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Steven R. Ratner

University of Michigan Law School, sratner@umich.edu

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REGULATORY TAKINGS IN INSTITUTIONAL CONTEXT: BEYOND THE FEAR OF FRAGMENTED INTERNATIONAL LAW

By Steven R. Ratner*

The last decade has witnessed a rebirth of popular and academic interest in the international norms governing expropriation. Debate has centered on the competing claims of corporations, host states, nongovernmental organizations (NGOs), and other actors over the extent to which governments may regulate their economies in a manner that affects foreign investment without compensating investors for resulting economic harm. The current controversy over regulatory takings represents the second act in international law’s expropriation battles; whereas the first act comprised the long dispute between North and South over compensation after an overt nationalization, today’s dispute turns on whether a governmental regulation is an expropriation in the first place. This issue is not new to international law, as old diplomatic intercourse and arbitrations demonstrate; but the range of actors making claims, the venues for their resolution, and the outcomes of these processes are more diverse, particular attention having been generated by the case law of arbitrations under the North American Free Trade Agreement (NAFTA) and bilateral investment treaties (BITs). Complaints have concerned both the outcomes of disputes and the processes involved in their resolution.

Neglected, though not wholly ignored, in discussions about the adequacy of the international law on regulatory takings is an appreciation of the diversity of the institutions that serve as the venues for the competing claims of international actors. In this article, I argue for more explicit consideration of these institutions and attempt to show that each one, and the regime of which it forms a part, has particular interests and purposes that will and should drive the way it approaches the issue of regulatory takings. The institutions do not address regulatory takings cases through some isolated application of doctrine to facts; rather, they form part of regimes whose goals include investment protection, human rights, regional integration, and insurance, and they are marked by distinct design features that affect their decision making. Without considering these institutions and the frameworks in which they operate, any diagnosis of the case law and attempt to improve it through doctrinal or procedural solutions will fall short. Indeed, I suggest that a coherent doctrine to cover all cases of regulatory takings beyond a rather general level is impossible, unnecessary, and counterproductive. Rather, each regime will possess its own specific doctrine and decision-making mechanisms tailored to its needs.

Viewed from this perspective, the issue of regulatory takings becomes part of a much broader debate in international law—one not addressed by those following investment disputes

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alone—over the fragmentation of the law through the possible conflict between multiple regimes of norms and institutions with overlapping competences and interests. In the recently completed study of fragmentation by the International Law Commission (ILC), the special rapporteur defined the underlying conflicts as "situation[s] where two rules or principles suggest different ways of dealing with a problem."¹ One of the key topics examined was the conflict between so-called general and special international law, including the notion of self-contained regimes. In focusing on regulatory takings, my institutional approach helps us understand whether expropriation law is part of general international law or rather a set of special international norms. If it is the latter, the possibility that these special norms may themselves conflict with one another and its consequences need to be explored.

My aim, then, is to examine disputes over regulatory takings in a variety of regime and institutional contexts to highlight the ways those contexts affect the outcomes of decision making. The diversity of these regimes and institutions will suggest in turn that much of the feared fragmentation in international law is an inevitable and indeed welcome development. To begin, part I describes the current dissatisfaction and disagreements regarding the law on regulatory takings and contrasts this situation with the struggle over expropriation of an earlier era. Part II recaps the state of the law on regulatory takings, to point up areas of agreement and, more important, to demonstrate the futility of a doctrinal solution to the problem of apparently inconsistent case law. Part III introduces my institutional approach, explaining how regulatory takings decisions are closely linked to institutions and regimes. Part IV applies this idea in some detail to key regimes that have addressed regulatory takings claims. Part V assesses the current trends in decision making within the framework of discussions of the fragmentation of international law, suggesting that, when it comes to regulatory takings, too much harmonization is not a good thing. Part VI concludes with a set of recommendations for decision makers and scholars evaluating regulatory takings decisions.

I. WHERE WE ARE ON REGULATORY TAKINGS, AND HOW WE GOT HERE

Act I: A Recapitulation

The ongoing expropriation battle is a sequel to the long diplomatic and legal clash between economically developed and less developed states over the role of international law in regulating a government’s treatment of foreign investment. In Act I of the expropriation battles, governments of developing states attempted to assert or reassert control over domestic resources owned by Northern corporations, in many cases as a result of colonialism or other forms of political and military support of their governments.² Large-scale nationalizations often stemmed from decolonization, though others, such as the Soviet and Mexican expropriations of the 1920s and 1930s, were independent of it. By the 1960s, one core claim of the developing

world vis-à-vis the North had achieved international recognition in the concept of permanent sovereignty over natural resources.3

As nationalizations proceeded, investors and home states, on the one hand, and host states, on the other, fought over the relevance of international law in two contexts—the lawfulness of a host state's abrogation of contracts with foreign investors, including the effect of clauses requiring disputes to be decided under international law; and the amount of compensation, if any, the host state owed the foreign investor whose property it had expropriated. Prosper Weil characterizes the legal debates in Act I as "an exercise in prejudiced assumptions, and those who supported the application of international law to investment relations were accused of sacrificing the interests of the Third World countries to Western multinational corporations."4 Diplomatic disputes were numerous, arbitrations less so, though each of them was closely parsed by international lawyers.5

Act I ended not as a result of negotiations and a grand compromise. Rather, political and economic forces at the global level, including the end of the Cold War, brought to a rather abrupt halt most of the overt disagreements among governments over whether host states could expropriate without compensation. (Indeed, even before the 1990s, developing states were concluding BITs with Northern states requiring full compensation for expropriation.) As the South found itself in need of foreign investment, its leaders and lawyers saw few advantages to pushing their point about the need to preserve the option of uncompensated expropriations, especially as the end of decolonization made these actions less likely anyway. Their position is part of a shift in attitudes identified by Weil, to the effect that "the theory of the internationalization of investment relations can no longer be questioned."6 The markers in the road include the demise of the United Nations Code of Conduct for Transnational Corporations; the overhaul of domestic investment codes; the exponential rise in the number of BITs, most with some formula of full or nearly full compensation; and the World Bank guidelines, with their emphasis on market-based compensation for expropriations.7 The developing world has not abandoned its former position entirely—whether reflected in expropriations by Venezuela, Bolivia, and Ecuador or the views of scholars like Sornarajah8—but its governments have typically relegated that position to a default rule trumped by some domestic law or treaty.

Act II: Identifying the Fronts

As Michael Reisman and Robert Sloane have noted, notwithstanding the recent Latin American moves, for the most part the days of direct nationalizations are a relic of the past.9 Instead,

6 Weil, supra note 4, at 412.
to the extent that foreign investors fear expropriation, it is principally from governmental regulation that negatively affects their property, some of which can be characterized as indirect expropriation. Thus, Act II of the expropriation battles is not primarily about whether and how much the host state must pay if it expropriates,\(^\text{10}\) but whether governmental action has crossed some line from noncompensable regulation to indirect expropriation that requires paying investors according to international standards.

Today's conflict takes place on three fronts: First, practitioners and scholars have disagreed over the outcomes of arbitrations, as some find that arbitrators drew the wrong line in finding that certain regulations constituted expropriations. The *Metalclad* case decided by a NAFTA panel in 2000 provoked the strongest ire; NGOs and academics accused the panel of sacrificing a state's environmental goals to the benefit of foreign investors.\(^\text{11}\)

Second, scholars and practitioners have complained about inconsistent results across arbitrations. While some focused on the ever-changing NAFTA case law on fair and equitable treatment, scholars also pointed to the myriad approaches on expropriation.\(^\text{12}\) Legal observers were handed an empirical gift in 2001 that would make social scientists green with envy: the issuance of two arbitral awards adjudicating an identical set of facts—Ronald Lauder's purchase and subsequent loss of a Czech television station—with diametrically opposed findings on indirect expropriation. Since 2005, four ad hoc arbitral panels under the U.S.-Argentina bilateral investment treaty have ruled that the reorganization by Argentina of its foreign-owned natural gas industry was not an expropriation, while the U.S. Overseas Private Investment Corporation (OPIC) reached the opposite conclusion.\(^\text{13}\)

Third, observers of foreign investment have issued broad attacks on the current methods of resolving investor-state arbitrations, extending their critiques far beyond inconsistent outcomes to claim systemic deficits of legitimacy.\(^\text{14}\) Jeffery Atik has usefully grouped these legitimacy critiques, at least as far as they concern NAFTA, into eleven complaints, including asymmetry of

\(^{10}\) For an example of where compensation is still a major issue, see Andrew E. Kramer, *Shell Bows to Kremlin Pressure on Gas Project: Offer to Sell Stake in Sakhalin Comes at Russia Tights Grip*, INT'L HERALD TRIB., Dec. 12, 2006, at 1.


obligations, the use of private forums for public issues, the weakening of domestic courts, overly broad interpretation of investment norms, and lack of transparency and NGO participation.\textsuperscript{15}

The debates in Acts I and II both have an ideological component—in Act I about North-South relations and in Act II about globalization generally. The sides portray investors as, alternatively, advancing corporate profits to the detriment of host state interests or advancing global capital flows to the benefit of all; or host states as, alternatively, surrendering to parochial or economically inefficient domestic constituencies or advancing progressive policies like environmental protection that benefit all the people of the home state. At the doctrinal level, Act II’s disputes among arbitral panels and scholars over, on the one hand, whether the economic impact of a regulation on the investor is the sole criterion for an expropriation or, on the other hand, whether other contextual factors about the regulation matter parallel the debates during Act I over whether the justification for a nationalization should affect the compensation.\textsuperscript{16}

Nevertheless, the current debates are much more complex. First, the targets of claims are not just Southern states. As a consequence of NAFTA, the United States and Canada have become the defendants in regulatory takings cases, changing their perspectives drastically. Second, today’s decision makers face pressures to consider values and norms previously seen as external to the foreign investment process, such as environmental protection. Human rights concerns, though long central to the Council of Europe’s approach to private property, are now pervasive.\textsuperscript{17} Third, new actors are involved, notably NGOs, which expand the opportunity for public participation in dialogue on regulatory takings and foreign investment generally. They may help derail negotiations between governments, as happened with the 1998 Multilateral Agreement on Investment.

Fourth, and most important, the institutional options for the resolution of claims of regulatory takings have vastly expanded since Act I. The thousands of bilateral investment treaties, NAFTA, and other regional agreements now give businesses numerous opportunities to challenge host states.

The arenas for the consideration of regulatory takings claims thus include the following:

\begin{itemize}
  \item negotiation of investment instruments between foreign investors and host state governments and companies;
  \item determination of host government policies regarding the necessity for compensation in the event of changes in the status quo;\textsuperscript{18}
  \item negotiation of BITs and multilateral agreements on foreign investment;
  \item negotiation of private settlements in the event of regulation with negative effects on foreign investment;
  \item negotiation and conclusion of lump sum settlement agreements;
\end{itemize}


negotiation and conclusion of individual settlement agreements by governments on behalf of an affected national;

proceedings in host state courts on investor claims of indirect expropriations;

ad hoc arbitral proceedings under BITs, NAFTA, the European Energy Charter, or other treaties, whether in the International Centre for Settlement of Investment Disputes (ICSID) or under the rules of the United Nations Commission on International Trade Law (UNCITRAL) or other rules;

ad hoc arbitral proceedings under special claims agreements, such as by the Iran–United States Claims Tribunal;

cases in the European Court of Human Rights under Protocol No. 1 to the European Convention on Human Rights;

cases in the European Court of Justice (ECJ) alleging violations of the fundamental right to property;

cases in the International Court of Justice interpreting friendship treaties or BITs;

determinations of the United States Foreign Claims Settlement Commission (FCSC) (and any foreign counterparts) on the eligibility of certain claims for compensation;

determinations of the Department of State as to whether governmental action constitutes expropriation to trigger suspension of foreign assistance under U.S. federal law;

negotiation of expropriation coverage in insurance contracts offered by the Overseas Private Investment Corporation and other governmental investment insurance agencies, followed by claims determinations and arbitration if necessary; and

negotiation of expropriation coverage in insurance contracts offered by private insurers, followed by claims determinations and arbitration if necessary.19


dlmiting the Focus of Inquiry

Many of these concerns are not limited to regulatory takings, but are aimed at other norms of international law, such as fair and equitable treatment. A focus on regulatory takings is nonetheless warranted for three reasons. First, the takings issue resonates in particular among those concerned about international law’s limits on the power of a government to regulate its economy. Although the norm of fair and equitable treatment has proved to have a great deal of teeth in penalizing states for actions against foreign investors, the rhetorical power of the notion of “taking” and “expropriation” seems to have galvanized concerns about both the risks of incoherence in outcomes and the purported overreaching of international law.20 Second, takings issues appear in the most institutional contexts. Claims of violation of fair and equitable treatment, for instance, arise in the context of BITs and NAFTA but not directly in others. Third,

19 The Dispute Settlement Body of the World Trade Organization has not faced these issues, in part because of the minimal WTO law on trade-related investment measures, though some have suggested it could engage these issues. See Ernst-Ulrich Petersmann, *Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralization of Dispute Settlement in International Trade*, 27 U. PA. J. INT’L ECON. L. 273, 314–20 (2006).

some selectivity is required to avoid too many variables in what is already a multi-institutional setting. It is also an area rich in history and doctrinal scholarship.  

II. THE DOCTRINE AND ITS LIMITS

The central problematique of "regulatory takings law," then, is a set of competing claims about the power of government to regulate economic activity in a manner deleterious to the value of private property without compensation. The claim that a governmental regulation amounts to a taking in violation of international law is typically a claim that the regulation is a form of indirect expropriation (though indirect expropriations may derive from many measures other than regulations).

What We Agree On

Despite the concerns about particular outcomes and coherence, and despite the many venues for regulatory takings claims, decision makers and scholars do agree on the core elements of the international law of regulatory takings, at least at a somewhat high level of generality. Some of these propositions are terminological clarifications; others attempt to restate customary international law or describe shared or overlapping interpretations of different treaties; and still others are simply descriptions of state or arbitral practice.

1. As a general matter, under customary international law, states are entitled to regulate their economy for a public purpose, according to law, and in a nondiscriminatory manner, even if it harms the economic interests of domestic and foreign investors. This lawful authority to regulate includes the authority to change policies as necessary to advance a public purpose. Such changes are not unlawful merely if they harm investors and are not expected by them.

2. Under customary international law, governmental and private actors are free to agree upon the point at which governmental regulation will constitute an indirect expropriation, as well as the consequences of that determination for compensation. Thus, treaties and private contracts may adopt any definition of expropriation acceptable to the parties.

3. The practice of states and public insurance entities is to designate the sorts of acts subject to compensation, and, in particular, to specify whether indirect expropriatory acts are covered. At the same time, because texts may fail to define such acts with precision (e.g., by not defining the term "indirect expropriation"), those who interpret the texts will often have to
derive their own criteria. In so doing, they may either adopt criteria that they regard as specific
to that text or rely upon customary international law on expropriation as a default rule to gov-
ern in the absence of any criteria specific to the treaty or contract.

4. Under customary international law, indirect expropriations are treated as a form of
expropriation subject to the duty to provide compensation. They are distinguished from
direct expropriations by the absence of a formal governmental act transferring ownership of
the property from the investor to the government. The more difficult question is distinguishing
indirect expropriations from noncompensable governmental regulations.

5. Under customary international law, whether a governmental regulation is an indirect
expropriation turns on the substance of the measure and not its form.

6. Decision makers charged with determining the point at which governmental regulation
becomes an indirect expropriation have refrained from developing or relying upon bright-line
tests. At the same time, decision makers have generally considered three factors critical to the
determination of an indirect expropriation under both treaties and custom.

a. The first factor is the impact of the measures on the investment. Though the trends of
decision are not uniform, in general governmental regulatory action crosses the line to indirect
expropriation when for a significant period the investor is deprived of control of the investment
in a manner akin to a direct expropriation. A mere reduction in profits is generally not a suf­
ficient sort of impact; rather, the actions of the government must so frustrate an investment’s
operation as to render it economically useless to the investor. As G. C. Christie wrote forty-five
years ago, “the most fundamental right that an owner of property has is the right to participate
in its control and management.”

b. The second factor is the extent to which the investor had vested property rights in the
investment, as contrasted with some less entrenched form of possession. Contractual or other
commitments by the host state may give rise to such rights, although there is disagreement as
to whether all the provisions of a state’s contract with an investor create them.

c. The third factor is the context of the governmental measure, including its purpose and
the proportionality between the harm to the investor and the benefit to the public. Although

25 Unlike Weston and others, I do not equate a “creeping expropriation” with an indirect one. As Reisman and
Sloane point out, supra note 9, at 122–28, creeping expropriation describes a process of governmental interference
with foreign investment that may end in either a direct expropriation or an indirect one. There is also disagreement
on whether the term “tantamount to expropriation” is different from the term “indirect expropriation.” See Been &
Beauvais, supra note 11, at 51–53.

26 For other endorsements of these three factors, see ORGANISATION FOR ECONOMIC CO-OPERATION AND
DEVELOPMENT [OECD] NEGOTIATING GROUP ON THE MULTILATERAL AGREEMENT ON INVESTMENT
(MAI), THE MULTILATERAL AGREEMENT ON INVESTMENT: DRAFT CONSOLIDATED TEXT, OECD Doc.
Fortier & Drymer, supra note 12, at 300–25; Andrew Newcombe, The Boundaries of Regulatory Expropriation in

27 Christie, supra note 21, at 337. For a recent case citing key endorsements by tribunals, see BG Group v. Argen­tina, supra note 13, paras. 261–68. See also Higgins, supra note 16, at 271 (noting that diminution in value is uncom­
pensated “so long as rights of use, exclusion and alienation remain”); Yves Nouvel, Les mesures équivalent à une expro­
priation dans la pratique récente des tribunaux arbitraux, 106 REVUE GÉNÉRALE DE DROIT INTERNATIONAL
PUBLIC 79, 90 (2002) (identifying standard as “substantial deprivation,” but noting that indicators are “the use,
enjoyment, and management of the investment”). For a notable preference for a broader factor, namely deprivation
of economic use and enjoyment, see RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNA­
TIONAL INVESTMENT LAW 107–08 (2008). On the basis of the few cases cited, this represents a minority view,
although the cases might be reconciled with a control test.
some have suggested that international law relies only on the first two criteria—together composing the so-called sole effect doctrine—the better view from a review of decisions is that this third factor is relevant.28

7. An indirect expropriation is legally distinct from a violation of other norms protecting foreign investors from changes in domestic regulations. Thus, a governmental measure may be a violation of the norm of fair and equitable treatment without rising to an expropriation; it may constitute an expropriation without violating the minimal standard of treatment; or it may constitute both (or neither).29 Moreover, it is distinct from the violation of a stabilization clause or an “umbrella” clause.

8. Decision makers should not mechanically transcribe national notions of noncompensable takings law to the international arena.30 Such reliance is inappropriate as a means of creating rules of international law generally;31 it is particularly wrong in the case of foreign investment law, as national governments emphasize political participation of domestic actors, while foreign actors must rely on international law standards for protection.32

These eight elements represent the core of international legal doctrine on regulatory takings. Much as scholars lament the absence of clear rules on the issue,33 an overlapping consensus is found under customary international law. Moreover, as we will see, although the formulations regarding expropriations in treaties may differ, and those charged with interpreting treaties need not incorporate custom into their interpretation, they have tended to reach interpretations consistent with customary law. The best evidence of this general coherence is simply that the outputs of the decision-making processes form a general, albeit not uniform, pattern—that the bulk of claims of regulatory takings are rejected, typically because (1) the investor is found not to have a legitimate expectation or property right in what he claims was taken from him; (2) the governmental measure does not have the requisite severe impact on his control of the investment; or (3) the purpose and the contours of the measure appear to place a fair burden on the investor compared to the public as a whole.

But Can't We Agree on More?

For some scholars, this level of doctrinal thinness is deeply unsatisfactory. They note, quite rightly, that each of the three factors listed under number 6 above can be interpreted,


30 It is at the same time worth noting the significant similarity between the three factors discussed above and those that the United States Supreme Court adopted in Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978). I thus disagree with the assessment in Been & Beauvais, supra note 11, at 59–86, who rely excessively on the outcome in Metalclad v. Mexico, supra note 11.


33 See, e.g., Been & Beauvais, supra note 11, at 141 (“little clarity or consensus in international law about how to define such actions”).
The control test is notably subject to multiple interpretations. Some have attempted to find the silver bullet that will reconcile the cases and serve as a guide for the future, including by emphasizing the intent of the state and the distinction between state takeover of property and mere regulation of its use. Others have eschewed a simple solution. Vicki Been and Joel Beauvais responded to early NAFTA decisions by clarifying the different economic and political contexts of domestic and international takings. Jan Paulsson has noted, "The magical formula for deciding claims of indirect expropriation is the international lawyer's equivalent of proving Fermat's Last Theorem." Yves Fortier and Stephen Drymer's reaction seems close to utter resignation when they say that the law is, more or less, "I know it when I see it."

This frustration about the possibility of a more specific doctrinal solution is understandable, but it must be explained wherein the impossibility lies—and whether it is to be resisted, accepted, or embraced. The futility of achieving more definite doctrine cannot be traced simply to the immense variety of governmental regulation that might be expropriatory and the need for a fact-specific inquiry, for in other areas of international (and domestic) law, vast factual permutations do not stand in the way of formulating doctrine with fairly specific—though hardly bright-line—tests. A more complete explanation for the impossibility of a doctrinal solution centers on the multiplicity of institutions in which regulatory takings claims are made and resolved.

III. THE CENTRALITY OF REGIMES AND INSTITUTIONS

Regimes and institutions significantly influence both the propensity of decision makers to follow the basic consensus position and their interpretation of it. Explicit consideration of these institutions suggests not only the futility of a doctrinal solution, but, more important, its lack of necessity and indeed undesirability.

Contextualizing Outcomes

To explain the relevance of institutions to the resolution of claims over regulatory takings, we first need to situate those institutions more broadly within the international legal order. These decision-making institutions are part of various regimes of governance. For political scientists, regimes, as defined by Stephen Krasner, consist of "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in..."

34 Newcombe, supra note 26, at 40–49. Indeed, Joseph L. Sax, Takings and the Police Power, 74 YALE L.J. 36, 51–53 (1964), and Kaplow, supra note 18, at 522–25, earlier noted the broad problems with expectations analysis and the definition of property.

35 Katharina A. Byrne, Regulatory Expropriation and State Intent, 2000 CAN. Y.B. INT'L L. 89.

36 Newcombe, supra note 26, at 20–22.

37 See generally Been & Beauvais, supra note 11.


39 Fortier & Drymer, supra note 12, at 327.

a given area of international relations." Those procedures often include institutions entrusted with the resolution of disputes between the various actors. Regime theory views state behavior as influenced not by the norms themselves, but by the institutions and norms together, creating a set of incentives and disincentives on states. Regimes can influence states, as they condition the benefits of membership on compliance, link compliance to cooperation on other issues, and pressure domestic actors. International lawyers, following the lead of the Permanent Court of International Justice (PCIJ) in the S.S. Wimbledon and the International Court of Justice in the Tehran Hostages case, have tended to speak of "self-contained regimes," though they differ greatly on the meaning of that term.

For my purposes, I adopt a hybrid conception of regime between those of political science and international law under which a regime is a self-identified field of international law comprising norms to regulate a certain type of conduct and institutions to make decisions within it. To say that there is a regime on $X$ (such as the environment) is not quite the same as saying that there is law governing $X$, as it requires institutions as well. This concept resembles what the International Law Commission's special rapporteur on fragmentation of international law, Martti Koskenniemi, has denoted as the broadest meaning of legal regimes, that is, "whole fields of functional specialization [that] . . . serve to identify and articulate interests that serve to direct the administration of the relevant rules." As Koskenniemi and others have recognized, the decision to identify a regime is both a descriptive and a constitutive act—it is as much a statement that a distinct set of rules and decision-making processes governs an issue as that it should do so. Identifying numerous regimes relevant to regulatory takings entails rejecting the idea of a single regime on regulatory takings.

The claim of multiple regimes has analytic power in appraising the outcomes of decision making. Individuals and businesses have made regulatory takings claims in regimes dedicated to a variety of goals: these include regimes governing regional economic integration, human rights, investment insurance, or diplomatic protection. In addition, as described further below, some claims arise in other settings, such as the Iran–United States Claims Tribunal and ad hoc panels under BITs, where placement within specific regimes presents more of a challenge.

Institutions are central to regimes in two senses: First, institutions continually make decisions oriented toward advancing the goals of the regime, not the goals of other regimes. As even an orthodox body like the ILC's study group recognized, the norms of a special regime "express

47 Koskenniemi Study, supra note 1, at 68, 71.
48 Id. at 84–85.
49 Indeed, international law has already shifted once in the way it doctrinally categorizes regulatory takings. Whereas formerly these were conceived (and by some scholars still are conceived) as part of the law of state responsibility for injuries to aliens, now they are part of, at a minimum, the law of foreign investment and, as discussed below, other doctrinal areas.
a unified object and purpose," and "their interpretation and application should, to the extent possible, reflect that object and purpose"; or, in Koskenniemi’s words, each regime may have its own “ethos” that will inform its interpretation of underlying instruments. Indeed, as the International Tribunal on the Law of the Sea stated in the MOX dispute between Ireland and the United Kingdom—involving four treaties and four dispute resolution mechanisms—"[T]he application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, inter alia, differences in the respective contexts, objects and purposes, subsequent practice of parties and travaux préparatoires.” Although the Tribunal spoke impassively of “the application,” what it meant was “our application”—an acceptance of that institution’s place within a regime. In advancing the regime’s goals, institutions also need to anticipate the reactions of key constituencies, whose common interests define those goals but whose individual interests might at times diverge from them.

Second, institutions matter because each is endowed with different characteristics that will influence the way that it advances regime goals. The institution’s composition, decision-making processes, political and legal constraints (including control mechanisms), and other attributes drive the outcomes of regulatory takings decisions. International relations scholars have long asked how and why states design institutions and what features of institutional design advance the purposes of the regime and interests of its constituencies. Contemporary perspectives range from empirically based studies emphasizing the interests of domestic or transnational nonstate actors to rational choice methods.

To appraise claims of institutional importance in regulatory takings decisions thus requires exploring the linkages between the goals of an institution’s regime and the design of the institution, on the one hand, and the outcomes of regulatory takings disputes, on the other. This inquiry requires, first, identifying the principal purposes of the regime; and second, discerning whether and how the institutions making decisions advance these ends, including by considering the traits of those institutions. Neither step is simple. The goals themselves may be difficult to identify other than at a high level of generality, or a regime could have more than one purpose. In fact, if an institution straddles more than one regime, several goals can permeate its decision making. Nevertheless, the aims, for instance, of the Council of Europe’s


51 Koskenniemi Study, supra note 1, at 14.

52 MOX Plant (Ir. v. UK), Provisional Measures, para. 51 (ITLOS Dec. 3, 2001), 41 ILM 405, 413 (2002). The treaties are the UN Convention on the Law of the Sea (UNCLOS), the Convention for the Protection of the Marine Environment of the North-East Atlantic (the OSPAR Convention), the Treaty Establishing the European Economic Community, and the Treaty Establishing the European Atomic Energy Community; the mechanisms are the International Tribunal for the Law of the Sea (ITLOS), the arbitral tribunal under OSPAR, the arbitral tribunal under UNCLOS, and the European Court of Justice.


system on human rights can be distinguished from those of NAFTA’s regime of regional integration. And the relationship between goals and an institution’s decisions is a matter of judgment, where a decision could be appraised as either contrary to or advancing the purposes of the regime, or perhaps as the basis for identifying yet a different set of goals. Moreover, a regime may produce internally inconsistent outcomes, namely, outcomes not due to regime differences and thus clearly of concern to lawyers interested in coherent case law. Given the complexity of each regime and the number of decisions within it, my methodology does not claim to prove a specific degree of institutional influence. But in considering the linkages between regimes and outcomes, we can move beyond sterile and decontextualized discussions of doctrine and achieve greater clarity in appraising the regulatory takings decisions.

Anticipating a Few Objections

Doctrinally oriented scholars might offer two critiques of this approach. First, an emphasis on institutions and regimes could be said to downplay or even ignore the texts interpreted by decision makers. Outcomes will often turn on whether an instrument provides compensation, say, for “measures tantamount to expropriation” as against “other measures affecting property,” and those drafting such instruments often make reflective choices to include and exclude certain acts meriting compensation. As Rosalyn Higgins demonstrated, the textual starting point can be critical in distinguishing outcomes. And treaties specify the basic elements of institutional design, whether they be the precision of the underlying obligation, the institution’s composition and jurisdiction, the law to be applied, or the finality of rulings. These elements embody the drafters’ choice regarding the delegation of interpretive matters to the treaty’s institutions.

But this textual starting point does not undermine regime and institutional importance for two reasons: First, as noted earlier, in many instances the underlying instruments simply do not define the term “expropriation” or “taking,” so that differences in outcomes across regimes cannot be linked to different definitions of compensable action. Indeed, the lack of such a definition may well reflect a choice by the drafters to leave the details of the definition to institutions they have authorized to interpret it. Second, and more important, the clauses used across investment protection instruments reflect the purposes of the regimes in which those instruments operate. The treaties, statutes, or contracts are the dependent variable; the goals of the regime come first. Our knowledge of the legal landscape regarding regulatory takings is rather thin if we stop at the point of saying, “These results are different because the treaties use different words.” We need to go deeper in the descriptive phase of analysis to make the right recommendations in the normative phase.

A second criticism is that the focus on regimes offers no analytic power beyond that achieved by examining whether decision makers pay heed to the rule in Article 31 of the Vienna Convention on the Law of Treaties that they interpret an instrument “in light of its object and

55 For a recent example from the insurance context, see Sempra Energy Int’l v. Argentine Republic, ICSID No. ARB/ 02/16 (Sept. 28, 2007), available at <http://ita.law.uvic.ca>.
58 Fortier & Drymer, supra note 12, at 295–96.
59 ALVAREZ, supra note 57, at 472–73.
purpose." Yet the Vienna Convention's requirements do not make the role of institutional design in decision making explicit. A simple inquiry into compliance with Article 31 misses key determinants intrinsic to the institutions that affect the outcomes. We can thus consider, for instance, how two institutions interpreting the same treaty, or similar treaties with the same object and purpose, might reach different conclusions as to their meanings.

Moreover, we need to look beyond rules of interpretation to reckon with concerns that have been raised by observers of regulatory takings decisions about the legitimacy of some of the institutions themselves. As Daniel Bodansky has clarified, an institution's legitimacy has both a popular dimension—whether its key constituencies accept its authority—and a normative one—whether that authority is objectively due respect. Both forms of legitimacy turn a great deal on the extent to which an institution's decisions advance the regime's aims. If the trends of decision advance those purposes, the states and nonstate actors affected by those decisions are more likely to see the institutions as legitimate—as doing what they are supposed to be doing. The legitimacy of institutions will also turn on the fairness of the decision-making process to the interested constituencies. The elements of fairness include, in the context of international courts, impartiality; principled, reasoned, and consistent decision making; opportunities for interested parties to be heard; stability of composition; and respect for the role of political institutions. Both outcomes and process thus affect legitimacy. If key constituencies over time accept institutions as legitimate, they are less likely to criticize those outcomes even when they disagree with them. (At the same time, some observers may criticize institutions as a surrogate target for criticism of the regime.) Over time, this legitimacy can loop back to affect outcomes, as decision makers become more emboldened with their decisions. Thus, beyond differences in regime aims and institutional design, institutional legitimacy may help to explain both the variances in the acceptability of individual decisions by interested constituencies and variances in the decisions themselves. More specifically, we can begin to understand whether the concerns raised about regulatory takings cases are about the law that has emerged, the institutions, or some combination of them.

IV. TRENDS IN INSTITUTIONAL DECISION MAKING REGARDING CLAIMS OF REGULATORY EXPROPRIATION

I now turn to seven institutions in which individuals and businesses have made claims of regulatory takings—the U.S. Overseas Private Investment Corporation, the U.S. Foreign Claims Settlement Commission, the European Court of Human Rights, the European Court

61 Daniel Bodansky, The Legitimacy of International Governance: A Coming Challenge for International Environmental Law? 93 AJIL 596, 601 (1999); cf. Ian Hurd, Legitimacy and Authority in International Politics, 53 INT'L ORG. 379, 381 (1999) (defining legitimacy as "the normative belief by an actor that a rule or institution ought to be obeyed").
62 Bodansky, supra note 61, at 612.
63 See Joseph H. H. Weiler, The Transformation of Europe, 100 YALE L.J. 2403, 2429 (1991) (demonstrating how ECJ decisions established the Court's legitimacy over time).
64 Id. at 2469; see also THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 18–19 (1990).
66 I appreciate this insight from Yuval Shany and John Crook.
of Justice, the Iran–United States Claims Tribunal, NAFTA Chapter 11 arbitral panels, and BIT panels. In each case, the method is to identify the regime in which those claims were heard (if there is one) and appraise the outcomes with respect to the goals and institutions of the regime. The study focuses on the major opinions to emerge rather than comprehensively review the entire case law and doctrine, which in some of these instances others have done. Clearly, without getting into the minds of arbitrators and judges, one cannot prove that regime aims and institutional factors caused specific outcomes. Yet the patterns below at least suggest the relevance of these factors to trends in decision making.

**OPIC and the Investment Insurance Regime**

OPIC belongs to a network of public investment insurance protection agencies, including other national entities and the World Bank’s Multilateral Investment Guarantee Agency. According to its authorizing legislation, the purpose of OPIC is to “mobilize and facilitate the participation of United States private capital and skills in the economic and social development of less developed countries and areas, and countries in transition from nonmarket to market economies, thereby complementing the development assistance objectives of the United States.” As a result, it can issue insurance for any “loss of investment, in whole or in part, in the approved project due to expropriation or confiscation by action of a foreign government or any political subdivision thereof.”

To guide OPIC in its insurance decisions, Congress provided a specific definition of expropriation, unique in the U.S. Code:

As used in this subpart—

... the term “expropriation” includes, but is not limited to, any abrogation, repudiation, or impairment by a foreign government ... of its own contract with an investor ... where such abrogation, repudiation, or impairment is not caused by the investor’s own fault or misconduct, and materially adversely affects the continued operation of the project.

Congress has not used this definition in other statutes on expropriations, nor have U.S. courts adopted it as an authoritative definition of expropriation under U.S. law.
Beyond the statute, the policies offered by OPIC have contained various coverages for and definitions of expropriation. OPIC's early contracts typically insured against "expropriatory action," defined as including any action by the foreign government that for a period of one year directly results in preventing:

(b) the Investor from effectively exercising its fundamental rights with respect to the Foreign Enterprise either as shareholder or as creditor...; ... or
(d) the Foreign Enterprise from exercising effective control over the use or disposition of a substantial portion of its property.

At the same time, OPIC contracts contained a clause that suggested denial of coverage for governmental regulation where international law did not require compensation, and another that made clear that breach of contract was not a basis for recovery unless it was also an expropriation. These clauses seemed to limit the statutory definition's implication that any breach of contract was an expropriation. In a series of cases, OPIC itself or arbitral panels have often resolved tensions between these clauses in a manner quite favorable to investors. In Revere Copper and Brass, Inc. v. OPIC, the arbitral panel found a bauxite contract between Revere Copper and the government of Jamaica to be an internationalized contract that the state had repudiated. When the tribunal turned to the contract's definition of expropriation, including the clause quoted above, it offered a very expansive notion of the "effective control" of the investor that captured many aspects of interference by the host state:

Control in a large industrial enterprise... is exercised by a continuous stream of decisions. ... Rational decisions require some continuity of the enterprise. ... [W]ithout the contract the odds cannot be calculated [and] rational decisions can[not] be made. What the Government did yesterday it can do tomorrow or next week or next month.... This is the antithesis of the rational decision making that lies at the heart of control. Here "effective control" not only of the contract but of the entire operation has been lost, due directly to the action of the Government.

As Higgins noted, this view essentially construed the breach of contract as an expropriation under the policy, notwithstanding language to the contrary in the contract, including the limits

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74 Id. at 322 (excluding "any law, decree, regulation or administrative action... which is not by its express terms for the purpose of nationalization, confiscation or expropriation (including... intervention, condemnation or other taking), is reasonably related to constitutionally sanctioned governmental objectives, is not arbitrary, is based upon a reasonable classification of entities to which it applies and does not violate... international law").
75 Id. at 323.
77 Id. at 1350.
to the definition of expropriation noted earlier. The conclusions of the arbitral panel in *Revere Copper* contrast with those of the U.S. State Department, whose lawyers determined that the Jamaican acts did not amount to expropriation for purposes of economic sanctions under the First Hickenlooper Amendment. A 1981 study of OPIC's first standard contract, written at the apogee of developing world claims about expropriation, noted that the contract's "definition of expropriation is substantially broader than the definition likely to be employed by a tribunal applying current principles of international law [and] is, therefore, *vis-à-vis* international law, *sui generis." 

The current standard contract, adopted in 1986, defines expropriation explicitly in terms of international law, but rather than adopt the customary international law understanding of expropriation, OPIC took a different step. The contract defines "Total Expropriation" as "violations of international law . . . or material breaches of local law" that "directly deprive the Investor of fundamental rights in the insured investment (Rights are 'fundamental' if without them the Investor is substantially deprived of the benefits of the investment)" and continue for a year. OPIC deleted the two limits on the contractual definition noted above, explaining that they were incorporated in the requirement that the acts violate international law. By defining expropriation to include any violation of international law, the OPIC contract includes contract repudiations that may constitute independent violations of international law but are not per se expropriations, direct or indirect, under customary international law. The centrality of contract breaches to the finding of expropriation is seen in OPIC's determination in *MidAmerican Energy Holdings* and the AAA panel's ruling in *Bechtel Enterprises v. OPIC*. 

And by defining expropriation as deprivation of the "fundamental rights" of the investor—those without which the investor is "substantially deprived" of the benefits of the investment—OPIC compensates for events beyond those resulting in lack of control. As a result, OPIC determined that actions by the Argentine government during its currency crisis were a covered expropriation risk, even though the ICSID panels found the identical acts nonexpropriatory under the BIT.

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78 Higgins, supra note 16, at 335. For the contract language, see *Revere Copper*, 17 ILM at 1322 (quoting §1.15 of the contract).

79 National Legal Provision for Protection of Foreign Investment, 1979 DIGEST §5, at 1217–22 (statute only addresses cases where foreign government "through the total cancellation or nullification of a contract, effectively took the property of an American investor," id. at 1221).

80 Koven, supra note 73, at 280–82.

81 OPIC Form Contract, supra note 72, §4.01, at 3446.

82 Id. at 3440–41.

83 Waste Mgmt., Inc. v. Mexico, ICSID No. ARB(AF)/00/3 (NAFTA Ch. 11 Arb. Trib. Apr. 30, 2004), 43 ILM 967, 1002, para. 175 (2004) (saying "it is one thing to expropriate a right under a contract and another to fail to comply with the contract"); McHarg, Roberts, Wallace, & Todd v. Islamic Republic of Iran, 13 Iran-U.S. Cl. Trib. Rep. 286, 302 (1986) (rejecting claim of expropriation of shares from evidence of contract breach alone); RESTATEMENT, supra note 23, §712 cmt. b & reporters' n.8. Tribunals have found expropriations when the plaintiff had "rights of a proprietary nature," such as those in concession agreements. 1 OPPENHEIM'S INTERNATIONAL LAW 928 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).


85 Bechtel Enterprises, supra note 72, at 24–25.

86 See the *Enron* and *Ponderosa* cases cited supra note 13.
Alongside these OPIC decisions are numerous cases where the facts justified finding an expropriation under a higher threshold and thus OPIC did not have to address the sorts of claims raised in \textit{Revere Copper} or in the Argentine cases. These include \textit{Cabot International}, where the Iranian government took away key elements of participation in and control of the business from the claimant, a 50 percent owner of the business;\footnote{OPIC Memorandum of Determination: Expropriatory Action Claim of Cabot International (Dec. 27, 1980) (on file with author).} and \textit{Sciences Application International}, where the government of Venezuela harassed the claimant and then prevented it from carrying out its business.\footnote{OPIC Memorandum of Determinations: Expropriation Claim of Science Applications International Corporation (July 12, 2004), available at <http://www.opic.gov/insurance/claims/report/documents/INTESAMoDv7_FINAL.pdf>.} On at least one occasion, an arbitral panel has ruled against policyholders by interpreting OPIC contracts in a manner that gives much more flexibility to host states.\footnote{See \textit{International Bank v. OPIC}, 11 ILM 1216, 1224–25 (1972), where the panel relied on the limits to the definition of expropriation and emphasized that the government had not taken the property of the claimant.}

The language of OPIC contracts and the resultant rulings in favor of investors generally stem from OPIC’s objectives of encouraging American companies to invest abroad by insuring them against a broad range of noncommercial risks.\footnote{See Pablo M. Zylberglait, \textit{OPIC’s Investment Insurance: The Platypus of Governmental Programs and Its Jurisprudence}, 25 LAW & POL’Y INT’L BUS. 359, 367 (1993) (citing OPIC senior counsel for proposition that OPIC is eager to pay claims despite contractual terms); see also id. at 385–86 (citing an example of interpretation generous to claimant).} Such insurance policies and determinations operate as an integral part of U.S. foreign economic policy. In addition, two features of institutional design also appear to influence outcomes. First, because OPIC’s statute makes it a self-sustaining entity, it must break even, requiring a careful balancing between paying out too few claims (and thus undercutting its ability to sell insurance) and paying out too many (to the detriment of the bottom line as well).\footnote{22 U.S.C. §2191 (2006); see also Peter R. Gilbert, \textit{Expropriations and the Overseas Private Investment Corporation}, 9 LAW & POL’Y INT’L BUS. 515, 538 (1977).} How this design feature plays itself out in OPIC decision making is difficult to determine, but at the very least it is unique to the investment insurance regime.

A second feature seems to cut more clearly in favor of OPIC’s proinvestor outlook—its prospects as an institution for recovery from the expropriating state. For many years, OPIC has boasted of its high recovery rate—95 percent of the amounts accepted\footnote{Asian Development Bank, \textit{Review of the Partial Risk Guarantee of the Asian Development Bank}, para. 27 (2000), available at <http://www.adb.org/Documents/Policies/PRG/prg203.asp>.}—which observers credit to its leverage as an arm of the U.S. government.\footnote{Gilbert, \textit{ supra} note 91, at 534–35, 547; Perry, \textit{ supra} note 68, at 554–58. As these and other commentators point out, OPIC coverage may also deter nationalizations in the first place.} OPIC’s determinations might well be informed by the likelihood that in the end, it will receive payment from the host state as subrogee of the policy pursuant to OPIC’s agreements with states hosting U.S. investment\footnote{See, e.g., \textit{Investment Incentive Agreement, U.S.–Cambodia, Art. 2(c), (d), Aug. 4, 1995}, available at <http://www.opic.gov/doingbusiness/ourwork/asia/documents/Cambodia-1995.pdf>.} (a trait of the regime of diplomatic protection). Indeed, if OPIC did not maintain this high confidence of recovery, it would eventually run afoul of its statutory mandate to operate as a
self-sustaining agency. OPIC's links to the U.S. government thus allow it to compensate investors for more types of governmental regulations than other institutions that are less certain of receiving payment from a host state.

OPIC's contracts and jurisprudence might be seen as a minor footnote to this study. After all, neither the old contract nor the current one adopts a definition that explicitly incorporates customary international law. But OPIC remains important for two reasons. First, if OPIC asserts a claim as subrogee, foreign states do end up paying for actions that the consensus position might not consider compensable. From those states' perspectives, that possibility is as important as their liability under BITs. Second, opinions concerning OPIC contracts continue to be cited by practitioners and the occasional arbitral tribunal as evidence of customary international law, when they clearly are not. OPIC's case law undeniably highlights the pitfalls of relying upon investment insurance clauses and decisions for determining the state of customary international law.

The Foreign Claims Settlement Commission and the Diplomatic Protection Regime

Congress created the FCSC to determine the validity and money value of claims by U.S. citizens against foreign governments arising out of World War II and various nationalizations in subsequent years. Its awards are paid out of funds established by peace treaties, settlement agreements concluded before and after the claims determination process, congressional authorization, or unilateral vesting of assets. The FCSC and its predecessors have adjudicated over 660,000 claims since the war. The Commission's authority has varied across settlements. For claims against Bulgaria, Hungary, and Romania, it determined whether U.S. nationals' property had been subject to a "nationalization, compulsory liquidation, or other taking." For Czechoslovakia, the mandate was to determine losses resulting from the "nationalization or other taking"; and for Vietnam, it was "nationalization, expropriation, or other taking of (or special measures directed against) property which . . . was owned wholly or partially, directly or indirectly, by nationals of the United States." In each case, Congress has directed the Commission to apply the extant claims settlement agreement (if one existed) and "applicable principles of international law, justice, and equity," as well as "applicable substantive law, including international law." In numerous individual determinations, the FCSC emphasized the necessity of finding violations of

95 See Methanex Corp. v. United States (NAFTA Ch. 11/UNCITRAL Aug. 3, 2005), 44 ILM 1345, 1456 (2005) (Final Award); CAMPBELL MCLACHLAN, LAURENCE SHORE, & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 297 (2007). It might be a form of state practice exhibiting the U.S. understanding of expropriation, but the contradictory signal sent by the State Department in the Revere Copper episode suggests otherwise.
96 For earlier treatments, compare Higgins, supra note 16, at 335, with Rudolf Dolzer, Indirect Expropriation of Alien Property, 1 ICSID REV. 41, 57–58 (1986).
international law so as to award money.\textsuperscript{102} From the Commission’s perspective, it “interprets these principles in its decisions [and] helps to promote the development of a consistent body of law and precedent concerning international claims.”\textsuperscript{103} The Commission’s program to adjudicate small claims against Iran was unusually specific in that Congress required the FCSC to apply the U.S.-Iran settlement agreement on small claims, which itself required application of the precedents of the Iran-U.S. Claims Tribunal.\textsuperscript{104}

The Commission’s approach to regulatory takings in particular remains somewhat obscure, as it appears that the vast majority of its determinations have involved the direct, intended confiscation of property.\textsuperscript{105} Yet the FCSC has had occasion to rule on the issue in some of its determinations regarding Eastern Europe. The Commission introduced the idea of a “constructive taking” in the Czechoslovak claims process. It found that a law requiring the deposit of rents from buildings into a special account was a taking, noting that the owners had “lost all control over the property and were little more than collecting agents for the Czechoslovakian Government,”\textsuperscript{106} and that a law placing property under state administration was a taking if (but only if) the purpose was to liquidate the business.\textsuperscript{107} Yet in a classic creeping expropriation case involving Poland, where the government gradually asserted more and more control over landlords, the Commission did not find an expropriation to have taken place until some fourteen years after the first of these regulations.\textsuperscript{108} In the Chobady claim, the Commission found that the loss of value of a bank account due to severe currency devaluation by Hungary was not a taking, in part because “[t]here is no evidence that the rights of depositors were curtailed or abolished by such actions.”\textsuperscript{109} and it also refused to find a ban on transfer of funds outside the country to be a taking.\textsuperscript{110} In its discussion, the Commission relied extensively on international law sources about losses arising from currency fluctuations. Other cases show similar caution

\textsuperscript{102} See, e.g., FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE UNITED STATES, DECISIONS AND ANNOTATIONS 278, 285, 394, 496, 548 (1968) [hereinafter FCSC DECISIONS AND ANNOTATIONS].

\textsuperscript{103} Edward D. Re, The Foreign Claims Settlement Commission: Its Functions and Jurisdiction, 60 MICH. L. REV. 1079, 1101 (1962) (by then-chair of FCSC).


\textsuperscript{105} In most of these, the Commission had evidence of a decree of confiscation but in others found a taking absent such a decree. See, e.g., FCSC DECISIONS AND ANNOTATIONS, supra note 102, at 230 (Hungary), 513 (Poland).

\textsuperscript{106} Claim of Alexander Feigler, Dec. No. CZ–2714 (FCSC Oct. 11, 1961), reprinted in FCSC DECISIONS AND ANNOTATIONS, supra note 102, at 422, 424; see also FCSC DECISIONS AND ANNOTATIONS at 417.

\textsuperscript{107} FCSC DECISIONS AND ANNOTATIONS, supra note 102, at 416; see also Weston, supra note 21, at 163–65 (noting at 164 that “the interposition of a State administrator . . . is to be considered a ‘constructive taking’ whenever it falls short of being truly custodial in character”).

\textsuperscript{108} Claim of Jan Glowacki, Dec. No. PO–1636 (FCSC Oct. 2, 1963), reprinted in FCSC DECISIONS AND ANNOTATIONS, supra note 102, at 516, 518. See also FCSC DECISIONS AND ANNOTATIONS at 519–20 on other cases. The Glowacki case cites no legal sources for this view.


\textsuperscript{110} See also Muresan Claim (FCSC Feb. 5, 1958), 26 ILR 294, 295 (same regarding Romania); Evanoff Claim (FCSC Aug. 13, 1958), 26 ILR 301, 302 (same regarding Bulgaria).
about indirect takings and a rather strict notion of loss of control consistent with the consensus position offered earlier. 111

The FCSC’s general caution appears to have been replicated by other national claims determination bodies. In their 1975 and 1999 studies of lump sum agreements, Richard Lillich and Burns Weston noted that many agreements to which the United States was not party included explicit coverage of indirect expropriations. 112 Nonetheless, this inclusion did not imply an expansive notion of the term. In examining U.S., British, and French cases, they concluded that those decisions “tended to define ‘indirect’ foreign-wealth deprivations as effective and permanent denials of the ‘use and enjoyment’ of alien-owned property, and . . . compensated for such deprivations . . . only to the extent that the claimed losses have not resulted from good-faith (i.e., nondiscriminatory) exercises of regulatory power,” adding that “customary international law generally has reached the same results.” 113

Despite the Commission’s explicit or apparent attempts to interpret customary international law and the general conformity with the consensus position, FCSC jurisprudence must also be read carefully because of design features unique to this institution. In an earlier study, Lillich pointed out the FCSC’s wholly domestic composition; the ex parte nature of its rulings, reached without any adversarial process to challenge the claimant’s legal or factual assertions; and “the underlying psychological bias of the commission,” which at a minimum has the potential to tilt its rulings toward claimants. 114 In addition, the Commission’s work is well-known for the paucity of its legal reasoning. 115

It is also plausible that institutional design aspects of diplomatic protection and claims settlement themselves affect the work of the Commission. In some situations, the Commission is managing a pool of existing assets from a prior claims settlement, while in others it has adjudicated in the absence (or in anticipation) of one. Where the United States had negotiated such an agreement, the FCSC might have an incentive to keep amounts low. In the Iran case, the Commission awarded $86 million to claimants with a pool of assets of just over $50 million. 116 In the postwar cases, where the Commission adjudicated once the settlement agreement was concluded or assets were vested, it awarded claimants a small fraction (averaging about 20 percent) of their total claims, although this figure still typically exceeded the amount of the fund by a great deal. 117 On the other hand, if the United States has not yet negotiated a claims settlement agreement with a state when the FCSC carries out its adjudication—as with claims

111 See, e.g., Claim of Erna Spielberg, Dec. No. CZ-2466, 14 FCSC, SEMIANN. REP. 146 (Jan.–June 1961) (denial of claim due to loss of property after refusal to grant export license).
112 1 Richard B. Lillich & Burns H. Weston, International Claims: Their Settlement by Lump Sum Agreements 169–70 (1975); see also Burns H. Weston, Richard B. Lillich, & David J. Bederman, International Claims: Their Settlement by Lump Sum Agreements, 1975–1995 (1999) (reprinting agreements, including 1968 Italy-Romania agreement, at 159 (“measures of nationalization, expropriation, placement in trust or any other similar legislative or administrative measure”), and 1971 Canada-Poland agreement, at 183 (“nationalized or otherwise taken”)).
113 Lillich & Weston, supra note 112, at 173.
114 Richard B. Lillich, International Claims: Their Adjudication by National Commissions 115 (1962); see id. at 104–16.
116 Lillich & Bederman, supra note 104, at 436, 437 & n.7.
117 FCSC Decisions and Annotations, supra note 102, at 157–58, 297, 457.
against Cuba, China, the German Democratic Republic, and Vietnam (the last three now settled by lump sum agreement)—it may have a significantly lesser incentive to keep award numbers low. 118 (Because of this different dynamic, the State Department sought to convince Congress to require the FCSC to explain the grounds for its determinations for possible use in future claims negotiations.) 119 This tendency would translate not only into larger awards on clearly expropriatory claims, but possibly into an inclination to rule in favor of claimants in regulatory takings situations. At this stage, this distinction is only speculation and would require testing through some quantitative analysis; but these asset management issues are unique to the FCSC adjudication process.

The European Court of Human Rights and the Regime of Protection of Human Dignity

By far the most decisions under international law concerning claims of regulatory takings have emerged from the European Court of Human Rights in cases brought under Protocol 1 to the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR). Yet the ECHR is not a treaty on the protection of property specifically—let alone alien property—at all. It is a treaty on “human rights and fundamental freedoms” generally, built on the ashes of World War II. Owing to the wide range of European views about the government’s relation to private property, European states concluded the Convention in November 1950 without clauses on the protection of private property. It took another fifteen months of consultations to agree upon this text:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. 120

The disagreements that delayed the conclusion of Protocol 1 (now ratified by all Council of Europe states except Andorra, Monaco, and Switzerland) shed a great deal of light on the place of the protection of private property within the ECHR regime. As Andrew Moravcsik and others have shown, one key purpose of the European Convention was to consolidate democracy in Europe—to use international commitments as a way of locking in democracy in the face of undemocratic domestic forces. 121 The Convention connects its own purposes with that of

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119 Redick, supra note 115, at 735–36.
the Council of Europe, noting that the Council’s goal of unity between European states is furthered by the realization of human rights, and that human rights are best protected through “effective political democracy.” The Convention thus seeks to advance human rights as instrumental to the cause of a Europe united by shared values. It is part of a regime on human rights, but at the same time is linked in a sense to the regime on European integration of the European Union (EU).

The European Commission and Court of Human Rights have for many years interpreted the Convention in an overtly teleological manner. As a result, one can expect that provisions on expropriation and private property will be interpreted to advance the twin objectives of democracy and European integration. The European tradition of a strong welfare state, which includes the view of many European governments that democracy is promoted by the redistribution of wealth, suggests that a European court will limit claims of private property deprivation due to governmental regulation. Indeed, this tradition explains the absence from the Convention of any right to property, while the strong views of Britain and France on this question prevented any mention of “compensation” in the first Protocol. As Helen Mountfield writes, the Court, as “an institution that is dedicated to protecting democracy, is mindful ... that a democratically elected government must be permitted to make and change policy without being, in effect, held to ransom by a small group of persons who have invested in reliance upon an earlier policy.” As for the goal of European unity, the diversity of views within Europe about government’s relationship to private property would point to an interpretive strategy that respects differences rather than imposes one European view. As Brigitte Stern sums up Protocol 1’s approach:

Le but de l’article 1 du Protocole I est précisément de protéger l’individu contre les interférences avec ses biens allant au-delà de ce que le Protocole considère comme nécessaire pour la satisfaction du bien commun, dans le cadre démocratique européen.

. . . Il convient alors d’essayer de dégager le plus petit commun dénominateur européen de protection de la propriété privée, compte tenu des évidentes divergences en ce domaine, résultant de conceptions diversifiées de l’ordre économique et social souhaitable.

After its seminal judgment of Sporrong & Lönroth v. Sweden, the Court approached Protocol 1’s text by asking whether the governmental action involves a deprivation of possessions, the control of the use of property, or something else. The Court’s rulings are plagued by some doctrinal incoherence, for example, as to whether a regulation affecting property is in one category or the other, and the consequences, if any, that flow from this distinction. Yet

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124 SIMPSON, supra note 120, at 762–65, 781–82, 784–86, 792, 796–97.
regardless of how the Court classifies an action, the core of its analysis is typically a proportionality test, "whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights"; a measure that imposes "an individual and excessive burden" will not pass.128 The Court applies that test by giving states a wide margin of appreciation to determine the public interest, as well as a measure’s proportionality to it.129 After examining the fit between those ends and means, it has sometimes awarded compensation, but that compensation itself can be limited by the proportionality calculus.130 Nonetheless, the Court’s doctrine remains quite thin, showing little attempt to explain the reach of the margin of appreciation or the point at which a measure becomes disproportionate.

With respect to outcomes, for many years the Court was generally skeptical about takings claims under Protocol 1, with governments winning the vast majority of cases.131 Stern, for instance, summarized the case law in 1991 by asserting that states will be liable only if "ils franchissent une ligne rouge[, m]ais celle-ci s’apparente quelque peu à la ligne d’horizon."132 In recent years, the Court’s caseload under Protocol 1, like the rest of its caseload, has exploded, 133 and it has ruled against governments at a much higher rate, finding numerous instances of unjustifiable deprivations of possessions134 or other disproportionate regulatory conduct.135 It has also introduced the idea of "legitimate expectation" into its jurisprudence, with its potential to expand the notion of possessions affected by regulation, although the Court has ruled both for and against applicants under this new concept.136

128 Id. at 26, 28, paras. 69, 73. See generally CAMILO B. SCHUTTE, THE EUROPEAN FUNDAMENTAL RIGHT OF PROPERTY 51–58 (2004).
132 Stern, supra note 126, at 423.
Both proportionality and the margin of appreciation are doctrines associated with the Court's jurisprudence as a whole and are not unique to Protocol 1. 137 It is hardly surprising that the institution that devised interpretive techniques for freedom of religion or expression cases under other articles of the Convention would rely on those same concepts in interpreting the right to property—although both principles constrain the state more in areas such as the rights to life and political participation than in the case of private property. 138 The pedigree of those concepts in European human rights law as developed by the Court again highlights the centrality of the regime's purposes and institutions to outcome. As Tom Allen has recently noted, the fair balance test empowers the Court to interpret Article 1 of the Protocol in a way that a more specific definition would not permit. 139

The self-identification of the European system with human rights protection more than private property protection is also evident in the Court's approach to incorporating international law concerning foreign investment into its jurisprudence on Protocol 1. The Commission and Court have made clear over the years that they do not regard the reference to "principles of public international law" in Article 1 of Protocol I as requiring them to apply international law to the actions of a state against its own nationals. 140 In James v. United Kingdom, one of the Court's most detailed discussions of the issue, the Court noted:

Especially as regards a taking of property effected in the context of a social reform, there may well be good grounds for drawing a distinction between nationals and non-nationals as far as compensation is concerned. To begin with, non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been consulted on its adoption. Secondly, . . . there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals. 141

The Court found that the drafting history of the Convention supported this interpretation, concluding that "the general principles of international law are not applicable to a taking by a State of the property of its own nationals." 142 At the same time, the Court has not discarded public international law entirely. In Stran Greek Refineries & Stratis Andreadis v. Greece, concerning the Greek government's refusal to pay an arbitral award to a construction company on the grounds that the original contract had been procured under the military regime, the Court relied extensively on international law sources to determine that the failure to pay did not strike the right balance between the right to property and the public interest. 143 The result is, in effect, a somewhat ambiguous posture, although one generally oriented away from customary international law.

137 See generally Francis G. Jacobs & Robin C. A. White, The European Convention on Human Rights 37-38, 306-09 (2d ed. 1996); Sporrong, supra note 127, at 26, para. 69 (stating that "the search for [the fair] balance is inherent in the whole of the Convention and is also reflected in the structure of [Protocol I]").
139 Allen, supra note 136, at 300-02.
141 Id. at 39, para. 63.
142 Id. at 39-40, para. 66.
The institutional design of the Court also seems to play a role in these decisions. First, given the large number of cases, the decision of the Court to limit—at least explicitly—reliance on customary international law in favor of substantive “criteria internal to the Convention”\textsuperscript{144} has the distinct advantage, as an institutional matter, of freeing it from having to digest non-ECHR case law to determine what international law requires. This institutional imperative of a court overloaded with cases contrasts with that of an arbitral tribunal that exists for only one case. Second, the increased incidence of findings of Protocol 1 violations stems in part from the increased caseload of the Court, in particular the number of cases related to restitution of private property in Eastern Europe,\textsuperscript{145} though it might also signal a new attitude in the Court about the state’s power over citizens in matters of private property. Eric Voeten has shown quantitatively that the Court’s rate of ruling against governments has increased with its age; he also suggests that ECHR members that aspire to EU membership have appointed judges more inclined than other judges to rule against governments.\textsuperscript{146} While these studies did not isolate treatment of Protocol 1, they might help explain trends in recent case law.

The Protocol 1 case law of the Court has ultimately elicited little protest among European governments. The trend of ruling in their favor until recently is surely part of the reason, as the Court has advanced the ends of the ECHR by allowing the governments leeway to regulate their economies. But the Court’s overall legitimacy has played a role in this acceptance. Substantively, the Court is perceived as legitimate because of its long history of advancing human rights regarding numerous aspects of the Convention, while respecting state interests through incrementalism, subsidiarity, and the margin of appreciation.\textsuperscript{147} Procedurally, the Court is also perceived as a fair institution because of its broad-based membership and the high quality of the judges, although the caseload now threatens to overwhelm the judges and the staff. These forms of legitimacy have served to protect it from criticism by its key constituencies in governments and civil society, and this protection has spilled over to rulings on private property. Its fidelity to regime aims and features of its institutional design thus help explain not only the outcomes of the decisions, but also why concerns about incoherence, fragmentation, or lack of accountability to political institutions raised in other contexts (such as NAFTA and BITs) do not stick to the European Court. Indeed, just as that legitimacy has translated into greater willingness to rule against governments on issues ranging from blasphemy to gays in the military, so it could explain the recent increased number of rulings against governments.\textsuperscript{148}

In the end, the purpose of the ECHR regime and the institutional design factors at work may cut in different ways in terms of future trends in decision making under the Convention. Allen, for instance, has shown that recent case law suggests that the Court is moving away from Sporrong’s notion of applying doctrines from the rest of the Convention to Protocol 1 and toward a separate set of doctrines on property grounded more in comparative law.\textsuperscript{149} But those very

\textsuperscript{144} Frigo, supra note 129, at 65; see also J. G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS 217 (1993).

\textsuperscript{145} For the Court’s basic approach, see Kopecký, supra note 136, at 139–41.


\textsuperscript{147} See, e.g., Paolo G. Carozza, Subsidiarity as a Structural Principle of International Human Rights Law, 97 AJILL 38, 73–76 (2003); Heller & Slaughter, supra note 65, at 300–23.


\textsuperscript{149} See generally Allen, supra note 136.
factors also highlight the need for caution in incorporating ECHR case law into decisions on foreign investment. The Court’s purpose and institutional features differ from those of other decision makers in the regulatory takings area. Those factors hardly render its jurisprudence irrelevant to the further development of international law (any more than its self-professed attitude of not applying custom), but any cross-pollination must take them into account. The irony is that, despite all these factors unique to the Court, in the last analysis, ECHR jurisprudence provides a level of protection similar to that of customary international law. Thus, its outcomes do not diverge from the consensus position, even if they tend toward one end of it.

The European Court of Justice and the Regime of European Integration

Regulatory takings claims have also arisen within the regime of European integration, as individuals and companies have alleged that Commission directives or national regulations implementing them violate the fundamental right to property recognized in EU law. The EU regime and the decisions of the European Court of Justice offer a sharp contrast to other regimes in their approaches to regulatory takings, one marked by the consistent rejection of such claims.

That difference originates in the fundamental purpose of the European Economic Community and the European Union and the place of private property rights relative to that aim. The Community’s chief end, according to the Treaty of Rome, is economic and social:

by establishing a common market and an economic and monetary union and by implementing common policies or activities . . . , to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

The Treaty of Rome lacked any provisions requiring the Community or its institutions to respect property—or other individual—rights. The founders saw human rights issues as matters for a different European regime, that of the Council of Europe. Yet this bifurcation of responsibilities would not last, as the ECJ, and eventually the member states themselves, came to recognize that the Community would need to respect individual human rights. In a series of cases in the 1970s, beginning with International Handelsgesellschaft, the Court declared that fundamental rights were integral to Community law. The ECJ would determine the scope


152 The closest is Article 222, now Article 295, which says that the Treaty will not prejudice domestic rules on property ownership. On the ECJ’s reluctance to apply that article, see Fiona Campbell-White, Property Rights: A Forgotten Issue Under the Union, in THE EUROPEAN UNION AND HUMAN RIGHTS 249 (Nanette A. Neuwahl & Allan Rosas eds., 1995).

of those rights by reference to the member states’ constitutional traditions and human rights treaties to which they were a party.\footnote{154}

By 1979, the Court had made clear that these rights included property rights. In the seminal case of \textit{Hauer v. Land Rheinland-Pfalz}, the Court faced a claim by German wine producers that a Community regulation to control wine production, which prohibited new plantings, violated their fundamental right to property. The Court found that right grounded in the constitutional traditions of many states and reflected in Protocol 1 to the ECHR, which addresses both deprivations of property and limitations on its use.\footnote{155} As for the former, Community policy would not deprive an owner of property as long as he is “free to dispose of it or to put it to other uses which are not prohibited,”\footnote{156} which remained the case under the wine regulation. As for the latter, the Court concluded quite quickly and inevitably that European constitutional traditions allow for legislation in all EC member states that restricts ownership, based on the “social function” of the right to property. For the Court, the only question in analyzing limitations in Community directives was whether “there exists a reasonable relationship between the measures . . . and the aim pursued by the Community,” so that a “disproportionate and intolerable interference with the rights of the owner” could be prevented.\footnote{157} In this standard, the ECJ anticipated the doctrine announced by the Court of Human Rights in \textit{Sporrong & Lönnroth}, still the standard under Protocol 1 today.\footnote{158} In several paragraphs, the Court examined the underlying regulations and found them to further the goal of a common market in wine that would benefit producers and consumers. It then concluded, in barely a paragraph, that a temporary measure to avoid overproduction pending a more permanent restructuring of the wine industry (involving regulations stricter than those in national law) does not violate the right to property.\footnote{159}

Since \textit{Hauer}, the European Union’s approach to regulatory takings has followed two broad trends. On the one hand, the notion of fundamental rights has become more entrenched in the EU legal order. Respect for such rights has moved from being a creature of case law to being part of the Treaty on European Union, where the member states elevated it to a constitutional principle that requires the Union to “respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights . . . and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”\footnote{160} The result is a significant mandate for the ECJ to apply the norms of the ECHR. The Charter of Fundamental Rights of the European Union, although not a legally binding document, has given further impetus to this movement by specifying the scope of these rights and

\footnote{154} Case 4/73, Nold v. Comm’n, 1974 ECR 491.


\footnote{157} \textit{Id.} at 3747, para. 23.


\footnote{159} \textit{Hauer}, 1979 ECR at 3749, para. 29.

acknowledging their origins in domestic traditions, as well as the ECHR and the Strasbourg court’s case law. With respect to the right to property, the charter includes a provision similar to that of Protocol 1.\footnote{Charter of Fundamental Rights of the European Union, Art. 17(1), Dec. 7, 2000, 2000 O.J. (C 364) 1, 12, reprinted in 40 ILM 266, 269 (2001):}

On the other hand, this entrenchment of fundamental rights has not led the ECJ to treat the right to property as a serious limitation on Community legislation. In a series of cases since the 1980s, the ECJ has consistently upheld Community directives and implementing regulations, principally in the agricultural sector, where the Community has attempted to control production through quotas and levies. These include cases involving cereals, milk production quotas, and food supplements.\footnote{Case C–265/87, Schrader HS Kraftfutter GmbH v. Hauptzollamt Gronau, 1989 ECR 2237 (cereals); Joined Cases T–466, 469, 473, 474, & 477/93, O’Dwyer v. Council, 1995 ECR II–2071 (milk production quotas); Joined Cases C–154 & 155/04, Queen v. Sec’y of State for Health, 2005 ECR I–6451 (food supplements).} In a case akin to claims of regulatory takings for environmental protection raised elsewhere, the ECJ in two paragraphs rejected a challenge by British farmers to an EC directive limiting farming near waters with a high concentration of nitrates, citing the standard from \textit{Hauer} and noting that the “substance” of the right to property was not impaired.\footnote{Case C–293/97, Queen v. Sec’y of State for Env’t ex parte Standley, 1999 ECR I–2603, 2647, para. 54.} It recently upheld a directive mandating the destruction of potentially diseased fish without compensation.\footnote{Joined Cases C–20 & 64/00, Booker Aquaculture v. Scottish Ministers, 2003 ECR I–7411.} And in two cases, the Court rejected arguments by Germany that the rights of German banana sellers were infringed by a reduction in their market share pursuant to various agreements of the General Agreement on Tariffs and Trade and the World Trade Organization, finding no property right in such a share.\footnote{Case 280/93, Germany v. Council, 1994 ECR I–4973, 5065, para. 78 (citing the “social function” of the right to property); Case 122/95, Germany v. Council, 1998 ECR I–973, 1019–20. For one German critique, see Hermann-Josef Blanke, \textit{Protection of Fundamental Rights Afforded by the European Court of Justice in Luxembourg}, in \textit{GOVERNING EUROPE UNDER A CONSTITUTION} 265, 275–77 (Herm.-Josef Blanke & Stelio Mangiameli eds., 2006).}

The closest the ECJ seems to have come to questioning economic regulations as infringements of the right to property is a case where a German court asked the Court for its interpretation of a regulation requiring compensation for discontinuance of milk production in a situation where a lessee had set up the milk production on his own instead of simply using the cows and facilities of the lessor, and the lease then expired. The Court stated that the regulation applied to the lessee, for any other interpretation would deprive the lessee of “the fruits of his labour and of his investments” and violate his fundamental rights.\footnote{Case 5/88, Wachauf v. Germany, 1989 ECR 2609, 2639, para. 19.} It upheld the regulation...
because it gave the local authorities “a sufficiently wide margin of appreciation” to apply the rules consistently with fundamental rights.  

Thus, notwithstanding the embedding of fundamental rights within EU law, the ECJ has interpreted the right to property to give the Commission very broad authority to regulate economic activity, even if it creates substantial deprivations of income. In a regime whose original primary purpose was, and whose contemporary primary goal remains, enhancement of economic welfare through integration and necessary regulation, acceptance of claims that such regulation crosses the line to a compensable deprivation of property would be a major shift. The ECJ’s willingness to strike down both Community and state actions as violations of other fundamental rights, in particular regarding equality and nondiscrimination, does not spill over to the right to property because those rights do not create nearly as strong a tension with a common market as the right to property. Moreover, the Court’s activism in creating critical elements of EU law like direct effect and supremacy over national law should not be viewed as in tension with its posture upholding Community regulations on property, for both are aimed at advancing the overall end of Community regulation of the economy over parochial interests.

The European Court of Justice’s institutional features also make it unlikely to push the right to property any further. As an initial matter, its fundamental rights jurisprudence, while filling a gap in Community law by reviewing Community institutional action that harms individuals, is still limited to review of Community measures and includes member state actions only to the extent that the latter implement Community rules or restrict market freedoms. The Court’s universe of potential deprivations of property is thus significantly curtailed; indeed, the Commission may be much more careful than member states to ensure that its policies do not come close to a direct deprivation of property or a disproportionate limitation on its use, lessening the likelihood of rulings against it. Second, the ECJ is accountable to member states, not individuals. When it upholds Commission regulations against individual claimants, it does not face the same risk of backlash as when it upholds them against governments as having direct effect.

In this sense, notwithstanding (1) the ECJ’s emphasis on the ECHR as a reflection of the content of EU fundamental rights, (2) the adoption of the jurisprudence of the Court of Human Rights in other areas, and (3) the apparent similarity in doctrinal standards between the two courts, the ECJ has adopted an approach more deferential than that of the Strasbourg court in the degree of rigor of its scrutiny of Community regulations and the outcomes of its decisions. The ECJ seems more inclined, in the case of property rights, to look at the whole of European constitutional practices. As commentators have pointed out, the ECJ is not adopting a maximum standard approach but, rather, an independent standard based on common European traditions. In the case of property, those practices show great diversity, and even though the Court of Human Rights seems willing to set some limits to that diversity, the ECJ is more likely to defer to the Commission and national implementing agencies.

167 *Id.* at 2640, para. 22.
Like those of the Strasbourg court, the ECJ’s opinions have been marked by little criticism from European decision makers.\textsuperscript{172} As Helfer and Slaughter have pointed out, key attributes that explain the legitimacy of the Strasbourg court also apply to the Luxembourg court.\textsuperscript{173} Just as these legitimating factors help explain the acceptance by European constituencies of the former’s decisions, so they undergird support for the case law the ECJ produces on this topic. Over time, the ECJ could conceivably change direction on this issue, as the Strasbourg court may now be doing, although so far the resistance to the pull of the latter’s approach seems firm. But, to return to my central claim, the ECJ’s direction on regulatory takings will be a function of developments within the European Union and the institutional dynamics of the Court vis-à-vis the political actors.

\textit{The Iran–United States Claims Tribunal as a Sui Generis Institution}

Among the most-cited cases concerning international law on regulatory takings are those of the Iran–United States Claims Tribunal, established in 1981 under the agreement that ended the 1979–1981 crisis over Iran’s seizure of U.S. diplomatic personnel. The Tribunal’s jurisprudence included a relatively large number of indirect expropriation cases because of the nature of the events in Iran during the revolution. Iran’s practices that deprived U.S. investors of control of their investments included the appointment of Iranian officials to oversee operations, denial of access by foreign workers and managers to the companies, and the diversion of profits to Iranian banks.\textsuperscript{174}

The Tribunal is a creature of the 1981 Algiers Accords, whose stated purpose was to achieve “a mutually acceptable resolution of the crisis in [Iranian–United States] relations arising out of the detention of the 52 United States nationals in Iran.”\textsuperscript{175} In light of this goal, the Algiers Accords gave the Tribunal jurisdiction to adjudicate claims and counterclaims “arising out of debts, contracts . . . , expropriations or other measures affecting property rights,” as well as claims arising out of U.S. responses to such actions.\textsuperscript{176} In the course of its investor-state jurisprudence, the Tribunal faced many claims that Iran had engaged in “expropriations or other measures affecting property rights”; at the same time, the Algiers Accords’ inclusion of the phrase “other measures affecting property rights” meant that the Tribunal at times ruled against Iran for governmental conduct it refused to characterize as an expropriation and at times was not clear in distinguishing between the two.\textsuperscript{177} Thus, decision makers considering the precedential value of the Tribunal’s case law must take into account that its jurisdiction extended beyond direct and indirect expropriations. Moreover, the Algiers Accords contained

\textsuperscript{172} For one academic critique, see Blanke, \textit{supra} note 165.

\textsuperscript{173} See generally Helfer & Slaughter, \textit{supra} note 65; see also Weiler, \textit{supra} note 63.


a complex, or at least ambiguous, choice-of-law clause that enabled the Tribunal to apply principles other than international law.\footnote{Algiers Claims Declaration, supra note 176, Art. V, at 232.}

Among the Tribunal’s numerous findings of indirect expropriations, several stand out for standards cited in many future cases.\footnote{For a full review of the case law on expropriations, see ALDRICH, supra note 174, at 171–218; BROWER & BRUESCHKE, supra note 177, at 369–471.} Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA concerned Iran’s appointment of new managers who exercised authority to control an investment in violation of the underlying partnership agreement. In finding that Iran had taken the investment, the Tribunal set forth a standard that it and others would cite frequently:

While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, . . . such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.\footnote{Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, 6 Iran-U.S. Cl. Trib. Rep. 219, 225–26 (1984).}

In Starrett Housing Corp. v. Islamic Republic of Iran, another case concerning the appointment of Iranian managers, the Tribunal spoke in more detail about the concept of a de facto expropriation, saying that “measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated” and concluding that Iran’s actions, as of January 1980, had met this standard.\footnote{Starrett Housing Corp. v. Iran, 4 Iran-U.S. Cl. Trib. Rep. 122, 154 (1983); see id. at 154–56.} And in Petrolane, Inc. v. Islamic Republic of Iran, the Tribunal found that Iran’s prevention of exportation of excess equipment “deprived the Claimant of the effective use, benefit and control of the equipment . . . in breach of contract, as well as constituting an expropriation.”\footnote{27 Iran-U.S. Cl. Trib. Rep. 64, 96 (1991).} These cases and others reveal a general pattern, consistent with the basic consensus position, that governmental regulation crosses the line to a compensable taking when the investor loses all or nearly all control of the investment—or some discrete part of it, like real or movable property—in a way that renders it economically useless.\footnote{For a summary of the Tribunal’s views, see ALDRICH, supra note 174, at 217–18.}

At the same time, U.S. investors did not always convince the Tribunal that Iran had expropriated their property (leaving aside the Tribunal’s valuation methods, which often left investors dissatisfied). In Starrett Housing, noted earlier, the Tribunal found that the disruptions prior to January 1980 were risks that the investor had to assume.\footnote{Starrett Housing, 4 Iran-U.S. Cl. Trib. Rep. at 156; see also Motorola v. Iran Nat’! Airlines, 19 Iran-U.S. Cl. Trib. Rep. 73, 85–87 (1988).} In Sea-Land Service v. Islamic Republic of Iran, the Tribunal rejected a finding of expropriation resulting from the revolution’s serious disruptions in the operations of the claimant’s container terminal. The Tribunal found that some disruptions were simply the consequence of the upheaval and “administrative chaos” within Iran and that others were legitimate and nondiscriminatory regulatory
measures; the absence of “deliberate governmental interference” and “intentional course of
direct conduct directed against Sea-Land” was critical to the majority of the chamber, eliciting a harsh
dissent from the American judge.185 And in Harza Engineering v. Islamic Republic of Iran, the
Tribunal found that new banking regulations with which the claimant had difficulty complying, and
indeed an unjustifiable dishonoring of a check, did not cross the line to a taking because the Iranian state bank did not “intend[,] to deprive the Claimant of its right to use its
bank account. Although the bank imposed [signature authentication] requirements . . . that
were difficult to meet under the circumstances prevailing at the time, the evidence presented
did not establish that these requirements were unreasonable or even inconsistent with normal
Iranian banking practice.”186 The relevance of intent in these two cases is at odds with the Tip-
pettets standard quoted above and was rejected by a different chamber a few years later.187

Ultimately, the Tribunal tried to draw lines between, on the one hand, active interference
by the government with an investment leading to the investor’s loss of control and, on the
other, disruptions inherent in the chaos that accompanies a political revolution. The Tribu-
nal’s deputy secretary-general has praised the case law as evincing that the Tribunal “has con-
sistently applied customary international law.”188 On the other hand, Charles Brower, a long-
time U.S.-appointed member, and Jason Brueschke have lamented the lack of “a single
standard for determining when a taking has occurred[,] which is a function of both the difficult
political atmosphere surrounding such claims and the overriding fact that different Chambers
not unexpectedly will view specific issues such as these differently”; they have also criticized the
Tribunal for issuing “wholly irreconcilable decisions” on expropriation.189

The resolution of bilateral claims through the Iran-U.S. Claims Tribunal is somewhat dif-
ficult to place within the regimes identified earlier. It is clearly not part of the regimes on invest-
ment insurance, human rights, or regional integration. Nor is it part of the diplomatic pro-
tection regime except in the sense that claimants had to have U.S. nationality to sue Iran and
the U.S. government played a subsidiary role on behalf of claimants.190 It does partake of cer-
tain aspects of the regime of international arbitration (discussed further below), but it was cre-
ated under circumstances and operated under constraints quite different from those of typical
arbitral panels. The Tribunal was fundamentally a political solution to a specific interstate cri-
sis, a sui generis creation combining elements of older ad hoc claims settlement commissions
with modern features (like a direct role for investors). The drafters of the Algiers Accord needed a way to meet Iran’s demand for an end to litigation by claimants and a return of
its assets—a key part of the hostage release—without denying American investors the

to compensate for expropriation of alien property does not depend on proof that the expropriation was inten-
tional”). ALDRICH, supra note 174, at 206–07, has pointed out that subsequent opinions did not cite the Sea-Land
standard.
188 Maurizio Brunetti, The Iran—United States Claims Tribunal, NAFTA Chapter 11, and the Doctrine of Indirect
189 BROWER & BRUESCHKE, supra note 177, at 440, 666.
190 See David D. Caron, The Nature of the Iran—United States Claims Tribunal and the Evolving Structure of Inter-
opportunity to recover something for their losses during the revolution. Full recovery for losses was not foremost in the minds of U.S. officials. 191

This pedigree and political function of the Tribunal has implications for both the sorts of cases it heard and the outcomes it reached. As an initial matter, unlike the two European courts, the Tribunal addressed claims by foreign investors during a time of revolutionary upheaval—when they were likely to face major obstacles to the functioning of their investments. The Tribunal thus had a special responsibility to distinguish between disruptions inevitable in emergency situations and interferences targeted at foreign investors. This differentiation assumes less importance in situations of stability, where governmental institutions act according to law and procedure, although the recent Argentina cases show that states of emergency can be relevant even without revolutions. Nonetheless, the standard applied by the Iran-U.S. Tribunal, which focuses on loss of effective control, has proved attractive to other tribunals in distinguishing between compensable and noncompensable governmental regulations.

More important, two aspects of the Tribunal’s institutional design ensured that it would not tread too far in either a proinvestor or prohost-state direction. First, its tripartite composition has meant that the third-country arbitrators effectively hold the cards. To maintain the confidence of both parties, their views on foreign investment could not simply reflect the views of one side or another (though they nonetheless more often than not agreed with the U.S. arbitrators that Iran had violated international law). The diversity of judges within a large court like those in Europe similarly mediates judgments between extreme positions, and those judges also require approval by the relevant states (through election by the Parliamentary Assembly of the Council of Europe for the Strasbourg court and selection by the EU member states for the ECJ); but the scrutiny in their selection is clearly less than that applied by Iran and the United States in the case of the Tribunal. 192 The third-country arbitrators would disappoint both American and Iranian lawyers and fellow judges (particularly the Iranians) in their rulings. At the same time, this composition does not distinguish the Tribunal from other arbitral bodies with party-appointed and third-party arbitrators, where arbitrators often need to compromise to achieve a majority decision. 193

Second, and notwithstanding the above, the arbitrators knew that the Tribunal’s continued operation depended upon the cooperation of the repeat players and most important constituents, Iran and the United States, whether with respect to the continued appointment of judges, the funding of salaries and expenses, or agreement on procedures to keep the process moving. As two of its members have noted, the Tribunal operated in the context of unremitting animosity and suspicion by both sides, making it fragile and prey to the politics of both states


192 For a critique of the selection process of the Strasbourg court, see JUTTA LIMBACH ET AL., JUDICIAL INDEPENDENCE: LAW AND PRACTICE OF APPOINTMENTS TO THE EUROPEAN COURT OF HUMAN RIGHTS 9 (2003).

from the beginning. 194 For it to sway too far toward either the American investors, whose claims formed the great bulk of the docket, or the Iranian government risked closure of the Tribunal. Neither government desired this outcome, but a tribunal perceived as biased by one of them could have pushed either to withdraw. Iran held an important trump card in that, under the Algiers Accords, for the Security Account to have funds to pay off winning U.S. claimants, Iran needed to replenish it whenever its balance went below $500 million. 195 A series of decisions against Iran that, for instance, held it liable for a wider range of disruptions to foreign investment could well have led its government to stop funding the account. 196

The extent to which these institutional constraints affected the views of the third-country arbitrators is hard to tell. Brower has accused the third-country arbitrators of giving into “the human desire . . . to ‘say yes’ to Iran from time to time.” 197 Nils Mangård, a third-country arbitrator from Sweden, has noted that he and his colleagues were “eager to avoid unnecessary clashes with national arbitrators from both sides” and “recognized a special responsibility for the survival of the Tribunal,” 198 although he was not referring specifically to holdings on the merits such as the meaning of expropriation. Still, it seems hard to conceive that the judges acted without any concern for how the results would play in each capital, particularly Tehran. Ad hoc arbitrators also try to avoid such antagonism, 199 but the repeat play of the Iran-U.S. Tribunal makes this factor a greater institutional constraint.

In the end, the results reached by the Tribunal clearly fall within the consensus position on regulatory takings. Indeed, the Tribunal’s repeated encounters with regulatory takings make them an important starting point for any future decision makers on the subject. At the same time, even as advocates and decision makers continue to invoke the judgments of the Tribunal, its contribution to the development of international law on regulatory takings should explicitly consider the institutional setting, in which the Tribunal needed the continued cooperation of both sides.

The North American Free Trade Agreement and the Regime of Trilateral Economic Integration

Within the parties to NAFTA, the Agreement’s Chapter 11 has set off the greatest alarms about the reach of international law on regulatory takings. NAFTA generally and Chapter 11 specifically have two key purposes. On the one hand, NAFTA’s overarching stated goal was to integrate the economies of the three North American states—particularly the United States and Mexico—through reductions in barriers to trade and investment, and thus to promote closer relations between them and advancement of their (particularly U.S.) values. As U.S. president Clinton stated in his letter transmitting NAFTA to Congress, “NAFTA is a critical step


195 Algiers Commitments Declaration, supra note 175, at 226, para. 7.


197 BROWER & BRUESCHKE, supra note 177, at 661.

198 Mangård, supra note 194, at 259; see also Establishment of the Claims Tribunal, in REVOLUTIONARY DAYS, supra note 191, at 116, 132–33 (remarks of Arthur W. Rovine).

199 See infra pp. 517–18.
toward building a new post–Cold War community of free markets and free nations throughout
the Western Hemisphere."\(^{200}\) The introductory paragraphs restate the economic ends, includ­
ing to "eliminate barriers to trade," "promote conditions of fair competition," and "increase
substantially investment opportunities."\(^{201}\)

On the other hand, for NAFTA's proponents in the United States, the main purpose of the
Agreement generally was the improvement of trade and investment opportunities for U.S.
companies, which they claimed would result in benefits for U.S. workers and consumers. In
this vein, Clinton's message begins with pitching NAFTA as "vital to the national interest and
to our ability to compete in the global economy," placing it as a continuation of U.S. policy
to conclude agreements that "expand opportunities for American workers and American firms
to export their products overseas."\(^{202}\) As for Chapter 11, it aimed at liberalizing investment
within both neighbors of the United States. With respect to Canada, the United States sought
to go beyond the 1988 Canada-U.S. Free Trade Agreement, which gave Canada the right to
review acquisitions above 150 million Canadian dollars. Although the United States did not
achieve this result, NAFTA's protections nonetheless went beyond those of the earlier agree­
ment.\(^{203}\) As for Mexico, NAFTA's protections for investors, in particular the investor-state
dispute settlement provisions, aimed at helping U.S. firms seeking to invest in Mexico by
entrenching Mexico's liberalization regarding foreign investment by means of a treaty.\(^{204}\)
José Alvarez and Jeffery Atik have characterized the results as an asymmetrical set of obli­
gations, leaving Mexico as the state most likely to be sued under the arbitration proceed­
ings and the one most likely to lose such cases.\(^{205}\)

In the eyes of the United States, these two objectives were not in tension—indeed, each
would be achieved by broad protections for investors. As a result, Chapter 11's constraints on
host country policies were drawn directly from the Model BIT that the United States pre­
sentcd in other contexts. Accordingly, Article 1110 contains a broad definition of and limi­
tation on expropriation:

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 expro­
priation* 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) [the treaty's minimum
standard of treatment]; and
(d) on payment of compensation . . . .\(^{206}\)

\(^{200}\) William J. Clinton, Message to the Congress Transmitting the NAFTA Legislation, 29 WEEKLY COMP. PRES.
DOCS. 2254, 2255 (Nov. 4, 1993).

1–3), 32 ILM 605 (pts. 4–8) (1993) [hereinafter NAFTA].

\(^{202}\) Clinton, supra note 200, at 2254.

\(^{203}\) MAXWELL A. CAMERON & BRIAN W. TOMLIN, THE MAKING OF NAFTA: HOW THE DEAL WAS DONE
40–42 (2000); Gustavo Vega C. & Gilbert R. Winham, The Role of NAFTA Dispute Settlement in the Management

\(^{204}\) Atik, supra note 15, at 220–21.

\(^{205}\) José E. Alvarez, Critical Theory and the North American Free Trade Agreement's Chapter Eleven, 28 U. MIAMI

\(^{206}\) NAFTA, supra note 201, Art. 1110, 32 ILM at 641 (emphasis added).
Such extensive protections for investors elicited much criticism from NGOs after the *Ethyl* and *Metalclad* proceedings began; indeed, their ability to characterize NAFTA as limiting a state’s legitimate regulatory needs helped derail the draft Multilateral Agreement on Investment in 1998.

The big news from the NAFTA investor-state arbitrations has been the startling lack of success of investors making expropriation claims. Of the twenty cases proceeding beyond a Notice of Arbitration as of July 2008 that have included a claim of a violation of Article 1110, the claimants have prevailed in exactly one—*Metalclad v. Mexico.* The eleven other cases to reach the merits—*S.D. Myers, Pope & Talbot* (both against Canada), *Loewen, Mondev, Methanex* (against the United States), *Azinian, Feldman, Waste Management, GAMI Investments, Fireman’s Fund,* and *International Thunderbird Gaming* (against Mexico)—were all unsuccessful on the expropriation claims. Thus, despite the many fears that NAFTA would open the floodgates to successful indirect expropriation claims against legitimate governmental regulations, the panels have resisted this use of the Agreement by investors—and have usually ruled against applicants regarding other provisions as well. The outcomes neither strayed far from the consensus position under customary international law—rejecting most claims of regulatory takings—nor proved inconsistent even within the regime of NAFTA.

As a matter of doctrine, the panels have adopted different standards on regulatory takings. Early on, one panel recognized that “it is much less clear when governmental action that interferes with broadly-defined property rights . . . crosses the line from valid regulation to a compensable taking, and it is fair to say that no one has come up with a fully satisfactory means of drawing this line.” Nevertheless, at a general level, the panels have adopted the three-part test in part III above, which considers (1) the impact on the investment, (2) the legitimate expectations of the investor, and (3) the context of the measure.

With respect to (1), a test was most fully elaborated in *Pope & Talbot,* concerning the effect of Canadian laws limiting exports of softwood lumber to the United States. After noting that the U.S. investor remained in “full ownership and control” of its investment because Canada had not interfered with the core aspects of the management, the panel found the diminished profits nonexpropriatory:

> [T]he test is whether that interference is sufficiently restrictive to support a conclusion that the property has been “taken” from the owner. Thus, the Harvard Draft defines the standard as requiring interference that would “justify an inference that the owner *** will not be able to use, enjoy, or dispose of the property . . . .” . . . Indeed, at the hearing, the Investor’s Counsel conceded, correctly, that under international law, expropriation requires a


208 For the draft treaty, see supra note 26.


211 Feldman, 42 ILM at 645, para. 100.
“substantial deprivation.” The Export Control Regime has not restricted the Investment in ways that meet these standards.212

As for factor (2), the panel in S.D. Myers offers a representative statement in positing, “in legal theory, rights other than property rights may be ‘expropriated’ . . . . Expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference.”213 A more pro-investor standard appeared in Methanex, where the panel required violations not of ownership rights held by the investor, but only of “specific commitments . . . given by the regulating government . . . that [it] would refrain from such regulation.”214

With regard to factor (3), although most NAFTA panels have not addressed this issue, the Fireman’s Fund panel recently listed the following factors as relevant: “whether the measure is within the recognized police powers of the host State; the (public) purpose and effect of the measure; whether the measure is discriminatory; the proportionality between the means employed and the aim sought to be realized; and the bona fide nature of the measure.”215 Metalclad remains the outlier in its test for an indirect expropriation: “covert 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.”216 No subsequent panel has adopted its standard. When Mexico challenged Metalclad in the British Columbia courts (as Canada was the place of arbitration), the provincial supreme court stated in dicta that the panel “gave an extremely broad definition of expropriation for the purposes of Article 1110”; it ended up setting aside part of the award against Mexico because it found that part of the expropriation analysis relied on an earlier finding of a violation of Article 1105, which had included a requirement of transparency that the Canadian court believed was not included in the scope of the arbitration.217 Feldman discussed, but did not endorse, the Metalclad test, instead emphasizing the total deprivation sustained by Metalclad and the violation of clear assurances given to it.218 The Waste Management panel noted “the breadth of the definition of expropriation” in Metalclad and effectively rejected the definition by stating that the deprivation of the “reasonably-to-be-expected economic benefit” of the investment was a necessary, but not a sufficient, criterion for an expropriation.219 The most sympathetic reference was in GAMi, where the panel

212 Pope & Talbot, para. 102 (footnotes omitted); see also S.D. Myers, 40 ILM at 1440, para. 283 (stating that “[a]n expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights although it may be . . . appropriate to view a deprivation as amounting to an expropriation, even if it were partial or temporary”; and finding Canada’s eighteen-month closure of the U.S. border to exports of chemicals not an expropriation); Waste Mgmt. v. Mexico, supra note 83, 43 ILM at 999, para. 160 (noting that NAFTA only compensates in the case of “arbitrary intervention by the State amounting to a virtual taking or sterilising of the enterprise”).

213 S.D. Myers, 40 ILM at 1440, paras. 281–82.

214 Methanex, supra note 95, 44 ILM at 1456, pt. IV, ch. D, para. 7.

215 Fireman’s Fund Ins. Co. v. Mexico, para. 176 (NAFTA Ch. 11 Arb. Trib. July 17, 2006), available at <http://ita.law.uvic.ca>; see also S.D. Myers, 40 ILM at 1440, paras. 280, 281 (noting in passing the need to examine the “purpose and effect” of governmental measures and also stating that expropriation involved “transferring ownership of . . . property to another person, usually the authority that exercised its de jure or de facto power to do the ‘taking’”).

216 Metalclad, supra note 11, 40 ILM at 50, para. 103.


218 Feldman, supra note 110, 42 ILM at 656–57.

219 Waste Mgmt., supra note 83, 43 ILM at 999, para. 159.
quoted—but again did not adopt—the *Metaclad* test and concluded—incorrectly, I believe—that the British Columbia Supreme Court left that standard “undisturbed.”

The lack of success of claimants can be attributed to several causes. Part of the explanation is simple—the spurious nature of some, perhaps even most, of the claims, which were added by claimants as an element of a litigation strategy and would not pass muster even under a very proinvestor approach to expropriation law. For instance, in *Feldman*, where the claimant asserted that the Mexican government’s denial of tax rebates for the exportation of cigarettes was expropriatory, Mexican law at the time of the investment prohibited such rebates without invoices, and the investor remained in complete control of the corporation throughout the proceedings.

Second, as a doctrinal matter, the panels have examined precedents and authorities outside NAFTA that adopt an understanding of indirect expropriations along the lines of the consensus position above; this view excludes a wide variety of governmental restrictions on investments, including those that have a significant effect on the investor’s income stream. For example, in *Waste Management*, where the government of Mexico failed to perform a contract with the investor by refusing to pay invoices or debts and frustrated the building of a landfill, the panel rejected a claim of a taking largely on the basis of the control test, but it went on to reject a somewhat more arguable claim that Mexico had expropriated the claimant’s contractual rights. In denying this claim, the panel carefully examined precedents outside NAFTA that concerned claims of expropriation of contractual rights. It found the handful of previous victories for claimants distinguishable—in part because they emanated from claims commissions with a mandate to consider more than expropriations—and concluded that a breach of contract does not constitute expropriation as long as a forum in which to seek a remedy is available to the claimant. Indeed, despite the broad definition adopted in *Metaclad*, even that panel emphasized, consistently with the control test, that the municipality’s denial of the construction permit for the landfill “effectively and unlawfully prevented the Claimant’s operation of the landfill,” and added that a local decree turning the land on which the landfill rested into an ecological preserve “had the effect of barring forever the operation of the landfill.”

Beyond these two factors, the panels’ tendency to resolve cases in favor of the regulating government seems influenced by at least two features unique to the NAFTA regime. First, NAFTA involves a very small number of states, which are repeat players in the Chapter 11 process. Although the drafters of Chapter 11 may have originally believed that Mexico would be the target of actions under those provisions—and indeed, *Metaclad v. Mexico* was the first case litigated to conclusion—Canadian and U.S. investors quickly brought cases against the United States and Canada, respectively. *Ethyl, S.D. Myers*, and *Pope & Talbot* (against Canada), as well as *Loewen* (against the United States), were all initiated in 1997 and 1998, and

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221 *Feldman*, 42 ILM at 648.
222 *Waste Mgmt.*, 43 ILM at 1002.
more claims followed. As a result, the expected asymmetry in the treaty’s obligations has been mitigated by the prospect of litigation against the two richer NAFTA parties.

All three NAFTA parties, therefore, and especially the most powerful one, now have a strong interest in ensuring that NAFTA’s aim of cross-border trade and investment is not interpreted to impose obligations to compensate investors simply because bona fide regulations have a serious economic impact on the investor. They take care to avoid decisions that prove so advantageous to foreign investors that they become a burden to the host state. Arbitrators thus operate in an environment where if they stray too far in one direction, the masters of NAFTA—the three parties—will react. The United States explicitly recognized the need for a balance between investor protection and host state flexibility in the 2002 Trade Promotion Act.225

This vigilance by the parties is manifested through a second feature of the regime, an institutional design construct that affords them a direct form of influence over the panels—a bona fide control mechanism. That institution is the trilateral intergovernmental Free Trade Commission (FTC) established under NAFTA Article 2001, which has the authority, under Article 1131, to make binding interpretations of Chapter 11.226 The possibility of FTC interference in Chapter 11 decision making is not in the realm of a mere threat; the parties have already used it once to rein in interpretations of Chapter 11—in this case, Article 1105’s requirement that the parties afford investors “treatment in accordance with international law, including fair and equitable treatment and full protection and security.” The panels in Meta/clad, S.D. Myers, and Pope & Talbot had adopted interpretations of Article 1105 that rejected the views of the NAFTA parties, finding that “fair and equitable treatment” constituted an independent standard well above the historical minimum standard under customary international law. Consequently, the FTC issued a Note of Interpretation in July 2001—in the midst of the Pope & Talbot case—that construed Article 1105 as requiring only “the customary international law minimum standard of treatment” and nothing more.227 It was, in short, an effort at top-down harmonization.

Although the note was criticized by the Pope & Talbot panel and other arbitrators as ultra vires, a power grab, and an interference in ongoing proceedings, the panel had little choice but to accept it.228 In Mondev, the panel concluded that the Note of Interpretation had resolved, for purposes of NAFTA, that Article 1105 refers to customary international law and that fair and equitable treatment and full protection and security are part of custom and not elements in addition to it.229 The panels gave it similar dispositive weight in Loewen, ADF, Waste Management, Methanex, and Thunderbird230—as they should have done under Article 31 of the

226 NAFTA, supra note 201, Art. 1131(2) (“An interpretation by the Commission of a provision of this Agreement shall be binding on a ‘Tribunal established under this Section.’”).
Vienna Convention. 231 In each case, the direction of the analysis was driven by the Note of Interpretation, channeling the discussion into the nature of the customary law standard. At the same time, as Ian Laird has persuasively argued, the Note of Interpretation did not have quite the effect that the parties had intended: no panel has accepted the position of the parties (not in the note, but in their filings) that customary international law adopts the low standard elaborated in the 1926 Neer case. 232 Yet the note sent a strong message to the panels that the interpretations of Article 1105 had strayed too far from the views of the parties. Judges do not like to be overruled by politicians—or, worse, to see their jurisdiction permanently curtailed—and arbitrators adjudicating claims under Article 1110 can be presumed to have internalized the lessons of the Article 1105 episode. Thus, although the Note of Interpretation sought to harmonize NAFTA with other law, it also highlights a unique feature of NAFTA’s institutional design.

Indeed, whereas the parties have not issued a Note of Interpretation for Article 1110, they continue to make their positions clear in their filings and elsewhere. 233 The ability of either of the NAFTA parties that are not the defendant in a suit to file its views, while criticized by some commentators, remains a powerful avenue for influencing the arbitrators. 234 Beyond filings in cases, in 2001 the United States revised its Model BIT to include a new annex on expropriations, which also appears in its free trade agreements with Chile, Colombia, Peru, Singapore, and six Central American states. It effectively endorses the consensus position noted earlier and makes clear that the United States will not tolerate an expansive notion of regulatory takings. 235 This position is not far from that of NGOs that had regarded NAFTA’s expropriation clause as too broad. 236

231 Vienna Convention on the Law of Treaties, supra note 60, Art. 31(3)(b).

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
(iii) the character of the government action.

(b) 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.

These outcomes, as well as the highly limited success rate of investors in all NAFTA cases, should allay some of the concerns about NAFTA decision making expressed by the Agreement’s opponents. So should the FTC control mechanism, which enhances the accountability of NAFTA tribunals to elected governments. Other aspects of NAFTA’s institutional design are also undergoing change to improve legitimacy, for example, the publication of pleadings and the opening up of hearings. And, as discussed further below, the arbitrators themselves are generally a sophisticated group who appreciate the fragility of the Chapter 11 process.

Yet first impressions are hard to change; although criticism of the process has clearly waned since the 1990s, some NGOs still voice objections to Chapter 11. Apparently, in their decade of deciding cases, NAFTA panels have still not established the level of subjective legitimacy among domestic constituencies that the European Court of Human Rights and Court of Justice have achieved. This censure is also part of more general anxiety within the United States and Mexico about NAFTA’s effect on the U.S. and Mexican worker, economy, consumer, and environment, and the globalized economy generally. This criticism seems off the mark with respect to regulatory takings since, with the exception of Metalclad, the panels have left significant regulatory space to each of the parties regarding environmental concerns. In the end, then, it appears that despite the NAFTA panels’ adherence to the general consensus position, they will still face criticism from those opposed to the idea of investor-state arbitration.

A Regime for Bilateral Investment Treaties?

Arbitrations under BITs now eclipse most of the other arenas in terms of the volume of case law, in particular on fair and equitable treatment, national treatment, and expropriation. Yet these decisions represent a challenge to my approach of identifying the regime in which decisions fall, its purposes, and the institutions within it, and then seeking to link these factors to the case law. The most evident host regime for BITs—a regime on foreign investment—seems in many ways broader and looser than those examined earlier. BITs do share a recognizable purpose, the very reason that developing states almost rush to conclude them: to promote foreign investment in those states by legally entrenching, hence signaling to investors, their receptivity to it. And most of the BITs of the last two decades share core elements—national and most-favored-nation treatment, free transfer of profits, and full or “appropriate” compensation for expropriation.

Nevertheless, in comparison to the other regimes, the universe of BIT partners includes actors whose agreement on the regime’s purpose is less deep. The pairings of states vary widely in terms of power relationships and their attitudes about foreign investment, including as revealed in the content of their national laws. Indeed, BITs vary with respect to matters such as bans on performance requirements, umbrella clauses that require each state to observe any contracts with foreign investors, and the role of ICSID in investor-state disputes. The goals of the regime, then, may not be shared beyond a superficial level, making it difficult to suggest their effect on decision making.

designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment” per se do not constitute indirect expropriations).  
237 See, e.g., PUBLIC CITIZEN, supra note 11; see also Andrew Nikiforuk, 11 Feet Under, GLOBE & MAIL (Can.), Nov. 26, 2004, at 58.  
238 For the range of practices, see, for example, 1 UNCTAD, supra note 24.
More important, the institutions associated with BITs are so freestanding that, at first glance, one might call into question whether BITs belong to a distinct regime at all. Instead of a permanent tribunal, such as the two European courts discussed above, the Iran-U.S. Claims Tribunal, or even individual tribunals with repeat players that are subject to a control mechanism as with NAFTA, BITs are characterized by one-off panels with no formal institutional ties to each other. (Multiple arbitrations under the same BIT, such as those concerning Argentina, tend to be exceptional.) Although many panels operate under the auspices of ICSID, ICSID’s Additional Facility, or the rules of UNCITRAL, these procedural commonalities do not together form one institution to govern the BIT dispute settlement process as a whole. If ad hoc BIT panels are just a set of stand-alone decision makers, then institutional factors would seem to play a minimal role in their outcomes. Panels might be viewed as free agents when it comes to indirect expropriations and other areas of investment law, unconstrained by the goals of any regime or formal and informal control mechanisms. Moreover, insofar as legitimacy can stem from substantive outcomes in a particular direction, free agency undermines legitimacy.

Yet, in looking further, it becomes clear that BIT panels do form part of one regime—that of international arbitration. That regime’s objective is to reach a judgment according to certain accepted practices. Arbitrators who treat their profession seriously will do certain obvious things to advance that end—notably, decide only matters within the scope of the arbitration, utilize rules that treat each party equally and fairly, and write opinions that rely on persuasive legal reasoning, including citations to sources and precedents. As Dino Kritsiotis has suggested, their teleology is a function of their methodology. 239 If they deviate from that with unfair procedures or unconvincing opinions (or worst, non liquet), they have failed as arbitrators. They belong to what Thomas Carbonneau calls “the arbitral legal culture.” 240 These aspects also affect decision making in the Iran-U.S. Claims Tribunal and NAFTA, which thus in a sense straddle their own regime and that of international arbitrations, although the institutional aspects of the arbitration regime may be overshadowed by or at least work hand in hand with features unique to those regimes.

Institutional design features also channel outcomes. First, BIT panels involving different BITs may comprise repeat players, whether the arbitrators and counsel who appear in many cases or secretariat officials from institutions like ICSID and the International Chamber of Commerce who at times offer assistance. Jeffery Commission’s recent empirical work on the composition of ICSID panels confirms this trend. 241 Second, arbitrators themselves face some procedural and ethical constraints, for example, concerning their relationship with the parties that appointed them. 242 Third, arbitrators typically aspire to appointment to future arbitrations, as a result of which they will not write opinions that deviate too far from the mainstream of legal opinion. Fourth, arbitrators are aware of the constraints on enforceability and need to

239 E-mail from Dino Kritsiotis (Mar. 22, 2006) (on file with author); see also ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 238–46, 382–84 (4th ed. 2004).
241 See Jeffery P. Commission, Precedent in Investment Treaty Arbitration—A Citation Analysis of a Developing Jurisprudence, 24 J. INT’L ARB. 129, 137–41 (2007); see also id. at 136 (“esprit de corps amongst ICSID and other investment treaty arbitrators”).
craft an award that both can be enforced as a formal legal matter and avoids demands on the losing party with which it is unable or unwilling to comply. 243

Last, the regime of arbitration imposes constraints to the extent that the failure of an arbitral tribunal to meet those minimal methodological criteria opens up the possibility of nullification or nonenforcement of the award, whether under the ICSID Convention, the New York Convention, the UNCITRAL Model Law, or domestic laws. 244 Certainly review and annulment are possible, as Metalclad's fate in the British Columbia courts showed and as seen in two recent ICSID cases, Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic and Mitchell v. Democratic Republic of the Congo. 245 These institutional design features also operate in the context of NAFTA and the Iran-U.S. Claims Tribunal (with the exception that the latter precludes nonenforcement of awards to U.S. claimants).

The effect of these elements of institutional design on decision making is complex. On the one hand, they will constrain panels' interpretation of the law regarding regulatory takings. Panels that take their responsibilities seriously will read and cite precedents in the area to demonstrate that their views are legally grounded, a process that Commission has confirmed empirically. 246 Over time, certain awards will gain greater respect than others as they are cited more often. 247 And, as discussed earlier, a consensus has already emerged and most panels will operate within it as they evaluate claims. Doctrine—black-letter law, if you will—guides most decision makers. In this sense, the four findings against expropriation in the Argentina-United States BIT cases are not surprising. 248 But in close cases, the absence of some of the institutional constraints and context seen in other regimes makes it particularly difficult to predict the outcome of BIT decisions, as each panel's interpretation of the consensus position and its evaluation of the facts according to its chosen test will be harder to forecast. 249 Notions of "control" and "property interests" leave ample room for BIT panels to rule for or against claimants.

243 On the former, see Günther J. Horvath, The Duty of the Tribunal to Render an Enforceable Award, 18 J. INT'L ARB. 135 (2001).

244 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Art. 52, Mar. 18, 1965, 17 UST 1270, 575 UNTS 159 (listing five reasons for annulment, including "serious departure from a fundamental rule of procedure" and "failure to state the reasons on which [the award] is based"); Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. 5, June 10, 1958, 21 UST 2517, 2520, 330 UNTS 38, 42. See also Andrea K. Bjorklund, Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims, 45 VA. J. INT'L L. 809, 871–73 (2005). See generally W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR (1992). In addition, the counsel appointed by the ICSID Secretariat to assist with its arbitrations may offer an informal sort of review before publication.


246 Commission, supra note 241, at 148–53.

247 Like Commission, I think Carbonneau, supra note 240, at 1204, goes too far when he describes the process of cross-arbitral interactions as a "process of stare decisis." See also Tai-Heng Cheng, Precedent and Control in Investment Treaty Arbitration, 30 FORDHAM INT'L L.J. 1014, 1030–32 (2007).

248 See supra note 13 and corresponding text.

249 See, e.g., Michael D. Goldhaber, Wanted: A World Investment Court, AM. LAW., FOCUS EUROPE, Summer 2004, <http://www.americanlawyer.com/focuseurope/investmentcourt04.html> (quoting Brigitte Stern in connection with Argentina cases: "You have the potential... for 20 arbitrations, one problem, and 20 solutions."). As things turned out, all cases on Argentina to reach the merits found no expropriation. See also Brigitte Stern, Trois arbitrages, un même problème, trois solutions, 1 REV. DE L'ARBITRAGE 3 (1980) (regarding Libyan nationalization arbitrations).
Indeed, with respect to nullification and nonenforcement, review of the panel’s legal reasoning is deliberately limited. For instance, the ICSID doctrine, in the words of the MINE v. Guinea annulment committee, bars annulment for the failure of a panel to state reasons for the award as long as “the award enables one to follow how the tribunal proceeded from Point A to Point B. and eventually to its conclusion, even if it made an error of fact or of law,” and holds that the “adequacy of the reasoning is not an appropriate standard of review.” 250 ICSID annulment committees have also rejected claims of insufficient reasoning in Wena v. Egypt and MTD v. Chile 251 (in which annulment was denied altogether), as well as Vivendi (partially annulled on a different ground). In domestic review proceedings, a similarly deferential standard to international arbitral awards can be found, 252 as national courts have repeatedly rejected such claims, for example, the Svea Court of Appeal in CME v. Czech Republic. 253

In this sense, the Lauder duo is poignant. 254 In Lauder v. Czech Republic, decided under the U.S.-Czech BIT on September 3, 2001, the panel found that the claimant did not suffer an expropriation when the agreement between his majority-owned television services company (CNTS) and the television station CET 21 was revised in 1996 to eliminate CNTS’s exclusive rights to operate CET 21. In CME v. Czech Republic, decided under the Netherlands-Czech BIT ten days later, the panel found that the contract revision was an expropriation by the Czech government.

These two opinions are impossible to reconcile. As an initial matter, the two panels reached diametrically opposed factual conclusions; Lauder found no state involvement in the contract revision and CME found coercion by the Czech Media Council. 255 Indeed, the Lauder panel’s key holding found that CET 21, not the state, interfered with the claimant’s property rights. But in addition, the two panels appear to have had different views of the law. The Lauder panel emphasized that “[a]ll property rights of the Claimant were actually fully maintained” and that he was able to “fully enjoy the economic benefits of the License granted to CET 21”; it added that he had never complained of an expropriation, and that the Czech Republic did not benefit from the action. 256 The CME panel, on the other hand, distinguished the acts from proper regulation inasmuch as they were “designed to force the foreign investor to contractually agree to the elimination of basic rights for the protection of its investment.” 257

250 Mar. Int’l Nominees Establishment v. Republic of Guinea, ICSID No. ARB/84/4, Decision on Annulment (Dec. 22, 1989), 5 ICSID REV. 95, paras. 5.09, 5.08 (1990); see also Vivendi, 41 ILM 1135. See REISMAN, supra note 244, at 84–85.


254 For a useful discussion, see Newcombe, supra note 26, at 14–16.


256 Lauder, para. 202; see id., paras. 201–04.

257 CME, para. 603.
One might somehow rationalize the two legal conclusions since the provisions on expropriation of the two BITs differed. The BIT with the United States addressed state conduct that "expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation')," while the BIT with the Netherlands spoke of measures "depriving, directly or indirectly, investors of the other Contracting Party of their investments," subject to similar conditions. Yet the CME tribunal interpreted the latter BIT to cover indirect expropriation, so it seems the two panels disagreed about the law on indirect expropriations. CME was decided by a 2-1 majority over the vigorous dissent of the Czech-appointed arbitrator, while the Lauder opinion was unanimous. The former does a more thorough job of citing precedents than the latter, but it reads them in a very proinvestor light (including by citing Metalclad). It remains to be seen whether that legal reasoning (having withstood challenge in the Swedish courts) gives CME a greater precedential factor than the unanimous outcome in Lauder.

As others have pointed out, the inconsistency might well have been avoided had the Czech government either consolidated the arbitrations or appointed the same arbitrators to the CME panel as had been appointed earlier to the Lauder panel. Yet these unused and ad hoc solutions for these cases simply highlight the risks posed by multiple BITs and multiple venues. They suggest not only the limitations of inter-regime harmonization but even, for those who prefer to think of the BITs themselves as a regime, the possibilities for lack of harmonization within a regime.

Some Tentative Assessments

The above account seeks to highlight the importance of institutions to the decision making with respect to claims of regulatory takings. I freely admit that I have not proved anything to the satisfaction of political scientists; my goal has rather been to offer a new account introducing a set of variables that have remained elusive in legal appraisals of regulatory takings decisions. They suggest the following description of the role of institutions and regimes.

1. Despite the general consensus on the customary international law limits of a government’s power to harm private property without compensation and the trends of various treaty interpretation bodies to conform such interpretations with this broad consensus, the outcome of particular cases depends upon the specific regime in which a claim is decided. This conclusion does not detract from the unexceptionable point that outcome differences can also turn on different textual definitions of expropriation.

2. Regimes affect outcomes on regulatory takings claims first because regimes have specific purposes, whether stated in their constitutive instruments or understood by their major constituencies, and institutions within them will seek to advance those goals. Decision makers

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260 CME, paras. 150–51.

261 Id., para. 606.

addressing regulatory takings claims are unlikely to seek uniformity of case law across regimes if such a position will not advance the aims of their own regime.

3. Regimes affect outcomes of decision making on regulatory takings second because of design traits of the institutions within the regime. These include the following (which overlap somewhat): (a) the institution’s composition, including the role of the affected parties in determining its membership and the background of its members; (b) its degree of independence from the parties in decision making; (c) the extent of any control mechanisms; (d) the extent to which the decision-making process involves repeat players; (e) the extent to which its procedures allow for consideration of all relevant facts and legal arguments from both sides; and (f) the prospects for enforcement of its decisions, including the availability of resources to pay successful claimants.

4. Interested constituencies are more likely to accept outcomes from institutions they regard as legitimate (although such outcomes may also foster institutional legitimacy in the first place). In the case of the OPIC, the FCSC, the European Court of Human Rights, the ECJ, and the Iran-U.S. Claims Tribunal, the overall acceptance by their constituencies of their purposes and workings has contributed to the relatively supportive response to their decisions. In the case of NAFTA and BIT tribunals, the objections of some constituencies to certain outcomes derive from broader concerns about the goals of these regimes and the workings of the institutions in them.

5. In the case of regulatory takings cases under BITs, the looseness of the regime in terms of institutions and the limited possibilities of control mean that decisions will emphasize different elements of the consensus position or might even adopt tests at odds with it. Nonetheless, the institutional design features of the regime of international arbitration can operate to constrain decision making somewhat.

V. A CALL FOR SOME FRAGMENTATION IN THE LAW(S) OF REGULATORY TAKINGS

Having demonstrated the futility of a single detailed doctrinal solution to apply to regulatory takings in multiple contexts, I turn now to two more normative claims—that a single doctrinal “solution” (assuming there is a problem) is unnecessary and that it is indeed counterproductive. These two claims relate directly to the broader debates on fragmentation discussed earlier, for the doctrinal solution seeks to control fragmentation through one doctrine for decision makers to apply regardless of the regime governing the regulations. To claim that a doctrinal solution is unnecessary is to say that fragmentation is not a threat to the rule of international law in this matter; to say that a doctrinal solution is counterproductive is to say that fragmentation is, in fact, to be embraced.

Confronting the Calls for Harmonization

My defense of an antiharmonization position with regard to regulatory takings begins with the laconic statement in 2007 of the ICSID panel in Enron Corp. & Ponderosa Assets v. Argentina, one of many claims brought under the U.S.-Argentina BIT by American companies affected by Argentina’s emergency legislation of 2000. In response to Enron’s argument that OPIC’s 2005 determination of expropriation by Argentina supported its claim under the BIT, the panel stated: “[A]lthough the OPIC ‘Memorandum of Determinations’... reaches a different
conclusion on this matter, it responds to a different kind of procedure and context that cannot influence or be taken into account in this arbitration. 263 To proponents of harmonization in international law, the arbitral panel’s one-sentence treatment of the OPIC determination seems a clear recipe for the uncertainty and lack of predictability that comes from fragmentation. How, they would argue, could future Ponderosas or Argentinas know what to do during emergency situations if different decision makers reach opposite legal conclusions? Ponderosa might represent as much a danger to the coherence of international law on regulatory takings as the contradictory outcomes in the Lauder cases (although we might worry less by simply treating the OPIC decision as one under domestic law). While proponents of harmonization might not deny the importance of institutional factors to outcomes, they would surely argue that such institutional factors should be constrained for the sake of consistent case law across regimes and institutions.

Harmonization for its own sake, however, seems a highly misplaced aspiration. As a general matter, international law is prescribed and applied to advance certain policies of relevant constituencies, and to do so in an authoritative and controlling manner. 264 When different constituencies have decided to create systems of rules, practices, and institutions—regimes—to advance their goals, the overlap of certain issues (like government measures affecting private property) across regimes cannot in and of itself justify a regime’s sacrifice of its purposes for the sake of some uniformity of decision making on the overriding issues. As the ILC recognized in its report on fragmentation, much of international law is special, rather than general, law, and normally special rules prevail over general ones. 265 Moreover, international law includes numerous special regimes with special rules and their own institutions to interpret and apply them. Certainly, some law is general law, and in some cases that law should prevail over special law, for example, on structural issues such as the interpretation of treaties and the place of jus cogens.

Yuval Shany has forcefully argued the opposite position, that harmonization for its own sake is critical because inconsistency across regimes “might further hinder the achievement of uniform interpretation of international law” and that an “effective legal system cannot, in the long run, tolerate serious inherent inconsistencies.” 266 Yet these general claims beg the question of why and where we need uniformity and what constitutes “an inherent inconsistency.” International law lives with much diversity across regimes, most obviously in the willingness of different human rights bodies to interpret identical words in different texts differently, a result that flows from the aims of the regimes and the traits of the institutions. Although the effectiveness of the international legal system in protecting human rights is highly limited, it is simply assuming a conclusion to attribute that ineffectiveness to diversity across regimes. The diversity of venues cannot in and of itself justify either that the law on indirect expropriation is or should be general law or that it falls in the category of general law that trumps special law. We must find a better argument for why regulatory takings law must be uniform.

263 Enron Corp. & Ponderosa Assets v. Argentina, supra note 13, para. 247.
265 ILC Study Group Report, supra note 50, at 8; on the difficulties of distinguishing between general and special rules, see Koskenniemi Study, supra note 1, at 60–65.
One such argument is that international law needs a coherent, uniform set of rules on regulatory takings to create a clear expectation among governments, corporations, and individuals as to the limits of uncompensated governmentally initiated harm to property. Without such uniformity, those actors could be subject to conflicting obligations or rights. Yet the status quo, in which the concept of expropriation has been given a range of meanings in various treaties and by different arbitral tribunals, has not created havoc in the law. Various regimes have managed to make determinations on the permissible scope of uncompensated governmental regulation without any harmonization beyond the general consensus position stated above. Most of their decisions have elicited no protest from most of the constituencies to which they are accountable, even if one, Metalclad, generated a great deal of controversy (followed by retrenchment). Further harmonization across regimes is not necessary to the effective functioning of international law or the process of foreign investment. The international system lives with conflicts of law in many contexts—national/national, international/national—and there seems to be no evidence that the regulatory takings area is creating particular uncertainty among investors or host states. Diverse constitutional traditions, regime goals, and institutional constraints explain the variety of approaches across domestic settings, between domestic and international systems, and across international regimes. In this sense, we might even say there is diversity, but no fragmentation at all.

The situation could be a serious problem for the expectations of both investors and host states if a single regulatory takings episode were decided by more than one tribunal, operating under different treaties or regimes, as in the Lauder scenario. At the current stage, however, this situation has really been the exception rather than the rule. Diversity of interpretations across international regimes seems no different from diversity of interpretations across domestic systems. At the same time, a diversity of interpretations of the same instrument within a regime—for example, if NAFTA panels were to reach inconsistent conclusions on the same issue—is harmful to expectations, but that is an issue of intraregime harmonization, which is laudable, rather than inter-regime harmonization.

A second, more persuasive argument for harmonization is that the coherence of international law as a whole suffers when different regimes take alternative approaches to regulatory takings, all the while claiming that their approach represents that of customary international law. This reasoning is narrower than Shany’s claims about the need for coherence of all of international law as a legal system insofar as it focuses on the coherence of the concept of customary international law. How can different institutions interpreting the term “indirect expropriation” in accordance with customary international law adopt distinct tests without undermining the entire idea of customary international law?

Four responses are required. First, not all the tribunals are explicitly relying on customary international law. The European Court of Human Rights and the ECJ refrain from relying upon custom, even if the outcomes of their cases end up falling within the general consensus position.

Second, most decision makers discussed here who rely on custom share a general consensus on the limits it places on uncompensated governmental harm to property. In that sense, there

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267 Cf. Pauwelyn, supra note 1, at 178-88.
already is some general law—or, one might say, there already is some harmonization at work—on regulatory takings; it is just not as thick and adumbrated as some other general law. Regulatory takings decisions could then be viewed as not about a conflict between special and general rules, but about different interpretations of the general rule leading to different special rules within distinct regimes, some of which may be inconsistent with each other. From that perspective, the diversity among regulatory takings approaches is matched in other areas of the law, including human rights and trade.

Third, it is possible for customary international law to have various contents across groupings of states. As the ICJ affirmed in the Right of Passage case, just as treaties may be specialized, so may custom. And the Asylum case acknowledged the possibility of regional custom in particular. So the possibility for customary international law governing the state parties for the purposes of a regional trade agreement to differ from customary international law governing within a human rights regime should bother us no more than that of different treaty definitions.

Fourth, some of these recitations of customary international law are simply wrong, whether those claiming an obligation to compensate investors for all unexpected economic harm arising from regulation or those denying any duty to compensate. One can no more prevent the invocation of erroneous statements of customary international law on expropriation than on international human rights (or any other area of the law where advocates for a position play a role). Such misstatements were also prevalent during the first round of expropriation battles concerning the standard of compensation for direct takings.

**Embracing Diversity**

Indeed, doctrinal uniformity in this area is not only unnecessary, but misguided. The limits of the power of the state to regulate in a way that harms private property is an area of international law where the relevant decision makers within each regime should continue to have the flexibility to interpret the consensus position—or even diverge from it!—as they choose. The expectations of those who created and implement NAFTA as to what constitutes an expropriation, even if they couch their definitions in terms of international law, differ significantly from those who created and implement the regimes of the Council of Europe or the European Union. The participants in these regimes should not be denied the opportunity to create law on regulatory takings to advance their policies. If one regime claims that international law allows the government to undertake policy X without compensating an affected property owner and another claims that international law requires the government undertaking that same policy to compensate for an expropriation, those choices should be respected. This differentiation reaches its limits when it runs up against jus cogens, but, at least in the case of regulatory takings, jus cogens is not a serious constraint. It also does not preclude allowing investors

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269 Koskenniemi refers to this nonetheless as a conflict through “conflicting interpretations of general law.” Koskenniemi Study, supra note 1, at 31; see also PAUWELYN, supra note 1, at 148–50, 155–57.

270 Right of Passage over Indian Territory (Port. v. India), 1960 ICJ REP. 6, 37–39 (Apr. 12); see also Koskenniemi Study, supra note 1, at 46–48.

271 Asylum (Colom./Peru), 1950 ICJ REP. 266, 276–78 (Nov. 20).

other protections from governmental action that might be uniform across regimes, such as
binding stabilization clauses, umbrella clauses, or fair and equitable treatment (though I would
not at this point preclude regime-specific meanings for these either).

In this sense, the ICSID panel in Enron & Ponderosa gave the OPIC determination exactly
the treatment it deserved. The OPIC claim involved a completely distinct definition of expro­
priation, a different purpose for making the determination, and a unique institutionalized pro­
cess of determination. It deserves the same weight—none—that any decision by an insurance
company to pay a claim should have in proceedings between the insured and the alleged tort­
feasor. OPIC’s interpretation is clearly outside the consensus view, as it begins with a sui generis
textual definition and a completely different purpose.

VI. CONCLUSION: SOME PRESCRIPTIONS FOR UNHARMONIZED DECISION MAKING

The institutions addressing regulatory takings operate in a field of law where the general
understanding about the limits of noncompensable governmental regulation is refracted
through the aims of particular regimes and the design of their institutions; the BIT arbitral pro­
cess differs insofar as the regime as a whole is thin and its institutions dissipated. Yet all these
decision makers also function within a general system of international law that for the most part
regards the decisions of other arbitral tribunals as the output of a legitimate prescriptive process
and thus a source of law. 273 As a result, each decision maker applying international law to a case
is presumably supposed to consider those other decisions, regardless of the regime in which
they were made. The challenge for decision makers operating across regimes is to determine
how to take the differences between them into account. As Special Rapporteur Koskenniemi
noted in his study, this difficulty is hardly confined to the area of international investment:
“[The whole complex of inter-regime relations is presently a legal black hole. What principles
of conflict-solution might be used for dealing with conflicts between two regimes or between
instruments across regimes? ]” 274

Two arbitrations offer a sense of the range of positions for decision makers in appraising
cases from other regimes. The first is the dismissive approach of the BIT panel in Enron & Pon­
derosa cited above, where the panel found that OPIC’s prior determination of an expro­
priation had no relevance for a ruling under the BIT. An alternative approach, more attractive to pro­
ponents of harmonization, is that of the panel in Técnicas Medioambientales Tecmed, S.A. v.
United Mexican States, a 2003 case under the Spain-Mexico BIT concerning Mexico’s closure
of a landfill. In determining whether Mexico’s environmental regulation was expropriatory,
the panel introduced the criterion of proportionality between the harm to the investor due to
the measures taken and the public interest served by them. In so doing, the panel explicitly
adopted tests from the European Court of Human Rights under Protocol 1. 275 After reviewing
the facts of the dispute, the panel ultimately concluded that the lack of evidence of both

273 ICJ Statute, Art. 38(1). See the helpful discussion in SHANY, supra note 266, at 86–94.
274 Koskenniemi Study, supra note 1, at 253.
275 Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID No. ARB(AF)/00/2 (May 29,
2003), 43 ILM 133, 164 (2004) (citing four European Court cases); see also Azurix, supra note 28, para. 312 (noting
that ECHR criteria for expropriation used in Tecmed “provide useful guidance,” although not applying them explicitly).
environmental harm and massive popular opposition to the landfill made the complete termination of the investment a disproportionate act. The willingness to incorporate a test from a different regime is one of the hallmark techniques of harmonization and seems to represent the polar opposite approach to the BIT panel’s view in the Argentine case.277

Teemed is hardly the only example of cross-regime citation and reliance—NAFTA and BIT panels have frequently cited each other’s views, as well as those of the International Court of Justice, the PCIJ, and the Iran-U.S. Claims Tribunal. But Teemed differs from these other cases both in the contrast between the two regimes and in the introduction into expropriation analysis of a test that, while often implicit in BIT cases, was not explicit, as they focused chiefly on deprivation of control (regardless of proportionality).

In light of these possibilities, I would offer the following strategies for decision makers seeking to appraise the weight to be given to decisions across regimes. I do so with an awareness that some investment arbitrators have already internalized these ideas.

1. Institutions within regimes making determinations about regulatory takings should not shy from teleology. Indirect expropriation does not have a single “plain meaning” that can be applied to all cases, and a search for a uniform meaning and reconciliation across different regimes will be frustrating to arbitrators or other decision makers and will not serve their purpose of deciding cases while advancing the goals of the regime.

2. All other things being equal, decision-making institutions should give the greatest weight to decisions emanating from their own regime. Institutions are embedded within regimes, and have a duty to advance the ends of the regime. Prior decisions by those institutions reflect those goals better than extraregime decisions.278 Ad hoc panels interpreting BITs should give the greatest weight to prior decisions interpreting the same BIT.

3. In deciding whether tests and doctrine from other regimes should be utilized in its own decisions, an institution should explicitly consider the differences across the regimes and the effect of those differences on the incorporation. On this measure, both Enron & Ponderosa and Teemed fall short as well-reasoned opinions, as neither explains clearly why the extraregime test should be, respectively, ignored and incorporated.

4. Precedents and doctrines from other regimes should be incorporated in decision making to the extent that the institution can demonstrate that those tests advance, or at least do not undermine, the purposes of the regime and that incorporation is within the authority of the institution.

5. BIT panels examining precedents not involving the BIT under consideration should engage in a similarly careful appraisal of precedents, determining whether the text interpreted in, or regime context of, other decisions permits reliance upon those precedents in interpreting the BIT.

6. These limits to cross-regime fertilization should not prevent decision makers from incorporating basic community policies when needed. Many general rules of international law will

276 Teemed, supra note 275, at 165–72.
277 See SHANY, supra note 266, at 101–02.
278 Cf. Joseph William Singer, Facing Real Conflicts, 24 CORNELL INT’L L.J. 197, 202 (1991) (“A rebuttable forum law presumption—while requiring the forum to articulate the policies underlying forum law—encourages the forum to articulate why forum policy is better than the policy of the competing jurisdiction.”).
still play a role in decision making. These may cover structural questions like the law of treaties, as well as substantive matters like human rights and environmental protection. 279

Applying these principles in real cases will require a new level of sophistication among decision makers, in particular arbitrators, for their chief job remains, along with reaching a decision, writing a legally convincing opinion. It is beyond the scope of this essay to consider the relevance for other regimes of each regime’s decisions regarding regulatory takings. The analysis suggests, for example, the need for care in giving precedential weight to OPIC and perhaps FCSC cases outside their arenas, as they are more self-contained than the other regimes considered. Moreover, as discussed, the ECHR regime has distinct features compared to NAFTA or the typical BIT. Nonetheless, these differences do not render ECHR doctrine for determining when a government must compensate a private property holder irrelevant to other regimes. Tecmed probably made an important step in incorporating the European Human Rights Court’s test of proportionality, 280 making explicit what has often stood in the background of regulatory takings decisions that reject the sole effect doctrine and consider the purpose and context of the government’s actions. In that sense, despite the Court’s view in James that customary international law will not inform its decisions, it may well be the case that some of the Court’s doctrines merit consideration in other treaty regimes and even in elaborating customary law. But the Tecmed panel’s lack of reasoning on the appropriateness of the test represents a missed opportunity for elaborating the criteria for legitimate cross-regime harmonization.

The best, though exceedingly brief, acknowledgment of both the promise and the limits of cross-regime harmonization is the opinion of the NAFTA panel in Fireman’s Fund Insurance Co. v. United Mexican States, concerning Mexico’s financial regulations in the midst of its economic crisis of the 1990s. The panel essentially restated the broad consensus position described earlier, which it described as stemming from the prior ten NAFTA cases concerning expropriation “and customary international law.” 281 In listing the contextual factors relevant to a determination of an expropriation, the panel included “the proportionality between the means employed and the aim sought to be realized,” and then added the following insightful footnote: “The Tribunal notes that this factor was relied upon in [Tecmed]. The factor is used by the European Court of Human Rights, and it may be questioned whether it is a viable source of interpreting Article 1110 of the NAFTA.” 282 Here the tribunal avoids the two extremes in Ponderosa and Tecmed and, with the sparsest of reasoning, both effectively adopts the proportionality test as stemming from earlier cases within NAFTA and points out the problems of Tecmed’s incorporation of it. Future arbitrators would do well to expand upon this strategy in ascertaining the relevance of extraregime jurisprudence. It suggests that, rather than any kind of *stare decisis* across arbitrations, a sliding scale of respect for precedent is warranted depending on the regime context of the earlier decisions.


280 Fortier & Drymer, supra note 12, at 324–25.

281 *Fireman’s Fund*, supra note 215, para. 176.

These principles are relevant not merely to the judge, arbitrator, or bureaucrat evaluating a claim, but also to scholars. Just as many scholars of human rights take account of the regime in which decisions are made—for example, regional courts versus global treaty bodies versus political arenas—when they appraise the law, so students of international investment should do the same. While most of the regimes and decision makers have adopted a basic understanding of the limits of noncompensable governmental regulation—the broad consensus described earlier—beyond this position, those appraising decisions cannot just mix and match outcomes across regimes.

Finally, by putting in context the fears by some NGOs and commentators that either the law on regulatory takings is out of control, or that the institutions deciding claims lack legitimacy (or both), my approach offers ideas for those seeking reform of existing law or institutions. The links between the design of institutions within regimes and regime effectiveness are just now being explored by political scientists, who have a long way to go in developing a theory of causation.283 By looking beyond apparently inconsistent case law to regimes pursuing their own ends, we can better determine wherein the problems really lie and what improvements in the law and institutions need to be made. Institutionally independent BIT tribunals reaching diametrically opposed views are obviously one area where scholars and practitioners need to consider alternatives. Perhaps NAFTA panels can be reconfigured as well. But the multiple regulatory takings judgments in other venues, in particular the two European courts, do not raise these concerns, suggesting that the problem is less coherence or incoherence of the law and more the structural aspects or the legitimacy of the institutions interpreting it. Future appraisal and decision making regarding regulatory takings thus demand appreciation of, and respect for, a range of approaches to this core relationship between the state and the private sector.

283 See Young, supra note 53, at 120.