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The Evolution of Indirect Expropriation Clauses: Lessons from Singapore's BITs/FTAs

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Abstract

This paper examines the evolution of expropriation provisions contained in Singapore's bilateral investment treaties and free trade agreements from the 1970s until now. It will be seen that whilst earlier treaties contained skeletal expropriation provisions, the later treaties have sought to guide the exercise of tribunals' discretion by providing a non-exhaustive list of factors to be taken into account when indirect expropriation is alleged. The consequences of this evolution in Singapore's treaty-making practice are considered in the light of customary international law. The paper postulates a framework for analyzing Singapore's treaty practice and this author concludes by submitting that the later treaties arguably go one step further in limiting the scope of indirect expropriation.

Investor-state dispute settlement is on a steady rise in South East Asia.[1] It is therefore timely that countries within the region are expanding their trade and investment programmes. The most recent example is the conclusion of the Trans-Pacific Partnership Agreement (TPP).[2] Signatories to the TPP include a number of countries from Southeast Asia, namely, Brunei, Singapore, Vietnam, and Malaysia. One of the substantive protections invariably offered in trade and investment treaties such as the TPP is the prohibition against direct or indirect expropriation.

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1. The list of ICSID cases alone involving countries in the region is as follows: *Churchill Mining & Planet Mining Pty Ltd v. Republic of Indonesia* (ICSID Case No. ARB/12/14 and 12/40); *Baggerwerken Decloedt En Zoon NV v. Republic of the Philippines* (ICSID Case No. ARB/11/27); *Ekran Berhad v. People's Republic of China* (ICSID Case No. ARB/11/15); *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste* (ICSID Case No. ARB/15/2); *Ansung Housing Co. Ltd. v. People's Republic of China* (ICSID Case No. ARB/14/25); *Nusa Tenggara Partnership B.V. & PT Newmont Nusa Tenggara v. Republic of Indonesia* (ICSID Case No.ARB/14/15); *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea* (ICSID Case No. ARB/13/33); *Lao Holdings N.V. v. Lao People's Democratic Republic* (ICSID Case No. ARB(AF)/12/6); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/11/12). Examples of non-ICSID cases include *Philip Morris Asia Ltd v. Australia* and *Michael McKenzie v. Vietnam*, (both arbitrated under the UNCITRAL Rules).
2. The text of the TPP was released in November 2015.

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Expropriation is one of those substantive obligations that has never lent itself well to a crisp definition. Determining when governmental action interfering with the property rights of private investors crosses the threshold from valid regulation to a compensable taking is a complex exercise, and it is fair to say that no one has come up with a fully satisfactory means of drawing this line.[3]

Article 9.7, read with Annex 9-B and Annex 9-C of the TPP, is very specific and provides a non-exhaustive list of factors to be taken into account when indirect expropriation is alleged. Generally, except in "rare circumstances", signatory states to the TPP will be able to avoid incurring financial liability in respect of expropriation claims, on the basis that regulatory actions were applied to protect "legitimate public welfare objectives". In this respect, the expropriation provisions within the TPP closely resemble those in the model bilateral investment treaty adopted by the US[4] in 2004 and 2012. This begs the question: Prior to the conclusion of the TPP, how many countries within Southeast Asia entered into treaties that contained similarly detailed expropriation provisions? It appears that within Southeast Asia, Singapore was one of the first, if not the first, countries to make the switch from the lean-style OECD-model approach to investment protection to the more refined and rebalanced US Model BIT-style approach, when it signed the US-Singapore FTA in 2003.

The earlier treaties, which Singapore entered into in the 1970s with, *inter alia*, the UK and Germany, convey substantial discretion on tribunals to determine when an indirect expropriatory act has occurred. This stands in contrast with the later treaties that Singapore concluded with countries such as the US, Peru, and the Government of the Hashemite Kingdom of Jordan post-2000. At around the time Singapore entered into the US-Singapore FTA in 2003 (which marked the start of a new trend in Singapore's treaty-making practice), other Southeast Asian countries were still adopting the lean OECD-approach to investment protection. Without being exhaustive, Article IV of the Cambodia-Vietnam BIT that was signed on 1 September 2001, Article VI of the Indonesia-Thailand BIT that was signed on 17 February 1998, and Article IV of the Cambodia-Philippines BIT that was signed on 16 August 2000, were drafted very much in the skeletal, "OECD-style".[5] It is therefore fair to observe that, within the region, Singapore took the lead in making the shift away from the lean-style OECD-model approach. To date, Singapore has also entered into the most FTAs/Multilateral Agreements amongst its Southeast Asian counterparts.[6] In the light of

3. *Marvin Feldman v. Mexico*, Case No. ARB (AF)/99/1, Award (16 December 2002) at para. 100 [*Feldman Award*]. However, Jan Paulsson and Zachary Douglas have suggested that one possible basis for distinguishing between compensable and uncompensable takings in a regulatory context is the frustration of the investor's legitimate expectations built on a reasonable reliance upon representations and undertakings by the host state. See Jan PAULSSON and Zachary DOUGLAS, "Indirect Expropriation in Investment Treaty Arbitrations" in Norbert HORN and Stefan KROLL, eds., *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (The Hague: Kluwer Law International, 2004), 145 at 158.

4. The US is also a signatory to the TPP.

5. Other examples would include art. 4 of the China-Brunei BIT that was signed on 17 November 2000; art. 5 of the Malaysia-Saudi Arabia BIT that was signed on 25 October 2000; and art. 5 of the Laos-India BIT that was signed on 9 November 2000.

6. To date, Singapore has entered into twenty-nine FTAs/Multilateral Agreements. Malaysia has entered into twenty-three; Indonesia has entered into fifteen; Laos has entered into sixteen; Myanmar has entered

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these observations, this author submits that Singapore should be used as a focal point for the ensuing discussion.

This paper examines the implications of the evolution of Singapore's investment treaty-making practice, and proceeds in several sections. Sections I and II provide a brief overview of Singapore's treaty-making practice over the decades, while Section III considers how Singapore's evolving treaty-making practice compares with the default position that appears to have been widely accepted by investment treaty tribunals. Section IV discusses the potential consequences of this divergence and postulates a framework for analyzing and making sense of Singapore's treaty-making practice. It is submitted that, although the earlier treaties arguably made it easier (as compared to the widely accepted position at international law) for investors to mount claims against Singapore, this situation is largely remedied in the later treaties. This author will conclude by examining how the lessons drawn from Singapore can be applied in the broader Southeast Asian context, particularly in the light of the fact that the ASEAN Comprehensive Investment Agreement [ACIA] has entered into force.[7]

I. SINGAPORE'S BITS/IGAS: THE EARLY FORMULATIONS OF PROVISIONS PROSCRIBING EXPROPRIATION

Throughout the 1970s, Singapore entered into a number of Investment Guarantee Agreements [IGAs] with, *inter alia*, France, Germany, the Netherlands, Switzerland, and the Belgo-Luxembourg Economic Union. As these IGAs are structured and worded very similarly, there is little utility in examining each of them in turn. Instead, this author submits that the preferred approach will be to examine just a couple of these IGAs. For example, Article 4 of the IGA concluded between the Republic of Singapore and the Federal Republic of Germany [Singapore-Germany IGA], which entered into force on 1 October 1975,[8] stipulates that the state is required to provide compensation for expropriatory actions taken for public benefit, but offers little guidance as to what such "expropriation" entails:

> Investments by nationals or companies of either Contracting Party shall not be expropriated in the territory of the other Contracting Party *except for public benefit* and against *just and equitable compensations* which represents the fair market value of the investment expropriated. Such compensation shall be made without delay and shall be freely transferable. The legality of any such expropriation and the amount of compensation shall be subject to review by *due process of law* in the territory of the Contracting Party in which the investment has been expropriated.[9] (emphasis added)

into fifteen; Brunei has entered into eighteen; the Philippines has entered into fourteen; Timor-Leste has entered into one; Thailand has entered into twenty-two; and Cambodia has entered into fifteen.

7. Signed by the Economic Ministers at the 14th ASEAN Summit in Cha-am, Thailand on 26 February 2009.

8. Treaty Between the Federal Republic of Germany and the Republic of Singapore Concerning the Promotion and Reciprocal Protection of Investments, 3 October 1973, 1008 U.N.T.S. 221.

9. Protocol to the Singapore-Germany IGA, at para. 4, states that the term "expropriation" shall pertain to acts of sovereign power, the effects of which are tantamount to expropriation or requisitioning, as well as measures of nationalization.

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The expropriation provision in the IGA concluded between Singapore and the UK [Singapore-UK IGA], which entered into force on 22 July 1975, is framed in a similarly skeletal manner. Article 5 of the Singapore-UK IGA provides that:

> Investments of nationals or companies of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation in the territory of the other Contracting Party except for a *public purpose related to the internal needs* of the expropriating Party and against *prompt, adequate and effective compensation*.[10] (emphasis added)

What is noteworthy is that, under the framework set out in these expropriation provisions, the state is obliged to compensate even when it has acted for "public benefit" or for a "public purpose". This gives rise to the question of how this framework reconciles with the default position that appears to have been widely accepted by international investment tribunals, which is essentially that a state is not liable for economic injury which is a consequence of *bona fide* "regulation" within the accepted "police power" of states.

The expropriation provisions cited above are very similarly worded to Article 3 of the Draft Convention on the Protection of Foreign Property, which was adopted by the Council of the Organization for Economic Co-operation and Development [OECD] on 12 October 1967.[11] The similarity in wording is unsurprising given that both the UK and Germany were supportive of the work done between 1959 and 1967 by the OECD.[12] Since these "OECD-style" BITs did not define what an expropriation actually was, they accorded much latitude to tribunals to determine what constitutes an expropriatory measure. This trend of tersely drafted expropriation provisions continued for decades—even as late as 2001, the Tribunal in *Lauder v. Czech Republic* observed that BITs generally did not define the term of expropriation and nationalization, or any of the other terms denoting similar measures of forced dispossession.[13]

II. THE MOVE TOWARDS MORE DETAILED EXPROPRIATION PROVISIONS IN SINGAPORE'S LATER TREATIES

A. *Setting the Context: Understanding the Lessons Learned from the Experience of the NAFTA Parties*

The evolution of Singapore's expropriation provisions appears to be closely tied to the lessons learned by the US administration pursuant to claims filed by foreign investors

10. Agreement between the Government of the Republic of Singapore and the Government of the United Kingdom of Great Britain and Northern Ireland for Promotion and Protection of Investments, 22 July 1975, 1018 U.N.T.S. 175.

11. OECD Draft Convention on the Protection of Foreign Property, 1968, 7 I.L.M. 117.

12. Eileen DENZA and Shelagh BROOKS, "Investment Protection Treaties: United Kingdom Experience" (1987) 36 International & Comparative Law Quarterly 908 at 910.

13. *Ronald S. Lauder v. The Czech Republic*, UNCITRAL (Final Award) (3 September 2001) [*Lauder Final Award*] at para. 200.

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under Chapter 11 of the North American Free Trade Agreement [NAFTA].[14] The ambiguously worded Article 1110[15] gave rise to much controversy[16] and, more significantly, left the US exposed to claims, several of which were perceived as "frivolous" by the American government.[17] Cases such as these prompted the American government to incorporate safeguards within the treaty text,[18] with the aim of striking a better balance between providing strong investor protections and preserving the government's ability to regulate. From 2003 to 2004, the US government pursued a revision of an earlier model BIT.[19] This rethinking by the American government culminated in the release of a revised version of the template it used to negotiate BITs, namely the 2004 US Model BIT,[20] which was released on 5 February 2004.

B. *The NAFTA Parties' Rethinking of Indirect Expropriation is Reflected in Singapore's Treaty-Making Practice*

The 2004 US Model BIT incorporated language aimed at limiting the scope of the expropriation obligation.[21] From a reading of the 2004 US Model BIT, it appears that the approach taken therein is similar to that taken in the US-Singapore FTA[22] (even though the US-Singapore FTA was signed before the 2004 US Model BIT was officially released), which heralded the start of a new trend in Singapore's treaty-making practice—it was the first of Singapore's FTAs to contain detailed language specifying what tribunals should/must focus on when determining if the measures at issue constitute a valid exercise of the state's regulatory powers.[23]

14. The NAFTA between the US, Canada, and Mexico (entered into force on 1 January 1994).

15. Art. 1110 of the NAFTA reads: "No Party may directly or indirectly nationalize or expropriate an investment … or take a measure tantamount to nationalization or expropriation of such an investment ('expropriation')."

16. Without being exhaustive, art. 1110 left it open as to whether "a measure tantamount to expropriation" refers to a subset of indirect expropriation, or if it constitutes a more lenient standard.

17. Gilbert GAGNE and Jean-Frederic MORIN, "The Evolving American Policy on Investment Protection: Evidence from Recent FTAs and the 2004 Model BIT" (2006) 9 International Economic Law 357 at 359. Investors' claims against the US ranged from approximately US$20 million (*Kenex Ltd. v. United States of America*) to approximately US$1 billion (*Methanex Corp. v. United States of America*).

18. Kenneth J. VANDEVELDE, "A Brief History of International Investment Agreements" (2005) 12 UC Davis Journal of International Law & Policy 157 at 179, where he opines that changes in the US BITs, such as the 2004 US Model BIT, "were largely in reaction to arbitral claims filed under the NAFTA investment chapter".

19. Sean D. MURPHY, *United States Practice in International Law: Volume 2, 2002–2004,* (Cambridge: Cambridge University Press, 2002–2006) at 163.

20. US, Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, 15 September 2004 [*2004 Model BIT*]. The 2004 Model BIT has since been superseded by the 2012 US Model BIT, which maintains language from its predecessor.

21. In particular, see annex B of the *2004 Model BIT, ibid.*, online: <http://www.state.gov/documents/organization/117601.pdf>.

22. US-Singapore Free Trade Agreement, 6 May 2003 (entered into force 1 January 2004) [*US-Singapore FTA*].

23. Countries within the European Union [EU] and Canada also seem to be taking a similar approach; see page 2 of the four-page summary of the investment chapter of the Canada-European Union Free Trade Agreement, which is presently being finalized, online: <http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf>.

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In this regard, Article 15.6(1) of the US-Singapore FTA provides that:

> 1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:
>
> (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2, 3, and 4; and (d) in accordance with due process of law and Article 15.5.1, 15.5.2, and 15.5.3.

The scope of Article 15.6(1) is further clarified and reaffirmed by the letters exchanged between the then Singapore Minister for Trade and Industry and the then US Trade Representative on 6 May 2003 [the 6 May 2003 letters on expropriation]. Paragraph 4 of the 6 May 2003 letters on expropriation state that the determination of indirect expropriation requires a case-by-case, fact-based inquiry that considers, *inter alia*, the economic impact of the government action, the extent to which the government action interferes with distinct, reasonable, investment-backed expectations, and the character of the government action. Paragraph 4 goes on to provide that "*[e]xcept in rare circumstances*, nondiscriminatory 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" (emphasis added).[24]

Since the conclusion of the US-Singapore FTA, Singapore's other treaties have continued in much the same vein. For example, Article 10.10 of the Singapore-Peru FTA[25] clarifies the scope of expropriation with the same level of particularity as Article 15.6(1) of the US-Singapore FTA.[26] Article 9.6, read with Annex 9-A, of the recently concluded Singapore-EU FTA is also worded in similar terms to paragraph 4 of the 6 May 2003 letters on expropriation. In other words, the reference to how a finding of indirect expropriation would only be justified in "rare circumstances" features also in the Singapore-EU FTA.[27] It therefore appears that Singapore had, through its experience of negotiating the US-Singapore FTA, come to appreciate the value of trying to inject a measure of predictability and consistency in tribunal decision-making.

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24. Letters dated 6 May 2003 exchanged between the Honourable George Yeo (Minister for Trade and Industry, Singapore) and Robert B. Zoellick (US Trade Representative), para. 4. Art. 15.26 of the *US-Singapore FTA*, *supra* note 22, provides that the letters dated 6 May 2003 on expropriation (amongst other letters) "shall form an integral part of the Agreement".

25. The Singapore-Peru FTA (entered into force in August 2009) [*Singapore-Peru FTA*]. See also art. 7 of the Singapore-Government of the Hashemite Kingdom of Jordan [Kingdom of Jordan] BIT (signed 16 May 2004), as well as the letters exchanged between Singapore's then Minister of State for Foreign Affairs Trade and Industry and the Minister of Industry and Trade of the Kingdom of Jordan on 16 May 2004 with respect to the construction of art. 7.

26. Art. 10.10 proscribes nationalization or expropriation unless such a measure is taken on a non-discriminatory basis, for a public purpose, in accordance with due process of law, and upon payment of compensation in accordance with the Article. Also, for greater certainty, footnote 10-9 of the Singapore-Peru FTA expressly ties the concept of "public purpose" (as referred to in art. 10.10) to the standard found in customary international law. *Singapore-Peru FTA*, *supra* note 25.

27. Annex 9-A of the Singapore-EU FTA.

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Two points from the provisions set out above are noteworthy. First, these detailed clarifications appear to be focused on clarifying the concept of indirect expropriation, as opposed to direct forms of expropriation in which the state openly and deliberately seizes property and/or transfers title to private property to itself or a state-mandated third party. The focus on indirect expropriation is understandable, given that few international investment cases have involved claims of direct expropriation.[28] Second, the reference to how regulatory actions would amount to indirect expropriations only in "rare circumstances" is an express indication to tribunals established under those treaties that a claimant must satisfy a high threshold before nondiscriminatory regulatory actions are found to be expropriatory. This phrase is conspicuously missing from corresponding provisions in the IGAs Singapore concluded with Germany and the UK (to name just a few). The consequence of the omission of this terminology is discussed below.

III. EXAMINING THE JURISPRUDENCE: HOW DOES THE FRAMEWORK CONTAINED IN SINGAPORE'S EARLIER BITS SQUARE WITH THE WIDELY ACCEPTED POSITION AT INTERNATIONAL LAW?

A. *The Hallmarks of Indirect Expropriation*

The concept of indirect expropriation continues to evade precise definition, and tribunals have consistently confirmed that the determination of expropriation is very much a fact-driven analysis.[29] Notwithstanding the absence of a short-hand definition, jurisprudence and commentary have accepted that, in order to constitute expropriation, measures implemented by a host state must effect a substantial deprivation of control over an investment, or a substantial diminution of its value.[30] The claimant must establish that the consequential loss in the value of an investment (i.e. the economic effect of the measures on the investment) is complete, or nearly complete,

28. Andrew NEWCOMBE and Lluis PARADELL, *Law and Practice of Investment Treaties: Standards of Treatment* (The Hague: Kluwer Law International, 2004) 341. The authors observed, however, that the governments of Venezuala, Ecuador, and Bolivia were in the midst of embarking on direct expropriation programmes in or around 2009. In any event, the concept of direct expropriation is fairly uncontroversial.

29. See e.g. *Amco Asia Corporation v. Republic of Indonesia*, ICSID Case No ARB/81/1 (Award) (20 November 1984), at paras. 244–50 (withdrawal of an investment authorization); *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt,* ICSID Case No ARB/84/3 (Award on the Merits) (20 May 1992), at paras. 158–66 (cancellation of a tourist development project); *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 (Award) (30 August 2000), at paras. 102–12 (denial of municipal permit after completion of a previously approved landfill project) [*Metalclad v. United Mexican States*]. In the words of one distinguished arbitrator: "[i]t all depends on the specific facts and circumstances of the case, particularly the gravity and length of the interference, the rights of the parties under a contract, or general legislation, and even cultural elements that define shared expectations." Francisco Orrego VICUNA, "Carlos Calvo, Honorary NAFTA Citizen" (2002–2003) 11 New York University Environmental Law Journal 19 at 28.

30. *Starrett Housing v. Iran*, Interlocutory Award No. ITL 32-24-1 (19 December 1983) 4 Iran-US Cl. Trib. Rep. 122, 154. See also *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1 (Award) (7 December 2011), at para. 327 [*Spyridon Roussalis v. Romania*]; *CME Czech Republic B.V (The Netherlands) v. The Czech Republic*, UNCITRAL, (Partial Award) (13 September 2001), at paras. 604–5.

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to support the inference that he has effectively been deprived of the expected benefits of it.[31] In *Metalclad v. Mexico* [*Metalclad*], the Tribunal explained that expropriation includes:

> [C]overt or incidental interference with the use of property which has the effect of depriving the owner, in *whole or in significant part*, of the use or reasonably-to-be expected economic benefit of property even if not necessarily to the obvious benefit of the host State.[32] (emphasis added)

Tribunals have recognized that a state could take a wide spectrum of measures in asserting control over property,[33] including requisition of land, exorbitant or arbitrary taxation, and annulment and cancellation of property rights, contractual rights, debts, or licences.[34] At the end of the day, the focus of the analysis appears to be on the effect of the state measure on the investment and the extent of the deprivation that the investor suffers.[35]

B. *Construing Broadly Worded Expropriation Provisions: To What Extent are Widely Accepted Principles of International Law Read In?*

The question then arises as to what tribunals are likely to do when faced with treaty provisions that do not contain an express direction that the pursuit of "public welfare objectives" should only be construed as expropriatory in "rare circumstances". The construction of such tersely worded provisions has important ramifications. Article 31 of the Vienna Convention on the Law of Treaties [VCLT] provides that the interpretation of any specific treaty provision must be guided by the specific treaty text, taking into account "any relevant rules of international law applicable in the relations between the parties" (amongst other factors). A general approach, which is easily reconcilable with Article 31 of the VCLT, can be identified from the jurisprudence dealing with such expropriation provisions. Broadly speaking, as a matter of practice, a number of tribunals have read in the customary international law notion that the deprivation would not trigger a state's obligation to compensate if carried out pursuant to the valid exercise of the state's police powers.

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31. *LG&E Energy Corp, LG&E Capital Corp., LG&E Internacional Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006), at para. 191 [*LG&E Energy, Decision on Liability*] ("[i]n many arbitral decisions, the compensation has been denied when it has not affected all or almost all the investment's economic value").

32. *Metalclad v. United Mexican States, supra* note 29, at para. 103.

33. See e.g. *Compañia del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1 (Final Award) (17 February 2000), at para. 76; see also *LG&E Energy, Decision on Liability, supra* note 31, at para. 188.

34. Newcombe and Paradell,*supra* note 28, at 327–8.

35. See e.g. *Spyridon Roussalis v. Romania, supra* note 30, at para. 328, where the Tribunal stated that the effect of the state's actions on the investment is "the key question" in order to determine whether an indirect expropriation has taken place. See also *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/01 (Award) (17 July 2006), at para. 176(f) [*Fireman's Fund*], where the Tribunal held that "the effects of the host State's measures are dispositive, not the underlying intent, for determining whether there is expropriation".

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In this regard, International Investment Arbitration (IIA) awards have repeatedly confirmed that states may justify deprivations based on the exercise of what are called the state's "police powers", a term that has historically been used in the context of US takings law,[36] and references to this principle can be found throughout the literature in the field of indirect expropriation.[37] Similarly, in the *Sedco* case, the Iran-US Claims Tribunal stated that it is "an accepted principle of international law that a State is not liable for economic injury which is a consequence of *bona fide* 'regulation' within the accepted police power of states".[38] While some tribunals have made it clear that they view this principle as an established part of customary international law,[39] given the difficulty of aggregating state practice and of locating *opinio juris*, it falls beyond the scope of this paper to embark on an independent study of state practice and *opinio juris* to verify the accuracy of such a view. Instead, the analysis in this section will proceed on the substantiated premise that it is, at the very least, a widely accepted principle in international investment law that a state will not be liable for any claim of expropriation if it adopts a measure as a result of the valid exercise of its police power.

Therefore, in *Marvin Feldman v. Mexico*,[40] the Tribunal was required to interpret Article 1110 of the NAFTA,[41] the generality of which rendered its practical application somewhat difficult.[42] Therefore, the Tribunal considered general principles of international law to justify its conclusion that governments must be free to act in the "broader public interest" through, *inter alia*, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, and the imposition of

36. Newcombe and Paradell, *supra* note 28 at 358, where the authors state that: "Under customary international law, not all deprivations of property are expropriatory." The authors refer to the following awards, which confirm that states may justify deprivations based on the exercise of "police powers": *Methanex Corp. v. US,* UNCITRAL (Final Award) (3 August 2005) 44 ILM 1343 [*Methanex Final Award*], at para. 410; *Saluka Investments B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL (Partial Award) (17 March 2006) [*Saluka Partial Award*], at paras. 253–8; *Lauder Final Award, supra* note 13 at para. 198; and *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2 (Award) (29 May 2003) [*Tecmed Award*], at para. 119.

37. George H. ALDRICH, "What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal" (1994) 88 American Journal of International Law 585 at 609. See also James CRAWFORD, SC, FBA, *Brownlie's Principles of Public International Law*, 8th ed. (Oxford: Oxford University Press, 2008) at 624, where the learned author states that: "Expropriation for certain public purposes, for example, exercise of police power … is lawful even if no compensation is payable."

38. *Sedco Inc v. National Iranian Oil Co* (1985) 9 Iran-US CTR 248 [*Sedco*] at 275.

39. *Saluka Partial Award*, *supra* note 36 at para. 262, where the Tribunal stated that:

> the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are "commonly accepted as within the police power of States" forms part of customary international law today. There is ample case law in support of this proposition.

See also *Tecmed Award*, *supra* note 36 at para. 119.

40. *Feldman Award, supra* note 3.

41. That provision reads in pertinent part as follows: "1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ('expropriation'), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6.5."

42. *Feldman Award, supra* note 3 at para. 98. According to the Tribunal: "The Article 1110 language is of such generality as to be difficult to apply in specific cases."

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zoning restrictions.[43] In arriving at its understanding of the content of this rule, the Tribunal expressly relied on Section 712 of the American Law Institute, Restatement of the Law Third (1987), the Foreign Relations of the United States [the Restatement].[44]

Comment g. (to Section 712) of the Restatement makes reference to a line of US jurisprudence and international cases[45] which support the position that a state is not responsible for any economic disadvantage resulting from *bona fide* action that is commonly accepted as within the "police power" of states.[46] As to whether a particular conduct by a state crosses the line that separates valid regulatory activity from expropriation, this would turn on, *inter alia*, whether the measure is applied in a discriminatory fashion, the degree to which the government action deprives the investor of effective control over the enterprise,[47] and the circumstances of the case.[48]

Likewise, in *Saluka v. Czech Republic*,[49] the Tribunal held that although Article 5 of the Netherlands-Czech Republic BIT[50] was framed in very broad terms and did not contain any express exception for the exercise of regulatory power, the Article "import[ed] into the treaty the customary international law notion" 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] The Tribunal termed this the "so-called 'police power exception'",[52] and went on to observe that this principle had acquired the status of custom.[53] As evidence of this customary rule, the Tribunal pointed to a variety of sources encompassing case-law,[54] the 1967 OECD Draft Convention on the Protection of Foreign Property,[55] the US Restatement (Third) of the Law of Foreign Relations (1987),[56] as well as the Harvard Draft Convention on the International Responsibility

43. *Ibid.*, at para. 103.
44. *Ibid.*, at para. 104.
45. Cases such as *Harza Engineering Co. v. Islamic Rep. of Iran,* 1 Iran-US C.T.R. 499 (1982) and *Sedco, supra* note 38 are cited in Third Restatement of the Foreign Relations Law of the United States, Vol. 2 (1987) [*US Third Restatement 1987*], at 211.
46. *Ibid.*, at 201.
47. *Ibid.*, at 212.
48. *Ibid.*, at 211.
49. *Saluka Partial Award, supra* note 36.
50. Art. 5 provides as follows: "Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with: (a) the measures are taken in the public interest and under due process of law; (b) the measures are not discriminatory; (c) the measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned and in any freely convertible currency accepted by the claimants."
51. *Saluka Partial Award, supra* note 36 at para. 255.
52. *Ibid.*, at para. 258.
53. *Ibid.*, at para. 262.
54. *Ibid.* The Tribunal specifically referred to the Methanex Final Award, at para. 410.
55. *Saluka Partial Award, supra* note 36 at para. 259. The Tribunal highlighted the portion of the draft convention which provided that measures taken in the pursuit of a state's "political, social or economic ends" do not constitute compensable expropriation.
56. *Ibid.*, at para. 260.

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of States for Injuries to Aliens [Harvard Draft Convention].[57] The *Saluka* approach has been endorsed in a number of decisions,[58] and is consonant with the reasoning undertaken by earlier tribunals. For example, in *ADF Group Inc. v. United States of America* [*ADF Group*], it was held that "any general requirement to accord 'fair and equitable treatment'… must be disciplined by being based upon State practice and judicial or arbitral case law or other sources of customary or general international law".[59]

It should be noted, however, that there are some recent cases suggesting that this seemingly well-accepted statement of the "customary rule" may merit further scrutiny. For example, the award rendered by the Tribunal in *Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada* [*Chemtura*] seems to suggest that the valid exercise of a state's police powers must be linked to human health and the environment.[60] Similarly, in *Saur International S.A. v. Republique Argentine* [*Saur*],[61] the Tribunal was of the view that, in *some* cases, the legitimate exercise of police powers would not give rise to the obligation to compensate.[62] The approach taken by the Tribunal in *Saur* marks a departure from the generally accepted position (being that the valid exercise of police powers always immunizes a state from having to pay compensation) and, at the time of writing, this author is not aware of any tribunal which has endorsed these specific paragraphs of either the *Chemtura* Award or the *Saur* Decision on Jurisdiction and Liability.

What emerges from the jurisprudence is that, regardless of whether the expropriation provision contains an express carve-out for states to take *bona fide* regulatory actions, the principle that a state does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are "commonly accepted as within the police power of States"[63] is a widely accepted principle of international law today. At first blush, this might invite the conclusion that the framework contained in the earlier BITs adequately preserves the state's right to undertake regulatory activity aimed at preserving public welfare. However, as will be discussed in the subsequent section, the accuracy of this conclusion is somewhat questionable.

57. *Saluka Partial Award, supra* note 36 at para. 256.

58. See e.g. *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (Decision on Liability) (14 December 2012), at para. 392; *Fireman's Fund, supra* note 35, p. 84, n. 162.

59. ICSID Case No. ARB(AF)/00/1 (Award) (9 January 2003), at para. 184. Although *ADF Group* deals with "fair and equitable" treatment, it is respectfully submitted that the principle quoted applies with equal force in the context of deprivation. A number of later decisions also appear to be in line with the *Saluka* approach. E.g. *Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary*, ICSID Case No. ARB/12/3 (Decision on Respondent's Objection under Arbitration Rule 41(5)) (16 January 2013), at para. 69, noting that, in the absence of definitions in BITs, the normal practice for investment tribunals was to focus on expropriation within the framework of international law standards, meaning state practice, treaties, and judicial interpretations of "expropriation" in the cases.

60. Ad Hoc NAFTA Arbitration under UNCITRAL Rules (Award) (2 August 2010) [*Chemtura Award*], at para. 266.

61. ICSID Case No. ARB/04/4 (Decision on Jurisdiction and Liability) (6 June 2012).

62. *Ibid.*, at para. 398.

63. *Saluka Partial Award, supra* note 36 at para. 260, citing *US Third Restatement, 1987, supra* note 45 at 201.

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IV. EXAMINING THE REPERCUSSIONS (WHETHER INTENDED OR OTHERWISE) OF SINGAPORE'S TREATY-MAKING PRACTICE

A. *Triggering the State's Obligation to Compensate: Examining the Interplay Between the Framework in Singapore's Earlier BITs and the "Police Powers" Exception*

A plain reading of Article 4 of the Singapore-Germany IGA and Article 5 of the Singapore-UK IGA[64] suggests that deprivatory measures taken for a "public purpose"/ for "public benefit" may still trigger a state's obligation to compensate. This may be contrasted with the widely accepted rule in international law that a state is generally not obliged to compensate when a substantial deprivation results from the exercise of its "police powers".[65]

This brings an important question to the fore: What is the relationship between "public purpose"/"public benefit"/"public interest" and "police powers"? Are the former categories simply a subset of "police powers"? Tribunals such as the one in *Compania del Desarrollo de Santa Elena, S.A. v. Costa Rica*[66] and *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*[67] appear to treat the doctrine of police powers and public purpose/public interest as conceptually distinct, but provide no guidance on where the differences lie. Indeed, the cases provide precious little guidance as to how the terms "public purpose" and "public benefit" differ from the exercise of "police powers". While the Tribunal in *ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary* [*ADC Affiliate v. Hungary*][68] noted that a "treaty requirement for 'public interest' requires some genuine interest of the public",[69] there has yet to be an occasion where a tribunal has delineated the boundaries of these terms, much less explained the differences between them.

In the light of this uncertainty in the jurisprudence, it is unsurprising that tribunals have, on occasion, used these terms interchangeably. This appears to have been the

64. Incidentally, art. 10.10(1) of the Singapore-Peru FTA is similarly worded to art. 4 of the Singapore-Germany IGA and art. 5 of the Singapore-UK IGA.

65. *Saluka Partial Award*, *supra* note 36 at para. 262. The Tribunal in *Saluka* appears to have proceeded on the premise that compensation would not be required in *any* instance involving the state's exercise of its "police powers". This is consistent with the position reflected in the US Third Restatement, which provides that "police power regulation or tax … does not give rise to an obligation to compensate even though a foreign national suffers loss as a consequence". *US Third Restatement, 1987*, *supra* note 45 at 211.

66. ICSID Case No. ARB/96/1 (Final Award) (17 February 2000) [*Compania Santa Elena, Final Award*] at paras. 71 and 72, where the Tribunal made it clear that mere public purpose does not justify uncompensated appropriations.

67. ICSID Case Nos. ARB/05/18 and ARB/07/15 (Award) (3 March 2010). The Tribunal definitively found that the deprivation was not an exercise of the state's *bona fide* police powers (at para. 387), but was of the view that it was "arguable that the expropriation was in Georgian public interest" (at para. 391).

68. ICSID Case No. ARB/03/16 (Award of the Tribunal) (2 October 2006).

69. *Ibid.*, at para. 432. In *ADC Affiliate v. Hungary*, a 2001 Hungarian decree voided the investors' contracts for the operation and management of the Budapest airport. The airport was subsequently taken over by the state in 2002, but then privatized in 2005. The Tribunal concluded that it was not satisfied that the taking was in the public interest and stated that the subsequent privatization of the airport, netting Hungary US$ 2.26 billion, rendered any public interest argument unsustainable.

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case in *Siemens A.G. v. Argentina*[70] and *Inmaris Perestroika v. Ukraine*.[71] On other occasions, the doctrine of "police powers" has been equated/confined to actions that are taken either to protect the "public interest",[72] "general welfare",[73] or "public health and the environment".[74] Indeed, some commentators have expressed the view that "police power" regulation may be broadly classified into the following three categories: (a) public order and morality; (b) protection of human health and the environment; and (c) state taxation.[75] Notwithstanding this loose classification, it has been recognized that the boundaries within each of these categories are by no means easy to determine.[76]

While Singapore has taken the position in at least one of its FTAs that "public purpose" may have some parallels to the domestic law concept of "public necessity",[77] the authorities reviewed (as set out above) suggest that the terms "public purpose", "public benefit", and "police powers" may well cover the exact same ground. Therefore, while the absence of express language preserving the state's right to take regulatory action will not necessarily prejudice its right to do so, the framework set out in Singapore's earlier BITs[78] may actually have displaced the widely accepted rule that

70. ICSID Case No. ARB/02/8 (Award) (6 February 2007), at para. 273, where the Tribunal used the terms "public purpose" and "public interest" interchangeably. But on the facts of the case, the Tribunal found that there was no evidence of a public purpose for a series of Argentine measures relating to a concession contract for the provision of national identity cards because the measures were simply an exercise of public authority to reduce the costs of the contract.

71. *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, (Excerpts of Award) (1 March 2012), where the terms "public purpose" and "public interest" appear to have been used interchangeably. The Tribunal rejected the claimants' assertion that the travel ban in question was not taken for a "*public purpose*", pointing out that there was no evidence that Ukraine's actions were politically motivated, or due to corruption, a desire for personal gain, or a personal vendetta, at para. 303. The Tribunal went on to say that it was "convinced that the Ministry's actions were genuinely motivated by an intent to *protect the public interest*", at para 303 (emphasis added).

72. *Methanex Final Award*, *supra* note 36, at para. 32 (Part II, Chapter C, at 17). It appears that Mexico had submitted that art. 1110 of the NAFTA "incorporates the principle that States are generally not liable to compensate aliens for economic loss resulting from non-discriminatory measures taken to *protect the public interest*" (emphasis added).

73. *Saluka Partial Award*, *supra* note 36 at para. 255. See also *AWG Group Ltd. v. Argentine Republic,* UNCITRAL (Decision on Liability) (30 July 2010) [*AWG Group Decision on Liability*], where the Tribunal recognized that a state has a "legitimate right to regulate and to exercise its *police power in the interests of public welfare*", at para. 139 (emphasis added).

74. In the Counter-Memorial filed by Canada in *Chemtura*, Canada repeatedly linked the application of the "police powers" doctrine to measures adopted by states to protect public health and the environment. See *Chemtura Award, supra* note 60, Canada's Counter-Memorial, at paras. 566, 571, and 580. Therefore, Canada submitted that:

> Taken as a whole, these NAFTA provisions demonstrate that the NAFTA signatories clearly did not intend for non-discriminatory regulatory measures *that are designed to protect public health and the environment*—such as the PMRA's decision to de-register lindane—to constitute expropriation" at para. 580 (emphasis added).

75. Newcombe and Paradell, *supra* note 28 at 358.

76. *Ibid.*, at 360–61.

77. *Singapore-Peru FTA*, *supra* note 25. Ftn. 10-9 of the Singapore-Peru FTA provides that:

> For greater certainty, for the purposes of this Article, public purpose refers to a concept in customary international law. Without prejudice to its definition under customary international law, public purpose may be similar or approximate to concepts under domestic law, for example, the concept of "public necessity".

78. The position set out in Singapore's BITs/FTAs is supported by decisions such as the one rendered in *Compania del Desarrollo de Santa Elena, S.A. v. Costa Rica,* ICSID Case No. ARB/96/1 (Final Award) (17 February 2000). The Tribunal made it clear that mere public purpose does not justify uncompensated

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a state will not have to compensate when it exercises its "police powers". Given that "police powers" has been variously equated with public interest, public welfare, and public health, the earlier BIT framework (which obliges a state to compensate even when it has acted for "public interest"/"public benefit") arguably renders it easier for an investor to invoke the State Party's obligation to compensate, where the investor has been substantially deprived of the economic benefit of its investment.

One way to get around this reading may be to take the view that the above BIT framework must be read in tandem with the widely accepted position at international law. In other words, if a state succeeds in persuading a tribunal that certain measures constitute a valid exercise of its "police powers", those same measures would not constitute an expropriation in the first place. In this regard, it is submitted that the conceptual distinction between "police powers" and "public purpose"/"public benefit"/"public interest" is as follows: "police powers" defines a type of measure that is in principle not an indirect expropriation. This proposition appears to have been (correctly) accepted by the Tribunals in *Chemtura*[79] and *AWG*,[80] as well as in the context of the Iran-US Claims Tribunal. The Iran-US Claims Tribunal observed that:

> A State is not responsible for loss of property or for *other economic disadvantage resulting from* bona fide general taxation or any other action that is commonly accepted as within the *police power of States, provided it is not discriminatory* and is not designed to cause the alien to abandon the property to the State or to sell it at a distress price.[81] (emphasis added)

"Public purpose", on the other hand, is a condition of legality of indirect expropriation. Without being exhaustive, this proposition appears to be reflected in, *inter alia*, the wording of Section IV(1) of the 1992 World Bank Guidelines,[82] Article 13 of the 1994 Energy Charter Treaty,[83] and Article 1110 of the NAFTA.

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appropriations: "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", at para. 72 (emphasis added).

79. *Chemtura Award*, *supra* note 60. The Tribunal found that the regulator took measures "motivated by the increasing awareness of the dangers presented by lindane *for human health and the environment*" and that 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*", at para. 266 (footnote omitted, emphasis added).

80. *AWG Group Decision on Liability*, *supra* note 73, where the Tribunal took the position that "it is important to recognize a State's *legitimate right* to regulate and *to exercise its police power in the interests of public welfare and not to confuse measures of that nature with expropriation*", at para. 139 (emphasis added).

81. *Too v. Greater Modesto Insurance Associates*, Award, 29 December 2989, 23 Iran-United States Cl. Trib. Rep. 378. The claimant sought compensation for the seizure of his liquor licence by the US Internal Revenue Service but the Tribunal ultimately rejected the allegation of taking on the grounds of police power regulations.

82. S. IV (1) on "Expropriation and Unilateral Alterations or Termination of Contracts", states that: "A state may not expropriate or otherwise take in whole or in part a foreign private investment in its territory, or take measures which have similar effects, except where this is done in accordance with applicable legal procedures, in pursuance in good faith of a public purpose, without discrimination on the basis of nationality and against the payment of appropriate compensation."

83. Art. 13 provides that: "investments of investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation" except where such measure complies with the rules

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Tribunals such as the one in *Methanex Corp. v. US* also appear to regard "public purpose" as a condition of legality of indirect expropriation; therefore, in reaching the conclusion that the ban on the use of a certain fuel additive was not expropriatory, the Tribunal noted that it had been made "for a public purpose, was non-discriminatory, and was accomplished by due process", and that from the standpoint of international law, "it was a lawful regulation and not an expropriation".[84]

B. *How Does the Inclusion of the "Rare Circumstances" Concept Change the Position Created by the BIT Framework?*

The inclusion of the "rare circumstances" phraseology appears to bring the position back somewhat full circle to that which appears to have been widely accepted by international investment tribunals (i.e. that a state does not have to compensate an investor at all where it has legitimately exercised its "police powers"). The detailed annexes provide that where the state has acted in pursuit of "public welfare objectives", such actions will rarely be considered expropriatory, and therefore will presumably rarely trigger the state's obligation to compensate. In Singapore's treaties, these legitimate "public welfare objectives" have been particularized to include "public health, safety, and the environment",[85] which is strikingly similar to the broad categories (set out above) that have been created to embody the concept of "police powers". Further, as explained above, "police powers" has been equated to acting in the "general" or "public welfare" in some cases.[86] The net effect of this is that under the "rare circumstances" concept, a state that acts in pursuit of "legitimate welfare objectives" will only have to compensate in "rare circumstances" if the investor is substantially deprived of the economic benefits of its investment.

While the US-Singapore FTA, Singapore-Peru FTA, and Singapore-Panama FTA were silent on what these "rare circumstances" entail,[87] the recently concluded Singapore-EU FTA has gone a step further in employing language to limit the scope of indirect expropriation. Therefore, Annex 9-A of the Singapore-EU FTA describes such "rare circumstances" as measures or a series of measures where the impact is "so severe in light of its purpose that it appears manifestly excessive". The wording of the Singapore-EU FTA is similar to that at Annex 11-B of the US-Korea FTA (which entered into force on 15 March 2012), where examples of such "rare circumstances" are specified to include actions or a series of actions that are "extremely severe or disproportionate in light of its purpose or effect".[88]

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of customary international law in this matter (public purpose, due process, non-discrimination, and compensation).

84. *Methanex Final Award, supra* note 36 at part IV, chapter D, para. 15.

85. See e.g. *US-Singapore FTA,* supra note 22; *Singapore-Peru FTA*, supra note 25.

86. "Police powers" has been equated to "general" or "public welfare" in cases such as *Saluka* and *AWG Group*. See *Saluka Partial Award, supra* note 36; *AWG Group Decision on Liability*, *supra* note 73.

87. Even the Singapore-Costa Rica FTA, which entered into force on 1 July 2013, does not offer examples of such "rare circumstances", online: <http://investmentpolicyhub.unctad.org/IIA/country/190/treaty/3283>.

88. Online: <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>. Para. 3(b) of annex 11-B states:

> Except in rare circumstances, such as, for example, when an action or a series of actions is extremely severe or disproportionate in light of its purpose or effect, non-discriminatory

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From the wording of the Singapore-EU FTA, it is clear that, from Singapore's perspective, under the "rare circumstances" treaty rule, an action is not expropriatory and a state does not have to compensate, except where the measure is so disproportionate and severe in the light of its purpose. This might not be all that different from the position that has been widely accepted by international investment tribunals;[89] a number of tribunals have found that although states customarily retain the "right to adopt measures having a social or general welfare purpose"[90] (i.e. the right to exercise police powers) without any imposition of liability, international law requires the exercise of such regulatory activity to be proportionate to the need being addressed. This means that whether or not a state is found to have validly exercised its police power depends significantly on the proportionality of the measure taken. The Tribunal in *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States* [*Tecmed*] stated the issue as follows: "[T]he Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments …".[91]

In that sense, the "rare circumstances concept" (as reflected in Singapore's later FTAs) is entirely consistent with the "police powers" rule that has gained widespread acceptance. Given that not all of Singapore's existing FTAs contain illustrations of what the "rare circumstances" concept entails, it remains open to tribunals to adopt any construction they deem appropriate. Having said that, it is probable that the illustrations provided in the Singapore-EU FTA will serve as useful guidance.[92]

C. *The "Rare Circumstances" Requirement Arguably Makes It More Difficult for an Investor to Persuade a Tribunal that an Expropriatory Act has Occurred*

The wording of the Annex 9-A of the Singapore-EU FTA[93] suggests that proportionality is a key facet of the "rare circumstances" concept. In fact, looked at from another

> regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, the environment, and real estate price stabilization (through, for example, measures to improve the housing conditions for low-income households), do not constitute indirect expropriations. (footnotes omitted)

89. Besides being in line with the approach taken by investment tribunals, the approach set out in the Singapore-EU FTA closely resembles the approach taken in other FTAs. Apart from the US-Korea FTA, annex 9-A of the Singapore-EU FTA is also similarly worded to annex A of the Agreement between Canada and the Slovak Republic for the Promotion and Protection of Investments [Canada-Slovak FIPA]. The Canada-Slovak FIPA lists examples of "rare circumstances" to include measures or a series of measures that are "so severe in light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith".

90. *LG&E Energy Decision on Liability, supra* note 31 at para. 195. See also *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. Arb/09/02 (Award) (31 October, 2012) [*Deutsche Bank Award*], at para. 522; *Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6 (Award) (7 July 2011), at para. 174.

91. *Tecmed Award*, *supra* note 36 at para. 122.

92. Perhaps the best way forward will be for Singapore to issue an interpretive note declaring its understanding of what the "rare circumstances" concept entails under, *inter alia*, the Singapore-Peru FTA and Singapore-Panama FTA.

93. In particular, the severity and excessiveness of the measure seems to be the only criteria for determining if the "rare circumstances" requirement is satisfied.

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angle, a compelling case can be made that the inclusion of the "rare circumstances" requirement makes it more challenging to establish that an indirect expropriation has occurred.

In this regard, it is important to bear in mind that, before a state may be found to have acted in an expropriatory manner, much will turn on how ready the tribunal is to second-guess the state's characterization of a particular measure as a valid exercise of its "police power". It is submitted that the widely accepted rule provides scant guidance on the extent of scrutiny that should be paid to a state's decision of what lies in its public interest and what measures are suitable in the circumstances. In contrast, the "rare circumstances" terminology is an express direction to tribunals that they should not sit in the shoes of the regulator, or attempt to substitute their own regulatory choices for those of the competent authorities. The "rare circumstances" concept, which was arguably born out of the US exposure to "frivolous claims",[94] paves the way for a state to convince a tribunal that a particular measure is a proper exercise of its sovereign power to act in the public interest. The widely accepted position, which is superficially seductive, contains an element of chance in that it is always a gamble as to whether the tribunal will accept a state's characterization of its own actions.

While tribunals have consistently accepted that states have a sovereign right to use their "police powers", there is no corresponding uniformity in tribunals' willingness to declare that their discretion to make a finding of expropriation should be employed sparingly and only in exceptional or "rare circumstances". On the contrary, tribunals such as the one in *Tecmed*[95] have taken pains to make it clear that while "due deference" is owed to the state when defining the issues that affect its public policy or the interests of society as a whole, the tribunal retains the discretion to assess the reasonableness of the state's action.[96] Similarly, in *ADC Affiliate v. Hungary*, the Tribunal affirmed that the state's inherent power to regulate is not without its limitations, saying, "[i]t is the Tribunal's understanding of the basic international law principles that while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries".[97]

The jurisprudence makes it clear that the state's right to regulate is not a blanket justification to contravene its international obligations towards investors. Where necessary, international tribunals have not been diffident in requiring the state to justify its measures once the claimant has established a deprivation.[98] For this reason, a strong

94. *Supra* note 17.

95. *Tecmed Award, supra* note 36 at para. 122. The Tribunal found that the Mexican government's failure to renew the hazardous waste landfill permit held by the investor's subsidiary was expropriatory.

96. This paragraph has been approvingly cited in cases such as *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15 (Award) (31 October 2011), at para. 243; *Fireman's Fund, supra* note 35, p. 83, ftn. 161; *Deutsche Bank Award*, *supra* note 90 at para. 522.

97. *ADC Affiliate v. Hungary*, ICSID Case No. ARB/03/16 (Award) (2 October 2006), at para. 423.

98. Newcombe and Paradell, *supra* note 28 at 366. See e.g. *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana* (Award of Jurisdiction and Liability) (27 October 1989) 95 ILR 184. Biloune made an investment agreement with the Ghana Investments Centre, a government entity, for the development of a resort complex. After work had begun, government issued a stop work order and partially demolished the work in progress. Biloune was then arrested, detained, and deported. The Tribunal found that there was no justification for any of these actions.

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case can be made that the specific inclusion of the "rare circumstance" exception effectively narrows the scope of the expropriation provision within the treaty, which in turn arguably reduces the investor's chances of persuading a tribunal that an expropriatory act has occurred. From a practical standpoint, there is therefore utility in expressly indicating to a tribunal that it should be slow to label a deprivative but avowedly "regulatory" measure as an expropriation. This is especially so since tribunals are not bound by any rule of *stare decisis* and are therefore not obliged to follow any particular jurisprudential trend.

V. CONCLUSION

The ACIA entered into force on 29 March 2012.[99] Article 14 of the ACIA proscribes nationalization or expropriation unless such a measure is taken for a public purpose, in a non-discriminatory manner, in accordance with due process of law, and upon payment of prompt, adequate, and effective compensation. While Annex 2 of the ACIA contains language that is broadly similar to paragraph 4(a) of the 6 May 2003 letters on expropriation, there is one crucial distinction. Paragraph 4 of Annex 2 of the ACIA states that: "[n]on-discriminatory measures of a Member State that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an expropriation of the type referred to in sub-paragraph 2(b)." From the wording of the paragraph, it appears that the Tribunal has absolutely no discretion to make a finding of expropriation as long as the state can establish that its non-discriminatory measure was applied to protect legitimate public welfare objectives. The omission of the "rare circumstances" phraseology at the start of the paragraph arguably renders it more challenging to establish that an indirect expropriation has occurred under the ACIA as compared to the US-Singapore FTA.

Given that a number of Southeast Asian countries were entering into "OECD-style" treaties even in the late 1990s and early 2000s, it is submitted that the repercussions from the evolution of Singapore's BITs/FTAs apply with equal force in the broader Southeast Asian context. To ensure that the detailed expropriation provisions in later treaties maintain their full effect, care must be taken to ensure that the Most-Favoured-Nation [MFN] provisions in these later treaties (if any) are carefully crafted to exclude reference to expropriation provisions under prior treaties.

The Tribunal held that acts of the Ghanaian authorities would constitute constructive expropriation unless the state "can establish by persuasive evidence sufficient justification for these events", at 209.

99. Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam have signed the ACIA.

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