ARTICLES

THINKING TWO STEPS AHEAD: DO EXPORT RESTRICTIONS ON AUSTRALIAN GAS AMOUNT TO INDIRECT EXPROPRIATION?

UMAIR GHORI*

The Australian Domestic Gas Security Mechanism (ADGSM) provides the Australian Government with an expedient regulatory tool over gas exporters. Australia is the largest exporter of Liquified Natural Gas (LNG) in the world but has suffered from very high domestic gas prices. If the Australian Government determines a year to be a gas shortfall year and imposes export restrictions under the ADGSM, it runs the risk of a challenge by LNG exporters under the Investor-State Dispute Settlement System (ISDS) for indirect expropriation. The article argues that Australian policymakers must prepare for such a challenge through anticipation of two possible courses of action. First: a challenge by investors in the WTO according to a state-espousal strategy. Second: ISDS proceedings where WTO interpretation of 'general or local short supply' is transplanted into ISDS proceedings. The article discusses both strategies and concludes that Australian policymakers must design export restrictions under the ADGSM that account for both possible approaches.

I. INTRODUCTION

In 2021 Australia was the leading exporter of LNG in the world and was projected to export up to 83 million tonnes of Liquified Natural Gas (LNG) per year by 2021-2022.[1] The value of Australia's exports of LNG was expected to touch AUD 49 billion in that same period.[2] Nevertheless, despite the abundance of gas resources in Australia, analysts warned of impending gas shortfalls in 2022 and that Australian consumers may pay higher prices compared to consumers in the importing countries.[3] In response to the high domestic price level for

* Associate Professor, Faculty of Law, Bond University. I thank the anonymous reviewers for their useful comments. All errors are mine.

1 Australian Government, Department of Industry, Science, Energy and Resources (DISER), 'LNG Demand and World Supply Capacity' (Figure 7.1) (June 2021) 3 <https://publications.industry.gov.au/publications/resourcesandenergyquarterlyjune2021/documents/Resources-and-Energy-Quarterly-June-2021-Gas.pdf>; Reuters, 'Australia grabs world's biggest LNG exporter crown from Qatar in Nov' (Web Page, 10 December 2018) <https://www.reuters.com/article/us-australia-qatar-lng/australia-grabs-worlds-biggest-lng-exporter-crown-from-qatar-in-nov-idUSKBN1O907N>; See also Climate Council, 'What the Frack? Australia Overtakes Qatar as World's Largest Gas Exporter' (Web Page, 18 January 2019) <https://www.climatecouncil.org.au/australia-worlds-largest-gas-exporter/>.

2 Australian Government, DISER, (n 1) 3; Previous estimates for LNG exports were AUD 51 billion for 2019-2020 period (see Australian Government, Department of Industry, Innovation and Science (DIIS) (Office of the Chief Economist), *Resources and Energy Quarterly* (Web Page, March 2019) <https://publications.industry.gov.au/publications/resourcesandenergyquarterlymarch2019/documents/Resources-and-Energy-Quarterly-March-2019.pdf> at 60-61.

3 See, eg, Nathan Richardson, 'Australia Watchdog Warn of Gas Shortfall in 2022', *S&P Global Platts* (Web Page, 17 August 2021) <https://www.spglobal.com/platts/en/market-insights/latest-news/lng/081721-australia-watchdog-warns-of-gas-shortfall-in-2022>; See further Michael West, 'Gas Crisis? Or Glut? Why Japan Pays Less for Australian LNG than Australians do', *The Conversation* (Web Page, 14 March 2017) <https://theconversation.com/gas-crisis-or-glut-why-japan-pays-less-for-australian-lng-than-australians-do-74438>; Samantha Hepburn, 'Australian Plans to Import Gas are Expensive, Bad for the Climate and Utterly Absurd' *The Guardian* (Web Page, 22 October 2019) <https://www.theguardian.com/australia-news/commentisfree/2019/oct/22/australian-plans-to-import-gas-are-expensive-bad-for-the-climate-and-utterly-absurd>; Contrasting claims on price levels have been made by the representative body of

LNG in the country, the Australian Government in July 2017 imposed certain gas restrictions, referred to as the Australian Domestic Gas Security Mechanism (ADGSM),[4] on LNG exporters.[5]

The ADGSM generates regulatory leverage by threatening restrictions on LNG exports unless the LNG exporters divert a certain proportion of gas production towards reinforcing domestic gas reserves.[6] Under the ADGSM, export restrictions can be imposed where the Resources Minister determines the supply shortage of LNG in the domestic market for a specific year.[7] Once export restrictions are imposed, the export of LNG requires permission from the Resources Minister. At this stage, the Resources Minister can specify additional compliance standards for the continued export of LNG from Australia.[8] The *Customs (Prohibited Exports) Regulations 1958* provide for a range of conditions that may include limits on the volume of LNG that can be exported after taking into consideration domestic needs or factors contributing to a shortfall of LNG.[9] The Regulations permit revocation of an export licence where the LNG exporters fail to adhere to any conditions imposed under the ADGSM.[10]

The LNG sector is characterised by a high level of sovereign risk. The Australian Government, Department of Industry, Innovation, and Science (DIIS) anticipated this risk in its original impact analysis of the ADGSM.[11] The DIIS rightly identified LNG projects as entailing high exploration and investment costs to the tune of billions of dollars. Foreign investors usually construct their investment strategy on a combination

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the gas exporters that claims that gas prices are actually below the Asian average price (see: Australian Petroleum Production and Exploration Association (APPEA), 'Australian Wholesale Gas Prices Below Asian Average' *Media Release* (Web Page, 14 May 2019) <https://www.appea.com.au/media_release/australian-wholesale-gas-prices-below-asian-average/>); APPEA repeats the same claims in its 2021 announcement on the new Heads of Agreement (see APPEA, 'Australia's Oil and Gas Industry Continues Commitment to Domestic Market under new Heads of Agreement' (21 January 2021) <https://www.appea.com.au/all_news/australias-oil-and-gas-industry-continues-commitment-to-domestic-market-under-new-heads-of-agreement/>).

4 See generally Australian Government, Department of Industry, Innovation and Science, *Australian Domestic Gas Security Mechanism* (Web Page, 1 July 2017) <https://www.industry.gov.au/regulation-and-standards/regulating-australian-resource-projects/australian-domestic-gas-security-mechanism>. The Explanatory Statement describes the purpose behind the ADGSM '…is to ensure that there is a sufficient supply of gas to meet the needs of Australian consumers, including households and industry, by requiring, if necessary, LNG exporters which are drawing gas from the domestic market to limit exports or find offsetting sources of new gas.' See Federal Register of Legislation, Explanatory Statement, *Customs (Prohibited Exports) Amendment (Liquefied Natural Gas) Regulations 2017* <https://www.legislation.gov.au/Details/F2017L00826/Explanatory%20Statement/Text>.

5 The Explanatory Statement is further reflected in the *Customs (Prohibited Exports) (Operation of the Australian Domestic Gas Security Mechanism) Guidelines 2017*; See generally Gilbert + Tobin, 'Role Reversal – Commonwealth Government flags domestic gas restrictions on East Coast LNG exporters' (Web Page, 27 April 2017) <https://www.gtlaw.com.au/insights/role-reversal-commonwealth-government-flags-domestic-gas-restrictions-east-coast-lng-1>; See generally Federal Register of Legislation, Explanatory Statement, *Customs (Prohibited Exports) Amendment (Liquefied Natural Gas) Regulations 2017* (Web Page) <https://www.legislation.gov.au/Details/F2017L00826/Explanatory%20Statement/Text>; See also Fleur Anderson, 'Malcolm Turnbull Slaps Export Controls on Recalcitrant Gas Exporters', *Australian Financial Review* (Web Page, 26 April 2017) <https://www.afr.com/politics/malcolm-turnbull-slaps-export-controls-on-recalcitrant-gas-exporters-20170426-gvsuh4>; Louise Yaxley, 'Malcolm Turnbull Says Government Will Restrict Gas Exports in Attempt to Lower Power Prices', *ABC News* (Web Page, 20 June 2017) <http://www.abc.net.au/news/2017-06-20/government-will-intervene-to-restrict-gas-export:-turnbull/8634674>; see also Henry Belot, 'Gas Export Controls on Hold as Government Strikes Deal with Suppliers', *ABC News* (Web Page, 27 September 2017) <http://www.abc.net.au/news/2017-09-27/gas-export-controls-on-hold-amid-government-agreement/8993254>.

6 The ADGSM is a temporary measure that will remain in force from 1 July 2017 to 1 January 2023, Federal Register of Legislation (n 5).

7 The minister may consult other regulatory agencies such as the Australian Competition and Consumer Commission (ACCC) and the Minister responsible for trade, industry and energy. See *Customs (Prohibited Exports) Regulations 1958* (Cth) regs 13GC(1), 13GE(1)-(3).

8 *Customs (Prohibited Exports) (Operation of the Australian Domestic Gas Security Mechanism) Guidelines 2017,* Guidelines 11(3), 11(15), 11(18).

9 *Customs (Prohibited Exports) Regulations 1958* (Cth) reg 13GC(4).

10 Ibid.

11 Explanatory Statement (n 5) 21-2.

of economic, fiscal, and regulatory factors.[12] The DIIS notes that a heavy-handed approach to LNG regulation may damage Australia's credibility in the eyes of foreign investors.[13] While the DIIS acknowledges that it is difficult to determine the extent of damage to Australia's reputation in the LNG sector, the nature and extent of any export restrictions might continue to influence foreign investment in the LNG sector.[14] As the Australian Government pre-empts any gas shortage in the east coast gas market, foreign investors will most likely adopt a wait and see approach from an international trade and investment angle.

International trade in LNG is also influenced by geopolitics. Threats of Russia suspending gas exports to its European neighbours, for example, may tempt Australian LNG producers to divert any surplus production to meet demand in Europe (in competition with other suppliers such as Qatar and the US). However, despite the Australian political leadership supporting the idea, analysts believe that rapid changes in export patterns will not be possible because of long term gas supply commitments to importers in Asia.[15] However, if LNG producers drastically increase their production levels to service demand, the Minister may still impose export restrictions should domestic LNG supply be insufficient. If restrictions are imposed, the export of LNG would require the permission of the Minister, or the ADGSM would have to be suspended, or exports authorised through a legislative exception to allow surplus LNG exports to Europe.

The ADGSM is not a popular measure. Taylor and Hunter, for example, argue that even where the ADGSM has resulted in a higher allocation of gas to the Australian domestic market, the ADGSM (being a market-based measure) is unlikely to prevent further price increases.[16] Another commentator has labelled the ADGSM a paradoxical measure because it only works when it is not used.[17] If export restrictions are triggered under the ADGSM, it may have ramifications for foreign investment inflows that are required for discovering new gas fields and increasing production.[18] Yet, the ADGSM coupled with tight oversight by the Australian competition watchdog, the Australian Competition and Consumer Commission (ACCC), has so far proven to be a useful strategy to stabilise supply for the domestic market. The LNG industry appears to acquiesce to the ADGSM scheme, as is evidenced by the renewed Heads of Agreement concluded between Australian Government and the representatives of the three major east-coast LNG projects in January 2021.[19] The new Heads of Agreement

12 Ibid.

13 Ibid.

14 Ibid.

15 See e.g., ABC News, 'Australia has offered to export more liquified natural gas to Europe in light of Ukraine tensions: Here's why' (Web Page, 27 January 2022) <https://www.abc.net.au/news/2022-01-27/why-australia-is-offering-natural-gas-to-europe-ukraine-tensions/100784520>; Amy Myers Jaffe, 'Can the US find enough natural gas resources to neutralize Russia's energy leverage over Europe?', *The Conversation* (Web Page, 1 February 2022) <https://theconversation.com/can-the-us-find-enough-natural-gas-sources-to-neutralize-russias-energy-leverage-over-europe-175824>; Phil Mercer, 'Australia Offers Gas to Europe as Russia – Ukraine Tensions Mount', *VOA News* (Web Page, 27 January 2022) <https://www.voanews.com/a/australia-offers-gas-to-europe-as-russia-ukraine-tensions-mount/6414712.html>; Angela MacDonald-Smith, 'Australian LNG can do 'zero' for Europe: CS', *Australian Financial Review* (Web Page, 28 January 2022) <https://www.afr.com/companies/energy/australian-lng-can-do-zero-for-europe-cs-20220128-p59rxo>.

16 Madeline Taylor and Tina Soliman Hunter, 'A Paradox of Plenty: The Australian Domestic Gas Supply Regulatory Dilemma' (2018) 11 *Journal of World Energy Law and Business* 465, 467.

17 Matthew Stevens, 'When not If for Matt Canavan to Pull Gas Market Regulation Trigger', *Financial Review* (Web Page, 10 September 2018) <https://www.afr.com/business/when-not-if-for-matt-canavan-to-pull-gas-market-regulation-trigger-20180910-h156sx>.

18 Ibid. See also Ben Eade, 'Manufacturing Australia Submission: Australian Domestic Gas Security Mechanism' *Manufacturing Australia* (3 August 2019, submission to the DIIS) 2-3.

19 Although, the ACCC warned of a significant gas shortfall of 6 Petajoules in the Southern States in 2022 if the LNG producers export all of their gas output, see Richardson (n 3); See also APPEA, 'Australia's Oil and Gas Industry Continues Commitment to Domestic Market under new Heads of Agreement' (n 3); See specifically, Australian Government, DISER 'Heads of Agreement: The Australian East Coast

extends the LNG industry commitments to not sell uncontracted gas internationally unless equivalent volumes of gas have been offered with reasonable notice to the Australian domestic market.[20]

The article adopts the following scheme. Part II of the article begins by providing a brief overview of the relevant Free Trade Agreements (FTAs)/Bilateral Investment Treaties (BITs) that cover foreign investment in the Australian Gas sector. Part II further presents a summary of Australian Government's response to the regulation of LNG exports and inputs received from industry stakeholders. Part III starts by posing a hypothetical query of whether export restrictions imposed under the ADGSM can amount to indirect expropriation. To answer this question, Part III first looks at the exceptional character of export restrictions under the General Agreement on Tariffs and Trade (*GATT*) or World Trade Organization (WTO) norms. Part III discusses the prospect of export restrictions being based under *GATT* Article XX exceptions that allow a WTO Member to derogate from its obligation under certain restricted circumstances. The article proposes *GATT* Article XX(j) as a possible defence to justify the export restrictions under the ADGSM. Part III further discusses the concept of indirect expropriation in the light of various arbitral awards. The article then moves to Part IV, which aims to answer the query posed in Part III, ie can export restrictions under the ADGSM amount to indirect expropriation? This part of the article lays down the basis for Part V, which offers two possible alternative arguments that Australia may take if an indirect expropriation claim is made. The first line of argument is WTO Dispute Settlement as a Parallel Action to Investor-state dispute settlement (ISDS), while the second line of argument is the so-called 'convergence' argument whereby arbitral panels resort to the interpretation of *GATT*/WTO norms and transplant their understanding into international investment law. In other words, arbitral panels import WTO jurisprudence to answer some difficult questions of law in the investor-state dispute settlement process. Part VI concludes.

II. Overview of Foreign Investment in LNG Projects in Australia

Table 1 below links major LNG projects in Australia with the origin of the investor and possible (non-exhaustive) FTAs/BITs coverage of the investment. Linking FTA/BIT coverage with the origin of investors reveals layers of liability owed by Australia to the investors. Note that some projects, such as the Gladstone LNG, can be covered under either ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA) or Malaysia-Australia Free Trade Agreement (MAFTA) or the Queensland Curtis LNG under either China-Australia Free Trade Agreement (ChAFTA) or the older Australia-China BIT.

It is also important to note that there may be temporal challenges created due to the coming into force of certain FTA/BITs and the enactment of the ADGSM. For example, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) came into force in December 2018 (almost a year after the ADGSM was put in place). This article acknowledges the limitation posed by temporal challenges. However, the article aims to illustrate the complex inter-woven linkages created by foreign investment in the Australian LNG sector and the entry into force of newer FTA/BITs replacing older agreements. In order to fully understand the possible FTA/BIT coverage over project-wise LNG investments, the individual investments

Domestic Gas Supply Commitment' (Web Page, 21 January 2021) <https://www.industry.gov.au/sites/default/files/2021-01/australian-east-coast-domestic-gas-supply-commitment-heads-of-agreement.docx>; See further statement by The Hon. Keith Pitt MP (Minister for Resources and Water), 'JobMaker Plan Secures Australia's Domestic Gas Supply' (Web Page, 21 January 2021) <https://www.minister.industry.gov.au/ministers/pitt/media-releases/jobmaker-plan-secures-australias-domestic-gas-supply>.

20 DISER (n 19) 1.

have to be investigated according to their timing and then characterised them according to FTA/BIT. While useful, such an exercise exceeds the scope of this article.

According to the information summarised in Table 1, CPTPP, ChAFTA, AANZFTA and Korea-Australia Free Trade Agreement (KAFTA) are the more prominent FTA/BITs shadowing the Australian LNG sector. The ChAFTA Chapter 9 provides for a commitment between Australia and China to treat each other's investors in a non-discriminatory manner. ChAFTA Chapter 9, Section B further contains an ISDS arbitration tribunal process. However, ChAFTA does not directly address the question of indirect expropriation. Furthermore, while ChAFTA Article 9.12(2)(a)(i) recognises breach of National Treatment obligations under Article 9.3, it makes no mention of indirect expropriation as grounds for an ISDS claim. It is also noteworthy that ChAFTA Article 9.9(3)(b)(ii) lists expropriation as one of the multiple issues under the 'Future Work Program' whereby both China and Australia will negotiate towards concluding a comprehensive Investment Chapter.

Table 1: Investor Breakdown of Major LNG Projects in Australia and Possible FTA/BIT coverage

Project	***Investor/Shareholder***	***Origin of Investors***	***Possible FTA/BIT Coverage***	***Possible ISDS Coverage***
Prelude FLNG[21]	Shell Australia KOGAS INPEX Group OPIC	UK, South Korea & Japan	Australia-EU Free Trade Agreement (AEUFTA) (proposed); Japan-Australia Economic Partnership Agreement (JAEPA); KAFTA; CPTPP	No; No; Yes; Yes
Northwest Shelf Venture[22]	Woodside BHP Billiton BP Chevron Australia Shell Australia Japan Australia LNG	UK, US, Japan & Australia	AEUFTA (proposed); JAEPA; AUSFTA; CPTPP	No; No; No; Yes
Pluto LNG[23]	Woodside Kansai Tokyo Gas	Australia & Japan	JAEPA; CPTPP	No; Yes
Gorgon[24]	Chevron Australia Shell Australia	UK, US, Japan & Australia	AEUFTA (proposed); JAEPA;	No; No;

21 See, eg, 'Project – Prelude FLNG Facility', *National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA)* (Web Page) <https://info.nopsema.gov.au/offshore_projects/25/show_public>.

22 See, eg, 'North West Shelf', *Woodside Energy* (Web Page) <https://www.woodside.com/what-we-do/operations/north-west-shelf>; see also Woodside Energy Group, 'Woodside Simplifies Portfolio and unlock Long-Term Value' (Announcement, 19 December 2024) <https://www.woodside.com/docs/default-source/asx-announcements/2024/woodside-simplifies-portfolio-and-unlocks-long-term-value.pdf?sfvrsn=5e249480_1>.

23 See, eg, 'Pluto LNG', *Woodside Energy* (Web Page) <https://www.woodside.com/what-we-do/operations/pluto-lng>; see also 'EIG's MidOcean Energy Completes Acquisition of Tokyo Gas' Interests in Portfolio of Australian Integrated LNG Projects', *MidOcean Energy* (Web Page) <https://midoceanenergy.com/eigs-midocean-energy-completes-acquisition-of-tokyo-gas-interests-in-portfolio-of-australian-integrated-lng-projects/> ('MidOcean Energy Acquisition').

24 See, eg, 'Project – Gorgon', *Chevron Australia* (Web Page) <https://australia.chevron.com/what-we-do/gorgon-project>; see also 'Gorgon LNG Project', *JERA* (Web Page) <https://www.jera.co.jp/en/corporate/business/projects/gorgon>; see also Mid Ocean Energy Acquisition (n 23).

	Mobil Australia Osaka Gas Tokyo Gas JERA		AUSFTA; CPTPP	No; Yes
Wheatstone[25]	Chevron Australia KUFPEC Woodside Kyushu Electric Tokyo Electric	UK, US, Japan, Kuwait & Australia	AEUFTA (proposed); JAEPA; AUSFTA; CPTPP;	No; No; No; Yes
Darwin[26]	ConocoPhillips Santos INPEX Group ENI JERA Tokyo Gas	US, Australia, Japan, Italy	AEUFTA (proposed); JAEPA; AUSFTA; CPTPP	No; No; No; Yes
Ichthys[27]	INPEX Group TotalEnergies CPC Corporation Taiwan Osaka Gas Kansai Electric Power JERA Toho Gas	Japan, France, Taiwan & Australia	AEUFTA (proposed); CPTPP	No Yes
Australia Pacific LNG[28]	ConocoPhillips Origin Sinopec	Australia, US & China	AUSFTA; ChAFTA Australia-China BIT	No; Yes Yes
Queensland Curtis Island LNG[29]	Shell Australia CNOOC Tokyo Gas	Australia, UK, China & Japan	AEUFTA (proposed); JAEPA; ChAFTA Australia-China BIT	No No; Yes Yes
Gladstone LNG[30]	Santos PETRONAS TotalEnergies KOGAS	Australia, Malaysia, EU, France & South Korea	MAFTA; AANZFTA; AEUFTA (proposed); KAFTA.	Yes; Yes; No; Yes

Chinese investors into the Australian LNG sector can also claim reliance on the older *China – Australia Bilateral Investment Treaty 1988* (hereinafter referred to as the 'China – Australia BIT). This treaty also provides for limited ISDS coverage in that only disputes concerning compensation for expropriation can be referred to the arbitration process.[31] Since China has transitioned to a capital exporting economy, it has adapted to using

25 See, eg, 'Wheatstone Project', *Chevron Australia* (Web Page) <https://australia.chevron.com/what-we-do/wheatstone-project>; see also 'Wheatstone LNG Project', *JERA* (Web Page) <https://www.jera.co.jp/en/corporate/business/projects/wheatstone>.

26 See, eg, 'Project – Barossa Area Development', *National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA)* (Web Page) <https://info.nopsema.gov.au/offshore_projects/26/show_public>; see also 'Santos Completes Bayu-Undan and Darwin LNG Sell-Down to SK', *Santos* (Web Page) <https://www.santos.com/news/santos-completes-bayu-undan-and-darwin-lng-sell-down-to-sk/>.

27 See, eg, 'Ichthys LNG', *INPEX* (Web Page) <https://www.inpex.com.au/projects/ichthys-lng/>.

28 See, eg, *Australia Pacific LNG* (Website) <https://aplng.com.au/about-us/>.

29 See, eg, Shell Australia, *About QGC* (Web Page) <https://www.shell.com.au/about-us/projects-and-locations/qgc/about-qgc.html>; see also Mid Ocean Energy Acquisition (n 23).

30 See, eg, Santos GLNG, 'GLNG Plant, *Santos GLNG* (Web Page) <https://www.glng.com/glngplant>.

31 See, eg, Busola Bayo-Oyo, 'ChAFTA and the hostility towards ISDS: Does this carry an FDI Risk?' *Practical Law Arbitration Blog* (Web Page, 19 December 2016) <http://arbitrationblog.practicallaw.com/chafta-and-the-hostility-towards-isds-does-this-carry-an-fdi-risk/>.

ISDS to protect its overseas investments.[32] For example, disputes such as *Tza Yap Shum v Peru*[33] (decided under the China – Peru BIT) and *Ping An Life Insurance v Belgium*[34] (decided under the China – Belgium BIT) show increased confidence by Chinese investors to protect their investment using bilateral ISDS mechanisms. In its current form, however, Chinese investors can only challenge the ADGSM as the basis of indirect expropriation if National Treatment standards under ChAFTA Article 9.3 are breachred. In other words, China's investors in the Australian LNG sector will have to show that export restrictions under the ADGSM breaches National Treatment standards within ChAFTA in order to access the existing ISDS mechanism. The position may change, however, if China and Australia adapt a comprehensive investment chapter pursuant to the Future Work Program within ChAFTA.

The CPTPP is another FTA/BIT that can potentially affect the prospect of an ISDS challenge if export restrictions under the ADGSM are triggered. Unlike the ChAFTA, the CPTPP provides a more specific definition of indirect expropriation. Indirect expropriation is defined with some precision in order to bind ISDS tribunals to the definition agreed by party states. The CPTPP adapts the agreed TPP text, which in turn refers to Article 9.8.1 dealing with expropriation and compensation. Article 9.8.1 is further explained and clarified through Annex 9-B where the CPTPP members are confirming their shared understanding on expropriation.

Indirect expropriation is illustrated in Paragraph 3 of Annex 9-B with the words that 'action or series of actions by a Party' can have an effect equivalent to direct expropriation. Paragraph 3(a) further specifies that indirect expropriation is to be determined on a case-by-case basis. Paragraph 3(a) supplements the case-by-case inquiry with open ended indicia such as economic impact of governmental action that has an adverse impact on the value of investment, the extent of interference of governmental action with the reasonable expectations of the investor and the characteristics of the governmental action.

As far as reasonable investment-backed expectations are concerned, the text further clarifies that the expectations must be based on binding written assurances and extent of governmental regulation in the relevant sector. Paragraph 3(b) of Annex 9-B excludes public health, safety, and the environment from the scope of indirect expropriation.

Even when the CPTPP provides for a tighter indirect expropriation approach, one exclusion immediately becomes apparent: ie resource diversion or price stability. The ADGSM is not a public health or environmental protection measure. Rather, its overarching aim is to stabilise price levels for LNG in the country by diverting a portion of gas output should there be a gas shortfall year. Therefore, the limits of the ADGSM

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32 See, eg, Dilini Pathirana, 'A Look into China's Slowly Increasing Appearance in ISDS Cases' *Investment Treaty News* (Web Page, 26 September 2017) <https://cf.iisd.net/itn/2017/09/26/a-look-into-chinas-slowly-increasing-appearance-in-isds-cases-dilini-pathirana/#_ednref10>.

33 See generally *Tza Yap Shum v the Republic of Peru*, ICSID Case No. ARB/07/6 <https://www.italaw.com/sites/default/files/case-documents/ita0882.pdf>.

34 *Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v The Government of Belgium*, ICSID Case No. ARB/12/29 (Award) <https://www.italaw.com/sites/default/files/case-documents/italaw4285.pdf>.

may be tested, especially in situations where Australian LNG exporters attempt to capture additional market share in the Chinese LNG market following China's imposition of tariffs on US LNG exports in May 2019.[35]

Another significant FTA/BIT noted in Table 1 is AANZFTA. AANZFTA adopts a similar textual approach to CPTPP, albeit with one added proviso in Paragraph 3(c) of the Annex on Expropriation and Compensation. Paragraph 3(c) lists the character of the government action as one factor considered in determining the indirect expropriation, but goes beyond the CPTPP text by adding the additional requirement that governmental action be disproportionate relative to the public purpose. The implication here is that the gas companies/LNG exporters might use this as grounds to claim that export restrictions under the ADGSM are disproportionate to the stated public purpose. On that basis, LNG exporters may argue ADGSM export restrictions indirectly expropriate the value of investment by preventing the LNG exports to overseas buyers. That line of argument may not be available under ChAFTA and CPTPP.

KAFTA is a major bilateral FTA between South Korea and Australia that also contains an investment chapter. South Korean investor KOGAS holds a 15% stake in the joint venture running the Gladstone LNG project.[36] As of April 2020, South Korea based KOGAS was the second-largest LNG importing company in the world after Japan-based JERA.[37] Overall, South Korea is the third largest importer of LNG in the world after Japan and China.[38] KAFTA Article 11.7 and Annex 11-B set out basic standards on expropriation and compensation. Cursory review of Annex 11-B reveals a scheme similar to that laid out in CPTPP and AANZFTA. Legitimate public welfare measures (which the ADGSM purports to be) do not per se constitute expropriation according to Annex 11-B, Paragraph 5. The overall approach seems to be like 'new wave' FTA/BITs that seek to specifically define the parties' understanding in order to bind the ISDS tribunals in terms of interpretation. One crucial point of distinction with AANZFTA, however, is that KAFTA does not adopt the additional requirement of disproportionality of the governmental action relative to the public purpose.

The Australian Government appears committed to a broad-based solution to LNG regulation. Prior to the new Heads of Agreement concluded in January 2021 between the Australian Government and the East Coast LNG producers, the DIIS invited public submissions in August 2019 on the continuation or amendments of the ADGSM. The submissions reveal mixed responses. The Australia Institute argued that the ADGSM is leading to high domestic gas prices because LNG companies produce just enough to avoid a determination of a 'shortfall year' but do not produce enough to reduce overall gas prices.[39] The Australia Institute submission argued for fuel switching along with a reduction in Australia's consumption of gas and the introduction of

35 See, eg, David F Asmus et al, 'Exploring the Impact of Increased Chinese Tariffs on LNG Growth', *Lexology* (Web Page, 20 May 2019) <https://www.lexology.com/library/detail.aspx?g=865cf236-aa8d-4dd6-9f71-0881329e7ce4&utm_source=lexology+daily+newsfeed&utm_medium=html+email+-+body+-+general+section&utm_campaign=australian+ihl+subscriber+daily+feed&utm_content=lexology+daily+newsfeed+2019-05-20&utm_term=>.

36 See, eg, Michael Herh, 'KOGAS Begins to Recoup Investment in Gladstone LNG Project in Australia', *Business Korea* (Web Page, 27 December 2017) <http://www.businesskorea.co.kr/news/articleView.html?idxno=20171>.

37 See, eg, LNG Intelligence, 'Kogas Seeks Widespread LNG Cargo Deferrals' (Web Page, 20 April 2020) <http://www.energyintel.com/pages/eig_article.aspx?DocId=1070044&NLID=117#:~:text=Kogas%20is%20South%20Korea's%20primary,globally%20after%20Japan%20and%20China>.

38 Ibid.

39 Mark Ogge, 'Just to Cap it Off: Submission to the 2019 Review of the ADGSM', *The Australia Institute* (submission to the DIIS, September 2019) 1, 6-10.

limits on exports in order to reduce prices for Australian consumers.[40] The Australia Institute advocated the use of a sovereignty argument to justify export restrictions. However, as this article suggests, the adoption of export limiting strategy may trigger action under investor-state dispute settlement (ISDS) by investors in the LNG sector for indirect expropriation. This proposition is subject to the caveat that foreign investors will have to prove, under some of the FTA/BITs briefly examined above, that governmental action or regulatory measures under the ADGSM has resulted in substantial deprivation or a total destruction of the value of the foreign investment, or that the Australian Government action is not in the public interest.

In its submission, the Institute for Energy Economics and Financial Analysis (IEEFA) argued that cartelisation behavior by LNG producers has resulted in artificially high price levels within Australia.[41] The IEEFA argued for a 'full domestic gas reservation policy' at a fixed price.[42] The IEEFA viewed the ADGSM as a failed policy that does not resolve the LNG pricing issue.[43] The IEEFA took the view that the ADGSM will never be triggered because the gas supply will be set at a level to avoid a shortfall necessary for triggering the ADGSM, while the LNG prices will be maintained at an artificially high level to increase domestic profitability.[44]

The submission by Lock the Gate Alliance (LGA) also noted high LNG price levels in the domestic market despite the ADGSM.[45] The LGA argued for a cap on exports similar to the submission by the Australia Institute mentioned above.[46] The stakeholders have so far focused on pricing and increasing domestic supply. The article does not investigate the financial and economic merit of the ADGSM. Instead, the article argues that if the Australian Government triggers the ADGSM and imposes export restrictions on LNG exports, it may potentially run the risk of indirectly expropriating the foreign investment in a gas project that is solely designed to extract, refine and export LNG from Australia.

III. Do Export Restrictions Amount to Indirect Expropriation?

The link between export restrictions and indirect expropriation has not received detailed academic attention. Ghori has explored elsewhere the nexus between export restrictions and indirect expropriation.[47] In situations where foreign investors aim to extract, refine and export natural resources, any regulatory measures that interfere with the core business of the investor may potentially be seen as meeting the 'substantial deprivation' threshold required for indirect expropriation. Ghori argued that in adjudicating future investment disputes involving export restrictions, tribunals may base heavy reliance on the *GATT*/WTO jurisprudence due to lack of equivalent jurisprudence in international investment law. If the tribunals do access WTO jurisprudence to decide ISDS claims, Dispute Settlement Body (DSB) decisions such as *India – Solar Cells* may play a crucial interpretative role if export restrictions have been imposed to alleviate local shortages under *GATT* Article

40 Ibid.

41 Bruce Robertson, 'Towards a Domestic Gas Reservation in Australia', *Institute for Energy Economics and Financial Analysis* (submission to the DIIS, July 2019) 2, 17-8.

42 Ibid.

43 Ibid 1-4.

44 Ibid 1.

45 Lock the Gate Alliance, 'Submission to the 2019 Review of the ADGSM' (undated) 1-3.

46 Ibid 3.

47 Umair Ghori, 'The Confluence of International Trade and Investment: Exploring the Nexus between Export Controls and Indirect Expropriation' (2020) 16 *New Zealand Yearbook of International Law* 76.

XX(j).[48] However, before an attempt is made to connect an international trade law concept with international investment law, it is vital to understand the character of export restrictions within the *GATT*/WTO environment.[49]

A. Export Restrictions as an Exceptional Measure

Export restrictions did not receive extensive attention during *GATT 1947* negotiations because the negotiators at the time were focussed on the reduction of trade barriers and the reduction of high import tariffs.[50] Export restrictions appear within the 'prohibition on quantitative restrictions' (*GATT* art XI) and are treated similarly to import quotas (GATT Article XI prohibits both import and export quotas). The prohibition on quotas under art XI is subject to some exceptions, most notably an exception under *GATT* art XI(2)(a) that allows WTO members the right to restrict exports for relieving critical shortages of foodstuffs or other 'essential' products. *GATT* art XI(2)(b) enables the WTO Members to apply technical standards for the classification or grading of commodities in international trade.

The general exceptions appearing under *GATT* art XX also affect export restrictions along with the additional requirement specified in the chapeau of *GATT* art XX. The chapeau provides that any exceptional measures must not be arbitrary or discriminatory 'between countries where the same conditions prevail'. Furthermore, the chapeau also provides that the general exceptions should not be used as a 'disguised' form of protectionism in international trade. Export restrictions are further permitted under security exceptions. More specifically, *GATT* art XXI(b)(iii) allows WTO Members to restrict trade in national emergencies or war.[51]

One of the possible measures under the ADGSM (if it is triggered) is the imposition of export tariffs, which may constitute an additional aspect of export restrictions. According to Matsushita, export tariffs differ from import tariffs because under *GATT* art II(1)(b), a limitation is placed on the import tariff levels above the concession rates. Export tariffs do not carry such restrictions. Therefore, WTO members can impose tariff-

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48 Ibid 82-4, 103; see also Umair Ghori, 'Are Export Controls under The Australian Domestic Gas Security Mechanism (ADGSM) Challenge Proof?' (2019) 26 *Australian International Law Journal* 45, 62-4.

49 It is also important to clarify that this article does not consider the consistency of the ADGSM with the WTO. If the subject of the dispute is WTO law, then the dispute will be decided on a state-to-state basis. Instead, this article considers the possibility of ISDS tribunals using WTO jurisprudence to plug holes in international investment law jurisprudence. For a discussion of ADGSM's consistency with the WTO, see Ghori (n 48) 57-64.

50 In a comprehensive monograph, Ilaria Espa succinctly explains the existing WTO disciplines on export restrictions. Espa's contribution further tracks the historical trend in the use of export restrictions and the wide-ranging export restrictions on primary commodities (see Ilaria Espa, *Export Restrictions on Critical Minerals and Metals: Testing the Adequacy of WTO Disciplines* (Cambridge, International Trade and Economic Law, 2015) 1-30, 67-100, 127-225. In a more recent book on the area, Chien-Huei Wu explains in painstaking detail the limited regulation of export restrictions and the extant jurisprudence under WTO law: *Law and Politics on Export Restrictions – WTO and Beyond* (Cambridge, International Trade and Economic Law, 2021) 23-111. See further Mitsuo Matsushita, 'Export Control of Natural Resources: WTO Panel Ruling on the Chinese Export Restrictions of Natural Resources' (2011) 3 *Trade, Law & Development* 268, 270. See also Bin Gu, 'Mineral Export Restraints and Sustainable Development: Are Rare Earths Testing the WTO's Loopholes?' (2011) 4 *Journal of International Economic Law* 765, 784; See also Umair Ghori, 'Three Lessons on the Construction of Export Controls under WTO Law' (2020) 39 *University of Queensland Law Journal* 85, 85-9.

51 Jackson and Matsushita point out the ineffectiveness of the prohibition under *GATT* art XI on export quotas by stating that the high number of accompanying exceptions makes the standard inapplicable (See, eg, John H Jackson et al, *Legal Problems of International Economic Relations* (West Publishing, 3rd ed, 1995) 946, cited in Matsushita (n 50) 272 and Mitsuo Matsushita, 'Export Controls of Natural Resources and the WTO/GATT Disciplines' (2011) 6 *Asian Journal of WTO & International Health Law & Policy* 281, 288.

based export restrictions.[52] It is noteworthy, however, that high export tariffs as export restrictions are not entirely outlawed under WTO law unless the tariffs are prohibitively high.[53] Effectively, prohibitive export tariffs mean zero-export quotas which fall within the purview of *GATT* art XI's prohibition on quotas.[54]

Availing the general exceptions under *GATT* art XX requires the invoking WTO Member to satisfy the standard of proof.[55] Firstly, the WTO Member adopting the exceptional measures must demonstrate that it falls within *GATT* art XX. Secondly, the requirement of the chapeau must be fulfilled. In *US – Shrimp*, the Appellate Body clarified that the order of application requires satisfaction of one of the exceptions under *GATT* art XX and then the chapeau.[56]

GATT art XX exceptions (b) and (g) have seen the most frequent use in the WTO jurisprudence. However, these exceptions will not be the subject of discussion in this article, because alleviating shortfall of resources is best explained through art XX(j). *GATT* art XX(j) has been used only once in the *India—Solar Cells* case, where India defended its solar subsidy and domestic content requirement (DCRs) for solar power developers (SPDs) under arts XX(j) and (d).[57] *India – Solar Cells* did not concern export restrictions. Instead, the case concerned government subsidies for solar industries. The case assumes importance in the context of the ADGSM for two reasons: (1) it is the only case that discusses the question of securing or distributing products in short supply; (2) *GATT* art XX(j) forms the basis of arguments that WTO members may adopt if export restrictions are imposed to secure or distribute products in short supply (LNG).

In explaining the question of 'short supply', the Appellate Body stated that the total quantity of imports that are available to meet the necessary supply in a market is an essential factor that must be considered.[58] Thus, factors such as stability in the international supply of the product along with the distance between a geographical area or market and production sites and the reliable nature of supply chains assume great importance.[59] The Appellate Body also stated that relevant factors depend on the nature and circumstances of each case.[60] The

52 Matsushita (n 50) 273.

53 Ibid; see also Julia Ya Qin, 'Reforming WTO Discipline on Export Duties: Sovereignty over Natural Resources, Economic Development and Environmental Protection' (2012) 46 *Journal of World Trade* 1147, 1153.

54 Matsushita (n 50) 273; Ya Qin (n 53) 1153.

55 Appellate Body Report, *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc WT/DS246/AB/R (7 April 2004) [95] ('*EC — Tariff Preferences,* Appellate Body Report'); Appellate Body Report, *United States — Import Prohibition of Shrimp and Certain Shrimp Products*, WTO Doc WT/DS58/AB/R (12 October 1998) [158] ('*US — Shrimp,* Appellate Body Report').

56 *US — Shrimp*, Appellate Body Report (n 55) [118]–[121].

57 Panel Report, *India — Certain Measures Relating to Solar Cells and Solar Modules*, WTO Doc WT/DS456/R (24 February 2016) [7.3.1]–[7.3.2] ('*India — Solar Cells,* Panel Report').

58 According to the Appellate Body, art XX(j) reflects different considerations that must be considered while assessing the question of 'general or local short supply'. Such considerations include the level of domestic production of the product in question, the nature of products in 'general or local short supply', geographical market, price fluctuations, the purchasing power of domestic and foreign consumers and the role played by domestic and foreign producers in the market including 'the extent to which domestic producers sell their production abroad': Report of the Appellate Body, *India — Certain Measures Relating to Solar Cells and Solar Modules*, WTO Doc WT/DS456/AB/R (24 February 2016) [6.4] ('*India — Solar Cells,* Appellate Body Report').

59 Ibid.

60 Ibid.

WTO Member adopting the exceptional measure must demonstrate that 'available' supply, from local and international sources, is not enough to meet demand.[61]

The criteria explained by the Appellate Body in *India – Solar Cells* is open enough to be applied to situations encountered in the future. However, the Appellate Body has not elaborated on the relative importance of the factors, and the question of importance is to be determined on a case-by-case basis. The risk with a flexible approach is that it may leave policymakers in an awkward position when constructing export restrictions because domestic factors may be perceived differently on an international scale.

B. Understanding Indirect Expropriation

Since indirect expropriation eludes a specific definition, various tribunals view it as resting on the facts of each claim.[62] In other words, the meaning of indirect expropriation is based on 'the specific facts and circumstances of the case, particularly the gravity and length of interference, the rights of the parties under a contract, or general legislation, and even cultural elements that define shared expectations'.[63] However, if a host government acts for a legitimate purpose, then the expropriatory action must be accompanied by fair compensation; otherwise, it is considered as confiscation.[64] Indirect expropriation must also be seen to substantially deprive or lead to a near total loss of value of investments following a governmental action.[65]

In *Metalclad v Mexico*, the tribunal highlighted that expropriation might mean 'covert or incidental interference with the use of the property', which deprives the owner of 'use or reasonably-to-be expected economic benefit of the property'.[66] Some awards have also acknowledged a plethora of measures such as restraints on property rights, variations in tax rates, change of contractual rights, or the withdrawal of licenses or any regulatory permits as indirect expropriation.[67]

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61 Ibid.

62 Yvette Anthony, 'The Evolution of Indirect Expropriation Clauses: Lessons from Singapore's BITs/FTAs' (2017) 7 *Asian Journal of International Law* 319, 325. In *Amco Asia Corporation v Indonesia,* the withdrawal of investment authorisation by a government body was treated as an expropriation *Amco Asia Corporation v Indonesia (Award)* (1984) 1 ICSID Rep 413, [244]–[250]; In *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt,* the cancellation of a tourist development project in order to protect antiquities was considered to be an 'unquestionable attribute of sovereignty' and hence unchallengeable because of public interest (See *Southern Pacific Properties (Middle East) Ltd v Egypt (Award on the Merits),* ICSID Arbitral Tribunal, Case No ARB/84/3, 20 May 1992) [58]–[129].

63 Francisco Vicuna, 'Carlos Calvo, Honorary NAFTA Citizen' (2003) 11 *New York University Environmental Law Journal* 19, 28, cited by Anthony (n 62) 325.

64 See *Southern Pacific Properties (Middle East) Ltd v Egypt (Award on the Merits)* (n 62) [163].

65 *Chemtura Corporation v Canada (Award)* (Permanent Court of Arbitration, Case No 2008-01, 2 August 2010) [242]. The *Chemtura* dispute was decided under the now defunct NAFTA regime. The tribunal noted that for a measure to constitute expropriation under Article 1110 of NAFTA, the governmental measure must amount to a substantial deprivation of the Claimant's investment.

66 *Metalclad Corporation v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/97/1, 30 August 2000) [103].

67 In *Compania del Desarrollo de Santa Elena SA v Costa Rica*, the arbitral tribunal held that lapse of time is a relevant factor when determining the question of expropriation. Time can be of immediate effect (like an outright seizure) or through a series of interconnected measures that gradually lead to a loss of ownership: *Compania del Desarrollo de Santa Elena SA v Costa Rica (Final Award)* (ICSID Arbitral Tribunal, Case No ARB/96/1, 17 February 2000) [76]–[77]. Regarding indirect expropriation, some awards have indicated that the effect of state measures and the degree of losses suffered by foreign investors are the operative factors, rather than the intention of the state: Anthony (n 62) 325; see also *Fireman's Fund Insurance Company v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/02/1, 17 July 2006) [176(f)]. The tribunal in *Spyridon Roussalis v Romania* declared that the effect of actions of the state is the key to determine whether indirect expropriation has occurred or not: *Spyridon Roussalis v Romania (Award)* (ICSID Arbitral Tribunal, Case No ARB/06/1, 7 December 2011) [327]–[328].

If a prima facie case of expropriation has been established by the aggrieved investor, the host state usually justifies the regulatory takings or expropriatory actions in the interest of public at large or under the 'police powers' of a state.[68] At this stage, the host state is trying to avoid payment of compensation on the ostensible grounds of public interest regulation.

What amounts to 'public interest' or 'police powers' of a state may vary from country to country, according to their municipal systems. Yvette Anthony argues that the 'police powers' of states and the exercise of powers for 'public purpose' or in the 'public interest' are two distinct concepts.[69] Awards in *Chemtura, AWG,* and *Too v Greater Modesto Insurance Associates* emphasise that the exercise of 'police powers' of the host state does not amount to expropriation.[70] Anthony argues that discriminatory governmental measures, loss of control over investment and the facts of each case must be considered when attempting to balance the scales with imperatives such as protection of public morality, public welfare, health, and the environment to determine what constitutes 'public interest' or 'public purpose'.[71]

The question of whether the duty to compensate the foreign investor arises when exercising legitimate 'police powers' to achieve a 'public welfare' continues to receive extensive academic attention but exceeds the stated scope of this article.[72] At this stage, no clear position has emerged from ISDS jurisprudence, and the case-by-case approach in determining compensation will likely continue.

The 'police powers' doctrine is not the only basis for resisting compensation for indirect expropriation. Awards such as *Tecmed v United Mexican States*[73] and several others[74] highlight the concept of 'legitimate

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68 See, eg, the discussions in Andrew Newcombe and Lluis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2004) 341, 358; see also Anthony (n 62) 319, 327; James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th ed, 2008) 624; Surya Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing, 2nd ed, 2012) 79, 119, 124.

69 Anthony (n 62) 332; See also discussion in Piero Bernardini, 'Reforming Investor – State Dispute Settlement: The Need to Balance Both Parties' Interests' (2016) 32 *ICSID Review – Foreign Investment Law Journal* 38-57.

70 *Chemtura Corporation v Canada (Award)* (Permanent Court of Arbitration, Case No 2008-01, 2 August 2010) [266]; *AWG Group v Argentina (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB/03/19, 30 July 2010) [139]; *Too v Greater Modesto Insurance Associates* (1989) 23 Iran–US CTR 378.

71 Anthony (n 62) 332; see also American Law Institute, *Restatement (Third) of Foreign Relations Law of the United States* (1987) § 712 cmt (g), ('*Third Restatement*').

72 See generally Shawn Nichols, 'Expanding Property Rights Under Investor-State Dispute Settlement (ISDS): Class Struggle in the Era of Transnational Capital' (2018) 25 *Review of International Political Economy* 243-269; Bernardini, 'Reforming Investor – State Dispute Settlement' (n 59); Mark Jennings, 'The International Investment Regime and Investor – State Dispute Settlement: States Bear the Primary Responsibility for Legitimacy' (2016) 17 *Business Law International* 127-152; Prabhash Ranjan and Pushkar Anand, 'COVID-19, India, and Investor-State Dispute Settlement (ISDS): Will India be able to Defend its Public Health Measures? (2020) 28 *Asia Pacific Law Review* 225-247; Stephen J Byrnes, 'Balancing Investor Rights and Environmental Protection in Investor – State Dispute Settlement under CAFTA: Lessons from the NAFTA Legitimacy Crisis' (2007) 8 *UC Davis Business Law Journal* 102-136; Daniel Gervais, 'Intellectual Property: A Beacon for Reform of Investor – State Dispute Settlement' (2019) 40 *Michigan Journal of International Law* 289-326; George K Foster, 'Investor- Community Conflicts in Investor – State Dispute Settlement: Rethinking 'Reasonable Expectations' and Expecting More from Investors' (2019) 69 *American University Law Review* 105-176.

73 See generally *Técnicas Medioambientales Tecmed SA v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/00/2, 29 May 2003) [154] ('*Tecmed*').

74 Other disputes following the *Tecmed* line of argument include *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentina (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB/02/1, 3 October 2006) [127]; *Occidental Exploration and Production*

expectations', which alludes to expectations that foreign investors may have considered when investing in an economy.[75] The notion of investor's legitimate expectations sits uneasily with a host state's inherent right to regulate in the public interest.

The concept of legitimate expectation views the credibility of the regulatory system as linked to the fair and equitable treatment accorded to the foreign investor. Even where the foreign investor holds legitimate expectations, the domestic regulatory framework cannot be modified in any way.[76]

The concept of legitimate expectations appears dubious and unrealistic. Host states will never fetter their powers to legislate or reform quickly, and unsurprisingly, this position has received due acknowledgment in dispute settlement jurisprudence. In *Impregilo v Argentina*, the tribunal stated that the legitimate expectations of foreign investors cannot be that the state will never modify its legislation. The only insulation afforded to foreign investors is from *unreasonable* modifications of legislation.[77]

Legitimate expectations can bind the government of the host state if any specific undertakings are given to the foreign investor.[78] For example, the tribunal in *Thunderbird v Mexico* adopted the position that legitimate

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Company v Ecuador (Final Award) (London Court of International Arbitration, Case No UN 3467, 1 July 2004) [185]; *CMS Gas Transmission Company v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/08, 12 May 2005) [279]; *Sempra Energy International v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/02/16, 28 September 2007) [298]. *Tecmed* is criticised by Zachary Douglas as 'perfect public regulation in a perfect world, …which all states should aspire but very few (if any) will ever attain': Zachary Douglas, 'Nothing if Not Critical for Investment Treaty Arbitration: *Occidental, Eureko* and *Methanex*' (2006) 22(1) *Arbitration International* 27, 28.

75 The legitimate expectations of the foreign investor occupy a precise role in the inquiry into the economic impact of governmental measures. The concept of 'legitimate expectations' has been imported into international investment law from the US case of *Penn Central Transportation Co. v. City of New York,* 438 US 104 (1978). The *Penn Central* test considers factors such as economic impact of governmental decision, investment-backed expectations, character of the regulation and the 'parcel as a whole' (see, eg, discussion by Steven Eagle, 'The Four-Factor *Penn Central* Regulatory Takings Test' (2014) 118 *Penn State Law Review* 601, 612-624). The import of legitimate expectations decision into the international investment law jurisprudence has elicited disparate views. Several academics point out the divergent nature of legitimate expectations. Michele Potesta underscores the use by foreign investor where it has been induced through informal representations by the host country (see Michele Potesta, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept' (2013) 28 *ICSID Review* 88, 103–10, 121–2). Christopher Campbell adopts a more critical view considers legitimate expectations as an 'invention of arbitrators'. Campbell states that arbitral tribunals are grounding their decisions by citing other arbitral awards that do not carry precedent value and, hence, the doctrine should be rejected as providing any basis on which to judge state conduct (see Christopher Campbell, 'House of Cards: The Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law' (2013) 30 *Journal of International Arbitration* 361, 378-9). Elizabeth Snodgrass adopts a more accepting view. She argues that the legitimate expectations should be recognised as a general principle of law on the basis of a comparative survey of various European Union jurisdictions (see Elizabeth Snodgrass, 'Protecting Investors' Legitimate Expectations: Recognizing and Delimiting a General Principle' (2006) 21 *ICSID Review – Foreign Investment Law Journal* 1, 56–8). Christoph Schreuer and Ursula Kriebaum argue that not every expectation can form the basis of an expropriation claim by the foreign investor against the host state. Schreuer and Ursula point out that the application of legitimate expectations is situational, especially in complex transactions. The foreign investor must demonstrate that it had knowledge and sound basis on which a business decision was taken. Such basis can be based on alluding to the existence of a general regulatory framework or through express assurances by the government of the host country (see Christoph Schreuer and Ursula Kriebaum, 'At What Time Must Legitimate Expectations Exist?' in Jacques Werner and Arif Hyder Ali (eds), *A Liber Amicorum: Thomas Wälde. Law beyond Conventional Thought* (CMP Publishing, 2009) 265, 269–70, 273–6.

76 *CMS Gas Transmission Company v Argentina (Award)* (n 74) [274]–[276].

77 *Impregilo SpA v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/07/17, 21 June 2011) [291]–[292]; see further arguments in Potesta (n 75) 117.

78 See, eg, the discussion in Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2nd ed, 2012) 148–9; see also Aniruddha Rajput and Sarthak Malhotra, 'Legitimate Expectations in Investment Arbitration: A Comparative Perspective' in Mahendra Pal Singh and Niraj Kumar (eds), *The Indian Yearbook of Comparative Law* (Springer, 2018) 297, 302-303.

expectations based on a government-issued legal opinion cannot constitute the basis for a claim unless the full nature of the foreign investment is disclosed in advance.[79] Even in cases of more informal advice, tribunals are cautious in holding representations enough to breach the fair and equitable standards under legitimate expectations.

In addition to the arbitrary exercise of police powers of the state or breach of legitimate expectations of the foreign investors, governmental regulation can sometimes breach fair and equitable treatment (FET) standards as well. Breach of FET standards constitutes a separate legal obligation that can often be viewed through the proportionality principle.

Put simply, the proportionality principle calls for an evaluation of all possible regulatory measures and adopting the least intrusive option.[80] Some arbitral awards (see discussion below) have considered how proportionality and reasonableness interact with each other. While the article does not offer detailed treatment of the proportionality argument, it is discussed briefly as a possible line of action by aggrieved investors against the host state.

Proportionality represents a balance between government regulation and the interests of foreign investors. The doctrine rests on four factors that must be satisfied: (i) the measure must achieve a legitimate aim; (ii) the measure must be appropriate to the achieve the stated aim; (iii) the test of necessity;[81] and (iv) balancing of competing interests which involves weighing and balancing the measure's aims with the importance of harm avoidance.[82]

Arbitral practice shows a mixed adoption of the proportionality argument. In *Saluka v Czech Republic,* an attempt to use proportionality was made to claim against the Czech Republic for failure to extend fair and

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79 *International Thunderbird Gaming Corporation v Mexico (Award)* (North American Free Trade Agreement Chapter 11 Tribunal, 26 January 2006) [145], [147]–[148], [155], [166]. The separate opinion of Thomas Wälde in the *Thunderbird* dispute highlights that the 'quite high' threshold for assurances and specific representations can only be met if the assurances visibly display an official character: *International Thunderbird Gaming Corporation v Mexico (Separate Opinion of Thomas Wälde)* (North American Free Trade Agreement Chapter 11 Tribunal, 26 January 2006) [32]; See also Potesta (n 75) 105–7.

80 See, eg, Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration* (Cambridge University Press, 2015) 23–6; see also Caroline Henckels, 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration' (2012) 15 *Journal of International Economic Law* 223, 224–8; see also Benedict Kingsbury and Stephen W Schill, 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest: The Concept of Proportionality' in Stephen W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) 75, 77–88.

81 The 'necessity' test under the proportionality principle has noticeably overlaps with its WTO counterpart. Mitchell and Henckels term the analysis on the 'necessity' test by the arbitral tribunals as more fragmented when compared to the analysis under WTO. Mitchell and Henckels argue that WTO jurisprudence provides a useful source for guiding investment tribunals in determining necessity because WTO panels have displayed appropriate institutional sensitivity and deference to national autonomy in their analysis (see Andrew Mitchell and Caroline Henckels, 'Variations on a Theme: Comparing the Concept of 'Necessity' in International Investment Law and WTO Law' (2013) 14 *Chicago Journal of International Law* 93, 126–37, 160, 163; see also Mads Andenas and Stefan Zlepting, 'Proportionality: WTO Law in Comparative Perspective' (2007) 42 *Texas International Law Journal* 371, 383.

82 See, eg, a summary of the proportionality approach in Henckels, *Proportionality and Deference in Investor-State Arbitration* (n 80) 24–6; see also Aharon Barak, *Proportionality* (Cambridge University Press, 2012) 131, 357, 484.

equitable treatment to foreign investors ('*Saluka*').[83] According to Prabhash Ranjan, the *Saluka* rule provides that 'a bona fide and non-discriminatory measure adopted for public welfare objective is not expropriation, notwithstanding the economic impact on foreign investment'.[84] Ranjan is of the view that the *Saluka* award did not set a new standard and appeared as a mere continuation of the 'police powers' doctrine.[85]

The proportionality doctrine received detailed treatment in the *American Silver v Bolivia* dispute. The dispute in question concerned a Bolivian governmental action revoking the mining licenses of the investor and ordering the return of land ownership to indigenous peoples.[86] The tribunal adopted the view that social benefit cannot solely be equated with economic benefit, especially when ignoring the surrounding socio-economic situation in the region. In other words, the expected economic benefit for local communities must be in proportion to social and community precepts that are considered necessary by the locals.[87] The tribunal further argued that the investors' economic losses could not carry weight over and above the interests of the indigenous peoples.[88]

The tribunal in *American Silver* indicated that the application of the proportionality standard is linked with the underlying FTA/BIT (ie the *United Kingdom–Bolivia BIT*).[89] Since the *United Kingdom–Bolivia BIT* did not address the standard of a proportionate response concerning expropriation,[90] the only reason that the tribunal covered proportionality as an issue was because the parties themselves had considered the reversion of title from a proportionality perspective.[91]

In another award (*RREEF v Spain)*, the tribunal viewed proportionality as closely linked with reasonableness.[92] This award is somewhat different from the *Tecmed* view that a regulatory measure is not expropriatory when a reasonable relationship of proportionality is established between the regulatory measures by the host government and the stated aims of such measures.[93]

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83 *Saluka Investments BV v Czech Republic (Partial Award)* (Ad Hoc Tribunal under the UNCITRAL Arbitration Rules, 17 March 2006); see further discussion in George S Georgiev, 'The Award in Saluka Investments v Czech Republic' in Guillermo Aguilar Alvarez and W Michael Reisman (eds), *The Reasons Requirement in International Investment Arbitration* (Martinus Nijhoff, 2008) 149, 150.

84 Prabhash Ranjan, 'Police Powers, Indirect Expropriation in International Investment Law, and Article 31(3)(c) of the VCLT: A Critique of Philip Morris v Uruguay' (2019) 9 *Asian Journal of International Law* 98, 114-5.

85 Ibid 115.

86 *South American Silver Ltd v Bolivia (Award)* (Permanent Court of Arbitration, Case No 2013-15, 22 November 2018) [169]; see also the discussion in Lasse Langfeldt, 'Proportionality in Investment Treaty Arbitration and the Necessity for Tribunals to Adopt a Clear Methodology' (LLM Thesis, Uppsala University, 2019) 24 –6.

87 *South American Silver Ltd v Bolivia (Award)* (n 86) [578].

88 Ibid [578].

89 *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Bolivia for the Promotion and Protection of Investments*, signed 24 May 1988, [1990] UKTS 34 (entered into force 16 February 1990).

90 *South American Silver Ltd v Bolivia (Award)* (n 86) [570].

91 See Langfeldt (n 86) 26.

92 *RREEF Instructure Ltd and RREEF Pan-European Infrastructure Two Lux Sàrl v Spain (Decision on Responsibility and on the Principles of Quantum)* (ICSID Arbitral Tribunal, Case No ARB/13/30, 30 December 2018) [463]–[468].

93 See *Tecmed* (n 73) [121]–[122]; see also the discussion in Ranjan (n 84) 116.

It is noticeable that the older BITs/FTAs included broad obligations to compensate but failed to incorporate compensatory mechanisms, eg the *North American Free Trade Agreement* (*NAFTA*) art 1110,[94] *Australia–Thailand FTA* art 912,[95] the *Indonesia–Thailand BIT* art VI[96] and the *Singapore–China BIT* art 6.[97]

As the discussion accompanying Table 1 in this article shows, the newer generation of BITs/FTAs such as CPTPP, AANZFTA, KAFTA and others now delineate the contours of expropriation by providing greater detail on fair and equitable treatment along with 'carve-outs' for public welfare measures. Other examples of 'new wave' BITs/FTAs, in addition to the ones discussed in the preceding section of this article, include *ASEAN Comprehensive Investment Agreement* (*ACIA*) annex 2,[98] the *Comprehensive and Progressive Trans-Pacific Partnership* (*CPTPP*) annexes 9-B and 9-C,[99] the Canada–European Union (EU) *Comprehensive and Economic Trade Agreement* (*CETA*) art 8.12,[100] the *EU–Vietnam Investment Protection Agreement* art 2.7 and the accompanying Annex 4 (Understanding on Expropriation).[101] The BITs/FTAs mentioned above restrict the ability of arbitral panels (or in the case of CETA, the newly constituted investment courts) to expansively interpret fair and equitable standard of treatment, something which has caused resentment against the ISDS system in the past. Note, however, that even in the newer generation of BITs/FTAs, the concepts of 'public purpose' and 'legitimate public policy' are not expressly defined. Therefore, the capacity of foreign investors to mount a challenge questioning the legitimacy of governmental measures continues to survive.

Notwithstanding the preceding discussion, if the regulatory action by the host state has not met the threshold of substantial deprivation or a near total destruction of the foreign investment, there will be little legal or economic basis for the foreign investor to challenge the host state.

Indeed, the new wave FTA/BITs have included mechanisms to discourage attempts by foreign investors to pressurise the host state through lodgment of frivolous claims.[102] For the Australian Government, this may mean operating in an optimal 'grey-zone' where regulatory leverage can be exerted against the gas operators without projecting the image that the value of the foreign investment is being expropriated. Conversely, the challenge for the aggrieved foreign investor is to show that substantial deprivation standard has been met and that a prima facie case for expropriation can be made under the operative FTA/BIT.

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94 See *North American Free Trade Agreement*, Canada–Mexico–United States, signed 17 December 1992, 32 ILM 289 (entered into force 1 January 1994).

95 See *Australia–Thailand Free Trade Agreement*, signed 5 July 2004, [2005] ATS 2 (entered into force 1 January 2005).

96 See *Agreement between the Government of the Republic of Indonesia and the Government of the Kingdom of Thailand for the Promotion and Protection of Investments*, signed 17 February 1998 (entered into force 5 November 1998).

97 See *Agreement on the Promotion and Protection of Investments (with Exchange of Letters)*, China–Singapore, signed 21 November 1985 (entered into force 7 February 1986).

98 See *ASEAN Comprehensive Investment Agreement*, signed 26 February 2009 (entered into force 24 February 2012) ('*ACIA*').

99 See *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, signed 8 March 2018, [2018] ATS 23 (entered into force 30 December 2018).

100 *Comprehensive Economic and Trade Agreement*, signed 30 October 2016 (provisionally in force).

101 *EU – Vietnam Investment Protection Agreement,* signed 30 June 2019 (entered into force 1 August 2020).

102 See, eg, CPTPP, Articles 9.23(6) and 9.29(4); See also generally Department of Foreign Affairs and Trade, 'CPTPP Outcomes: Investment – Benefits of Foreign Investment to Australia' (Web Page) <https://www.dfat.gov.au/trade/agreements/in-force/cptpp/outcomes-documents/Pages/cptpp-investment>.

With Part III providing the necessary background on indirect expropriation and its underlying drivers, Part IV now seeks to explore the possibility of export restrictions under the ADGSM amounting to indirect expropriation.

IV. Establishing Export Restrictions Under the ADGSM as Indirect Expropriation

Certain assumptions are made to advance the analysis connecting two otherwise unrelated concepts (export control is a trade measure, whereas indirect expropriation is an investment concept). The similarity, however, is that both concepts spring from governmental action. The assumptions are summarised as follows:

Assumption 1: Investment within an LNG project is controlled by a foreign investor and is made under an existing FTA/BIT;

Assumption 2: The main aim behind the foreign investment is the extraction, processing, and export of LNG from Australia. Exports constitute a significant share of the revenue of the LNG companies;

Assumption 3: Export restrictions are imposed according to an Australian Government policy under the ADGSM, whereby the Resources Minister deems the following year as a shortfall year. Export restrictions cause revenue-based damages to the foreign investor.

Imposing export restrictions under the ADGSM overlaps with the *GATT* art XX(j) exception discussed above. *GATT* art XX(j) enables a WTO member to adopt measures in order to alleviate 'general or local short supply'. By using *GATT* art XX(j) and adopting the assumptions outlined above, this Part explores Australia's liability risk if export restrictions are imposed under the ADGSM.

Australia's decision to control LNG exports can be classified under 'police powers' of the state or actions taken for 'public welfare'. Note that some of the BITs/FTAs listed in Table 1 expressly acknowledge 'public welfare' measures as not giving rise to a claim for indirect expropriation. In addition to the above, governmental control of LNG exports can potentially be argued as a proportionate response to gas prices in Australia (under the proportionality argument) or through the legitimate expectations of foreign investors. The classification may alter the outcome of the ISDS if LNG exporters challenge Australian export restrictions in terms of compensation available to the foreign investors.

Since 'police powers', 'public interest', and 'public welfare' have no universally accepted legal definition, the only indicators are treatment under customary international law (particularly through the operation of *Statute of the International Court of Justice* art 38), in academic literature and/or by various arbitral tribunals constituted under BITs/FTAs.

The question of whether the Australian export restrictions on LNG amount to indirect expropriation or a non-compensable exercise of 'police powers' is pivotal to both foreign investors and the Australian Government. For the foreign investor:[103]

> [t]he line of demarcation between measures for which no compensation is due and actions qualifying as indirect expropriations (that require compensation) may well make the difference between the burden to operate (or abandon) a non-profitable enterprise and the right to receive full compensation (either from the host State or from an insurance contract). For the host State, the definition determines the scope of the State's power to enact legislation that regulates the rights and obligations of owners in instances where compensation may fall due.

On the other hand, Sornarajah considered any regulatory measures concerning 'anti-trust, consumer protection, securities, environmental protection, land planning' as 'non-compensable takings since they are regarded as essential to the efficient functioning of the state'.[104] However, the powers of the state exercised to achieve these aims must be non-discriminatory.[105]

Additionally, specific awards such as *Chemtura Corporation v Government of Canada* held that the police powers of state must always be linked to important issues such as protecting human health and the environment.[106] In *Saur International SA v Argentina*, it was held that any legitimate exercise of police powers of the state does not give rise to an obligation to compensate.[107]

The problem with the argument based on 'legitimate' exercise of police powers is that states often view their actions in the public realm as 'necessary' to achieve public welfare purposes. In the absence of a commonly agreed definition of the term 'necessary' in ISDS jurisprudence, tribunals may consider borrowing the interpretation of the term 'necessary' under WTO law.

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103 Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff Publishers, 1995) 98, quoted in Organisation for Economic Co-operation and Development, "'Indirect Expropriation" and the "Right to Regulate" in International Investment Law' (Working Paper on International Investment No 2004/04, September 2004) 5.

104 Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 1994) 283, cited in ibid 4–5.

105 See, eg, Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (Oxford University Press, 9th ed, 1992) 919–20; *BP Exploration Company (Libya) Ltd v Libya* (1973) 53 ILR 297, 329 ('*BP Exploration*'); *Methanex Corporation v United States (Final Award on Jurisdiction and Merits)* (2005) 44 ILM 1345, 1456 ('*Methanex (Final Award)*'); Veijo Heiskanen, 'The Contribution of the Iran-United States Claims Tribunal to the Development of the Doctrine of Indirect Expropriation' (2003) 5 *International Law Forum* 176, 179, 185; Ben Mostafa, 'The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law' (2008) 15 *Australian International Law Journal* 265, 272–4.

106 *Chemtura Corporation v Canada (Award)* (Permanent Court of Arbitration, Case No 2008-01, 2 August 2010) [266], cited in Anthony (n 62) 329.

107 *SAUR International SA v Argentina (Decision on Jurisdiction and Liability)* (ICSID Arbitral Tribunal, Case No ARB/04/4, 6 June 2012) [398], cited in Anthony (n 62) 329.

The term 'necessary' was explained in several well-known WTO cases such as *Korea—Beef,*[108] *EC—Asbestos*,[109] *EC—Tariff Preferences*,[110] *US—Gambling,*[111] and *Brazil—Retreaded Tyres.*[112] In *Brazil—Retreaded Tyres,* the Appellate Body explicitly acknowledged the fundamental right of WTO members to determine the appropriate level of protection necessary to achieve stated public policy goals.[113]

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[108] Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc WT/DS161/AB/R; WT/DS169/AB/R (11 December 2000) ('*Korea — Beef,* Appellate Body Report'). The Appellate Body in *Korea — Beef* held that 'necessary', within *GATT* art XX(d), requires a weighing and balancing of several factors that can include the contribution of the compliance measure in enforcing the law in question, the importance of common interests or values protected by the law and the impact of law on 'imports or exports': at [164].

[109] Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (12 March 2001) ('*EC — Asbestos,* Appellate Body Report'). In *EC — Asbestos,* the Appellate Body analysed the term 'reasonably available' to determine whether French import restrictions were 'necessary' under *GATT* art XX(b): at [170], [173]–[175].

[110] Appellate Body Report, *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc WT/DS246/AB/R (7 April 2004) ('*EC — Tariff Preferences*, Appellate Body Report'); Panel Report, *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc WT/DS246/R (1 December 2003) ('*EC — Tariff Preferences*, Panel Report'). The *EC — Tariff Preferences* case demonstrates that interpreting 'necessary' must be combined with proven 'effectiveness' of the trade measures (here, the EU's European Generalised System of Preferences ('GSP') scheme). The EU defended the GSP tariff preferences because it promoted the 'development of alternative economic activities to replace illicit drug production and trafficking' hence satisfying *GATT* art XX(b). The dispute settlement panel disagreed with this argument. It stated that the GSP was developmental in nature that emphasised promoting sustainable development in developing countries. Thus, invalidating EU's defence under *GATT* art XX(b). The panel pointed out the declining utility of GSP schemes due to global tariff reduction, along with a lack of monitoring and compliance mechanisms for measuring 'effectiveness' of the GSP scheme and the availability of less trade restrictive options. The panel concluded that the part of the EC GSP schemes relating to drug arrangements was not 'necessary' to protect human life or health: [4.92]–[4.99], [7.211], [7.219] –[7.223]. The takeaway for Australian policymakers from the *EC — Tariff Preferences* case is that if Australia adopts LNG export restrictions and justifies them under the 'necessary' standard, the measures must be proven as effective to achieve the stated goals.

[111] The case concerned *Marrakesh Agreement Establishing the World Trade* Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1995) annex B ('*General Agreement on Trade in Services*') art XIV(a), which is identically worded to *GATT* art XX(a). The meaning of the term 'necessary' involved assessing the 'relative importance' of the interests or values promoted by the challenged measure, contribution of the measure to the achievement of the aims pursued by it, restrictive impact of the measure on international trade, weighed and measured with the interests or values, and, finally, a comparison between the challenged measure and possible alternatives available (Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R (7 April 2005) [291], [304]–[309] ('*US – Gambling*, Appellate Body Report'). The Appellate Body also noted that 'it is not the responding party's burden to show … that there are no reasonably available alternatives to achieve its objectives' and that 'a responding party need not identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective': at [309]. Instead, the responding party must make a case that its measures are 'necessary' by producing evidence that enables 'weighing and balancing' of the measure by the panels: at [310]–[311].

[112] Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres,* WTO Doc WT/DS332/AB/R (3 December 2007) ('*Brazil — Retreaded Tyres,* Appellate Body Report'); Panel Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/AB/R (12 June 2007) ('*Brazil — Retreaded Tyres,* Panel Report').

[113] The 'necessary' standard was further expounded in *Brazil — Retreaded Tyres*, where the dispute concerned Brazil's ban on the import and marketing of, and dealing with, retreaded tyres. Brazil's regional trading partners in the Mercosur regime received exemptions from the ban. Brazil claimed that the ban was 'necessary' under *GATT* art XX(b) and (d). They sought an acknowledgment that WTO Members have the right to determine the appropriate level of protection according to their public policy. The Appellate Body further endorsed the panel's finding that the import ban on retreaded tyres can be provisionally justified: *Brazil — Retreaded Tyres*, Appellate Body Report (n 112), [145]. The panel 'weighed and balanced' the contribution of the import restrictions in the context of the stated objective of the Brazilian policy. The panel then considered alternatives suggested by the complainant and held that the suggested measures did not constitute 'reasonably available' alternatives to the import restrictions: *Brazil — Retreaded Tyres*, Appellate Body Report (n 112) [157]; See also *Brazil — Retreaded Tyres,* Panel Report (n 112) [7.159]. The Appellate Body further noted that even where the contribution of the measures is not immediately observable, the measure could still be considered 'necessary'. This underscores the need for policymakers to closely consider factors that contribute to the overall objective of the trade restrictive measure: *Brazil — Retreaded Tyres*, Appellate Body Report (n 112) [210]–[212]. In hindsight, the position adopted by the WTO seems to endorse the expectation that the imposing Member has already undertaken a comprehensive analysis of the measure in light of possible, less-trade restrictive alternatives, and simultaneously, the complaining WTO Member, is afforded the opportunity to identify possible less-trade restrictive measures that the responding Member could have taken.

In the event of a gas shortfall year, the Australian Government can justify its export restrictions as 'necessary' under *GATT* art XX(d) by arguing a short supply of gas, leading to high gas prices within the Australian economy. The challenge for policymakers in Australia is to structure export restrictions consistently with the approach illustrated in *Korea—Beef, which requires* a consideration of all possible alternatives that may be reasonably available. In addition to the *Korea–Beef* argument, policymakers must ensure that the 'effectiveness' criteria highlighted in the *EC—Tariff Preferences* case is met. Collectively, this means that the policymakers have considered all available policy options to affect a reduction in domestic LNG prices, and that the policy option selected is effective in achieving the stated goal of the Australian Government.

Alternatively, Australia may consider adopting an argument under *GATT* art XX(j). The difference between an argument under *GATT* art XX(d) and (j) are the operative standards of 'necessary' or 'essential.' In other words, the Australian Government will have to establish export restrictions as 'essential' to the securing and distributing products (LNG) in 'general or local short supply'.

To do so, the Australian Government must consider two inter-connected factors. The first is the 'essential' test in the *India—Solar Cells* case.[114] In defining 'essential', the Appellate Body endorsed a test similar to the 'necessary' test under *GATT* art XX(d), which involves 'weighing and balancing' a series of factors.[115] Secondly, the Australian Government must also consider the interpretation of 'general or local short supply' as explained by the Appellate Body in *India—Solar Cells* in the following words:[116]

> [t]he total quantity of imports that may be available to meet demand in a particular geographical area or market. It may… be relevant to consider the extent to which the international supply of a product is stable and accessible, including…distance between a particular geographical area or market and production sites, as well as reliability of local or transnational supply chains. Whether and which factors are relevant necessarily depends on the particularities of each case.

The Appellate Body further held that, regardless of how the factors identified occur in each case, the party imposing the trade restrictions (in this case, the LNG export restrictions) must demonstrate that available supply, from both domestic and international sources, to the market is insufficient to meet local demand.[117]

Since no country has ever faced an expropriation claim[118] in connection with export restrictions based on 'general or local short supply', the design of trade and investment policy can take into consideration the

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114 The term 'essential', according to the Appellate Body, ranks closer to the 'indispensable' end of the continuum than the word 'necessary': *India — Solar Cells*, Appellate Body Report (n 58) [5.62].

115 Ibid [5.63] (emphasis added).

116 Ibid [6.4].

117 Ibid.

118 Note, however, export restrictions have in the past formed the basis of ISDS claims. In a well-known arbitration under the NAFTA Chapter 11, the Claimant/Investor claimed that export restrictions imposed by Canada infringed Canada's National Treatment obligations under NAFTA along with prohibition of performance requirements and expropriation (*see Pope & Talbot Inc v Canada (Award on the Merits of Phase 2)* (Ad Hoc Tribunal under the UNCITRAL Arbitration Rules, 10 April 2001) [18], [78-79], [83-88], [93] (hereinafter referred to

standard highlighted in *India—Solar Cells (see discussion above)* when dealing with 'general or local short supply' issue. Assuming the exporting economy satisfies such considerations, a 'police powers'-based approach can be adapted to argue that export restrictions are not expropriatory in nature and that the government has merely acted to alleviate 'general or local short supply'.

Indirect expropriation is generally couched in issues such as health and the environment. Any devaluation of the foreign investor(s) interests is a by-product of governmental measures. It is this devaluation that the foreign investor seeks to correct when it pursues a claim in an ISDS setting. Applied to the current proposition, for the Australia Government the challenge in enacting LNG export restrictions is to not only avoid a breach of *GATT* obligations owed to other WTO Members (where importers may be based) but also to ensure that any foreign investor who is affected by the LNG export restrictions is unable to access ISDS relief under a relevant FTA/BIT to which Australia is a party.[119]

The origin of foreign investors may prove to be an essential factor in anticipating the fallout from the imposition of export restrictions. Table 1 already alludes to the multi-layered investment in the Australian LNG sector as far as BITs/FTAs are concerned. In other words, investors in some projects can protect their investment from more than one BIT or FTA.

The best example is the Gladstone LNG project, where investment can be covered from AANZFTA or MAFTA.[120] Australia is already in an FTA with another country (in this context, Malaysia). The Malaysian investors (Petronas holding 27.5% share) have invested in the LNG sector of Australia with the apparent aim of extracting, refining, and exporting gas. Indubitably, any measures that restrict or are seen to restrict the stated rationale for foreign investment can form the basis of an expropriation claim against Australia.

Australia's liability to the foreign investors, however, depends on inter-connected factors such as legitimate expectations of the investors, the terms of the BIT, the proportionality and necessity of the adopted measures, and the construction of expropriation clauses within the underlying BIT.

In the event of a hypothetical ISDS claim, Australia will have to demonstrate that actions were under the police powers of the state to ensure a stable gas supply. Petronas (or the foreign investor) will attempt to claim compensation for indirect expropriation because of lost revenue and loss of share value. Australia can also attempt to base its arguments on the proportionality, legitimacy and necessity analysis featured in disputes such as *RREEF v Spain* and *American Silver*.[121]

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as '*Pope & Talbot v Canada*'). See also comments by Joost Pauwelyn, 'Editorial Comment: Adding Sweeteners to Softwood Lumber: The WTO-NAFTA "Spaghetti Bowl" is Cooking' (2006) 9 *Journal of International Economic Law* 197.

119 Ghori (n 48) 64-7.

120 Russell Thirgood, Michael Roche and Erika Williams, 'Australia: Proposed LNG Export Restraints and Australian Liability Under International Trade Law', *Mondaq* (Web Page, 20 June 2017) <http://www.mondaq.com/australia/x/603326/Inward+Foreign+Investment/Proposed+LNG+export+restrictions+and+Australian+liability+under+international+trade+law>.

121 In this respect, see the arguments in the preceding section of this article.

Australia may consider adopting the exception under *GATT* art XX(j), which may enable export restrictions to relieve 'general or local short supply'. The inherent public interest argument within *GATT* art XX(j) can settle the issue of the police powers of the state on the straight-forward basis that states have the right to ensure that their citizens have access to, inter alia, food, water, affordable energy, and security.

Australia's policymakers must carefully justify any future export restrictions under the ADGSM because the stated aim of any restraints can alter the outcome. For example, if export restrictions are used by the government to boost domestic economic activity by diverting critical materials inwards through prohibiting their export, then this may provide the necessary basis for ISDS proceedings. Since such a policy will not be viewed from the lens of the police powers of the state or regulatory powers exercised in the public interest or for public welfare, the defence case would be weak. One can argue that governments usually have the right to take economic initiatives that lead to advancement and the creation of jobs, but this argument may be on weaker footing when contrasted with loss suffered by the foreign investor.

Thirgood, Roche, and Williams raise an interesting point where the foreign investment may not be under FTA/BIT that the host country may have signed. In such a situation, efforts of foreign investors to protect their investment under an FTA/BIT setting may face difficulties.[122] That prospect is highly unlikely, however, since the information presented in Table 1 shows that major LNG project will likely have a FTA/BIT coverage.

Furthermore, the experience of Phillip Morris's claim against Australia's tobacco plain-packaging regulations shows that any *post facto* restructuring in order to bring an expropriation claim will likely not succeed.[123] Therefore, as long as Australia treats investment in a non-discriminatory manner between domestic and foreign investors in the LNG sector, it can resist ISDS claims for indirect expropriation under FTAs/BITs.

Changes introduced by host governments, whether driven by economic or political motivations or concern for ensuring the supply of resources in the domestic market, almost always have the potential to hamper the ability of foreign investors to carry out their business activity. One pre-emptive solution to such a challenge may be the use of an economic equilibrium clause in the project agreement.[124] The economic equilibrium clause allows stabilisation of the economic return to the investor, instead of stabilisation of the legal framework.[125] Under economic equilibrium clauses, host states may issue changes that are potentially detrimental to the project but are also bound to consult the foreign investor in order to ameliorate any impact of the proposed changes.[126] The parties in an economic equilibrium setting may discuss a renegotiated framework of investment, or the state compensates the foreign investor.

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122 Thirgood, Roche and Williams (n 120).

123 Phillip Morris attempted to restructure its investment in Australia to take advantage of the BIT between Hong Kong and Australia. This was ultimately unsuccessful and held to be an abuse of process by the tribunal: ibid.

124 For a brief discussion of the 'economic equilibrium clause', see David Clinch and James Watson, 'Stabilisation Clauses: Issues and Trends', *Lexology* (Web Page, 30 June 2010) <https://www.lexology.com/library/detail.aspx?g=c5976193-1acd-4082-b9e7-87c0414b5328>.

125 Stabilisation clauses are contractual protections incorporated within long term investments between foreign investors and states. Majority of stabilisation clauses appear in investment agreements in the oil, gas and resources sector. They can also be found in infrastructure and transport projects as well: ibid.

126 Ibid.

While concluding an economic equilibrium clause in the project agreement enables discussion between host states and foreign investors, the foreign investor still has the final call whether to accept the compensation offered or to lodge a claim of indirect expropriation by initiating ISDS proceedings. Inclusion of economic equilibrium clauses in the project agreement may be influenced by a variety of factors, which include (but are not limited to): the willingness of the host country to enter into pre-investment negotiations; the nature and size of foreign investments; the extent of profit remittance from the host country; the socio-political sensitivity of the sector attracting investment; and the investor's understanding of the regulatory standards in the host economy as well as under the FTA or BIT umbrella. Additionally, the extent to which local producers export their production overseas is another factor identified by the Appellate Body.[127]

V. ARGUMENTS

The challenge confronting policymakers in Australia is to justify their policy response from several standpoints of 'legitimacy', 'necessity', 'proportionality', 'legitimate expectations', 'public welfare' and/or 'police powers'. Any justification by the Australian Government must holistically consider the logical overlap between the exceptional grounds under *GATT* art XX and the commonly accepted grounds of public regulation by states.

Since 'non-discriminatory regulation for a public purpose' is deemed by arbitral panels as falling within the doctrine of police powers,[128] there is little conceptual difference with public interest imperatives that the newer generation of BITs/FTAs refer to while carving out public welfare exceptions.[129]

Adherence to procedure and management of perception in adopting regulatory measures has assumed greater importance in arbitral awards because the exercise of police powers of the state is viewed as non-compensable if it is done in a non-discriminatory manner. A similar position is reflected in modern BITs/FTAs in that exercise of governmental powers is not considered indirect expropriation if it is intended to achieve public welfare aims.

From an export control perspective, the Appellate Body in *India—Solar Cells* case elaborates on the meaning of 'general or local short supply'. If export restrictions on LNG are imposed by the Australian Government in a uniform, and non-discriminatory manner, the claim of foreign investors for compensation may be difficult to pursue. One possibility that the investors may consider is the incorporation of stabilisation and/or economic equilibrium clauses in investment agreements, which can give foreign investors a more significant say in execution of governmental measures.

To ameliorate the risk of ISDS claims for LNG export restrictions, it is vital that the Australian Government show actual disruption in the market. This provides the necessary causal connection between

127 *India — Solar Cells,* Appellate Body Report (n 58) [5.71].

128 See discussion in *Methanex (Final Award)* (n 105) 1456, cited in Mostafa (n 105) 272–4.

129 By way of illustration, *ACIA* (n 98) annex 2 (4) specifically provides for carve-outs for 'measures … designed and applied to protect legitimate public welfare objectives such as public health, safety and the environment', which will not be considered as expropriation.

export restrictions and 'general or local short supply' of LNG. Conversely, LNG exporters may counter-argue to show that there is per se no 'general or local short supply' in order to claim compensation for expropriation.

Note that in the absence of a defined criterion, both sides to the dispute, ie the government and the foreign investors, may offer their subjective interpretation of what is, or should be, the threshold of disruption that necessitates the imposition of LNG export restrictions. Surely, such state of affairs is a recipe for conflict and confusion because even when instances of disruptions under international trade are interpreted under the *GATT*/WTO framework, there are no mutually agreed definitions under international investment law. Also, BITs/FTAs can provide basic definitions or markers amounting to disruption. However, there are no known BITs/FTAs that define disruption in a foreign investment context where the very purpose behind the foreign investment is to extract, refine, and export natural resources.

Another point to consider is that any response to anticipated shortages or market disruptions is often difficult to justify because it may be challenged as speculative by the foreign investor. The host state is often placed in an awkward position: should it wait until actual disruption occurs? Or are risk assessments sufficient grounds for the imposition of export restrictions? LNG exporters may be inclined to argue that since no actual market disruption has occurred or no actual shortage exists, therefore, any imposition of LNG export restrictions is expropriatory. In the absence of agreed formulae in international investment law for determining imminent market disruption, mere speculation of market disruption will likely not succeed in arbitral panels (something similar to Appellate Body's cold shoulder to India's argument of impending shortage of solar cells and modules in the *India—Solar Cells* case).[130]

For Australia, like any other sovereign country, the prospect of foreign investors and arbitral panels interpreting questions of public interest when determining the efficacy of measures in response to 'actual or likely disruption' is a genuinely unsavoury proposition indeed. It is quite evident from Australia's duel with Phillip Morris that influential multinational corporations (MNCs) can exert pressure on governmental authorities resulting in regulatory chill. Host states consider the fettering of their regulatory discretion an unwelcome prospect.[131] Considering the prospect that LNG export restrictions may be held as indirect expropriation in an ISDS setting, the article now discusses two alternative arguments.

A. Difficult, but not Entirely Impossible: State-espousal Strategy under WTO Dispute Settlement

Foreign investors can indirectly access the WTO system, which has traditionally not been an option designed for a private party challenge against a WTO Member. Recourse by foreign investors to WTO dispute settlement is based on foreign investor's challenge of the Australian measures as a breach of its WTO obligations.

Fortunately for Australia, this option is beset with multiple obstacles: First, the complainant must be a WTO Member (not a private party) who must establish the exact breach of WTO obligations, and the LNG

[130] *India — Solar Cells,* Appellate Body Report (n 58) [5.76]. The panel in *India — Solar Cells* held that India 'had not identified any actual disruptions', and that solar power developers ('SPDs') in India have not 'experienced an actual disruption in supply': *India — Solar Cells,* Panel Report (n 57) [7.262].

[131] Thirgood, Roche and Williams (n 120).

export restrictions must breach the terms of the *GATT*/WTO framework, or not fall under the exceptional factors under *GATT* arts XI and XX. Secondly, the country in which the foreign investor is based must establish *locus standi* to bring about the complaint in the WTO. Thirdly, the WTO may have to adjudicate a breach of obligations that, quite possibly, may be owed under a different bilateral FTA.[132]

Additional complications for the foreign investor may come if the underlying FTA/BIT contains a 'fork-in-the-road'[133] clause. A 'fork-in-the-road' clause requires the foreign investor to determine whether to pursue a compensatory claim in the Australian courts or select an international dispute settlement option.[134] Note that the 'fork-in-the-road' clause will only assist in choosing enforcement alternatives but not with treaty selection.[135] Hence, the options for foreign investors in the Australian LNG sector will either be restricted to Australian courts or claiming redress under an identified FTA/BIT.

When the Australian Government acts under domestic compulsion to restrict exports of LNG because of domestic short supply, the imposition of export restrictions will be deemed a sovereign act, which would mean that the local courts will extend constitutional shade to cover the export restrictions. In such cases, foreign investors will be reluctant to apply to the domestic courts for redress. The Australian Government can also resist demands for compensation by arguing that export restrictions are sovereign measures designed to alleviate 'general or local short supply'. If the matter proceeds to arbitration, the Australian Government can adopt the position that the LNG export restrictions were an act of state.[136]

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132 This is a challenging proposition, as is illustrated by the *Mexico — Soft Drinks* case in the WTO. See Appellate Body Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WTO Doc WT/DS308/AB/R (6 March 2006, '*Mexico — Soft Drinks*, Appellate Body Report'); Panel Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WTO Doc WT/DS308/R (7 October 2005) ('*Mexico — Soft Drinks*, Panel Report'). In *Mexico – Soft Drinks*, the US argued that domestic taxes imposed by Mexico on manufactured soft drinks using non-cane sugar violated the national treatment (NT) obligations owed to the US by Mexico under *GATT*. Mexico defended its measures as an appropriate response to the earlier breach by the US of its market access commitments accorded to Mexico under *NAFTA* on sugar exports, while the US-origin high-fructose corn syrup ('HFCS') (a sugar alternative used as input in manufacturing of beverages) enjoyed preferential access to the Mexican market. Mexico also claimed that the US continuously refused to submit to the *NAFTA* dispute settlement process. Resultantly, Mexico viewed the measures as falling within the scope of the *GATT* art XX(d) exception, which permits a WTO Member to derogate from a *GATT*/WTO obligation to secure compliance with laws or regulations. The panel concluded that the tax breached the WTO NT obligation, but that the WTO has no jurisdiction to adjudicate obligations owed under *NAFTA*: *Mexico — Soft Drinks*, Panel Report [4.70], [4.72], [8.193], [8.199]. On appeal, the panel's conclusions were upheld by the Appellate Body that disagreed with Mexico's argument on *GATT* art XX(d). The Appellate Body stated that the term 'laws or regulations' in *GATT* art XX(d) referred 'to the rules that form part of the domestic legal order of the WTO Member invoking the provision and do not include the international obligations of another WTO Member': *Mexico — Soft Drinks*, Appellate Body Report [75], [79]–[80]. See also detailed discussions in Sergio Puig, 'The Merging of International Trade and Investment Law' (2015) 33 *Berkeley Journal of International Law* 1, 23–27; Roger Alford, 'The Convergence of International Trade and Investment Arbitration' (2014) 12 *Santa Clara Journal of International Law* 35, 46–7.

133 'Fork-in-the-road' allows investors to circumvent the rule requiring parties to seek domestic remedies before seeking an international claim: see, eg, discussion in Deborah Ruff and Trevor Tan, 'Fork-in-The-Road Clauses: Divergent Paths in Recent Decisions', *Norton Rose Fulbright* (online, October 2015) <http://www.nortonrosefulbright.com/knowledge/publications/132586/fork-in-the-road-clauses>; see also the discussion in Christoph Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration' (2005) 4 *The Law & Practice of International Courts and Tribunals* 1, 3–5; Christoph Schreuer, 'Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road' (2004) 5 *Journal of World Investment and Trade* 231, 239–249.

134 Puig (n 132) 36; Schreuer (n 133) 239-249; see further Ruff and Tan (n 133).

135 Puig (n 132) 36.

136 The act of state position is illustrated in *Reliance Industries Ltd and BG Exploration & Production India Ltd v India*, wherein the claimants (Reliance Industries and BG Exploration) lodged an arbitration claim against the respondent government (India) for unpaid sums due on production sharing contracts. After the tribunal ruled that it lacked jurisdiction to determine the question of legality of the government ordering its subordinate departments to withhold payments, the matter was appealed to the Queen's Bench Division, Commercial Court

Since the WTO dispute-settlement system is only accessible if there is a *prima facie* breach of *GATT*/WTO norms while imposing LNG export restrictions, the resource endowment of investors along with significant influence, assumes critical importance if the foreign investor wishes to institute parallel claims under ISDS and WTO dispute settlement proceedings.[137]

There are some notable examples where parallel proceedings were instituted to secure broad-ranging relief for foreign investors. For example, in the *Mexico—Soft Drinks* case, foreign investors lodged a claim in the WTO along with instituting ISDS proceedings under *NAFTA*. Roger Alford notes that the complementarity between WTO and *NAFTA* systems enabled prospective and retroactive relief for foreign investors.[138] If the claim had been restricted to WTO, then the WTO Appellate Body's direction to Mexico for repealing the unlawful taxes would have been the only possible relief. However, the institution of parallel investor claims under NAFTA arbitration enabled foreign investors to collectively gain approximately USD170 million in damages in three separate claims.[139]

More recently, Cuba, Indonesia, Ukraine, Honduras and the Dominican Republic instituted a complaint against the Australian tobacco plain-packaging legislation in the WTO, alleging a violation of the WTO's *Agreement on Trade-Related Aspects of Intellectual Property Rights*.[140] The action was launched alongside the high-profile ISDS claims by Philip Morris under the *Hong Kong–Australia BIT*.[141] In both forums, Australia managed to thwart the challenges.

in England. Popplewell J held that the issues in question were covered under the foreign-act-of-state doctrine and were non-justiciable before the court and non-arbitrable before the tribunal. *Reliance Industries* case illustrates the application of act of state doctrine in an arbitration and court settings. For Australia, one implication may be that any state party intending to avoid performance under a contract can easily issue executive orders, ordinances or legislation and then invoke the act-of-state principle in any proceedings where the seat of arbitration is in England: see generally *Reliance Industries Ltd and BG Exploration & Production India Ltd v India* [2018] EWHC 822 (Comm); see also Lucia Raimanova and Matej Kosalko, 'Act of State Doctrine Applies in Arbitration', *Allen & Overy* (Web Page, 21 June 2018) <http://www.allenovery.com/publications/en-gb/Pages/Act-of-State-doctrine-applies-in-arbitration.aspx>.

137 Puig (n 132) 44.

138 Alford (n 132) 47.

139 Three claims cited by Alford (n 132) 47 are: (i) *Archer Daniels Midland Co et al v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/04/05, 21 November 2007), where the tribunal awarded USD 33 million in damages to the Claimant; (ii) *Corn Products International Inc v Mexico (Decision on Responsibility)* (ICSID Arbitral Tribunal, Case No ARB(AF)/04/01, 15 January 2008), where the tribunal awarded USD 58.4 million in damages; and (iii) *Cargill Inc v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/05/02, 18 September 2009), where the tribunal awarded USD 77.3 million in damages.

140 See generally Panel Report, *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc WT/DS435/R; WT/DS441/R; WT/DS458/R; WT/DS467/R (28 June 2018). In this case, the WTO panel endorsed Australia's plain packaging laws by holding that they contributed to improving public health by reducing and discouraging use of tobacco products: [7.228]–[7.232], [7.1725], [7.1731], [7.2794]–[7.2795]; see also 'Australia Wins Landmark World Trade Organisation Ruling on Tobacco Plain Packaging Laws', *ABC News* (Web Page, 28 June 2018) <http://www.abc.net.au/news/2018-06-29/australia-wins-landmark-wto-ruling-on-tobacco-plain-packaging/9921972>.; *Marrakesh Agreement Establishing the World Trade* Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C ('*Agreement on Trade-Related Aspects of Intellectual Property Rights*') ('*TRIPS Agreement*').

141 See generally *Philip Morris Asia Ltd v Australia (Award on Jurisdiction and Admissibility)* (Permanent Court of Arbitration, Case No 2012-12, 17 December 2015); *Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments*, signed 15 September 1993, [1993] ATS 30 (entered into force 15 October 1993).

Sergio Puig describes that strategy of MNCs as 'party shopping', where foreign investors strategically select willing WTO Members to espouse claims on their behalf in the WTO dispute settlement system.[142] Instituting parallel proceedings, however, is an expensive proposition since it involves MNCs with significant resources at their disposal. Pursuing such a claim necessitates comprehensive cost benefit analysis.

In case the Australian Government does impose export restrictions on LNG, foreign investors will have to determine whether to pursue a parallel claims strategy. For this strategy to work, the MNCs will have to lobby their governments to bring about a state-espousal of their claims in the WTO, which is made difficult by the self-regulating nature of the WTO dispute-settlement system.[143]

B. Convergence: ISDS Process Using WTO Dispute-Settlement Jurisprudence as an Interpretative Aid

Foreign investors may, alternatively, 'borrow' arguments from WTO jurisprudence in their ISDS claim against the Australian Government. The WTO cases of *China—Rare Earths* and *China—Raw Materials* show the WTO is heavily inclined towards the promotion of fair and equitable sharing of resources between domestic users and importers. The challenge in adapting the WTO standards in investment disputes is a known grey area. While it may appear a stretch to suggest that an ISDS tribunal will find an indirect expropriation based on non-compliance with the *GATT*, that is not what the article is suggesting. Instead, the article is examining the possibility of ISDS tribunals adapting WTO jurisprudence to interpret concepts that currently do not exist in international investment law jurisprudence.

Note that if LNG export restrictions remain within the confines of international trade, *GATT*/WTO dispute settlement will lead to the WTO DSB recommending that Australia brings its measures in line with its WTO obligations. It is only when the LNG export control disputes move into the field of international investment law that we encounter no clear boundaries since no international agreements address the link between export restrictions and expropriation.

The meaning of expropriation is to be determined by BITs/FTAs and the interpretation by arbitral tribunals. Past awards have not resolved the question of whether host countries remain the owner of their natural resources or are subjected to standards requiring equitable distribution of resources after entering into BITs/FTAs.

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142 Puig (n 132) 36; Alford points out that Ukraine (one of the complainants in the WTO case) had not exported tobacco to Australia in recent years: Alford (n 132) 50. British American Tobacco was known to be assisting Ukraine with its legal costs in the WTO claim because multinational corporations currently have no standing to lodge a WTO claim. Ukraine eventually dropped the claim against Australia, citing hopes of finding a mutually agreed solution with Australia: 'Ukraine Drops Lawsuit against Australia over Plain-Packaging Tobacco Laws, WTO Says', *ABC News* (Web Page, 3 June 2015) <http://www.abc.net.au/news/2015-06-04/plain-packaging-tobacco-ukraine-drops-lawsuit-against-australia/6520160>.

143 Puig (n 132) 36–7, citing Appellate Body Report, *Mexico — Anti-Dumping Investigation of High Fructose Corn Syrup from the United States — Recourse to Article 21.5 of the DSU by the United States*, WTO Doc WT/DS132/AB/RW (22 October 2001) [73]–[74]. In this case, the Appellate Body held that the request for establishment of panel by a WTO Member is predicated on good faith and an exercise of sound judgment regarding the utility of dispute settlement process under the WTO system.

Future panels hearing the hypothetical dispute may consider 'importing' or 'transplanting' the interpretation of the concept of a local or general short supply of materials from *GATT*/WTO norms.[144] The interpretation of *GATT* art XX(j) by the Appellate Body in *India—Solar Cells* (especially in para [6.4]) provides a useful starting point. The concluding comment: 'whether and which factors are relevant necessarily depend on the particularities of each case', acts as the control valve for the determining whether the LNG export restrictions are justified based on 'local or general short supply'. Knowledge of *GATT* art XX(j) reasoning allows Australian policymakers to construct compliant export restrictions that diminish the prospects of a challenge by foreign investors.

The convergence approach involving the import of WTO jurisprudence in adjudicating investment disputes has been applied by arbitral panels in the past and has also received academic attention.[145] While the convergence approach does not find universal endorsement, it does provide a compelling alternative where there is a lack of clarity in law or a dearth of jurisprudence on a given issue. This situation is best illustrated through the example of national treatment (NT) disputes in an investment context where dispute settlement panels were called upon to borrow the interpretation of NT from the WTO norms.

In *Pope and Talbot v Canada,* Canada interpreted the NT standard under WTO law and attempted to transplant the same understanding in its softwood lumber dispute with US-based investors under *NAFTA*.[146] Canada argued that even where foreign investors were awarded lower quotas as compared to domestic producers, there was no discrimination because foreign investors were not disadvantaged as a group.[147] According to Kurtz, Canada implied that the effect of a challenged measure is determined by a comparison between local producers and foreign investors to identify any disproportionate effect on foreign investors as a whole.[148]

The tribunal, however, rebutted Canada's argument on the disproportionate disadvantage test as based in WTO jurisprudence.[149] The tribunal argued that if Canada's arguments were adopted, this might mean the foreign investor would have to determine the quota details of US-owned businesses in Canada and then review

144 Recall that the article makes the assumption that LNG export restrictions are imposed by Australia for securing and distributing LNG in the domestic market. According to Puig the 'transplantation' approach may see disputing parties importing a rule from a trade treaty to an investment treaty. Puig cites the example of the strategy employed by Philip Morris, linking Australia's obligations under the *Hong Kong–Australia BIT* with Australia's WTO obligations under the *TRIPS Agreement* and the *Agreement on Technical Barriers to Trade* (*Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Technical Barriers to Trade*'): Puig (n 132) 41-4.

145 Jurgen Kurtz, 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents' (2009) 20 *European Journal of International Law* 749, 751–759, 770–771; Robert Howse and Efraim Chalamish, 'The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jurgen Kurtz' (2010) 20 *European Journal of International Law* 1087, 1088–1090; Alford (n 132) 37; Frank Garcia et al, 'Reforming the International Investment Regime: Lessons from International Trade Law' (2015) 18 *Journal of International Economic Law* 861, 864; Brooks Allen and Tommaso Soave, 'Jurisdictional Overlap in WTO Dispute Settlement and Investment Arbitration' (2014) 30 *Arbitration International* 1, 28; Andrea Bjorklund, 'Convergence or Complementarity' (2013) 12 *Santa Clara Journal of International Law* 65, 68–70; Puig (n 132) 4–5.

146 *See Pope & Talbot Inc v Canada (Award on the Merits of Phase 2)* (Ad Hoc Tribunal under the UNCITRAL Arbitration Rules, 10 April 2001) [43]–[44] ('*Pope & Talbot v Canada*'). See also discussions in Chien-Huei Wu, *Law and Politics on Export Restrictions: WTO and Beyond* (Cambridge International Trade and Economic Law, 2021) 218-226.

147 Kurtz (n 145) 761.

148 *Pope & Talbot v Canada* (n 146) [46]–[63].

149 Ibid.

the treatment accorded to the said businesses as a whole, in contrast with domestic companies operating in like circumstances.[150]

The tribunal concluded that if the Canadian approach were to be adopted, 'only in the simplest and most obvious cases of denial of national treatment could the complainant hope to make a case for recovery'.[151] Based on *Pope and Talbot v Canada* alone, foreign investors in the Australian LNG sector could argue that LNG export restrictions by Australia are discriminatory and amount to indirect expropriation *if* it can be demonstrated that local LNG businesses are being advantaged. This prospect is remote because most LNG projects are run as joint ventures between local and foreign companies.

The strategy may also pose some challenges for foreign investors. The example discussed here illustrates potential possibilities, but not necessarily a practical strategy. There have been other disputes where the convergence approach was considered with caution by dispute settlement tribunals. For example, in another *NAFTA* dispute, *SD Myers v Canada*, the tribunal cited the Appellate Body's treatment of 'like' circumstances in *Japan—Taxes on Alcoholic Beverages*, where the Appellate Body had commented that:[152]

> [T]here can be no one precise and absolute definition of what is 'like.' The concept of 'likeness' is a relative one that evokes the image of an accordion. The accordion of 'likeness' stretches and squeezes in different places as different provisions of the WTO Agreement are applied.

The tribunal observed that similar to the *GATT* treatment of 'like', the overall legal context provided by the FTA (in this case *NAFTA*) and any other treaties must be considered carefully.[153] The tribunal pointed out that all three *NAFTA* countries are also part of the Organisation of Economic Co-operation and Development (OECD), and hence, the *OECD Declaration on International and Multinational Enterprises* becomes relevant as well in determining the question of 'like' circumstances.[154]

In the well-known Methanex dispute, the tribunal considered the WTO concept of NT in order to determine the connection between 'like circumstances' and 'like products'.[155] The tribunal in Methanex

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150 Ibid [71]–[72]; Kurtz (n 145) 762.

151 *Pope & Talbot v Canada* (n 136) [71]–[72]; Kurtz (n 145) 762.

152 Appellate Body Report, *Japan — Taxes on Alcoholic Beverages*, WTO Doc WT/DS8/AB/R; WT/DS10/AB/R; WT/DS11/AB/R (4 October 1996) 21 ('*Japan — Alcoholic Beverages,* Appellate Body Report'), cited in *SD Myers v Canada (Partial Award)* (North American Free Trade Agreement Tribunal under the UNCITRAL Arbitration Rules, 13 November 2000) [244] ('*SD Myers v Canada*').

153 *SD Myers v Canada* (n 152) [245], [248].

154 The *OECD Declaration on International and Multinational Enterprises* dealt with the 'like situation' test by affirming that:

> [T]he comparison between foreign-controlled enterprises is only valid if it is made between firms operating in the same sector. More general considerations, such as the policy objectives of Member countries could be considered to define the circumstances in which comparison between foreign-controlled and domestic enterprises is permissible inasmuch as those objectives are not contrary to the principle of national treatment …

Ibid [249], citing the 1993 version of Organisation for Economic Co-operation and Development, *OECD Declaration on International Investment and Multinational Enterprises*, 21 June 1976.

155 Kurtz (n 145) 763–5; *Methanex (Final Award)* (n 105) 1447–8.

specifically observed that 'if the drafters of NAFTA had wanted to incorporate trade criteria in its investment chapter by engrafting a *GATT*-type formula, they could have produced a version of Article 1102'.[156]

The tribunal further noted that the drafters of *NAFTA* were cautious about including terms such as 'like goods', 'any like, directly competitive or substitutable goods', and 'like circumstances'.[157] The tribunal observed that 'like goods' is not used within the context of ch 11 (investment), while 'like circumstances' (which is used as an expression in art 1102, within ch 11) is used for investment, concerning standards related to measures constituting technical barriers to trade (TBTs), only concerning services but not goods.[158]

Roger Alford comments that *Pope and Talbot*, *SD Myers,* and *Methanex* presume the relevance of WTO jurisprudence in settlement of investment disputes and that the 'pull toward reliance on WTO as persuasive authority appears almost irresistible'.[159] Alford further refers to the dissenting arbitrator in *UPS v Canada*, who argued that the wording of *NAFTA* art 1102 points to a close connection to NT standards in *GATT* and the *General Agreement on Trade in Services* (*GATS*), as well as other international trade and investment treaties.[160] The dissenting arbitrator views this as consistent with precedents under *GATT* and WTO.[161]

It is noticeable that the *NAFTA* cases discussed above are based on the issue of NT between domestic industries and foreign investor-owned businesses aggrieved by regulatory measures. Here, the context involves LNG export restrictions that curtail foreign investors' ability to export. The article assumes that the export restrictions are due to 'local and general short supply' of gas in the Australian domestic market that affects local LNG and foreign-owned LNG businesses on an equal basis. Therefore, a breach of NT standards is a non-issue. Since export restrictions are not covered under any FTA/BIT, in the absence of any express provisions, the standard discussed by the Appellate Body in *India—Solar Cells* presents a close guide as to how Australian LNG restraints may be treated under the auspices of the WTO and, perhaps, by an international investment tribunal.

The convergence approach carries its complications. Borrowing from *GATT*/WTO jurisprudence requires in-depth analysis in order to minimise any inconsistencies in awards.[162] Kurtz warns that 'serious, real-

156 *Methanex (Final Award)* (n 105) 1447–8.

157 Ibid.

158 Ibid.

159 Alford (n 132) 42.

160 Alford (n 132) 42 n 27, citing comments by Dean Ronald Cass in *United Parcel Service of America Inc v Canada (Award on the Merits) (Separate Statement of Dean Ronald Cass)* (North American Free Trade Agreement Chapter 11 Tribunal, 24 May 2007) [57]–[61] <https://arbitrationlaw.com/sites/default/files/free_pdfs/UPS%20v%20Canada%20-Merits.pdf>.

161 Ibid.

162 Kurtz cites the instance of the presiding arbitrator in *Continental Casualty Company v Argentina* who had served on the WTO Appellate Body: Kurtz (n 145) 771, citing *Continental Casualty Company v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/9, 5 September 2008), 85-9, [193]–[199]; see also Puig (n 132) 29; Alec Stone Sweet, 'Investor-State Arbitration: Proportionality's New Frontier' (2014) 4 *Law & Ethics of Human Rights* 48, 49, 69–75 (Sweet praises the analysis by the tribunal in *Continental Casualty* as a 'rich piece of jurisprudence, far more sophisticated than the awards produced in … previous cases'). In *Continental Casualty*, Argentina defended its regulatory measures as necessary and relied upon the comparative definition of the term 'necessary' under *GATT* art XX to explain art XI in the *Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment*, signed 14 November 1991 (entered into force 20 October 1994). The arbitral panel applied the WTO jurisprudence regarding *GATT* art XX from previous cases such as *Korea — Beef* and *Brazil — Retreaded Tyres* in explaining the terms 'necessary' and 'necessity'.

world implications' can result from the cross-application of *GATT*/WTO jurisprudence in investment disputes if there is a lack of proper understanding of the norms. Kurtz cites Argentina's multimillion-dollar liability because of 'objective evidence of legal error' by the tribunals. The disaffection with the International Centre for Settlement of Investment Disputes system (ICSID) system of ISDS led to the Latin American backlash that saw several countries denounce the ICSID system.[163]

Connecting WTO law with international investment disputes has attracted criticism as well. In the context of the *US–Argentina BIT* and the claims for compensation by investors thereunder, drawing from WTO jurisprudence offers the advantage of applying an international standard that may be superior to the alternative of adjudication under the domestic law of the host state to the dispute.[164] However, there are no reasons to believe that the *US–Argentina BIT* intended to link WTO law to BIT disputes.[165] This may be due to the meaning of 'necessary' in *GATT* art XX being linked to a balancing test, implied in the preamble of that provision, which is missing from art XI of the *US–Argentina BIT*.[166] The thrust of this criticism seems to be that importing *GATT*/WTO norms into a BIT dispute is not merited because the underlying treaty framework is affected by how operative clauses are interpreted in light of its substantive content.

VI. Conclusion

The validity of export restrictions can be justifiable under certain circumstances, but the Australian measures are not fully insulated against an ISDS challenge. The field remains open to varied interpretations and variables that can potentially impact the disputes emanating from LNG export restrictions under the ADGSM.

The prime reason for such a position is that if a policy measure remains within the confines of international trade, WTO dispute settlement process will result in a recommendation that the losing state brings its measures in line with its WTO obligations. It is only when the dispute on LNG export restrictions moves to the realm of international investment law that we encounter blurred boundaries because there is no explicit link between export restrictions and expropriation in international agreements.

For Australia, ADGSM export restrictions must be evaluated through the lens of legitimacy and necessity. In the construction of *GATT*/WTO compliant export restrictions, Australian policymakers can learn from the experience of WTO dispute settlement body decisions while remaining faithful to any FTA/BIT norms. Adjudication through transplanted norms from the *GATT*/WTO system in an ISDS setting remains possible, albeit difficult.

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163 For example, the leading economy in Latin America (Brazil) has refused to ratify the *Convention on the Settlement of Investment Disputes between States and Nationals of Other* States, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) ('*ICSID Convention*'). Other resource-rich developing economies in Latin America such as Bolivia, Ecuador and Venezuela withdrew from the *ICSID Convention* and Argentina threatened to withdraw (but has not withdrawn) from the *ICSID Convention*: see also Kurtz (n 145) 771; See further Jurgen Kurtz, 'Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis' (Working Paper 06/08, Jean Monnet Program, 2008) 25–9.

164 See the discussion in José E Alvarez and Kathryn Khamsi, 'The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime' (Working Paper 2008/5, Institute for International Law and Justice, 2008) 54–5.

165 Ibid.

166 Ibid 55.

Australian policymakers must also be mindful that selective citation of past arbitral awards makes the task of constructing justifiable export control measures quite tricky for the host states. The foreign investors, on the other hand, have the freedom to approach the process of confronting LNG export restrictions from both a trade and investment angle. Obviously, in order to adopt a parallel strategy, foreign investors must possess significant resources coupled with political influence to trigger a state-espousal of their claims in the WTO.

Investment arbitration is not a self-contained system, even where BITs/FTAs are evolving into more prescriptive documents. Hence, ISDS panels cannot ignore the general norms and rules of international law in the arbitral process.[167] Furthermore, the arbitral process suffers from a distinct lack of precedent-creating systems, which could potentially assure consistency for users of the system.[168] Since state-based espousal in the WTO is a problematic proposition with no guarantee of success, the foreign investors in the LNG sector will likely import parallel arguments from the realm of international trade law under WTO to buttress their claims. For Australian policymakers, this means that the design of LNG export restrictions under the ADGSM must be such that it remains faithful to both international trade norms and obligations under BITs/FTAs that Australia is privy to.

This article takes the position that in the event of any future dispute between Australia and the foreign investors in the LNG sector (assuming the ADGSM is triggered), arbitral tribunals may import or transplant concepts from the *GATT*/WTO norms. If the Australian Government triggers the ADGSM to relieve short supply of gas in the east coast market, *GATT* art XX(j) interpretation enables Australian policymakers to construct compliant export restrictions that reduces the likelihood of a challenge by foreign investors.

[167] Margie-Lys Jaime, 'Relying Upon Parties' Interpretation in Treaty-Based Investor-State Dispute Settlement: Filling the Gaps in International Investment Agreements' (2014) 46 *Georgetown Journal of International Law* 261, 272–7.

[168] Ibid 277–8; see generally the discussion in Alain Pellet, 'Annulment Faute de Mieux: Is there a Need for an Appeals Facility?' in N Jansen Calamita, David Earnest and Markus Burgstaller (eds), *The Future of ICSIBID and the Place of Investment Treaties in International Law: Current Issues in Investment Treaty Law* (British Institute of International and Comparative Law, 2013) bk 4 255.