Queen Mary University of London
Centre for Commercial Law Studies

TradeLab

International Economic Law Clinic

POTENTIAL INVESTMENT TREATY CLAIMS ARISING OUT OF MEASURES IMPLEMENTING CHILE'S INTERNATIONAL CLIMATE CHANGE COMMITMENTS

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Table of Abbreviations

ASEAN	Association of Southeast Asian Nations
BIT	bilateral investment treaty
CCAC	Climate and Clean Air Coalition
CAFTA	Central America Free Trade Area
CIL	customary international law
COMESA	Common Market for Eastern and Southern Africa
CO_2	carbon dioxide
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
EU	European Union
EU EPA	EU Economic Partnership Agreements
FDI	foreign direct investment
FET	fair and equitable treatment
FTA	free trade agreement
GDP	gross domestic product
GHG	greenhouse gas
GSP	Generalised System of Preferences
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IGSD	Institute for Governance and Sustainable Development
IIA	international investment agreement
IISD	International Institute for Sustainable Development
ISDS	investor-state dispute settlement
IUSCT	Iran-United States Claims Tribunal
LCIA	London Court of International Arbitration
LLCPs	long-lived climate pollutants
MFN	most favoured nation
NAFTA	North American Free Trade Agreement
NDC	Nationally Determined Contributions
OECD	Organisation for Economic Co-operation and Development

PCA	Permanent Court of Arbitration
PM	particulate matter
SCC	Stockholm Chamber of Commerce
SDG	Sustainable Development Goals
SLCPs	short-lived climate pollutants
SNAP	Supporting National Planning and Action on SLCPs
TPP	Trans-Pacific Partnership
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

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Executive Summary

This report appraises the extent to which Chile's obligations under international investment agreements may thwart Chile's implementation of its international and domestic climate change commitments under the 2015 Paris Agreement, its 2020 Updated Nationally Determined Contributions and its 2022 Framework Law on Climate Change. Chile's predicament, similar to many other countries, is how to maintain sufficient regulatory space to adopt climate change related mitigation and adaptation measures while remaining credibly committed to attracting foreign investment through existing or future international investment agreements.

The **key features of this report** are as follows:

- Analysing the elements of relevant clauses – particularly fair and equitable treatment and expropriation clauses – in light of the relevant jurisprudence of arbitral tribunals (Section 2.1);
- Analysing Chile's regulatory space using a sample of first-generation international investment agreements: the Chile-France BIT (signed in 1992), and the Chile-United Kingdom BIT (signed in 1996) (Section 2.2);
- Analysing Chile's regulatory space using a sample of next-generation international investment agreements: the investment chapter of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed in 2018), and the investment chapter of the Canada-Chile Free Trade Agreement (signed in 1996, amended in 2019) (Section 2.3);
- Providing an analysis of Chile's evolving regulatory space over time in light of the contrast provided by the sample of agreements from distinct generations (Section 2.4);
- Identifying and analysing the potential investment treaty claims arising in connection with a hypothetical climate change mitigation measure (Section 3).

The reports answers **two fundamental questions**:

1. To what extent have the international investment agreements that Chile has entered over the decades affected Chile's regulatory space? (Section 2)

2. What are the risks of investment treaty claims arising from measures adopted to implement Chile's international climate change commitments? (Section 3)

Evolution of Chile's Regulatory Space

Section 1 introduces the report and highlights the significance of the questions examined.

Section 2 examines the evolution of Chile's regulatory space. In this section, the report compares a sample of first-generation international investment agreements to a sample of next-generation investment agreements concluded by Chile so as to determine the extent to which Chile's regulatory space has shrunk or has been shielded over time. The first-generation agreements reviewed in the report are (1) the 1992 Chile-France BIT and (2) the 1996 Chile-United Kingdom BIT, and the next-generation agreements reviewed are (3) the investment chapter of the 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership and (4) the investment chapter of the 2019 revised Canada-Chile Free Trade Agreement. The report focuses on a number of key provisions in these agreements, namely fair and equitable treatment clauses, expropriation clauses, as well as exception clauses in the next-generation agreements. Based on the analysis of these clauses, the report concludes that Chile's regulatory space has been increasingly protected against potential investment treaty claims in the drafting of its international investment agreements over time. The diagram below summarizes the findings of the report in this regard (see Section 2.4 for a more detailed diagram as well as further discussion around this diagram):

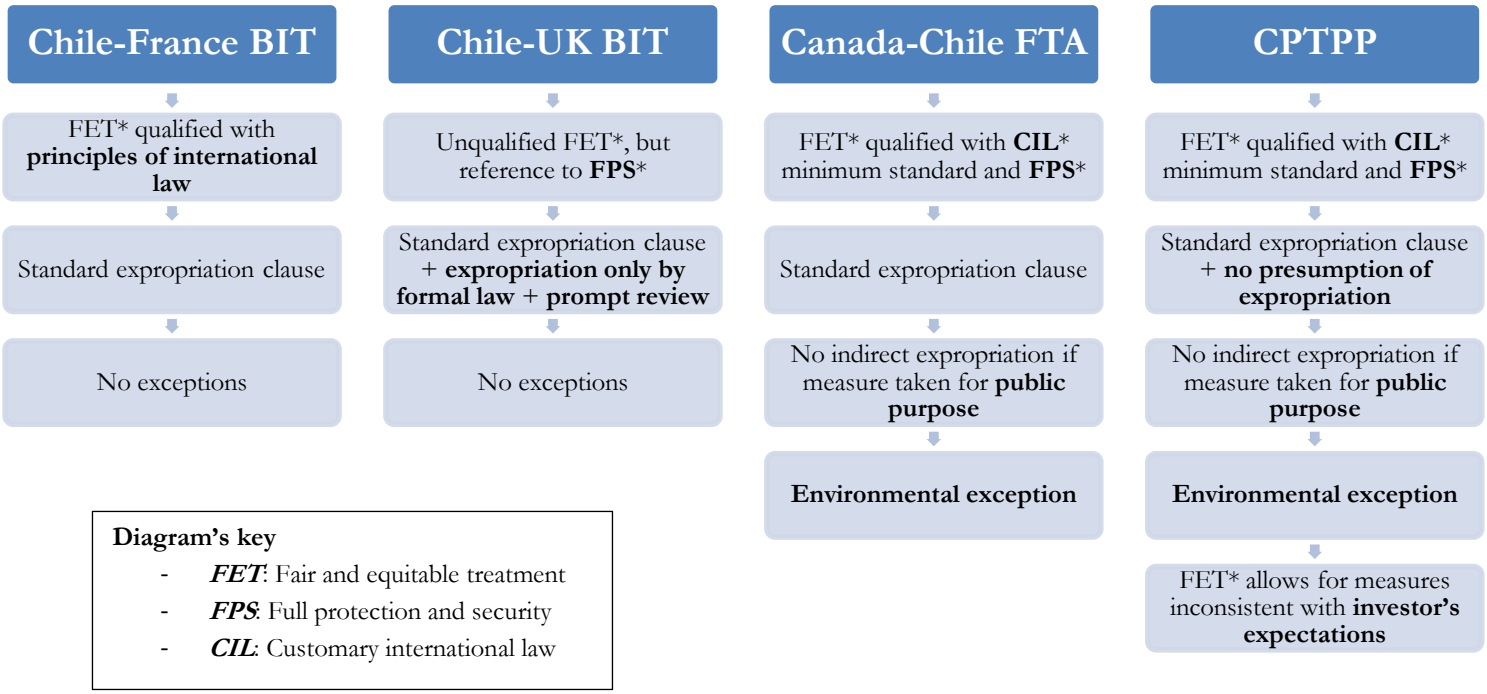

Figure 1: Chile's evolving regulatory space under international investment agreements

Risks of Potential Investment Treaty Claims

Section 3 of the report examines the risks of potential investment treaty claims arising out of the adoption of climate change measures by Chile. The report considers these risks in light of a hypothetical mitigation measure in relation to black carbon emissions that Chile might adopt as part of its 2020 Updated Nationally Determined Contributions. The report considers whether such a measure could trigger investment treaty claims based on fair and equitable treatment and expropriation clauses and the likelihood that these may succeed before an investment tribunal. The report finds that Chile can pursue climate change measures, such as the reduction of its black carbon emissions, so long as any measure taken is pursued for a legitimate public purpose, in a non-discriminatory manner and in good faith. Given the global commitments on curbing climate change, any measure for this purpose will most likely meet the legitimate public purpose requirement. The measure must be designed carefully so as not to violate any specific representations (and thus, legitimate expectations) made to a foreign investor. In addition, the measure must apply to all relevant businesses across the industry so as not to be discriminatory.

Section 4 of the report concludes that there is ample scope for Chile to adopt its climate change policies to implement its international commitments.

1 Introduction

One of the most pressing questions in international investment law is the extent to which states entering into international investment agreements (IIAs) give away part of their regulatory space. Indeed, several states have reacted to actual or perceived constraints on their regulatory space under IIAs by withdrawing from their IIAs and/or the ICSID Convention.[1]

The significance of states' regulatory space under IIAs is perhaps most acutely felt when it comes to climate change. States increasingly need to adopt climate change policies to comply with commitments under the Paris Agreement and other international legal instruments, and may regard IIAs as constraining their actions. Maintaining sufficient regulatory space to adopt climate change-related mitigation and adaptation measures has thus become a priority for states committed or committing to attracting foreign investment via existing or future IIAs.

This report considers the question whether Chile's IIAs make it difficult for Chile to implement climate change commitments. The report first compares a sample of first-generation IIAs to a sample of next-generation IIAs concluded by Chile in order to determine the extent to which Chile's regulatory space has shrunk or expanded over time. Second, building on this analysis, it identifies a hypothetical mitigation measure in relation to black carbon emissions that Chile might adopt as part of its Nationally Determined Contributions (NDCs) and considers whether this measure may give rise to investment treaty claims and the likelihood that these may succeed before an investment tribunal.

1.1 Question 1: regulatory space under Chile's investment agreements

Since 1990, Chile has entered into several IIAs. The report reviews a sample of Chile's first and next-generation IIAs (see **Figure 2** below).

[1] Three countries have so far denounced the ICSID Convention; Bolivia in 2007, Ecuador in 2009 and Venezuela in 2012; see Manuel Casas and Andrew Willcocks, 'Denunciation of ICSID Convention' (Jus Mundi, 2022). Between 2008 and 2017 Ecuador also withdrew from all of its BITs, but following a recent change in administration, Ecuador has changed course, re-joining the ICSID Convention in 2021. See Jonathan C Hamilton and Francisco Jijón, 'The Return of Investment Protections in Ecuador' (White & Case Publications, 2021). See further Tomer Broude, Yoram Z Haftel and Alexander Thompson, 'Legitimation through Modification: Do States Seek More Regulatory Space in their Investment Agreements?' in D Behn, O Kristian and M Langford (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (CUP 2022).

Treaty	Date Signed	Date Entered into Force	Treaty Duration
Chile-France BIT	14 July 1992	24 July 1994	An initial term of 10 years. Continues in force unless terminated
Chile-United Kingdom BIT	8 January 1996	21 April 1997	An initial term of 10 years. Continues in force unless terminated
Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)	8 March 2018	30 December 2018 for 8 of 11 signatories Signed but not yet ratified by Chile	No initial term. Continues in force unless terminated[2]
Canada-Chile FTA	5 December 1996	5 July 1997, amended on 5 February 2019	No initial term. Continues in force unless terminated

Figure 2: Sample of reviewed Chile's IIAs

The analysis focuses on fair and equitable treatment, expropriation and exception clauses, and the extent to which these clauses might either shrink or shield Chile's regulatory space, specifically in relation to climate change policies. The comparison between first-generation and next-generation IIAs shows the extent to which Chile's regulatory space has been increasingly protected.

1.2 Question 2: risks of investment treaty claims arising from Chile's climate change measures

Chile is one of the most carbon-intensive economies in Latin America. Most of Chile's greenhouse gas (GHG) emissions derive from burning coal, natural gas and diesel, which are central to powering some of the most important industries in Chile, including mining (eg copper, coal, nitrate) and forestry. The burning of these fuels is responsible for the emission of carbon dioxide (CO_2) and black carbon, which is 'the second largest contributor to climate change after CO_2'.[3] Curbing black carbon emissions is one of the most effective strategies for slowing climate change due to black carbon's short lifespan in the atmosphere, which makes it easy to tackle.

[2] Despite not having yet ratified the treaty, under VCLT Article 18, Chile is required to refrain from acts that would defeat the object and purpose of the treaty.
[3] Renee Cho, 'The Damaging Effects of Black Carbon' (State of the Planet - Columbia Climate School, 2016).

As part of its Updated 2020 NDCs, Chile has committed to pursuing mitigation targets in relation to both CO_2 and black carbon (see **Figure 3** below).[4]

Chile's Mitigation Targets	
Carbon dioxide (CO2)	**Black carbon emissions**
GHG emission budget not exceeding 1,100 million tonnes of CO_2 equivalent between 2020 and 2030	Reducing total black carbon emissions by at least 25% by 2030, compared to the levels in 2016
GHG emission maximum (peak) by 2025, and GHG emission level of 95 million tonnes of CO2 equivalent by 2030	

Figure 3: Chile's mitigation targets under its Updated NDCs (2020)

It is expected that the climate will respond quickly to reductions of black carbon, enabling Chile to achieve its 25% by 2030 mitigation target. This target will be implemented via several measures, including 'setting emissions and quality standards for the main industrial pollutant issuers'.[5] However, any measures adopted may give rise to potential investment treaty claims. This report presents a hypothetical climate change mitigation measure tackling black carbon emissions and identifies the principal investment treaty claims based on fair and equitable treatment and expropriation clauses that could arise from the implementation of this measure.

[4] Government of Chile, 'Chile's Nationally Determined Contributions' (Update 2020), 33-4.
[5] ibid.

2 The Evolution of Chile's Regulatory Space: A Comparative Analysis of First-Generation and Next-Generation International Investment Agreements

Section 2 reviews the Chile-France BIT and the Chile-UK BIT (first-generation IIAs) and the investment chapters of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Canada-Chile FTA (next-generation IIAs). The analysis focuses on fair and equitable treatment and expropriation clauses and the extent to which these clauses might either shrink or rather shield Chile's regulatory space. The comparison between first-generation versus next-generation IIAs shows the extent to which Chile's regulatory space has been increasingly protected.

2.1 Fair and equitable treatment and expropriation clauses: an introduction

This section starts by explaining the protection afforded by fair and equitable treatment and expropriation clauses in general. This discussion lays the foundations for the more detailed analysis of the relevant clauses in the first and next-generation IIAs reviewed in this report.

2.1.1 Fair and equitable treatment

Fair and equitable treatment (FET) is a core standard of protection in international investment law. The meaning of this clause and of what a 'fair and equitable treatment' entails has been extensively debated in the case law[6] and in the scholarship.[7] FET is also the most litigated provision in investment arbitration.

Much of the case law on the fair and equitable treatment standard developed in the context of claims based on Article 1105 of NAFTA.

[6] See eg *Eco Oro Minerals Corp. v. Republic of Colombia* (*Eco Oro v Colombia*) ICSID Case No. ARB/16/41 Decision on Jurisdiction, Liability and Directions on Quantum dated 9 September 2021, paras 743 onwards and *Eco Oro v Colombia*, Partial Dissent of Professor Philippe Sands, paras 5-11 which summarises the debate in the case law.

[7] See, eg, Ursula Kriebaum, Christoph Schreuer and Rudolf Dolzer, *Principles of International Investment Law* (3rd ed, OUP 2022); Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013); Alexandra Diehl, *The Core Standard of International Investment Protection: Fair and Equitable Treatment* (Kluwer 2012); Roland Kläger, *'Fair and Equitable Treatment' in International Investment Law* (CUP 2011); Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (OUP 2008).

NAFTA Article 1105(1)

Fair and Equitable Treatment

Each Party shall accord to investments of investors of another Party **treatment in accordance with international law**, including **fair and equitable treatment** and **full protection and security**.

Figure 4: FET clause in NAFTA

According to the NAFTA Free Trade Commission, the wording of this Article reflects the customary international law minimum standard of treatment, which requires treatment no less than the treatment required by customary international law but also not beyond it. This interpretation has been followed by NAFTA tribunals.[8]

In *Waste Management II v Mexico*, the tribunal, relying on the legal reasoning in *S D Myers v Canada*, *Mondev v USA*, *ADF v USA* and *Loewen v USA*, held that there is a violation of fair and equitable treatment when:

> … conduct attributable to the State and harmful to the Claimant […] is **arbitrary**, **grossly unfair**, **unjust** or **idiosyncratic**, is **discriminatory** and exposes the Claimant to sectional or racial prejudice, or involves a **lack of due process** leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a **complete lack of transparency** and candour in an administrative process. In applying this standard it is relevant that the treatment is **in breach of representations made by the host State** which were **reasonably relied on by the Claimant**.[9]

Beyond the NAFTA context, the locus classicus on FET is *Tecmed v Mexico*. In *Tecmed* the tribunal elaborated further on the FET standard:

***Tecmed v Mexico* on FET**

'The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments **treatment that does not affect the basic expectations that were taken into account by the foreign investor** to make the investment. The foreign investor expects the host State to act in a **consistent manner**, **free from ambiguity** and **totally transparently** in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.

Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The

[8] See eg *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2 Award dated 20 September 2021.

[9] *Waste Management, Inc. v. United Mexican States* (*Waste Management II v Mexico)* ('Number 2'), ICSID Case No. ARB(AF)/00/3 Award dated 30 April 2004, para 98 (emphasis added).

foreign investor also expects the host State to **act consistently,** i.e. **without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.** The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.

In fact, failure by the host State to comply with such pattern of conduct with respect to the foreign investor or its investments affects the investor's ability to measure the treatment and protection awarded by the host State and to determine whether the actions of the host State conform to the fair and equitable treatment principle. Therefore, **compliance by the host State with such pattern of conduct** is closely related to the above-mentioned principle, to the actual chances of enforcing such principle, and to excluding the possibility that state action be characterized as arbitrary; i.e. as **presenting insufficiencies that would be recognized "...by any reasonable and impartial man,"** or, **although not in violation of specific regulations**, **as being contrary to the law because: ...(it) shocks, or at least surprises, a sense of juridical propriety**'.[10]

Figure 5: FET in *Tecmed v Mexico*

Nowadays, FET is understood to encompass seven forms of standards of treatment which host states must afford to foreign investors. These are summarised in **Figure 6** below.

(1) Legality

This is an essential component of the rule of law. According to this principle, host states' actions must ordinarily **conform to any of their legal obligations**, including those contained in **domestic law** as well as **international treaties**. **Improper motives and bad faith**, such as the **pursuit of vindictiveness or extraneous political objectives**, are typical indicators of illegal public decision-making and therefore factors that may show that an act has been taken contrary to the principle of legality.[11]

In *GAMI Investments v Mexico*, the tribunal interpreted FET as encompassing **an obligation not only to abide by but also to enforce provisions of national law**.[12] The same conclusion was reached in ***Tecmed***.[13] Thus, legality means in many instances an **obligation to enforce domestic law**.

However, a violation of domestic law does not necessarily entail a violation of the FET standard.[14] Instead, FET remains **an independent standard of international law** against which the domestic legal order is measured.

(2) Administrative due process and denial of justice

This requirement comes in two forms:

(a) **Administrative due process**: this entails the **establishment of procedural rights for investors in administrative proceedings**. Aspects of this standard can include the right to a fair trial and a prohibition

[10] *Técnicas Medioambientales Tecmed v. United Mexican States (Tecmed v Mexico)* ICSID Case No. ARB(AF)/00/2 Award dated 29 May 2003, para 154 (emphasis added). See further Stephan W Schill, 'International Investment Law and Comparative Public Law – An Introduction' in S W Schill (ed) *International Investment Law and Comparative Public Law* (OUP 2010).
[11] Marc Jacob and Stephan W Schill, 'Fair and Equitable Treatment: Content, Practice, Method' in M Bungenberg, J Griebel, S Hobe and A Reinisch (eds) *International Investment Law: A Handbook* (Hart Publishing 2015), 720.
[12] *GAMI Investments, Inc. v. United Mexican States (GAMI v Mexico)* UNCITRAL Final Award dated 15 November 2004, para 91.
[13] *Tecmed v Mexico* (n. 10), para 154.
[14] Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (OUP 2017), Ch 2.

on arbitrary and discriminatory misconduct. It is demanded that administrative bodies conform to generally accepted practices.

(b) **Judicial due process**: in *Loewen v United States*, the tribunal found that the trial conducted by the Mississippi state courts 'exhibited a gross absence of due process and of protection of the investor from prejudice on account of his nationality'.[15] The tribunal found that the trial conducted itself in a manner that was so flawed that it constituted a miscarriage of justice and, thus, a violation of FET on the basis of a failure to respect due process.[16]

(3) Legitimate expectations

The legitimate expectations doctrine[17] springs from the tenet that legitimate expectations should not be unreasonably disappointed. This ties in with the idea that **states should not renege on a prior commitment**. An investor's legitimate expectations can be based either on **(a) the host's legal framework** or **(b) any undertakings and representations made explicitly or implicitly** by the host state. The latter are the most valid sources of legitimate expectations.[18] It is important to note here that there should be a **specific assurance by the state towards the investor** that amounts to a specific assurance in the context of a pre-existing quasi-contractual relationship.[19] In other words, investors' expectations can only be considered legitimate when based on some **specific representations made by the host state** and when **specific commitments or assurances** have been given to encourage the investment.[20]

In *International Thunderbird Gaming v Mexico*, the arbitral tribunal noted that 'the concept of legitimate expectations relates … to a situation where a contracting parties' conduct create reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct such that a failure by the [state] to honour those expectations could cause the investor (or investment) to suffer damages'.[21]

In *National Grid v Argentina*, the tribunal said 'this standard protects the reasonable expectations of the investor at the time of investment, and which were based on representations, commitments or specific conditions offered by the State concerned'.[22] Thus, treatment by the state should 'not affect the basic expectations that were considered by the foreign investor to make the investment'.[23]

This standard aims to **balance the right of the host state to determine its own legal and economic order** with **the investor's concern for planning and stability based on the legal and economic order at the time of investment**.[24] For example, in *CMS v Argentina*, Argentina had given guarantees for price adjustments for the transportation of natural gas in legislation, regulations and under a licence. However, under emergency laws and

[15] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America (Loewen v USA)*, ICSID Case No. ARB(AF)/98/3 Award dated 26 June 2003, para 139.
[16] ibid, para 122.
[17] See Michele Potestà, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept' (2013) 28 ICSID Review 88; Paparinskis (n 7), 251. On the role of public interest in the protection of legitimate expectations see Federico Ortino, 'The Public Interest as Part of Legitimate Expectations in Investment Arbitration: Missing in Action?' in C Brower, J Donoghue, C Murphy, C Payne and E Shirlow (eds) *By Peaceful Means: International Adjudication and Arbitration Essays in Honour of David D Caron* (OUP 2022 forthcoming).
[18] Kriebaum, Schreuer and Dolzer (n 7), 171 onwards.
[19] Patrick Dumberry 'The Protection of investors' Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105' (2014) 31(1) Journal of International Arbitration 4. See also *Glamis Gold Ltd v United States of America*, UNCITRAL Award dated 8 June 2009, paras 766 and 799; *Cargill Incorporated v United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award dated 18 September 2009, para 290.
[20] *Glamis Gold v. United States* (n 19), para 767; *Mobil Investments Canada Inc and Murphy Oil Corporation v Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum dated 22 May 2012, para 152. See also *Eco Oro v Colombia*, Partial Dissent of Professor Sands (n 6), para 14.
[21] *International Thunderbird Gaming Corporation v. The United Mexican States (International Thunderbird Gaming v Mexico)* UNCITRAL Arbitral Award dated 26 January 2006, para 147.
[22] *National Grid PLC v. The Argentine Republic* (*National Grid v Argentina)*, UNCITRAL Award dated 3 November 2008, para 173.
[23] ibid.
[24] Kriebaum, Schreuer and Dolzer (n 7), 208-12.

regulations, Argentina first suspended and then terminated these guarantees, and was eventually found to have breached the FET standard.[25]

Attribution of a particular conduct to a host state can prove difficult. Examples of attributable representations can include express opinions and statements released by administrative agencies about the application of domestic law. However, as noted, legitimate expectations may not be based solely on explicit representations but may also be drawn by past practices (seen as the 'common level of legal comfort').[26] Legitimate expectations, however, must be based on **objectively verifiable facts**. In *Suez v Argentina*, the arbitral tribunal stated that 'one must not look single-mindedly at the Claimants' subjective expectations. The Tribunal must rather examine them from an objective and reasonable point of view'.[27]

(4) Stability, predictability and consistency of the host state's legal framework

This idea is closely related to that of protecting legitimate expectations. However, it is important to note that an investor **cannot expect** that a **regulatory framework will remain static or unchanging**.[28]

However, the difference here is that these concepts do not revolve around the investor's actual relationship with the host state. Rather, they relate to a **broader assessment of the wider regulatory framework**. Stability, predictability and consistency translate into a certain overall degree of tranquillity and coherence.[29] **Legal security** requires **consistent, understandable and readily available rules**.

In *CMS v Argentina*, a tribunal held that 'there can be no doubt… **[t]hat a stable legal and business environment is an essential element of fair and equitable treatment**'.[30] Furthermore, in *Metalclad v Mexico*, it was found that there was a violation of FET as Mexico '**failed to ensure a predictable framework for Metalclad's business planning and investment**'.[31] In *Tecmed*, a tribunal also concluded that a foreign investor need to 'know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices and directives, to be able to plan its investment and comply with such regulations'.[32]

Hence, investment tribunals' insistence upon a stable, predictable and consistent legal framework is clear.

(5) Non-discrimination

This requirement means that there should be no **arbitrary differentiation** across **all decisions** by a host state. This does not mean, however, **that all decisions must be uniform**. The most important idea here is that '**like ought to be treated alike**'.

(6) Transparency

This principle is closely related to the concepts of legality, due process, legitimate expectations, stability, predictability and consistency of the host state's legal framework. This principle holds that the **public exercise of authority should be transparent**. Some investment tribunals have concluded that a lack of transparency led to a violation of FET similarly to what tribunals have concluded in relation to due process.[33]

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[25] *CMS Gas Transmission Company v. The Republic of Argentina (CMS v Argentina)*, ICSID Case No. ARB/01/8 Award dated 12 May 2005, para 295.
[26] ibid.
[27] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic* (*Suez v Argentina)*, ICSID Case No. ARB/03/19 (formerly *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic (II)*) Decision on Liability dated 30 July 2010, para 209.
[28] *El Paso v Argentine Republic*, ICSID Case No ARB/03/15, Award dated 31 October 2011, para 374; *Eco Oro v. Colombia* (n 6), para 749.
[29] Jacob and Schill (n 11), 729.
[30] *CMS v Argentina* (n 25), para 274.
[31] *Metalclad Corporation v. The United Mexican States (Metalclad v Mexico)*, ICSID Case No. ARB(AF)/97/1 Award dated 30 August 2000, para 99.
[32] *Tecmed v Mexico* (n 10), para 154.
[33] Jacob and Schill (n 11), 735.

In *Metalclad*, for example, the Federal Government of Mexico and the state government had issued construction and operating permits for the investor's landfill project. The investor was assured that it had all the permits it needed but the municipal government refused to grant a construction permit. The Claimant complained on the basis of a lack of transparency under Article 1105 of NAFTA. The Tribunal held that Mexico violated the FET standard and mentioned that they 'failed to ensure a transparent and predictable framework for Metalclad's business planning and investment'.[34]

Most of the case law on the matter generally refers to instances of due process.[35]

(7) Reasonableness and Proportionality

Reasonableness and proportionality are distinct concepts. Reasonableness is a yardstick used to gauge the lawfulness of official behaviour and centres on the rational merits of a decision. Proportionality looks more to the suitability of a measure to achieving a host state's intended goal.[36]

In *Costa Rica v Nicaragua*, the ICJ adopted a reasonableness and proportionality reasoning as a method of balancing the right of the state to regulate navigation on the section of the river located in its territory with the right to free navigation as granted by an international treaty to a neighbouring country. The ICJ noted that Nicaragua's power to regulate Costa Rica's right to free navigation was 'not unlimited' and 'must not be manifestly excessive when measured against the protection afforded to the purpose invoked'.[37] This ruling has been seen as summarising the requirement of reasonableness and proportionality in international law.

Figure 6: Seven forms of customary international law minimum standard of treatment under FET

FET clauses also frequently refer to a full protection and security standard. This requirement translates into a due diligence obligation in relation to the protection of the investor and the physical integrity of its investments.[38] **Figure 7** below summarises the most relevant cases where full protection and security was discussed and shows the extent to which full protection and security complements FET.

Case	Relevant Provision	Full protection and security
Wena Hotels Limited v Egypt, ICSID Case No ARB/98/4, Award dated 8 December 2000	**Article 2(2) Egypt-UK BIT** Article 2(2) refers to full protection and security in alongside fair and equitable treatment. This clause is drafted similarly to Article 2(1) in the Chile-UK BIT (1996).	In *Wena*, the tribunal found that a state not imposing any sanctions against those that had unlawfully entered and looted the hotel premises of an investor constituted a violation of the requirements of full protection and security. The tribunal found that full protection and security means 'an **obligation of vigilance**, in the sense that [the host state] shall take all measures necessary to ensure the full

[34] *Metalclad v Mexico* (n 31), para 99.
[35] See, for example, *Infinito Gold Ltd. v. Republic of Costa Rica* (*Infinito Gold Ltd v Costa Rica*) ICSID Case No. ARB/14/5 Award dated 3 June 2021, para 355; *GPF GP S.à.r.l v. Republic of Poland*, SCC Case No. V2014/168 Final Award dated 29 April 2020, para 54.
[36] Gebhard Bücheler, *Proportionality in Investor-State Arbitration* (OUP 2015).
[37] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, para 87.
[38] Kriebaum, Schreuer and Dolzer (n 7), 160 onwards.

		enjoyment of protection and security of [the Claimants'] investments and should not be permitted to invoke its own legislation to detract from any such obligation. [The host state] must show that it has taken all measures of precaution to protect the investment on its territory'. (para 84)
Saluka Investments BV v Czech Republic, PCA 2006 Partial Award dated 17 March 2006	**Article 3(2) Czech-Netherlands BIT** Article 3(2) refers more generally to full protection and security	There is some debate as to whether full protection and security encompasses **legal safety**. This was addressed in the *Saluka* award, where the tribunal found that the standard only refers to **impairment against the physical integrity of an investment** and against **interference by use of force**. (para 484)
Técnicas Medioambientales Tecmed SA v Mexico, ICSID Case No. ARB (AF)/00/2, Award dated 29th May 2003	**Article III(1) Mexico-Spain BIT** Article III(1) refers to full protection and security separately from fair and equitable treatment, which appears in Article IV(1).	On the issue of whether **legal safety** is part of the full protection and security standard, the tribunal found that the **revocation of administrative permits** as a consequence of adverse movements against the investor's activities was a violation by the state of its obligation to accord **fair and equitable treatment** and not a violation of the standard of full protection and security. (para 175)
Elettronica Sicula Spa (ELSI), United States v Italy, Judgment, Merits, Elettronica Sicula S.P.A. (ELSI), Judgment, I.C.J. Reports 1989, p15	**Article V(1) US-Italy Treaty of Friendship, Commerce and Navigation (1948)** Article V(1) refers to full protection and security in the context of an expropriation clause, similarly to Article 5(1) of the Chile-France BIT (1992). In this context, full protection and security can be regarded as a precursor to expropriation.	In *ELSI*, the Court linked full protection and security to the availability of a legal mechanism to verify the lawfulness of a requisition of a plant. In this sense, the **availability of legal remedies** in the event that the physical integrity of an investment is affected is an important factor in considering whether the full protection and security standard has been violated. (para 108)

Figure 7: Most relevant cases on full protection and security

2.1.2 Expropriation

Expropriation is the most serious infringement of an investor's rights. Protection from expropriation is at the heart of BITs. First-generation BITs were designed as treaties for the 'promotion and protection' of investments. Providing an environment that guarantees that investments will not be unduly taken from investors is crucial to achieving this purpose.

Expropriation refers to a state's taking of property, or something of value from its owner. In an investment law context, government actions interfering with an investor's legitimate ownership of

its investment or with the investor's rights to use and profit from its investment may amount to an expropriation. More specifically, BITs usually protect against three forms of expropriation: direct, indirect and creeping expropriation. These are elaborated further in **Figure 8** below.

Direct Expropriation

Direct expropriation can be described as a **measure** taken by the host state which directly **removes an investor's legal title over its investment** or **physically seizes its property**.[39] Direct expropriation is nowadays an uncommon form of expropriation in modern investment law arbitration.

Telenor Mobile v Hungary notes that 'nowadays, direct expropriation is the **exception rather than the rule**, as states prefer to **avoid opprobrium and the loss of confidence of prospective investors by more oblique means**'.[40]

Indirect Expropriation

Indirect expropriation relates to instances in which the **value of** or **any right in an investment have been diminished or eliminated or affected by a government measure**. Indirect expropriation is the most frequent form of expropriation dealt with in investment arbitration. Tribunals have long realised that governments can effectively damage investors' profit expectations not just by a compulsory transfer of rights but also through measures that **have no direct impact on the ownership of the property**.[41]

The difficulty in defining indirect expropriation lies in separating it from a simple regulatory measure taken by the state. To do so, tribunals have to conduct a case-by-case examination of **a wide range of factors**. These may include the type of interference with an investor's investment, the severity of the interference, the duration of the interference, and whether or not the measure was taken as part of a regulation for the general welfare of the public.[42]

In looking at the **type of interference**, some tribunals have put a great **emphasis on the loss of profitability**. Most tribunals, however, focus on whether **the investor maintains control over the investment** and **deny relief when the investor retains control even if the investment profitability has, as a result of the host state's interference, been dramatically reduced**. Taxation measures are generally considered non-expropriatory. Only in extreme cases such as where 'a tax law is extraordinary, punitive in amount or arbitrary in its incidence would issues of indirect expropriation be raised.'[43]

In looking at the **severity of the interference**, tribunals look to ensure that the **'deprivation was not merely ephemeral**'.[44]

In looking at the **duration of the expropriation**, a measure would generally need to divest the investor of its control, use or enjoyment of the property permanently. This factor has been less discussed in the case law.

[39] UNCTAD, *Expropriation – UNCTAD Series on Issues in International Investment Agreements II* (2012), 6.
[40] *Telenor Mobile Communications A.S. v. The Republic of Hungary* (*Telenor Mobile v Hungary)*, ICSID Case No. ARB/04/15 Award dated 13 September 2006, para 69.
[41] The *Amoco* tribunal defined an expropriation as a compulsory transfer of property rights. *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited (Amoco)*, IUSCT Case No. 56 Partial Award dated 14 July 1987, para 108.
[42] Krista Nadakavukaren Schefer, *International Investment Law* (3rd edn, Edward Elgar Publishing 2020).
[43] *EnCana Corporation v Ecuador*, LCIA Case No. UN3481, Award dated 3 February 2006, para 177.
[44] *Tippets, Abbett, McCarthy, Stratton v TAMS-AFFA Consulting Engineers of Iran*, IUSCT, Award dated 22 June 1984, para 225.

Creeping Expropriation
Creeping expropriation is a subcategory of indirect expropriation. This is described as a situation in which '**a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property**'.[45] Examples of creeping expropriation manifest when each of a series of states acts within a limited time span may not be regarded as significant on their own, but they might become significant when taken and considered as a whole. The most difficult question in cases of creeping expropriation is the question of quantum as it is difficult to establish the expropriation date.

Figure 8: Three forms of expropriation: direct, indirect and creeping expropriation

As previously noted, indirect expropriation is the most frequent form of expropriation in investment law. **Figure 9** below summarises some of the most relevant cases discussing examples of measures that were considered to amount (or not) to an indirect expropriation.

Case name	Treaty Provision	Tribunal interpretation
Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1 Award dated 30 August 2000	**NAFTA Article 1110(1)** No Party may directly or indirectly nationalise or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalisation or expropriation of such an investment ('expropriation') …	'Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also **covert** or **incidental interference with the use of property** which has the effect of **depriving the owner**, in whole or in significant part, of the **use** or **reasonably-to-be-expected economic benefit** of property even if not necessarily to the obvious benefit of the host State'. (para 103)
Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3 Award dated November 21 2000	**Article 5(2) Argentina-France BIT** The Contracting Parties shall not take, directly or indirectly, any expropriation or nationalisation measures or any other equivalent measures having a similar effect of dispossession, …	'Where, as here, there has been no taking or dispossession, as such, and the question turns on whether there have been **measures equivalent to expropriation** which have had an effect similar to the dispossession of Claimants' rights and expectations, it is necessary to consider whether the challenged measures have or will (i) **radically deprive Claimants of the economic use and enjoyment of its investment** – *Tecmed,* (ii) **effectively neutralise the benefit of Claimants' property** – *CME*, (iii) **deprive the owner of the benefit and economic use of its contractual rights** – *Santa Elena*, (iv) **render Claimants' property rights useless** – *Starrett Housing*, or **have a similar dispossessory effect**'. (para 7.5.24)

[45] *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9 Award dated 16 September 2003, paras 20-2.

Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6 Award dated 12 April 2002	**Article 4 Egypt-Greece BIT** Investments […] shall not be expropriated, nationalised or subjected to any other measure the effects of which would be tantamount to expropriation or nationalisation …	'As the Respondent also concedes that at least for a period of 4 months, Claimant was deprived, by the Decree, of rights it had been granted under the License, there is no dispute between the Parties that, in principle, a taking did take place. When measures are taken by a State the effect of which is to **deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights** being the investment, the measures are often referred to as a "creeping" or "indirect" expropriation or, as in the BIT, as measures "**the effect of which is tantamount to expropriation**". As a matter of fact, the investor is **deprived by such measures of parts of the value of his investment**. This is the case here, and, therefore, it is the Tribunal's view that such a taking amounted to an expropriation within the meaning of Art. 4 of the BIT and that, accordingly, Respondent is liable to pay compensation therefore.' (para 107)
Merrill and Ring Forestry L.P. v. Canada, ICSID Case No. UNCT/07/1 Award dated 31 March 2010	**NAFTA Article 1110(1)** No Party may directly or indirectly nationalise or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalisation or expropriation of such an investment ('expropriation') …	'The Tribunal must conclude accordingly that the use, enjoyment or disposition of the property concerned have not been affected in this case so as to amount to an expropriation. While regulatory measures usually imply a long decision process, a rather typical situation in the forestry sector worldwide, the normal time period for completing an export permit in this case is not excessively long, as reflected in the 35-45 day approval delay and the operation of the automated online application procedures. **A lengthy delay could of course result in undue interference**, but **this is not the case here**, except in limited and unusual circumstances'. (para 151)

Figure 9: Most relevant cases on indirect expropriation

Most BITs set out conditions rendering expropriation lawful. These requirements are that the host state's act: (1) is adopted for a public purpose, (2) is non-discriminatory, (3) respects due process of law, and (4) is accompanied by full and adequate compensation. These conditions are also commonly recognised under customary international law. **Figure 10** below elaborates further on each condition.

(1) Public Purpose
This requirement is one which gives the host state significant discretion. Its purpose is simply **to prevent expropriation undertaken for private benefit**. A classic example would be a simple transfer of title of property from one private party to another, or an action taken by a government for retaliation against an investor. Whilst the

distinction between public and private parties may be difficult given that in many economic systems private parties engage in economic activities for public benefit, the investigation will ultimately come down to whether or not the measure taken **is intended to benefit the public**. This intention can validly occur **even if the benefits were de facto accorded to a private party**.[46]

In practice, the public purpose requirement has rarely been controversial in investment law arbitration. As previously noted, **tribunals have granted states a large although not unlimited margin of discretion in relation to this requirement**. This is exemplified in the *Amoco v Iran* case. In that case the tribunal said in relation to the concept of 'public purpose' that 'it is clear that, as a result of the modern acceptance of the right to nationalise, this term is broadly interpreted, and that States, in practice, are granted extensive discretion. An expropriation, the only purpose of which would have been to avoid contractual obligations of the State or of an entity controlled by it, could not, nevertheless, be considered as lawful under international law'.[47]

In *ADC v Hungary*, the tribunal found that the public purpose requirement in the case of an expropriation of an airport operation and management contract was not fulfilled. It specifically explained that **simply invoking a public purpose is not enough**. It said that 'a treaty requirement for 'public interest' requires some genuine interest of the public. If mere reference to 'public interest' can magically put such interest into existence and therefore satisfy the requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met'.[48]

In *OI v Venezuela*, the tribunal noted that '[t]o determine whether the expropriation was actually carried out for reasons of public interest, we must analyse how the Expropriation Decree itself justifies the decision. Sufficient evidence needs to be shown to prove the public purpose of the expropriation'.[49]

These cases show that this requirement is rather broad and allows for significant discretion. That being said, a simple invocation of the term will not excuse an otherwise unlawful expropriation.

(2) Non-Discrimination

This requirement prohibits expropriations **targeting particular investments** for reasons unrelated to the host states' legitimate regulatory objectives**.** An example would be a measure that expropriates an investment solely because it is foreign-owned. This requirement reflects the non-discrimination principle which is a core principle of international investment law.

In general, this requirement prohibits governments from distinguishing the treatment of investment and economic actors on the basis of national origin in order to ensure competitive equality between comparable economic actors.[50] When applied in the investment law context, this rule primarily imposes upon the host state an obligation to offer foreign investors both national treatment (NT) and most-favoured-nation (MFN) treatment. In the context of an expropriation, non-discrimination prevents the host state from singling out the property of a foreign investor or one group of foreign investors. This also means that personal characteristics of investors such as race, gender, sex, sexuality, religion etc cannot constitute the basis for a lawful expropriation.

Investment tribunals have usually examined differences in treatment based on nationality. These can be detected when (a) there is an **appropriate comparator**, (b) there has been a **difference in treatment**, and (c) the difference in treatment is **unreasonable**.[51]

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[46] Higgins states that a public purpose can constitute a 'means of differentiating takings for purely private gain on the part of the ruler from those for reasons related to the economic preferences of the country concerned'. Rosalyn Higgins, 'The Taking of Property by the State' (1982-83) 176 Recueil des Cours 259, 371.
[47] *Amoco* (n 41), para 145.
[48] *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary* (*ADC v Hungary*), ICSID Case No. ARB/03/16 Award dated 2 October 2006, para 432.
[49] *OI European Group B.V. v. Bolivarian Republic of Venezuela* (*OI v Venezuela)*, ICSID Case No. ARB/11/25 Award dated 10 March 2015, para 368.
[50] Nadakavukaren Schefer (n 42), 244.
[51] Stephan Hobe, 'The Development of the Law of Aliens and the Emergence of General Principles of Protection under Public International Law', in M Bungenberg, J Griebel, S Hobe and A Reinisch (eds) *International Investment Law: A Handbook* (Hart Publishing 2015), 16.

In *Liberian Eastern Timber Corporation v Liberia*, it was found that the Liberian government, by taking areas away from the Claimant and giving them to other foreign-owned companies who were 'friends' of the government, violated the non-discrimination requirement.[52] In *Amoco*, the tribunal found that discrimination in the field of expropriation is also prohibited under customary international law.[53]

(3) Due Process

This has been viewed as a requirement of **procedural fairness** and respect for **the rule of law** vis-à-vis a foreign investor.

In *Guaracachi America and Rurelec v Bolivia*, Manuel Conthe (in dissent) outlined three basic elements for verifying that a host state has acted in accordance with due process when expropriating a foreign investment. These include: (1) that the host state's actions must be **reasoned** (ie accompanied by justification); (2) that the act and its reasons must be **communicated** to the investor formally; and (3) that the legal procedures must give a chance to the foreign investor **to be heard** before the state adopts its final decision.[54]

In the *ADC* case, Hungary was found not to have adhered to due process by failing to offer the foreign investor procedural safeguards.[55] The tribunal noted that 'due process of law … demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it … basic legal mechanisms such as reasonable advance notice, fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible … the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard'.[56]

(4) Compensation

Compensation is the last requirement to be met for an expropriation to be deemed lawful. To this end, compensation must be **prompt** and **adequate**. **Promptness** typically refers to requiring payment **without delay** or **without undue delay**. This could be referred to as a temporal element, ie an investor should not need to wait years to be compensated. The reference to **adequate** compensation usually refers to the full value of the investment, ie the fair market value of the investment. This is known as the quantum element. An investor should receive the proper value for its losses, one which reflects the value of the assets coupled with the expected profits resulting from the investment had the investment not been expropriated. The terminology for adequacy varies across BITs, where adequate compensation can also be expressed as 'full' or 'just' compensation. These terms can be considered as synonyms.

The quantum element is undoubtedly the most contentious aspect of compensation. First-generation BITs do not typically specify the method of calculation of compensation to be used. More modern treaties, such as the USMCA Agreement, provide a detailed explanation of the method to be used. In practice, tribunals have used different methods of calculation. These include the discounted cash flow value, the liquidation value and replacement or book value.[57] Other methods look into the sunk costs plus the lost profits of the investment. At present, nearly all tribunals tend to use the fair market value method to calculate compensation.[58]

Figure 10: Conditions for a lawful expropriation

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[52] *Liberian Eastern Timber Corporation v. Republic of Liberia* (*Liberian Eastern Timber Corporation v Liberia)*, ICSID Case No. ARB/83/2 Award dated 31 March 1986.
[53] *Amoco* (n 41).
[54] *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia (Guaracachi America and Rurelec v Bolivia)* UNCITRAL, PCA Case No. 2011-17, Dissenting Opinion of Co-Abitrator Manuel Conthe 2 dated 31 January 2014, para 5.
[55] *ADC v Hungary* (n 48) para 440.
[56] ibid, para 435.
[57] World Bank, 'Legal Framework for the Treatment of Foreign Investment' (Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment, 1992) Vol 2 Guidelines, Report No. 11415, 42-3.
[58] Nadakavukaren Schefer (n 42), 300.

2.2 First-generation agreements: Chile-France BIT and Chile-UK BIT

Based on the foregoing analysis, it is now possible to comment on the **Chile-France BIT (1992)** and the **Chile-UK BIT (1996)** and in particular their FET and expropriation clauses. For ease of reference, this report reviews the relevant provisions together and compares them with each other to identify any similarities and/or differences.

2.2.1 Fair and equitable treatment

Chile-France BIT[59]	Chile-UK BIT
Article 3 Each contracting party undertakes to provide in its territory and in the maritime area, **fair and equitable treatment in accordance with the principles of international law**, to investments of nationals and companies of the other party and to ensure enjoyment of the rights thus recognized is **not hampered in either law or fact**. **Article 5(1)** Investments made by companies or nationals of either Contracting Party **shall enjoy full protection and security,** in the territory, and in the maritime zones of the other Contracting Party.	**Article 2(1)** Investments of investors of each Contracting Party shall at all times be accorded **fair and equitable treatment** and shall enjoy **full protection and security** in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by **unreasonable** or **discriminatory measures** the management, maintenance, use, enjoyment or disposal of investments in its territory of the other Contracting Party.

Figure 11: FET clauses in the Chile-France BIT and the Chile-UK BIT

These FET clauses are drafted similarly. There are however a few minor differences. Article 3 of the Chile-France BIT refers to 'fair and equitable treatment in accordance with the principles of international law'. This refers to the minimum standard of treatment (MST) to be accorded to foreign investors which is the standard of treatment recognised under customary international law. This means that Article 3 of the Chile-France BIT is a qualified FET clause. It is unclear whether this qualification makes any difference. In the past, the minimum standard of treatment required a particularly egregious treatment of the investor by the state. However, several recent tribunals have held that the minimum standard of treatment has changed so as to cover the same types of

[59] This is an unofficial translation of the Chile-France BIT, whose original text was drafted in Spanish and in French. The translation is provided by the authors of the report. The original texts in Spanish of Articles 3 and 5(1) are reported in **Annex 1**.

treatment as the fair and equitable treatment standard. What might have once been a qualification in substance might therefore have become merely a qualification in name only.[60]

The provision further clarifies that this standard of treatment must be accorded both in law (de iure) and in fact (de facto). This clarification is not significant.

In contrast, the Chile-UK BIT refers to fair and equitable treatment without expressly mentioning a relationship between this standard and a customary international law minimum standard of treatment (MST). This means that Article 2(1) of the Chile-UK BIT is an unqualified FET clause. Article 2(1) of the Chile-UK BIT further states that '[n]either contracting party shall in any way impair by unreasonable and discriminatory measures the management, maintenance, use, enjoyment or disposal of investments'. This additional requirement is missing from the Chile-France BIT. What is interesting about this inclusion is that (a) the text elaborates on what constitutes unfair and inequitable treatment and (b) implicitly cross refers to general non-discrimination requirements typical of an expropriation clause.

Both the Chile-France BIT and the Chile-UK BIT refer to 'full protection and security'. In the Chile-France BIT, this reference appears in Article 5(1) which deals more generally with expropriation. In the Chile-UK BIT, conversely, full protection and security is listed as one of the components of the FET clause. Despite this difference, the reference to 'full protection and security' in both BITs can be understood to impose a requirement upon Chile, France and the UK to provide physical protection to the investments of the other contracting party's foreign investors.

2.2.2 Expropriation

Chile-France BIT[61]	Chile-UK BIT
Article 5(2) No Contracting Party shall take measures to **expropriate** or **nationalize** or any other measure having the effect of **dispossessing**, **directly** or **indirectly**, the nationals or companies of the other Contracting Party of its investments in its territory and maritime area, except when undertaken for a '**public**	**Article 4(1)** Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation […] in the territory of the other Contracting Party **unless the measures are taken for a public benefit related to the internal needs of that**

[60] See the difference of views between the majority and minority in *Eco Oro v Colombia* (n 6), paras 743-785 and Partial Dissent of Professor Sands (n 6), paras 5-11.
[61] This is an unofficial translation of the Chile-France BIT, whose original text was drafted in Spanish and in French. The translation is provided by the authors of the report. The original text in Spanish of Article 5(2) is reported in **Annex 1**.

benefit'. These measures shall not discriminate against or be inconsistent with any special agreement referred to in Article 10 of this Treaty. Any measures of dispossession which may be taken shall give rise to a **prompt** and **adequate compensation**, the amount of which shall be calculated on the basis of the real value of the investments … This compensation will be calculated following due process.	**Party** in a **non-discriminatory manner**, **by authorisation of a formal law**, and **against prompt**, **adequate** and **effective compensation** […] The investor affected shall have a right, under the law of the Contracting party making the expropriation, to **prompt review**, by a judicial or other independent authority of that Party, **of his** or **its case** and **of the valuation of his** or **its investment** in accordance with the principles set out in this paragraph.

Figure 12: Expropriation clauses in the Chile-France BIT and the Chile-UK BIT

These BITs contain similar expropriation clauses. Both clauses prohibit the same forms of expropriation (direct, indirect and creeping expropriation) and contain similar conditions upon which an expropriation may be considered lawful (public purpose, compensation). Neither of these BITs contains a definition of indirect expropriation or includes a carve-out for general regulatory measures. There are however a few differences, outlined in **Figure 13** below.

Differences between the Chile-France and Chile-UK Expropriation Clauses
Conditions for Lawful Expropriation
For an expropriation to be lawful, both the Chile-France BIT and the Chile-UK BIT require that the concerned measure pursue a **public purpose** and is accompanied by a prompt and adequate **compensation**. The Chile-UK BIT further specifies that the concerned measure must be taken '**in a non-discriminatory manner**'. This language is missing from the Chile-France BIT. This, however, does not seem to be a material difference, since non-discrimination is a core principle of international investment law. As a result, a discriminatory expropriatory measure, such as for example a measure targeting a group of foreign investors, would likely be considered unlawful both under the Chile-France BIT and the Chile-UK BIT. The Chile-UK BIT includes a further additional requirement, that is that the measure must be taken '**by authorisation of a formal law**'. This language, which is missing from the Chile-France BIT, requires the host states to adopt the concerned measure via a formal legislative process. In this sense, the **Chile-UK BIT adds a level of formality** to the expropriatory measure for it to be considered lawful.
Public Purpose related to Internal Needs
The Chile-UK BIT specifically refers to 'measures … taken for a public benefit related to the internal needs' of the host state adopting the expropriatory measure. This wording is missing from the Chile-France BIT. This difference in wording, however, does not seem to be material. This language appears to be a **typical feature of UK BITs**. Indeed, similar wording is found in Article 5(1) of the Model UK BIT as well as in other BITs concluded by the United Kingdom with the Peru and Nigeria.[62] However, it is likely that a tribunal would interpret this clause in accordance with the general meaning of public purpose discussed in **Figure 12** above.

[62] See eg Article 6(1) of the Peru-United Kingdom BIT (1993) '… except for reasons of public necessity and for a public purpose or in a social interest related to the internal needs of that Party' and Article 5(1) of the Nigeria-United Kingdom BIT (1990) '… except for a public purpose related to the internal policies of that party'.

Right to Prompt Review
Both the Chile-France BIT and the Chile-UK BIT refer to a right of the foreign investor to be compensated promptly and adequately in case of expropriation. The **Chile-UK BIT**, however, **goes further**. It provides that the 'investor affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment' in accordance with the principles set out in Article 4(1). Hence, the Chile-UK BIT expressly grants the investor affected by an expropriatory measure **a right to request a judicial review of the merits of the expropriation and the compensation awarded** before the decision on the expropriation of its investment becomes final. The Chile-France BIT does not refer to this right to an additional review process. It is possible, however, that Chile and France already grant this right under their domestic laws. The express reference in the BIT, however, further protects investors under the Chile-UK BIT since it gives them the possibility to claim a breach of Article 4(1) if either relevant host state fails to respect this right.
Cross-Reference to Article 10 of the Chile-France BIT
Article 5(2) and Article 10 of the **Chile-France BIT** state that **any specific undertaking** between a Contracting Party and nationals and companies of the other Contracting Party on specific foreign investments prevails over the Chile-France BIT 'insofar as its provisions are more favourable than those laid down' in the BIT.

Figure 13: Differences between the Chile- France BIT and the Chile-UK BIT Expropriation Clauses

Overall, the Chile-UK BIT appears to be more demanding than the Chile-France BIT in terms of the level of protection that Chile and the UK as the host states are required to grant foreign investors of the other contracting party under their expropriation clauses.

2.3 Next-generation agreements: CPTPP and Canada-Chile FTA

This subsection focuses on the FET and expropriation clauses contained in the investment chapters of the CPTPP and the Canada-Chile FTA. It conducts a comparative analysis of the relevant provisions of each investment chapter and lays the foundations of the comparison between the reviewed first and next-generation IIAs.

2.3.1 Fair and equitable treatment

FET clauses in the CPTPP and the Canada-Chile FTA investment chapters are drafted similarly (see **Figure 14** below). The relevant provisions in both investment chapters refer to 'fair and equitable treatment' as a component of a customary international law minimum standard of treatment (MST). Both provisions also include 'full protection and security' as an explicit component of the minimum standard of treatment. The relevance of including an explicit reference to 'full protection and security' has been discussed in Section 2.1.1 but broadly refers to a requirement on the host states to provide physical protection to the investment of foreign investors

of the other Contracting Party. Relevantly, both FET provisions also prescribe that host states have no obligation to provide anything further than the customary international law minimum standard of treatment. In theory, this qualification should protect the regulatory space of host states from the stricter FET standard. However, as noted above, it is unclear whether this qualification is meaningful, as different arbitrators have come to different conclusions on whether the minimum standard of treatment has changed to align with the FET standard.

CPTPP	Canada-Chile FTA
Article 9.6 (1) Each Party shall accord to covered investments treatment **in accordance with applicable customary international law principles**, including **fair and equitable treatment** and **full protection and security**. (2) For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. The concepts of "fair and equitable" treatment and "full protection and security" do not require treatment **in addition** to or **beyond that which is required by that standard**, and do not create additional substantive rights. The obligations in paragraph 1 to provide: (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.	**Article G-05** (1) Each Party shall accord to investments of investors of the other Party **treatment in accordance with international law**, including **fair and equitable treatment** and **full protection and security**. (2) Paragraph 1 prescribes the **customary international law minimum standard of treatment of** aliens as the **minimum standard of treatment** to be accorded to investments of investors of the other Party. (3) The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment **in addition** to or **beyond that which is required by the customary international law minimum standard of treatment** of aliens, and do not create any additional rights. The obligation in paragraph 1 to provide: (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process; and (b) "full protection and security" means that each Party is required to provide the level of police protection required under customary international law.

Figure 14: FET clauses in the investment chapters of the CPTPP and the Canada-Chile FTA

Both the CPTPP and the Canada-Chile FTA mention examples of typical obligations falling under the FET standard, namely, an obligation to not deny justice in criminal, civil or administrative adjudicatory proceedings and an obligation to respect due process. It should be noted however that FET standards linked to customary international law are usually interpreted to include these requirements regardless of an explicit reference to a denial of justice and due process in the text of

the relevant IIA.[63] In this sense, the FET clauses in the Chile-France BIT and the Chile-UK BIT may also be interpreted to cover these obligations, despite these first-generation clauses not expressly referring to them.

Relevantly, the CPTPP and the Canada-Chile FTA explicitly mention that a breach of another provision of the agreement or of a separate international agreement does not automatically establish a breach of FET.[64]

CPTPP	Canada-Chile FTA
Article 9.6 (3) A determination that **there has been a breach of another provision of this Agreement**, or of a separate international agreement, **does not establish that there has been a breach of this Article**.	**Article G-05** (4) A determination that **there has been a breach of another provision of this Agreement,** or of a separate international agreement, **does not establish that there has been a breach of this Article**. (5) For greater certainty, the fact that a measure **breaches domestic law does not, in and of itself, establish a breach of this Article**. In order to ascertain whether the measure breaches this Article, the Tribunal must consider whether a Party has acted inconsistently with the obligations in paragraph 1.

Figure 15: Comparison between Article 9.6(3) of the CPTPP and Articles G-05(4)-(5) of the Canada-Chile FTA

The Canada-Chile FTA also notes that a measure breaching domestic law does not automatically amount to a breach of FET (see **Figure 15** above).[65] These provisions enhance the regulatory space of Chile and the other host states concerned.

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[63] See *supra*, Figure 6.

[64] This language is used to contrast findings such as in *S.D. Myers v Canada*, where the tribunal held: '[i]n some cases, the breach of a rule of international law by a host Party may not be decisive in determining that a foreign investor has been denied 'fair and equitable treatment', but the fact that a host Party has breached a rule of international law that is specifically designed to protect investors will tend to weigh heavily in favour of finding a breach of Article 1105 [FET clause]'. See *S.D. Myers, Inc v Government of Canada*, UNCITRAL Partial Award dated 13 November 2000, para 264. See further Rumana Islam, 'Interplay Between Fair and Equitable Treatment (FET) Standard and Other Investment Protection Standards' (2014) 14 Bangladesh Journal of Law 117.

[65] In *Cargill v Mexico*, for example, a NAFTA tribunal stated that the separation between domestic legality and FET breach is 'the very rationale for the customary international law minimum standard of treatment of aliens'. See *Cargill v Mexico* ICSID Case No. ARB(AF0)/05/2 Award dated 18 September 2009, para 303. Other cases, however, adopted the opposite approach and equated a failure to comply with domestic law with an FET breach. See, eg, *Quiborax v Bolivia*, where a finding that Bolivia's conduct had been 'discriminatory and unjustified under Bolivian law' led the tribunal to conclude that '[b]y the same token' Bolivia's conduct 'violates the fair and equitable treatment standard'. See *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2 Award dated September 2015, para 292. Hepburn (n. 15) at 25 argues that the most emblematic case on this point is *Clayton and Bilcon of Delaware Inc v Government of Canada*, PCA Case No. 2009/04.

The FET clause in the CPTPP also allows for an 'investor's' legitimate expectations to be interfered with in some form without this automatically resulting in an FET breach, even if this interference leads to loss or damage to the covered investment.

CPTPP	Canada-Chile FTA
Article 9.6(4) For greater certainty, the mere fact that a Party takes or fails to take an action that may be **inconsistent** with an **investor's expectations** does **not constitute a breach of this Article**, **even if there is loss or damage** to the covered investment as a result.	**Article G-01(4)** For greater certainty, the mere fact that a Party takes or fails to take an action, including through a modification to its laws or regulations, in a manner which **negatively affects an investment** or **interferes with an investor's expectations**, including its expectations of profits, **even if there is loss or damage** to the covered investment as a result, does not amount to **a breach of an obligation under this Chapter**.

Figure 16: Comparison between Article 9.6(4) of the CPTPP and Article G-01(4) of the Canada-Chile FTA

This provision, which is absent in the reviewed first-generation BITs, is another example of the extent to which the CPTPP offers a higher level of protection for the policy space of Chile and other host states. Similarly, the Canada-Chile FTA also provides that 'the mere fact that a Party takes or fails to take action, including through a modification to its laws or regulations, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, even if there is loss or damage to the covered investment as a result, does not amount to a breach of an obligation under this Chapter' (see **Figure 16** above). In the Canada-Chile FTA, however, this provision is not part of the FET clause, but is enshrined in the investment chapter's scope and coverage. In this sense, G-01(4) does not cover exclusively an FET violation but rather covers violations under the investment chapter more broadly. Article 9.6(4) of the CPTPP gives greater certainty than the Canada-Chile FTA that there is no FET violation when an investor's legitimate expectations are 'frustrated', even when this leads to loss or damage of the investor's investment.[66] The CPTPP FET clause further shields Chile's and the other host states' regulatory space. This clause, however, does not go as far as to clarify whether there is a breach of FET in the event that the investor's expectations were based on host states' specific representations, leaving this open for interpretation by arbitral tribunals.[67]

[66] Rodrigo Monardes, Ana Novik and Carlos Portales 'Addressing the Right to Regulate in the CPTPP Investment Chapter: Identifying New Treaty Practice', Jorge A Huerta-Goldman and David A Gantz (eds) *The Comprehensive and Progressive Trans-Pacific Partnership: The Trans-Pacific Partnership, the Comprehensive and Progressive TPP, their Roots in NAFTA and Beyond* (CUP 2021), 301.
[67] ibid, 301-2.

2.3.2 Expropriation

Expropriation clauses in the CPTPP and the Canada-Chile FTA are drafted similarly (see **Figure 17** below). They both prohibit direct expropriation and nationalisation as well as measures equivalent or tantamount to expropriation (indirect and/or creeping expropriation). Host states can only lawfully expropriate a foreign investment covered under the relevant treaty when they do so (a) for a public purpose, (b) in a non-discriminatory manner, (c) in accordance with due process, and (d) upon the payment of compensation. These provisions differ slightly on the exact methodology to determine quantum but this is not discussed in the report.

CPTPP	Canada-Chile FTA
Article 9.8 (1) No Party shall expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation (expropriation), except: (a) for **a public purpose**; (b) in a **non-discriminatory manner**; (c) on payment of prompt, adequate and effective **compensation** in accordance with paragraphs 2, 3 and 4; and (d) in accordance with **due process of law**.	**Article G-10** (1) Neither Party may directly or indirectly nationalise or expropriate an investment of an investor of the other Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a **public purpose**; (b) on a **non-discriminatory basis**; (c) in accordance with **due process of law** and Article G-05(1); and (d) on **payment of compensation** in accordance with paragraphs 2 through 6.

Figure 17: Expropriation clauses in the investment chapters of the CPTPP and the Canada-Chile FTA

The expropriation clause in the CPTPP also covers measures on subsidies or grants.[68] Article 9.8(6) provides that a 'decision not to issue, renew, or maintain a subsidy or grant, or decision to modify or reduce a subsidy or grant' does not amount, on its own, to an expropriation 'in absence of any specific commitment' (see **Figure 18** below).

[68] A similar provision is enshrined in the FET clause of the CPTPP at Article 9.6(5). See **Annex 3**.

CPTPP	Canada-Chile FTA
Article 9.8 (6) For greater certainty, **a Party's decision not to issue, renew or maintain a subsidy or grant,** or decision to modify or reduce a subsidy or grant, (a) **in the absence of any specific commitment** under law or contract to issue, renew or maintain that subsidy or grant; or (b) in accordance with any terms or conditions attached to the issuance, renewal, modification, reduction and maintenance of that subsidy or grant, **standing alone**, **does not constitute an expropriation**.	**Article G-01** (5) For greater certainty, **the mere fact that a subsidy or grant has not been issued, renewed or maintained**, or has been modified or reduced, by a Party: (a) **in the absence of any specific commitment** under law or contract to issue, renew or maintain that subsidy or grant; or (b) in accordance with any terms or conditions attached to the issuance, renewal, modification, reduction or maintenance of that subsidy or grant**, does not constitute a breach of obligations in this Chapter**, **even if there is loss or damage** to the covered investment as a result.

Figure 18: A comparison of Article 9.8(6) of the CPTPP and Article G-01(5) of the Canada-Chile FTA

This provision may be relevant in the context of the adoption of climate change policies aimed at subsidising the transition to a low-carbon or a carbon-free economy and effectively grants Chile and the other host states concerned a greater regulatory space. The Canada-Chile FTA also includes a similar provision in Article G-01(5), which even covers violations of all obligations enshrined in the investment chapter. It provides that 'the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party […] does not constitute a breach of obligations in this Chapter provided that no 'specific commitment' has been made (see **Figure 18** above). The CPTPP provides greater certainty than the Canada-Chile FTA in excluding a presumption of violation of the expropriation clause 'even if there is loss or damage to the covered investments as a result'. Both provisions, however, were absent in the Chile-France BIT and Chile-UK BIT and show the extent to which the CPTPP and the Canada-Chile FTA further shield Chile's and the other host states' right to regulate, including in pursuit of their climate change policies.

CPTPP	Canada-Chile FTA
Annex 9-B (3) … (a) The determination of whether an action or series of actions by a Party in a specific fact situation, constitutes an indirect expropriation,	**Annex G-10** … **(2)** The determination of whether a measure or series of measures of a Party constitutes an indirect

requires a case-by-case, fact-based inquiry that considers, among other factors: (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an **adverse effect on the economic value** of an investment, **standing alone**, **does not establish that an indirect expropriation has occurred**; (ii) the extent to which the government action interferes with distinct, reasonable **investment-backed expectations**; and (iii) the character of the government action. (b) **Non-discriminatory regulatory actions** by a Party that are designed and applied to **protect legitimate public welfare objectives**, such as public health, safety and **the environment**, **do not constitute indirect expropriations**, **except in rare circumstances**.	expropriation requires a case-by-case, fact-based inquiry that considers, among other factors: (a) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an **adverse effect on the economic value** of an investment **does not establish that an indirect expropriation has occurred**; (b) the extent to which the measure or series of measures interferes with distinct, reasonable **investment-backed expectations**; and (c) the character of the measure or series of measures. **(3) Except in rare circumstances**, such as when a **measure** or series of measures **is so severe** in the light of its purpose that it cannot be reasonably viewed **as having been adopted and applied in good faith**, **non-discriminatory measures** of a Party that are designed and applied to protect **public welfare objectives**, such as health, safety and **the environment**, do not constitute **indirect expropriations**.

Figure 19: A comparison of the Annexes on Indirect Expropriation in the CPTPP and the Canada-Chile FTA

Both the CPTPP and the Canada-Chile FTA contain an Annex elaborating further on what constitutes an indirect expropriation. These annexes are a common feature of next-generation IIAs and are designed to further protect host states' right to regulate. Annex 9-B of the CPTPP and Annex G-10 of the Canada-Chile FTA are drafted similarly (see **Figure 19** above). Both annexes are structured in two parts. The first part covers the definition of indirect expropriation and the factors to be considered when assessing whether a measure amounts to an indirect expropriation (see Annex 9-B(3)(a) of the CPTPP and Annex G-10(2) of the Canada-Chile FTA). The second part refers more directly to the right to regulate and explains what measures are excluded from being considered as indirect expropriations (see Annex 9-B(3)(b) of the CPTPP and Annex G-10(3) of the Canada-Chile FTA).

In the first part, both annexes define indirect expropriation as a measure or series of measures of a Party having 'an effect equivalent to direct expropriation without formal transfer of title or outright seizure'. Both also explain that the determination of whether a measure amounts to indirect expropriation is a complex exercise involving a case-by-case and fact-based examination

of a list of factors, including: (a) the economic impact of the measure on the economic value of an investment; (b) the measure's potential interference with reasonable investment-backed expectations; and (c) the nature of the measure. Both also add that a determination that a measure has an adverse impact on the economic value of the investment does not, in and of itself, establish that the measure constitutes an indirect expropriation. This language is included to further shield the relevant host states' regulatory space.

The most interesting feature in this first part of the annexes, however, is the reference to investment-backed expectations.[69] While Annex G-10(2)(a)(ii) of the Canada-Chile FTA does not elaborate on what investment-backed expectations may be considered reasonable, Annex 9-B(3)(a)(ii) of the CPTPP contains a footnote on this point (see **Figure 20** below).

CPTPP Annex 9-B(3)(a)(ii) - Footnote 36
Footnote 36 For greater certainty, whether an **investor's investment-backed expectations** are **reasonable** depends, to the extent relevant, on factors such as whether the government provided the investor with binding **written assurances** and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector.

Figure 20: Footnote to Annex 9-B(3)(a)(ii) of the CPTPP

This footnote clarifies that these are expectations that must be backed, for example, by binding written assurances provided by the host state. With this wording the CPTPP further protects Chile's and the other host states' right to regulate, limiting the instances of expectations frustrated by a regulatory measure that might give rise a successful claim of indirect expropriation.

The second part of both annexes addresses the right to regulate. The second part is also described to reflect the doctrine of police powers (ie regulatory powers) in customary international law.[70] In a nutshell, a measure that constitutes a legitimate exercise of regulatory powers is not an indirect expropriation. This understanding is reflected in the case law and, in particular, is based on this passage in *Saluka v Czech Republic*:

[69] Monardes, Novik and Portales (n 66), 305.
[70] *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 Award dated 8 July 2016, para 301; *Eco Oro v Colombia* (n 6), para 626.

> 'It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their **regulatory powers**, they adopt in a **non-discriminatory manner bona fide regulations** that are **aimed at the general welfare'**.[71]

Both annexes provide that measures that are (a) non-discriminatory and (b) designed and applied to protect legitimate public welfare objectives, including public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances (see **Figure 19** above). While Annex 9-B(3)(b) of the CPTPP does not define what amounts to rare circumstances, Annex G-10(3) of the Canada-Chile FTA clarifies this concept. Annex G-10(3) explains that these rare circumstances occur when a measure is 'so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith'. In practice this means that these rare circumstances manifest when a measure is taken in bad faith. It should be noted that it will prove difficult for an investor to show that a host state has acted in bad faith as this will amount to demonstrating a host state's underlying intention, something which is hard to prove. In practice, tribunals rarely have found that a state has acted in bad faith.

The inclusion of this Annex in both the CPTPP and the Canada-Chile FTA is emblematic. Expropriation clauses already grant host states the right to lawfully expropriate foreign investments when this is justified by a public purpose, understood to cover measures taken for environmental, health and other welfare purposes, and is coupled with the payment of a prompt and adequate compensation. But Annex 9-B(3)(b) of CPTPP and Annex G-10(3) of the Canada-Chile FTA effectively expand the host state's regulatory space by expressly establishing that measures which would normally be seen as tantamount to expropriation cannot be regarded as such and do not give rise to any compensation, provided that certain conditions are met.[72] The absence of an explanation as to what constitutes 'rare circumstances' in Annex 9-B(3)(b) raises questions as to whether this concept may be construed more broadly.[73] For example, rare circumstances under the CPTPP could be construed to cover not just bad faith but also blatant negligence. Hence, Annex G-10(3) of the Canada-Chile FTA effectively grants greater protection to the relevant host states' regulatory space than Annex 9-B(3)(b) of CPTPP.

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[71] *Saluka Investments BV v Czech Republic*, ICGJ 368 (PCA 2006) Partial Award dated 17th March 2006, para 255; *Eco Oro v Colombia* (n 6), paras 627-29 (emphasis added).

[72] Monardes, Novik and Portales (n 66), 304-5.

[73] Monardes, Novik and Portales argue '… the lack of clarity with respect to paragraph 3(b) and the non-determination of what "in rare circumstances" entails means that the ambiguity persists for this provision of indirect expropriation, and the State's regulatory measures could be challenged, not solving completely the tension between investor's protection and the right to regulate'; Monardes, Novik and Portales (n 66), 306.

2.3.3 Exception for environmental measures

Next-generation IIAs frequently contain exceptions concerning measures relating to the protection of health, safety and the environment, as well as corporate social responsibility.[74] These exceptions are usually absent from first-generation BITs, including the Chile-France BIT and the Chile-UK BIT reviewed in this report. The inclusion of these provisions in next-generation IIAs is considered a response to the direction followed by the case law. At times, arbitral tribunals have interpreted FET, expropriation and other clauses very broadly so as to adversely affect host states' regulatory space,[75] arguably going beyond the host states' original intention under the relevant IIA.[76] Moreover, host states have included these novel provisions in their next-generation IIAs to contrast a phenomenon known as 'regulatory chill' which manifests when a host state changes its environmental (and other) policies out of fear that an investment tribunal may rule its actions to constitute a breach of the relevant IIA.[77]

CPTPP	CCFTA
Article 9.16 Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing **any measure otherwise consistent** with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive	**Annex G-14** Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing **any measure otherwise consistent** with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to **environmental concerns.**

[74] See eg Caroline Henckels, 'Submission to the OECD Public Consultation on Investment Treaties and Climate Change', in OECD, *Investment Treaties and Climate Change* (OECD Public Consultation – Compilation of Submissions, January-March 2022), 129-32.

[75] See eg *Occidental v Ecuador,* where Ecuador was found to have violated both FET and the expropriation clause after declaring the expiry of a 'participation contract' for the exploration and exploitation of the Ecuadorian Amazon in response to the investor's breach of the contract. The tribunal stated that the expiration decree 'was not a proportionate response' and condemned Ecuador to pay US 1.7 billion. See *Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11 Award dated 5 October 2012, paras 452 and 455. The Annulment Committee reviewing the case upheld the finding but reduced the amount of compensation to US 1.1 billion. See *Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11 Decision on Annulment of the Award dated 2 November 2015. It has been argued that this case partly drove Ecuador's decision to withdraw from ICSID. See Daniela Pàez-Salgado, 'Occidental v Ecuador: Partial Annulment Decisions Upholds the State's Liability' (Kluwer Arbitration Blog, 2015).

[76] Monardes, Novik and Portales (n 66), 302.

[77] This phenomenon of 'regulatory chill' is widely documented and accepted by scholars. Examples include: *Ethyl Corporation v. Canada* (Canada, fearing claims of indirect expropriation, abolished a prohibition on the use of fuel additives and paid approximately $13 million USD in compensation); *Indonesian Forestry Law* (the host state, fearing to have to pay $31 billion USD in compensation, reneged on a prohibition on opencast mining); *Dow Agrosciences LLC v Canada* (the investor alleged that a restriction on the use of a chemical pesticide amounted to an FET violation; to avoid having to pay compensation, Canada entered into a settlement agreement with the investor); see Maryam Malakotipour, 'The Chilling Effect of Indirect Expropriation Clauses on Host States' Public Policies: a Call for a Legislative Response' (2020) 22(2) International Community Law Review 235, 245-7. See also Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2018) 7 Transnational Environmental Law 229.

to **environmental,** health or other regulatory **objectives**.	

Figure 21: A comparison of environmental exceptions in the CPTPP and the Canada-Chile FTA

Both the CPTPP and the Canada-Chile FTA include an exception covering environmental measures (see **Figure 21** above). This is the most relevant exception in relation to climate change policies, as these are typically pursued through the adoption of environmental measures. Article 9.16 of the CPTPP and Article G-14 of the Canada-Chile FTA are drafted similarly and essentially provide that host states can adopt, maintain or enforce any measure to protect their environment, provided that this measure is 'consistent' with the investment obligations undertaken by the host state. Where Article 9.16 of the CPTPP differs from Article G-14 of the Canada-Chile FTA is in the inclusion of health and other regulatory objectives within the scope of this exception.

What is notable, however, is the requirement both in the CPTPP and the Canada-Chile FTA that the measure must be 'otherwise consistent' with the host state's investment obligations. At first glance, this language might be read as to impair the host state's right to derogate from its investment obligations for the purpose of protecting the environment.[78] Some have even argued that an exception drafted in these terms is 'self-cancelling',[79] and have therefore questioned whether this provision can be considered an exception at all.[80] Others have argued that these provisions are nonetheless meaningful. Following the doctrine of effective interpretation,[81] provisions worded in these terms and categorised as 'exceptions' should be read by tribunals as a reminder of the host states' intention to reaffirm their right to regulate.[82] Hence, tribunals should use them to interpret host states' compliance with investment obligations. This interpretation has also been reflected in the case law.[83] In *SD Meyers v Canada*, for example, Schwartz (in dissent)

[78] Joshua Paine, 'Autonomy to Set the Level of Regulatory Protection in International Investment Law' (2021) 70 International and Comparative Law Quarterly 697, 716.
[79] ibid 716. See also Lise Johnson, Lisa Sachs and Nathan Lobel, 'Aligning International Investment Agreements with the Sustainable Development Goals' (2019) 58 Columbia Journal Transnational Law 58, 101; Camille Martini, 'Balancing Investors' Rights with Environmental Protection in International Investment Arbitration: An Assessment of Recent Trends in Investment Treaty Drafting' (2017) 50 The International Lawyer 529, 568.
[80] Paine (n 78), 716-7.
[81] Michael Waibel, 'Demystifying the Art of Interpretation' (2011) 22 European Journal of International Law 571, 581-2.
[82] Paine (n 78), 717.
[83] *David R. Aven, Samuel D. Aven, Giacomo A. Buscemi and others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3 Award dated 18 September 2018 paras 412–13, 743; *Adel A Hamadi Al Tamimi v Sultanate of Oman*, ICSID Case No. ARB/11/33 Award dated 3 November 2015, paras 387–90, 445–6, 458; *Infinito Gold Ltd v Costa Rica*, (n 34), paras 772–81.

stated that a similarly drafted clause under NAFTA[84] should be interpreted as meaning that 'the parties take both the environment and open trade very seriously and that means should be found to reconcile these two objectives' and, if possible, to make them mutually supportive'.[85]

It should be noted, however, that other IIAs contain environmental exceptions drafted differently and, arguably, more strongly.[86] This is the case, for example, of Article 2201(3) of the 2008 Canada-Colombia FTA which provides that a host state cannot be prevented from adopting or enforcing environmental measures provided that such measures are non-discriminatory and do not constitute a disguised restriction on international investment. This interpretation was endorsed in *Eco Oro v Colombia*, where the tribunal interpreted Article 2201(3) as meaning that the adoption or enforcement of an environmental measure affecting a foreign investor's investment does not necessarily lead to a breach of the Canada-Colombia FTA.[87] It should be noted, however, that a majority of the tribunal also concluded that, even in this scenario, Colombia was liable to pay compensation to Eco Oro for the economic loss suffered.[88] Hence, while, as a matter of principle, environmental exceptions such as Article 2201(3) grant host states a higher level of protection of their policy space, this is not necessarily the case in practice.

More generally, it should be noted that host states' right to regulate to protect the environment, including by adopting climate change policies, does not only depend on environmental exceptions. The absence of environmental exceptions in the reviewed Chile-France BIT and Chile-UK BIT is not per se problematic and does not impair Chile, France and the UK's ability to adopt measures to protect their environment. Even under first-generation BITs, host states' ability to pursue climate change policies without triggering investment treaty claims depends entirely on how the relevant measures are designed and implemented. In short, what matters is that a host state acts fairly and in a non-discriminatory manner vis-à-vis a foreign investor and recognises that, in some

[84] NAFTA Article 1114(1): 'Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns'.
[85] *S.D. Myers, Inc v. Canada*, UNCITRAL, Separate Opinion by Dr Bryan Schwartz (on the Partial Award) dated by 12 November 2000, para 118.
[86] Paine (n 78), 718.
[87] *Eco Oro v. Colombia* (n 6), paras 826-37.
[88] ibid. On this point see also Jonathan Bonnitcha, 'Submission to the OECD Public Consultation on Investment Treaties and Climate Change', in OECD, *Investment Treaties and Climate Change* (OECD Public Consultation – Compilation of Submissions, January-March 2022), 31. In *Bear Creek Mining v Peru*, the tribunal reached a similar conclusion and found that the exception clause at Article 2201(3)of the 2008 Canada-Peru FTA, which is identical to the exception at Article 2201(3) of the Canada-Colombia FTA, did 'not offer any waiver from the obligation … to compensate for the expropriation'. See *Bear Creek Mining v Peru*, ICSID Case No. ARB/14/21 Award dated 30 November 2017, para 477.

instances, the measures in question might have consequences (including economic consequences).[89]

2.4 Results of the comparative analysis: an evolving regulatory space?

This section presents the results of the comparative analysis of the sample of first and next-generation IIAs reviewed in this report. The analysis focused on FET and expropriation clauses and, for the next-generation IIAs, on environmental exceptions. Overall, the analysis shows the extent to which Chile's regulatory space has been increasingly protected over the time. **Figure 22** below summarises the findings of the comparative analysis.

[89] *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1 Award dated 17 February 2000, paras 19, 54-56, 71. In this case, Costa Rica acknowledged that the measure in question constituted an expropriation and had economic consequences regardless of its environmental nature. The parties' disagreement related to the quantum of compensation.

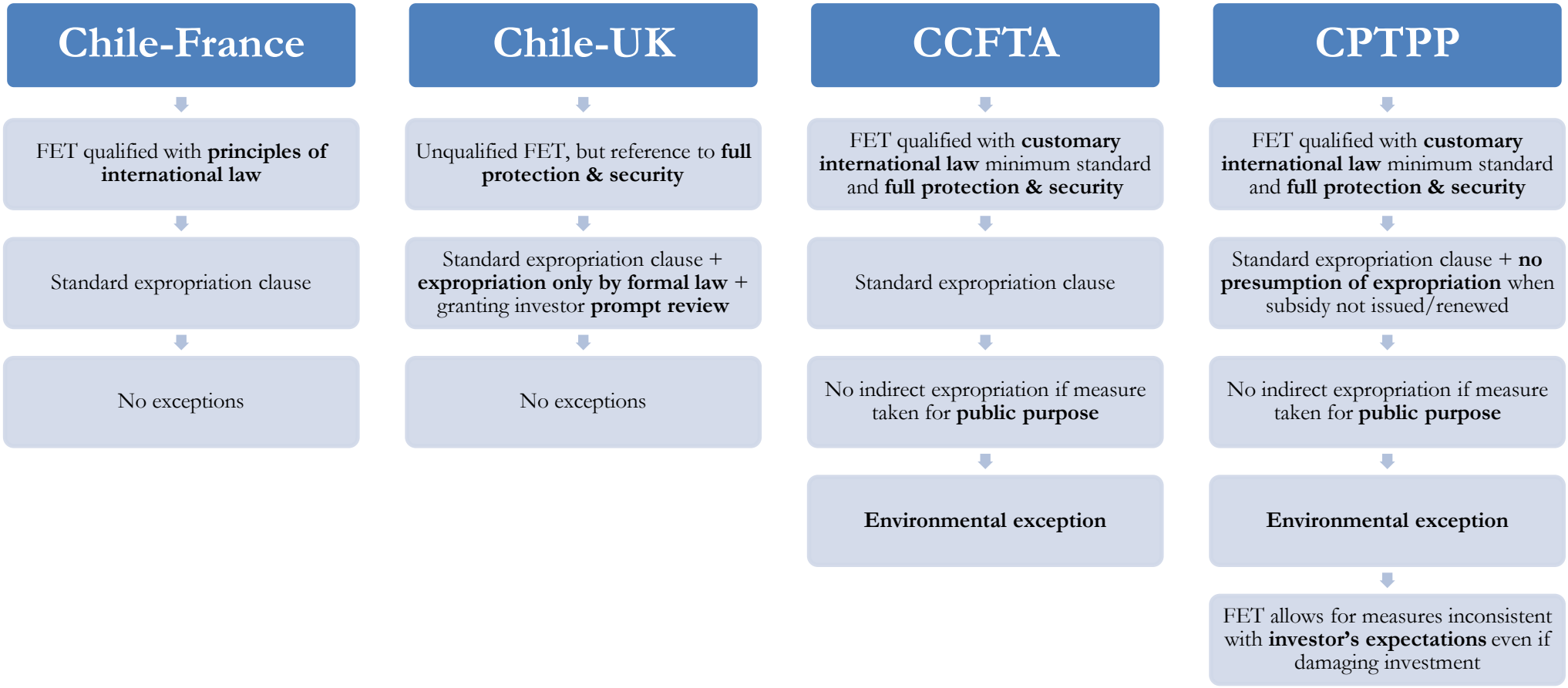

Figure 22: Evolution of Chile's regulatory space over time in light of the reviewed IIAs

The comparison between the Chile-France BIT and the Chile-UK BIT, on the one hand, and the investment chapters of the CPTPP and the Canada-Chile FTA, on the other, shows that there has been an evolution in the language of FET and expropriation clauses from broad and relatively vague provisions to new and more detailed provisions to limit the extent to which arbitral tribunals may broaden the scope of these clauses in their interpretative exercise. Next-generation IIAs increasingly shield Chile's right to regulate, including to tackle climate change, while, at the same time, decrease the risk of investment treaty claims, provided that the measures adopted are designed and implemented in a non-discriminatory manner and in good faith.

FET provisions in the Chile-France BIT and Chile-UK BIT are relatively vague and lack significant detail as to what conduct may amount to unfair and unequal treatment (although the Chile-UK BIT refers expressly to the obligation to ensure full protection and security to the investor's investment and to the obligation not to impair the investor's rights by adopting unreasonable and discriminatory measures). The absence of language as found in the FET clauses in the CPTPP and the Canada-Chile FTA is not per se problematic but might give more scope to an arbitral tribunal to interpret these first-generation clauses broadly. Conversely, the FET clauses in the CPTPP and the Canada-Chile FTA restrict the tribunals' interpretative scope by identifying a greater number of instances in which there is no violation of the fair and equitable standard of treatment or, at least, such violation should not be presumed. The most notable example is the reference to the possibility of frustrating an investor's legitimate expectations, including when there is damage to the investor's investment, without breaching FET in the CPTPP. Other examples of language protecting Chile's regulatory space are the reference to a violation of domestic law as not necessarily establishing, in and of itself, an FET breach (Article G-05(5) of the Canada-Chile FTA) or the reference to a violation of another IIA clause as not establishing a presumption of an FET breach (Article 9.6(3) of the CPTPP and Article G-05(4) of the Canada-Chile FTA).

Expropriation clauses in the Chile-France BIT and the Chile-UK BIT are standard expropriation clauses covering direct and indirect expropriation and clarifying the conditions upon which an expropriation can be considered lawful. The Chile-UK BIT, however, imposes additional procedural steps on the host state undertaking an expropriatory measure (obligation to authorise the expropriation by a formal law and right of the investor to a prompt review before a final decision on the expropriation is taken). The absence of a definition of indirect expropriation as enshrined in the CPTPP and the Canada-Chile FTA respective Annexes leaves ample scope to arbitral tribunals to interpret the concept of indirect expropriation relatively broadly.

The Annex on indirect expropriation is one of the key innovations of next-generation IIAs and perhaps the most important aspect in terms of protection of host states' regulatory space. Both Annex 9-B(3) of the CPTPP and Annex G-10(2) and (3) of the Canada-Chile FTA demarcate the difference between measures amounting to indirect expropriation and leading to an award on compensation, on the one hand, and regulatory measures undertaken for legitimate public purposes that do not constitute an indirect expropriation and, as such, are 'non-compensable'.[90] The Canada-Chile FTA goes further than the CPTPP in that it clarifies what are the 'rare circumstances' in which a measure, normally covered by the Annex on indirect expropriation, may nonetheless constitute an indirect expropriation, thus leaving less scope to arbitral tribunals' interpretation as to when these rare circumstances may occur. In this sense, the Annex of the Canada-Chile FTA further shields Chile's regulatory space.

Environmental and other exceptions are also a recent innovation in next-generation IIAs. While the absence of these exceptions in first-generation BITs, such as the Chile-France BIT and the Chile-UK BIT, is not per se problematic and does not translate into the inability of the host states to design and implement environmental policies, their inclusion in next-generation IIAs, such as the CPTPP and the Canada-Chile FTA, is emblematic. It should be noted, however, that while the CPTPP and Canada-Chile FTA environmental exceptions signal to investors that Chile and the other host states envisage to adopt measures to protect their environment, the requirement that such measures be 'otherwise consistent' with these host states' investment obligations weakens their role as 'exceptions'.

In sum, both first-generation BITs (Chile-France BIT and Chile-UK BIT) and next-generation IIAs (CPTPP and Canada-Chile FTA) afford Chile sufficient regulatory space to adopt climate change mitigation and adaptation measures in compliance with their international and domestic commitments under the 2015 Paris Agreement, the 2020 Updated NDCs and the 2022 Framework Law on Climate Change.[91] The new and more precise clauses enshrined in next-generation IIAs such as the CPTPP and the Canada-Chile FTA respond to host states concerns in relation to broad (and arguably excessive) coverage granted by arbitral tribunals to foreign investors' rights against measures that host states need to adopt to protect their public interests. In practice, however, next-

[90] Monardes, Novik and Portales (n 66), 304.

[91] Under Article 1 of the 2022 Framework Law on Climate Change, Chile committed to achieve a net zero CO_2 emissions target by 2050, making it one of the first developing countries to set such an ambitious goal. See Ministerio del Medio Ambiente, 'Ley Marco de Cambio Climático', Diario Oficial de la República de Chile – Ley Número 21 .455 (13 June 2022). See also Robert Currie Ríos, 'Chile Adopts New Climate Change Framework Law: A Paradigm Shift' (Climate Law Blog – Sabin Center for Climate Change Law, 2022).

generation IIAs further shield Chile's right to regulate in that they leave a narrower scope to tribunals to interpret their clauses broadly so as to effectively restrict their ability to adopt climate change policies.

3 Case Study: Chile's Climate Change Commitments to Reduce Black Carbon

To elaborate on the tension between a host state's right to regulate on climate change and foreign investors' rights under an IIA, the report will now consider the extent to which a hypothetical climate change mitigation measure tackling black carbon emissions might give rise to investment treaty claims and how best Chile can address these claims (Section 3.3). Sections 3.1 and 3.2 lay the foundation of the discussion in section 3.3. Section 3.1 explains the contribution of black carbon emissions to climate change. Section 3.2 elaborates on Chile's mitigation target to reduce black carbon emissions and identifies the industries that contribute the most to black carbon emissions in Chile and that are likely to be affected by any measure tackling black carbon emissions. Section 3.2 also explains the rationale for the decision to focus on the mining sector in this report.

3.1 Black carbon and its contribution to climate change

Black carbon is a sooty material made up of parts of fine particulate matter ($PM_{2.5}$). It is formed through the incomplete combustion of wood, fossil fuels and other fuels.[92]

Black carbon is one of the primary short-lived climate pollutants (SLCPs) contributing to the global average temperature increase. Black carbon emissions alongside CO_2 emissions are the major contributors to global warming and, in turn, climate change. SLCPs remain in the atmosphere for shorter periods than long-lived climate pollutants (LLCPs) such as CO_2. Black carbon remains in the atmosphere for an average of 4 to 12 days,[93] while CO_2 remains in the atmosphere for approximately 300 to 1,000 years.[94] Given its short lifespan in the atmosphere, black carbon is easier to tackle than CO_2 and other LLCPs. Accordingly, measures aimed at reducing black carbon emissions generate more immediate results in combating climate change than measures focused on CO_2 emissions. This is due to the fact that the effects of the decrease of CO_2 and other LLCPs on the global average temperature take a longer period of time to manifest themselves.[95]

[92] CCAC, 'Black Carbon' (UNEP).
[93] 'Status of black carbon monitoring ambient air in Europe' (European Environment Agency, Technical Report No. 18/2013), 28; Sabrina Shakman, 'These Climate Pollutants Don't Last Long, But They're Wreaking Havoc on the Arctic' (Inside Climate News, 2018).
[94] Alan Buis, 'The Atmosphere: Getting a Handle on Carbon Dioxide', (NASA – Global Climate Change, 2019).
[95] IGSD, 'Primer on Short-Lived Climate Pollutants' (2013), 58.

Black carbon emissions are responsible for up to 45% of global warming.[96] The major sources of these emissions worldwide are household energy consumption, transportation, agriculture, industrial production, waste, fossil fuel operations, and large-scale combustion. **Figure 23** below outlines the percentage of contribution of each one of the listed anthropogenic activities.[97]

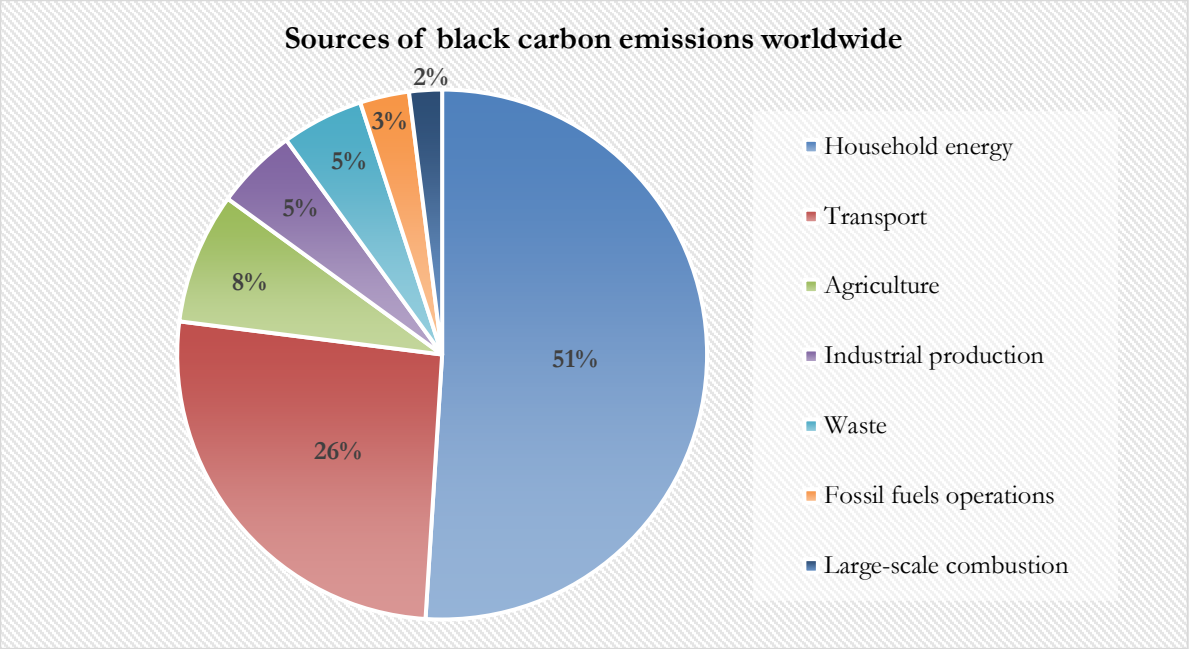

Figure 23: Sources of black carbon emissions worldwide

Most of the world's black carbon emissions originate in Asia, Africa and Latin America.[98] In 2015, in the Latin America and Caribbean region, the largest portion of black carbon emissions originated from (i) transportation emissions and (ii) household consumption, such as biomass cookstoves and coal stoves. Other anthropogenic activities contributing to black carbon emissions were, in order of contribution, (iii) agriculture (iv) large-scale combustion from the use of boilers and furnaces in power plants and factories, (v) industrial production, including brick and metallurgic coke production, and (vi) fossil fuels production (see **Figure 24** below, which also shows the major sources of black carbon emissions in other regions of the world).[99]

[96] CCAC, 'Short-lived Climate Pollutants (SCLPs)' (UNEP).
[97] 'Black Carbon' (n 92).
[98] A 2017 study concluded that emissions from Asia, Africa and Latin America accounted for approximately 88% of worldwide black carbon emissions. See 'Black Carbon' (n 92).
[99] ibid.

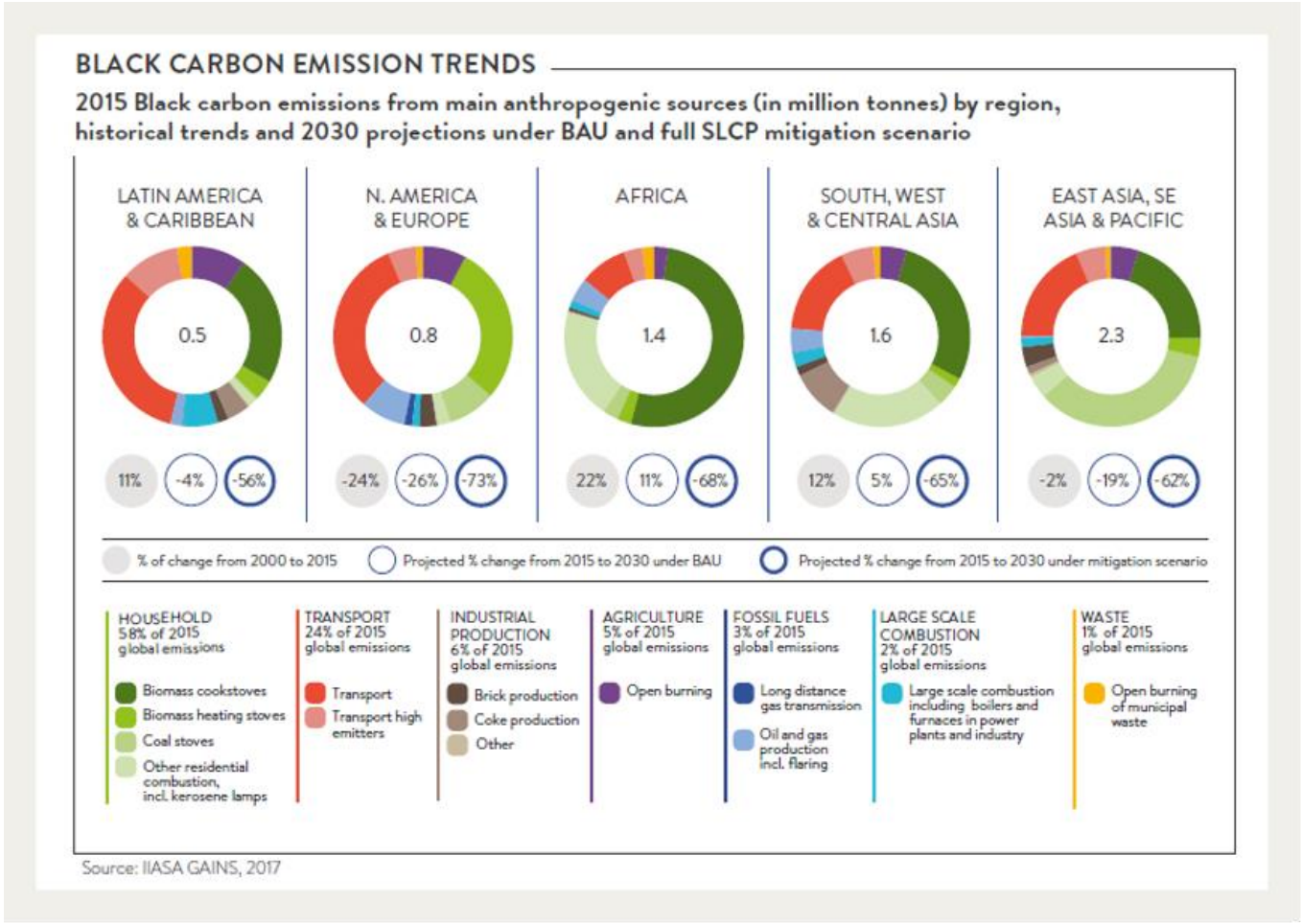

Figure 24: Black carbon emissions trends worldwide (2015)

Figure 24 further illustrates that in Latin America and the Caribbean there was an 11% increase in black carbon emissions from 2000 to 2015. There is a 4% projected decrease in black carbon emissions from 2015 to 2030 if business continued as usual and no mitigation measures were implemented, and a 56% projected decrease if mitigation measures were adopted. The sharp difference (from 4% to 56%) between a non-mitigation and a mitigation scenario might explain, at least in part, Chile's commitment to tackle black carbon emissions as part of its climate mitigation targets under its Updated 2020 NDCs.

3.2 Chile's mitigation target to reduce black carbon emissions

Chile's commitment to reducing black carbon emissions is novel as, in its Intended NDCs published in 2015, Chile had not undertaken any specific commitments on black carbon but had only referred to general efforts in reducing black carbon in regions with high levels of this

substance.[100] In its Updated NDCs published in 2020, Chile expressly committed to reducing black carbon emissions by at least 25% by 2030 compared to 2016 levels.[101]

Chile's mitigation targets cover both black carbon and CO_2 emissions. Chile's commitment to reducing black carbon emissions can be explained by the fact that black carbon is 'the largest contributor to climate change after CO_2'.[102] The importance of tackling black carbon emissions alongside CO_2 and other emissions is also mentioned in Chile's Framework Law on Climate Change issued in June 2022.[103]

3.3 Industries and investments potentially affected by mitigation measures

Chile's commitment to reducing black carbon emissions by 2030 is likely to be achieved via mitigation measures involving different sectors. Since 2017, the Ministry for Environment commissioned several studies aimed at creating an inventory of black carbon emissions. In 2020, an independent study identified the main sectors responsible for generating black carbon emissions in Chile.[104] **Figure 25** below provides a breakdown of the contribution of each sector to black carbon emissions in Chile.[105] This breakdown helps to identify the industries that are more likely to be affected by mitigation measures on black carbon over the next few years.

[100] Government of Chile, 'Intended Nationally Determined Contribution of Chile towards the Climate Agreement of Paris 2015' (Santiago, 2015), 17-8.
[101] Government of Chile, 'Chile's Nationally Determined Contributions' (Update 2020) (n 4), 33-4.
[102] Cho, (n 3).
[103] Article 11(1)(c) of Chile's Framework Law on Climate Change (n 91).
[104] Laura Gallardo et al, (eds) 'Mitigación de Carbono Negro en la Actualización de la Contribución Nacionalmente Determinada de Chile: Resumen para Tomadores de Decisión', (Centro de Ciencia del Clima y la Resiliencia para el Ministerio del Medio Ambiente a través de Programa de las Naciones Unidad para el Medio Ambiente (PNUMA/UNEP) y la Iniciativa *Supporting National Action and Planning on Short-Live Climate Pollutants* (SNAP), 2020), 14-5.
[105] ibid, 15.

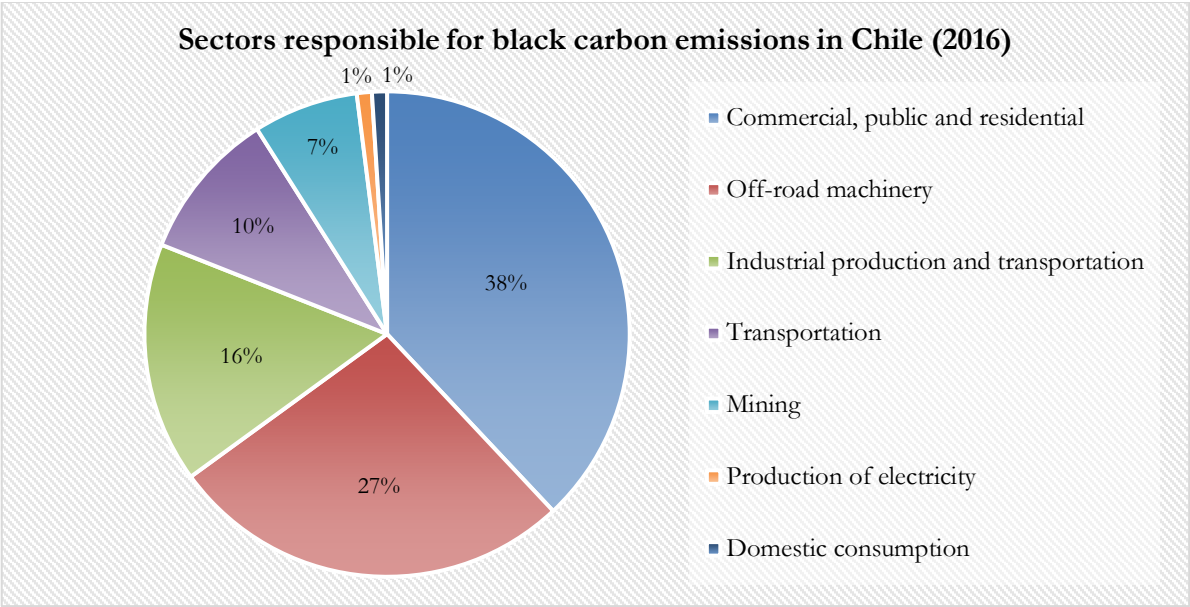

Figure 25: Sectors responsible for generating black carbon emissions in Chile (2016)

Commercial, public and residential sectors

The commercial, public and residential sectors are the most significant contributors to black carbon emissions. Within these sectors, the burning of wood for residential heating and traditional cooking are the causes of most black carbon emissions in Chile.[106]

Sectors using off-road machinery

Off-road machinery (with net power below 560kw) such as excavators, backhoes, tractors and drilling equipment are the second largest contributors to black carbon emissions. These machines emit black carbon in the atmosphere by using large amounts of diesel fuel to operate their engines.[107] The use of these machines is prevalent in the mining and other industrial sectors (eg construction sector and agriculture).

Industrial production and transportation

The third largest contributor to black carbon emissions in Chile is industrial production. This derives predominantly from the pulp and paper manufacturing sector. Other industrial sectors where the burning of wood is common also contribute to these emissions.[108] Transportation

[106] ibid.
[107] ibid.
[108] ibid.

follows as the next largest contributor. Transportation covers all means of transport except shipping[109] and air transport.[110]

Mining

Mining is the fifth largest contributor to black carbon emissions in Chile. These emissions derive from all mining operations except those where diesel engines are used. The emissions caused by diesel engines operating off-road and other machinery are already accounted for above (under sector using off-road machinery).[111]

Production of electricity and domestic consumption

These last two sectors contributing to black carbon emissions in Chile account only for 1% of total black carbon emissions. These emissions are mostly caused by the burning of natural gas.

3.4 Investment treaty claims arising from a hypothetical climate change measure

In Section 2, the report analysed the scope of Chile to adopt climate change mitigation and adaptation measures under both first-generation BITs and next-generation IIAs. In this subsection, the report presents a hypothetical mitigation measure concerning black carbon emissions and identifies the investment treaty claims that may arise in connection with this measure.

3.4.1 Climate change measure: ban on diesel fuel affecting heavy-duty mining trucks

The report focuses on a hypothetical measure in the mining sector. The rationale for this choice is simple. Besides being one of the major contributors to black carbon emissions in Chile, the mining sector attracts significant foreign direct investment (FDI) and is one of the most important sectors for Chile's economy.[112] In 2020, the mining sector in Chile accounted for approximately 12.5% of Chile's gross domestic product (GDP), and mining exports amounted to over 37.5 billion US dollars.[113] Large mining investment projects in Chile from 2020 to 2024 total 24 billion US dollars.[114] Both domestic and foreign-owned companies are involved in this sector. **Figure 26** below shows the market share of the leading mining companies operating in Chile.[115]

[109] ibid.
[110] ibid.
[111] ibid.
[112] A large number of the leading mining companies operating in Chile are foreign-owned: see **Figure 26**.
[113] Bruna Alves, 'Mining in Chile – Statistics and Facts' (Statista, 2021).
[114] International Trade Administration, 'Chile – Country Commercial Guide – Mining' (2022).
[115] Bruna Alves, 'Leading Mining Companies in Chile by Net Revenue in 2020', (Statista, 2021).

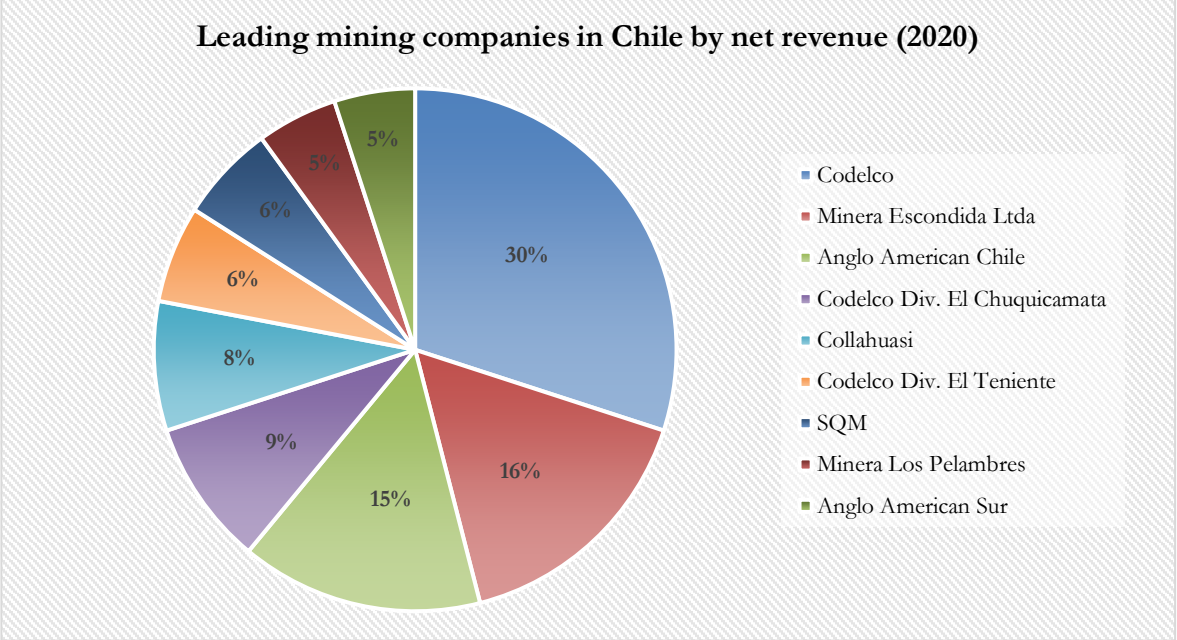

Figure 26: Leading mining companies in Chile by net revenue (2020)

The measure could consist, for example, of a ban (or even a moratorium) requiring mining companies to cease using heavy-duty trucks operating with diesel engines by 2025. The measure could also be broader and consist of a ban on the use of diesel more generally. Irrespective of its scope of application, in either case the measure would likely affect the mining sector. This measure, although hypothetical, is not entirely speculative as Chile has already taken steps in this direction by committing to zero-emissions sales of off-road machinery (with net power below 560kw) by 2035.[116]

In this hypothetical scenario, the measure could affect a foreign investor operating in the mining sector if, for example, switching from diesel to hydrogen fuel makes the investor incur substantial unforeseen costs. If we consider that hydrogen fuel is on average three times more expensive than diesel fuel,[117] and that the use of mining trucks and equipment is central to mining operations, this projection is not speculative. If the interference with the profitability is significant enough, investment treaty claims may arise, including:

[116] Oscar Delgado and Samantha Pettigrew, 'New Legislation in Chile shows Climate Leadership' (The International Council on Clean Transportation, 2022).
[117] Caroline Donnelly, 'Hydrogen vs. Diesel: The Great Datacentre Backup Power Debate' (Ahead in the Clouds, 2021).

A. **A claim of a FET violation**, as the measure may affect an investor's **legitimate expectations** to operate in a stable and predictable legal and regulatory environment.

B. **A claim of indirect expropriation**, as the measure may significantly affect or even deprive the foreign investors' investment of its value.

3.4.2 Potential investment treaty claims

3.4.2.1 Violation of FET

A foreign investor could claim that the envisaged measure violates its legitimate expectations to operate in a stable and predictable legal and regulatory environment. The investor could claim more specifically that the short time frame (2022-2025) for replacing diesel with another type of fuel, coupled with significant equipment and related costs, could severely affect its ability to continue its mining activities.

The short time frame would be of particular concern as: (a) Chile only committed to reducing its black carbon emissions in 2020 when it made black carbon part of its updated mitigation targets;[118] (b) the timeframe to comply with the measure would be relatively short (3 years).

Three scenarios might arise:

a. **Pre-2015**: foreign mining companies operating in Chile since before 2015 could have a stronger argument that this measure was unpredictable. As a result, these mining companies could more easily argue that the regulatory change concerned frustrated their legitimate expectations to continue operating their heavy-duty trucks with diesel fuel.

   Normally, however, this argument will not, in and of itself, be sufficient to support a conclusion that there is a FET violation. For a legitimate expectations argument to succeed, these mining companies would need to show that Chile had made specific representations or given assurances relating to the use of heavy-duty trucks (usually diesel-fuelled) in mining operations or relating more generally to diesel fuel. Indeed, a general expectation that a legal and regulatory environment will remain static is not protected under a FET

[118] As mentioned above, in its Intended NDCs in 2015, Chile had only mentioned general efforts to reduce black carbon in regions severely affected by this substance. See *supra*, Section 3.2.

standard. This has been endorsed in the case law. In *Charanne v Spain*, the tribunal stated that 'in the absence of a specific commitment, an investor cannot have a legitimate expectation that existing rules will not be modified'.[119] More recently in *Eco Oro*, the tribunal concluded that Colombia (the host state) was under no obligation to guarantee that the domestic regulatory environment would remain stable, especially in the absence of a stabilisation clause.[120] The tribunal also added that it accepted that 'a State cannot be rigidly bound to those rules and regulations in force at the time the investment is made'.[121]

The situation would, however, be different if either (i) Chile was reneging on prior specific representations or assurances made or given to these foreign mining companies[122] or (ii) Chile had acted inconsistently over time so as to create such an unstable and unpredictable legal environment that these mining companies could have legitimately claimed that Chile's conduct lacked transparency, or was, at least, confusing.[123] In either of these scenarios, the chances that Chile would be found in breach of the FET standard of treatment would be much higher. In the second scenario, however, Chile would have a higher chance to defend its conduct, especially considering that, as described above, the hypothetical measure would affect both domestic and foreign mining companies, would pursue a genuine climate change mitigation target and would be adopted in good faith. In these circumstances, Chile's alleged inconsistent conduct and the ensuing foreign mining companies' confusion would not necessarily lead to a FET breach. In the words of Philippe Sands (in dissent) in *Eco Oro*:

> '**[n]either the MST nor the FTA offer a right against confusion**. The majority is correct to point out that there were problems with the manner in which the government handled the process … [i]t was slow, it was inconsistent, it was uncertain. The key question, however, is: did the process … cross the line of departing from the rule of law, or proceed on a basis that shocks our sense of juridical propriety? In my

[119] *Charanne B.V. and Construction Investments S.a.r.l. v. Spain*, SCC Case No. 062/2012 dated 21 January 2016, para 499.
[120] *Eco Oro v Colombia* (n 6), paras 748-9.
[121] ibid, para 749.
[122] See, for example, *Novenergia v Spain*, where Spain's decision to renege on its guaranteed renewable energy tariffs was seen as a radical regulatory change amounting to a FET violation even if the decision pursued a legitimate public purpose. See *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063 dated 15 February 2018, paras 681 and 697.
[123] See, for example, *Eco Oro v Colombia*, where the majority of the tribunal found that Colombia had frustrated Eco Oro's legitimate expectations by continuously delaying delimiting the area within which Eco Oro could exercise its exploration and exploitation rights. This conduct, which continued for a lengthy period of time and led to a significant level of legal uncertainty and confusion for Eco Oro, led the tribunal to conclude that Colombia subjected Eco Oro to 'a regulatory roller coaster' amounting to a FET violation. See *Eco Oro v Colombia* (n 6), paras 718, 791-821.

view it did not … By any reasonable standard, the situation faced by the [host state], in seeking to give effect to a legitimate objective of environmental protection, was challenging. Its approach in meeting that challenge was not perfect, but it was not contrary to the rule of law, and it was not a conduct that shocked or offended a sense of juridical propriety'.[124]

b. **2015-2020**: foreign mining companies establishing their business in Chile between 2015 and 2020 could still argue that the measure was somewhat unpredictable as Chile only included black carbon in its mitigation targets in 2020. The sudden regulatory changes in relation to black carbon (in 2020) and diesel fuel (in 2022) could be considered too rapid and could potentially lead to claims of a violation of the FET standard on a legitimate expectation basis, provided that either (a) Chile had made relevant specific representations or given specific assurances upon which these mining companies could show to have relied, and/or (b) Chile had acted inconsistently so as to create significant legal uncertainty and confusion. Such a scenario would occur if, for example, post-2015 and pre-2020, and despite its intentions to tackle black carbon emissions in the mining sector, Chile had attracted investments from foreign mining companies on the understanding that they could continue to operate heavy-duty diesel-fuelled tracks up to 2040 or 2050 (instead of 2025).

   In a post-2015 context, however, in the absence of any specific representations, it would be much harder for foreign mining companies to rely on a legitimate expectations' and/or a stable and predictable legal environment argument(s), given that Chile referred to general efforts to reduce black carbon emissions in its Intended NDCs issued in 2015. The question here would be whether a general effort to reduce black carbon without a reference to an intention to ban diesel fuel could be seen as an indication that Chile would have adopted measures similar to the hypothetical measure in this report.

c. **Post-2020**: foreign investors establishing their mining business in Chile post-2020 would be less likely to be able to argue that this measure effectively led to a frustration of their legitimate expectations. This is because they could have reasonably foreseen a measure of this kind. Indeed, Chile's Updated NDCs are part of the public domain. Moreover, investors are (or should be) aware that all countries are in the process of taking steps to comply with their international obligations under the Paris Agreement, and a measure

[124] *Eco Oro v Colombia*, (n 6) Partial Dissent of Professor Sands, paras 34 and 37 (emphasis added).

concerning a heavy pollutant such as diesel fuel should not be considered unforeseeable. In addition, tribunals have recognised that a legal and regulatory framework should not be considered as static, and this is all the more so when host states have signalled that they might take certain measures affecting a particular sector, namely transportation.[125] As a result, in the absence of a specific commitment, it would be even harder for these foreign mining companies to argue that in adopting this hypothetical measure Chile acted in breach of FET.

The situation would be different if Chile had undertaken some form of specific commitment vis-à-vis these foreign mining companies (eg ban on the use of diesel fuel by no earlier than 2035). Even in these circumstances, however, Chile could argue that the earlier phasing out of diesel-fulled heavy trucks has become necessary given the urgency of the climate emergency. As stated by Philippe Sands (in dissent) in *Eco Oro*:

> '[i]n the age of climate change … it is clear that society finds itself in a state of transition. The law – including international law – must take account of that state of transition, which gives rise to numerous uncertainties. Adjudicators – judges and arbitrators – recognise the need to proceed with caution at a time of transition and uncertainty. Indeed, the precautionary principle has been developed to assist in the taking of decisions in times of uncertainty'.[126]

The likelihood of a successful claim by the affected mining companies in these three scenarios would also depend on the level of protection granted by the FET clause in the relevant IIA. The broad language of the reviewed first-generation BITs would give more scope to the mining companies to argue that the frustration of their expectations is covered under the FET clause. As a matter of principle, the Chile-UK BIT unqualified FET clause would give them even more scope for such an argument. As discussed above, however, the qualification of a first-generation FET clause does not seem to be decisive. Also, for a legitimate expectations argument to be successful, even under first-generation BITs, the mining companies would still need to show that Chile had given a specific undertaking in relation to their investment.

[125] Government of Chile (n 4), 34.
[126] *Eco Oro v Colombia*, (n 6) Partial Dissent of Professor Sands, para 33.

What is clear, however, is that Chile would be in an even stronger position to defeat an FET violation claim based on legitimate expectations under the Canada-Chile FTA and, even more so, under the CPTPP. Both these next-generation IIAs allow for an investor's legitimate expectations to be interfered with in some form without this automatically resulting in an investment treaty violation. And, most importantly, under these next-generation IIAs, it would not be sufficient for the mining companies to show that their investment has been affected as a result of this interference. Under the CPTPP, Chile would find itself in an even stronger position as Article 9.6(4) expressly states that a measure may be inconsistent with an investor's expectation without this giving rise to a FET violation. This is of course true to the extent that the mining companies would not be able to show that Chile had made specific representations in relation to their investment, as this factor is extremely relevant, and at times even decisive, irrespective of the wording of the FET clause in the relevant IIA.

In sum, in the event that a hypothetical measure such as the one discussed in this report was adopted, the likelihood of an FET claim succeeding would largely depend on (a) the period in which the foreign mining company established its business (pre-2015, 2015-2020, or post-2020), (b) whether Chile had made any specific representations or given any assurances in relation to heavy-duty trucks or more generally in relation to the use of diesel fuel and (c) the wording of the FET clause in the relevant IIA. In general terms, however, Chile is more likely to defeat an FET claim in relation to a climate change measure if it can show that the measure (a) is applied fairly and in a non-discriminatory manner, (b) pursues a legitimate climate change mitigation and/or adaptation objective, and (c) is adopted in good faith.

3.4.2.2 Expropriation

A foreign investor could also claim that the hypothetical measure amounts to an indirect expropriation. Arguments in support of this claim might range from a claim that the value of the investment and its profitability have been negatively affected (eg because the investor has not recovered the initial costs incurred) to a claim that the investment has been entirely deprived of its value (eg because the investor must cease its operations).

Whilst a mere reduction in profit-making ability does not amount to expropriation, regulations that completely defeat the profit-making ability of an investment constitute compensable indirect

expropriation.[127] The success of an indirect expropriation claim would depend largely on the extent to which the applicable IIA elaborates on what constitutes a host state's legitimate exercise of its right to regulate.

Under the CPTPP Annex 9-B(3) and Canada-Chile FTA Annex G-10(2) and G-10(3), it would be easier for Chile to defeat an indirect expropriation claim. The recent *Eco Oro* case is enlightening in this respect as it concerns the interpretation of an IIA, the Canada-Colombia FTA, which resembles the CPTPP and the Canada-Chile FTA and which contains an Annex on Indirect Expropriation (ie Annex 811(2)(a) and (b)). In this case, the majority of the tribunal concluded that a series of measures aimed to protect the environment and causing a substantial deprivation to Eco Oro capable of being considered an indirect expropriation, were a 'legitimate exercise of Colombia's police powers' pursuant to Annex 811(2)(b) of the Canada-Colombia FTA.[128] As a result, Eco Oro was not awarded any compensation in relation this claim. The tribunal reached this conclusion after finding that the measures were (a) non-discriminatory, (b) designed and applied to protect the environment and (c) adopted in good faith so as not to comprise a rare circumstance.[129]

Following this reasoning, if Chile adopted a measure such as the hypothetical measure presented in this report, which, as described, (a) is non-discriminatory, (b) pursues a legitimate climate change objective and (c) is adopted in good faith, it would likely succeed in defeating an indirect expropriation claim under the CPTPP or the Canada-Chile FTA. This conclusion would more confidently be reached under the Canada-Chile FTA as Annex G-10(3) confirms that a measure would not comprise a 'rare circumstance' if adopted in good faith. The CPTPP is instead silent on this point. In this scenario, Chile could also invoke its environmental exception under Article 9.16 of the CPTPP and argue that its measure is aimed at protecting a legitimate environmental concern. It should be noted, however, that Article 9.16 requires Chile to adopt measures 'otherwise consistent' with its investment obligations. In this sense, it would be harder for Chile to sidestep an indirect expropriation claim under the CPTPP environmental exception.

The situation would be different and more complex if Chile was sued under the Chile-France BIT or the Chile-UK BIT. In this second scenario, it would be harder for Chile to defeat an indirect

[127] Peter D. Isakoff, 'Defining the Scope of Indirect Expropriations for International Investments' (2013) 3(2) Global Business Law Review 189.
[128] *Eco Oro v Colombia*, (n 6) paras 634, 642 and 699.
[129] ibid, paras 635 and 642.

expropriation claim since both these first-generation BITs do not contain an Annex elaborating on the difference between measures amounting to indirect expropriations and non-compensable regulatory measures. Hence, in this second scenario, it is likely that Chile would need to account for having to compensate the affected foreign mining companies. In such scenario, in the short-term, negotiating an out-of-court settlement on compensation might be a strategic option. In the longer-term, it might be worth considering renegotiating existing IIAs to reflect new compensation approaches that reflect and better take into account policies changes driven by climate change.[130]

In sum, Chile would more likely succeed in defeating an indirect expropriation claim arising from the implementation of a climate change measure under a next-generation IIA than a first-generation IIA. In either scenario, Chile would be more likely to defeat an indirect expropriation claim if the climate change measure is (a) non-discriminatory and thus applies across the whole industry, (b) pursue a legitimate climate mitigation and/or adaptation target and (c) is adopted in good faith.

[130] An example of this novel approach to compensation is summarised in Bonnitcha (n 88), 28-36 and Emma Aisbett, 'Submission to the OECD Public Consultation on Investment Treaties and Climate Change', in OECD, *Investment Treaties and Climate Change* (OECD Public Consultation –Compilation of Submissions, January-March 2022), 9-15.

4 Concluding Remarks

This report concludes that there is sufficient scope for Chile to implement its international climate change commitments under both first-generation and next-generation IIAs. Climate change is a pressing issue, such that no investor can legitimately expect a static regulatory environment whereby states do not enact measures to address climate change. This conclusion is the result of considering two fundamental questions. First, to what extent have the international investment agreements that Chile has entered over the decades affected Chile's regulatory space in general? Second, what are the risks of investment treaty claims arising from measures adopted in pursuance of Chile's international climate change commitments?

Section 2 considers the first of these two questions. In this section, the analysis focused on FET and expropriation clauses, and on the environmental exceptions in next-generation IIAs. The report demonstrates that (i) FET provisions in first-generation BITs are not as detailed as in later-generation IIAs, and thus tribunals enjoy a broader discretion when interpreting these clauses; (ii) first-generation IIAs do not include an Annex on Indirect Expropriation, hence only expropriation clauses protect Chile's regulatory space in these agreements (iii) besides an Annex on Indirect Expropriation, later-generation IIAs include environmental exceptions which can function as interpretative tools and give more weight to envisaged environmental measures. Therefore, the report concludes that although Chile's regulatory space has been accommodated to varying degrees in both generations of IIAs, its regulatory space has indeed been increasingly shielded with the introduction of next-generation IIAs such as the CPTPP. Chile can more confidently rely on its regulatory space to implement its international climate change commitments, particularly given that the next-generation IIAs explicitly contain provisions to pursue legitimate public purposes, which include climate change mitigation and adaptation measures. Further, the more detailed provisions in the next-generation IIAs bridle the discretion of arbitration tribunals, which favours Chile's regulatory space.

Section 3 considers the second question. In this regard, the report focused on Chile's mitigation target concerning black carbon emissions. More specifically, Section 3 zoomed in on the mining industry which could be an example of a sector where investment treaty claims may arise in case of a hypothetical climate change measure. Section 3 finds that for Chile's regulatory space not to be constrained by IIA claims, Chile must carefully consider the manner of adoption of any measures. Such measures must be non-discriminatory, in pursuit of a legitimate climate change

purpose, taken in good faith, and must not violate an investment-backed legitimate expectations. In spite of the foregoing, it must be said that climate change is such an urgent issue that no foreign investor can legitimately claim that they are not aware that climate change is an ongoing crisis. Therefore, investors cannot legitimately claim that states would not be reasonably expected to pursue climate change mitigation and adaptation measures. Thus, this report demonstrates that there is ample scope for Chile to adopt its climate change policies to implement its international commitments.

Annex 1 – Chile-France BIT (1992)[131]

	English Translation	Original text (Spanish)
Article 3	Each Contracting Party shall undertake to accord in its territory and maritime zone just and equitable treatment, in accordance with the principles of international law, to the investments of nationals and companies of the other Party and to ensure that the exercise of the right so granted is not impeded either *de jure* or *de facto*.	Cada Parte Contratante dará un tratamiento justo y equitativo de conformidad con los principios del Derecho Internacional a las inversiones efectuadas por los nacionales y sociedades de la otra Parte Contratante en su territorio o en su zona marítima, y garantizará que el ejercicio del derecho así reconocido no sea obstaculizado por la ley ni por la práctica.

	English Translation	Original text (Spanish)
Article 5	(1) Investments made by nationals or companies of either Contracting Party shall be fully and completely protected in the territory and maritime zone of the other Contracting Party. (2) The Contracting Parties shall not take any expropriation or nationalization measures in their territory and maritime zone or any other measures which could cause investors of the other Party to be dispossessed, directly or indirectly, of the investments belonging to them, except for reasons of public necessity. Such measures shall be neither discriminatory nor contrary to a specific undertaking as described in article 10 of this Agreement. Any dispossession measures taken shall give rise to the payment of prompt and adequate compensation, the amount of which, calculated in accordance with the real value of the investments in question, shall be assessed on the basis of a normal economic situation prior to any threat of dispossession. Such compensation shall be calculated in accordance with standard procedure. Such compensation, its amount and methods of payment, shall be determined not later than the date of dispossession. The compensation shall be effectively realizable, paid without delay and freely transferable. It shall yield, up to the date of payment,	(1) Las inversiones realizadas por los nacionales o sociedades de una de las Partes Contratantes gozarán de plena y total protección y seguridad en el territorio y en la zona marítima de la otra Parte Contratante. (2) Ninguna de las Partes Contratantes tomará medidas de expropiación o nacionalización ni ninguna otra medida que tenga el efecto de privar, en forma directa o indirecta, a los nacionales o sociedades de la otra Parte Contratante de sus inversiones en su territorio y en su zona marítima, excepto en favor del bien común. Estas medidas no serán discriminatorias ni contrarias a un compromiso especial conforme a lo mencionado en el Artículo 10 de este Convenio. Cualquier medidas de privación que pudiere adoptarse dará lugar a una indemnización pronta y adecuada, cuyo monto se calculará sobre la base del valor real de las inversiones en cuestión y se fijará de conformidad con la situación económica normal imperante antes de cualquier amenaza de privación siendo comprobable de acuerdo con un procedimiento judicial regular. Dichas indemnizaciones, los montos y condiciones de pago se fijarán a más tardar en la fecha de desposeimiento. Esta indemnización será efectivamente realizable, se pagará sin demora y será libremente transferible. Hasta la fecha de pago, devengará intereses calculados según la tasa de mercado correspondiente.

[131] The English translation of the relevant provisions of the Chile-France BIT provided in this Annex is the translation provided in the UNTS collection (No. 32895).

	interest calculated on the basis of the appropriate market interest rate. (3) Nationals or companies of either Contracting Party whose investments have suffered losses as a result of war or any other armed conflict, revolution, state of national emergency or uprising in the territory or maritime zone of the other Contracting Party, shall be accorded by the latter Party treatment which is no less favourable than that accorded to its own nationals or companies or to those of the most favoured nation.	(3) Los nacionales o sociedades de una de las Partes Contratantes cuyas inversiones hayan sufrido pérdidas debido a una guerra u otro conflicto armado, revolución, estado nacional de emergencia o revuelta que ocurriere en el territorio o en las zonas marítimas de la otra Parte Contratante, recibirán un tratamiento de esa Parte Contratante que no sea menos favorable que aquél otorgado a sus propios nacionales o sociedades o a aquéllos de la nación más favorecida.

	English Translation	Original text (Spanish)
Article 10	Investments which have been the subject of a specific undertaking by one Contracting Party vis-à-vis nationals and companies of the other Contracting Party shall be governed, without prejudice to the provisions of this Agreement, by the terms of that undertaking, insofar as its provisions are more favourable than those laid down by this Agreement.	Las inversiones que hayan formado parte de un compromiso especial de una de las Partes Contratantes, con respecto a los nacionales o sociedades de la otra Parte Contratante, se regirán, sin perjuicio de las disposiciones de este Convenio, por los términos de dicho compromiso si éste incluye disposiciones más favorables que aquellas de este Convenio.

Annex 2 – Chile-United Kingdom BIT (1997)

	Promotion and Protection of Investment
Article 2	(1) Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such investments. (2) Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other contracting party.

	Expropriation
Article 4	(1) Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation') in the territory of the other Contracting Party unless the measures are taken for a public benefit related to the internal needs of that Party in a non-discriminatory manner, by authorisation of a formal law, and against prompt, adequate and effective compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realisable and be freely transferable. The investor affected shall have a right, under the law of the Contracting party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph. (2) Where a Contracting Party expropriates the assets of an investor which is incorporated or constituted under the law in force in any part of its own territory, and in which investors of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (I) of this Article are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment to such investors of the other Contracting Party who are owners of those shares.

Annex 3 – CPTPP (2018)

	Minimum Standard of Treatment
Article 9.6	(1) Each Party shall accord to covered investments treatment in accordance with applicable customary international law principles, including fair and equitable treatment and full protection and security. (2) For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligations in paragraph 1 to provide: (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and (b) "full protection and security" require each Party to provide the level of police protection required under customary international law. (3) A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article. (4) For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result. (5) For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.

	Expropriation and Compensation
Article 9.8	(1) No Party shall expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation (expropriation), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate and effective compensation in accordance with paragraphs 2, 3 and 4; and (d) in accordance with due process of law. (2) Compensation shall: (a) be paid without delay; (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (the date of expropriation); (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and (d) be fully realisable and freely transferable.

	(3) If the fair market value is denominated in a freely usable currency, the compensation paid shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment. (4) If the fair market value is denominated in a currency that is not freely usable, the compensation paid, converted into the currency of payment at the market rate of exchange prevailing on the date of payment, shall be no less than: (a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date; plus (b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment. (5) This Article shall not apply to the issuance of compulsory licences granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation or creation of intellectual property rights, to the extent that the issuance, revocation, limitation or creation is consistent with Chapter 18 (Intellectual Property) and the TRIPS Agreement. (6) For greater certainty, a Party's decision not to issue, renew or maintain a subsidy or grant, or decision to modify or reduce a subsidy or grant, (a) in the absence of any specific commitment under law or contract to issue, renew or maintain that subsidy or grant; or (b) in accordance with any terms or conditions attached to the issuance, renewal, modification, reduction and maintenance of that subsidy or grant, standing alone, does not constitute an expropriation.

	Investment and Environmental, Health and Other Regulatory Objectives
Article 9.16	Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.

	Annex on Expropriation
Annex 9-B	The Parties confirm their shared understanding that: (1) An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment. (2) Article 9.8.1 (Expropriation and Compensation) addresses two situations. The first is direct expropriation, in which an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure. (3) The second situation addressed by Article 9.8.1 (Expropriation and Compensation) is indirect expropriation, in which an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

	(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors: (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action. (b) Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health,37 safety and the environment, do not constitute indirect expropriations, except in rare circumstances.

Annex 4 – Canada-Chile Free Trade Agreement (1997, updated 2019)

	Scope and Coverage
Article G-01	(1) This Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of the other Party; (b) investments of investors of the other Party in the territory of the Party; and (c) with respect to Articles G-06, G-14 and G-14 bis all investments in the territory of the Party. (2) This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter H bis of the Agreement. (3) For the purposes of this Chapter, the Parties reaffirm the right of each Party to regulate within its territory to achieve legitimate policy objectives, such as the protection of health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity. (4) For greater certainty, the mere fact that a Party takes or fails to take an action, including through a modification to its laws or regulations, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, even if there is loss or damage to the covered investment as a result, does not amount to a breach of an obligation under this Chapter. (5) For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party: (a) in the absence of any specific commitment under law or contract to issue, renew or maintain that subsidy or grant; or (b) in accordance with any terms or conditions attached to the issuance, renewal, modification, reduction or maintenance of that subsidy or grant, does not constitute a breach of obligations in this Chapter, even if there is loss or damage to the covered investment as a result.

	Minimum Standard of Treatment
Article G-05	(1) Each Party shall accord to investments of investors of the other Party treatment in accordance with international law, including fair and equitable treatment and full protection and security. (2) Paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be accorded to investments of investors of the other Party. (3) The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens, and do not create any additional rights. The obligation in paragraph 1 to provide: (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process; and

	(b) "full protection and security" means that each Party is required to provide the level of police protection required under customary international law. (4) A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article. (5) For greater certainty, the fact that a measure breaches domestic law does not, in and of itself, establish a breach of this Article. In order to ascertain whether the measure breaches this Article, the Tribunal must consider whether a Party has acted inconsistently with the obligations in paragraph 1. (6) Without prejudice to paragraph 1 and notwithstanding Article G-08(6)(b),each Party shall accord to investors of the other Party, and to investments of investors of the other Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife. (7) Paragraph 6 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article G-02 but for Article G-08(6)(b).

	Expropriation and Compensation
Article G-10	(1) Neither Party may directly or indirectly nationalize or expropriate an investment of an investor of the other Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article G-05(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6. (2) Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place("date of expropriation") and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value. (3) Compensation shall be paid without delay and be fully realizable. (4) If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment. (5) If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment. (6) On payment, compensation shall be freely transferable as provided in Article G-09. (7) This Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the TRIPS Agreement.

	(8) For purposes of this Article and for greater certainty, a non-discriminatory measure of general application shall not be considered a measure tantamount to an expropriation of a debt security or loan covered by this Chapter solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.

	Environmental Measures
Article G-14	(1) Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns. (2) The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

	Annex on Expropriation
Annex G-10	(1) The concept of a "measure tantamount to nationalization or expropriation" in paragraph 1 of Article G-10 can also be termed "indirect expropriation". Indirect expropriation results from a measure or series of measures of a Party that has an effect equivalent to direct expropriation without formal transfer of title or outright seizure. (2) The determination of whether a measure or series of measures of a Party constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors: (a) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred: (b) the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations; and (c) the character of the measure or series of measures. (3) Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.

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