

REMEDYING MISALIGNED NORMS IN INTERNATIONAL AND CONSTITUTIONAL LAW: INVESTMENT TREATIES, PROPERTY RIGHTS AND PROPORTIONALITY

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The enlargement of the scope of international law has led to more frequent overlaps in the substantive rules of domestic and international law. One such overlap is in the rules on expropriation, or the protection of property rights. This article argues that Australian constitutional law and international law are misaligned on the question of expropriation, with international law generally imposing a higher standard of protection compared to the Australian Constitution. The article contends that this misalignment matters, because it is irrational and discriminatory, and because it hinders Australia's compliance with international law by increasing the complexity of official decision-making. The article then considers whether and how the misalignment can be remedied. Although a deliberate re-alignment faces difficulties, the article concludes that a form of alignment may organically emerge for other reasons, as both international tribunals and the Australian High Court take tentative steps towards the use of proportionality to resolve property rights claims.

I INTRODUCTION

Throughout most of its history, the rules of public international law governed different matters than the rules of the various domestic legal systems. International law applied to states; domestic law applied to individuals.¹ The enlargement of the scope of international law today,² though, has given rise to the possibility of overlapping rules in both international and domestic law purporting to govern the same conduct.³ The development is perhaps most noticeable in human rights law,

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1 Oxford University Press, *Max Planck Encyclopedia of Public International Law* (online at 10 September 2020) International Law and Domestic (Municipal) Law, 'B. The Theoretical Issue' [4].

2 '[T]he scope of international law [today], is almost infinite': Vaughan Lowe, *International Law* (Oxford University Press, 2007) 2.

3 André Nollkaemper, 'The Power of Secondary Rules to Connect the International and National Legal Orders' in Tomer Broude and Yuval Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing, 2011) 45.

where many countries' legal systems contain domestic charters of human rights that closely track the protections offered by international human rights instruments.⁴

The issue of overlapping rules has largely arisen relatively recently, stemming from the similarly recent expansion of international law into domains previously covered solely by domestic law. One area of overlaps, however, has existed for much longer: the protection of private property rights. Constitutional rules on the taking of property have existed at least since 1791, when they appeared in the United States ('US') Bill of Rights.⁵ Meanwhile, customary international law has also long offered protection against the uncompensated expropriation of aliens' property, at least since the 19th century.⁶

Although a long-standing concern, the issue of overlapping rules on expropriation has become more significant since the advent of mechanisms for aggrieved claimants to pursue cases in international law against foreign states. Such investor-state dispute settlement ('ISDS') mechanisms are now contained in bilateral and multilateral investment treaties, in which states offer their consent to arbitrate disputes over state interferences with foreign investments, including claims that investments have been expropriated. More than 900 cases have been filed under investment treaties, and almost 120 states have faced at least one case.⁷ In many of these cases, the claimant's allegation of expropriation under international law could also have been brought as a complaint under the respondent state's domestic law, typically as a claim in the state's domestic courts relying on a constitutional protection of property rights.

Such cases have therefore squarely raised the question of overlapping norms in both international and domestic law. Australia, in particular, has faced this issue in the context of challenges to its tobacco plain packaging legislation. As is well-known, in 2011, a Hong Kong-based affiliate of tobacco multinational Philip Morris commenced arbitration against Australia under the Australia–Hong Kong bilateral investment treaty, alleging (amongst other things) that Australia's legislation expropriated its investments in Australia. The following year, two other tobacco companies filed constitutional complaints in the Australian High Court, alleging that the legislation violated the protection against the acquisition of property in section 51(xxxi) of the *Australian Constitution*.⁸

4 Such rules of domestic law taking their content from international law have been called 'consubstantial' norms: Antonios Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34(1) *Loyola of Los Angeles International and Comparative Law Review* 133, 143.

5 For the history of constitutional property rights protections in the common law world, see Tom Allen, *The Right to Property in Commonwealth Constitutions* (Cambridge University Press, 2000) ch 3.

6 Oxford University Press, *Max Planck Encyclopedia of Public International Law* (online at 10 September 2020) Expropriation and Nationalization, 'A. Historical Development' [1].

7 United Nations Conference on Trade and Development, *World Investment Report 2019: Special Economic Zones* (Report No UNCTAD/WIR/2019, 2019) 102. Not all these cases have involved claims of expropriation.

8 Section 51(xxxi) provides: 'The Parliament shall ... have power to make laws ... with respect to ... the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws'.

Despite the extensive general commentary on the cases and the recognition that they were proceeding in parallel, scholars did not directly analyse the situation as an instance of overlapping or ‘multi-sourced equivalent norms’ studied in other contexts.⁹ In 2015, former Chief Justice Robert French observed that ‘the jurisdiction and the remedies [available to investors under domestic law] will depend on domestic law and not necessarily be congruent with the jurisdiction and remedies available under ISDS provisions’.¹⁰ However, Chief Justice French did not elaborate further on the lack of congruence, nor directly offer views on whether this situation was concerning or not. In 2016, Nottage observed that there had been ‘almost no sustained analysis of how Australia’s domestic law protections for (all) investors compare to substantive protections for foreign investors under international customary and treaty law’.¹¹

This article aims to address the lack of attention to this issue, using the Australian experience to illuminate lessons for broader interaction between domestic and international law.¹² In Part II, this article contends that Australian constitutional law and international law are indeed misaligned on the question of expropriation, with international law generally imposing a higher standard of protection compared to the *Australian Constitution*.

Part III argues that this misalignment matters. First, the misalignment is troubling in its economic context because it is irrational and discriminatory to grant a competitive advantage to foreigners in preference to local investors in Australia. Second, the misalignment is significant because it hinders Australia’s compliance with international law by increasing the complexity of official decision-making, requiring for each proposed action an assessment not only of compliance with domestic law but also of compliance with the differing requirements of international law. In Part IV, the article considers whether and how the misalignment can be remedied. Although noting doctrinal difficulties, the article concludes that a form of alignment may organically emerge for independent reasons, as both international tribunals and the Australian High Court take tentative steps towards the use of proportionality to resolve property rights claims.

Before commencing the analysis, though, it should be acknowledged that comparison of Australian law and international law in this area is complicated by the variegated nature of the latter. Unlike section 51(xxxi) of the *Australian Constitution*, international law contains no such canonical text on the taking of property. Australia is party to around 30 investment treaties,¹³ and globally there

9 See Broude and Shany (n 3).

10 Chief Justice Robert French, ‘ISDS: Litigating the Judiciary’ (Speech, Chartered Institute of Arbitrators Centenary Conference, 21 March 2015) 10.

11 Luke Nottage, ‘Investor-State Arbitration Policy and Practice in Australia’ (Investor-State Arbitration Series Paper No 6, Centre for International Governance Innovation, 27 June 2016) 1.

12 The focus here is thus not on the question of overlapping *jurisdiction* between international and domestic courts (on which see, eg, Yuval Shany, *Regulating Jurisdictional Relations Between National and International Courts* (Oxford University Press, 2007)), but rather the overlapping *substance* of rules in international and domestic law.

13 Australia is party both to bilateral investment treaties and to broader trade agreements that contain provisions on investment protection similar to investment treaties: United Nations Conference on Trade and Development, ‘Australia’, *Investment Policy Hub* (Web Page)

are now more than 3,300 investment treaties in existence,¹⁴ the vast majority of which have provisions on expropriation that are similar but usually not identical.¹⁵ In recent years, the degree of difference between these treaty provisions has increased as some states conclude new treaties with amended clauses while others retain their earlier treaties. Even if the varied treaty provisions are generally taken to reflect customary international law on expropriation, there is no single agreed textual formulation of the customary rule, and its precise content is no less contested than the content of the thousands of treaty-based rules. It is therefore difficult to be precise about what ‘international law’, as a whole, says on expropriation.

Nevertheless, some basic features of the customary and treaty controls on expropriation can be stated. International law covers both direct and indirect expropriation, and typically subjects expropriation to four conditions: the existence of a valid public purpose; a non-discriminatory measure; compliance with due process; and payment of compensation.¹⁶ The concept of ‘police powers’ is well accepted,¹⁷ permitting states to pass ordinary regulatory measures without transgressing controls on expropriation. A further unifying effect has been the willingness of adjudicators to refer to earlier international case law, in particular in determining whether facts cross the threshold from mere regulation of property use to indirect expropriation. Although international case law has no formal precedential value and is only a subsidiary source of international law,¹⁸ it might provide useful guidance as to the agreed content of customary international law on expropriation, which the treaty provisions are largely taken to reflect.¹⁹ This case law has produced a degree of coherence on certain elements of the test for

<investmentpolicy.unctad.org/international-investment-agreements/countries/11/Australia> (*Investment Policy Hub*). However, not all of these treaties provide access to investor-state arbitration.

- 14 As of October 2019, the United Nations Conference on Trade and Development’s (‘UNCTAD’) Investment Policy Hub counted 3,302 bilateral investment treaties or treaties with investment provisions, with 2,667 of these in force: United Nations Conference on Trade and Development, ‘International Investment Agreements Navigator’, *Investment Policy Hub* (Web Page) <investmentpolicy.unctad.org/international-investment-agreements>.
- 15 UNCTAD’s IIA Mapping Project counts only nine treaties that do not include expropriation guarantees: United Nations Conference on Trade and Development, ‘Mapping of IIA Content’, *Investment Policy Hub* (Web Page) <<https://investmentpolicy.unctad.org/international-investment-agreements/iiia-mapping#iiaInnerMenu>>. The 2015 Australia-China Free Trade Agreement is one of these, but Australia also maintains a separate 1988 investment treaty with China, which contains an expropriation clause: *Free Trade Agreement between the Government of Australia and the Government of the People’s Republic of China*, signed 17 June 2015, [2015] ATS 15 (entered into force 20 December 2015) art 9.9 [3]; *Agreement between the Government of Australia and the Government of the People’s Republic of China on the Reciprocal Encouragement and Protection of Investments*, [1988] ATS 14 (signed and entered into force 11 July 1988) art VIII.
- 16 See, eg, *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, signed 17 December 1992, CTS 1994/2 (entered into force 1 January 1994) art 1110 for one prominent textual formulation of international law on expropriation, which includes all these features.
- 17 ‘[S]upport for the police powers doctrine appears to be overwhelming’: United Nations Conference on Trade and Development, *Expropriation* (UN Doc No UNCTAD/DIAE/IA/2011/7, July 2012) 85.
- 18 *Statute of the International Court of Justice* art 38(1)(d).
- 19 Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press, 2013) 165.

expropriation in international law, such as the ‘substantial deprivation’ standard discussed in Part II(A). In light of this, comparative work is facilitated.

II INSTANCES OF MISALIGNMENT

This Part outlines three instances where Australian constitutional law and international law are misaligned on the question of expropriation, addressing the acquisition/deprivation dichotomy, the treatment of taxation, and the treatment of property forfeiture. On each of these issues, international law is more protective of property rights than Australian constitutional law.

A The Acquisition/Deprivation Dichotomy

The text of section 51(xxxi) requires an ‘acquisition of property’. This phrasing applies most easily to situations of direct expropriation, where ownership of an identifiable piece of land is compulsorily transferred from a private party to the government for public uses such as a road, airport or national park. It is less clear, on its face, that section 51(xxxi) applies to indirect or regulatory expropriation. In such situations, the claim is that government regulation has burdened private rights to such a degree that the effect is equivalent to a direct expropriation, even if no legal title has been transferred. Regulation might, for instance, ban all development of certain land, rendering it essentially worthless to its private owner, without necessarily undertaking any acquisition of property.

In *Commonwealth v Tasmania* (‘*Tasmanian Dam Case*’), for example, three High Court justices ruled that legislation allowing the Commonwealth government to determine how Tasmania used its land did not amount to an acquisition of property from Tasmania,²⁰ since neither the Commonwealth nor anyone else gained any ‘proprietary interest of any kind in the property’, and there was no ‘vesting of possession in the Commonwealth’.²¹ Mason J added:

To bring the constitutional provision into play it is not enough that legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be.²²

Similarly, in *Mutual Pools and Staff Pty Ltd v Commonwealth* (‘*Mutual Pools*’), the Court held that ‘[t]he extinguishment, modification or deprivation of rights in relation to property does not of itself constitute an acquisition of property’.²³

20 As well as acquisitions of property from private parties, section 51(xxxi) also applies to acquisitions by the Commonwealth from the Australian states.

21 *Commonwealth v Tasmania* (1983) 158 CLR 1, 146 (Mason J). See also at 181 (Murphy J); 247–8 (Brennan J) (‘*Tasmanian Dam Case*’).

22 Ibid 145.

23 *Mutual Pools and Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 185 (Deane and Gaudron JJ) (citations omitted) (‘*Mutual Pools*’).

Given this position, it might be thought difficult for any claim of regulatory expropriation to succeed under section 51(xxxi).²⁴ The most recent and high-profile illustration of the difficulty is *JT International SA v Commonwealth* (*JT International*), the plain packaging dispute, in which the claimants alleged that Australia's laws prohibiting display of trademarks on tobacco packaging constituted an acquisition of property. As in *Mutual Pools*, the Court distinguished between taking, or deprivation, of property and acquisition of property: 'Taking involves deprivation of property seen from the perspective of its owner. Acquisition involves receipt of something seen from the perspective of the acquirer. Acquisition is therefore not made out by mere extinguishment of rights.'²⁵ French CJ added that, while the plain packaging law 'may be said to constitute a taking', it 'does not involve the accrual of a benefit of a proprietary character to the Commonwealth which would constitute an acquisition'.²⁶ The claim of regulatory expropriation therefore failed, due to the strict requirement for acquisition under section 51(xxxi).

Another example is *ICM Agriculture Pty Ltd v Commonwealth* (*ICM Agriculture*), which related to the extinguishment of water licences held by the claimants for agricultural irrigation purposes. Although the licences were replaced with a new scheme which continued to allow water access, the claimants' entitlements were reduced by around 70%. The Court hinted at the importance of water conservation and a calculation that the burdens to be borne by the claimants were outweighed by the public good in altering the water licence scheme,²⁷ suggesting that a more substantive analysis was in the Court's mind. However, it ultimately could not tear itself away from the formalistic 'acquisition' analysis: '[t]he determinative issue ... is constitutional' and 'neither requires nor permits consideration of any of the large and difficult policy questions that may lie behind the legislative and executive acts which give rise to this proceeding'.²⁸ The Court held that the state had not acquired any property; the claimants' water rights 'did not in any sense "return" to the State upon cancellation of the licences'. Moreover, '[t]he State gained no larger or different right itself to extract or permit others to extract water'.²⁹

Under investment treaties, meanwhile, tribunals typically take the opposite approach to the High Court, focusing not on state-side acquisition but on claimant-side deprivation.³⁰ In one influential definition of indirect expropriation, the *Metalclad Corporation v Mexico* (*Metalclad*) tribunal described it as 'covert or incidental interference with the use of property which has the effect of depriving the owner ... of the use or reasonably-to-be-expected economic benefit of property

24 Tom Allen, 'The Acquisition of Property on Just Terms' (2000) 22(3) *Sydney Law Review* 351, 377.

25 *JT International SA v Commonwealth of Australia* (2012) 150 CLR 1, 33 (French CJ) (citations omitted).

26 *Ibid* 34–5.

27 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 182 (Hayne, Kiefel and Bell JJ) (*ICM Agriculture*).

28 *Ibid*.

29 *Ibid* 202 (Hayne, Kiefel and Bell JJ).

30 Nottage (n 11) 13–14.

even if not necessarily to the obvious benefit of the host State'.³¹ More recently, the *Anglia Auto Accessories Ltd v Czech Republic* tribunal used similar language, noting 'consistent arbitral case law which establishes that an expropriation takes place when an investor has been permanently deprived of the value of its investment'.³²

Cases on revocation of licences provide useful illustrations of these general definitions of indirect expropriation. The tribunal in *Ampal-American Israel Corporation v Egypt*, for instance, held that Egypt's 2008 revocation of the investor's licence, which had guaranteed the investor tax-free status until 2025, constituted an expropriation.³³ The tribunal highlighted that the licence was intended to grant certainty in the investor's legal situation for a defined period of time, outside the 'vicissitudes of changes' in policy, and that revoking it went beyond the ordinary exercise of regulatory powers.³⁴ Similarly, in a 2012 award in *Goetz v Burundi*, the tribunal found that the state's revocation of the claimant's licence to operate a bank within a Free Economic Zone amounted to an indirect expropriation, on the grounds that the revocation had 'deprived the claimants of the benefit that they could have expected from their investments'.³⁵ When such investment treaty cases are compared with the Australian case of *ICM Agriculture* discussed above, it is apparent that claimants are likely to struggle to characterise a licence revocation as an acquisition under section 51(xxxi), but will more easily make out an argument for indirect expropriation under an investment treaty.

Alongside licence revocations, the focus on deprivation has led some investment treaty tribunals to support an approach sometimes labelled 'conceptual severance'.³⁶ Under this approach, a claimant's investment can be disaggregated into distinct elements of property, or even distinct rights in relation to each element of property. Deprivation of one of these elements or rights can then amount to expropriation of that element or right, with compensation due, even if the investment overall is only minimally affected. For instance, the *Metalclad* tribunal considered that the denial of an operating permit for a landfill (after earlier promises to grant it) constituted an expropriation, without considering what other potential uses for the land in question remained to the investor.³⁷ Similarly, taking of one specific asset comprising part of the investment, in *Middle East Cement v Egypt*, or one specific contractual right, in *Eureko v Poland*, amounted to

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

32 *Anglia Auto Accessories Ltd v Czech Republic (Final Award)* (SCC Arbitral Tribunal, Case No V 2014/181, 10 March 2017) [292].

33 *Ampal-American Israel Corporation v Egypt (Decision on Liability and Heads of Loss)* (ICSID Arbitral Tribunal, Case No ARB/12/11, 21 February 2017) [183] ('*Ampal-American*'). The tribunal was unclear, however, as to whether the expropriation was viewed as direct or indirect: compare [179]–[180] with [182]–[183].

34 *Ibid* [182]–[183].

35 *Goetz v Burundi (Sentence)* (ICSID Arbitral Tribunal, Case No ARB/01/2, 21 June 2012) [243].

36 Margaret Radin, 'The Liberal Conception of Property: Crosscurrents in the Jurisprudence of Takings' (1988) 88(8) *Columbia Law Review* 1667, 1676.

37 *Metalclad* (n 31) [104], [107].

expropriation.³⁸ Certainly, the ‘tendency has been for tribunals to consider that the investment must be viewed as a whole’.³⁹ Nevertheless, ‘tribunals have not treated the ... problem uniformly’,⁴⁰ and the possibility of conceptual severance, and the consequent favouring of the investor-claimant, remains live in investment treaty arbitration.

By contrast, ‘[j]udicial pronouncements in favour of conceptual severance are rare in Australia’.⁴¹ In *Waterhouse v Minister for the Arts and Territories*, an export ban had been placed on a painting owned by the claimant. The Federal Court was willing to conceive of the owner’s property in the painting as a bundle of rights – for instance, to retain, display, enjoy, sell or mortgage the painting – but explicitly declined to find that impairment of one particular ‘stick’ in this bundle – the right to take the painting out of Australia – was sufficient to ground an acquisition of property contrary to section 51(xxxi).⁴² Unlike in international investment law, the Court’s focus was on the numerous rights remaining to the claimant, rather than the one right taken away by the state.

It is true that other statements from the High Court suggest that the threshold for acquisition is not insurmountable. The *Tasmanian Dam Case*, as noted above, acknowledged that a ‘slight or insubstantial’ acquisition would be sufficient.⁴³ Indeed, regulatory expropriation claims have on occasion succeeded under the *Australian Constitution*. In *Newcrest Mining (WA) Ltd v Commonwealth* (‘*Newcrest*’), the claimant was prevented from exploiting mining licences in the Northern Territory granted by the Commonwealth, due to the combined effect of measures taken to ban mining in Kakadu National Park and to extend the borders of that park. The relevant law imposed the mining ban also on the Commonwealth itself, meaning that the Commonwealth did not (re-)acquire from Newcrest any rights to conduct mining in the area. However, a majority of the Court held that the state had effected an ‘acquisition of the land freed from the rights of Newcrest to occupy and conduct mining operations thereon and ... [of] the minerals freed from the rights of Newcrest to mine them’.⁴⁴ Gummow J conceded that ‘[t]here is no reason why the identifiable benefit or advantage relating to the ownership or use of property, which is acquired, should correspond precisely to that which was taken’.⁴⁵ Notably, this reasoning suggests that it need not even be a proprietary

38 See Ursula Kriebaum, ‘Partial Expropriation’ (2007) 8(1) *Journal of World Investment and Trade* 69; *Middle East Cement Shipping and Handling Co SA v Egypt (Award)* (ICSID Arbitral Tribunal, Case No ARB/99/6, 12 April 2002) 31–2 [127], 35 [144]; *Eureko BV v Poland (Partial Award)* (Ad Hoc Arbitral Tribunal, 19 August 2005) 77 [240]–[241]. See also *Ampal-American* (n 33) 41 [180].

39 Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) 349–50.

40 Santiago Montt, *State Liability in Investment Treaty Arbitration* (Hart Publishing, 2009) 268.

41 Pamela O’Connor, ‘The Changing Paradigm of Property and the Framing of Regulation as a “Taking”’ (2010) 36(2) *Monash University Law Review* 50, 66, citing the sole example of Callinan J’s dissent in *Commonwealth v Western Australia* (1999) 196 CLR 392.

42 *Waterhouse v Minister for the Arts and Territories* (1993) 43 FCR 175, 183–5 (Black CJ and Gummow J), 192–3 (Lockhart J).

43 *Tasmanian Dam Case* (1983) 158 CLR 1, 145 (Mason J).

44 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 634 (Gummow J), 530 (Brennan J), 560 (Toohey J), 561 (Gaudron J), 661 (Kirby J) (‘*Newcrest*’).

45 *Ibid* 634 (Gummow J).

interest that is ‘acquired’ by the state; an ‘identifiable benefit or advantage’ relating to a property right is enough.⁴⁶ Gummow J also distinguished the case from others involving ‘merely an impairment’ of a bundle of rights (such as *Waterhouse* above), on the basis that for Newcrest ‘there was an effective *sterilisation* of the rights constituting the property in question’.⁴⁷ It is not clear how this reasoning, on its face, squares with the Court’s view in *Mutual Pools* that the extinguishment of rights ‘does not of itself constitute an acquisition of property’.⁴⁸ As well, if *Newcrest* amounted to an acquisition, it is difficult to understand why *ICM Agriculture* did not.⁴⁹ As discussed further in Part IV(C), the formalistic reasoning of the Court in *Newcrest* perhaps demonstrates that it is willing to manufacture an acquisition in order to fulfil section 51(xxxi), when other considerations push it to do so.⁵⁰

Nevertheless, the Court’s general insistence on acquisition clearly favours the state over the claimant, in contrast to the general preference of investment tribunals to focus on the claimant’s loss.

B Taxation as Expropriation

The High Court has also proved to be far more deferential to state measures relating to taxation than investment tribunals.

Both fora have acknowledged that taxation powers are an inherent feature of state regulatory authority, and that measures imposing taxation cannot normally be considered as expropriations or acquisitions of private property. Taxation naturally involves an acquisition of property from private parties for the benefit of the state, and it would ordinarily make no sense to require compensation for this acquisition.⁵¹ Thus, the High Court has said that it would simply be “‘inconsistent”, “incongruous” or “irrelevant” to characterise’ a tax as an acquisition.⁵² Similarly, investment tribunals have held that ‘general taxation is the result of a State’s permissible exercise of regulatory powers ... [and] is not an expropriation’.⁵³

46 See the dissenting judges in *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 (Toohey J at 30 [56], Kirby J at 96–7 [246]).

47 *Newcrest* (1997) 190 CLR 513, 635 (Gummow J) (emphasis added).

48 *Mutual Pools* (1994) 179 CLR 155, 185 (Deane and Gaudron JJ).

49 Lael Weis, ‘Property’ in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 1024.

50 As discussed below in Part IV(C), Weis suggests that these considerations include an implicit proportionality test, where the Court will construct an ‘acquisition’ if it feels that private burden has outweighed public benefit in the case.

51 *Newcrest* (1997) 190 CLR 513, 654 (Kirby J). ‘In explaining why the power to extract taxation is outside the requirement of “just terms” in section 51(xxxi), it is usually pointed out that the express power to tax people *necessarily* involves the contemplation of the acquisition of the taxpayer’s property’ (emphasis in original).

52 George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams: Australian Constitutional Law and Theory* (Federation Press, 7th ed, 2018) 1300. See also *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, 508–9 (Mason CJ, Brennan, Deane and Gaudron JJ) (‘ATM’).

53 *Burlington Resources Inc v Ecuador (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB/08/5, 14 December 2012) [391] (‘*Burlington Decision on Liability*’). See, eg, *Ryan v Poland (Award)* (ICSID Additional Facility Arbitral Tribunal, Case No ARB(AF)/11/3, 24 November 2015)

The High Court has thus constructed a category of automatic exemption from section 51(xxxi) for any law that imposes ‘taxation’ within the meaning of section 51(ii).⁵⁴ Privileging ease of administration, the Court seemingly applies the exemption regardless of the size or motivations of the tax. Although no situation of alleged confiscatory taxation has yet been presented to the Court, it does not appear to acknowledge the concept; as Higgins J put it in *R v Barger*, the taxation power is ‘unlimited as to amount, as to subjects, as to objects, as to conditions, as to machinery’.⁵⁵ Furthermore, as long as a measure can be characterised as taxation, it will fall within section 51(ii) even if ‘the revenue purpose of the tax is secondary’ to other motivations.⁵⁶ The exemption has also been held to apply to payments that are functionally equivalent to taxes, such as the ‘levy’ at issue in *ATM*.⁵⁷ Furthermore, on an interpretation of section 51(xxxi) supported by at least one High Court judge, a law will fall within this automatic taxation exemption even if it does not actually impose any taxation, as long as it qualifies as a law ‘with respect to’ taxation.⁵⁸

Similarly to the implied taxation exemption developed by the Australian High Court, some investment treaties contain express clauses removing taxation measures from the treaties’ strictures. In contrast to the High Court’s formalistic approach, however, investment treaty tribunals have been willing to second-guess states’ claimed exercises of tax powers under such exception clauses, finding either that the measures are not bona fide tax measures or that they are so extreme as to amount to confiscations.

In ‘[t]he most notable line of expropriation cases’,⁵⁹ the *Yukos Universal Ltd v Russia* (‘*Yukos*’) cases, the claimants alleged that Russia had expropriated their investment by forcibly auctioning off the claimants’ main oil production asset in order to pay taxes allegedly owed. In defence, Russia pointed to article 21 of the *Energy Charter Treaty* (‘*ECT*’),⁶⁰ the instrument governing the claim, which contained an exception for ‘taxation measures’. Russia emphasised the strong policy rationale in declining to treat taxation as expropriation, and urged the tribunal to find that its measures – ostensibly taken to enforce domestic tax laws – were tax measures that fell within the exception and therefore did not breach the *ECT*. The tribunal accepted that Russia’s measures related, *prima facie*, to taxation. However, the tribunal looked beyond this, finding evidence that Russia’s primary motivation in auctioning the oil asset was not to enforce tax law but to

[492]: Bilateral investment treaties are ‘not meant to shield foreign investors from a bona fide exercise of the taxation power of the State’.

54 *ATM* (1993) 176 CLR 480, 508 (Mason CJ, Brennan, Deane and Gaudron JJ).

55 (1908) 6 CLR 41, 114 (Higgins J).

56 Justice Michelle Gordon, ‘The Commonwealth’s Taxing Power and Its Limits: Are We There Yet?’ (2013) 36(3) *Melbourne University Law Review* 1037, 1051. But note the *ATM* majority’s reference to ‘genuine taxation’: *ATM* (1993) 176 CLR 480, 510.

57 *ATM* (1993) 176 CLR 480, 526 (Dawson and Toohey JJ).

58 *Mutual Pools* (1994) 179 CLR 155, 224 (McHugh J). Cf at 198 (Dawson and Toohey JJ).

59 Matthew Davie, ‘Taxation-Based Investment Treaty Claims’ (2015) 6(1) *Journal of International Dispute Settlement* 202, 204.

60 *Energy Charter Treaty*, opened for signature 17 December 1994, 2080 UNTS 95 (entered into force 18 April 1998) art 21.

bankrupt Yukos and to weaken the political ambitions of its then-Chief Executive Officer Mikhail Khodorkovsky. Russia's measures were therefore not bona fide taxation measures, according to the tribunal, and were not covered by the *ECT* tax exception clause.⁶¹

The numerous 'Law 42' cases against Ecuador provide a further example. These cases relate to a 2006 Ecuadorian law requiring oil companies to pay to the state 99% of their profits above a certain threshold. Several US-based investors brought separate claims against Ecuador challenging the new law under the US-Ecuador bilateral investment treaty ('BIT'). The various tribunals hearings these claims addressed Ecuador's argument that the 'Law 42' payment was a tax, and was therefore excluded from scrutiny by the BIT's tax exception similar to *ECT* article 21 at issue in the *Yukos* cases.

In *Murphy Exploration and Production Company – International v Ecuador* ('*Murphy*'), the tribunal acknowledged that Law 42 had an effect very similar to a tax. However, the tribunal ultimately viewed the payments as a unilateral change by the State to the terms of the investor's contractual arrangements with the state, altering *Murphy*'s contractual obligations but not imposing a public law tax obligation. On this basis, the tribunal declined to apply the BIT's tax exception as Ecuador had contended, and instead proceeded to rule on whether Law 42 breached the BIT.⁶² In a similar holding, the tribunal majority in *Occidental Petroleum Corporation v Ecuador* also refrained from viewing Law 42 as a tax measure, instead framing it as a radical alteration of the investor's contractual obligations to the state.⁶³

Other cases, including *Burlington Resources Inc v Ecuador* ('*Burlington*'), have disagreed with the *Murphy* and *Occidental* conclusions on Law 42. The *Burlington* tribunal, in particular, emphasised the substantive similarities between the effects of Law 42 and a tax, and held that Law 42 was covered by the BIT's tax exception.⁶⁴ However, the tax exception in investment treaties is often expressed not to apply to expropriation claims – ie, despite the exception for tax measures, claims that a tax measure constitutes an expropriation can still be made (while other claims in relation to the tax measure are barred).⁶⁵ This 'exception to the exception' is intended to acknowledge that, in extreme circumstances, taxes can amount to expropriation. This was the situation in *Burlington*, where the tribunal applied the 'exception to the exception' and proceeded to consider whether Law 42 expropriated the claimant, despite the tax exception.⁶⁶

61 *Yukos Universal Ltd v Russia (Final Award)* (Permanent Court of Arbitration, Case No AA 227, 18 July 2014) [1430] ('*Yukos*').

62 *Murphy Exploration & Production Company – International v Ecuador (Partial Final Award)* (Permanent Court of Arbitration, 6 May 2016) [190] ('*Murphy*').

63 *Occidental Petroleum Corporation v Ecuador (Award)* (ICSID Arbitral Tribunal, Case No ARB/06/11, 5 October 2012) [495], [510] ('*Occidental*').

64 *Burlington Resources Inc v Ecuador (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/08/5, 2 June 2010) [165]–[167] ('*Burlington Decision on Jurisdiction*').

65 See, eg, *Energy Charter Treaty*, opened for signature 17 December 1994, 2080 UNTS 95 (entered into force 18 April 1998) art 21(5).

66 *Burlington Decision on Jurisdiction* (n 64) [342].

Certainly, most tax-related expropriation claims under investment treaties have not succeeded, on the grounds that the extra burden imposed by the new or amended tax was not sufficiently large.⁶⁷ Nevertheless, and even where investment treaties do not contain tax exception clauses at all, tribunals have proved willing to apply a similarly-grounded exception to the general principle that taxation is not expropriation, in situations of confiscatory taxation.⁶⁸ In *EnCana Corporation v Ecuador*, for instance, the tribunal considered that ‘a tax law [that] is extraordinary, punitive in amount or arbitrary in its incidence would [raise] issues of indirect expropriation’.⁶⁹ Both the majority and dissenting arbitrator in *Burlington* accepted that confiscatory taxation amounted to expropriation, although they differed on whether Law 42 was confiscatory on the facts.⁷⁰ Beyond investment treaties, the principle is recognised in customary international law as well.⁷¹

The *Australian Constitution*, meanwhile, lacks these implicit and explicit doctrines subjecting these categories of taxes to scrutiny as potential expropriations. It is true that the section 51(ii) taxation power does not cover taxes that amount to penalties or that are arbitrary.⁷² However, a penalty is defined as a payment for a prior unlawful act or omission.⁷³ This is a different notion both to a confiscatory tax, which does not depend on any prior illegality, and to a *mala fide* tax measure of the kind applied in *Yukos*, where the liability imposed did not purport to go beyond what was lawfully due. The requirement that tax liability not be imposed ‘in an arbitrary or capricious manner’,⁷⁴ meanwhile, ‘has not been the subject of extensive consideration by the courts’.⁷⁵ However, the High Court has said that taxes must be imposed according to ascertainable criteria, and that taxpayers must have a right of judicial review of whether those criteria were satisfied.⁷⁶ *Yukos* did seek review of certain decisions in its case in the Russian courts, without success.⁷⁷ Further, at least some elements of the tax liability imposed by Russia were done according to criteria which *Yukos* should arguably

67 Davie (n 59) 205–6.

68 Ali Lazem and Ilias Bantekas, ‘The Treatment of Tax as Expropriation in International Investor-State Arbitration’ (2015) 31 *Arbitration International* aiv030:1–46, 20; *Perenco Ecuador Ltd v Ecuador (Decision on Remaining Issues of Jurisdiction and Liability)* (ICSID Arbitral Tribunal, Case No ARB/08/6, 12 September 2014) [672]; *Burlington Decision on Liability* (n 53) [391]–[402].

69 *EnCana Corporation v Ecuador (Award)* (London Court of International Arbitration, Case No UN3481, 3 February 2006) [177].

70 *Burlington Decision on Liability* (n 53) [393], [457]; *Burlington Resources Inc v Ecuador (Dissenting Opinion of Arbitrator Orrego Vicuña)* (ICSID Arbitral Tribunal, Case No ARB/08/5, 8 November 2012) [27].

71 AR Albrecht, ‘The Taxation of Aliens under International Law’ (1952) 29 *British Yearbook of International Law* 145, 171.

72 Gordon (n 56) 1044, 1060.

73 *R v Barger* (1908) 6 CLR 41, 99 (Isaacs J).

74 *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622, 640 (Gibbs CJ, Wilson, Deane and Dawson JJ).

75 Gordon (n 56) 1062.

76 *WR Carpenter Holdings Pty Ltd v Federal Commissioner of Taxation* (2008) 237 CLR 198, 204 (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ).

77 See, eg, *Yukos* (n 61) [928], [991].

have been able to ascertain.⁷⁸ It is thus arguable that (some of) the measures in *Yukos*, as well as situations of confiscatory taxation, would pass the Australian arbitrariness requirement. This would place them within the section 51(ii) taxation power, and therefore outside section 51(xxxi).

Whether or not the approach of investment tribunals is preferable to the formalistic Australian position, the result of this is that tax measures in general are more likely to constitute breaches of an investment treaty than to breach section 51(xxxi).

C Forfeiture as Expropriation

In a third area, the High Court has taken a strict approach to cases relating to forfeiture of property connected to unlawful activity. In *Burton v Honan*, the Court held that the state was entitled to seize an illegally imported car without payment of any compensation. In the Court's view, it was irrelevant that the car was then owned by an innocent party who had no knowledge of the car's prior illegal importation. For the Court, any law that could be characterised as relating to property forfeiture simply did not amount to an acquisition of property under section 51(xxxi).⁷⁹ In *Re Director of Public Prosecutions; Ex parte Lawler* ('*Lawler*'), the Court held that the forfeiture of a leased fishing boat due to illegal fishing was not an acquisition of property, even though the boat's owners had no knowledge of the lessees' illegal fishing and were unlikely to obtain any compensation from the lessees, and even though the lessees had already paid a fine.⁸⁰ Meanwhile, in *Theophanous v Commonwealth*, five judges doubted (although without finally ruling) that monetary penalties were required to be proportionate in order to avoid being captured by section 51(xxxi).⁸¹

This strict approach has certainly been criticised.⁸² Yet it remains the prevailing approach, as demonstrated in 2014 in *Attorney-General (NT) v Emmerson* ('*Emmerson*').⁸³ In this case, a law that subjected a convicted drug trafficker to civil forfeiture of all of his property, including innocently-acquired property, was held not to constitute a prohibited acquisition of property. The Court acknowledged that the law was intended both as a punishment and as a revenue-raising measure to offset the costs of drug enforcement operations. Nevertheless, the Court was not prepared to consider whether the punishment of forfeiture was appropriate or proportional to the crime in question, instead deferring to the legislature. Thus, the Court held that 'it is irrelevant (and wrong) for the courts to attempt to determine whether any forfeiture ... is proportionate to the stated

78 Ibid [1404]. Nevertheless, other measures in the case, such as a rigged forced auction process: at [986], seem more likely to be found arbitrary under the Australian test.

79 *Burton v Honan* (1952) 86 CLR 169, 180–1 (Dixon CJ, McTiernan J agreeing at 181, Webb J agreeing at 182, Kitto J agreeing at 182) ('*Burton*').

80 (1994) 179 CLR 270, 276 (Mason CJ), 281 (Brennan J), 285 (Deane and Gaudron JJ), 291 (Dawson J), Toohey J (292), 295–6 (McHugh J) ('*Lawler*').

81 (2006) 225 CLR 101, 128 (Gummow, Kirby, Hayne, Heydon and Crennan JJ).

82 *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133, 311–12 (Callinan J); Weis, 'Property' (n 49) 1026–7.

83 (2014) 253 CLR 393 ('*Emmerson*').

objectives’, and that complaints about proportionality were ‘of a political, rather than legal, nature’.⁸⁴

This position may be contrasted with cases under investment treaties. In *İçkale İnşaat Limited Şirketi v Turkmenistan* (‘*İçkale*’), the tribunal majority held that the state’s seizure of property was not out of proportion to certain amounts contractually owed to the state by the claimant, and therefore did not amount to expropriation.⁸⁵ The dissenting arbitrator, meanwhile, held that the seizure of property worth USD7 million to cover penalties of USD1.2 million was excessive and expropriatory, in breach of the Turkey-Turkmenistan BIT.⁸⁶ Although the two camps viewed the facts differently, the proportionality of the seizure was clearly relevant for all the arbitrators in determining whether it could be labelled an expropriation. The results of cases such as *Burton*, *Lawler* and *Emmerson* in Australia would not likely be the same if the *İçkale* approach was applied.

Similarly, in *Khan v Mongolia*, the tribunal concluded that a forfeiture of property imposed under spurious legal grounds and without due process constituted an expropriation.⁸⁷ Although the tribunal did not refer to proportionality as a guiding principle, the finding provides a further indication of a more substantive assessment of forfeitures by investment tribunals, compared with the High Court’s absolutist position.⁸⁸

D Other Advantages of Investment Treaties

The advantages offered by the expropriation provisions of investment treaties are further enhanced by the fact that the constitutional protection of section 51(xxxi) only applies to measures taken at the Australian federal level.⁸⁹ While legislative protections exist in certain areas in the law of each Australian state,⁹⁰ there is no constitutional guarantee against expropriation or interference with property rights at the state level. Moreover, sectors of significant interest to foreign investors in Australia, such as mining, are largely regulated by state law, rather than federal law.⁹¹ Investors and rights-holders in those sectors thus have very

84 Ibid 435, 439 (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

85 *İçkale İnşaat Limited Şirketi v Turkmenistan (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/24, 8 March 2016) [371]–[376] (‘*İçkale*’).

86 *İçkale İnşaat Limited Şirketi v Turkmenistan (Partially Dissenting Opinion of Carolyn B Lamm)* (ICSID Arbitral Tribunal, Case No ARB/10/24, 23 February 2016) [15].

87 *Khan Resources Inc v Mongolia (Award on the Merits)* (Permanent Court of Arbitration, Case No 2011-09, 2 March 2015) [340], [359]–[366].

88 The issue is likely to arise again in a pending investment treaty case with factual parallels to *Burton* and *Lawler*: see *Angel Samuel Seda v Colombia* (ICSID Arbitral Tribunal, Case No ARB/19/6), discussed in Lisa Böhmer, ‘US Investors in Colombian Real Estate Project Pursue Their Claim over Land That was Seized under Asset Forfeiture Law’, *Investment Arbitration Reporter* (online, 26 March 2019) <<https://www.iareporter.com/articles/us-investors-in-colombian-real-estate-project-pursue-their-claim-over-land-that-was-seized-under-asset-forfeiture-law/>>.

89 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 409–10 (Gaudron, McHugh, Gummow and Hayne JJ).

90 See, eg, *Land Acquisition and Compensation Act 1986* (Vic); *Acquisition of Land Act 1967* (Qld). See generally O’Connor (n 41) 69–77.

91 Weis, ‘Property’ (n 49) 1018. The Australian states ‘are the source of most real property and land use legislation’, meaning that section 51(xxxi) applies in practice to very few situations except ‘statutory benefits or payment schemes’.

limited recourse to constitutional claims against either Australia or an Australian state, potentially leaving an international claim as the only option.⁹²

For reasons of scope, this article focuses only on the expropriation provisions of investment treaties and on section 51(xxxi) of the *Australian Constitution*. Nevertheless, it is worth noting that, apart from their expropriation provisions, investment treaties also offer other advantages to foreign investors compared to Australian law.⁹³ For instance, Australian administrative law does not recognise the notion of substantive legitimate expectations, only protecting expectations of certain procedural treatment.⁹⁴ By contrast, the concept of substantive legitimate expectations has become central to the guarantee of ‘fair and equitable treatment’ contained in investment treaties.⁹⁵ In many cases, investment tribunals have ordered compensation for investors when government officials have resiled from specific promises of substantive treatment (such as the grant of a licence, or the continued availability of a favourable regulatory regime).⁹⁶ Although the remedy ordered is monetary compensation rather than fulfilment of the promised treatment, neither remedy would be available in this situation under Australian administrative law.⁹⁷

Lastly, even the mere option of international arbitration for foreign investors arguably constitutes an additional advantage over domestic investors, who can only bring claims to domestic courts. As long recognised in the context of the North American Free Trade Agreement,⁹⁸ the possibility of an international claim may offer a bargaining chip to foreign investors not possessed by domestic investors. Similarly, the mere option of a monetary remedy under an investment treaty, not being available in claims under domestic law, may be advantageous for foreign investors.⁹⁹

92 Under international law, measures of the Australian states are attributable to Australia: International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 6th Comm, 56th sess, Agenda Item 162, UN Doc A/RES/56/83 (28 January 2002) annex art 4.

93 See Jonathan Bonnitcha, Submission to OECD, *Public Consultation on Investor-State Dispute Settlement* (5 August 2012).

94 Matthew Groves, ‘Substantive Legitimate Expectations in Australian Administrative Law’ (2008) 32(3) *Melbourne University Law Review* 470.

95 See, eg, *Novenergia II – Energy & Environment (SCA) v Spain (Final Arbitral Award)* (Stockholm Chamber of Commerce Arbitral Tribunal, Case No 2015/063, 15 February 2018) [648]–[649].

96 See, eg, *Micula v Romania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/20, 11 December 2013) [667] (‘Cases supporting the doctrine of legitimate expectations are numerous’) (*Micula v Romania*).

97 On the differences between the conception of legitimate expectations in Australian law and international investment law, see Alexander Ferguson, ‘The Limits of the Comparative Public Law Methodology in International Investment Law: An Australian Case Study’ (2018) 41(2) *University of New South Wales Law Journal* 526.

98 David Schneiderman, ‘NAFTA’s Takings Rule: American Constitutionalism Comes to Canada’ (1996) 46(4) *University of Toronto Law Journal* 499, 525; Howard Mann, ‘NAFTA and the Environment: Lessons for the Future’ (2000) 13(2) *Tulane Environmental Law Journal* 387, 405.

99 Bonnitcha (n 93) 11.

III THE SIGNIFICANCE OF MISALIGNMENT

The analysis in Part II demonstrates that protections of property rights against state interference are weaker under the *Australian Constitution* than under investment treaties to which Australia and other states are parties. Why does this misalignment matter? At the outset, it might be argued that, rather than being concerning, a misalignment of constitutional and international law is entirely natural. In the international context, Ratner has contended that rules on regulatory takings arise in a variety of international regimes (such as international investment law, the European Court of Human Rights, the European Court of Justice, and the Iran-US Claims Tribunal), and that the differing institutions within each regime create unsurprising pressures towards differing outcomes, even on similar texts.¹⁰⁰ Although not the focus of his inquiry, Ratner's relaxed approach to misalignment extends also to international-domestic misalignment: '[d]iverse constitutional traditions, regime goals, and institutional constraints [also] explain the variety of approaches ... between domestic and international systems'.¹⁰¹ On this view, '[h]armonization for its own sake ... seems a highly misplaced aspiration'.¹⁰²

Certainly, there is no reason to think that the Australian constitutional provision was intended to reflect or parallel international law protections of property rights. Even if it was so intended, in light of Ratner's observations, one might even wonder *which* particular regime of international law section 51(xxxi) was intended to reflect. In this sense, it is not surprising at all to see divergent outcomes between the High Court and investment tribunals. But Ratner's point may be descriptive rather than normative; even if there are good descriptive reasons to expect divergence, this does not suggest that there are no normative reasons to favour alignment between domestic and international law standards. Indeed, Ratner encourages adjudicators to draw on comparative material from other regimes, as long as this occurs with a careful awareness of regime differences.¹⁰³

Before addressing normative reasons in favour of alignment, though, there are two potential normative reasons *against misalignment* to be considered, the second more cogent than the first.

A Against Misalignment

The first potential reason sometimes offered to argue against misalignment is the possibility of parallel claims, where property rights-holders bring either concurrent or successive claims in both constitutional law and international law. Even if chances of success are higher under an investment treaty, a claimant might be tempted to bring two claims simply to improve its odds, or to place greater pressure on the state to encourage a settlement. This imposes a litigation burden on states, demanding resources to defend two substantially similar claims rather

100 Steven Ratner, 'Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law' (2008) 102(3) *American Journal of International Law* 475.

101 *Ibid* 523.

102 *Ibid* 522.

103 *Ibid* 526.

than one, and creates ‘double recovery’ difficulties for adjudicators. The plain packaging dispute provides an example, as Australia faced parallel domestic and international law claims (albeit from formally distinct claimants),¹⁰⁴ and was forced to spend around AUD39 million in legal fees across three fora.¹⁰⁵

However, merely aligning the substance of constitutional and international law in this area would not remove the possibility of parallel claims; investors could still bring two claims even if the law applied in each is the same. Furthermore, some treaties already limit the availability of parallel claims through ‘fork-in-the-road’ clauses, which bar international claims if a parallel domestic claim is already underway or completed.¹⁰⁶ In addition, even if both claims proceed, adjudicators can still manage double recovery issues on-the-fly, for instance by ensuring that they take into account any compensation already ordered in an earlier parallel proceeding.¹⁰⁷ The risk of parallel proceedings therefore does not seem to justify any concern over misalignment of norms.

There is a second, more persuasive reason why misalignment might be normatively undesirable. It rests in the suggestion that the misalignment – in this case, creating stronger rights in international law compared to domestic law – grants a competitive advantage to foreign investors in Australia over domestic investors.¹⁰⁸ On its face, it might appear economically irrational and even discriminatory for Australia to handicap its own investors in favour of foreigners. One preliminary response to this is that, as with the possibility of parallel claims, aligning the substantive protections would not completely address this concern, since foreigners would still enjoy the advantage of procedural protections via international arbitration, in addition to Australian court claims. However, even if this is true, this is not a reason to ignore the substantive misalignment.

Several counterarguments are often made to try to justify the apparently irrational competitive advantage granted by the misalignment. First, it might be contended that the advantage is only superficial, since domestic investors can simply become foreign if they wish to benefit from treaty protections. Indeed, the

104 Philip Morris was the claimant in the investment treaty case, intervened in the domestic constitutional proceedings, and reportedly funded and directed the World Trade Organisation case against Australia: Stephanie Nebehay, ‘Australia Says Big Tobacco Aiding WTO Challengers’, *Reuters* (online, 23 May 2012) <www.reuters.com/article/trade-tobacco/australia-says-big-tobacco-aiding-wto-challengers-idUSL5E8GMHBW20120522>.

105 Some of this amount was recovered in a costs order against Philip Morris: Jarrod Hepburn, ‘Final Costs Details Are Released in Philip Morris v. Australia Following Request by IAREporter’, *Investment Arbitration Reporter* (online, 21 March 2019) <<https://www.iareporter.com/articles/final-costs-details-are-released-in-philip-morris-v-australia-following-request-by-iareporter/>>.

106 See generally Hanno Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration* (Oxford University Press, 2013).

107 See, eg, *Quasar de Valores SICAV SA v Russia (Award)* (Stockholm Chamber of Commerce Arbitral Tribunal, Case No 24/2007, 20 July 2012) [34]. In any case, the remedy at the High Court would be a declaration of invalidity rather than an award of monetary compensation. However, following such a declaration, the government could simply re-enact the expropriating measure this time providing compensation, thus essentially reaching the same position as an award of compensation by an investment tribunal: Bonnitcha (n 93) 5. Potential differences in the valuation techniques of each system are beyond the scope of this article.

108 ‘The possibility that investment treaties confer a competitive advantage on foreign investors over domestic investors ... is a serious cause for concern’: Bonnitcha (n 93) 11.

majority of claimants under investment treaties have been medium or large companies,¹⁰⁹ which can often relatively easily shift assets and engage in ‘treaty-planning’ to ensure that their investment in Australia is held by a corporate affiliate from one of Australia’s treaty partner states. Although such changes of nationality are more difficult for small companies and (particularly) individuals, they are not unknown. The prominent *Micula v Romania* case, for instance, was brought by two formerly Romanian brothers who became Swedish citizens before investing back into Romania, under protection of the Sweden-Romania BIT.¹¹⁰ *Tokios Tokelès v Ukraine* similarly involved a group of Ukrainian nationals who established a company in Lithuania which then invested back into Ukraine.¹¹¹ However, while the distinction of nationality might not be as significant as it might appear, this only provides a reason not to be necessarily concerned about misalignment; it does not provide a positive reason justifying it.

A second counterargument that might justify misalignment arises from the ‘grand bargain’ of investment treaties.¹¹² Under this thesis, investment treaties deliberately offer foreign investors greater legal protection than domestic law in order to attract those investors into a host state, in return for their much-needed foreign capital, technology and know-how. The additional protection granted by investment treaties is a form of positive discrimination in favour of foreigners to offset disadvantages in the host state (such as an unfamiliar legal system, currency exchange risks, or anti-foreign bias).¹¹³ On this view, international and constitutional law are intentionally misaligned in this area, to the benefit of all.

But whether the ‘grand bargain’ is correct depends on empirical and economic evidence of, for instance, whether the presence of BITs actually increases investment flows, or whether investors actually consider the availability of BIT protections when making foreign investment decisions. These questions have long been debated in the literature without firm conclusions.¹¹⁴ In the absence of clear evidence that granting stronger protections to foreigners achieves its purpose, there would seem to be no reason to persist with it, in light of the countervailing risks. In any case, even if the ‘grand bargain’ thesis is plausible, it does not require treaties to grant protection that is greater than domestic law; it only requires protection at a level that is sufficiently high to outweigh the risks of investing in the particular state. If domestic law already grants sufficient protection (however ‘sufficient’ may be defined), there is no reason for treaties to grant any higher

109 Only one-third of claimants in cases until 2012 were small or family-owned businesses: Roberto Echandi, ‘The Debate on Treaty-Based Investor-State Dispute Settlement: Empirical Evidence (1987–2017) and Policy Implications’ (2019) 34(1) *ICSID Review* 32, 43.

110 *Micula v Romania* (n 96) [3].

111 *Tokios Tokelès v Ukraine (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/02/18, 29 April 2004) [21].

112 Jeswald W Salacuse and Nicholas P Sullivan, ‘Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain’ in Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (Oxford University Press, 2009) 109.

113 For a similar argument, see *Quasar de Valores SICAV SA v Russia* (n 107) [21]–[23].

114 See, eg, Jonathan Bonnitcha, Lauge N Skovgaard Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press, 2017) 166, 178.

level.¹¹⁵ It is thus difficult to say that the greater protection in investment treaties compared to Australian constitutional law is justified by the objective of encouraging foreign investment into Australia.

A third counterargument perhaps justifying misalignment, connected to the second one, is that the greater protection of international law is simply a consequence of investment treaties' reciprocity. The protection offered to foreigners in Australia under investment treaties is equally granted to Australians overseas. Australia may thus have rationally chosen to offer protection to foreigners at a certain level – which happens to be higher than Australian constitutional protection – so that Australians benefit from that same level when investing abroad. In other words, on this account, the level of protection in treaties constitutes the standard that Australia has determined its investors should enjoy overseas. But, if this is true, it is difficult to understand why Australia has not determined that its investors should enjoy that same level when investing domestically. Furthermore, the same empirical questions raised above apply here: on the current evidence, it is not clear that Australian investors actually consider the presence of an investment treaty as a determinative (or even relevant) question when making foreign investment decisions.

Thus, there are no strong reasons to justify the misalignment of constitutional and international law on property protection. The apparent irrationality and discriminatory nature of the misalignment, mentioned earlier, might therefore favour removing it.

B In Favour of Alignment

There are further reasons that positively favour alignment of substantive norms, some stronger than others. One potential such reason rests on the idea of 'virtuous competition' between domestic and international institutions.¹¹⁶ If one body of substantive law is clearly more protective than the other, claimants will be likely to bring claims in the forum that applies the more protective law. In the context of investment disputes, claimants would ignore domestic courts, and pursue treaty claims instead in international arbitration. Consequently, the argument goes, the quality of domestic dispute resolution institutions may decrease, as business is diverted away from them to international tribunals and they retain little incentive to provide a high-quality service. Commentators have posited this perverse effect of investment treaties: while aimed at improving the situation of foreigners, they may actually worsen the situation of locals, who cannot access international arbitration and are left with recourse to the now-

115 This argument underpins the European Commission's call to terminate all investment treaties between European Union ('EU') states, on the grounds that EU law already gives sufficient protection to EU investors: European Commission, 'Commission Welcomes Member States' Commitments to Terminate All Bilateral Investment Treaties Within the EU', *Représentation au Luxembourg* (Web Page, 17 January 2019) <ec.europa.eu/luxembourg/news/commission-welcomes-member-states%E2%80%99-commitments-terminate-all-bilateral-investment-treaties_fr>.

116 Paul B Stephan, 'International Investment Law and Municipal Law: Substitutes or Complements?' (2014) 9(4) *Capital Markets Law Journal* 354.

degraded local courts.¹¹⁷ Aligning the substance of the two bodies of law would, on this view, help to rectify this situation. Where the substance of the law is the same, claimants will select the dispute resolution forum perceived to be of higher quality. In turn, this encourages virtuous competition between local courts and arbitral tribunals for the business of foreign investment dispute settlement, leading to improvements in both fora.

This argument may apply in countries where general fears over the quality, timeliness or independence of national court processes might encourage claimants to divert to international tribunals. This diversion might, perhaps, have some effect in encouraging local processes to improve. But the argument seems less plausible in relation to developed systems such as Australia. It is doubtful that Australian courts will degrade purely because foreign investment disputes are heard in international arbitration instead; the courts have plenty of other claimants and complex issues to consider.

A stronger reason to favour alignment is that continued misalignment carries a likelihood of an increased risk of violation of international law by host states. In many situations, the fact that domestic law does not match up to the standards of international law means that the state is *violating* international law. Domestic customs legislation that imposes import tariffs higher than those permitted by World Trade Organisation ('WTO') rules, for instance, in itself violates the WTO Agreements.¹¹⁸ By contrast, the fact that the *Australian Constitution* imposes property protections that are generally lower than those imposed in investment treaties and customary international law does not itself breach any investment treaty (or customary international law). Investment treaties do not require states to offer stronger domestic law guarantees; they only require states not to breach the stronger guarantees offered in the treaties themselves by interfering with specific property rights-holders. The state must then review each particular measure to ensure that it complies with both constitutional and international guarantees, taking a calculated risk on its domestic and international liability in passing each measure. Given the breadth of the protection against indirect expropriation in international law, in particular, a wide range of measures could potentially violate the protection, increasing this risk. Misalignment increases the complexity of this calculation, and thereby further increases the state's risk of a violation. Officials must not only receive advice on domestic law, in which they presumably already have significant expertise, but also on the different requirements of international law, in which they may have limited expertise (and even limited awareness).¹¹⁹

117 Ibid 368–9.

118 Legislation 'as such' can violate WTO commitments, even before it is applied by executive officials: Appellate Body Report, *United States: Anti-Dumping Act of 1916*, WTO Doc WT/DS136/AB/R (28 August 2000) [88].

119 Empirical scholars have shown limited awareness of investment treaty obligations amongst officials from a range of states: Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Hart Publishing, 2018) (examining Kazakhstan, Nigeria, Turkey, Ukraine and Uzbekistan); Christine Côté, 'A Chilling Effect? The Impact of Investment Agreements on National Regulatory Autonomy in the Areas of Health, Safety and the Environment' (PhD Thesis, London School of Economics and Political Science, 2014) (examining Canada).

The Department of Foreign Affairs and Trade ('DFAT') and the Office of International Law ('OIL') within the Attorney-General's Department ('AGD') are of course, available to give such advice. However, it is unclear whether a request for advice would necessarily come prior to passing any new legislation or executive measure, potentially leaving it up to more informal processes when international law issues happen to be recognised by relevant officials.¹²⁰ Although Australia has only faced one real investment treaty claim to date, more claims could come at any time under any of its treaties containing investor-state arbitration clauses.¹²¹ A closer alignment between domestic and international law, however it might come about, would simplify the situation for lawmakers, government officials and legal advisors: ensuring compliance with *domestic* law, already likely to be a routine part of government processes, would automatically entail ensuring compliance with *international* law.¹²²

Some scholars have opposed the general idea of judicial alignment done to facilitate compliance with international law on the grounds that Parliament, not the judiciary, should decide Australia's compliance with international law.¹²³ While this might be true,¹²⁴ it does not suggest that alignment in itself is not beneficial. Parliament's decision on compliance will obviously be much easier if international law is already aligned, one way or another, with domestic law. Moreover, Parliament cannot make this decision if it is unaware of relevant international obligations. As just noted,¹²⁵ and as McHugh J observed in *Al-Kateb v Godwin*,¹²⁶ this is a common situation today. In that situation, Parliament's acts could only comply with international law by chance, and this chance is clearly higher when there is alignment.

In sum, there are no good reasons favouring misalignment, while there are good reasons favouring alignment. Part IV next contends that alignment, produced as a side-effect of a judicial re-interpretation done not to facilitate compliance with international law but for *other* reasons, would provide the benefits discussed in this Part.

120 The OIL website states only that it 'provides international law advice to the Australian government', without clarifying whether this automatically occurs during consideration of any proposed bill or measure: 'International Law', *Attorney-General's Department* (Web Page) <www.ag.gov.au/Internationalrelations/InternationalLaw/Pages/default.aspx>. The Department of the Prime Minister and Cabinet ('PMC') Legislation Handbook indicates that consultation with DFAT and AGD should occur on any new legislation implementing a treaty, but it does not clarify the position for measures not explicitly implementing any treaty: Department of the Prime Minister and Cabinet, 'Legislation Handbook' (Policy Handbook, February 2017) [5.28] <www.pmc.gov.au/resource-centre/government/legislation-handbook>. Various parliamentary committees (eg, the Senate Standing Committee for the Scrutiny of Bills and the Parliamentary Joint Committee on Human Rights) also scrutinise new bills and regulations for compliance with international human rights law, but this does not appear to extend to international law generally.

121 See *Investment Policy Hub* (n 13).

122 This was part of the rationale for the *Human Rights Act 2004* (UK): see Secretary of State for the Home Department, 'Rights Brought Home: The Human Rights Bill' (White Paper, October 1997) ch 1.

123 Brent Michael, 'International Law in Constitutional Interpretation: A Theoretical Perspective' (2012) 23(3) *Public Law Review* 197, 205.

124 See below text accompanying n 153.

125 See above n 119.

126 (2004) 219 CLR 562, 578 [65].

IV REMEDYING MISALIGNMENT

Alignment of international and constitutional standards on property rights would therefore bring certain benefits. How might this alignment occur?

As with other instances of differential or discriminatory legal treatment, there are logically two broad approaches to achieving alignment: ‘levelling down’ or ‘levelling up’. Given the findings above that international law is, on the whole, more protective of property rights than domestic law in the Australian context, the former approach would involve lowering international law protections to the level of domestic law. The latter approach, meanwhile, would involve raising domestic law protections to the higher levels of international law. The question of which approach is preferable can only be answered by reference to underlying philosophical concerns, such as the appropriate degree of protection of property rights from state interference, and the appropriate deference that courts should grant to the decisions of political organs on that degree of protection. Part IV does not seek to argue in favour of either approach. Instead, it analyses the viability of each approach, before observing that an alignment may be emerging regardless of any deliberate ‘levelling’ efforts.

A Levelling Down

An extreme version of ‘levelling down’ would simply be to terminate all investment treaties. This would not affect the continued existence of customary international law protections against expropriation, or the possibility of claims against Australia by an aggrieved investor’s home state under the international law of diplomatic protection.¹²⁷ However, in practice, terminating investment treaties would leave nearly all foreign investors with access only to domestic law remedies. States including Ecuador, South Africa, Bolivia, Indonesia and Venezuela have taken this path, seeking to exit the investment treaty system entirely.¹²⁸ However, there is no indication that Australia plans to do the same. Indeed, Australia is actively seeking new investment treaties, and has recently concluded agreements with Uruguay and Hong Kong,¹²⁹ as well as continuing to negotiate the Regional Comprehensive Economic Partnership with 15 other nations.¹³⁰ Australia appears keen to preserve the perceived benefits of investment treaties, including protection for Australian investments overseas.

127 See, eg, the International Court of Justice case *Diallo (Guinea v Democratic Republic of the Congo) (Judgment)* [2010] ICJ Rep 639.

128 Daniel Uribe, ‘Ecuador Withdraws from Its Remaining Investment Treaties’, *Third World Network* (Web Page, June 2017) <www.twn.my/twnf/2017/4528.htm>.

129 International Institute for Sustainable Development, ‘Australia Inks New BIT with Uruguay, Trade and Investment Deals with Hong Kong’, *Investment Treaty News* (Web Page, 27 June 2019) <www.iisd.org/itn/2019/06/27/australia-inks-new-bit-with-uruguay-trade-and-investment-deals-with-hong-kong/>.

130 ‘Regional Comprehensive Economic Partnership’, *Department of Foreign Affairs and Trade* (Web Page) <dfat.gov.au/trade/agreements/negotiations/rcep/>.

Without pursuing the extreme option, then, ‘levelling down’ might otherwise occur via two methods. The ‘legislative’ method would call on Australia to (re)negotiate its investment treaties such that the definition of expropriation matches its domestic understanding of property takings. For example, Australia might ensure that its future investment treaties contain strong tax exception clauses, explicitly providing that tribunals cannot review any tax-related measure even when it allegedly constitutes an expropriation. India’s 2016 model investment treaty provides an example of such a clause.¹³¹

Some states have pursued this ‘legislative’ method of alignment.¹³² For many years now, the United States has included an interpretive annex on expropriation with its investment treaties.¹³³ This annex effectively codifies the judicially-developed test for takings under the Fifth Amendment of the *United States Constitution*,¹³⁴ instructing investment arbitrators to apply the factors used by US courts to draw the boundary between regulation and regulatory expropriation. The US has been highly successful in spreading this annex amongst partner states (and even amongst non-partner states)¹³⁵ and thereby aligning its international law commitments on expropriation to its domestic constitutional law.

The US approach might be effective to align international law with US law, but it does not assist Australia (or other states),¹³⁶ since there may still be a mismatch between Australian law and international/US law.¹³⁷ In fact, it is clearly impossible for *both* BIT partner states to adopt treaty standards that precisely reflect their own domestic law, unless the two states’ laws are already aligned.¹³⁸ Even if international commitments were altered to reflect the ‘lowest common denominator’ of the two states’ domestic laws, the domestic law of one state will inevitably offer greater protection than the treaty in certain respects. Alignment in treaties themselves is therefore most likely achievable only by states with strong

131 *Model Text for the Indian Bilateral Investment Treaty* (2016) art 2.4(ii) <finmin.nic.in/reports/ModelTextIndia_BIT.pdf>.

132 In fact, in relation to contractual rights, many states pursue ‘legislative’ levelling down via the so-called ‘umbrella’ clause in investment treaties. This clause obliges states to abide by any contractual obligations made to foreign investors, meaning that a breach of contract automatically becomes a breach of treaty: see Newcombe and Paradell (n 39) ch 9. This sets international protection at domestic law standards. However, since the focus of this article is on property rights rather than contractual rights, umbrella clauses are not further addressed here.

133 See, eg, *United States-Chile Free Trade Agreement*, signed 6 June 2003 (entered into force 1 January 2004) annex 10-D.

134 Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press, 2016) 183–4. See *Penn Central Transportation Co v City of New York*, 438 US 104 (1978).

135 Suzanne Spears, ‘Making Way for the Public Interest in International Investment Agreements’ in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) 271, 278.

136 The focus of this article is on alignment between international and Australian law, whether or not such alignment might leave the treaty misaligned with the partner state’s law.

137 Vicki Been and Joel C Beauvais, ‘The Global Fifth Amendment? NAFTA’s Investment Protections and the Misguided Quest for an International “Regulatory Takings” Doctrine’ (2003) 78(1) *New York University Law Review* 30, 141.

138 Jan Kleinheisterkamp, ‘Investment Treaty Law and the Fear for Sovereignty: Transnational Challenges and Solutions’ (2015) 78(5) *Modern Law Review* 793, 814.

negotiating positions (such as the US), and is likely not possible for Australia in most of its treaties.

An alternative method of ‘levelling down’ is likely to suffer from similar problems of effectiveness. This ‘judicial’ method would see arbitrators in investment treaty cases interpreting expropriation provisions according to a comparative survey of constitutional and administrative law standards across numerous jurisdictions.¹³⁹ The principles extracted from the survey would either inform treaty interpretation directly, where treaty terms (such as ‘expropriation’) are ambiguous, or would become relevant as ‘general principles of law’, one of the recognised sources of international law.¹⁴⁰ The aim of this method would be to bring international law closer to the standards of domestic legal systems generally via interpretation. Such a ‘comparative public law’ method has been advocated by scholars in recent years, and has been employed by certain investment tribunals.¹⁴¹ However, the method has also encountered several criticisms, including pleas for greater attention to the differences of context from which domestic principles are transported into international (investment) law, concerns over the limited range of countries typically surveyed, a perception of undue activism by adjudicators, and doubts over whether investment arbitration is sufficiently analogous to domestic public law.¹⁴² More importantly for present purposes, the comparative public law method also naturally fails to align international law with even the law of *one* state, let alone both treaty partner states or all states.

B Levelling Up

The second approach to remedying misalignment, ‘levelling up’, would entail Australia (and other states) amending domestic law to conform it to the generally higher international law standards. The immediate problem here is that the domestic law in question is constitutional law, which, in many states, is very

139 Arbitrators are already often required to draw on the domestic law of the particular respondent state (rather than domestic systems generally) in interpreting investment treaties. In particular, the property rights that are alleged to have been expropriated are defined by the respondent’s law, not by international law: see, eg, *Philip Morris Brands Sàrl v Uruguay (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016) [235]–[271]. However, it is international law that determines the question at hand – namely, whether those rights have been expropriated. See, eg, Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (Oxford University Press, 2017) 2, 41.

140 Stephan Schill, ‘International Investment Law and Comparative Public Law: An Introduction’ in Stephan Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) 23–35.

141 *Ibid*; Kleinheisterkamp (n 138); *Gold Reserve Inc v Venezuela (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/09/1, 22 September 2014) [576]. But see Jarrod Hepburn, ‘Comparative Public Law at the Dawn of Investment Treaty Arbitration’ (2014) 15(3–4) *Journal of World Investment and Trade* 705, for caution on one apparent instance of comparative public law reasoning.

142 José E Alvarez, ‘“Beware: Boundary Crossings”: A Critical Appraisal of Public Law Approaches to International Investment Law’ (2016) 17(2) *Journal of World Investment and Trade* 171; Caroline Foster, ‘A New Stratosphere? Investment Treaty Arbitration as “Internationalized Public Law”’ (2015) 64(2) *International and Comparative Law Quarterly* 461.

difficult to amend. In Australia, as is well-known, only eight of 44 amendment proposals have succeeded in the *Constitution's* 119-year history.¹⁴³

One possible way around this immediate problem is to 'level up' via statute; in other words, Parliament could legislate protections at the standard of international law, beyond the constitutional law standard. This is effectively the approach taken by some Australian jurisdictions to increase human rights protections to international law standards.¹⁴⁴ This approach would be quite feasible, given political will to do so. Nevertheless, it would obviously offer only statutory protection, with no guarantee against change. Investment treaties, by contrast, typically contain 'sunset' clauses guaranteeing continued operation for ten or more years even after termination.¹⁴⁵

If foreign investors seek similar stability in domestic law, levelling up would require a willingness to re-interpret the constitutional text or adopt new judicial tests in order to bring the domestic constitutional standard closer to international standards. South Africa's Constitutional Court has moved towards this in one recent case, where two judges looked to the international law of expropriation to interpret the South African constitutional right to property.¹⁴⁶ But the *South African Constitution* mandates courts to consider international law in interpreting constitutional rights.¹⁴⁷ No such provision exists in the *Australian Constitution*, and the High Court has generally been cautious about, if not hostile to,¹⁴⁸ the use of international law in Australian constitutional interpretation.¹⁴⁹ There is certainly no Australian judicial support for placing binding reliance on international law. In *Polites v The Commonwealth*, the High Court rejected the argument that the legislative powers of the Commonwealth in section 51 extended only to passing laws that would be consistent with international law.¹⁵⁰ This position, which therefore places no restriction on the Commonwealth intentionally legislating in

143 Parliament of Australia, 'Constitution Alteration', *About Parliament* (Web Page, June 2018) <www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice7/HTML/Chapter1/Constitution_alteration>.

144 For instance, part 3 of the *Human Rights Act 2004* (ACT) explicitly notes that 'the primary source of [the rights protected in that statute] is the *International Covenant on Civil and Political Rights*', and section 31(1) explicitly permits courts to refer to international law when interpreting the rights. See also section 32(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*') and Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill 2006* (Vic) 7, confirming that the Victorian Charter rights are 'based on fundamental rights protected in international human rights law'.

145 Kathryn Gordon and Joachim Pohl, 'Investment Treaties Over Time: Treaty Practice and Interpretation in a Changing World' (Working Paper on International Investment No 2015/02, OECD, 2015) 19.

146 *Agri South Africa v Minister for Minerals and Energy* [2013] ZACC 9 [103] (Froneman J, Van der Westhuizen J concurring).

147 *Constitution of the Republic of South Africa Act 1996* (South Africa) s 39(1)(b): 'When interpreting the Bill of Rights, a court ... must consider international law'.

148 *Al-Kateb v Godwin* (2004) 219 CLR 562, 589 (McHugh J).

149 Michael (n 123) 214.

150 (1945) 70 CLR 60, 78 (Dixon J). See also at 69 (Latham CJ), 75 (Starke J), 79 (McTiernan J), 81 (Williams J).

breach of international law, has been treated as ‘difficult to overrule’.¹⁵¹ Even in cases of ambiguity, the Court has consistently rejected reading the *Constitution* in light of international law.¹⁵² The position relies on entirely plausible grounds, such as separation of powers concerns over the judiciary’s role in ensuring Australia’s compliance with international law, or the irrelevance of ‘foreign’ values in determining Australian values.¹⁵³ Kirby J’s prominent opposing view¹⁵⁴ has appeared typically in dissenting judgments, where he has remained in ‘splendid isolation’¹⁵⁵ on the point. An argument that section 51(xxxi) authorises only those acquisitions of property that would not breach international law would therefore be rejected.

C Organic Methodological Convergence?

On the High Court’s prevailing approach to section 51(xxxi), then, the prospects for (and wisdom of) alignment via a deliberate re-interpretation of the constitutional provision appear to be limited. However, as outlined next, quite apart from questions of alignment with international law, the Court’s approach to section 51(xxxi) has been criticised in itself. Indeed, scholars have argued that the seeds of a new approach to section 51(xxxi) can already be found in the Court’s case law. A frank acknowledgment of the deficiencies of the current approach could therefore push the Court to adjust its thinking. Although such an adjustment would most likely not (and should not) be driven by any overt desire for alignment with international law, this section contends that one side-effect of an adjustment done for *other* reasons may be to produce alignment in any event, through convergence on the methodology of proportionality.

Weis, in particular, has contended that the High Court’s current approach to section 51(xxxi) is inconsistent with the Court’s insistence that the provision is a constitutional guarantee of an individual right to property.¹⁵⁶ If the provision is such a guarantee, Weis argues, the Court should explicitly employ rights-based reasoning – including balancing or proportionality tests – to determine breaches of it. Weis observes that this mode of reasoning is already in use in relation to other Australian constitutional guarantees relating to free trade and the implied freedom of political communication, and that it is therefore incongruous *not* to use it in relation to section 51(xxxi).¹⁵⁷ Indeed, Weis suggests, the Court has already

151 Devika Hovell and George Williams, ‘A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa’ (2005) 29(1) *Melbourne University Law Review* 95, 107–8.

152 Michael (n 123) 198.

153 *Ibid* 205, 215.

154 It has nevertheless been suggested that even Kirby J would agree with the *Polites* holding: Williams, Brennan and Lynch (n 52) 976.

155 Annemarie Devereux and Sarah McCosker, ‘International Law and Australian Law’ in Donald Rothwell and Emily Crawford (eds), *International Law in Australia* (Thomson Reuters, 3rd ed, 2017) 43.

156 Lael K Weis, ‘“On Just Terms”, Revisited’ (2017) 45(2) *Federal Law Review* 223.

157 *Ibid* 232–3. For a recent discussion of the High Court’s moves towards proportionality in other areas, see Caroline Henckels, ‘Proportionality and the Separation of Powers in Constitutional Review: Examining the Role of Judicial Deference’ (2017) 45(2) *Federal Law Review* 181 (‘Proportionality and the Separation of Powers in Constitutional Review’).

implicitly drawn on proportionality reasoning in section 51(xxxi) cases. As noted earlier, the outcome of the *ICM* case, for instance, can arguably be better explained on the basis that the Court balanced the public interest of regulated access to water resources against the private burdens imposed on the claimant by the regulatory scheme in question.¹⁵⁸ The Court's reluctance to acknowledge explicitly the utility of proportionality reasoning, Weis says, has created 'difficulties of administration and coherence'¹⁵⁹ that damage the asserted status of section 51(xxxi) as a constitutional guarantee.¹⁶⁰

To implement the favoured proportionality test, Weis proposes greater attention on the phrase 'on just terms' in section 51(xxxi), which, in her view, should set up a two-stage analysis: first, whether an acquisition of property has occurred to enliven the constitutional guarantee, and second, whether this acquisition was done on just terms in the sense that it was *justified*. Importantly, a justified acquisition may not necessarily involve payment of (full) compensation, on Weis' view, if the result of the balancing test suggests otherwise.¹⁶¹ In addition to an explicit adoption of proportionality, the proposal would require a move away from the view that 'on just terms' means only that compensation is required, and towards the view that the phrase has a broader meaning, referring more generally to fair dealing and a balance of interests. However, Weis points to existing High Court case law that suggests support for the latter view,¹⁶² ultimately contending that 'the proposed approach is better supported by the text and structure of section 51(xxxi) than the current approach'.¹⁶³

Weis also suggests that bringing balancing or proportionality tests into section 51(xxxi) via the 'just terms' requirement would 'provide important opportunities for cross-fertilisation'¹⁶⁴ – perhaps including dialogue between domestic and international law on the issue. International human rights courts have long used proportionality tests in adjudicating the right to property, which may provide useful guidance for the High Court if Weis' proposals are pursued. Indeed, the Court has already indicated that it is open to such dialogue, at least as a source of ideas.¹⁶⁵ In the context of section 51(xxxi) specifically, Kirby J in *Newcrest* supported reference to international human rights law to influence that provision's interpretation. In Kirby J's view, while constitutional law does 'not necessarily

158 Weis, "'On Just Terms", Revisited' (n 156) 239.

159 *Ibid* 254–5.

160 Indeed, these difficulties are likely to lessen any benefits of clarity and predictability that might be thought to flow from the formalistic, bright-line tests adopted in the Court's current approach (outlined in Part II above).

161 In this regard, adopting Weis' test in Australian law may lead to divergence from international law, where full compensation is ostensibly the rule: International Law Commission (n 92) art 31(1). However, calculation of compensation in international law is notoriously flexible, and some scholars question the nature of 'full' compensation: see, eg, Benoît Mayer, 'Less-Than-Full Reparations in International Law' (2016) 56(3) *Indian Journal of International Law* 463.

162 Weis, "'On Just Terms", Revisited' (n 156) 251.

163 *Ibid* 246.

164 *Ibid* 252.

165 Consulting European Court of Human Rights case law, see *Roach v Electoral Commissioner* (2007) 233 CLR 162, 178–9 (Gleeson CJ) and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 47 (Brennan J). See Michael (n 123) 203.

conform with international law’, ‘international law is a legitimate and important influence on the development of ... constitutional law’.¹⁶⁶ Kirby J connected the right to property in the *Universal Declaration of Human Rights* to a more basic prohibition against arbitrary deprivation of property, reflected (he said) in Magna Carta, the French Declaration of the Rights of Man and of the Citizen, and provisions in the constitutions of the United States, India, Malaysia, Japan and South Africa. Moreover, in his view, these constitutional provisions ‘reflect universal and fundamental rights by now recognised in customary international law’.

Certainly, it is a debatable question whether the right to property as understood in international human rights law (whether based in treaty or custom) and the prohibition of uncompensated expropriation of foreign property in customary international law are equivalent. The human right to property is often described as having different concerns to the rule on expropriation in custom, and the European Court of Human Rights has rejected reliance on customary international law to inform the meaning of the right to property in *Protocol 1* to the *European Convention on Human Rights*.¹⁶⁷ To the extent that section 51(xxxi) is viewed as encapsulating a human right, reference to custom (and to the rulings of investment tribunals), even as a source of ideas for interpretation, might be unwarranted.

But, importantly, international investment treaties and arbitral awards are themselves beginning to adopt proportionality tests to resolve regulatory expropriation claims. The 2007 Korea–United States Free Trade Agreement, for instance, asks tribunals to consider ‘whether the government action imposes a special sacrifice on the particular investor or investment that exceeds what the investor or investment should be expected to endure for the public interest’.¹⁶⁸ The treaty also provides that government action that is ‘extremely severe or disproportionate in light of its purpose or effect’ could amount to indirect expropriation even if it is otherwise a non-discriminatory regulatory action designed to protect public welfare.¹⁶⁹ The 2016 *Canada-European Union Comprehensive Economic and Trade Agreement* (‘CETA’)¹⁷⁰ and the 2012 Canada–China BIT,¹⁷¹ as well as other recent EU and Chinese agreements, contain similar clauses.¹⁷²

166 *Newcrest* (1997) 190 CLR 513, 657. See also Kirby J in *Commonwealth v Western Australia* (1999) 196 CLR 392, 461–2, referring to the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) in a discussion of section 51(xxxi)’s requirement for ‘just terms’.

167 *James v United Kingdom* (1986) 98 Eur Court HR (ser A) 25–8 [58]–[66].

168 *Free Trade Agreement between the United States of America and the Republic of Korea*, signed 30 June 2007 (entered into force 15 March 2012) annex 11-B art 3(a)(iii).

169 *Ibid* annex 11-B art 3(b).

170 *Canada-European Union Comprehensive Economic and Trade Agreement*, signed 30 June 2016, [2017] OJ L 11/24 (entered into force 21 September 2017) annex 8-A art 3.

171 *Agreement between Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments*, signed 9 September 2012, CTS 2014/26 (entered into force 1 October 2014) annex B.10 art 3.

172 See Catharine Titi, ‘Refining the Expropriation Clause: What Role for Proportionality?’ in Julien Chaisse (ed), *China-European Union Investment Relationships* (Edward Elgar Publishing, 2018) 126–8.

Australia has also incorporated similar text into recent treaties such as the *ASEAN-Australia-New Zealand Free Trade Agreement*, which requires tribunals to consider ‘whether the [government] action is disproportionate to the public purpose’ as part of an expropriation analysis.¹⁷³ Other Australian treaties, such as the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (‘*CPTPP*’), do not include explicit text on proportionality. However, the *CPTPP* provides that a non-discriminatory public welfare measure may amount to expropriation in ‘rare circumstances’.¹⁷⁴ The *CPTPP* does not explain when those circumstances arise, but a tribunal ruling on the treaty may be tempted to draw inspiration from the equivalent clause in *CETA*, which explicitly defines ‘rare circumstances’ as being ‘when the impact of a measure ... is so severe in light of its purpose that it appears manifestly excessive’.¹⁷⁵ Indeed, even without textual underpinnings, tribunals have already adopted the method to analyse expropriation claims in some cases.¹⁷⁶ While the prevalence of these developments ‘should not be overstated’,¹⁷⁷ there is an argument that proportionality is ‘crystallizing as a norm in relation to ... a claim of expropriation’.¹⁷⁸

Notably, these moves towards proportionality in newer investment treaties have come in response to perceptions that older treaties protect property rights too strongly, at the expense of states’ regulatory freedom.¹⁷⁹ The proportionality test aims to lessen focus on the deprivation of investor rights, instead setting that deprivation in a broader public interest context.¹⁸⁰ From this perspective, imposing proportionality in investment treaties is effectively levelling down, aiming to reduce protection (even if not necessarily to domestic law standards). Meanwhile, the proposed domestic development towards a greater role for proportionality in section 51(xxxi) analyses, if taken up to remedy the deficiencies of the High Court’s current approach,¹⁸¹ would likely lead to increased protection for property

173 *Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area*, signed 27 February 2009, [2010] ATS 1 (entered into force 1 January 2010) ch 11, annex on Expropriation and Compensation, art 3(c).

174 *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, opened for signature 8 March 2018, [2018] ATS 23 (entered into force 30 December 2018) annex 9-B, art 3(b).

175 *Canada-European Union Comprehensive Economic and Trade Agreement* (n 170) annex 8-A, art 3.

176 See Benedict Kingsbury and Stephan Schill, ‘Public Law Concepts to Balance Investors’ Rights with State Regulatory Actions in the Public Interest: The Concept of Proportionality’ in Stephan Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) 75, 88–96; Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration* (Cambridge University Press, 2015) 122. For a recent example, see *South American Silver Ltd v Bolivia (Award)* (Permanent Court of Arbitration, Case No 2013–15, 22 November 2018) [568]–[577].

177 Henckels, ‘Proportionality and the Separation of Powers in Constitutional Review’ (n 157) 125.

178 Caroline Henckels, ‘Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration’ (2012) 15(1) *Journal of International Economic Law* 223, 254.

179 Henckels, ‘Proportionality and the Separation of Powers in Constitutional Review’ (n 157) 1–7, 22, 196.

180 This does not necessarily mean that the state will win, however. The *Tecnicas Medioambientales Tecmed SA v Mexico* case demonstrates that tribunals may sometimes view the public interest as outweighed by the burden on an investor: *Tecnicas Medioambientales Tecmed SA v Mexico (Award)* (ICSID Arbitral Tribunal Additional Facility, Case No ARB(AF)/00/2, 29 May 2003) [122], [151].

181 This is not to downplay the challenges facing the proposal. As Weis acknowledges, the High Court would need to overcome its ‘discomfort with rights analysis’, which is ‘less familiar to Australian constitutional law’ than in other countries: Weis, ‘Property’ (n 49) 1030. Indeed, there remain doubts that section

rights compared to the current domestic approach. Thus, the parallel development of proportionality tests could lead organically to a kind of alignment in the middle between international and domestic law in this area – not in legal text or even necessarily in outcomes, but at the level of judicial methodology. In particular, the adoption of proportionality in both investment treaty claims and section 51(xxxi) claims would tend towards smoothing out the differences on the questions of acquisition, taxation and forfeiture addressed in Part II.

In relation to acquisition, while, on Weis' proposal, 'finding that there *is not* an "acquisition" of property will still be dispositive',¹⁸² the circumstances in which the court will find an acquisition would not depend on a sterile analysis of loss and gain, but would instead consider 'the values associated with property such that property rights merit constitutional protection'.¹⁸³ As a result, 'one would expect the types of laws that do not implicate the constitutional guarantee at all to be few and narrowly defined'.¹⁸⁴ As *Newcrest* has already shown, the deprivation of the right to use a mining licence can relatively easily be re-cast as an 'acquisition of the land freed from the rights of Newcrest to occupy and conduct mining operations thereon'.¹⁸⁵ The court would thus be likely to find an acquisition more often, with the real analysis coming in the stage two inquiry into whether the acquisition was justified under a proportionality test. This approach would begin to parallel the approach in investment treaty tribunals, which usually have little trouble in finding *some* kind of deprivation of rights before turning to the real question of whether the deprivation is justified – and increasingly, in particular, whether it is justified under a similar kind of proportionality test.

In relation to taxation, Weis suggests that certain types of laws, including taxation, might still sensibly be regarded as *never* effecting an 'acquisition', meaning that section 51(xxxi) would still not be activated and claims of expropriatory taxation would continue to be dismissed. However, given that these types of laws should be 'narrowly defined'¹⁸⁶ under Weis' proposal, it would remain open to the court to decline to treat extreme or *mala fide* taxation measures as taxation that remains exempt from section 51(xxxi) scrutiny.¹⁸⁷ This would permit a more substantive analysis, potentially including a proportionality analysis, of the kind undertaken in the investment treaty cases against Russia and Ecuador discussed in Part II(B). As for forfeiture, a two-stage proportionality test would clearly bring an Australian court's analysis much closer to the analysis of the *İçkale* and *Khan* cases discussed in Part II(C).

51(xxxi) operates as a protection of individual rights at all, and Chief Justice Kiefel has previously indicated that the application of proportionality analysis to section 51(xxxi) claims would be inappropriate: *JT International SA v Commonwealth* (2012) 250 CLR 1, 123.

182 Weis, "'On Just Terms", Revisited' (n 156) 246–7.

183 *Ibid* 246.

184 *Ibid* 248.

185 *Newcrest* (1997) 190 CLR 513, 634 (Gummow J). Kirby J has also pointed to High Court case law suggesting that 'acquisitions' of property might well also include deprivations, unsettling the dichotomy discussed in Part II(A) above: *Commonwealth v Western Australia* (1999) 196 CLR 392, 456–8 [183]–[186].

186 Weis, "'On Just Terms", Revisited' (n 156) 248.

187 See above n 56.

To be sure, there are reasons to be cautious about an increased role for proportionality both in the High Court and in investment tribunals, including concerns over judicial law-making and the separation of powers, threats to legal predictability, and questions of legitimacy and capacity of judges to perform the value-balancing that proportionality entails.¹⁸⁸ There are also differences in the way in which proportionality tests can be administered, meaning that, as noted above, even convergence on methodology is not guaranteed to produce convergence on outcomes. While these concerns are not necessarily insurmountable,¹⁸⁹ it is beyond the scope of this article to address them. The contention here is only that, if Weis' proposed test were adopted – and there are at least some good reasons for doing so, as Weis outlines – one side-effect would be to push domestic law towards alignment with international law in this area, bringing the benefits argued for in Part III.

V CONCLUSION

As the reach of international law grows, situations of overlapping norms will arise more frequently. Since international law typically emerges from the practices of at least two states, each individual state will not necessarily be able to control the content of the international rules that result. The potential for divergence or misalignment between the overlapping international and domestic rules thus arises. As this article has argued, Australian constitutional law provides an example of this in its grant of property rights that overlaps in substance with, but is generally weaker than, international law rules on expropriation. This misalignment increases complexity and heightens the risk of violation of international law by states. When the domestic rule applies to both locals and foreigners in a state but the international rule applies only to foreigners, as in the situation examined in this article, misalignment also creates differential treatment which may be difficult to justify.

As indicated in Part II(D), remedying the misalignment in the situation examined in this article would not resolve all misalignment problems, given the broad scope of investment treaty protections and the narrow scope of section 51(xxxi) (reaching only federal measures). Moreover, as the various responses mapped in Part IV demonstrate, remedying even this misalignment is not necessarily straightforward. In some cases, misalignment might be minimised by ensuring that the domestic rule closely tracks the international rule. In other cases, international rules can be moulded (at least, by powerful states) to reflect established domestic rules. Even if textual similarity is achievable, though, a kind

188 See, eg, Gebhard Bücheler, *Proportionality in Investor-State Arbitration* (Oxford University Press, 2015) 63–5; Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21(1) *Melbourne University Law Review* 1, 55. The concerns may be greater at the international level, where adjudicators are not 'embedded within the local community': Henckels, 'Proportionality and the Separation of Powers in Constitutional Review' (n 157) 29.

189 For example, for a proposal to resolve separation of powers concerns at the domestic level, see Henckels, 'Proportionality and the Separation of Powers in Constitutional Review' (n 157).

of *de facto* alignment may be emerging in any event, as examined in Part IV, depending on the use of judicial techniques such as proportionality. As Weis has outlined,¹⁹⁰ there are at least some good reasons for Australian law to adopt a proportionality test for section 51(xxxi) claims, regardless of developments in international law. This kind of alignment will thus not necessarily occur consciously, and this article does not argue that it *should* occur consciously. To the extent that Australian and international adjudicators might converge on a methodology for property rights claims, this will likely be driven more by factors specific to each legal regime, and perhaps also by a common understanding of the underlying rationale behind section 51(xxxi) and treaty and customary rules on expropriation, than by a deliberate desire to harmonise.

Despite the downsides of misalignment, then, the prospects for a remedy may hinge on the continuing coincidence of values in international and (Australian) constitutional law, encouraging adjudicators to apply techniques suitable for the questions of individual-state relations that most frequently lie behind overlapping domestic-international norms. In the meantime, Australia's compliance with international law will depend on the continued vigilance and good faith of its officials.

190 See above text accompanying nn 156–64.