CHAPTER 32

Police Powers or the State's Right to Regulate

Chemtura v. Canada[1]

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I. INTRODUCTION

While statehood "is characterized by sovereignty,"[2] sovereignty does not vest the State with an unfettered power to act at its sole good will. The doctrine of police powers and State's right to regulate ("police powers")[3] represents an attempt by investment tribunals to reconcile the sovereign right of the State, as the guardian of the general public interest, to regulate economic activities on its territory with its treaty or contractual obligations. In particular, "the right of entering into international engagements is an attribute of State sovereignty."[4] And, as noted by the *Framatome* tribunal, this same principle also applies to contractual commitments.[5]

* The author is indebted to B. Samson, Ph.D. candidate, Nanterre University (CEDIN) for his assistance in the research for this contribution, and thanks heartily Prof. Pedro Nikken and Dr. Olivia Danic for their remarks.

1. *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award (2 August 2010) (Kaufmann-Kohler, Brower, Crawford) [hereinafter *Chemtura v. Canada*].
2. Arbitration Commission of the Conference on Yugoslavia, Opinion No. 1 (29 November 1991), ¶ 1(b).
3. Both the singular and the plural are used. I use the general formula when both aspects (police powers and right to regulate) are concerned and "right to regulate" (which can be seen as an element of the general police powers) when I point at it more specifically.
4. Permanent Court of International Justice, *S.S. "Wimbledon"*, Judgment (17 August 1923), Series A, No. 1, p. 25.
5. *Framatome v. Atomic Energy Organization of Iran (A.E.O.I.)*, ICC Case No. 3896, Award (30 April 1982), *Clunet* 76 (1984).

As defined by Dr. Aikaterini Titi, "the right to regulate denotes the legal right exceptionally permitting the host state to regulate in derogation of international commitments it has undertaken by means of an investment agreement without incurring a duty to compensate."[6] This doctrine operates mainly in case of an allegation of indirect expropriation, although, allegedly, it may come into play in the case of lesser breaches of an investor's right.[7] While the police powers of the State are primarily invoked in matters concerning the protection of the environment, they can more broadly be effective in "the public interest in general,"[8] that is, "in the interests of public health, safety, morals or welfare."[9]

Recently emerging, the doctrine of the police powers contradicts the tradition principle reflected in the Hull doctrine according to which "under every rule of law and equity, no government is entitled to expropriate private property, for whatev purpose, without provision for prompt, adequate and effective payment therefore."

For a long period, investment tribunals strictly maintained the Hull doctrin echoed in paragraph 4 of Resolution 1803 (XVII) of the UN General Assembly. Moreover, a number of BITs (virtually all), concordantly include such an obligation compensate in case of expropriation with some variations as to the calculation of t compensation. Even though it was challenged during the 1970s and the early 1980s connection with the request for a "new international economic order," the gene principle has no doubt acquired the status of a firmly established customary rule. However, it was readily apparent that, if unqualified, the Hull doctrine was too ri and could threaten the ability of the Government to take public policy measures.

6. Aikaterini Titi, *The Right to Regulate in International Investment Law* 18 (Nomos 2014).
7. *See infra* Section III (A).
8. Alessandra Asterii, "Waiting for the Environmentalists: Environmental Language in Inv ment Treaties" in *International Investment Law and Its Others* 120-121 (Rainer Hofman Christian Tams (eds.), Nomos 2012).
9. Ben Mostafa, *The Sole Effects Doctrine, Police Powers and Indirect Expropriation Un International Law*, 15 Australian International Law Journal 278 (2008). As rightly noted by author such a wide definition is hardly operational; it describes the potential scope of doctrine; but it does not suffice to characterise its effects. *See also, e.g.*, Sabrina Rob Cuendet, *Droits de l'investisseur étranger et protection de l'environnement: Contributio l'analyse de l'expropriation indirecte* 256-257 (Nijhoff 2010) or Titi, *supra* n.6, at 181.
10. Letter from the Secretary of State of the United States to the Mexican Ambassado Washington (22 August 1938), 32 American Journal of International Law, Suppl., 193 (19
11. A/RES/1803 (XVII) (14 December 1962) "Permanent Sovereignty over Natural Resources *also* OECD, Draft Multilateral Agreement on Investment, Art. IV(2)(1) (22 April 1998); DAFFE/MAI(98)7/REV1. *See, e.g.*, *LIAMCO v. Libya*, Award (12 April 1977) (Mahmassani I.L.M. 91 (1981); *see also, e.g.*, *Kuwait v. AMINOIL*, Award (24 March 1982) (Reuter, Sul Fitzmaurice) 21 I.L.M. 1023 (1982), ¶ 93.
12. *See CME Czech Republic B.V. (The Netherlands) v. Czech Republic*, UNCITRAL, Final Award March 2003) (Kühn, Schwebel, Brownlie), ¶¶ 497-498. *See also, e.g.*, *Generation Ukraine v. Ukraine*, ICSID Case No. ARB/00/9, Award (16 September 2003) (Paulsson, Salpius, Vo ¶ 11.3; José Alvarez, *A BIT On Custom*, 42 New York University Journal of International & Politics 63-64 (2009); Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Pol and Interpretation* 271 (Oxford University Press 2011).

This was why arbitral tribunals started to soften the traditional position during the mid-1980s. They found inspiration in the doctrine of the police powers of the State already well established in the constitutional law of the United States.[13]

In sum, the police powers doctrine accepts that a non-discriminatory taking of property without compensation can be lawful, if decided for a reason of public interest.[14] Its purpose is to preserve the right of the State to regulate in the public interest. As an ICSID tribunal put it:

> [G]overnments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation.[15]

The doctrine of police powers has established itself as an enforceable legal principle, through both the case-law and the newly adopted BITs.[16] It has been strengthened by the jurisprudence of the European Court of Human Rights ("ECHR") applying Article 1 of Protocol 1 to the European Convention.[17] A number of investment awards have cited the case-law of the Court of Strasbourg in support of the application of the police powers doctrine.[18]

13. *Chicago & Alton R. R. v. Tranbarger*, 238 US 76-78 (1 June 1915). *See also* the case-law cited therein and *Hamilton, Collector of Internal Revenue for the Collection District of Kentucky v. Kentucky Distilleries & Warehouse Company*, 251 US 156-158 (20 November 1919); *see also, e.g.*, Jorge E. Viñuales, *Foreign Investment and the Environment in International Law*, 367-369 (CUP 2012); Suzy H. Nikièma, *L'expropriation indirecte en droit international des investissements*, 166-170 (PUF 2012) and Arnaud de Nanteuil, *L'expropriation indirecte en droit international de l'investissement*, 166-176 and 466-476 (Pedone 2014).
14. *See, e.g.*, Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20 ICSID Rev. F.I.L.J. 26 (2005) or Arnaud de Nanteuil, *supra* n.13, at 481.
15. *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) (Kerameus, Covarrubias Bravo, Gantz), ¶ 103 [hereinafter *Feldman v. Mexico*].
16. *See, e.g.*, Katia Yannaca-Small, "Indirect Expropriation and the Right to Regulate: How to Draw the Line?" in *Arbitration under International Investment Agreements: A Guide to the Key Issues*, 476-477 (Katia Yannaca-Small (ed.), OUP 2010); Alessandra Asterii, *supra* n.8, at 142-143; or Pedro J. Martinez-Fraga and C. Ryan Reetz, *Public Purpose in International Law Rethinking Regulatory Sovereignty in the Global Era*, n.243 (CUP 2015).
17. *See, e.g.*, ECHR, *Sporrong and Lönnroth*, Applications No. 7151/75 and 7152/75, Judgment (23 September 1982), Series A no. 52, 26 and 28, ¶¶ 69 and 73; *James and others v. The United Kingdom*, Application No. 8793/79, Judgment (21 February 1986), ¶ 54; *Frendo Randon and Others v. Malta*, Application No. 2226/10, Judgment (22 November 2011), ¶¶ 51-54 and *Deguara Caruana Gatto and Others v. Malta*, Application No. 14796/11, Judgment (9 July 2013), ¶¶ 48-51.
18. *See Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, (29 May 2003) (Grigera Naón, Fernandez Rozas, Bernal Verea) [hereinafter *Tecmed v. Mexico*], ¶ 122; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006) (Rigo Sureda, Lalonde, Martins), ¶ 311 and *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009) (Bernardini, Rovine, Derains), ¶ 293. In *Fireman's Fund v. Mexico*, the tribunal noted that: "it may be questioned whether it is a viable source of interpreting Article 1110 of the NAFTA." *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award (17 July 2006) (van den Berg, Lowenfeld, Olavarrieta) n.161 [hereinafter *Fireman's Fund v. Mexico*]. It might not be a formal "source", but it is certainly a source of inspiration.

Although mentioned in earlier decisions, which generally either rejected it as a atter of principle or considered that the conditions for its application were not met, e doctrine found its way to positive law as remarkably illustrated by *Chemtura rporation v. Canada*, as explained below.

. THE CASE

A. The Context of the *Chemtura v. Canada* Case

1. The Origins and Early Challenges to the Police Powers Doctrine

ne endorsement of the police powers doctrine at the international level before the id-1980s is debatable and the scarce case law usually cited is controversial.[19]

The doctrine of police powers was nevertheless invoked in scholarly writings in e early 1960s. It very partially appears in Federico Garcia-Amador's fourth Report to e International Law Commission ("ILC") on State Responsibility, but nowhere does e indicate that when the conditions for the application of the doctrine are met no ompensation is due.[20] This was suggested soon after in Article 10, paragraph 5, of the arvard Draft Convention on the International Responsibility of States for Injuries to liens which can probably be seen as largely reflecting the doctrine as now commonly pplied by international tribunals:

> 5. An uncompensated taking of property of an alien or a deprivation of the use or enjoyment of property of an alien which results from the execution of the tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health, or morality; or from the valid exercise of belligerent rights; or is otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful, provided:
>
> (a) it is not a clear and discriminatory violation of the law of the State concerned;
> (b) it is not the result of a violation of any provision of Articles 6 to 8 of this Convention [denial of justice];

9. The commentary generally refers to the *Poggioli, Parsons* and *Kügele* cases. In *Poggioli*, umpire Ralston assumed "that it was within [the Venezuelan Government's] police power to close [a port]" and granted no compensation for its damaging consequences but this was because "... no contract [existed] between the Poggiolis and the Government by virtue of which damages could be claimed for the closing of the port." (*See* Mixed Claims Commission Italy-Venezuela, *Poggioli*, Award (1903), X RIAA 691); second, in *Parsons*, the destruction of private property at stake occurred in time of war, which limits the precedent's value of the award (*see* arbitral tribunal (Great Britain-United States), *J. Parsons*, Award (30 November 1926), VI RIIA 165-166); and third, in *Kügele*, the Upper Silesian arbitral tribunal found that there was no expropriation since had the claimant "paid the tax, he would be entitled to go on with his business" (*see* Award (5 February 1932), 1931-32 Ann. Dig. Int'l L. 69).

0. *See* I.L.C. Yearbook (1956), at 11, ¶ 43, n.50 the Special Rapporteur refering to the *J. Parsons* case (1925), *supra* n.19.

> (c) it is not an unreasonable departure from the principles of justice recognized by the principal legal systems of the world; and
> (d) it is not an abuse of the powers specified in this paragraph for the purpose of depriving an alien of his property.[21]

Shortly thereafter, the *Second Restatement* of the *Foreign Relations Law of the United States* published under the auspices of the American Law Institute (1965) rather cursorily envisaged that "the maintenance of public order, safety, or health" and "the enforcement of any law of the state" if "reasonably necessary," could justify the taking of an alien's property without just compensation.[22] However, the distinction between expropriation and regulation resulting from the police powers doctrine as applied by US Courts was only fully endorsed in the *Third Restatement* (1987):

> A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory.[23]

This position, which was cited with approval in several investment awards,[24] probably lies at the origin of the (relative) popularity of the doctrine in international jurisprudence.

In spite of the scarcity and uncertain scope of the international precedents, just like the *Third Restatement*, the contemporary awards referring to the police power doctrine initially took for granted that it was "safe to say that customary international law recognizes" it.[25] Thus, in *Sedco v. NIOC*, one of the pioneering cases for this matter,

21. 55 American Journal of International Law 554 (1961). The 1961 Harvard Draft is sometimes cited in relation with the police powers doctrine in investments awards (*see, e.g., Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award (26 June 2000) (Dervaird, Greenberg, Belman), ¶ 102 [hereinafter *Pope & Talbot v. Canada*]; *Saluka Investments B. V. v. Czech Republic*, UNCITRAL Rules, Partial Award (17 March 2006) (Watts, Fortier, Behrens), ¶ 256 [hereinafter *Saluka v. Czech Republic*]; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability (30 July 2010) (Salacuse, Kaufmann-Kohler, Nikken), ¶ 147 [hereinafter *Suez v. Argentina*]; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011) (Caflisch, Bernardini, Stern), ¶ 238, n.164 [hereinafter *El Paso v. Argentina*]; and *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (14 December 2012) (Kaufmann-Kohler, Orrego Vicuña, Stern), ¶ 394 [hereinafter *Burlington v. Ecuador*]).
22. American Law Institute, *Restatement of the Law, Second, Foreign Relations Law of the United States* 592, ¶ 197 (1965), *see also* ¶ 195, at 587.
23. American Law Institute, *Restatement of the Law, Third, Foreign Relations Law of the United States*, vol. 2, 201, ¶ 712 (1987).
24. *See, e.g., Too v. Greater Modesto Insurance Associates*, Award (29 December 1989), 23 Iran-US C.T.R. 187; *Pope & Talbot v. Canada, supra* n.21, ¶ 99; *Feldman v. Mexico, supra* n.15, ¶¶ 105-106; *Saluka v Czech Republic, supra* n.21, ¶ 260; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. The Argentine Republic*, ICISD Case ARB/02/1, Decision on Liability (3 October 2006) (de Maekelt, Rezek, van den Berg), ¶ 195 [hereinafter *LG&E v. Argentina*]; and *El Paso v. Argentina, supra* n.21, ¶ 238 (citing with approval a similar legal opinion of Prof. I. Brownlie).
25. *Feldman v. Mexico, supra* n.15, ¶ 103.

ran-US Claims Tribunal noted that it was an "accepted principle of international :hat a State is not liable for economic injury which is a consequence of bona fide lation within the accepted police power of States."[26]

It was not until the eve of the 21st century, that the police powers doctrine was ;nized in a number of investment cases.[27] This was usually without consequences ıe instant case, since the tribunals found that, for one reason or another, the litions for its application were not met. However, even though this repeated ;nition of the police powers doctrine, was somehow negative, in hollow, it ıinly contributed in anchoring it in the international legal sphere and precising its e and content.

Thus, in *Marvin Feldman v. Canada* the ICSID tribunal strongly supported the :e powers doctrine;[28] however, in the precise case, after analyzing the circum- :ces on the basis of Section 712 of the *Third Restatement*,[29] "the Tribunal [held] that ıctions of Mexico with regard to the Claimant's investment do not constitute an opriation under Article 1110 of NAFTA"[30] but on grounds other than the police ers doctrine.

The same was true in several other cases in which the arbitral tribunals orated on the conditions for applying the doctrine and concluded that they were met in the instant case. In particular, in *Fireman's Fund v. Mexico*, the ICSID ınal lists the various elements which, according to the case-law and customary :national law, should be taken into consideration for determining the existence of xpropriation within the meaning of Article 1110(1) of the NAFTA. Among these en elements, the tribunal retained: "(j) ... whether the measure is within the gnized police powers of the host State; the (public) purpose and effect of the sure; whether the measure is discriminatory; the proportionality between neans employed and the aim sought to be realized; and the bona fide nature of the sure";[31] but this was not the ground for the decision.[32]

For its part, the UNCITRAL Tribunal in *S.D. Myers v. Canada* accepted that "[t]he ›ral body of precedent does not treat regulatory action as amounting to expropria ," but it considered that "[r]egulatory conduct by public authorities is unlikely to be subject of legitimate complaint under Article 1110 [expropriation] of the NAFTA,

Sedco, Inc. et al. v. National Iranian Oil Co. et al.*, No. ITL 55-129-3, Award (28 October 1985) 9 Iran-US C.T.R. 248.

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Feldman v. Mexico, supra n.15, ¶ 103.

See Restatement of the Law, Third, supra n.23

Feldman v. Mexico, supra n.15, ¶ 153.

Fireman's Fund v. Mexico, supra n.18, ¶¶ 176-177; footnote omitted.

See also, e.g., Glamis Gold, Ltd v. United States of America, UNCITRAL, Award (8 June 2009) (Young, Caron, Hubbard), ¶ 354 [hereinafter *Glamis Gold v. US*]; *Suez v. Argentina, supra* n.21 ¶ 147.

although the tribunal does not rule out that possibility,"[33] a view criticized in *Fireman's Fund v. Mexico.*[34]

These ("negative") recognitions contributed to anchor the police powers doctrine in the international legal sphere and to shape its scope and content. Nevertheless, the doctrine, in its absolute sense, was challenged by other tribunals which showed skepticism as to its existence and application as a legal norm.

Thus, in *Pope & Talbot v. Canada*, an UNCITRAL tribunal found that "the scope of [Article 1110 of NAFTA] does cover non-discriminatory regulation that might be said to fall within an exercise of a state's so-called police powers"[35] and it warned that "much creeping expropriation could be conducted by regulation and a blanket exception for regulatory measures would create a gaping loophole in international protections against expropriation."[36]

Similarly, the ICSID tribunal in *Santa Elena v. Costa Rica* firmly maintained that:

> Expropriatory environmental measures—no matter how laudable and beneficial to society as a whole—are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.[37]

This position was also robustly maintained in *Metalclad v. Mexico*.[38] Without mentioning the police powers of the State, the tribunal reaffirmed the "sole effect" doctrine, which contradicts the police powers principle. According to the sole effect doctrine, "if a governmental measure effectively deprives the owner of control over his property or substantially affects its commercial value, compensation is required even if the State may purport to have adopted the measure in the exercise of its police powers."[39]

33. *S.D. Myers Inc. v. Government of Canada*, NAFTA, UNCITRAL, Partial Award (13 November 2000) (Hunter, Schwartz, Chiasson), ¶¶ 281-283.
34. *Fireman's Fund v. Mexico, supra* n.18, n.160 ("The present Tribunal believes that the issue is more subtle than the proposition of 'unlikely' in *S.D. Myers*.").
35. *Pope & Talbot v. Canada, supra* n.21, ¶ 96.
36. *Ibid.*, ¶ 99.
37. *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award (17 February 2000) (Fortier, Lauterpacht, Weil), ¶ 72 [hereinafter *Santa Elena v. Costa Rica*].
38. *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000) (Lauterpacht, Civiletti, Siqueiros), ¶¶ 85, 89, 103, 106-107 and 111.
39. Veijo Heiskanen, *The Contribution of the Iran-United States Claims Tribunal to the Development of the Doctrine of Indirect Expropriation*, 5 Int'l L.F. D. Int'l 177 (2003). *See also* Santiago Montt, *State Liability in Investment Treaty Arbitration* 253 (Hart 2009); Rahim Moloo and Justin Jacinto, *Environmental and Health Regulation: Assessing Liability under Investment Treaties*, 29 Berkeley Journal of International Law 13 (2011); Titi, *supra* n.6, at 181 and Martinez-Fraga & Reetz, *supra* n.16, at 45 and, in the case law *see, e.g., Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award (30 June 2009) (Kaufmann-Kohler, Schreuer, Otton), ¶ 133.

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It was not until the eve of the 21st century, that the police powers doctrine was recognized in a number of investment cases.[27] This was usually without consequences to the instant case, since the tribunals found that, for one reason or another, the conditions for its application were not met. However, even though this repeated recognition of the police powers doctrine, was somehow negative, in hollow, it certainly contributed in anchoring it in the international legal sphere and precising its scope and content.

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The same was true in several other cases in which the arbitral tribunals elaborated on the conditions for applying the doctrine and concluded that they were not met in the instant case. In particular, in *Fireman's Fund v. Mexico*, the ICSID tribunal lists the various elements which, according to the case-law and customary international law, should be taken into consideration for determining the existence of an expropriation within the meaning of Article 1110(1) of the NAFTA. Among these eleven elements, the tribunal retained: "(j) ... whether the measure is within the recognized police powers of the host State; the (public) purpose and effect of the measure; whether the measure is discriminatory; the proportionality between the means employed and the aim sought to be realized; and the bona fide nature of the measure";[31] but this was not the ground for the decision.[32]

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2. The Recognition of the Police Powers Doctrine in Modern Investment Arbitration Law

In *Tecmed v. Mexico*, the tribunal first noted that "[t]he principle that the State's exercise of its sovereign power within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable."[40] However, citing the *ELSI* case before the International Court of Justice and the ICSID award in *Marvin Feldman v. Mexico*,[41] the tribunal immediately qualified its statement specifying: "[t]hat the actions of the Respondent are legitimate or lawful or in compliance with the law from the standpoint of the Respondent's domestic laws does not mean that they conform to the Agreement or to international law."[42] The *Tecmed* tribunal also found:

> no principle stating that regulatory administrative actions are *per se* excluded from the scope of the [BIT], even if they are beneficial to society as a whole—such as environmental protection—, particularly if the negative economic impact of such actions on the financial position of the investor is sufficient to neutralize in full the value, or economic or commercial use of its investment without receiving any compensation whatsoever.[43]

After refusing to exclude regulatory actions and measures from the definition of expropriatory acts,[44] it reintroduced nevertheless a more measured approach of the police power doctrine. To determine if regulatory actions are to be characterized as expropriatory, the tribunal considered "whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality."[45]

Two years later, the *Methanex v. US* UNCITRAL tribunal clearly affirmed the application of the doctrine in a striking manner for the first time, when it stated that:

> [A]s 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 and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.[46]

40. *Tecmed v. Mexico*, *supra* n.18, ¶ 119.
41. *Ibid.*, ¶ 120, n.137 (citing International Court of Justice, *Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, Judgment, *ICJ Reports 1989* (20 July 1989), p. 73; *Feldman v. Mexico*, *supra*, n.15, 26, 78.
42. *Ibid.*, ¶ 120.
43. *Ibid.*, ¶ 121.
44. *Ibid.*, ¶¶ 121-122 (citing with approval the above-quoted *dictum* from *Santa Elena v. Costa Rica*, *supra* n.37).
45. *Ibid.*, ¶ 122.
46. *Methanex Corporation v. United States of America*, UNCITRAL, Final Award (3 August 2005) (Veeder, Reisman, Rowley), ¶ IV.7 [hereinafter *Methanex v. US*].

Afterward the tribunal rejected the claim for compensation.[47] However, the link between the principle enunciated and the rejection of the claim is not fully clear.[48]

Soon after, the *Saluka* tribunal also found that "the measures at issue [could] be justified as permissible regulatory actions."[49] Leaving no doubt that this finding was a consequence of the police powers doctrine, the tribunal relied on the 1961 Harvard draft convention, the *Third Restatement* and an accompanying note to the 1967 OECD Draft Convention on the Protection of Foreign Property.[50] It affirmed that: "[i]t is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare."[51]

As shown above, the *Chemtura v. Canada* case was preceded by abundant case law that endorsed the police powers doctrine, such as the *Tecmed v. Mexico* or the *Methanex v. US* awards. However, *Chemtura v. Canada* can be considered "landmark" in that it contains a clear expression of the police powers doctrine from which the Tribunal inferred radical conclusions, as discussed below.

B. The *Chemtura v. Canada* Case[52]

The *Chemtura* case was brought against Canada by an American firm manufacturing lindane, an agricultural pesticide. Lindane-based products were not allowed to be sold or distributed in the United States. Similarly, "as a result of the risks associated with the use of lindane, many steps [were] taken to restrict the use of lindane on an international level … ."[53] Following a special review, Canada's pesticide federal agency "formed the view that the [health and environmental] risk assessment findings warranted regulatory action by way of suspension or termination of lindane registrations"[54] and accordingly terminated the use of lindane based products. Shortly thereafter, Canada's agency terminated the Claimant's registrations for authorized lindane-containing products. After a thorough review of the factual circumstances, the very distinguished Tribunal concluded that:

47. *Ibid.*, ¶ IV.15 and IV.18.
48. de Nanteuil, *supra* n.13, at 488-489.
49. *Saluka v. Czech Republic*, *supra* n.21, ¶ 265. The importance of this award as a step in the strengthening of the police powers doctrine is rightly underlined in de Nanteuil, *supra* n.13, at 487.
50. *Saluka v. Czech Republic*, *supra* n.21, ¶ 256.
51. *Ibid.*, ¶ 255. For another reminder of the doctrine, *see European Media Ventures SA v. The Czech Republic*, UNCITRAL, Partial Award on Liability (8 July 2009) (Mustill, Greenwood, Lew), ¶ 76 ("[A]n investor who contracts with a private party … and who depends for the achievement of the full benefit of those contracts upon the host State's exercise of its regulatory powers is not entitled to compensation for expropriation merely because regulatory decisions go against him, even if the consequence is that his business is ruined.").
52. *Chemtura v. Canada*, *supra* n.1.
53. *Ibid.*, ¶ 8.
54. *Ibid.*, ¶ 29.

In summary, the evidence shows that the measures did not amount to a substantial deprivation of the Claimant's investment.

Irrespective of the existence of a contractual deprivation, the Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers. ... [T]he PMRA [Pest Management Regulatory Agency] took measures within its mandate, in a non-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.* [55]

Thus, following the *Methanex v. US* and *Saluka v. Czech Republic* precedents,[56] the *Chemtura* Tribunal takes the extreme view that, since the contractual deprivation results from "a valid exercise of the Respondent's police powers," it "does not constitute an expropriation." In other terms the Tribunal considers that the exercise of the State's police powers precludes not only the obligation to pay compensation but disqualifies the measure concerned as an expropriation.

Besides confirming the police power doctrine in its most absolute sense,[57] the *Chemtura v. Canada* Award is noteworthy in that (a) it elaborates on the applicable standard of expropriation,[58] scratching in passing the "extremely broad" characterization of the notion retained in *Mexico v. Metalclad*,[59] and (b) it assesses the meaning and scope of the fair and equitable treatment and full protection and security standards of Article 1105 of NAFTA, by reference to customary international law. Stating that such an assessment "must be conducted *in concreto*,"[60] the Tribunal noted:

that it is not its task to determine whether certain uses of lindane are dangerous, whether in general or in the Canadian context .... As Canada has noted, the rule of a Chapter 11 Tribunal is not to second-guess the correctness of the science-based decision-making of highly specialized national regulatory agencies. ... Irrespective of the state of the science, however, the Tribunal cannot ignore the fact that lindane has raised increasingly serious concerns both in other countries and at the international level since the 1970s.[61]

Relying on the restriction or prohibition of the use of lindane in other countries and on Canada's international commitments,[62] the Tribunal decided that the Respondent had acted within the limits of its margin of appreciation.

55. *Ibid.*, ¶¶ 265-266 (emphasis added). *See* in a different context *Saluka v. Czech Republic, supra* n.21, ¶ 262.
56. *See Saluka v. Czech Republic, supra* n.21 and *Methanex v.US, supra* n.46.
57. For analyses of the Award, *see, e.g.*, Moloo & Jacinto, *supra* n.39, at 65; Caroline Foster, *Adjudication, Arbitration and the turn to Public Law "Standards of Review": Putting the Precautionary Principle in the Crucible*, 3 Journal of International Dispute Settlement 538 (2012); Viñuales, *supra* n.13, at 371; and Saverio di Benedetto, *International Investment Law and the Environment*, 144 (Edward Elgar, 2013).
58. *Chemtura v. Canada, supra* n.1, ¶¶ 239-249.
59. *Ibid.*, ¶ 248 – citing the Supreme Court of British Colombia, *United Mexican States v. Metalclad Corporation*, decision of 2 May 2001, 2001 BCSC 664.
60. *Chemtura v. Canada, supra* n.1, ¶ 123.
61. *Ibid.*, ¶¶ 134-135.
62. *Ibid.*, ¶¶ 135-138.

III. *CHEMTURA v. CANADA*'S IMPACT AND CONTRIBUTION TO THE DEVELOPMENT OF INVESTMENT LAW

Despite some hesitations, it cannot be denied that the police powers doctrine is now part of positive law. In compliance with the continuous interaction and mutual cross-fertilization between the developing case-law and the evolving content of the BITs, the police powers doctrine is now amply reflected in recent model BITs and newly concluded BITs.[63]

The indisputable beneficial impact of the police powers doctrine must not however be overestimated as (A) it is of no use for dealing with several aspects of deprivation of property; (B) the absolute thesis according to which a taking of property decided under the regulatory power of the State is not an expropriation with the consequence that in all cases no compensation is due is hardly tenable; and (C) for the time being the conditions for applying the doctrine unfortunately remain uncertain.

A. The Relatively Limited Scope of the Doctrine

In spite of some views to the contrary,[64] the police powers doctrine does not apply to every interference with private property. As aptly explained in *Suez v. Argentina*:

[T]he application of the police powers doctrine as an explicit, affirmative defense to treaty claims *other* than for expropriation is inappropriate, because ... if a tribunal finds that a State has violated treaty standards of fair and equitable treatment and full protection and security, it must of necessity have determined that such State has exceeded its reasonable right to regulate. Consequently, ... a decision on the application of the police powers doctrine in such circumstance would be duplicative and therefore inappropriate. [65]

The doctrine however remains applicable to expropriation cases, both when the tribunal examines whether the taking of property took place, and when its sole task is to determine whether a taking of property is compensable. In the first instance, some tribunals have expounded a three-stage approach pursuant to which "the Tribunal must ascertain whether the *coactiva* measures were a 'forcible appropriation' that (i) substantially deprived [the Claimant] of the value of its investment, (ii) on a permanent basis, and (iii) found no justification in the police powers doctrine."[66] The second instance implies that the tribunal has *already* determined that the deprivation of property took place and the doctrine is therefore controlling.

63. For a recent study of investment treaty practice concerning the State's right to regulate, *see* Asteril, *supra* n.8.
64. *See, e.g.*, Moloo & Jacinto, *supra* n.39, at 16 and Caroline Henckels, *Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration*, 15 Journal of International Economic Law 225 (2012). *See also* Jorge E. Viñuales, *supra* n.13, at 369.
65. *Suez v. Argentina, supra* n.21, ¶ 148 (emphasis in original).
66. *Burlington v. Ecuador, supra* n.21, ¶ 473. *See also Glamis Gold v. US, supra* n.32, ¶ 356.

B. The Search for a Truly Balanced Conception of the Police Powers Doctrine

The police powers doctrine in its absolute conception implies that any taking of property decided within the regulatory power of the State (at least if not discriminatory) does not qualify as a proper "expropriation" and, therefore, is not subject to compensation.[67] This, which results from the formulas used in some of the awards quoted above,[68] is an excessive view. As rightly noted by the *Pope & Talbot* tribunal, such an interpretation of the doctrine "would create a gaping loophole in international protections against expropriation."[69] On the other hand a "dry" application of the sole effect doctrine[70] does not satisfactorily preserve the general interest (supposedly) represented by the Government. It is at this stage that the doctrine of police powers comes in. The aim of the police powers doctrine is to determine when an expropriation is *not* compensable.

It must be accepted that a measure taken by the Government in the use of its right to regulate and within its police powers may result, directly or indirectly (usually indirectly), in a deprivation of property. Such deprivation may be considered an expropriation. In other words, the police powers doctrine does not determine the qualification of the measure itself, but instead may affect the State's obligation to compensate the investor, which can be – but is not necessarily – paralyzed when the police powers doctrine comes into play.

Another drawback of the absolute conception of the police powers approach is that it can be "objectively" discriminatory: whatever the intent of the Government, a State regulation decided *bona fide* in the general interest can impose an exclusive and excessive sacrifice on a single economic actor – in the hypothesis envisaged, a foreign investor. To avoid these drawbacks two different but complementary solutions may be considered: *first*, apply the proportionality test as the main criterion for implementing the police power doctrine; *second*, find inspiration in the French principle of equality with regard to public burdens (*égalité devant les charges publiques*).

The *proportionality test* is by no means unknown from the case-law[71] or the scholarly studies relating to the police powers doctrine. As has been noted, "investment law is indebted to the 2003 award in *Tecmed v. Mexico* for the introduction of the

67. It is commonly asserted 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." *See Methanex v.US*, *supra* n.46, ¶ IV.7. *See also Saluka v. Czech Republic*, *supra* n.21, ¶ 255. This is both true and confusing. *See* Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 Recueil des Cours 331 (1982).
68. *Methanex v. US*, *supra* n.46, ¶ IV.7; *Saluka v. Czech Republic*, *supra* n.21, ¶ 265 and *Chemtura v. Canada*, *supra* n.1, ¶ II.B.
69. *Pope & Talbot v. Canada*, *supra* n.21, ¶ 99. For a well-argued criticism of the absolute conception of the police powers doctrine, *see, e.g.*, de Nanteuil, *supra* n.13, at 491-502.
70. *See supra*, Section II (A)(1), at 7.
71. The "balance" between the general interest and the protection of private property is a key element of the reasoning of the regional courts of human rights in this matter – *see supra*, Section (I) at 3.

proportionality test within the framework of indirect expropriation."[72] In that decision, the ICSID tribunal strongly relied on the proportionality existing between the actions or measures challenged by the claimant and the public interest invoked by the respondent.[73] The *Tecmed v. Mexico* formula was repeated in *LG&E.*[74] And in *Chemtura v. Canada* it is apparent that the Tribunal considered that the contested measures, "motivated by the increasing awareness of the dangers presented by lindane for human health and the environment"[75] were proportionate to meet this aim since "the evidence shows that the measures did not amount to a substantial deprivation of the Claimant's investment."[76] The proportionality test, although unavoidably subjective, allows a distinction between deprivations of property which are compensable (those which amount to a disproportionate deprivation of property) and those which are not (since they are proportional to the aim of general interest pursued).

The proportionality test is related to the principle of equality with regard to public burdens (*égalité devant les charges publiques*), and may be used to determine whether an expropriation is compensable. This principle of French administrative law helps prevent that a measure taken for the general interest and involving no responsibility of the State from placing an inordinate burden on a single or a small group of persons;[77] in such a case, "*cette charge, créée dans un intérêt général doit être supportée par la collectivité.*"[78] The French *Conseil d'État* even applies this principle to questions involving the country's foreign relations:

> *[L]a responsabilité de l'État est susceptible d'être engagée sur le fondement de l'égalité des citoyens devant les charges publiques, pour assurer la réparation de préjudices nés de conventions conclues par la France avec d'autres Etats et incorporées régulièrement dans l'ordre juridique interne, à la condition d'une part que ni la convention elle-même ni la loi qui en a éventuellement autorisé la ratification ne puissent être interprétées comme ayant entendu exclure toute*

72. Arnaud de Nanteuil, *Droit international de l'investissement* 359 (Pedone 2014) – French original: "*Le droit de l'investissement est redevable de l'introduction du test de proportionnalité dans le cadre de l'expropriation indirecte à la sentence* Tecmed c. Mexique, *rendue en 2003.*"
73. *Tecmed v. Mexico*, *supra* n.18, ¶ 122.
74. *LG&E. v. Argentina*, *supra* n.24, ¶ 195.
75. *Chemtura v. Canada*, *supra* n.1, ¶ 266.
76. *Ibid.*, ¶ 265.
77. *See also* the German equivalent concept of "*Sonderopfer*" for the principle that "special sacrifices imposed by regulation on individuals for the benefit of the community at large need to be compensated." *See* Thomas Wälde & Abba Kolo, *Environmental Regulation, Investment Protection and "Regulatory Taking" in International Law*, 50 I.C.L.Q. n.154 (2001); *see also* Friedrich Kreft, *Öffentlich-rechtliche Ersatzleistungen: Eigentum, Enteignung, Entschädigung* (de Gruyter 1998) and Horst Wüstenbecker, *Verwaltungsrecht AT 2: Mit Staatshaftungsrecht* (Alpmann Schmidt 2010). For an application of the "*Sonderopfer*"-theory in a case concerning an *indirect* limitation of enjoyment of property ("*materielle Enteignung*"; *see Saar Papier Vertriebs GmbH v. Republic of Poland*, UNCITRAL, Final Award (16 October 1995) (Karrer, Szurski, Ahrens), ¶¶ 82-83.
78. French Conseil d'État, Ass., *Société anonyme des produits laitiers 'La Fleurette'*, No. 51704, Judgment (14 January 1938), Recueil Lebon 25 (1938). *See also, e.g.*, French Conseil d'État, *Couiteas*, No. 38284, Judgment (30 November 1923), Recueil Lebon 789 (1923), at 789.

indemnisation et d'autre part que le préjudice dont il est demandé réparation soit d'une gravité suffisante et présente un caractère spécial.[79]

Mutatis mutandis, this reasoning – and this sentence almost verbatim – could be transposed in the field of investment law and constitute a precious guideline for applying the police powers doctrine.

Now, this does not solve another important issue: when is this so? In other words, what are the condition(s) or criterion/criteria triggering the application of the doctrine? This is certainly one of the main issues, still largely unanswered.

C. An Uncertain Test

As set forth above, the conditions for applying the doctrine unfortunately remain uncertain. The post-*Chemtura* fate of the policy power doctrine is still prudently casuistic as reflected in this remark of the ICSID tribunal in *El Paso v. Argentina*:

> No absolute position can be taken in such delicate matters, where contradictory interests have to be reconciled. In this sense, the Tribunal subscribes to the decisions which have refused to hold that a general regulation issued by a State and interfering with the rights of foreign investors can *never* be considered expropriatory because it should be analysed as an exercise of the State's sovereign power or of its police powers.[80]

The tribunal then added:

> In sum, a general regulation is a lawful act rather than an expropriation if it is non-discriminatory, made for a public purpose and taken in conformity with due process. In other words, *in principle, general non-discriminatory regulatory measures, adopted in accordance with the rules of good faith and due process, do not entail a duty of compensation.*[81]

Although he maintains some reservations as to this exclusion of the very word "expropriation" to characterize this particular case of lawful taking of property,[82] the present writer concurs with this view.[83] But it is still subject to criticism and reservations. In a recent award, relying on the notion of unjust enrichment, an arbitral tribunal stated:

79. French Conseil d'État, Ass., 30 March 1966, *Compagnie générale radio-électrique*, No. 50515, Recueil Lebon 257 (1966). *See also, e.g.*, French Conseil d'État, *Mlle Ismah Susilawati*, No. 32525, Judgment (11 February 2011), Recueil Lebon 36 (2011).
80. *El Paso v. Argentina*, *supra* n.21, ¶ 234 (emphasis in original).
81. *Ibid.*, ¶ 240 (emphasis in original). *See also Les Laboratoires Servier, S.A.A., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland*, UNCITRAL, Award (14 February 2012) (Park, Hanotiau, Lalonde), ¶ 276; or *Burlington v. Ecuador*, *supra* n.21, ¶ 473.
82. Compensation is not the only condition for expropriation under international law: the conditions other than compensation remain. Regrettably, it is the equivalent of throwing out the baby (the general regulation of expropriation under international law) with the bathwater (the condition of compensation). *Contra, e.g.*, Howard Mann, *Investment agreements and the regulatory state: can exception clauses create safe havens for governments?*, IISD 6 (2007) and a clearly dominant (but misleading) practice cited therein. This is essentially a terminological issue.
83. *See also supra*, Section III (B) at 12.

> Accordingly, lawful deprivation, under international law, assumes the payment by the host State to the foreign investor of adequate, effective and prompt compensation, to use the phrasing of the Hull formula. In effect, when a foreign investor makes its investment in the host State, by necessary implication, that State represents to that investor that there will be no deprivation without such compensation in accordance with the host State's international obligations.[84]

IV. CONCLUSION

There can be no doubt that the doctrine of the police powers is now an integral part of investment law. It is a useful principle permitting tribunals to reach a satisfactory balance between the protection of the rights and interests of the investors, and the general interest, of which the Government is the guardian. However, as the *Saluka* tribunal rightly noted:

> [I]nternational law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered ... as falling within the police or regulatory power of States and, thus, non-compensable. 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.[85]

In addition, recent "carve-out" clauses "renegotiated or agreed on the basis of modified model treaties as a consequence of the debates accompanying the case law resulting essentially from the NAFTA"[86] contain an express reference to the police powers of the State.[87] Indeed, aside from the classical general exception clauses, which now commonly include health and environmental concerns,[88] and "balancing clauses," which "do not provide an exception to the investment obligations [but] can be employed, through interpretation, to balance the obligations of the treaty against other obligations,"[89] "carve-out clauses" have appeared in more recent BITs and FTA

84. *Enkev Beheer B.V. v. The Republic of Poland*, PCA Case No. 2013-01, First Partial Award (29 April 2014) (Veeder, van den Berg, Sachs), ¶ 354.
85. *Saluka v. Czech Republic*, *supra* n.21, ¶ 263.
86. Asterii, *supra* n.8, at 142-143.
87. *See* COMESA Common Investment Area Agreement (2007), Art. 20(8) which provides that "[c]onsistent with the right of states to regulate and the customary international law principles on police powers, bona fide regulatory measures taken by a Member State that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation under this Article."
88. *See, e.g.*, Singapore/China BIT (1985), Art. 11; EFTA/Singapore FTA (2002), Art. 43; Norway Model BIT (2007), Art. 12 (for a recent critique of this provision, *see* Titi, *supra* n.6, at 68); France/Senegal BIT (2007), Art. 12. UK/Colombia BIT (2010), Article VIII, which commands the State Parties to exercise their regulatory powers in a "non-discriminatory and proportionate" manner; and Canada/Burkina-Faso BIT (2015), Art. 18, which is modelled after Article XX of GATT (*see* Titi, *supra* n.6, at 99-108).
89. Asterii, *supra* n.8, at 183. *See, e.g.*, NAFTA (1992), Art. 1114; Belgium Model BIT (2004). *See also* Belgium/Montenegro BIT (2010), Art. 5; U.S. Model BIT (2012), Art. 12(3) and Japan/Ukraine BIT (2015) Art. 25. For a critique of "balancing clauses" which have sometimes been considered "meaningless" (Mann, *supra* n.79, *see also* Asterii, *supra* n.8, at 141 and Titi, *supra* n.6, at 65-67).

investment chapters. Such clauses do not provide "an excuse for non-performance of the investment obligation [but] [c]larifications on the extent of the regulatory powers of states with regards to expropriation and standard of treatment."[90]

In other words, the police powers doctrine is firmly established and most generally accepted as a justification for ruling out a claim for compensation in case of expropriation but the conditions for its application remain vague and controversial.[91] A general use of the proportionality test and a decided recourse to the principle of equality with regard to public burdens might help in introducing more predictability in the application of the doctrine.

However, whatever the tests and criteria used it will remain indispensable to take all the circumstances into consideration including the "broader factual context" as recalled by the *Chemtura* Tribunal.[92] To that aim, a residual element of subjectivity – both of the Government and of the Adjudicator – is unavoidable.

90. Asterli, *supra* n.8. *See, e.g.*, Annex B; Ghana Model BIT (2008), Art. 7(6); India/Nepal BIT (2011), Art. 5(2)(c); US Model BIT (2012) or the draft EU-Canada Comprehensive Economic and Trade Agreement (2014), Annex on Expropriation (for a recent study concerning the right to regulate in EU investment treaties, *see* Aikaterini Titi, *Le «droit de réglementer» et les nouveaux accords de l'Union européenne sur l'investissement*, 142 Journal du droit international 39-64 (2015)).
91. *See, e.g.*, Yannaca-Small, *supra* n.16, at 470 and de Nanteuil, *supra* n.13, at 178, n.2 and 476-493.
92. *Chemtura v. Canada*, *supra* n.1, ¶ 137.