CHAPTER 8


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1 Introduction

The importance of the right to regulate in international investment law has been increasing steadily over time. The right to regulate is often seen as a State response to expansive interpretations of international investment agreement (IIA) provisions by arbitral tribunals and to an ever-growing number of investor claims filed even against traditionally capital exporting States.1 The most recent and perhaps most emphatic formal “recognition” of the right to regulate to-date, can be seen in the 2016 Comprehensive Economic and Trade Agreement (CETA) between the European Union (EU) and Canada.

Yet, despite its increasing importance in the discourse of international investment law, the right to regulate is undertheorized and its nature remains somewhat of a mystery. Often, references to the right to regulate are limited to general statements that: there exists a domain of State regulation where compensation is not owed to the investor even if the latter suffers losses because of it; a balance must be found between the State's need to regulate for the public interest and investment protection; strengthening the right to regulate will reduce arbitrary interpretations by tribunals, will foster legal certainty, and will lead to an overall more balanced regime.

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In light of this, the aim of this contribution is two-fold. First, it seeks to theorise the concept of a right to regulate in international law and international investment law. Second, it seeks to assess the ways in which the right to regulate may be employed in the process of legal argumentation and to ascertain the implications that the invocation of that right has for the State’s international responsibility. Because there exists no single idea or concept of the right to regulate, the primary analytical tool that will be used to conceptualise it is Wesley Newcomb Hohfeld’s seminal analysis of the web of jural relations that arise by the use of the single term “right”.

The chapter proceeds as follows. Section II briefly introduces Hohfeld’s work on the various legal relations created by “rights” generally. Section III conceptualises the right to regulate in general international law as a Hohfeldian legal power. The section argues that this is also the way in which the right to regulate is most commonly understood in IIA’s and in arbitral decisions. At the same time, the section also identifies a conception of the right to regulate taking the form of a Hohfeldian immunity, existing in the non-precluded measures clauses of IIA’s and in the defence of necessity under the law of State responsibility. Section IV identifies a “new narrative” of sorts regarding the right to regulate that conceptualises it as a Hohfeldian claim. Current approaches in literature and the recently adopted Canada-EU CETA (2016) will serve as the background, in order to put some flesh into that emerging and, so far, somewhat vague conception of the right to regulate. The same section also offers three arguments against a general understanding of the right to regulate as a claim. Section V concludes.

II Hohfeld’s Schematisation of Legal Relations

Hohfeld’s fundamental insight regarding the study of legal relations is summarised in the following statement from his seminal 1913 article published in the Yale Law Journal:

One of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express or tacit assumption that all legal relations may be reduced to ‘rights’ and ‘duties’, and that these latter categories are therefore adequate for the purpose of analyzing even the most complex legal interests[.]²