 18, pp. 9–108. as cited in Hailes, O. and Turnbull, K. (2024) 'Police Powers in a Pandemic: Investment Treaty Interpretation and the Customary Presumption of Reasonable Regulation', in P. Merkouris et al. (eds.) *Custom and its Interpretation in International Investment Law*. Cambridge: Cambridge University Press (The Rules of Interpretation of Customary International Law), p 242

legitimate governmental authority acting within its constitutional and statutory mandate, was directed at a genuine and documented public welfare concern, was applied without discriminatory intent or effect, was calibrated to the objective without imposing disproportionate costs on investors and was accompanied by adequate administrative process.

3.2 Possibility of invoking ‘police powers’ defence on other stages of the proceeding

We have now presented that ‘police powers’ defence can be successfully incorporated in states’ defence in relation to expropriation objections, as well as to FET claims, on the merits stage. Another question arises here: could ‘police powers’ be applied to the strategic arguments presented by the state on other stages of the arbitral proceedings?

It is quite hard to master any example on how to use ‘police powers’ defence to the consideration of the case regarding jurisdiction and admissibility. Usually, the jurisdiction objections are based on the relevant treaty provisions in relation of the investment made, measures under dispute do not fall within the treaty provisions, procedural misconduct or wrongly chosen arbitral institution. Could it be possible to argue that the claim is inadmissible based on the objection that the measures under dispute are lawful exercise of ‘police powers’? Technically yes, practically the Tribunal will almost for sure consider this as merits issue and not the jurisdiction one. So, in case measures themselves are not into consideration yet, there is no place where to adjust ‘police powers’ doctrine into the state’s strategy. However, the *Ruiz v. Spain* Tribunal has made an interesting decision:

> *“The Tribunal lacks jurisdiction over disputes arising out of deposit withdrawals that do not concern acts or omissions taken by the Respondent in the exercise of sovereign powers.”* [133]

[133] *Antonio del Valle Ruiz and others v. Kingdom of Spain*, PCA Case No. 2019-17, Final Award, 13 March 2023, para 800(c)

This gives us even more grounds for stating that the 'police powers' doctrine can not be used without the direct link between the argumentation and the disputed measures. Spain did not use 'police powers' to argue the Tribunal's lack of jurisdiction, it stipulated that some of the disputes measures (precisely those arising out of deposit withdrawals) were acts taken by the European Commission and therefore do not fall within the treaty between Spain and Mexico. And then following with the objections to other claims argued that the measures that were taken by Spain itself were the legitimate exercise of state's 'police powers'.

The same is true regarding the calculation of damages. If it is presented at the same time as objections on the merits, any state will insist on that no damages should be granted as it did not conduct the breach of the treaty provisions. It is simply in no use to make the same 'police powers' arguments in repetition of those already stated as merits objections. In such case, only successful defence on merits and jurisdiction will result in no compensation awarded for no breach of the treaty provisions found.

If calculation of damages is presented on the later stage of proceeding, the facts of the case are already clear, and the Tribunal has already found breach of the expropriation or the FET provision. It seems that 'police powers' are in no use in such circumstances as again merits facts are not into consideration. Possibly for the state would be to argue that the claimed damages are too remote or speculative or are not connected to the measures under the dispute as *S.D. Myers v. Canada* Tribunal stated that the damages "must be neither speculative nor too remote[134]" in order to be recoverable.

Although, what if state tries to argue that the sum of compensation should be significantly reduced because the measures were taken in public interest (but for some reasons do not complete the 'police powers' test)? Does this affect the Tribunal's damages assessment?

We strongly believe that this would not have any positive impact on the Tribual's assessment. While addressing this question, the conducted research on the Tribunals

[134] S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Partial Awars, 13 Nowember 2000, para 316

decisions showed no such examples. The states argue that the damage is not resulted be the measures taken or is too remote from the measures taken to lower the final sum of compensation. As the measures are already decided to be conducted in breach of the treaty's provisions, there is not much scope to argue the reasons of adopting these measures. All of that have already been argued in relation to merits, and the repetitiveness of the same arguments in theory could be made in short following the previous line of argumentation. That would be a unique way to present a position and that is possible that some day we will have the opportunity to revise an award where state used 'police powers' regarding damages assessment.

After the arbitral proceeding resulted in an award, the parties usually have the right to appeal or to start annulment process (that depends on applicable treaty provisions and on arbitral rules chosen by the parties). In our opinion 'police powers' could be used only within the scope of argument that the Tribunal failed "to state reasons on which the Award is based[135]", meaning that the Tribunal did not properly examined the respondent' arguments with respect to 'police powers' and did not provide adequate legal basis for its decision.

Italy tried to do so in annulment proceeding of *Rockhopper v. Italy* award, but they focused more on procedural grounds for annulment. Even though their strategy in the initial arbitration proceeding was indeed based on 'police powers' defence, and the Tribunal nevertheless found that Italy has conducted direct expropriation[136], in the annulment proceeding they focused, among other jurisdiction and procedural arguments, on the lack of legal grounds for the Tribunal's decision and on adopting legal basis that was not argued by the parties during the arbitral proceeding without directly invoking 'police powers'[137]. Their position turned out to be successful and

[135] *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14, Decision on Annulment, 2 June 2025, para 13

[136] *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14, Final Award, 23 August 2022

[137] *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14, Decision on Annulment, 2 June 2025

the award was annulled. Although, Rockhopper initiated new arbitral proceeding in 2025[138] and the claim or the outcome of it are still unknown.

There also exists another procedural tool that is worth noting. Arbitration rules, in example ICSID, ICC, PCA, UNCITRAL rules, allow parties to fill the application for interim measures (or as sometimes referred provisional measures, compensatory measures). That allows the Tribunal to step in and grant the interim decision, in case special circumstances are met, way before it renders the final award.

The reason behind provisional measures is that the state "can interfere with the arbitration in a myriad of ways[139]", including conducting criminal prosecution against investor, witness tampering etc. and the mechanism of granting provisional measures serves as "a procedural safeguard[140]" to prevent such interferences.

Even though the logic behind it is ironclad, and the parallels could be easily drawn to the commercial arbitration or to the domestic court proceedings where parties have the procedural opportunity to preserve their rights by asking tribunal or the court to grant provisional measures, in the scope of investment arbitration the most controversial matter is that interim measures "can infringe the state's sovereignty.[141]"

The ISCID Arbitration Rules use the term "recommend"[142], while UNCITRAL Arbitration Rules in contrary use the term "order"[143] regarding what decision the Tribunal is authorized to render. Although this rises question whether the decision is binding upon rendering, the Tribunals take the position that the word 'recommend' in the scope of ISCID Rules has the same meaning as 'order', therefore the decision on provisional measures is binding as is the final award[144].

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[138] 'Rockhopper Launches New ICSID Arbitration After Award Annulment' Investment Treaty News, International Institute for Sustainable Development, 19 January 2026 URL: https://www.iisd.org/itn/2026/01/19/rockhopper-launches-new-icsid-arbitration-after-award-annulment/; see also ISCID Case Database https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/17/14

[139] Y. Dautaj, B. Gustafsson. Provisional Measures in Investor-State Arbitration: States Playing Games in Local Courts by Invoking the Trump Card (Police Powers). UNIVERSITY OF BOLOGNA LAW REVIEW, ISSN 2531-6133 [VOL.4:1 2019] p. 28

[140] same, p. 29

[141] same, p. 30

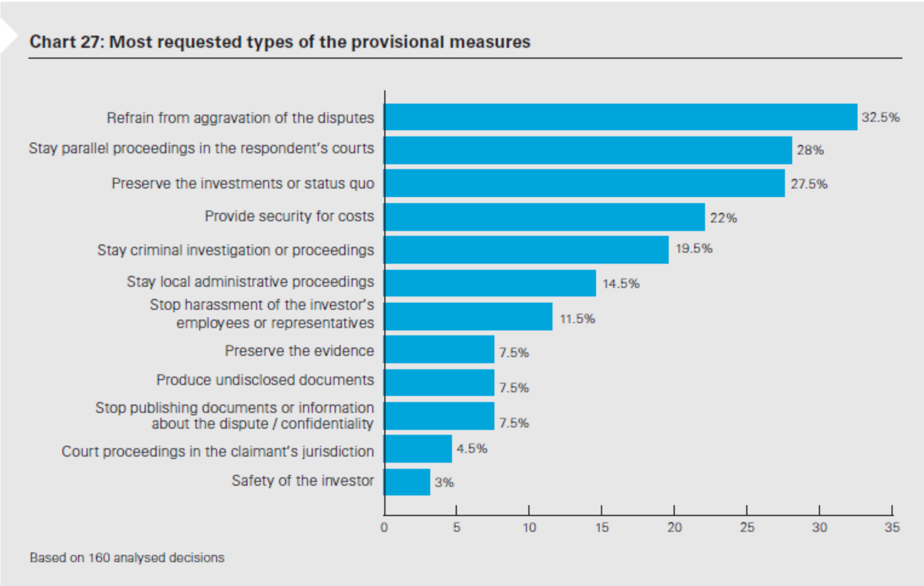
[142] ICSID ARBITRATION RULES (2022) Rule 47

[143] UNCITRAL Arbitration Rules (2021) art 26

[144] i.e. *Emilio Augustìn Maffezini v. Kingdom of Spain*, ICSID Case No. ARV/97/7, Decision on Request for Provisional Measures, 28 October 1999, para 9*; City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del*

As White & Case lawyers found in the survey on provisional measures, the most requested types of provisional measures are non-aggravation of the dispute, preservation of the status quo, and a stay of parallel proceedings in the respondent's courts.[145]

Picture 1.[146]



The presented analysis of 160 decisions on the provisional measures (see the overview in picture 1 below) raises a few substantial questions relevant to the topic of this thesis. Does the Tribunal possess the power to intervene in the proceedings pending in national courts? And should actions of the state (to this scope, any action of any of the state's agencies, bodies will be considered as the state's actions) that gave rise to the interim measures application be justified simply based on the sovereign 'police powers' of the state?

For a long time, the Tribunals were developing a very cautious approach to the provisional measures questions and stayed reluctant to directly interfere with a state's sovereignty by granting provisional measures. Over the last few years, the situation shifted, although the question regarding the power of the Tribunal to grant provisional measures is still not resolved in full. Tribunals now usually do not hesitate to grant

Ecuador (Petroecuador) [I], ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007, para 51-53

[145] David Goldberg, Yarik Kryvoi, Ivan Philippov. Provisional measures in investor-state arbitration, BIICL/White & Case, London, 2023

[146] same, p. 20

such relief without stating explicitly what aggravation of dispute means, as an example *Uniper v. Netherlands* Tribunal held:

> *"the Tribunal strongly recommends that the Respondent take no further steps that could aggravate the dispute or deter, restrain or preclude any of the Claimants from continuing to participate fully and freely in this Arbitration.[147]"*

That does not interfere directly with the state's 'police powers' while ensuring the normal course of the arbitration proceeding.

Still, the decision on provisional measures cannot be rendered without proper analysis if the applicable test is met. As the Tribunal in CEMEX v. Venezuela held, even the so called 'principle of non-aggravation' cannot supplant the requirements of Article 47 [of ICSID Arbitration Rules][148].

Professor Schreuer explained that "ICSID Arbitration Practice shows that Tribunals will only grant provisional measures if they are found to be necessary, urgent and required in order to avoid irreparable harm.[149]"

Thus, even though the state's actions and measures taken are under consideration at the time the application for provisional measures is made, invoking 'police powers' is simply not logical. The Tribunals acknowledge the state's sovereign powers as a general presumption and are considering factual circumstances merely to the extent that they have an impact on the arbitration proceeding itself. The parties would argue over the urgency or irreparable harm conditions to be met. While arguing so, the state obviously will explain its actions to be in accordance with national law, although not invoking 'police powers' directly and completing the full test. It is a preliminary stage of the arbitral proceeding, which means all the measures under dispute (and the defence objections) will be resolved at the later merits stage.

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[147] *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/22, Procedural Order No. 2 Decision on the Claimants' Request for Provisional Measures, 9 May 2022, para j)

[148] *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on the Claimants' Request for Provisional Measures, 3 March 2010, para 26

[149] C. Schreuer, The ICSID Convention: A Commentary (2nd ed. 2009), p.776.

It has been firmly established that the burden of proof lies on the claimant. That said, it is the claimant's obligation to prove the state's actions to be constituted unlawfully and in breach of treaty provisions. Nonetheless, the state cannot simply rely on the "police powers" doctrine without properly presenting its own case, as is evident from the analysis of the three significant awards. It is worth emphasising that if the measure is a legitimate exercise of regulatory authority, then there may be no expropriation in the first place. Thus, "police powers" defence is distinct from necessity and countermeasures both practically and doctrinally as not the circumstance precluding wrongfulness is to be established, but the absence of expropriation as such.

Three analysed cases bring essential lessons for developing practicable strategies in future: *Saluka* shows that police powers can defeat an expropriation claim but may not be enough for FET; *Burlington* shows the boundary between fiscal regulation and physical takeover; and *Philip Morris* shows perhaps the strongest model of a successful public-health regulatory defence.

The "police powers" defence is a powerful tool to use in merits objections, even though arbitral tribunals are not unanimous in their assessment of the doctrine. While it could be expanded to other stages, for example, to the assessment of provisional measures, it would hardly be useful. The arbitration practice regarding the application of the "police powers" doctrine is constantly evolving, and the states have a unique opportunity to present their cases creatively, resulting in new awards with enhanced evaluation of the doctrine. We believe that in the next few years, the controversy over the "police powers" will be resolved by a more accurate and similar approach from tribunals and further development of academic studies.

CONCLUSION

The "police powers" doctrine stems directly from the states' sovereignty and provides that there should not be any liability of the state for the legitimate exercise of its 'police powers', thus, even in case the state's measures negatively affect the investment, the state is not obliged to pay compensation for such losses if its actions were adopted in good faith with a legitimate purpose, proportionate and non-discriminatory.

An examination of the "police powers" doctrine, based on a detailed analysis of arbitral practice and academic literature, has enabled the identification of the following aspects, which are consistent with the research objectives set out.

1. It has been determined that while the existence of the "police powers" doctrine is not in dispute, its legal nature has sparked numerous debates and remains a highly controversial topic. The real controversy is whether the doctrine has become international customary law or remains a structured principle that integrates different approaches to interpreting investment treaties. The proponents of the doctrine note that the core of it is stable, it is consistent with broader states' sovereign right to regulate, is reflected in more recent investment treaties, and most importantly, is recognised by arbitral tribunals as customary international law. Those who hold a different position usually mark up the methodology of the doctrine's application; that the reflection in investment treaties may just resolve uncertainties; the scope of the doctrine still remains too broad; and that arbitration practice is not consistent, and some tribunals rely on the provisions of agreements rather than on 'police powers'. Nonetheless, we shall synthesize this analysis into a more balanced statement: the core of the doctrine has customary-law character, but its detailed criteria remain unsettled and continue to be shaped by treaty text and arbitral practice.

2. It has been determined that there exist concepts in international public law that resemble the "police powers" doctrine at first glance, although they hold a different legal purpose and meaning. The 'sole effects doctrine' is quite similar to 'police powers', is widely applied to indirect expropriation claims, but still exists separately and could be applied alongside 'police powers' – the main focus is on the

consequences (economic effect), not the reason for states' measures. 'Right to regulate' is probably the most confusing concept, and some arbitral tribunals do not separate it from 'police powers', although it appears to be a broader concept than 'police powers' as a practical implementation of it. Necessity and countermeasures are two completely different concepts that fall within the scope of the law of international responsibility of states and preclude unlawfulness of states' actions, while 'police powers' define whether the expropriation occurred at all. Proportionality often overlaps with 'police powers' and is used as a criterion for its assessment, although it remains an interpretative tool, or more accurately, a method of legal interpretation.

3. It has been determined that the "police powers" doctrine is something of a 'red line' drawn to strike a balance between the obligations that states undertake by signing international investment treaties and the need to act in accordance with the public purpose. State retains its sovereign rights to act; promises made by signing the investment treaties create a bond for compensation for breaches. And the 'police powers' are something in the middle that gives states an opportunity to act freely in public purpose if needed, without the obligation to pay compensation for losses caused to investors if the key 'police powers' criteria are met.

4. It has been determined that the arbitral tribunals have developed a more or less stable approach to defining measures as non-compensable legitimate exercise of 'police powers' that does not constitute expropriation or breach of fair and equitable treatment standard. The aforementioned criteria (a measure adopted in good faith with a legitimate purpose of public interest, proportionate, and non-discriminatory) are assessed by the tribunals on a case-by-case basis, with specific attention to the factual circumstances of the dispute. If these criteria are met, the measure falls within the scope of the state's 'police powers' and is non-compensable. In practice, the "police powers" criteria are assessed in relation to regulatory measures (i.e., environmental regulations, taxation) and are almost inapplicable if the direct taking of property (i.e., military or police force intervention) has occurred.

5. It has been determined that the “police powers” doctrine is a powerful and effective tool to invoke in investment arbitration when used wisely. The state's defence strategy, though, should be based on a thorough initial assessment of the present factual circumstances and evidence that could be provided in arbitration. The tribunals usually put the burden of proof on the claimant, who has to prove that the state conducted the unlawful actions that do not fall within ‘police powers’. Despite this, the state should be ready to provide its own narrative that fully describes the reasoning behind adopted measures under dispute, with a detailed assessment of ‘police powers’. It is essential to treat different claims separately with separate explanations that may overlap slightly (without repetition) while covering all measures within the scope of the dispute. Undermining of this crucial aspect could result in dismissing the expropriation claim but a complete loss on the FET claim, as can be observed in numerous arbitration cases, including *Burlington v. Ecuador*.

Overall, the study has confirmed that the doctrine has a customary core, while its detailed application remains context-dependent, and that it is most effective when used as part of a broader, evidence-based respondent-State strategy. While the controversy over the “police powers” doctrine’s legal nature remains unresolved, arbitral tribunals have developed a detailed approach to determining whether a measure falls within the scope of the doctrine and is non-compensable. This gives states a unique opportunity to adopt regulations in a more balanced way without breaching treaty provisions, and at the same time provides states with a powerful defence in case an arbitration claim arises.

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