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# LEGAL OPINION ON RIGHT TO REGULATE ON INVESTMENT TREATIES

## Canada, European Union, Japan, Netherlands, and United States of America

Current to: 28.07.2023

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## EXECUTIVE SUMMARY

The concept of a “right to regulate” is one of current attention because of its presumable protection for host states facing investor claims of violations of international investment agreement obligations. The meaning of “right to regulate”, however, is contested both in the literature and in tribunal decisions.

The narrow version of the concept sees references to the “right to regulate” as re-affirmations of state sovereignty, while broader views consider a reference to a right to regulate in a treaty as an indication that regulatory measures that would otherwise violate treaty obligations will be non-compensable if taken in the public interest.

Despite the ambiguity of its meaning, references to the right to regulate are appearing in international investment agreements, with the European Union being a particularly frequent user of such a term. The Netherlands’ Model bilateral investment treaty also refers to it, as do a few Canadian instruments. Japan and the United States do not appear to have adopted provisions on the right to regulate in their investment agreements.

While the term “right to regulate” itself is often located in preambular passages, it may also be found in the body text as a stand-alone provision, a part of the scope provision, or as a part of a regulatory measures provision. References to broader notions of the right to regulate, such as exceptions and non-derogation clauses, are found in the body of the treaty.

Numerous tribunal decisions recognizing the right to regulate exist, with discussions generally embedded in analyses of fair and equitable treatment claims or claims of expropriation. There is not a consistent approach to the role such a concept should play, and a tribunal’s openness to finding a right to regulate does not always lead to a finding for the host in the overall award.

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## I. FACTS

SECO has mentioned as a background document the OECD Working Paper “The Future of Investment Treaties – Track 1 sustainability cluster. Illustrative case study on goals and challenges in treaty policy – exceptions clauses. Note by the Secretariat” (2021), in particular, to distinguish right to regulate from general exception provisions.<sup>1</sup> For that reason, we will refrain from an in-depth discussion about that paper here. However, we mention the provisions cited in that report when they incorporate investor obligations.

## II. QUESTIONS

The State Secretariat for Economic Affairs (SECO) has requested a report concerning the right to regulate in international investment agreements (IIAs), looking at different models, such as language reaffirming the right to regulate (subject to the provisions of the Chapter/circular language), provisions in the preamble, the Investment Chapter, or other Chapters of Free Trade Agreements.

SECO also has requested to make a distinction between such provisions and those concerning general exceptions, which will be the subject of a separate report.

For the purpose of this report, SECO has defined certain treaties and model instruments as priorities, namely, the 2016 Comprehensive Economic and Trade Agreement (CETA); the 2016 United States – Mexico – Canada Agreement (USMCA); the 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP); Canada’s Foreign Investment Promotion and Protection Agreement (FIPA) Model (2021); the US Model Bilateral Investment Treaty (2012); and the Netherlands Model Investment Agreement (2019). Japanese treaty practice is also to be surveyed. References to other agreements concluded by the European Union (EU) are also welcomed.

A detailed list of the agreements examined in this legal opinion is found in Annex 1. To avoid repetition, for an analysis of CETA and the EU – Japan Economic Partnership (2018), see the EU section. Likewise, for an analysis of the CPTPP, see the Canada section, and for the analysis of the USMCA, see the US section.

## III. ANALYSIS

### 1. General Overview of the Right to Regulate in IIAs

The appearance of the “right to regulate” foreign investments in international texts goes back at least to the Charter of Economic Rights and Duties of States (1974), which declares in article 2(2)(a) that each State has the right:

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<sup>1</sup> David Gaukrodger (2021), “The Future of Investment Treaties – Track 1 sustainability cluster. Illustrative case study on goals and challenges in treaty policy – exceptions clauses”, OECD Note by the Secretariat, No. DAF/INV/TR1/WD (2021)1, OECD Publishing, Paris, <https://doi.org/10.1787/4a6f4f17-en>.

*“[t]o regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. [...]”*.<sup>2</sup>

This reference was a natural extension of the Charter’s focus on permanent sovereignty – the concept that the State cannot give up ultimate ownership of its natural resources. The right to regulate, in this view, suggests that no international commitments a state might make will affect the legality of domestic legal rules that exist. While soft law, this aspect of the Charter is hardly controversial today.

The application of the right to regulate to investment protection treaties has been taking place for over 25 years. An early appearance of a right to regulate as it is understood today is found in the text of the failed Multilateral Agreement on Investment (MAI), negotiated by OECD members between 1995 and 1998. The MAI included an Annex 3 with an Article 3 titled the Right to Regulate:

*“[a] Contracting Party may adopt, maintain, or enforce any measure that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to healthy, safety or environmental concerns provided that such measures are consistent with this agreement”*.

Likewise, an interpretative note to Article 5 (“Expropriation and Compensation”), gives the concept of a “right to regulate” support even without using the term. It states that the protection against indirect expropriation does not “establish a new requirement that Parties pay compensation for losses which an investor or investment may incur through regulation, revenue raising and other normal activity in the public interest undertaken by governments”.<sup>3</sup> The “right” therefore, indicates the host state’s absolution from the need to compensate an investor for losses incurred from regulatory changes that are meant to benefit the public.

Provisions on the right to regulate were further encouraged by the work of international intergovernmental and non-governmental organizations. A main actor in this area has been the United Nations Conference on Trade and Development (UNCTAD). Already in a 2002 expert meeting organized by UNCTAD, Mann, Sornarajah, and Trachtman (among others) discussed how to incorporate this notion in IIAs.<sup>4</sup>

The International Institute for Sustainable Development (IISD) also formulated policy guidance for governments that includes referring to the right to regulate in IIAs. That NGOs’ model texts were among the earliest to include such language. For example, Article 25 B) of the 2004 IISD Model IIA, recognizes it as part of the “inherent rights of the States”, in the following terms: “In accordance with customary international law and other general principles of international law, host states have the right to take regulatory or other measures to ensure that development in their territory is consistent with the goals and principles of sustainable development, and with other social and economic policy objectives”.<sup>5</sup>

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<sup>2</sup> United Nations General Assembly Resolution 3281 (XXIX): Charter of Economic Rights and Duties of States, 12 December 1974, <https://digitallibrary.un.org/record/190150?ln=en> (21.07.2023).

<sup>3</sup> OECD, “Indirect Expropriation” and the “Right to Regulate” in International Investment Law”, OECD Working Papers on International Investment, 2004/04, OECD Publishing, p. 9, <http://dx.doi.org/10.1787/780155872321>.

<sup>4</sup> UNCTAD, The Development Dimension of FDI: Policy and Rule-Making Perspectives: Proceedings of the Expert Meeting Held in Geneva from 6 to 8 November 2002. United Nations Publication. New York, NY: United Nations, 2003, [https://unctad.org/system/files/official-document/iteiia20034\\_en.pdf#page=208](https://unctad.org/system/files/official-document/iteiia20034_en.pdf#page=208)

<sup>5</sup> See IISD, Howard Mann, Konrad von Moltke, Luke Eric Peterson, and Aaron Cosbey, Model International Agreement on Investment for Sustainable Development (IAISD), Negotiator’s Handbook, Second Edition

Early incorporations of the notions behind the right to regulate in IIAs overlapped with these efforts. In the beginning, the IIAs used the MAI approach, addressing the right to regulate indirectly by providing explicit criteria of what constitutes – and what does not constitute – an indirect expropriation, typically stating that except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.<sup>6</sup>

The earliest agreement in which the right to regulate is explicitly acknowledged seems to be the New Zealand - Singapore Closer Economic Partnership Agreement (CEPA) (2000), which recognizes the right to regulate in the preamble (“*Recognising their right to regulate, and to introduce new regulations on the supply of services and on investment in order to meet national policy objectives*”). The same year, the EFTA - Mexico Free Trade Agreement (2000) became the first agreement to place the right to regulate provisions in the body of the text. It did so for trade in services, investment, and financial services.<sup>7</sup>

According to EDIT,<sup>8</sup> at least 135 IIAs include explicit provisions on the “right to regulate” today. The majority of them are treaties with investment provisions (TIPs), largely free trade agreements (FTAs) with investment chapters (a total of 92 IIAs). The same database only lists 29 bilateral investment treaties (BITs) and 14 model IIAs with such provisions.

## 1.1. The Notion of the “Right to Regulate”

### 1.1.1. What “Right to Regulate” Means

The right to regulate is a notion that is increasingly found in legal scholarship and investment treaty practice, and is emerging in investor-state dispute settlement (ISDS) case law. However, there is no common understanding of what the right to regulate is.

On a plain reading, the “right to regulate” is simply an acknowledgment of the traditional concept of sovereignty. According to accepted doctrine, in general international law the State’s right to regulate derives from its jurisdiction<sup>9</sup> and is a manifestation of the State’s jurisdictional powers.<sup>10</sup> Sovereignty’s

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(April 2006), [https://www.iisd.org/system/files/publications/investment\\_model\\_int\\_handbook.pdf](https://www.iisd.org/system/files/publications/investment_model_int_handbook.pdf) (21.07.2023);

<sup>6</sup> See for example, Australia – United States FTA, Annex 11-B, Article 4(b); Chile – United States FTA, Annex 10-D; Central America – Dominican Republic – United States FTA (CAFTA-DR), Annex 10-C; Morocco – United States FTA, Annex 10-B.

<sup>7</sup> EFTA - Mexico FTA (2000), Arts. 25 and 35.

<sup>8</sup> Wolfgang Alschner, Manfred Elsig, and Rodrigo Polanco, “Introducing the Electronic Database of Investment Treaties (EDIT): The Genesis of a New Database and Its Use,” *World Trade Review*, Cambridge University Press, vol. 20(1), pages 73-94, February 2021. Unless otherwise mentioned, all these BITs, model IIAs and regional instruments are available at the Electronic Database of Investment Treaties (EDIT), <https://edit.wti.org/app.php/document/investment-treaty/search> (21.07.2023).

<sup>9</sup> Lone Wandahl Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective*. Routledge, 2016, p. 31.

<sup>10</sup> Charalampos Giannakopoulos, “The Right to Regulate in International Investment Law and the Law of State Responsibility: A Hohfeldian Approach”. In *Permutations of Responsibility in International Law*, Brill Nijhoff, 2019, p. 158, [https://doi.org/10.1163/9789004390485\\_009](https://doi.org/10.1163/9789004390485_009).

internal and external dimensions include the State's right to prescribe laws that set the boundaries of the public order and to protect the public interests of the State's citizens (e.g., health and safety).<sup>11</sup>

Under such a view, adding "the right to regulate" to an investment treaty text is, at best, superfluous (because it exists without explicit reference). At worst, setting forth the right to regulate in one IIA suggests that it would not exist without such words, and could lead to misinterpretation of IIAs that do not contain such language.

A more context-specific interpretation of "right to regulate" looks at the term particularly as placed in IIAs. Titi, for instance, defines the right to regulate as "the host state's legal right to adopt legislation or other measures in derogation of substantive commitments it has undertaken in its international investment treaties *without having to compensate aggrieved investors*".<sup>12</sup> Therefore, the rationale of the right to regulate is not to question the State's capacity to regulate in its domestic legal system, but to allow it without the need to compensate foreign investors who have been adversely affected by its actions.<sup>13</sup>

Interestingly, neither UNCTAD nor IISD concepts are clear about exactly what the term "right to regulate" means. UNCTAD's Investment Policy Framework for Sustainable Development (2015), for example, defines the right to regulate as a core principle and a necessity for the public good, according to which "[e]ach country has the sovereign right to establish entry and operational conditions for foreign investment, subject to international commitments, in the interest of the public good and to minimize potential negative effects". UNCTAD includes, as part of such a right, the general legal and administrative framework of host countries, industry-specific rules, and the effective implementation of rules, including the enforcement of rights.<sup>14</sup> The reference to "subject to international commitments", however, leaves open the question of to what extent the "sovereign right" overrides the obligations of the IIA itself. The IISD model's "inherent rights of the States" approach is no clearer on this point.

#### *Critical views*

For some authors, the imprecise notion of the "right to regulate" should be replaced by a "duty of regulate",<sup>15</sup> especially in issues that concern both investment and human rights.<sup>16</sup> The idea here is that a "right" of a State can only protect the interests of humans, society, or the environment if such right

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<sup>11</sup> Yulia Levashova, *The Right of States to Regulate in International Investment Law: The Search for Balance between Public Interest and Fair and Equitable Treatment*. International Arbitration Law Library Vol. 50. Alphen aan den Rijn: Wolters Kluwer, 2019, p. 27.

<sup>12</sup> Catharine Titi, *The Right to Regulate in International Investment Law*. Baden-Baden Germany: Beck/Hart, 2014, p. 33; Catharine Titi, *The Right to Regulate in International Investment Law (Revisited)*. Moscow, 2022: International and Comparative Law Research Center, 2022, p. 17, <https://papers.ssrn.com/abstract=4058447> (emphasis supplied).

<sup>13</sup> Titi (2022), pp. 17-18. Another definition describes it similarly as the "affirmation of the sovereign right for states to choose their political, social and economic priorities – within certain limits – through the adoption of legislation and administrative practices without violating international rules protecting foreign investments". Mouyal, op. cit. p. 8.

<sup>14</sup> UNCTAD, *Investment Policy Framework for Sustainable Development (2015)*, pp. 30, 33, available at: [https://unctad.org/system/files/official-document/diaepcb2015d5\\_en.pdf](https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf) (26.05.2023).

<sup>15</sup> Rodrigo Polanco, *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* Cambridge, United Kingdom ; New York, NY, USA: Cambridge University Press, 2019, p. 310; Krista Nadakavukaren Schefer, *State Powers and Investor-State Dispute Settlement in: Shaheez Lalani and Rodrigo Polanco Lazo, The Role of the State in Investor-State Arbitration (Brill/Nijhoff, 2015)*, pp. 15-21.

<sup>16</sup> Mouyal, op. cit.



is actually exercised. The invocation of the right solely in a dispute settlement action, therefore does little in the way of improving state behavior. Making the right into a duty, on the other hand, would require both the investor (subject to the regulation) and the host (subject to the duty – whether it would voluntarily choose to regulate or not) to act in the public interest.

### 1.1.2. Varieties of Right to Regulate Provisions in Investment Treaties

If the right to regulate is looked for more broadly than looking for the words “right to regulate”, there are a number of permutations that can be found in treaties<sup>17</sup>:

- Numerous authors (e.g., Footer<sup>18</sup>, Levashova<sup>19</sup>, Gleason, and Titi<sup>20</sup>) right to regulate is found where IIAs impose restrictions (especially for social or environmental purposes) by including exceptions to the general prohibition on the imposition of performance requirements or in non-derogation (“non-lowering of standards”) clauses that prevent hosts’ from weakening environmental or labor standards to attract or retain foreign investment;
- According to Giannakopoulos, a right to regulate is implied through exceptions provisions, but also through the provisions on expropriation (which permit states to expropriate for a public purpose) and in the fair and equitable treatment standard (FET) that includes a test of the legitimacy of an investor’s expectations;<sup>21</sup>
- Baltag, Joshi, and Duggal point to an even wider array of what they consider the right to regulate provisions appearing in post-2018 IIAs. Such provisions include qualifications on national treatment requiring compliance with investor’s formalities, restriction of transfers in the exercise of regulatory powers and the domestic rule of law, exclusion of taxation measures, prudential measures, exemptions in the context of indirect expropriation or performance requirements, anticorruption measures and consistency with IIAs obligations.<sup>22</sup>

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<sup>17</sup> UNCTAD suggests several types of provisions that countries can consider when drafting and negotiating IIAs in order to safeguard the right to regulate. These include: a) clarifying the scope and meaning of treaty provisions such as the FET and expropriation standards; and b) using specific flexibility mechanisms such as exceptions and reservations. Concerning FET, options to reduce uncertainty regarding States’ liabilities and to preserve the right to regulate include qualifying or clarifying the FET clause, including by way of an exhaustive list of State obligations under FET, or even considering omitting it. Regarding exceptions, UNCTAD suggest the inclusion of carefully crafted exceptions to protect human rights, health, core labor standards and the environment, with checks and balances to avoid abuse. Likewise, the right to regulate might also be reflected in clauses stating that investments need to be in accordance with the host country’s laws, allowing countries to lodge reservations (including for future policies). UNCTAD, op. cit., pp. 8, 72, 83, 86, 88.

<sup>18</sup> Mary Footer, ‘Bits and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment’ (2009) 18 Michigan State International Law Review 33, 42–43.

<sup>19</sup> Levashova, op. cit., p. 27.

<sup>20</sup> Ted Gleason and Catharine Titi, “The Right to Regulate”, Academic Forum on ISDS Concept Paper 2022/2, 20 October 2022, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4255605](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4255605) (21.07.2023).

<sup>21</sup> Giannakopoulos, op. cit. p. 159.

<sup>22</sup> Crina Baltag, Riddhi Joshi and Kabir Duggal, ‘Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and Corporate Social Responsibility: Too Much or Too Little?’ [2023] ICSID Review - Foreign Investment Law Journal 1, 1–41.

## 1.2. Where Investor Right to Regulate Provisions are Found

In the question of placement, we consider the narrow version of “right to regulate” provisions rather than provisions on non-derogation or exceptions, explanations of expropriation or FET, or other extensions of the right to regulate concept.

### a) Within the Treaty

The placement of the right to regulate provisions within the text of IIAs varies. The majority of provisions labeled as such (or similar wording) are placed in dedicated provisions in the main text of the agreement. However, some references are in the Preambles (particularly concerning environmental and human rights).

### b) Geographically

The European Union (EU) is the main driver of the right to regulate provisions in IIAs, with these clauses are prevalent in IIAs concluded by the EU. The European Free Trade Association (EFTA) IIAs, too, contain such provisions.

Outside of Europe, provisions on the right to regulate are regularly found in agreements concluded by Australia, Chile, Colombia, Georgia, India, Korea, and New Zealand. IIAs concluded by African countries also increasingly include such provisions,<sup>23</sup> particularly in the last decade.<sup>24</sup>

## 1.3. Right to Regulate in Selected IIAs

Several IIAs include explicit “right to regulate” provisions. The following analysis of the defined priority agreements and countries looks at both the explicit clauses and provisions with extended use of rights to regulate.

### a) European Union’s Treaty Practice

The European Union’s IIAs regularly include the right to regulate in dedicated provisions in the main text of the agreement. These clauses include a range of approaches, including: (1) recognizing the right to regulate in the preamble of the agreement; (2) “reaffirming” such right in a dedicated provision on investment and regulatory measures, recognizing the right of each Party to establish their own levels of protection; and (3) as part of the context of “not lowering standards” provisions.

#### i. CETA (2016)

The Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, includes three types of right to regulate provisions described above.

CETA’s preamble recognizes that the provisions of the agreement preserve the right of the Parties to regulate within their territories and the Parties’ flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals, and the promotion and protection of cultural diversity.

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<sup>23</sup> Talkmore Chidede, “The Right to Regulate in Africa’s International Investment Law Regime”, *Oregon Review of International Law* 20 (2019 de 2018), 437-468.

<sup>24</sup> See for example, SADC Investment Protocol (2006), SADC Model BIT (2012), Senegal - Turkey BIT (2010), EU - SADC Economic Partnership Agreement (2016), Ethiopia - United Arab Emirates BIT (2016), Draft Pan-African Investment Code (2016), EAC Model Investment Treaty (2016), Côte d'Ivoire - Portugal BIT (2019), SACU - Mozambique – UK EPA (2019), and the Democratic Republic of the Congo - Rwanda BIT (2021).

Additionally, in the investment chapter (Chapter 8), Article 8.9 reaffirms the right to regulate, stating:

*Article 8.9. Investment and Regulatory Measures*

*1. For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.*

*2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section.*

[...]

Other provisions, found respectively in the chapters on trade and labor (Chapter 23) and trade and environment (Chapter 24), recognize the right of each Party to regulate and establish their own levels of protection on labor (Article 23.2) and environmental matters (Article 24.3), and to adopt or modify its laws and policies accordingly and in a manner consistent with their international labor or environmental commitments. Likewise, each Party shall seek to ensure that those laws and policies provide for and encourage high levels of protection and shall strive to continue to improve such laws and policies and their underlying levels of protection.

Additionally, CETA includes provisions on not lowering standards provisions on labor law (Article 23.4) and environmental law (Article 24.5).

**ii. Other EU IIAs**

**a) Prior to CETA**

In EU IIAs negotiated prior to CETA, right to regulate provisions are present in two ways, as part of the preamble, but mostly in provisions recognizing the right of each Party to establish their own levels of protection.

The earliest EU agreement that included a provision recognizing the Parties' right to regulate and to determine their own level of protection is CARIFORUM - EC EPA (2008). The provisions of that EPA (a clause concerning environmental and public health protection<sup>25</sup> and social regulations and labor standards<sup>26</sup>), however, are not found in the investment chapter, but rather in the chapter on environment and the chapter on social matters. Similarly, the preambular inclusion of a right to regulate, such as that of the EU - Iraq Cooperation Agreement (2012) - according to which the parties take into account their "right to regulate the provision of services within their territories and to guarantee the achievement of legitimate public policy objectives" – was not directed at investment protection.

Later agreements include similar provisions, often recognizing the rights of each Party to establish its own levels of environmental and labor protection, to adopt or modify its relevant laws and policies accordingly, to encourage high levels of environmental and labor protection, and to continue to improve those laws and policies.<sup>27</sup>

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<sup>25</sup> CARIFORUM - EC EPA, Art. 184.

<sup>26</sup> CARIFORUM - EC EPA, Art. 192.

<sup>27</sup> See EU - Korea, Republic of FTA (2010), Art. 13.3; Colombia - Ecuador - EU - Peru FTA (2012), Art. 268; Central America - EU Association Agreement (2012), Art. 285; EU - Ukraine Association Agreement (2014), Art. 290; EU - Georgia Association Agreement (2014), Art. 228; EU - Moldova, Republic of

## b) Post-CETA

Few EU agreements post-CETA merely restate the right to regulate.<sup>28</sup> Instead, they regularly include binding provisions on States' right to regulate and to determine their own level of protection and often also hortatory "shall strive" language<sup>29</sup>. These provisions may be outside the investment chapters, mainly in the parts of the agreement dedicated to environmental, labor, or sustainable development concerns. However, the most recent EU agreements include right to regulate provisions in several sections of the treaty, including the investment chapter. Both the EU - Chile Interim Trade Agreement (2022) and the EU - New Zealand FTA (2023), affirm in their preamble the Parties' right to regulate within their territories to achieve legitimate policy objectives.<sup>30</sup> Further, these treaties reaffirm the right to regulate in an investment chapter clause to achieve legitimate policy objectives (such as the protection of public health, social services, education, safety, environment - including climate change, or public morals, social or consumer protection, privacy, and data protection or the promotion and protection of cultural diversity).<sup>31</sup> Another part of the treaty (Trade and Sustainable Development Chapter), includes a mix of a binding non-derogation clause and a right to regulate, with hortatory language concerning high level or improvement of environmental and labor standards.<sup>32</sup>

Post-CETA EU agreements that exclusively regulate investment follow a similar pattern. EU - Angola Sustainable Investment Facilitation Agreement (IFA) (2022), includes a provision on Investment and Regulatory Measures, reaffirming the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, environment or public morals, social or consumer protection privacy and data protection and the promotion and protection of cultural diversity. At the same time, those provisions clarify that the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively

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Association Agreement (2014), Art. 364; EU - Kazakhstan EPCA (2015), Art. 153; and EU - SADC Economic Partnership Agreement (2016), Art. 9.

<sup>28</sup> The EU - Organisation of African, Caribbean and Pacific States Partnership Agreement (2021) is exceptional in that the parties simply acknowledge that right (Article 41) and reaffirm the importance of concluding IIAs that fully preserve their sovereign right to regulate investment for legitimate public policy purposes (Article 42).

<sup>29</sup> For example, each Party "shall strive" to ensure that its laws and policies provide for and encourage high levels of environmental and labor protection and "shall strive" to continue to improve those laws and policies and their underlying levels of protection. See Armenia - EU Comprehensive and Enhanced Partnership Agreement (2017), Art. 273; EU - United Kingdom Trade and Cooperation Agreement (2020), Art. 356.

<sup>30</sup> The agreement with New Zealand exemplifies that such objectives include the protection of human, animal or plant life or health; social services; public education; safety; the environment, including climate change; public morals; social or consumer protection; animal welfare; privacy and data protection; the promotion and protection of cultural diversity; and, in the case of New Zealand, the promotion or protection of the rights, interests, duties, and responsibilities of Māori.

<sup>31</sup> EU - Chile Interim Trade Agreement (2022), Art. 10.2; and EU - New Zealand FTA (2023), Art. 10.1. The latter agreement adds among the legitimacy policy objectives animal welfare; and, in the case of New Zealand, the promotion or protection of the rights, interests, duties, and responsibilities of Māori.

<sup>32</sup> EU - Chile Interim Trade Agreement (2022), Art. 26.2; and EU - New Zealand FTA (2023), Art. 19.2. See also EU-Singapore FTA (2018) (Articles 12.1.3 and 12.12 to put an obligation on State Parties to not only not weaken environmental and labor protections to encourage investment, but also an obligation ("shall not fail to") to enforce its environmental and labor protection laws (at least to the extent the failure to enforce could affect investment)). See also, along the same lines, EU - Japan Economic Partnership (2018), Article 16.2; EU - Vietnam FTA (2019) Arts. 13.2. and 13.3.

affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of the investment protection obligations contained in those treaties.<sup>33</sup>

Additionally, both Investment Protection Agreements (IPAs) concluded with Singapore (2018) and Vietnam (2019), address subsidies practices, explicitly stating that decisions regarding issuing, renewing, or discontinuing subsidies or grants will not generally be compensable.<sup>34</sup>

While the EU-China Comprehensive Agreement on Investment (CAI) (2021) in Section IV ("Investment and Sustainable Development") has a "subsection" dedicated to Investment and Environment (Subsection 2) and to Investment and Labor (Subsection 3) with a right to regulate and a non-derogation obligation including both environmental and labor protections ("A Party shall not waive"), the remainder of the provision is more programmatic, with the Parties' recognition or duty to "strive to" maintain strong environmental protections.<sup>35</sup>

## **b) United States Treaty Practice**

The United States does not generally include right to regulate provisions in its IIAs. The sole exception is the USMCA, as explained below.

### **i. US Model BIT (2012)**

There is no right to regulate provision.

### **ii. USMCA (2020)**

The USMCA explicitly recognizes that right in the preamble, and in a dedicated chapter concerning hydrocarbons. In the Preamble, the parties:

*RECOGNIZE their inherent right to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities, and protect legitimate public welfare objectives, such as health, safety, environmental protection, conservation of living or non-living exhaustible natural resources, integrity and stability of the financial system, and public morals, in accordance with the rights and obligations provided in this Agreement; (...)*

In the text of the agreement, the only other part where the right to regulate is recognized is in Chapter 8, which includes a single article on Mexico's ownership of hydrocarbons, which recognizes that country's sovereign right to regulate with respect to them:

*Article 8.1. Recognition of the United Mexican States' Direct, Inalienable, and Imprescriptible Ownership of Hydrocarbons*

*1. As provided for in this Agreement, the Parties confirm their full respect for sovereignty and their sovereign right to regulate with respect to matters addressed in this Chapter in accordance with their respective Constitutions and domestic laws, in the full exercise of their democratic processes.*

*2. In the case of Mexico, and without prejudice to their rights and remedies available under this Agreement, the United States and Canada recognize that:*

*(a) Mexico reserves its sovereign right to reform its Constitution and its domestic legislation; and*

*(b) Mexico has the direct, inalienable, and imprescriptible ownership of all hydrocarbons in the subsoil of the national territory, including the continental shelf and the exclusive economic zone located outside the territorial sea and adjacent thereto, in strata or deposits, regardless*

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<sup>33</sup> EU - Angola Sustainable IFA (2022), Art. 5.2.

<sup>34</sup> EU - Singapore IPA (2018), Art. 2.2; EU - Vietnam IPA (2019), Art. 2.2.

<sup>35</sup> EU-China CAI (2021), Subsections 2 and 3, Arts. 1 and 2.

*of their physical conditions pursuant to Mexico's Constitution (Constitución Política de los Estados Unidos Mexicanos). The information requirement is textually similar to that in the European agreements, with an exception to the host's non-discrimination obligations to allow it to demand the investor provide information for statistical or regulatory purposes.*

Without using the wording, the USMCA also reaffirms the State's right to regulate and to establish its own level of protection, according to which the State may "adopt measures that it considers appropriate to ensure that investment is undertaken in a manner sensitive to environmental concerns". This provision is found both in the investment (Article 14.16) and the environment chapter (Article 24.3).

### **c) Canada's Treaty Practice**

Canadian treaty practice has a limited recognition of the right to regulate. Prior to CETA, only the Canada – South Korea FTA (2014) included a recognition of the right of each Party to establish its own level of environmental protection and to adopt or modify its relevant laws and policies accordingly. That FTA's Article 17.2 is in the chapter on the environment and not in its chapter on investment.

After CETA, right to regulate provisions are found in CPTPP, USMCA (see supra 1.5.b.ii), and the Canadian Model FIPA (2021)

#### **i. CPTPP**

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018) only recognizes the right to regulate in the Preamble:

*The Parties to this Agreement, resolving to: (...)*

*REAFFIRM the importance of promoting corporate social responsibility, cultural identity and diversity, environmental protection and conservation, gender equality, indigenous rights, labour rights, inclusive trade, sustainable development and traditional knowledge, as well as the importance of preserving their right to regulate in the public interest; (...)*

Trans-Pacific Partnership (TPP) Agreement original preamble already recognized the inherent right of the Parties "to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals".

#### **ii. Canada Model FIPA (2021)**

The most recent Canadian Model IIA, explicitly recognizes the right to regulate, both in the preamble and in a dedicated provision.

In similar terms than the CPTPP, the preamble reaffirms the following:

*(...) the importance of promoting responsible business conduct, cultural identity and diversity, environmental protection and conservation, gender equality, the rights of Indigenous peoples, labour rights, inclusive trade, sustainable development and traditional knowledge, as well as the importance of preserving the Party's right to regulate in the public interest;*

The text of the model agreement, in the Section devoted to investment protections (Section B), considers an Article 3, where the Parties reaffirm their right to regulate territory to achieve legitimate policy objectives, in almost identical terms than in the Preamble:

*Article 3. Right to Regulate*

*The Parties reaffirm the right of each Party to regulate within its territory to achieve legitimate policy objectives, such as with respect to the protection of the environment and addressing climate change; social or consumer protection; or the promotion and protection of health, safety, rights of Indigenous peoples, gender equality, and cultural diversity.*

Finally, it is important to note that even though the Canada – UK Trade Continuity Agreement (TCA) (2020) does not include an explicit provision on the right to regulate, in a joint interpretative instrument concluded between both parties concluded the same year, Canada and the United Kingdom recognize the importance of the right to regulate in the public interest, and declare that the TCA “preserves the ability of the United Kingdom and Canada to adopt and apply their own laws and regulations that regulate economic activity in the public interest, to achieve legitimate public policy objectives such as the protection and promotion of public health, social services, public education, safety, the environment, public morals, social or consumer protection, privacy and data protection, and the promotion and protection of cultural diversity”.<sup>36</sup>

**d) Netherlands Model BIT (2019)**

The right to regulate is rarely present in the Netherlands’ investment treaty practice. Only the recent Netherlands Model BIT (2019) recognizes it in two parts.

In the preamble, the Model agreement recognizes that the main objectives of the treaty – fostering an open and transparency policy environment, investors’ protection, and sustainable development - can be achieved without compromising the right of the Contracting Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment, public morals, labor rights, animal welfare, social or consumer protection or for prudential financial reasons.

In almost identical terms, Article 2 of the Model BIT reaffirms the right to regulate, stating:

*Article 2. Scope and Application*

*2. The provisions of this Agreement shall not affect the right of the Contracting Parties to regulate within their territories necessary to achieve legitimate policy objectives such as the protection of public health, safety, environment, public morals, labor rights, animal welfare, social or consumer protection or for prudential financial reasons. The mere fact that a Contracting Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor’s expectations, including its expectation of profits, is not a breach of an obligation under this Agreement.*

**e) Japan’s Treaty Practice**

Japan has limited treaty practice on the right to regulate. After TPP/CPTPP, such provisions are found in only two agreements, in the EU - Japan Economic Partnership (2018), already analyzed in the EU section (see supra 1.5.b.ii), and the Japan - United Kingdom CEPA (2020) – but this agreement does not include ISDS.

In its trade and sustainable development chapter (Chapter 16), the Japan-UK CEPA includes a provision affirming the State’s right to regulate or to adopt within their territories regulatory measures necessary to achieve legitimate policy objectives (with the inclusion of the protection of the environment and

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<sup>36</sup> Joint Interpretative Instrument on the Agreement on Trade Continuity Between the United Kingdom of Great Britain and Northern Ireland and Canada (2020), Arts. 1 and 2.

labor as “legitimate policies”), with a non-binding commitment that each Party “shall strive” to ensure that its laws, regulations and related policies provide high levels of environmental and labor protection and shall strive to continue to improve those laws and regulations and their underlying levels of protection. At the same time, the agreement includes a binding “not lowering” labor and environmental standards provision, committing not to waive, derogate from those laws and regulations or fail to effectively enforce them through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties.<sup>37</sup>

#### 1.4. Right to Regulate in International Investment Law Jurisprudence

The State’s sovereign right to regulate has been affirmed in a number of ISDS decisions. The jurisprudence has dealt with the right to regulate, but all publicly available cases where this issue has been discussed were brought under treaties that did not explicitly recognize this right.

These decisions mainly concern two standards of protection usually found in IIAs: fair and equitable treatment (FET) and protection against indirect expropriation. A few awards also deal with the right to regulate with respect to the interpretation of exceptions.

##### i. Fair and Equitable Treatment

Several ISDS awards have affirmed that the right to regulate is inherent in the obligation of fair and equitable treatment. Some, like the tribunal in *Philip Morris v. Uruguay* (2016), brought under the Switzerland - Uruguay BIT (1988), do not use the phrase “right to regulate”, but clearly intend the same as those who hold that the right to regulate means that regulatory acts by the host to protect public interests are not to be considered compensatory. In *Philip Morris*, the tribunal held that the requirements of legitimate expectations and legal stability as manifestations of the FET standard do not affect the State’s rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances.<sup>38</sup>

Several cases go a step closer to the same result, by using the term “right to regulate” and finding it part of the basic rule of FET. In *United Utilities v. Estonia Award* (2019), interpreting the Estonia - Netherlands BIT (1992), the tribunal found that the essence of FET is to assess and balance the State’s “right to regulate” against the rights of an investor. A finding of a violation of the FET standard necessarily entails a determination that the State exceeded its reasonable right to regulate and to interfere with investors’ rights.<sup>39</sup> The tribunal in *Addiko Bank v. Montenegro Award* (2021), interpreting the Austria-Yugoslavia (Serbia and Montenegro) BIT (2001), also used the “balancing” concept and further observed:

*“A State’s right to regulate/legislate is an important aspect of its sovereignty and the inclusion of the FET standard in a treaty does not eliminate this right.”<sup>40</sup>*

Continuing in the next paragraphs to draw on earlier tribunal decisions that were implicitly referring to the right to regulate, the tribunal then noted:

<sup>37</sup> Japan-UK CEPA (2020), Art. 16.2.

<sup>38</sup> Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay (ICSID Case No. ARB/10/7), Award, 8 July 2016, §422.

<sup>39</sup> United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia, ICSID Case No. ARB/14/24, Award, 21 June 2019, §767.

<sup>40</sup> Addiko Bank AG v. Montenegro, ICSID Case No. ARB/17/35, Award, 24 November 2021, §559.



*“The Tribunal also agrees with Respondent that when balancing a State’s right to regulate against an investor’s expectations, the Tribunal must afford significant latitude to the State to decide what is appropriate for its own internal needs.”<sup>41</sup>*

The same award considers the stability requirement in the BIT cannot be interpreted as a stabilization clause imposing restrictions on the respondent’s ability to alter the regulatory framework:

*“The Tribunal agrees with Respondent that the stability requirement in Article 2 of the BIT cannot be interpreted as a stabilisation clause imposing restrictions on Respondent’s ability to alter the regulatory framework. This is not what is contemplated within the concept of stability under the FET standard. [...]The stability requirement under the BIT must be balanced against the State’s sovereign right to regulate”.<sup>42</sup>*

However, the tribunal observed that the right to regulate neither eliminates procedural safeguards (such as due process and good faith) when implementing new regulations, nor can the new regulations modify the regulatory framework for the investment “beyond the acceptable margin of change”.<sup>43</sup>

The procedural aspects of regulatory changes appeared important to the tribunal in *Infracapital v. Spain*.<sup>44</sup> In their 2021 decision, they observe that FET imposes a general limitation on States, so the exercise of their right to regulate and change legislation must not be contrary to the principles of reasonableness, transparency, due process, and to the prohibition against discrimination and arbitrariness.<sup>45</sup> The *Hydro Energy 1 and Hydroxana v. Spain*<sup>46</sup> decision from 2020 also points to the need for safeguards despite the right to regulate. That tribunal stated that the ECT requirement of stability is linked to legitimate expectations that the legal framework will not be changed arbitrarily. It also notes that the promise of stability has a relatively high threshold, and does not mean an investor is protected from any changes or that the State loses the legitimate right to regulate.<sup>47</sup>

The degree of change was also a point of discussion for *Eiser v. Spain* (2017), where the tribunal concluded that the obligation to accord fair and equitable treatment necessarily embraces an obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long-term investments. Thus, while regulatory regimes can evolve, they cannot be so radically altered as to deprive existing investors, who invested in reliance on the old regimes, of their investment’s value.<sup>48</sup> The same criteria are repeated in the *Novenergia v. Spain* award (2018).<sup>49</sup> Citing both *Eiser* and *Novenergia*, the *Foresight v. Spain* Final Award (2018) considers that the right to regulate must be subject to limitations if investor protections are not to be rendered meaningless.<sup>50</sup>

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<sup>41</sup> Addiko Bank, § 560.

<sup>42</sup> Addiko Bank, §§ 656, 659.

<sup>43</sup> Addiko Bank, §§563-617, §662.

<sup>44</sup> *Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021.

<sup>45</sup> *Infracapital*, §658.

<sup>46</sup> *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020.

<sup>47</sup> *Hydro Energy 1*, §553, 555.

<sup>48</sup> *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, § 382.

<sup>49</sup> *Novenergia II - Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Case No. 063/2015, Award, 15 February 2018, §654.

<sup>50</sup> *Foresight and others v. Kingdom of Spain*, SCC Case No. V2015/150, Final Award, 14 November 2018, §363-364.

In *PV Investors v. Spain* Final Award (2020), the tribunal uses a balancing approach, but adds that States enjoy a margin of appreciation in the field of economic regulation. Thus, a tribunal reviewing general economic regulations will normally not second-guess (e.g., review de novo) whether the State's choices are well-founded, or an alternative is more suitable.<sup>51</sup> In *Infracapital v. Spain*, the tribunal did the same, saying that the assessment of reasonableness when dealing with the State's right to regulate does not mean that it has an open-ended mandate to second-guess regulators. In fact, the tribunal considered it appropriate to allow some margin of appreciation with respect to a State's policy choices and concluded there was a reasonable relationship between the public policy objective and the disputed measures.<sup>52</sup>

#### *Impact of Tribunal Acknowledgements of the Right to Regulate*

Recognition of a right to regulate suggests that host states will not be liable for regulatory changes, so claimants may have more difficulty winning their claims. Indeed, the right to regulate is sometimes mentioned as a factor in the host's successful defense from claims. The *Plama v. Bulgaria* Award (2008) notes that the State maintains its legitimate right to regulate, and this right should also be considered when assessing compliance with the FET standard.<sup>53</sup> More recently, in at least one case brought under the Energy Charter Treaty (ECT), the right to regulate was a decisive factor in deciding the dispute in favor of the State. The *Charanne v. Spain* Award (2016) concluded that even regulations aimed at a limited group of investors are not always specific commitments vis-à-vis those investors; and that to transform regulations into specific commitments assumed by the States would impose excessive limitations on the States' right to regulate the economy in the public's interest.<sup>54</sup>

Yet, acknowledgment of a right to regulate alone does not always mean that the tribunal will find for the host. The principle, as applied to facts, means that claimants still win their claims in some cases. This was the result of several well-known earlier cases. For example, the *ADC v. Hungary* Award (2006), in the framework of the Cyprus - Hungary BIT (1989), observed that although a sovereign State has the inherent right to regulate its domestic affairs, the right is not unlimited, and when it enters into a BIT it becomes bound by it, and the obligations contained therein must be honored.<sup>55</sup> The tribunal in *Total v. Argentina* Decision on Liability (2010), interpreting the Argentina – France BIT (1991), noted that in the course of discussing the ascertainment of legitimate expectations, the host State's right to regulate domestic matters in the public interest has to be taken into consideration as well.<sup>56</sup> The award in *Micula v. Romania* (2013), decided under the Romania - Sweden BIT (2002), also notably held that the State has a right to regulate and investors must expect that the legislation will change absent a stabilization clause or other specific assurance giving rise to a legitimate expectation of stability.<sup>57</sup>

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<sup>51</sup> *PV Investors v. Kingdom of Spain*, PCA Case No. 2012-14, Final Award, 28 February 2020, §580-583.

<sup>52</sup> *Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021, §658, 662.

<sup>53</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, §177.

<sup>54</sup> *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016, §493.

<sup>55</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, §423.

<sup>56</sup> *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, §123, 309.

<sup>57</sup> *Ioan Micula, Viorel Micula and others v. Romania*, CSID Case No. ARB/05/20, Award, 11 December 2013, §666, 668, 671-673.

## ii. Indirect expropriation

Several ISDS decisions have also affirmed the right to regulate in the context of indirect expropriation. Many of these decisions look at the right to expropriate as itself an affirmation of the right to regulate. An early statement in the 2021 award in *Infinito Gold v. Costa Rica*, made by the tribunal of Gabrielle Kaufmann-Kohler, Brigitte Stern, and Bernard Hanatiaou, implies that, in their view, a measure is not expropriatory if it is made to protect the public interest:

699. [...] A State measure constitutes expropriation 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. [footnote referring to Quiborax and Burlington Resources awards]<sup>58</sup>

Earlier statements along these lines also appeared in the decisions in *Invesmart v. Czech Republic* and *AWG v. Argentina*. The *Invesmart* award from 2009 interpreted the Czech and Slovak Republic - Netherlands BIT (1991). The tribunal notes that international investment treaties were never intended to do away with their signatories' right to regulate. Therefore, the BIT's expropriation article imports the customary international law's justification of a deprivation of property rights if it results from the exercise of regulatory actions aimed at the maintenance of public order. In this case, the revocation of a bank's license is seen as a bona fide non-discriminatory regulation aimed at the general welfare because all states with modern banking regulatory regimes vest a licensing (and revocation of licenses) power in their regulators.<sup>59</sup> A similar view is apparent in the *AWG v. Argentina* Decision on Liability (2010), in the framework of the Argentina - United Kingdom BIT (1990). There, the tribunal pointed out numerous past decisions in which other tribunals have recognized a State's legitimate right to regulate and exercise its police power in the interests of public welfare and, therefore, determined them to be not expropriatory. In analyzing the measures taken by Argentina to cope with a financial crisis, the tribunal found that due to the severity of the crisis, those general measures were within the general police powers of the Argentine State. As they did not constitute a permanent and substantial deprivation of the Claimants' investments, there was no expropriation.<sup>60</sup>

The award in *Nations Energy v. Panama* (2010), interpreting Panama - United States of America BIT (1982), also held that the State has the right to regulate the conditions under which tax credits can be used and that the deprivation thereof does not constitute expropriation.<sup>61</sup>

However, other awards have emphasized the limitations of the right to regulate as a decisive factor in deciding the dispute in favor of the investor. For example, *ADC v. Hungary* Award (2006), interpreting Cyprus - Hungary BIT (1989), held that the "right to regulate" is not an answer to an expropriation claim. Although a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited.<sup>62</sup> Likewise, the more recent *Magyar v. Hungary* Award (2019), interpreting Hungary - United Kingdom BIT (1987), notes that in certain circumstances, a bona fide exercise of the State's right to regulate is exempt from the duty to provide compensation, but that these circumstances are narrow. The two situations in which measures annulling rights of the investor can be exempt from the otherwise applicable duty of compensation are: (i) measures of police powers that aim at enforcing existing regulations against the investor's own wrongdoings, (e.g., criminal, tax

<sup>58</sup> *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 03 June 2021.

<sup>59</sup> *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009, §496-500.

<sup>60</sup> *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on Liability, 30 July 2010, §139-140.

<sup>61</sup> *Nations Energy, Inc. and others v. Republic of Panama*, ICSID Case No. ARB/06/19, Award, 24 November 2010, §690.

<sup>62</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, §423-424.

and administrative sanctions, or revocation of licenses and concessions); and (ii) regulatory measures aimed at abating threats the investor’s activities may pose to public health, environment or public order. In the concrete dispute, the tribunal found that while Hungary was fully entitled to change its agricultural land-holding policy, it was not apparent why this policy change - which purportedly benefited Hungarian society as a whole - should have been carried out at the expense of the Claimants’ vested rights. The tribunal concluded there was no rationale that would justify exempting Hungary from its duty to pay compensation.<sup>63</sup>

### iii. Exceptions

Some ISDS awards have also dealt with the right to regulate outside of the FET and protection against expropriation standards, particularly in the interpretation of exceptions. The Award in *Daimler v. Argentina* (2012), brought under the Argentina – Germany BIT (1991), noted the respondent’s sovereign right to regulate its economy as it sees fit, both in times of economic crisis and otherwise. For the tribunal, what is at issue is not its general sovereignty, but its obligation to observe its treaty commitments under the BIT.<sup>64</sup>

The tribunal in *Infinito Gold* was faced with the interpretation of an environmental provision in Annex III of the Canada – Costa Rica BIT (1998) that read:

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

The disagreement surrounded the term “otherwise consistent” – basically asking whether this provision was an “exception” to the States’ treaty obligations or not. The tribunal decided it was not. Instead, what the host (and the non-disputing Party) had characterized as an environmental exception had the “purpose of [protecting] the Contracting State’s legitimate regulatory space and to reserve a margin of discretion in environmental matters. [...] In other words, this provision reaffirms the State’s right to regulate”.<sup>65</sup>

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<sup>63</sup> Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary, ICSID Case No. ARB/17/27, Award, 13 November 2019, §364-367.

<sup>64</sup> Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1, Award, 22 August 2012, §100.

<sup>65</sup> Infinito Gold Ltd. v. Republic of Costa Rica, ICSID Case No. ARB/14/5, Award, 03 June 2021, §778.

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## Annex A: Treaties analyzed in this legal report

- A. Comprehensive Economic and Trade Agreement (CETA)
- B. Other agreements concluded by the European Union (EU). We have considered as relevant EU investment treaty practice, all IIAs signed or concluded by the EU after CETA with investment chapters or sections, namely:
  - EU-Angola Sustainable Investment Facilitation Agreement (2022)<sup>66</sup>
  - EU-Organisation of African, Caribbean, and Pacific States Partnership (OACPS) Agreement (2021)<sup>67</sup>
  - China-EU Comprehensive Agreement on Investment (2021)<sup>68</sup>
  - EU-United Kingdom Trade and Cooperation Agreement (2020)
  - EU-Vietnam FTA and Investment Protection Agreement (2019)
  - EU-Singapore FTA and Investment Protection Agreement (2018)
  - EU-Japan Economic Partnership (2018)
  - Interim Trade Agreement Between the European Union and the Republic of Chile (2022)<sup>69</sup>
  - EU-Chile Advanced Framework Agreement (2022)<sup>70</sup>
  - Free Trade Agreement Between the European Union and New Zealand (2023)<sup>71</sup>
- C. United States–Mexico–Canada Agreement (USMCA)
- D. Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)
- E. Canada’s Foreign Investment Promotion and Protection Agreement (FIPA) Model (2021)
- F. US Model Bilateral Investment Treaty (2012)
- G. Netherlands Model Investment Agreement (2019),
- H. Japanese treaty practice. We have considered as relevant Japanese investment treaty practice, all IIAs signed or concluded by Japan in the past ten years, namely:
  - Bahrain-Japan BIT (2022)
  - Georgia-Japan BIT (2021)
  - Regional Comprehensive Economic Partnership Agreement-RCEP (2020)
  - Japan-United Kingdom CEPA (2020)
  - Japan-Morocco BIT (2020)

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<sup>66</sup> Draft text made public on 18.11.2022, available at: <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/a17ccfe1-ce36-428f-bc7f-76bcb902c36a/details?download=true> (10.07.2023)

<sup>67</sup> Negotiated Agreement text initialled by EU OACPS chief negotiators (15.04.2021), made public on 15.04.2022, available at: [https://international-partnerships.ec.europa.eu/system/files/2021-04/negotiated-agreement-text-initialled-by-eu-oacps-chief-negotiators-20210415\\_en.pdf](https://international-partnerships.ec.europa.eu/system/files/2021-04/negotiated-agreement-text-initialled-by-eu-oacps-chief-negotiators-20210415_en.pdf) (10.07.2023)

<sup>68</sup> EU-China Agreement in principle, made public on 30 December 2020, available at: [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/china/eu-china-agreement/eu-china-agreement-principle\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/china/eu-china-agreement/eu-china-agreement-principle_en) (10.07.2023).

<sup>69</sup> EU-Chile Interim Trade Agreement, concluded on 9 December 2022 (not signed yet), available at: [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/text-agreement\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/text-agreement_en) (10.07.2023).

<sup>70</sup> EU-Chile Advanced Framework Agreement, partially concluded on 9 December 2022 (not signed yet), available at: [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/text-agreement\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/text-agreement_en) (10.07.2023).

<sup>71</sup> EU-New Zealand: Text of the agreement, signed on 9 July 2023, available at: [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/new-zealand/eu-new-zealand-agreement/text-agreement\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/new-zealand/eu-new-zealand-agreement/text-agreement_en) (10.07.2023).

- Argentina-Japan BIT (2018)
- Japan-Jordan BIT (2018)
- Japan-United Arab Emirates BIT (2018)
- Armenia-Japan BIT (2018)
- Israel-Japan BIT (2017)
- Japan-Kenya BIT (2016)
- Iran, Islamic Republic of-Japan BIT (2016)
- Trans-Pacific Partnership (TPP) (2016)
- Japan-Oman BIT (2015)
- Japan-Mongolia EPA (2015)
- Japan-Ukraine BIT (2015)
- Japan-Uruguay BIT (2015)
- Japan-Kazakhstan BIT (2014)
- Australia-Japan EPA (2014)
- Japan-Myanmar BIT (2013)
- Japan-Mozambique BIT (2013)
- Japan-Saudi Arabia BIT (2013)