

ARTICLES

A Meaningful Distinction? “Legitimate Objectives” in Canadian Investment Treaties and Their Consideration by Investor-State Dispute Settlement Tribunals

Une distinction significative? Les “objectifs légitimes” dans les traités d’investissement canadiens et leur prise en compte par les tribunaux d’arbitrage entre investisseurs et États

Jean-Michel Marcoux¹ and Waldo Ali²

¹École supérieure d’études internationales, Université Laval, Canada and ²Global Affairs Canada, Canada

Corresponding author: Jean-Michel Marcoux; Email: jean-michel.marcoux.esei@ulaval.ca

Abstract

In its 2021 *Model Foreign Investment Promotion and Protection Agreement*, Canada has sought to preserve regulatory flexibility by using terms like “legitimate policy objectives,” “legitimate public policy objectives,” and “legitimate public welfare objectives.” How can this threefold distinction of “legitimate objectives” impact the interpretation of international investment obligations? Through an analysis of the content of international investment agreements and awards from tribunals that have expressly referred to these terms, this article argues that various forms of “legitimate objectives” do not encapsulate distinct legally significant terms and could lead to unintended consequences.

Keywords: Canada; international investment agreements; investor-state dispute settlement; legitimate policy objectives; legitimate public policy objectives; legitimate public welfare objectives; right to regulate

Résumé

Dans son modèle d’accord de promotion et de protection des investissements étrangers de 2021, le Canada a cherché à préserver une souplesse réglementaire en utilisant des termes tels

The authors are grateful to Vladyslav Lanovoy, Vincent-Joel Proulx, Roojin Habibi, and Nickolas Eburne for the organization of the symposium and the workshop that was held in Ottawa in November 2024. We sincerely thank Alexandra Dosman, Kevin Gray, the participants in the workshop, and two Reviewers for their helpful comments. The authors prepared this article in their personal capacities. The views and opinions expressed in this article are the authors’ only and do not necessarily represent the views and opinions of any employer.

© The Canadian Yearbook of International Law/Annuaire canadien de droit international 2026. This is an Open Access article, distributed under the terms of the Creative Commons Attribution-NonCommercial licence (<http://creativecommons.org/licenses/by-nc/4.0>), which permits non-commercial re-use, distribution, and reproduction in any medium, provided the original article is properly cited. The written permission of Cambridge University Press must be obtained prior to any commercial use.

que “objectifs légitimes en matière de politique,” “objectifs légitimes de politique publique” et “objectifs légitimes de bien-être public.” Comment cette triple distinction des “objectifs légitimes” peut-elle influencer l’interprétation des obligations internationales en matière d’investissement? À travers une analyse du contenu des accords internationaux d’investissement et des sentences rendues par des tribunaux qui ont expressément fait référence à ces termes, cet article soutient que les différentes formes d’“objectifs légitimes” ne recouvrent pas des notions distinctes ayant une portée juridique significative et pourraient entraîner des conséquences imprévues.

Mot-clés: Canada; accords internationaux d’investissement; règlement des différends entre investisseurs et États; objectifs légitimes en matière de politique; objectifs légitimes de politique publique; objectifs légitimes de bien-être public; droit de réglementer

1. Introduction

International investment law deals with a broad range of rules and principles that impose obligations on states to protect foreign investment and foreign investors operating in their territory. In addition to customary international law and general principles of law, international investment agreements (IIAs) — both bilateral investment treaties and investment chapters included in free trade agreements — play a key role in articulating these obligations. With respect to their substance, international investment obligations require states to treat foreign investment and foreign investors according to a minimum standard of treatment, to ensure that expropriation of foreign investment follows a strict set of criteria, and to prohibit discrimination based on the origins of foreign investment and foreign investors, among others. Procedurally, several IIAs also include a dispute settlement mechanism — known as investor-state dispute settlement (ISDS) — allowing foreign investors to submit a claim to arbitration should they consider that the host state has violated its obligations under the agreement.

Addressing the impact of international investment law on the ability of states to adopt domestic regulations to protect public interest is undoubtedly a broad, multifaceted theme. Expressed in general terms, it implies striking a balance between the protection of foreign investors and the right of sovereign host states to regulate.¹ Despite its relatively abstract nature, the state’s right to regulate remains a very tangible problem for policy-makers. In its *World Investment Report 2015*, the United Nations Conference on Trade and Development (UNCTAD) identified lessons learned from several decades of rule making.² The very first lesson highlights the unforeseen risks resulting from IIAs and the harm that they can generate. According to the report, “[b]road and vague formulation of IIA provisions has allowed investors

¹See e.g. Suzanna A Spears, “The Quest for Policy Space in a New Generation of International Investment Agreements” (2010) 12 JIEL 1037 at 1042; Catharine Titi, “The Right to Regulate” in Makane Moïse Mbengue & Stéphanie Schacherer, eds, *Foreign Investment under the Comprehensive and Trade Agreement (CETA)* (Cham, Switzerland: Springer, 2019) 159 at 162; Joshua Paine, “Autonomy to Set the Level of Regulatory Protection in International Investment Law” (2021) 70 ICLQ 697 at 697; Crina Baltag et al., “Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and Corporate Social Responsibility: Too Much or Too Little?” (2023) 38 ICSID Rev 381 at 385.

²UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (New York: United Nations, 2015) at 125.

to challenge core domestic policy decisions, for instance in the area of environmental, energy and health policies.”³ In parallel to these developments, several authors have extensively documented the right of states to regulate by examining how international investment obligations relate to environmental, labour, human rights, and corruption concerns.⁴

In line with the explicit recognition of the problem by UNCTAD, some states have reacted by adapting the content of their treaties. Among diverse means to improve flexibility, states have relied on two prominent avenues.⁵ On the one hand, more recent bilateral investment treaty models and IIAs now include interpretive language to clarify the scope of obligations and to expressly emphasize the right of states to regulate.⁶ On the other hand, some states have chosen to include exceptions to justify measures that would otherwise be inconsistent with other provisions.⁷ All these provisions seek to ensure that states retain enough policy space under international investment law to adopt regulatory measures for a broad range of objectives.⁸

Canada has actively participated in this process of adapting its IIAs with a view to preserving regulatory flexibility. Relying on its early experience in disputes based on Chapter 11 of the *North American Free Trade Agreement* (NAFTA),⁹ it published a

³*Ibid* at 125.

⁴Among the many examples that can be found in the literature, see e.g. Spears, *supra* note 1; Andreas Kulick, *Global Public Interest in International Investment Law* (Cambridge: Cambridge University Press, 2012); Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge: Cambridge University Press, 2013).

⁵See e.g. Spears, *supra* note 1; Aikaterini Titi, *The Right to Regulate in International Investment Law* (Baden-Baden: Nomos Verlag 2014) at 123–24 [Titi, *Right to Regulate*].

⁶See e.g. Caroline Henckels, “Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP” (2016) 19 JIEL 27; Catharine Titi, “International Investment Law and the European Union: Towards a New Generation of International Investment Agreements” (2020) 26 Eur J Intl L 639; Rodrigo Monardes et al, “Addressing the Right to Regulate in the CPTPP Investment Chapter: Identifying New Treaty Practice” in Jorge A Huerta-Goldman & David A Gantz, eds, *The Comprehensive and Progressive Trans-Pacific Partnership: Analysis and Commentary* (Cambridge: Cambridge University Press, 2021) 288; Baltag et al, *supra* note 1; Jeriel Teo et al, “Rebalancing Investment Protection Standards: Analysing the Effectiveness of New Treaty Language in Preserving Regulatory Space for Host States” (2024) 25 J World Investment & Trade 497.

⁷See e.g. Andrew Newcombe, “The Use of General Exceptions in IIAs: Increasing Legitimacy or Uncertainty?” in Armand de Mestral & Céline Lévesque, eds, *Improving International Investment Agreements* (London: Routledge, 2013) 267 [Newcombe, “Use of General Exceptions”]; Céline Lévesque, “The Inclusion of GATT Article XX Exceptions in IIAs: A Potentially Risky Policy” in Roberto Echandi & Pierre Sauvé, eds, *Prospects in International Investment Law and Policy* (Cambridge: Cambridge University Press, 2013) 363 [Lévesque, “Inclusion”]; Amelia Keene, “The Incorporation and Interpretation of WTO-Style Environmental Exceptions in International Investment Agreements” (2017) 18 J World Investment & Trade 62; Caroline Henckels, “Should Investment Treaties Contain Public Policy Exceptions?” (2018) 59 Boston College L Rev 2825 [Henckels, “Should Investment Treaties”]; Wolfgang Alschner & Kun Hui, “Missing in Action: General Public Policy Exceptions in Investment Treaties” in Lisa Sachs et al, eds, *2018 Yearbook on International Investment Law and Policy* (Oxford: Oxford University Press, 2018) 363.

⁸Other options have also been addressed in more details in the literature, including carve-outs to limit the jurisdiction of arbitral tribunals over specific types of disputes and non-precluded measures. See e.g. Vera Korzun, “The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs” (2017) 50 Vanderbilt J Transnational L 355 at 394–308.

⁹*North American Free Trade Agreement*, 17 December 1992, Can TS 1994 No 2 (1993) 32 ILM 289 (entered into force 1 January 1994).

model intended to orient its future negotiations in 2004.¹⁰ Following an extensive treaty-making practice, it gradually included changes to its model.¹¹ More recently, Canada published an “updated” version of its model Foreign Investment Promotion and Protection Agreement (FIPA) in 2021.¹² The document benefits from the negotiation of investment chapters in three particularly important free trade agreements — that is, the *Comprehensive Economic and Trade Agreement (CETA)*,¹³ the *Comprehensive and Progressive Trans-Pacific Partnership (CPTPP)*,¹⁴ and the *Canada-United States-Mexico Agreement (CUSMA)*.¹⁵ The model was also informed by extensive stakeholder consultations, which have led to the first comprehensive revision of the document since 2004.¹⁶

This article focuses on a specific development in Canada’s 2021 Model FIPA that contributes to improving regulatory flexibilities under international investment law. Amidst the various innovations analyzed in the literature,¹⁷ we are particularly interested in three different forms of “legitimate objectives” that appear throughout the document and that have been included in at least one subsequent IIA.¹⁸ First, the terms “legitimate policy objectives” are used both in a provision that expressly reaffirms the right of each party to regulate and in a footnote that clarifies the meaning of “manifest arbitrariness” in the context of the minimum standard of treatment.¹⁹ Second, the model refers to “legitimate public policy objectives” in the provisions addressing national treatment and most-favoured-nation (MFN)

¹⁰Government of Canada, “Agreement between Canada and ---- for the Promotion and Protection of Investments,” 2004, online: <investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2820/download> [Canada 2004 Model FIPA].

¹¹While the existence of these revised versions is acknowledged in the literature, Canada has not made them publicly available. See e.g. Céline Lévesque & Christian Schmid, “The 2021 Canadian Model FIPA: More Than Meets the Eye” (2023) 38 ICSID Rev 670.

¹²Government of Canada, “2021 Model FIPA,” 2021, online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=eng> [Canada 2021 Model FIPA].

¹³*Comprehensive Economic and Trade Agreement*, 30 October 2016 (provisionally entered into force 21 September 2017), online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng> [CETA].

¹⁴*Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 8 March 2018 (entered into force for Canada 30 December 2018), online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/cptpp-ptpgp.aspx?lang=eng> [CPTPP].

¹⁵*Protocol Replacing the North American Free Trade Agreement with the Agreement between Canada, the United States of America, and the United Mexican States*, 10 December 2019, Can TS 2020 no 5 (entered into force 1 July 2020) [CUSMA].

¹⁶Government of Canada, “Canada’s 2021 Foreign Investment Promotion and Protection Agreement (FIPA) Model,” 11 May 2021, online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng>.

¹⁷Government of Canada, “2021 FIPA Model – Summary of Main Changes,” 18 May 2021, online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa_summary-2021_modele_apie_resume.aspx?lang=eng>. See also Charles H Brower II, “Against Imperial Arbitrators: The Brilliance of Canada’s New Model Investment Treaty” (2023) 17 FIU L Rev 1; Lévesque & Schmid, *supra* note 11.

¹⁸2023 *Canada-Ukraine Free Trade Agreement*, 22 September 2023, ch 17, online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ukraine/text-texte/2023/17.aspx?lang=eng>.

¹⁹Canada 2021 Model FIPA, *supra* note 12, art 3, n 1.

treatment as well as in the elaboration of a specific exception pertaining to performance requirements.²⁰ Third, “legitimate public welfare objectives” are mentioned in a paragraph of the model that clarifies the meaning of an indirect expropriation.²¹ While all these terms include “legitimate” and “objectives,” they use distinct qualifiers depending upon the specific legal context in which they are used.

This article posits that the distinction between these terms is not fortuitous. In fact, the use of various forms of “legitimate objectives” in the 2021 Model FIPA differs from the consistent use of “legitimate public welfare objectives” throughout Chapter 14 of the previously negotiated *CUSMA*.²² Moving from a unique term to refer to “legitimate objectives” to three distinct expressions should not be dismissed as an unintended change. Moreover, according to Article 31(1) of the *Vienna Convention on the Law of Treaties*, a treaty must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty.”²³ The fact that the threefold distinction is reproduced in the French version — that is, “objectifs légitimes en matière de politique,” “objectifs légitimes de politique publique,” and “objectifs légitimes de bien-être public” — also supports the view that it remains meaningful for the drafters of the document.²⁴ In other words, if the drafters of the model treaty wanted to refer to the exact same scope of legitimate objectives, one can expect that they would have used the same terms throughout the entire text of Canada’s 2021 Model FIPA.

How can the threefold distinction of “legitimate objectives” in Canadian investment agreements impact the interpretation of international investment obligations? Through an analysis of the content of IIAs signed by Canada and awards from tribunals that have expressly referred to these terms, our main objective is to assess whether tribunals have considered them as legally significant and to infer potential consequences of this distinction. Despite the establishment of three different forms of legitimate objectives that can contribute to improve regulatory flexibility, this article argues that the distinction included in Canada’s 2021 Model FIPA does not rely on any clear trends in the practice of investment arbitration tribunals and could lead to unintended consequences.

The article proceeds in three main steps. First, it provides an analysis of the content of IIAs and models with a view to tracing the inclusion of “legitimate policy objectives,” “legitimate public policy objectives,” and “legitimate public welfare objectives” within Canada’s treaty practice. It thus seeks to explain the emergence of the distinction in Canada’s 2021 Model FIPA, highlighting how these terms relate to previously signed IIAs and the broader experience of Canada. Second, it assesses how tribunals have interpreted these terms. More specifically, it explores whether the distinction among the three forms of legitimate objectives has led to any meaningful outcomes when adjudicating investment disputes. Third, the article explores the

²⁰*Ibid.*, arts 5(4), 6(4), 12(3)(f).

²¹*Ibid.*, art 9(3).

²²*CUSMA*, *supra* note 15, art 14.4(4) (national treatment), art 14.5(4) (most-favoured-nation treatment), art 14.10(3)(g) (performance requirements), Annex 14-B, para 3(b) (expropriation).

²³*Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, art 31(1) (entered into force 27 January 1980).

²⁴Government of Canada, “Modèle d’APIE – 2021,” 2021, online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=fra>.

potential implications of the distinction between various forms of “legitimate objectives” in the settlement of investment disputes. Without seeking to downplay the relevance of thoroughly engaging with the host state’s legitimate objectives in IIAs, this section emphasizes that the threefold distinction can become a breeding ground for arguments based on political motivations when interpreting international investment obligations and constitutes an imperfect tool to avoid state liability in comparison to the inclusion of a regime of general exceptions.

2. Different forms of “legitimate objectives” in Canadian IIAs

Canada’s approach to IIAs has, over the years, sought to strike a delicate balance between the protection of foreign investors and the need for governmental regulation in the public interest. One way in which Canada has sought to achieve this balance is by incorporating terms like “legitimate policy objectives,” “legitimate public policy objectives,” and “legitimate public welfare objectives” in its IIAs. As this section shows, these terms have gradually been integrated into various agreements and model treaties. This evolution is primarily in response to criticisms of these agreements, a reflection of Canada’s extensive experience as a respondent state and a result of a desire to offer clearer guidance for tribunals. In this section, we examine how Canada’s approach to incorporating these terms has been shaped by its experience in negotiating major agreements such as *CETA*,²⁵ *CPTPP*,²⁶ and *CUSMA*.²⁷ Canada’s efforts to safeguard its regulatory autonomy is reflected in the evolution of key treaty provisions, including the right to regulate, minimum standard of treatment, national treatment, MFN treatment, performance requirements, and expropriation. By analyzing these provisions, we trace how this threefold distinction has evolved in Canada’s 2021 Model FIPA.

A. Legitimate policy objectives

i. Right to regulate

The extent to which the protection of foreign investment can conflict with the right of states to regulate is a long-standing debate. For example, Kate Miles has highlighted “the polarization of positions that continues to inform the relationship between the investment sector and those supporting the need for host state environmental policy space within international investment regimes.”²⁸ The absence of textual guidance in IIAs may have prompted tribunals to heavily sanction regulatory actions that have had a negative impact on foreign investment, regardless of the legitimate objectives underlying the measures adopted by the host states.

Canada’s experience as a respondent state under Chapter 11 of *NAFTA* was pivotal in shaping its approach to investment agreements, particularly in safeguarding the “right to regulate.”²⁹ Early cases like *Ethyl Corporation v Government of*

²⁵*CETA*, *supra* note 13.

²⁶*CPTPP*, *supra* note 14.

²⁷*CUSMA*, *supra* note 15.

²⁸Miles, *supra* note 4 at 11.

²⁹Wolfgang Alschner, “The Negotiation, Diffusion, and Legacy of *NAFTA* Chapter 11: An Empirical Eulogy” (2023) 60 *Can YB Intl L* 137.

Canada³⁰ and *SD Myers v Government of Canada*³¹ exposed the risks that investment treaties could pose to legitimate regulatory actions. In *Ethyl*, Canada faced a challenge to its ban on a gasoline additive, ultimately settling with compensation to the investor. Similarly, in *SD Myers*, a tribunal ruled that Canada's temporary ban on the export of hazardous polychlorinated biphenyl (PCB) wastes violated NAFTA's national treatment obligation. These rulings raised concerns about the potential for investment agreements to interfere with regulatory measures. In response, Canada reviewed its FIPA model in 2004. The aim of the review was to address these concerns by including provisions that explicitly safeguarded the government's right to regulate in the public interest, particularly in areas like health, safety, and environmental protection.³²

This evolving approach was reinforced further when Canada began to embed clearer safeguards for regulatory autonomy in its agreements, setting a key precedent with CETA. Article 8.9 of CETA explicitly affirms the right of Canada and the European Union to regulate in pursuit of "legitimate policy objectives," including public health, safety, and environmental protection.³³ This provision directly addresses concerns over regulatory chill, alleviating fears that governments might avoid legitimate regulatory actions due to potential investor claims. By emphasizing regulatory autonomy, CETA counters criticisms that investment agreements undermine public policy objectives and directs tribunals to respect the government's prerogative to regulate in the public interest. Canada's experience with CETA also shaped its approach during the *Canada-Chile Free Trade Agreement* update negotiations.³⁴ In these negotiations, Canada advocated for a general right-to-regulate clause similar to the approach in CETA. The resulting agreement indicates Canada's effort to balance regulatory autonomy and investor protection, also referring to the right of each party to regulate to achieve "legitimate policy objectives."³⁵

The culmination of this evolving practice is evident in the 2021 Model FIPA. Article 3 of the document explicitly reaffirms each party's right to regulate in pursuit of legitimate policy objectives, stating: "Each Party has the right to regulate within its territory to achieve legitimate policy objectives, such as the protection of public health, safety, the environment, public morals, social or consumer protection, or the promotion and protection of cultural diversity."³⁶ This provision represents a significant evolution in Canada's treaty practice, emphasizing regulatory sovereignty while ensuring that states can enact public interest measures without breaching their investment obligations. By explicitly affirming "legitimate policy objectives," the 2021 Model FIPA seeks to establish guidance to tribunals that bona fide regulatory actions should not be easily construed as treaty violations.

³⁰*Ethyl Corporation v Government of Canada*, UNCITRAL, Award on Jurisdiction (24 June 1998).

³¹*SD Myers, Inc v Government of Canada*, UNCITRAL, Partial Award (13 November 2000).

³²Canada 2004 Model FIPA, *supra* note 10.

³³CETA, *supra* note 13, art 8.9.

³⁴*Canada-Chile Free Trade Agreement*, 5 December 1996 (entered into force 5 July 1997, modernized version entered into force 5 February 2017), online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/2017_Amend_Modif-App1-Chap-G.aspx?lang=eng&ga=2.215917399.1562755871.1728402919-1524420296.1705590025> [*Canada-Chile FTA*].

³⁵*Ibid.*, art G-01(3).

³⁶Canada 2021 Model FIPA, *supra* note 12, art 3.

ii. *Minimum Standard of Treatment*

A key element of Canada's updated treaty practice that has been reflected in the 2021 Model FIPA relates to the explicit articulation of the minimum standard of treatment. Canada's experiences under earlier agreements, particularly *NAFTA*, exposed the risks that vague definitions of fair and equitable treatment (FET) posed to legitimate objectives. In cases like *Metalclad Corporation v United Mexican States*, a tribunal found that Mexico had violated the FET standard due to transparency obligations, even though the regulatory actions were aimed at environmental protection.³⁷ This broad interpretation of FET raised concerns that legitimate state actions could be unduly constrained by investor claims, even in areas of critical public concern such as health and environmental protection.³⁸ The NAFTA Free Trade Commission's 2001 note of interpretation was an early step in addressing these issues, clarifying that FET did not require treatment beyond customary international law.³⁹ However, the need for more precise language remained, particularly to protect states' regulatory authority in areas of public welfare.

The 2021 Model FIPA represents a culmination of these lessons. It does not refer to FET and narrows the minimum standard of treatment by clearly defining key terms like "manifest arbitrariness," ensuring that tribunals afford deference to state measures that are rationally connected to "legitimate policy objectives." Article 8 of the 2021 Model FIPA provides a detailed definition of "manifest arbitrariness": "For greater certainty, 'manifest arbitrariness' means a measure or series of measures that exhibit a willful disregard of due process of law, an act that shocks or at least surprises a sense of judicial propriety, or a measure or series of measures that lack a rational connection to the objectives purportedly being pursued by the government."⁴⁰

In a footnote, the 2021 Model FIPA further clarifies that "[a] measure is manifestly arbitrary when it is evident that the measure is not rationally connected to a legitimate policy objective, such as when a measure is based on prejudice or bias rather than on reason or fact."⁴¹ By linking manifest arbitrariness to the absence of a rational connection to legitimate policy objectives, the 2021 Model FIPA thus ensures that tribunals assess state actions based on their procedural fairness and rationality rather than merely on their adverse effects on investors. This approach reflects Canada's intent to prioritize the protection of public policy measures while still offering investors a transparent and predictable framework.

B. *Legitimate public policy objectives*

i. *National treatment and MFN treatment*

One intersection point between substantive protections and legitimate objectives in international investment law can be found in non-discrimination requirements. As far as national treatment and MFN treatment are concerned, distinctions based on

³⁷ *Metalclad Corporation v United Mexican States*, Award, ICSID Case no ARB(AF)/97/1 (30 August 2000), para 99 [*Metalclad*, Award].

³⁸ *Metalclad Corporation v United Mexican States*, Submission of the Government of Canada, ICSID Case no ARB(AF)/97/1 (28 July 1999).

³⁹ NAFTA Free Trade Commission, "Notes of Interpretation of Certain Chapter 11 Provisions" (31 July 2001), online: <www.sice.oas.org/tpd/nafta/commission/CH11understanding_e.asp>.

⁴⁰ Canada 2021 Model FIPA, *supra* note 12, art 8.

⁴¹ *Ibid*, n 1.

the origins of foreign investors or foreign investment undoubtedly constitute a breach of international investment obligations. However, several international investment tribunals have dismissed claims based on a breach of national treatment or MFN treatment if a measure adopted by the host state sufficiently pursues a legitimate objective.⁴²

The 2021 Model FIPA introduces a notable shift in how Canada approaches the application of national treatment and MFN treatment standards, particularly with regard to “like circumstances.” Articles 5(4) and 6(4) both incorporate “legitimate public policy objectives” into the analysis of “like circumstances,” stating: “Whether treatment is accorded in ‘like circumstances’ depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public policy objectives.”⁴³ These provisions allow host states to justify differential treatment between investors or investments, provided the distinctions are based on legitimate public policy objectives. This change provides much-needed clarity to both states and investors. By recognizing that differentiated treatment may be justified where it serves public interest goals — such as environmental protection, health, safety, and economic development — the 2021 Model FIPA introduces a more balanced framework for assessing national treatment and MFN treatment claims.

In earlier investment treaties, the concept of “like circumstances” was often left undefined, leading to interpretative challenges for tribunals. A key case exemplifying these challenges was *Pope & Talbot v Government of Canada*, in which a US investor argued that Canada’s export controls on softwood lumber violated NAFTA’s national treatment provision.⁴⁴ The investor contended that it was treated less favourably than domestic Canadian companies that were not subject to the same export controls. The tribunal struggled to assess whether the Canadian government’s actions amounted to discrimination in “like circumstances.” Canada defended its measures, arguing that they were necessary to fulfill obligations under a bilateral agreement designed to manage exports of softwood lumber to the United States.⁴⁵ However, the tribunal lacked a clear framework to balance Canada’s legitimate objectives against the alleged unequal treatment of foreign investors. As a result, the decision focused heavily on comparing the treatment of the investor to domestic companies, without fully accounting for the broader public policy context that justified Canada’s actions.⁴⁶ This case underscored the need for clearer guidance on how tribunals should assess the role of public policy in the “like circumstances” analysis.

The incorporation of legitimate public policy objectives into the assessment of “like circumstances” reflects a broader international trend in modern treaties signed

⁴²See e.g. Nicholas DiMascio & Joost Pauwelyn, “Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?” (2008) 102 Am J Intl L 48; Nicolas F Diebold, “Standards of Non-Discrimination in International Economic Law” (2011) 60 ICLQ 831; Andrew D Mitchell et al, *Non-Discrimination and the Role of Regulatory Purpose in International Trade and Investment Law* (Cheltenham, UK: Edward Elgar, 2016) at 138–39.

⁴³Canada 2021 Model FIPA, *supra* note 12, arts 5(4), 6(4).

⁴⁴*Pope & Talbot Inc v Government of Canada*, UNCITRAL, Interim Award (26 June 2000) [*Pope & Talbot*, Interim Award].

⁴⁵See *Pope & Talbot Inc v Government of Canada*, Government of Canada Counter Memorial (29 March 2000) at paras 4, 19.

⁴⁶*Pope & Talbot*, Interim Award, *supra* note 44 at paras 77–104.

by Canada, although it does so by using different terms. The investment chapters in *CPTPP* and *CUSMA* stress that the consideration of “like circumstances” requires an analysis of the totality of circumstances, “including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.”⁴⁷ As mentioned in a “Drafters’ Note” elaborated during the negotiation of the original *Trans-Pacific Partnership*, the parties considered that like circumstances “include not only competition in the relevant business or economic sectors, but also such circumstances as the applicable legal and regulatory frameworks and whether the differential treatment is based on legitimate public welfare objectives.”⁴⁸ By embedding legitimate public policy objectives into the 2021 Model FIPA, Canada aligns itself with a broader trend that recognizes the importance of preserving regulatory flexibility for states but through slightly different terms.

ii. Performance requirements

Article 12 of Canada’s 2021 Model FIPA outlines prohibitions on certain performance requirements, which is a common feature of investment treaties. However, it includes key exceptions for measures that are necessary to achieve “legitimate public policy objectives.” With respect to specific performance requirements, the text states that they shall not prevent a party from adopting or maintaining a measure to achieve a legitimate public policy objective, provided that the measure: (1) is not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade and (2) does not impose restrictions greater than are required to achieve the objective.⁴⁹

This exception mirrors the carve-outs found in *CPTPP*⁵⁰ and *CUSMA*⁵¹ regarding obligations on cross-border data transfers, including the imposition of a necessity test.⁵² Although the 2021 Model FIPA follows an exception that partly recalls the introductory paragraph of Article XX of the *General Agreement on Tariffs and Trade*,⁵³ it goes further by employing clearer language and extends to all “legitimate public policy objectives,” offering broader coverage. By contrast, earlier versions of the exception focused on measures deemed necessary to “meet generally applicable health, safety, or environmental requirements.”⁵⁴ Moreover, during the 2021 Model FIPA review, Canada elected not to subject Article 12 to ISDS.⁵⁵ As a result, it can be inferred that this decision may have influenced Canada’s choice to broaden the

⁴⁷ *CPTPP*, *supra* note 14, ch 9, n 14; *CUSMA*, *supra* note 15, arts 14.4(4), 14.5(4).

⁴⁸ “Drafters’ Note on the Interpretation of ‘In Like Circumstances’ under Article 9.4 (National Treatment) and Article 9.5 (Most-Favoured-Nation Treatment)” (n.d.) at para 3, online: <www.mfat.govt.nz/assets/Trade-agreements/CPTPP/Interpretation-of-In-Like-Circumstances.pdf>.

⁴⁹ Canada 2021 Model FIPA, *supra* note 12, art 12(3)(f).

⁵⁰ *CPTPP*, *supra* note 14, art 14.11(3), 14.13(3).

⁵¹ *CUSMA*, *supra* note 15, art 19.11(2).

⁵² Canada 2021 Model FIPA, *supra* note 12, art 12(3)(f)(a–b).

⁵³ *General Agreement on Tariffs and Trade*, 30 October 1947, 58 UNTS 187 (entered into force 1 January 1948), art XX (“[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade”).

⁵⁴ See e.g. *Canada-Chile FTA*, *supra* note 34, art G-06(2).

⁵⁵ Canada 2021 Model FIPA, *supra* note 12, art 24(2).

scope of the carve-out beyond the more limited focus on health, safety, and the environment.

Once again, the inclusion of exceptions for legitimate public policy objectives in performance requirements under the 2021 Model FIPA aligns with broader global trends in investment treaty reform. This evolution mirrors developments in other modern treaties, such as *CPTPP* and *CUSMA*, both of which provide a similar exception that nevertheless uses the terms “legitimate public welfare objectives.”⁵⁶ The use of “legitimate public policy objectives” in the context of performance requirements thus differs from IIAs previously signed by Canada.

C. Legitimate public welfare objectives

Attempts to limit the scope of the host state’s obligations regarding expropriation have often relied on the “police powers” doctrine under customary international law. The doctrine refers to measures adopted by a state under its sovereign powers and that do not amount to a compensable deprivation of property rights.⁵⁷ In an often-cited quote, the tribunal in *Methanex Corporation v United States of America* established that “as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alia, a foreign investor or investment is not deemed expropriatory and compensable.”⁵⁸

It is within this broader context that Article 9(3) of the 2021 Model FIPA addresses the conditions under which indirect expropriation occurs under the agreement.⁵⁹ Without expressly relying on the “police powers” doctrine, it explains that, even if a measure has an impact similar to direct expropriation, non-discriminatory measures aimed at protecting “legitimate public welfare objectives” — such as health, safety, or the environment — are not considered indirect expropriations. These determinations require a fact-based inquiry on a case-by-case basis to assess the measure’s effects.

The inclusion of such language evolved from Canada’s experiences and other international developments. Earlier cases like *Metalclad v Mexico* had blurred the lines between regulation and expropriation.⁶⁰ The 2004 Model FIPA included an annex influenced by *NAFTA* tribunals’ interpretations and the desire to provide clearer guidance.⁶¹ To enhance transparency and cohesion, the 2021 Model FIPA incorporates what was previously included in the annex into the body of the article. More specifically, it defines indirect expropriation as a measure or series of measures that, while not involving formal seizure, have effects equivalent to direct expropriation, resulting in the substantive deprivation of an investment. The concept of a “series of measures”⁶² is also included, referring to incremental government actions

⁵⁶*CPTPP*, *supra* note 14, art 9.10(3)(h); *CUSMA*, *supra* note 15, art 14.10(3)(g).

⁵⁷See e.g. Andrew Newcombe, “The Boundaries of Regulatory Expropriation in International Law” (2005) 20 ICSID Rev 1; Jorge E Viñuales, “Customary Law in Investment Regulation” (2014) 23 Italian YB Intl L Online 23.

⁵⁸*Methanex Corporation v United States of America*, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005), Part IV, ch D at 4.

⁵⁹Canada 2021 Model FIPA, *supra* note 12, art 9(3).

⁶⁰*Metalclad*, Award, *supra* note 37.

⁶¹Canada 2004 Model FIPA, *supra* note 10, Annex B.13(1).

⁶²Canada 2021 Model FIPA, *supra* note 12, art 9(3).

that, when considered cumulatively, amount to expropriation, even if no single measure constitutes a direct taking. Examples of such actions include forced divestment, interference in management rights, refusal of access to resources, or excessive taxation.

Unlike other IIAs signed by Canada, the 2021 FIPA avoids the inclusion of “except in rare circumstances” when defining which regulatory actions do not constitute indirect expropriation.⁶³ Moreover, Canada’s choice to use concise language such as “adopted or maintained in good faith” likely reflects an intent to provide clearer guidance to tribunals while ensuring flexibility in interpretation. By avoiding more complex concepts like “rare circumstances” or references to measures being “so severe” as to breach good faith, Canada may be aiming to streamline the text, allowing tribunals to interpret public welfare measures with fewer constraints. This phrasing seems designed to make the 2021 Model FIPA adaptable to a wider range of circumstances, ensuring that tribunals focus on the core principle of good faith without being bound by overly rigid evaluative criteria.

3. The interpretation of “legitimate objectives” by investment arbitration tribunals

The previous section has explored the origins and the rationale for the inclusion of different forms of “legitimate objectives” in Canada’s 2021 Model FIPA, in line with broader concerns in international investment law. While this development can be explained from an investment policy perspective, one wonders if these terms — that is, “legitimate policy objectives,” “legitimate public policy objectives,” and “legitimate public welfare objectives” — have been interpreted differently by international investment arbitration tribunals. This section thus examines whether different forms of “legitimate objectives” have generated any meaningful outcomes in the interpretation of international investment obligations. Despite some dominant trends, tribunals have often referred to them interchangeably and without establishing any difference in the scope of each concept. In other words, tribunals have relied on these terms without articulating any legally significant distinction among them.

Some clarifications regarding the methodology underlying this section are worth noting. By using the full text search tool of the Investor-State Law Guide database,⁶⁴ we retrieved all decisions from tribunals including at least one reference to “legitimate policy objectives,” “legitimate public policy objectives,” or “legitimate public welfare objectives.” In order to provide a comprehensive understanding of the use of these three different terms in international investment arbitration, the decisions discussed here are not limited to disputes involving Canada as a respondent state or Canadian foreign investors as claimants. To the extent that a decision includes at least one reference to one of the three forms of legitimate objectives analyzed in the present article, it has been considered in the analysis. As of July 2024, this led to the identification of fifty-four decisions from tribunals (that is, procedural orders, decisions on jurisdiction, awards, and dissenting opinions). When reading these decisions, some synonyms were also considered (for example, “legitimate policy

⁶³ See e.g. Canada 2004 Model FIPA, *supra* note 10, Annex B.13(1)(c); CUSMA, *supra* note 15, Annex 14-b (3)(b).

⁶⁴ *Investor-State Law Guide*, online: <new.investorstatelawguide.com>.

goals”) to capture slightly different words that were used by tribunals. The remainder of this section summarizes the findings for each form of legitimate objectives.

A. Legitimate policy objectives

The terms “legitimate policy objectives” undoubtedly refer to a very broad scope of regulatory issues. Rather than being tied to a specific standard of protection, it appears that “legitimate policy objectives” can thus be used when discussing almost any potential violations of international investment obligations. In other words, as far as decisions from tribunals are concerned, the use of “legitimate policy objectives” has not been limited to the interpretation of specific substantive standards and has served to encapsulate a broad range of regulatory objectives.

i. Arguments of disputing parties

One instance in which decisions from international investment arbitration tribunals have broadly referred to “legitimate policy objectives” is when summarizing the arguments of disputing parties. For example, the claimants in *AES Corporation and Tau Power BV v Republic of Kazakhstan* repeatedly referred to “legitimate policy objectives” or “legitimate policy goals” when articulating their claims pertaining to non-impairment provisions,⁶⁵ the free transfer of capital,⁶⁶ and FET.⁶⁷ In *Lone Pine Resources v Government of Canada*, the tribunal reported that Canada relied on these terms in its arguments pertaining to an alleged breach of the FET standard, stressing that the protection of a watercourse constituted a “legitimate policy objective” on which the impugned legislation to revoke exploration permits was based.⁶⁸ Tribunals have also sometimes generally summarized the claims of the disputing parties by referring to “legitimate policy objectives” or strongly related synonyms, without focusing on a specific substantive provision of the applicable IIA.⁶⁹

In addition to summarizing the position of the disputing parties, tribunals have included in their decisions a summary of the position of non-disputing parties elaborated in separate submissions. One of these submissions was provided by Canada in *Red Eagle Exploration Limited v Republic of Colombia*.⁷⁰ In this submission, Canada referred to the binding decision of the Canada-Colombia Joint Commission Interpretation of Certain Chapter Eight Provisions, which provides the following: “Whether treatment is accorded in ‘like circumstances’ under Article 803 and 804 depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or covered investments on the

⁶⁵*AES Corporation and Tau Power BV v Republic of Kazakhstan*, Award, ICSID Case No ARB/10/16 (1 November 2016) at para 326 [*AES and Tau Power*, Award].

⁶⁶*Ibid* at para 356.

⁶⁷*Ibid* at para 386. See also *Global Telecom Holding SAE v Canada*, Award, ICSID Case No ARB/16/16 (27 March 2020) at para 531 [*Global Telecom*, Award].

⁶⁸See *Lone Pine Resources Inc v Government of Canada*, Final Award, ICSID Case No UNCT/15/2 (21 November 2022) at para 563 [*Lone Pine*, Final Award].

⁶⁹See e.g. *AES and Tau Power*, Award, *supra* note 65 at para 341; *EBL (Genossenschaft Elektra Baselland) and Tubo Sol PE2 SL v Kingdom of Spain*, Award, ICSID Case No ARB/18/42 (11 January 2024) at para 593 [*EBL and Tubo*, Award].

⁷⁰*Red Eagle Exploration Limited v Republic of Colombia*, Award, ICSID Case No ARB/18/12 (28 February 2024) at para 288 [*Red Eagle*, Award].

basis of *legitimate policy objectives*.⁷¹ Interestingly, and in a way that differs from Canada's 2021 Model FIPA, this use of "legitimate policy objectives" is specifically tied to national treatment and MFN treatment.

ii. *Right to regulate*

Some tribunals have referred to "legitimate policy objectives" to generally assess the nature of a measure adopted by the respondent state, without linking the use of these terms to the actual content of the applicable IIA. An example of this can be found in the award in *AES and Tau Power v Kazakhstan*. Before engaging with breaches of actual provisions of the applicable agreement, the tribunal assessed the objectives underlying the measures adopted by the respondent state. According to the tribunal, "the underlying policy goal of avoiding a shortage in electricity supply by incentivizing increased investments in the electricity sector is per se a *legitimate policy goal*, which may justify the taking of certain measures."⁷² With respect to both the expropriation claim and the FET claim, the tribunal in *Marfin Investment Group Holdings SA, Alexandros Bakatselos and Others v Republic of Cyprus* emphasized that investment arbitration tribunals are not supposed "to evaluate the substantive correctness of economic and policy choices made by States."⁷³ When addressing the FET claim, the tribunal mentioned that it "should not determine, with the benefit of hindsight, whether the challenged measures were the best solution that could have preserved the investors' interests and could have achieved the *legitimate policy goal* being pursued."⁷⁴ In both instances, the acknowledgement by the tribunal of a legitimate policy objective underlying the measure is not tied to a specific substantive standard.

iii. *FET*

Tribunals have also relied on "legitimate policy objectives" when interpreting the FET standard, particularly under the *Energy Charter Treaty* (ECT).⁷⁵ One key example is found in *Electrabel SA v Hungary* and concerns the use of a proportionality test to determine whether a measure is "arbitrary."⁷⁶ In its decision, the tribunal mentioned that "a measure will not be arbitrary if it is reasonably related to a rational policy" and that "the impact of the measure on the investor be proportional to the policy objective sought."⁷⁷ The tribunal concluded the elaboration of the standard for arbitrariness by mentioning that "[t]he test for proportionality has been developed from certain municipal administrative laws, and requires the measure to be suitable to achieve a *legitimate policy objective*, necessary for that objective, and not excessive considering the relative weight of each interest involved."⁷⁸

⁷¹*Ibid* at para 288 [emphasis added].

⁷²*AES and Tau Power*, Award, *supra* note 65 at para 361 [emphasis added]; see also at para 363.

⁷³*Marfin Investment Group Holdings SA, Alexandros Bakatselos and Others v Republic of Cyprus*, Award, ICSID Case No ARB/13/27 (26 July 2018) at para 1213 [*Marfin*, Award].

⁷⁴*Ibid* at para 1213 [emphasis added].

⁷⁵*Energy Charter Treaty*, 17 December 1994, 2080 UNTS 95 (entered into force 16 April 1998).

⁷⁶*Electrabel SA v Hungary*, Award, ICSID Case No ARB/07/19 (25 November 2015) [*Electrabel*, Award].

⁷⁷*Ibid* at para 171.

⁷⁸*Ibid* at para 171 [emphasis added].

This interpretation was subsequently used in the tribunal's reasoning in *Antaris GmbH and Dr Michael Göde v Czech Republic*,⁷⁹ *Cavalum SGPS, SA v Kingdom of Spain*,⁸⁰ *EBL (Genossenschaft Elektra Baselland) and Tubo Sol PE2 SL v Kingdom of Spain*,⁸¹ *Hydro Energy 1 SARL and Hydroxana Sweden AB v Kingdom of Spain*,⁸² *Infracapital F1 SARL and Infracapital Solar BV v Kingdom of Spain*,⁸³ and *RWE Innogy GmbH and RWE Innogy Aersa SAU v Kingdom of Spain*.⁸⁴ Such references to a "legitimate policy objective" are in line with the use of this term in the footnote of Canada's 2021 Model FIPA that relates to the minimum standard of treatment.⁸⁵ However, this seemingly consistent approach adopted by tribunals results more from the citation of a specific excerpt from the award in *Electrabel v Hungary* than an actual attempt to preserve the use of these terms to address arbitrariness under the FET standard.

Other tribunals have relied on "legitimate policy objectives" in the context of the FET standard but in a way that goes beyond the analysis of arbitrariness. In a dispute based on a bilateral investment treaty between Canada and Egypt, the tribunal found that the claimant had "not met its burden of proving that the Transfer Framework was not based on legal standards, reflected an excess of discretion, prejudice or personal preference, or was politically motivated and without any *legitimate policy objective*."⁸⁶ In *Muszynianka Spółka z Ograniczona Odpowiedzialnoscia v Slovak Republic*, the decision of the tribunal includes several references to "legitimate policy objectives" as part of an analysis of the reasonableness of the measures adopted by the host state, without referring to their arbitrary character.⁸⁷ After emphasizing that "[i]nvestment treaty arbitration tribunals owe deference to States in determining what serves as a legitimate public purpose,"⁸⁸ the tribunal considered that "[e]nvironmental preservation, public health, and seeking to regulate the use of natural resources in an informed and optimal fashion all represent core State functions and thus *legitimate policy objectives*."⁸⁹ In another general discussion about deference and the minimum standard of treatment, the tribunal in *Resolute Forest Products v Government of Canada* stressed that one could not establish that the government of Nova Scotia "acted on anything but

⁷⁹*Antaris GmbH and Dr Michael Göde v Czech Republic*, Award, PCA Case No 2014-01 (2 May 2018), n 548.

⁸⁰*Cavalum SGPS, SA v Kingdom of Spain*, Decision on Jurisdiction, Liability and Directions on Quantum, ICSID Case No ARB/15/34 (31 August 2020) at para 415.

⁸¹*EBL and Tubo*, Award, *supra* note 69, n 1538.

⁸²*Hydro Energy 1 SARL and Hydroxana Sweden AB v Kingdom of Spain*, Decision on Jurisdiction, Liability and Directions on Quantum, ICSID Case No ARB/15/42 (9 March 2020) at paras 573–74, 676 [*Hydro Energy 1 and Hydroxana*, Decision on Jurisdiction, Liability and Directions on Quantum].

⁸³*Infracapital F1 SARL and Infracapital Solar BV v Kingdom of Spain*, Decision on Jurisdiction, Liability and Directions on Quantum, ICSID Case No ARB/16/18 (13 September 2021) at paras 659, 661.

⁸⁴*RWE Innogy GmbH and RWE Innogy Aersa SAU v Kingdom of Spain*, Decision on Jurisdiction, Liability, and Certain Issues of Quantum, ICSID Case No ARB/14/34 (30 December 2019) at para 570.

⁸⁵Canada 2021 Model FIPA, *supra* note 12, n 1.

⁸⁶*Global Telecom*, Award, *supra* note 67 at para 564 [emphasis added]. See also *ibid* at para 571.

⁸⁷*Muszynianka Spółka z Ograniczona Odpowiedzialnoscia v Slovak Republic*, Award, PCA Case No 2017-08 (7 October 2020) [*Muszynianka*, Award].

⁸⁸*Ibid* at para 546.

⁸⁹*Ibid* at para 550 [emphasis added].

rational and *legitimate policy goals* through measures falling within the scope of government prerogatives.”⁹⁰

In sum, with the exception of references to these terms in the context of the standard of arbitrariness as part of FET, tribunals have expressly relied on “legitimate policy objectives” in ways that often amount to a “catch-all” phrase. Whether summarizing the arguments of the disputing parties or articulating their own reasoning, they have referred to these terms in a manner that is quite general and not strictly tied to specific provisions of IIAs.

B. Legitimate public policy objectives

In a way that reflects the use of “legitimate policy objectives,” it is rather difficult to identify a common pattern in the use of the terms “legitimate public policy objectives” in investment arbitration. When one considers submissions from various parties and the reasoning of tribunals, it is clear that the latter have been used for a broad range of substantive standards. Even if some tribunals have relied on these terms when assessing the existence of “like circumstances” to determine whether provisions on national treatment or MFN treatment have been breached, the case law does not suggest any strong connection between “legitimate public policy objectives” and these provisions from a legal perspective.

i. Arguments of disputing parties

Once again, some examples of a broad range of substantive standards for which “legitimate public policy objectives” have been used can be found in the sections of decisions where tribunals have summarized the arguments of the disputing parties. In *Hesham Talaat M Al-Warraq v Republic of Indonesia*, the tribunal reported that these terms were used by the claimant in the context of its expropriation claim.⁹¹ Before arguing that the measure adopted by the respondent state did not meet this requirement, the claimant recalled that “[i]t is a general rule of customary international law that a bona fide regulatory act that genuinely pursues a *legitimate public policy objective* and complies with the requirements of non-discrimination, due process and proportionality may not be designated as expropriatory, despite an adverse economic impact.”⁹² In *Copper Mesa Mining Corporation v Republic of Ecuador*, the tribunal emphasized that the respondent state referred to “legitimate public policy measures” when refuting that the measures amounted to expropriation.⁹³

The terms have also sometimes been used in a very broad sense. In *Gardabani Holdings BV and Silk Road Holdings BV v Georgia*, the tribunal recalled that the respondent state denied the breach of “any provision of the [bilateral investment treaty]” as its conduct “was transparent and reasonable and was guided by a

⁹⁰ *Resolute Forest Products Inc v Government of Canada*, Final Award, PCA Case No 2016-13 (25 July 2022) at para 746 [*Resolute Forest Products*, Final Award] [emphasis added].

⁹¹ *Hesham Talaat M Al-Warraq v Republic of Indonesia*, Final Award (15 December 2014).

⁹² *Ibid* at para 303 [emphasis added].

⁹³ *Copper Mesa Mining Corporation v Republic of Ecuador*, Award, PCA Case No 2021-2 (15 March 2016) at paras 6.12 [*Copper Mesa*, Award].

legitimate public policy objective.”⁹⁴ Another interesting use of slightly different terms can be found in the argument provided by the respondent state in *Copper Mesa v Ecuador*. After citing the provision of the applicable bilateral investment treaty that includes general exceptions, the tribunal provided the following:

According to the Respondent, the Mining Mandate was adopted for the *legitimate public policy purposes* of protecting public health and the environment where the requirement to consult the local population on the basis of an [environmental impact study] was specifically intended to protect the residents and local communities and to reduce the environmental impacts of mining activities. ... These measures were not, according to the Respondent, arbitrary, unjustifiable or inconsistent with the Treaty.⁹⁵

The reliance on these terms does not seem to suggest any specific limitation with respect to the objectives that they encapsulate. According to the respondent, measures to protect both public health and the environment are considered as “legitimate public policy purposes.”⁹⁶

Even in the absence of the terms under the applicable treaty, the express consideration of “legitimate public policy objectives” in the “like circumstances” analysis has played a role more recently in *Resolute Forest Products v Canada*. In this case, the tribunal recalled that, according to Canada, “public policy may justify differential treatment by demonstrating that the treatment in question bears a ‘reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investments’”⁹⁷ and that financial assistance to domestic industry can help achieve “a number of legitimate public policy objectives.”⁹⁸ Similarly, when summarizing the arguments of the respondent state, the tribunal in *Thomas Gosling et al v Republic of Mauritius* recalled that “the existence of a *legitimate public policy objective* on the part of the State is ... fundamental to the identification of a comparator and the question of whether there has been a difference in treatment.”⁹⁹

ii. Expropriation

Tribunals have also relied on “legitimate public policy objectives” in the interpretation of various substantive standards in their reasoning. With respect to expropriation claims, the tribunal in *Sodexo Pass International SAS v Hungary* distinguished between a *bona fide* regulatory measure and an indirect expropriation, stressing that “non-discriminatory measure or series of measures by a Party that are designed and applied to protect *legitimate public policy objectives* do not constitute indirect

⁹⁴*Gardabani Holdings BV and Silk Road Holdings BV v Georgia*, Award, ICSID Case No ARB/17/29 (27 October 2022) at para 421 [*Gardabani and Silk Road*, Award] [emphasis added].

⁹⁵*Copper Mesa*, Award, *supra* note 93 at para 6.16.

⁹⁶Interestingly, the claimant responded to this argument by using the terms “legitimate policy objectives.” See *ibid* at para 6.19.

⁹⁷*Resolute Forest Products*, Final Award, *supra* note 90 at para 520.

⁹⁸*Ibid* at para 520.

⁹⁹*Thomas Gosling et al v Republic of Mauritius*, Award, ICSID Case No ARB/16/32 (18 February 2020) at para 183 [emphasis added].

expropriation.”¹⁰⁰ When examining the reason provided by the respondent state for the adoption of a measure in *British Caribbean Bank Limited (Turks & Caicos) v Government of Belize*, the tribunal had to assess whether it had been adopted for public purpose.¹⁰¹ Having accepted “that a State is entitled to broad latitude to devise its public policy as it sees fit,” the tribunal rejected that “the mere avoidance of payment, without more, can serve as a *legitimate public policy objective* for the expropriation of property.”¹⁰² In *Marfin v Cyprus*, the tribunal considered two measures pertaining to a bank’s management and recapitalization as “non-discriminatory, proportional measures taken in good faith in the exercise of Cyprus’ regulatory powers in the pursuit of a *legitimate public policy objective* — the protection of the health of Cyprus’ financial system during a time of profound economic crisis.”¹⁰³

iii. Minimum standard of treatment and FET

“Legitimate public policy objectives” have also been used in the context of alleged breaches of the FET standard. In *Mamidoil Jetoil Greek Petroleum Products Societe SA v Republic of Albania*, the tribunal considered that measures pertaining to land use and change in zoning regulations “pursued a *legitimate objective of public policy*, were carried out in a transparent way, were proportionate and not arbitrary, and did not lead to unreasonable instability.”¹⁰⁴ In *Silver Ridge Power BV v Italian Republic*, the tribunal relied on these terms as part of its analysis of an alleged frustration of the claimant’s legitimate expectations.¹⁰⁵ The same terms were used by other tribunals when determining whether the respondent state had unreasonably impaired the investment¹⁰⁶ or when determining whether there was evidence of fraud and corruption on the side of the foreign investor.¹⁰⁷

A decision related to a dispute based on *NAFTA* illustrates the use of “legitimate public policy objectives” when addressing an alleged discriminatory treatment of a foreign investor as part of the analysis of a potential violation of the minimum standard of treatment. In *Merrill & Ring Forestry LP v Government of Canada*, the tribunal examined whether the measures benefited a particular domestic sawmill to the detriment of the foreign investor.¹⁰⁸ The tribunal considered that “there is a substantial argument in Canada’s favor that this reflects a *legitimate public policy objective*: i.e., the creation of domestic employment and the retention in Canada of

¹⁰⁰*Sodexo Pass International SAS v Hungary*, Award, ICSID Case No ARB/14/20 (28 January 2019) at para 260 [emphasis added].

¹⁰¹*British Caribbean Bank Limited (Turks & Caicos) v Government of Belize*, Award, PCA Case No 2010-18 (19 December 2014).

¹⁰²*Ibid* at para 236 [emphasis added].

¹⁰³*Marfin*, Award, *supra* note 73 at para 830.

¹⁰⁴*Mamidoil Jetoil Greek Petroleum Products Societe SA v Republic of Albania*, Award, ICSID Case No ARB/11/24 (30 March 2015) at para 657 [emphasis added]; see also at para 667; *Muszynianka*, Award, *supra* note 87 at paras 557, 565; *Red Eagle*, Award, *supra* note 70 at paras 312–13.

¹⁰⁵*Silver Ridge Power BV v Italian Republic*, Award, ICSID Case No ARB/15/37 (26 February 2021) at para 452.

¹⁰⁶*Gardabani and Silk Road*, Award, *supra* note 94 at para 663.

¹⁰⁷*JSC DTEK Krymenergo (Ukraine) v Russian Federation*, Award, PCA Case No 2018-41 (1 November 2023) at para 611.

¹⁰⁸*Merrill & Ring Forestry LP v Government of Canada*, Award (31 March 2010) at para 235.

part of the timber value chain that would otherwise go to foreigners as a result of the export of unprocessed logs.”¹⁰⁹ Articulating issues pertaining to the minimum standard of treatment, the promotion of domestic industry, and the legitimate objectives pursued by the host state, it provided the following:

It is non-controversial that the Tribunal’s task is not to pass judgment on the policy legitimacy of Canada’s log export regime, but only to determine in this case whether its application breaches the minimum standard of treatment for aliens. ... The fact that its chosen regulatory instrument imposes a degree of constraint on the freedom of other Canadian based businesses, particularly the timberland owners, to export their unprocessed logs may properly be seen as a *legitimate public policy consequence* of its chosen industrial policy.¹¹⁰

iv. Non-discrimination

One can also encounter references to “legitimate public policy objectives” when interpreting provisions pertaining to national treatment and MFN treatment. In fact, the identification of instances where tribunals have expressly referred to “legitimate public policy objectives” is instructive to assess the inclusion of these terms in Canada’s 2021 Model FIPA. While it is clear that the practice of *NAFTA* tribunals has implied the consideration of legitimate objectives in the “like circumstances” analysis,¹¹¹ the terms “legitimate public policy objectives” have only recently been explicitly used in the context of specific provisions pertaining to national treatment and MFN treatment. In two separate opinions related to disputes decided under *NAFTA*, the terms that were used with respect to the analysis of “like circumstances” were “legitimate policy objectives”¹¹² and “legitimate public welfare reasons,”¹¹³ not “legitimate public policy objectives.” In other words, allowing more regulatory flexibility under national treatment and MFN treatment has not been strictly tied to the terms “legitimate public policy objectives,” at least as far as the case law is concerned.

While some references to “legitimate public policy objectives” can be noted in the interpretation of non-discrimination standards, disputing parties and tribunals have clearly not limited the use of these terms to these specific provisions. Such references have also emerged in discussions pertaining to expropriation, FET, and minimum standard of treatment. Moreover, although one could argue that “legitimate *public* policy objectives” are semantically intended to have a narrower scope than “legitimate policy objectives,” nothing in the use of these terms suggests any differences in the objectives that are covered by these two concepts. It is thus unclear from the analysis above whether “legitimate public policy objectives” serve a distinct legal purpose from “legitimate policy objectives.”

¹⁰⁹*Ibid* at para 235.

¹¹⁰*Ibid* at para 236.

¹¹¹See e.g. Titi, *Right to Regulate*, *supra* note 5 at 139–40.

¹¹²*SD Myers, Inc v Government of Canada*, Separate Opinion by Dr Bryan Schwartz (12 November 2000) at paras 129–31 [*SD Myers*, Separate Opinion]; *International Thunderbird Gaming Corporation v United Mexican States*, Separate Opinion (December 2005) at para 105.

¹¹³*SD Myers*, Separate Opinion, *supra* note 112 at para 137.

C. Legitimate public welfare objectives

In contrast to the other forms previously analyzed, “legitimate public welfare objectives” have benefited from a more consistent inclusion in the content of IIAs. As mentioned in the previous section, several agreements signed by the United States and Canada since 2004 include an annex on indirect expropriation, which generally provides that “non-discriminatory measures of a Party that are designed and applied to protect *legitimate public welfare objectives* ... do not constitute indirect expropriation.”¹¹⁴ The inclusion of this language in investment treaties and the existence of several disputes pertaining to indirect expropriation have arguably led to a significant engagement of investment arbitration tribunals with these terms. Although “legitimate public welfare objectives” are generally related to discussions on indirect expropriation, a more detailed analysis of these references nevertheless suggests that they have also been used in the context of other substantive standards and that their interpretation has not led to the identification of a clearly defined scope of objectives. In other words, “legitimate public welfare objectives” appear to have been used as a way to stress regulatory flexibility, broadly understood.

i. Direct citations and arguments of disputing parties

Several references to “legitimate public welfare objectives” in decisions of tribunals result from direct citations to provisions on indirect expropriation, either when tribunals articulate the legal framework or summarize the arguments of the disputing parties. As far as agreements signed by the United States are concerned, decisions related to disputes based on the investment chapters of the *Dominican Republic-Central America-United States Free Trade Agreement*,¹¹⁵ the *United States-Peru Trade Promotion Agreement*,¹¹⁶ the *United States-Panama Trade Promotion Agreement*,¹¹⁷

¹¹⁴See e.g. *Free Trade Agreement between Canada and the Republic of Peru*, 29 May 2008, Can TS 2009 No 15, Annex 812.1(c) (entered into force 1 August 2009) [emphasis added] [*Canada-Peru FTA*].

¹¹⁵*Dominican Republic-Central America-United States Free Trade Agreement*, 5 August 2004 (entered into force 1 March 2006), online: <ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>. See *David Aven et al v Republic of Costa Rica*, Final Award, ICSID Case No UNCT/15/3 (18 September 2018) at para 20 [*Aven et al*, Final Award]; *Michael Ballantine and Lisa Ballantine v Dominican Republic*, Final Award, PCA Case No 2016-17 (3 September 2019) at para 269 [*Ballantine*, Final Award]; *Spence International Investments, LLC, Berkowitz et al v Republic of Costa Rica*, Interim Award, ICSID Case No UNCT/13/2 (30 May 2017) at para 26 [*Spence International, Berkowitz et al*, Interim Award]; *Railroad Development Corporation v Republic of Guatemala*, Award, ICSID Case No ARB/07/23 (29 June 2012) at para 79 [*Railroad Development*, Award].

¹¹⁶*United States-Peru Trade Promotion Agreement*, 12 April 2006 (entered into force 1 February 2009), online: <ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>. See *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v Republic of Peru*, Final Award, ICSID Case No UNCT/18/2 (6 December 2022) at para 1190 [*Gramercy*, Final Award]; *Kaloti Metals & Logistics, LLC v Republic of Peru*, Award, ICSID Case No ARB/21/29 (14 May 2024) at paras 293, 300 and 314 [*Kaloti*, Award]; *Latam Hydro LLC and CH Mamacocha SRL v Republic of Peru*, Award, ICSID Case No ARB/19/28 (20 December 2023) at para 1010 [*Latam Hydro and CH Mamacocha*, Award].

¹¹⁷*United States-Panama Trade Promotion Agreement*, 28 June 2007 (entered into force 31 October 2012), online: <ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text>. See *Omega Engineering LLC and Oscar Rivera v Republic of Panama*, Award, ICSID Case No ARB/16/42 (14 October 2022) at para 119 [*Omega and Rivera*, Award].

and the *United States-Oman Free Trade Agreement*¹¹⁸ have thus expressly referred to “legitimate public welfare objectives” when citing this interpretive language. Likewise, decisions pertaining to disputes based on the *Free Trade Agreement between Canada and the Republic of Peru*,¹¹⁹ the *Free Trade Agreement between Canada and the Republic of Colombia (Canada-Colombia FTA)*,¹²⁰ and the *Agreement between the Government of Romania and the Government of Canada for the Promotion and Reciprocal Protection of Investments*¹²¹ have included a reference to “legitimate public welfare objectives” that results from direct citations to treaty language. The content of model bilateral investment treaties adopted by the United States and Canada was cited in other decisions, even if the disputes were based on agreements that did not involve these parties.¹²²

Other tribunals have referred to “legitimate public welfare objectives” when summarizing the arguments advanced by disputing parties, also in the context of indirect expropriation claims.¹²³ In *David Aven et al v Republic of Costa Rica*, the tribunal thus recalled the argument of the respondent state that it should “assess whether the actions of the host State are 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.”¹²⁴ The tribunal in *Montauk Metals v Republic of Colombia* stressed the effort made by the respondent state to link the protection of the environment to a “legitimate public welfare objective” in the context of an expropriation claim.¹²⁵ While the terms are absent from the applicable

¹¹⁸*United States-Oman Free Trade Agreement*, 19 January 2006 (entered into force 1 January 2009), online: <ustr.gov/trade-agreements/free-trade-agreements/oman-fta/final-text>. See *Adel A Hamadi Al Tamimi v Sultanate of Oman*, Award, ICSID Case No ARB/11/33 (3 November 2015) at para 346.

¹¹⁹*Canada-Peru FTA*, *supra* note 114. See *Bear Creek Mining Corporation v Republic of Perú*, Award, ICSID Case No ARB/14/21 (30 November 2017) at paras 336, 371 [*Bear Creek*, Award].

¹²⁰*Free Trade Agreement between Canada and the Republic of Colombia*, 21 November 2008, Can TS 2011 No 11 (entered into force 15 August 2011). See *Eco Oro Minerals Corp v Republic of Colombia*, Decision on Jurisdiction, Liability and Directions on Quantum, ICSID Case No ARB/16/41 (9 September 2021) at para 385 [*Eco Oro*, Decision on Jurisdiction, Liability and Directions on Quantum]; *Eco Oro Minerals Corp v Republic of Colombia*, Partial Dissent of Professor Philippe Sands QC, ICSID Case No ARB/16/41 (9 September 2021), n 2; *Montauk Metals Inc v Republic of Colombia*, Award, ICSID Case No ARB/18/13 (7 June 2024) at para 760 [*Montauk Metals*, Award]; *Red Eagle*, Award, *supra* note 70 at paras 344, 363, 398; *Red Eagle Exploration Limited v Republic of Colombia*, Dissenting Opinion of José a Martínez de Hoz, ICSID Case No ARB/18/12 (23 February 2024), n 137 [*Red Eagle*, Dissenting Opinion].

¹²¹*Agreement between the Government of Romania and the Government of Canada for the Promotion and Reciprocal Protection of Investments*, 8 May 2009, Can TS 2011 No X (entered into force 23 November 2011). See *Gabriel Resources Ltd and Gabriel Resources (Jersey) Ltd v Romania*, Award, ICSID Case No ARB/15/31 (8 March 2024) at para 928 [*Gabriel Resources*, Award].

¹²²*Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v Argentine Republic*, Dissenting Opinion of Dr Santiago Torres Bernádez, ICSID Case No Arb/14/32 (5 November 2021) at para 55 [*Casinos Austria*, Dissenting Opinion]; *Philip Morris Brands SARL et al v Oriental Republic of Uruguay*, Award, ICSID Case No ARB/10/7 (8 July 2016) at paras 300–01.

¹²³In addition to the references mentioned in the rest of this paragraph, see *Eco Oro*, Decision on Jurisdiction, Liability and Directions on Quantum, *supra* note 120 at para 535; *Gramercy*, Final Award, *supra* note 116 at para 747; *Kaloti*, Award, *supra* note 116 at para 305; *Windstream Energy LLC v Government of Canada (I)*, Award, PCA Case No 2013-22 (27 September 2016) at para 266 [*Windstream Energy (I)*, Award].

¹²⁴*Aven et al*, Final Award, *supra* note 115 at para 404.

¹²⁵*Montauk Metals*, Award, *supra* note 120 at para 672.

IIAs, the tribunal in *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* recalled the respondent state's argument that "there is a necessary presumption that states are regulating when they say they are regulating and, in this context, non-responsibility of the state must be presumed for non-discriminatory regulatory actions that are designed and applied to protect *legitimate public welfare objectives*, such as public health, safety and the environment."¹²⁶

States acting as non-disputing parties have routinely intervened to clarify the meaning of treaty language that pertains to indirect expropriation. For example, in *Bear Creek Mining Corporation v Republic of Perú*, the tribunal reproduced the arguments of Canada with respect to the interpretation of Annex 812.1. In its submission, Canada had argued that a "State is not required to compensate an investment for any loss sustained by the imposition of a non-discriminatory, regulatory measure designed and applied to protect *legitimate public welfare objectives*."¹²⁷ References to "legitimate public welfare objectives" in non-disputing party submissions from both Canada and the United States have been mentioned in decisions from other tribunals.¹²⁸ After having addressed the need to maintain regulatory flexibility to protect legitimate public welfare objectives, states acting as non-disputing parties have thus emphasized the relevance of this provision in a way that stresses the lack of requirement to compensate a foreign investor. However, one constant approach in these submissions is the absence of an attempt to strictly identify which objectives would fall under this category. For example, in *Eco Oro Minerals Corp v Republic of Colombia*, the tribunal interpreted the reference to "legitimate public welfare objectives" in Canada's non-disputing party submission as broadly referring to "measures taken pursuant to its police powers."¹²⁹

Other examples illustrate that "legitimate public welfare objectives" have been used outside the context of indirect expropriation. Despite a notable involvement to clarify the scope of indirect expropriation, the United States has also provided non-disputing party submissions that use these terms in relation to other substantive standards. In *Aven et al v Costa Rica*, the tribunal recalled the arguments of the United States regarding a provision establishing the minimum standard of treatment. After mentioning that "neither the concepts of 'good faith' nor 'legitimate expectations' are component elements of 'fair and equitable treatment' under customary international law that give rise to an independent host State obligation," the United States emphasized that "States may modify or amend their regulations to achieve *legitimate public welfare objectives* and will not incur liability under customary international law merely because such changes interfere with an investor's 'expectations' about the state of regulation in a particular sector."¹³⁰

¹²⁶*Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, Award, ICSID Case No ARB/97/3 (20 August 2007) at para 6.5.14 [emphasis added]. See also *Marfin*, Award, *supra* note 73 at para 908.

¹²⁷*Bear Creek*, Award, *supra* note 119 at para 338.

¹²⁸*Aven et al*, Final Award, *supra* note 115 at para 81; *Eco Oro*, Decision on Jurisdiction, Liability and Directions on Quantum, *supra* note 120 at para 617; *Infinito Gold Ltd v Republic of Costa Rica*, Award, ICSID Case No ARB/14/5 (3 June 2021) at para 695; *Latam Hydro and CH Mamacocha*, Award, *supra* note 116 at para 1239; *Montauk Metals*, Award, *supra* note 120 at paras 791–92.

¹²⁹*Eco Oro*, Decision on Jurisdiction, Liability and Directions on Quantum, *supra* note 120 at para 617.

¹³⁰*Aven et al*, Final Award, *supra* note 115 at para 80 [emphasis added]. See also *Windstream Energy (I)*, Award, *supra* note 123 at para 335. For an example pertaining to a non-disputing party submission by Mexico, see *Windstream Energy (I)*, Award, *supra* note 123 at para 346.

In other non-disputing party submissions, the United States has used the same terms when articulating its understanding of a provision pertaining to national treatment. For example, the tribunal in *Michael Ballantine and Lisa Ballantine v Dominican Republic* mentioned that the United States interpreted the terms “like circumstances” as encapsulating “all the circumstances, including whether the relevant treatment distinguished between investors or investments on the basis of *legitimate public welfare objectives*.”¹³¹ These references to “legitimate public welfare objectives” in the presentation of non-disputing party submissions suggest that the United States has broadly relied on these terms to address regulatory flexibility, regardless of the substantive standard that is interpreted.¹³²

ii. Expropriation

In light of all these references to “legitimate public welfare objectives” in the elaboration of the legal framework and submissions from various parties, one can expect that the terms have been explicitly considered by tribunals in their legal reasoning. *Eco Oro v Colombia* is an example where the tribunal expressly relied on the language included in the provisions of Annex 811 of the *Canada-Colombia FTA*. After qualifying provision 2(b) of the annex (that is, the provision that includes the reference to “legitimate public welfare objectives”) as an “exception,” the tribunal considered the provision “as a reflection or explanation of the factors that are relevant to the expropriation inquiry.”¹³³ By majority, the tribunal concluded that the measures adopted by Colombia “were non-discriminatory and designed and applied to protect a *legitimate public welfare objective*, namely the protection of the environment.”¹³⁴ This led the majority of the tribunal to ultimately dismiss the indirect expropriation claim.¹³⁵ Although one member of the tribunal dissented, he nevertheless conceded that environmental protection was included in the “legitimate public welfare objectives” mentioned in the Annex and that the purpose of the measures adopted by Colombia qualified for this designation.¹³⁶

In another dispute involving Colombia and based on similar regulatory measures, the tribunal in *Montauk Metals v Colombia* also used the terms “legitimate public welfare objectives” when assessing the indirect expropriation claim. The tribunal described the interpretive annex of the applicable agreement as “an explanation of the factors relevant to determine the existence of an indirect expropriation when dealing

¹³¹ *Ballantine*, Final Award, *supra* note 115 at para 338 [emphasis added]. See also *Elliott Associates, LP (USA) v Republic of Korea*, Award, PCA Case No 2018-51 (20 June 2023) at para 660; *Gramercy*, Final Award, *supra* note 116 at para 776; *Mason Capital LP (USA) and Mason Management LLC (USA) v Republic of Korea*, Final Award, PCA Case No 2018-55 (11 April 2014) at para 784.

¹³² Such an absence of distinction is sometimes a reflection of international investment agreements (IIAs) signed by the United States. For example, in the *Free Trade Agreement between the United States of America and the Republic of Korea*, “legitimate public welfare objectives” are mentioned in provisions dealing with national treatment and expropriation. See *Free Trade Agreement between the United States of America and the Republic of Korea*, 30 June 2007 (entered into force 15 March 2012), art 11.3 and Annex 11-B, online: <ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>.

¹³³ *Eco Oro*, *Decision on Jurisdiction, Liability and Directions on Quantum*, *supra* note 120 at para 629.

¹³⁴ *Ibid* at para 642 [emphasis added].

¹³⁵ *Ibid* at para 699.

¹³⁶ *Eco Oro Minerals Corp v Republic of Colombia*, Partial Dissenting Opinion of Horacio A Grigera Naón, ICSID Case No ARB/16/41 (9 September 2021) at para 28.

with a measure pursuant of a *legitimate public welfare purpose*.¹³⁷ Following the interpretation of the annex by the tribunal in *Eco Oro v Colombia*, the tribunal ultimately concluded that the measures at hand were not expropriatory. Among the steps of its finding, it emphasized that the measures “were designed and applied to protect the páramo ecosystems, which constitutes a *legitimate public welfare objective*.”¹³⁸

The consideration of “legitimate public welfare objectives” in some tribunals’ reasoning when assessing an indirect expropriation claim has nevertheless been quite limited. One example can be found in *Bear Creek v Peru*, when the tribunal determined whether the measure adopted by the respondent state was a valid exercise of police powers. Despite referring to Canada’s submission as a non-disputing party, the tribunal considered that Canada’s position “must be taken into account in the context of the specific provisions provided in the [free trade agreement].”¹³⁹ The tribunal subsequently focused on the general exceptions provided in the free trade agreement and considered that “no other exceptions from general international law or otherwise can be considered applicable in this case,” without examining the role of the annex that refers to measures designed to protect “legitimate public welfare objectives.”¹⁴⁰ Granted, the main issue underlying this reasoning was the tension between the elaboration of a regime of general exceptions and the police powers of the host state, not the interpretation of “legitimate public welfare objectives” *per se*. Yet the decision illustrates how tribunals might fail to fully appreciate the guidance provided in the text of the applicable treaty and the attempt to improve regulatory flexibility when interpreting investment obligations. This point is further explored in the final section of the article.

Even in the absence of a reference to “legitimate public welfare objectives” in the applicable treaty, some tribunals have interpreted investment obligations regarding indirect expropriation by relying on these terms. In *Hydro Energy 1 and Hydroxana v Spain*, the tribunal identified some basic principles underlying Article 13(1) the ECT. Among these principles, it considered that “a State is not required to compensate an investment for any loss sustained by the imposition of a non-discriminatory, regulatory measure designed and applied to protect *legitimate public welfare objectives*.”¹⁴¹ Such an interpretation suggests a fairly broad acceptance of the relevance of these terms when assessing an indirect expropriation claim under international investment law more generally.

To a certain extent, the inclusion of “legitimate public welfare objectives” in the content of IIAs has streamlined the engagement of tribunals and disputing parties with this form of legitimate objectives when addressing claims of indirect expropriation. Of course, some direct citations to provisions that include a consideration of “legitimate public welfare objectives” have not been followed by any consideration in the actual reasoning of the tribunal.¹⁴² However, being able to explicitly rely on the language included in an annex that is intended to provide guidance to determine

¹³⁷ *Montauk Metals*, Award, *supra* note 120 at para 761 [emphasis added].

¹³⁸ *Ibid* at para 826 [emphasis added].

¹³⁹ *Bear Creek*, Award, *supra* note 119 at para 471.

¹⁴⁰ *Ibid* at para 473.

¹⁴¹ *Hydro Energy 1 and Hydroxana*, Decision on Jurisdiction, Liability and Directions on Quantum, *supra* note 82 at para 534 [emphasis added].

¹⁴² See e.g. *Spence International, Berkowitz et al*, Interim Award, *supra* note 115 at para 26; *Casinos Austria*, Dissenting Opinion, *supra* note 122 at para 55; *Gabriel Resources*, Award, *supra* note 121 at para 928; *Red*

whether an indirect expropriation has occurred has led several parties to expressly rely on “legitimate public welfare objectives.” This ultimately suggests that various actors involved in the settlement of investment disputes — including non-disputing parties — have somehow engaged with changes that have been made by states in the content of IIAs. Yet the use of these terms in the context of other substantive standards should not be obfuscated.

To sum up, the case law provides some form of a basis to justify the distinction between different forms of “legitimate objectives” that is now included in Canada’s 2021 Model FIPA. For each group of terms, one can see examples that align with its use in the model agreement. It is also clear that references to these terms when establishing the applicable law, summarizing the arguments of the parties or articulating the findings of the tribunal all relate to the regulatory flexibility that host states retain under international investment law. Beyond this common denominator, two points are worth mentioning. First, the use of each phrase has not been limited to specific substantive standards in international investment law. While some terms have been predominantly used in the interpretation of specific standards, they have also been mentioned to refer to several provisions. Second, the practice of tribunals does not suggest that these distinct terms entail any difference in the scope of regulatory flexibility. Parties and tribunals have mostly argued that the purpose of a specific regulatory measure fits the scope of specific terms (for example, the protection of public health, the environment or domestic financial system), without actually seeking to determine whether these distinct forms of “legitimate objectives” entail different scopes. An analysis of decisions from tribunals thus demonstrates that the various forms of “legitimate objectives” have not become distinct legally significant terms as far as the interpretation of international investment obligations is concerned.

One could argue that the interchangeable use of these terms in decisions from investment arbitration tribunals is ultimately reflected in Canada’s 2021 Model FIPA. In other words, given the absence of any meaningful distinction regarding the legal signification of these various forms of “legitimate objectives,” Canada has never intended to draw a distinction between these terms in its model treaty. This argument nevertheless fails to address the fact that the 2021 Model FIPA departs from the more consistent use of “legitimate public welfare objectives” in *CUSMA*.¹⁴³ It would be quite puzzling to suggest that Canada, when developing its own model treaty, has chosen a more detailed approach regarding “legitimate objectives” with the mere intent of using synonyms. While assuming that the distinction found in Canada’s 2021 Model FIPA is not fortuitous, an analysis of the practice of investment arbitration tribunals suggests that it does not rely on a legally significant distinction.

4. Implications of the 2021 Model FIPA’s Approach

There is an interesting tension regarding the use of “legitimate objectives” by Canada. On the one hand, the 2021 Model FIPA’s attempt to improve regulatory flexibility

Eagle, Dissenting Opinion, *supra* note 120, n 137; *Railroad Development*, Award, *supra* note 115 at para 79; *Omega and Rivera*, Award, *supra* note 117 at para 119.

¹⁴³See the discussion referring to the importance of the distinction between the three sets of terms in the introduction of the article.

includes a careful distinction between different forms of “legitimate objectives” used in distinct provisions. On the other hand, an analysis of decisions from investment arbitration tribunals suggests that the attempted distinction has not emerged as a legally significant one. All three phrases — that is, “legitimate policy objectives,” “legitimate public policy objectives,” and “legitimate public welfare objectives” — have been used for claims regarding various substantive standards and without any attempt to precisely define their scope. Although adding more language to investment treaties with a view to preserving regulatory flexibility is crucial, this section seeks to highlight some implications of the approach adopted in Canada’s 2021 Model FIPA. More specifically, it shows that the inclusion of various forms of “legitimate objectives” can lead to more arguments revolving around the political motivations underlying regulatory measures and does not guarantee the preservation of the legality of measures that would otherwise be inconsistent with investment obligations.

A. Political motivations underlying regulatory measures

The three groups of terms included in Canada’s 2021 Model FIPA to address “legitimate objectives” emphasize the inevitable political nature of the motivations underlying the regulatory measures adopted by states. By relying on “policy,” “public policy,” or “public welfare,” states are making a political choice when seeking to protect “legitimate objectives.” Yet presenting a measure as politically motivated is sometimes used to highlight its illegality under international investment law.¹⁴⁴ While useful to stress the regulatory flexibility of states when defining the scope of investment obligations, these various forms of “legitimate objectives” can thus become the basis for arguments by claimants that depict regulatory measures as inconsistent with international investment obligations.

One illustration of this tension between “political motivations” and “legitimate objectives” can be found in the *Bear Creek v Peru* award with respect to the claim of indirect expropriation. The tribunal referred to the testimony of the claimant’s witness, which confirmed that the decree challenged by the claimant “was not designed and applied to protect a *legitimate public welfare objective*.”¹⁴⁵ According to the witness, the adoption of the decree was championed by the founder of the Frente de Defensa de los Recursos Naturales de la Zona Sur de Puno, an alliance of local communities, as part of his “political platform.”¹⁴⁶ The position of the witness was summarized as follows:

Respondent implemented Supreme Decree 032 in an effort to *placate political pressure*, which is not a *legitimate public welfare objective*. That Respondent adopted Supreme Decree 032 with other interconnected measures intended to address the *full range of the protests* is nothing more than a veiled attempt to legitimize the admittedly unconstitutional decree. Even Respondent’s government

¹⁴⁴A theoretical basis for this point can be found in Martti Koskeniemi’s work on the politics of international law. See e.g. Martti Koskeniemi, “The Politics of International Law” (1990) 1 Eur J Intl L 4 at 5 (“[t]he fight for an international Rule of Law is a fight against politics, understood as a matter of furthering subjective desires and leading into an international anarchy”).

¹⁴⁵*Bear Creek*, Award, *supra* note 119 at para 349 [emphasis added].

¹⁴⁶*Ibid* at para 349.

officials have stated that cancellation of the Santa Ana Mining Concession due to *political protests* was illegal and unconstitutional.¹⁴⁷

Implicitly, the claimant's witness thus suggested that a measure adopted by a state as a response to political protest could not be reconciled with the "legitimate public welfare objectives" mentioned in the applicable investment agreement.

In response to these concerns, the tribunal mentioned that the respondent had stressed the legitimate nature of the adopted decree. More specifically, "Supreme Decree 032 addresses a *legitimate public welfare objective* — promoting public safety and safeguarding the integrity of Respondent's constitutional and regulatory system for natural resources."¹⁴⁸ According to the respondent, suggesting that the decree was "politically motivated is unsupported, illogical, and at odds with considerable witness testimony."¹⁴⁹ These arguments were taken into consideration by the tribunal when determining whether the "social unrest" could justify the derogation of the previous decree that authorized the claimant to acquire, own, and operate the mining concession.¹⁵⁰ Even after recalling the "strong political pressure on Respondent," the tribunal considered that, "while politically plausible for a government to take any action which it hopes to [solve the unrest], the issues for the present Tribunal are whether the unrest was caused by or can be attributed to Claimant and whether Respondents action depriving Claimant of the rights it had been granted ... was legally justified."¹⁵¹ The tribunal subsequently turned to an analysis of whether the claimant had obtained the "social license" to operate the concessions and concluded that the respondent in hindsight could not consider that the claimant's conduct had caused or contributed to the social unrest in the region.¹⁵² Most importantly, this analysis was concluded without any reference to the "legitimate public welfare objectives," which were nevertheless mentioned in the applicable agreement.

The tension between the political motivation underlying the regulatory measures and the legitimate objectives pursued by the host state have also been mentioned by tribunals in other disputes. For example, the respondent in *Copper Mesa v Ecuador* reportedly denied that the resolutions pertaining to the termination of another mining concession "were adopted for 'political' reasons or as a result of political lobbying."¹⁵³ According to Ecuador, "they were legitimate measures taken to implement the Mining Mandate, which served *legitimate public policy purposes* and addressed issues of serious public concern."¹⁵⁴ When determining whether the measures were arbitrary, unreasonable, and lacked transparency, the tribunal in *Global Telecom Holding SAE v Canada* highlighted an important inconsistency in the claimant's argument. According to the tribunal, "Wind Mobile's acknowledgment that 'the Government's primary policy objective' was 'to create, enhance, and sustain competition in the Canadian wireless telecommunications market' contradicts GTH's argument that the Transfer Framework was *politically-motivated*, and

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid* at para 363 [emphasis added].

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid* at para 401.

¹⁵¹ *Ibid.*

¹⁵² *Ibid* at para 412.

¹⁵³ *Copper Mesa*, Award, *supra* note 93 at para 6.36.

¹⁵⁴ *Ibid* at para 6.36 [emphasis added].

adopted to ‘deflect public criticism’ rather than to advance a *legitimate policy objective*.¹⁵⁵

To be clear, the idea here is not to suggest that tribunals will inevitably conclude that the characterization of a measure as politically motivated implies a violation of international investment law. The point is merely to stress that, even with refined language regarding various forms of “legitimate objectives,” claimants can — and have already sought to — make arguments that highlight the political motivations underlying the disputed regulatory measures. Given the broad and undefined scope of these terms in IIAs, it is up to tribunals to decide whether these politically motivated measures still fall under the scope of the “legitimate objectives” that can be adopted by states. Some tribunals might be more responsive to this type of argument and conclude that the identification of political motivations may contribute to finding a breach of treaty obligations. Stated in the words of Martti Koskenniemi, it ultimately becomes a “political choice” of tribunals to decide whether the political motivations that are inherent to the adoption of regulatory measures to protect legitimate objectives lead to a violation of international investment law.¹⁵⁶ Further distinguishing between various forms of “legitimate objectives” can thus be considered to be linked to the indeterminacy of international investment law. As suggested in the following subsection, a clearly established list of legitimate objectives that could be used to justify a violation of another provision of the agreement could potentially circumscribe the political choice of tribunals and further support regulatory flexibility.

B. An imperfect tool to avoid state liability

Requiring the consideration of the right to protect “legitimate objectives” when determining whether a breach of international investment law has occurred can leave more space for states to adopt regulatory measures. Yet the fact that the three forms of “legitimate objectives” have been included in Canada’s 2021 Model FIPA without a regime of general exceptions — and considering that Canada has emerged as a pioneer regarding the inclusion of general exceptions in IIAs — is notable.¹⁵⁷ The open-ended nature of all three forms of “legitimate objectives” implies that tribunals have a lot of discretion when deciding whether a regulatory measure falls under the scope of these terms. In a way that relates to the point mentioned in the previous subsection, a tribunal could find that a measure violates an international investment obligation if it considers that it does not pursue a legitimate objective. Except for the reference to “legitimate public policy objectives” in the provision pertaining to performance requirements, “legitimate objectives” are not included in the model agreement as providing a legal exception. While multiple forms of “legitimate objectives” can contribute to improve regulatory flexibility, such an approach is an imperfect substitute for other provisions that allow states to avoid liability for the adoption of specific types of measures.

Once again, the content of decisions from tribunals that refer to various forms of “legitimate objectives” is instructive to understand the mutually supportive role of provisions that clarify the scope of substantive standards and those that establish a

¹⁵⁵ *Global Telecom*, Award, *supra* note 67 at para 565 [emphasis added].

¹⁵⁶ Koskenniemi, *supra* note 144 at 7.

¹⁵⁷ See e.g. Titi, *Right to Regulate*, *supra* note 5 at 169.

regime of general exceptions. As mentioned above, some tribunals have seemed to confuse the two. In *Eco Oro v Colombia*, the tribunal considered the provision referring to “legitimate public welfare objectives” in the interpretative annex regarding indirect expropriation as an “exception.”¹⁵⁸ However, other decisions have rendered a genuine effort to distinguish between the two. When referring to a non-disputing party submission in *Latam Hydro LLC and CH Mamacocha SRL v Republic of Peru*, the tribunal stressed the United States’ position that such a provision “should not be construed as an exception, but as additional guidance for tribunals to assess whether an indirect expropriation has occurred.”¹⁵⁹

Granted, the recent practice of investment arbitration tribunals suggests significant issues regarding the interpretation of general exceptions. Wolfgang Alschner and Kun Hui have concluded that these exceptions have been “missing in action.”¹⁶⁰ So far, tribunals have interpreted general exceptions in a way that does not excuse the liability of states. For example, the tribunal in *Copper Mesa v Ecuador* confused the analysis of police powers doctrine and the general exceptions provision.¹⁶¹ In *Bear Creek v Peru*, the tribunal concluded that the existence of a closed list of general exceptions prevented the application of the police powers doctrine¹⁶² and that such exceptions do not “offer any waiver from the obligation ... to compensate for the expropriation.”¹⁶³

A similar approach was adopted by the tribunal in *Eco Oro v Colombia*. Having found that the respondent state had not accorded a treatment in accordance with the minimum standard of treatment,¹⁶⁴ the majority of the tribunal considered that the provision of the applicable agreement establishing general exceptions could not be construed as a way to avoid the liability of the state and the payment of a compensation.¹⁶⁵ In a way that considers the guidance pertaining to the interpretation of indirect expropriation as being more relevant to avoid liability than the general exceptions, the majority of the tribunal provided the following:

[B]y prohibiting an investor from applying for restitution pursuant to Article 834(2)(b), the State is not precluded from adopting or enforcing the measure in question. Equally, however, there is no provision in Article 2201(3) permitting such action to be taken without the payment of compensation. Given that the [free trade agreement] is equally supportive of investment protection, had it been the intention of the Contracting Parties that a measure could be taken pursuant to Article 2201(3) without any liability for compensation, the Article would have been drafted in similar terms as Annex 811(2)(b).¹⁶⁶

This interpretation was also followed more recently by the majority of the tribunal in *Montauk Metals v Colombia*,¹⁶⁷ although it did not have to apply the provision given

¹⁵⁸*Eco Oro*, Decision on Jurisdiction, Liability and Directions on Quantum, *supra* note 120 at para 629.

¹⁵⁹*Latam Hydro and CH Mamacocha*, Award, *supra* note 116 at para 1239.

¹⁶⁰Alschner & Hui, *supra* note 7. See also Wolfgang Alschner, *Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes* (Oxford: Oxford University Press, 2022) at 162–66.

¹⁶¹*Copper Mesa*, Award, *supra* note 93 at para 6.58.

¹⁶²*Bear Creek*, Award, *supra* note 119 at paras 473–74.

¹⁶³*Ibid* at para 477.

¹⁶⁴*Eco Oro*, Decision on Jurisdiction, Liability and Directions on Quantum, *supra* note 120 at para 821.

¹⁶⁵*Ibid* at para 829.

¹⁶⁶*Ibid* [emphasis added].

¹⁶⁷*Montauk Metals*, Award, *supra* note 120 at para 976.

the absence of a breach of a substantive provision.¹⁶⁸ All these examples of problematic interpretation of general exceptions relate to provisions found in IIAs signed by Canada.

Some authors have acknowledged important limits to general exceptions in international investment law.¹⁶⁹ Arguing that the inclusion of general exceptions in IIAs creates some uncertainty, they have suggested that clarifying the substantive obligations constitutes “the better way forward” or “a preferable approach.”¹⁷⁰ It has even been suggested that providing an exhaustive list of objectives that can be pursued by states in a general exception regime can ultimately be interpreted in a way that limits the flexibility included in the content of substantive provisions.¹⁷¹ This approach is reflected in Canada’s 2021 Model FIPA. The threefold distinction of “legitimate objectives” is part of a broader effort to deepen the precision of substantive protections and provide a more interpretative context rather than relying on general exceptions. In a detailed comment on Canada’s 2021 Model FIPA, Céline Lévesque and Christian Schmid suggest that the clarification regarding the consideration of “legitimate public policy objectives” when conducting a “like circumstances” analysis under the national treatment and MFN treatment provisions may explain why Canada is more comfortable with the idea of removing general exceptions.¹⁷² More broadly, Charles H. Brower II’s praise of the Canadian model agreement is based on these efforts to add precision to provisions, which he considers as “cutting off virtually every avenue for second-guessing the normal operations of modern regulatory states.”¹⁷³ After stressing that the tribunal’s decision in *Eco Oro v Colombia* shows how interactions among primary obligations and exceptions can be hard to predict, he doubts that similar problems would arise under Canada’s 2021 Model FIPA.¹⁷⁴

While one can accept that considering the regulatory flexibility included in the substantive standards can theoretically remove the need to rely on general exceptions, this position assumes that arbitrators will effectively give meaning to the more precise language when interpreting primary obligations. It is questionable whether tribunals that have erroneously interpreted general exceptions by failing to acknowledge the absence of state liability would have adequately interpreted more precise substantive provisions. At the very least, it is useful to stress that provisions clarifying the right of states to protect various forms of “legitimate objectives” and general exceptions do not serve the same purposes from a legal perspective and can coexist in the same agreement.¹⁷⁵ Adding different forms of “legitimate objectives” when clarifying the scope of provisions or stressing the right to regulate thus does not excuse the liability of states if arbitrators fail to appreciate the greater precision included in the text of recent

¹⁶⁸ *Ibid* at para 984. See also *Red Eagle*, Award, *supra* note 70 at para 428.

¹⁶⁹ See e.g. Newcombe, “Use of General Exceptions,” *supra* note 7; Lévesque, “Inclusion,” *supra* note 7; Henckels, “Should Investment Treaties,” *supra* note 7.

¹⁷⁰ See Newcombe, “Use of General Exceptions,” *supra* note 7 at 269; Henckels, “Should Investment Treaties,” *supra* note 7 at 2839. However, Henckels adds that “at least as long as current institutional arrangements for ISDS persist, exceptions may be an important failsafe against erroneous interpretations of the substantive obligations.” See *ibid* at 2843–44.

¹⁷¹ See e.g. Newcombe, “Use of General Exceptions,” *supra* note 7 at 278–79; Henckels, “Should Investment Treaties,” *supra* note 7 at 2836–37.

¹⁷² Lévesque & Schmid, *supra* note 11 at 679–80.

¹⁷³ Brower, *supra* note 17 at 5.

¹⁷⁴ *Ibid* at 112.

¹⁷⁵ See e.g. Spears, *supra* note 1 at 1059–60.

IAs. Even if general exceptions imply a narrower scope of legitimate objectives, the possibility that arbitrators do not fully take into consideration the flexibility included in the content of substantive investment protections is a strong argument that shows the importance of preserving general exceptions in IAs.

One could also argue that the absence of general exceptions has not prevented the interpretation of international obligations in a way that is favorable to the protection of legitimate objectives in other areas of international law. For example, none of the provisions of the *Agreement on Technical Barriers to Trade* can be considered as providing a regime of general exceptions.¹⁷⁶ When interpreting the provision imposing a non-discrimination requirement, the Appellate Body nevertheless considered that discrimination against imported products resulting from “legitimate regulatory distinctions” would not violate this provision.¹⁷⁷ Such a reasoning is in line with the broader interpretation of “like circumstances” in the 2021 Model FIPA. While providing a comforting interpretation of international obligations that considers legitimate objectives, it must be stressed that this use was limited to the non-discrimination obligation and that the international investment arbitration regime does not currently include an appeal mechanism similar to the Appellate Body. Once again, expressly providing general exceptions in the text of the model would be a more prudent approach.

Interestingly, the choice made by Canada to remove general exceptions from its 2021 Model FIPA is hardly reconcilable with its own position in a submission as a non-disputing party in *Eco Oro v Colombia*.¹⁷⁸ When interpreting the relation between general exceptions and investment obligations, Canada mentioned that “[m] any of the investment provisions contain their own flexibilities that determine whether regulatory action is legitimate or if it amounts to a breach of an obligation.”¹⁷⁹ Even if Canada considered that “legitimate regulatory actions will rarely need to be justified on the basis of the general exception ... because they will not constitute breaches of the investment obligations in the first place,” it nevertheless stressed the importance of general exceptions as a “safety net” that is intended “to protect the State’s exercise of regulatory power in pursuit of the specific legitimate objectives identified in the exceptions.”¹⁸⁰ This conceptualization of general exceptions as a safety net is particularly relevant in a context where Canada’s 2021 Model FIPA relies on different forms of “legitimate objectives” with a view to inducing flexibilities in various investment obligations.

Overall, explicitly providing that provisions in an IIA must be interpreted by considering “legitimate objectives” is relevant to improving regulatory flexibility. There are nevertheless some implications that are related to the efforts deployed by Canada in its most recent Model FIPA to distinguish between various forms of such objectives. By highlighting the political nature inherent in the objectives that are sought, the three sets of terms used in the 2021 Model FIPA can easily lead to legal

¹⁷⁶ *Agreement on Technical Barriers to Trade*, 15 April 1994, 1868 UNTS 120 (entered into force 1 January 1995).

¹⁷⁷ *United States – Measures Affecting the Production and Sale of Clove Cigarettes (Complaint by Indonesia)*, Appellate Body Report, WTO Doc WT/DS406/AB/R (2012) at para 175.

¹⁷⁸ *Eco Oro Minerals Corp v Republic of Colombia*, Non-Disputing Party Submission of Canada, ICSID Case No ARB/16/41 (27 February 2020).

¹⁷⁹ *Ibid* at para 19.

¹⁸⁰ *Ibid* at para 20.

arguments that seek to present measures adopted by host states as “political” and inconsistent with international investment obligations. Moreover, despite the carefully elaborated threefold distinction, more guidance and precision pertaining to the scope of substantive standards does not provide a substitution for general exceptions that can allow states to avoid liability for measures that would otherwise be inconsistent with the rest of the applicable agreement.

5. Conclusion

The threefold distinction of “legitimate objectives” included in Canada’s 2021 Model FIPA has not emerged out of thin air. When looking at previous agreements and some trends in international investment arbitration, one can identify the roots of this development in the Canadian investment treaty policy. However, the analysis above demonstrates that “legitimate policy objectives,” “legitimate public policy objectives,” and “legitimate public welfare objectives” have not emerged as distinct legally significant terms. Instead of providing a consistent approach, decisions from investment arbitration tribunals have often interchangeably relied on these phrases when interpreting various substantive protections and have not sought to define a clear scope for each group of terms. In addition to the absence of distinct legally significant terms, the threefold distinction can even lead to unintended consequences: arguments focusing on “legitimate objectives” can facilitate the emergence of a stronger focus on the political motivations underlying regulatory measures, and the efforts to clarify the scope of primary obligations can obfuscate the need for a regime of general exceptions that can excuse state liability for regulatory measures that are otherwise inconsistent with the applicable agreement.

These findings have broader implications for Canada’s investment treaty policy. It is clear that the distinction between “legitimate policy objectives,” “legitimate public policy objectives,” and “legitimate public welfare objectives” has been included to support the host state’s right to regulate in the context of different provisions. It is also clear that improving the clarity and the precision of substantive standards requires some innovations in terms that are used by states when drafting their IIAs. It must nevertheless be acknowledged that the approach adopted in Canada’s 2021 Model FIPA also induces some form of uncertainty. Since a broader acceptance of the terms used in the model agreement by reproducing them in IIAs could eventually lead to more solid foundations for the legal significance of various forms of “legitimate objectives,” preserving regulatory flexibility is best served by conjugating the approach with other tools — including by (re)integrating general exceptions — in these same agreements.