City Research Online

City St George's, University of London

Citation: Collins, D. A. (2016). The Line of Equilibrium: Improving Investment Arbitration through the Application of the WTO General Exceptions. Arbitration International, 32(4), pp. 575-587. doi: 10.1093/arbint/aiw031

This is the accepted version of the paper.

This version of the publication may differ from the final published version. To cite this item please consult the publisher's version.

Permanent repository link: https://openaccess.city.ac.uk/id/eprint/15719/

Link to published version: https://doi.org/10.1093/arbint/aiw031

Copyright and Reuse: Copyright and Moral Rights remain with the author(s) and/or copyright holders. Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge, unless otherwise indicated, provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way. For full details of reuse please refer to City Research Online policy.

City Research Online: http://openaccess.city.ac.uk/ publications@citystgeorges.ac.uk

The Line of Equilibrium: Improving the Legitimacy of Investment Treaty Arbitration through the Application of the WTO's General Exceptions

David Collins*

ABSTRACT:

This article considers the application of the general exceptions of the World Trade Organization (WTO) General Agreement on Tariffs and Trade (GATT) and General Agreement on Trade in Services (GATS) to the context of international investment arbitration under international investment agreements (IIAs). It suggests that the designated categories and balancing contemplated by the WTO exceptions, along with its tried and sophisticated jurisprudence may offer useful guidance to arbitrators seeking to evaluate public interest exceptions implemented by host states. Improvements to the trade-inspired general exceptions for the investment context to enhance this exercise are also proposed. Taken together these initiatives may help promote the legitimacy of investment arbitration which continues to face criticism for its failure to consider non-economic matters and as an affront to national sovereignty.

I Introduction

Much has been written of the "crisis of legitimacy" facing investment treaty arbitration.[1] The overwhelming response (mostly negative) to the European Union's public consultation on the investor-state dispute settlement provisions of the Transatlantic Trade and Investment Partnership (TTIP) which resulted in a controversial and highly innovative investment court proposal[2] is perhaps the most stark example of a deep seated aversion to the traditional so-called "secret court" forum for investor grievances against host governments. While investor-

* Professor of International Economic Law, City University London <david.collins@utoronto.ca> A version of this article was accepted for publication in Arbitration International.

[1] E.g. S Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions" 73:4 Fordham Law Review 1521 (2005) and M Waibel ed. *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer, 2010)

[2] <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf> (including an appeals system)

state dispute settlement provisions directing parties to international arbitration systems such as the International Centre for the Settlement of Investment Disputes ('ICSID') appear in virtually all of the 2800 plus international investment agreements ('IIA's) currently in force, commentators argue that these fora lack the integrity of either domestic courts or other species of international dispute settlement, including conventional commercial arbitration. The reasons for this criticism include the lack of an effective appeals mechanism from tribunal decisions (which legal theorists and practitioners alike tend to align with the principles of fundamental justice), inconsistency among tribunal awards in an environment where there is no principle of *stare decisis*, poor transparency in the arbitration process itself stemming from the confidentiality of the proceedings, and, perhaps most significantly insufficient awareness of public interest concerns on the part of arbitrators as would befit a public international dispute settlement system.[3] The denunciation of investment treaty arbitration must be placed in the context of a general resentment among many scholars towards international investment law itself (as comprised by the network of modern IIAs) which has been condemned for its one-sidedness in favour of multinational corporations. These organizations allegedly enjoy the benefit of a multitude of treaty protections without corresponding obligations, foisting the risk of liability exclusively upon host states, many of which are poorly-resourced and ill-equipped to negotiate IIAs that suit their individual developmental needs.[4]

This article will not confront the debate over the suitability or effectiveness of IIAs, nor even will it address the broader controversies surrounding investor-state dispute settlement through international arbitration.[5] It will instead offer a plausible means of resolving the criticism that arbitrators do not appreciate the essential public dimension of treaty-based disputes as distinct from the commercial ones from which many of them have cultivated their

---

[3] See e.g. P Muchlinski, H Muir Watt, G Van Harten, and H Schepel, "Statement of Concern about Planned Provisions on Investment Protection and Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP)" Kent Law School (July 2013), <https://www.kent.ac.uk/law/isds_treaty_consultation.html>

[4] See generally M Sornarajah, *The International Law on Foreign Investment* (2nd ed, Cambridge, 2010)

[5] E.g. S Montt, *State Liability in Investment Treaty Arbitration* (Hart, 2009) (emphasizing the need for a deferential approach to sovereign regulatory decisions) and S Franck and L Wylie, "Predicting Outcomes in Investment Treaty Arbitration" 65 Duke Law Journal 459 (2015) (observing the need for further empirical testing in order to construct effective reforms)

experience. The solution offered herein is a simple one which has drawn surprisingly little commentary from the academic and practitioner communities. This article will recommend that arbitrators pay greater regard to the general exceptions contained in existing IIAs and, more daringly, that future treaties incorporate more clearly defined exception clauses, such as those modelled on provisions of the World Trade Organization ('WTO')'s General Agreement on Tariffs and Trade ('GATT') and the General Agreement on Trade in Services ('GATS'). Together these changes should help moderate some of the regulatory intrusion associated with strong investor protections such as guarantees against indirect expropriation and fair and equitable treatment. While challenging, this process could be assisted through resort to the general exception jurisprudence of the WTO panels and Appellate Body. Embracing WTO law on non-economic justifications should improve the legitimacy of investor-state arbitration, reinforcing recognized public policy norms developed in other spheres and crucially countering the much-maligned "fragmentation" of international economic law into segregated, insular systems that has been condemned by commentators.[6]

This article will proceed as follows. Part II will introduce the general exceptions contained in the GATT and GATS, with Part III illustrating how these concepts have been adapted to some IIAs. Part IV will explore the ways in which WTO jurisprudence on the general exceptions could be usefully applied as an interpretive tool to assist investment tribunal arbitrators. Part V will then consider ways in which IIA general exceptions could improve upon the language that has been imported from the WTO context to better balance public interest concerns against substantive investor protections in IIAs. Conclusions will be offered in the final section.

II The General Exceptions of the GATT and the GATS

General exceptions to the substantive obligations of the WTO's main treaty on goods, the GATT, and its main treaty on services, the GATS, take the form of exhaustive lists of non-

[6] See J Alvarez, *The Public International Law Regime Governing International Investment* (Hague Academy of International Law, 2011) at 407-410

trade matters. These entitle Member states to transgress the core obligations found in the instrument, most importantly the guarantee of non-discrimination as to the national origin of the good or service. The general exceptions of GATT and GATS have been invoked in a number of disputes, including shrimp harvesting, on-line gambling[7], drug-trafficking, publications and audio-visual materials[8], and more recently clove-flavoured cigarettes[9] and seal meat.[10] These disputes are among the most high-profile ones brought before the WTO panels and Appellate Body, capturing the attention of the world's media as emblematic of the confrontation between globalization and nationhood.

WTO caselaw has established that the way to approach an assessment of a general exception that has been invoked by a Member under the GATT is first to examine whether a measure can be provisionally justified under one of the specific exceptions listed in paragraph a to j and if so, to consider whether the application of the measure meets the requirement of the chapeau. This is effectively a two-stage analysis focussing first on the measure itself and secondly on the application of that measure.[11] So far WTO Members have been successful in using a general exception to defend a measure only once.[12] Still this should not be taken to indicate that succeeding in an Article XX justification is almost possible. Many such arguments raised by Member states result in panels or the Appellate Body ordering modifications to national laws rather than their complete withdrawal. Many more public policy based measures are never brought before WTO dispute settlement panels at all. Indeed, the GATT (and GATS) general exceptions have played a significant role in facilitating WTO

---

[7] United States Measures Affecting the Cross Border Supply of Gambling and Betting Services, Panel Report WT/DS285/R, 10 November 2004

[8] China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, Appellate Body Report WT/DS363/AB/R, 21 December 2009

[9] United States Measures Affecting the Production and Sale of Clove Cigarettes, Panel Report WT/DS406/R, 2 September 2011

[10] European Communities - Measures Prohibiting the Importation and Marketing of Seal Products, Appellate Body Report, WT/DS401/AB/R, 22 May 2014

[11] US-Shrimp, Appellate Body Report, WT/DS58/AB/R, 6 November 1998 [119]-[120]

[12] Ibid.

Member's invocation of social values in conjunction with their international trade obligations.[13] This is one of the reasons that cases involving general exceptions tend to garner so much attention from both lay and expert commentators.

i) Enumerated Exceptions

As noted above, Article XX of the GATT 1994 (incorporating the original GATT of 1947) list of "general exceptions" allow WTO Members to enact measures of certain specified varieties, regardless of their impact on any other obligation contained in the treaty and provided that they are not imposed for trade protectionism. The listed categories of most relevance to investment treaty arbitration are as follows:

(*a*) [Measures] necessary to protect public morals;

(*b*) [Measures] necessary to protect human, animal or plant life or health;

(*d*) [Measures] necessary to secure compliance with laws or regulations ..., including those relating to customs enforcement, the enforcement of monopolies .., the protection of patents, trademarks and copyrights, and the prevention of deceptive practices;

(*g*) [Measures] relating to the conservation of exhaustible natural resources;

Public morals could potentially cover all sorts of measures relating to expressions of cultural identity. Animal or plant life or health is best seen as covering health issues, whereas exhaustible natural resources is closely aligned to what we would now consider environmental concerns. Taken together these encompass many of the most pressing social issues faced by governments and their citizens around the world.

The GATS, which was enacted along with the creation of the WTO in 1995 governs the increasingly important trade in services and contains similarly worded general exceptions

[13] P van den Bossche, *The Law and Policy of the World Trade Organization* (3rd ed Cambridge, 2013) at 553

in its Article XIV. The following listed categories are of the most relevance to investment arbitration:

(a) [Measures] necessary to protect public morals or to maintain public order;

(b) [Measures] necessary to protect human, animal or plant life or health;

(c) [Measures] necessary to secure compliance with laws or regulations ... including those relating to: (i) the prevention of deceptive and fraudulent practices ...; (ii) the protection of the privacy of individuals ...; (iii) safety

Public morals and public order, which have been the subject of several disputes, could be generalized into cultural issues possibly also embrace wider concerns relating to social stability or the prevention of civil unrest. As under GATT, human, animal or plant life or health may be seen to cover health matters generally.

ii) The Chapeau

The enumerated general exceptions in both the GATT and GATS are controlled by what has come to be known as the "chapeau" of the respective provision. This feature examines the manner in which a regulation is applied, ensuring that it does not conceal a protectionist motivation behind the veil of public interest. The chapeau states that the ability of Members to justify a measure on one of the specified grounds is:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade...[14]

In many ways the chapeau captures the essence of the general exceptions as a unified category of public interest that stands alongside (or perhaps in opposition to) the ethos of economic liberalism that permeates the WTO regime. This dynamic tension was discussed by the Appellate Body:

[14] The GATS contains the phrase "...disguised restriction on trade *in services*."

> The task of interpreting and applying the chapeau is ... essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception ...and the right of the other Members under varying substantive provisions ... so that neither of the competing rights will cancel out the other...The location of the line of equilibrium, as expressed in the chapeau [of GATT Article XX], is not fixed and unchanging; the line moves as the kind and shape of the measures at stake vary and as the facts making up specific cases differ.[15]

Establishing this "line of equilibrium" between national sovereignty and international responsibility is thus characterized as an exercise in judicial discretion. Adjudicators are called upon to assess relevant facts in the given context, with the analysis rooted in the articulation of the particular public policy concern that has been evoked by the respondent to justify departure from the agreed protection. The variable result of this process should be applauded for its adaptive capacity even as it admittedly departs from the principle of consistency and the closely aligned pursuit of predictability. The lack of consistency in the treatment of the chapeau underpins much of the criticism of the current system because of its contribution to a general sense of legal uncertainty.[16] These critiques fail to appreciate that the chapeau contemplates a qualitative balancing exercise that is by definition unique to each situation – effectively acknowledging that some certainty must be sacrificed for justice to be done.

Broadly speaking, the chapeau is understood to prevent the misuse, or rather the abuse of a Member's right to invoke the general exceptions of the GATT or GATS. The WTO Member seeking to rely on an exception bears the burden of demonstrating that the use of the exceptions is legitimate, meaning that it does not have a protectionist aim but rather seeks to fulfil a publicly-minded policy goal. This can often be disclosed by reference to the manner in which a measure is applied rather than its substance. According to the Appellate Body, protectionist intent can often be discerned from the "design, architecture, and revealing structure of a measure."[17]

---

[15] United States: Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body, (1998) WT/DS58/AB/R at [158]

[16] E.g. Franck above n 1 at 1523

[17] EC-Asbestos, Panel Report, WT/DS135/R (adopted 5 April 2001) at [8.236]

III WTO-Inspired General Exceptions in IIAs

The resonance of the legal concepts and tests developed under GATT Article XX and GATS XIV is evident in the role they continue to play outside the sphere of international trade and the domain of the WTO. The new mega-regional trade agreements have embraced the WTO's general exceptions to varying degrees. They are incorporated by reference into the investment chapters of the new Comprehensive Economic Trade Agreement ('CETA') between Canada and the EU[18] as well as the TTIP between the US and the EU,[19] and the draft multi-state Trade in Services Agreement (TISA).[20] The investment chapter of the multi-state Trans Pacific Partnership contains general exception derogations from the prohibition on performance requirements,[21] although the agreement's chapter on exceptions which contains GATT XX language is not incorporated by reference into the investment chapter. This feature may be explained by a footnote to the TPP's national treatment obligation which expressly preserves host states the right to enact discriminatory measures for the purpose of "legitimate public welfare objectives."[22] The importance of the mega-regionals must not be understated, as they are poised to represent a new benchmark for investor protections in international law.

To give a few examples of modern bilateral arrangements which have acknowledged WTO general exceptions, the Korea-Australia Free Trade Agreement contains an investment chapter that contains general exceptions that are modelled on those of the GATT/GATS.[23] The China-New Zealand Free Trade Agreement of 2008 incorporates both GATT XX and GATS

---

[18] Chapter 32 Art X.02

[19] Public Consultation on Modalities for Investment Protection and ISDS in TTIP <http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf > at 19-20

[20] Art I-9

[21] Art 9.9 (3) d) [as exceptions to the prohibitions on the use of performance requirements]

[22] Footnote 14 to Art 9.4

[23] Art 22.1

XIV.[24] While only a very small number of bilateral investment treaties have included general exceptions modelled on those of the GATT/GATS[25], the ASEAN Comprehensive Investment Agreement repeats the general exceptions from GATS almost verbatim, with a slight modification that refers to a "disguised restriction on investors" in its chapeau.[26] The Canada Model BIT borrows some language from the GATT and GATS, including categories for "human, animal, plant life or health" and "the conservation of living or non-living resources" both with the qualifier "necessary" and controlled by a chapeau which speaks of preventing a "disguised restriction on international trade or investment."[27] GATT/GATS general exceptions also appear in a number of regional trade agreements. NAFTA expressly incorporates the general exceptions of GATT Article XX including its interpretive notes as well as the chapeau in relation to its chapters on trade in goods, although these do not apply to its material on investment.[28] MERCOSUR-India Preferential Trade Agreement expressly incorporates GATT Article XX.[29]

The above instances of WTO-inspired language in the text of general exceptions in IIAs and other non-WTO treaties, some of which embrace investment, are not simply instances of historic "path dependence" or negotiation-inertia. The decision to integrate the concepts of public interest developed in the WTO context to these new treaties reflects a deeply entrenched awareness of the language and history of these provisions in the legal culture worldwide. It represents a profound systematization of legal concepts and understanding within the international legal, diplomatic, economic and political community. The wealth of caselaw that has developed through the WTO dispute settlement process on the application of these

---

[24] Art 200 (signed April 2008)

[25] A Newcombe, "General Exceptions in International Investment Agreements" Draft Discussion Paper, British Institute of International and Comparative Law (13/14 May 2008) <http://www.biicl.org/files/3866_andrew_newcombe.pdf> at 2, noting also that Canada is the only country that has shown a clear tendency to include general exceptions in its BITs, at 3.

[26] Art 17.1 (signed 26 February 2009)

[27] Art 10.1 a) and c) (2004). Canada includes general exceptions in 18 of its BITs.

[28] Art 2101

[29] Art 9 (signed 25 January 2004)

principles should therefore be recognized as a sophisticated tool available to investment arbitrators facing public interest questions that arise in IIA-based claims.

IV Applying WTO Jurisprudence to Investment Treaty Arbitration

The need for WTO-style general exceptions in IIAs to help arbitrators respond to the public dimension of investor-state arbitration is rooted in the reality that foreign firms can impose significant burdens on citizens. These are often not reflected in the commercial advantages gained from foreign direct investment. Foreign firms are perhaps even more intrusive into the lives of citizens and stakeholder groups than foreign-originated goods because of the disruption that can occur as a consequence of foreign personnel interacting with local citizens both in an economic as well as a social capacity. This is one reason why, as with the WTO, public-policy oriented regulations imposed by governments are at the heart some of the most high profile disputes brought before international investment tribunals. Cigarette manufacturer Philip Morris brought a claim in investment arbitration against Australia for its plain-packaging tobacco laws based on national health policy, however the tribunal ultimately declined to take jurisdiction over the matter.[30] The now-settled dispute between energy company Vattenfall against Germany for the termination of its nuclear power program was rooted in environmental and health risks.

With these challenges in mind, a number of IIAs include provisions relating to public interest norms such as the environment or labour but do not frame them using the detailed language of the GATT and GATS, opting instead for a very minimal format that is unfortunately lacking in guidance to adjudicators.[31] The practical difficulty with vaguely worded exceptions in contrast with those of the WTO is that, without a legacy of established jurisprudence, arbitrators are compelled to consider the relevant principle in legal isolation without the benefit of WTO caselaw especially that relating to the careful balancing exercise

[30] Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia, Award on Jurisdiction and Admissibility, Case No. 2012-12 (PCA) (17 December 2015) [not publicly available]

[31] E.g. US Model BIT 2012 Art 12 (the environment) and Art 13 (labour)

contemplated under the chapeau. Recognizing this deficiency, commentators have urged investment treaty arbitrators to draw upon the wealth of WTO case law regarding the general exceptions in order to interpret public interest defences that appear in IIAs, even where the same structure and language is not evident.[32]

Commentators have further lamented the absence of GATT/GATS style general exceptions in IIAs because of the broad powers IIAs confer on investors, in contrast to the WTO regime and its more limited focus on reciprocal reduction to trade barriers. General exceptions modelled on those of the WTO could act as a fail-safe against improper invocation of investor arbitration, helping preserve host state regulatory sovereignty in crucial specified spheres of regulation.[33] The lack of this feature in investment arbitration places significant pressure on tribunals to strike the correct balance between legal restraint and flexibility when considering experimental regulations that might be pursued in the public interest. This is particularly important when there is the potential for sizable compensation awards against host states, and where, unlike the WTO, there is no possibility of appeal.[34]

Investment arbitrators have struggled with public interest-oriented arguments by host states as a defence to the infringement of investors' entitlements under IIAs. For example, in *Parkerings v Lithuania*, a dispute concerning the building of a car park in the historic town centre of Vilnius, the tribunal was called upon to consider the allegation of discrimination against a foreign company as a consequence of cultural sensitivities connected to the site. Instead of the systematic balancing that would characterize a WTO panel assessment of public order and the chapeau, the tribunal completed their assessment of the measure in one rather opaque sentence: "The historical and archaeological preservation and environmental protection could be and in this case were a justification for the refusal of the project."[35] In a similarly

---

[32] B Mercurio, "International Investment Agreements and Public Health: Neutralizing a Threat Through Treaty Drafting" *Bulletin of the World Health Organization* 92:520-525 <http://dx.doi.org/10.2471/BLT.13.130955> (2014)

[33] J Kurtz, "The Merits and Limits of Comparativism: National Treatment in International Investment Law and the WTO" in S Schill ed. *International Investment Law and Comparative Public Law* (Oxford, 2012) at 266

[34] Ibid. at 255

[35] ICSID Arbitration case No. ARB/05/8 (11 September 2007) at [392]

dissatisfying modality, the tribunal in *SPP v Egypt* accepted the validity of Egypt's rejection of a construction project near the Giza Plateau on the basis of the presence of historical artefacts at the site. But, rather than assess what was effectively a cultural justification for an expropriation by reference to the language of the relevant IIA (because it did not contain a cultural exception), the arbitrators were relegated to consider the legitimacy of the regulation on the basis of Egyptian domestic law on takings.[36] While this approach is clearly respectful of one aspect of the host state's sovereignty, such an approach does little to provide legal assurance for foreign investors seeking the guarantees against egregious intervention by host states through treaty. More fundamentally, it re-casts the arbitrator's role as one tied to the interpretation of domestic laws, which are arguably better evaluated by domestic judges. In so doing, arbitrators are denied recourse to international laws such as contemplated by the GATT/GATS general exceptions, the consideration of which along with the chapeau are imbued with universal principles such as proportionality and good faith.

Importing WTO-style general exceptions into IIAs has been viewed with some trepidation by some commentators.[37] Chief concerns include the reference in the chapeau to "countries where the same conditions prevail" which strictly speaking does not acknowledge discrimination between investors, although of course this wording could be reworked with minor changes. More problematically, difficulties in reconciling broader jurisdictional conflicts between WTO dispute settlement and investment arbitration have been well-chronicled by academics and practitioners.[38] This tension has been particularly observed in the context of the often unappreciated differences in the national treatment standards of both disciplines.[39] Additionally, it has been observed that WTO obligations tend to be generally

---

[36] ICSID Case no. ARB/84/3, (20 May 1992) at [158] and [159]

[37] E.g. S Lester, "Improving Investment Treaties through General Exception Provisions: The Australian Example" Investment Treaty News (May 2014) and A Newcombe, "The Use of General Exceptions in IIAs: Increasing Legitimacy or Uncertainty" in A De Mestral and C Levesque eds. *Improving International Investment Agreements* (Routledge, 2012)

[38] E.g. B Allen and T Soave, "Jurisdictional Overlap in WTO Dispute Settlement and Investment Arbitration" 30:1 Arbitration International 1 (2014)

[39] N DiMascio and J Pauwelyn, "Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin" (2008) 102 American Journal of International Law 48 at 76 (noting for example the difference between like products and like circumstances)

well-defined (e.g. tariff bindings, non-discrimination) whereas some IIA provisions, such as fair and equitable treatment and indirect expropriation, are themselves highly indeterminate. It is admittedly unclear how a general exception, even a carefully framed one, could be used to justify the departure from such an ambiguous guarantee.[40]

These difficulties may explain why investment arbitrators have demonstrated a tendency to construe express exceptions in IIAs narrowly.[41] For example, in *SD Myers v Canada*, a dispute brought under NAFTA, the tribunal held that even if the NAFTA investment chapter had Article XX-like general exceptions (which it does not, unlike its trade chapter), Canada's ban on chemical exports could not be justified under the Article XX's chapeau. This was because the ban was motivated by protectionism for the domestic chemical industry. The tribunal, which appeared to wish that they had an Article XX provision at their disposal, ultimately ruled in favour of the investor even though there was a clear, scientifically supported environmental risk associated with the particular chemicals that were subject to the ban.[42] In *Methanex v USA*, another dispute brought under NAFTA by a Canadian chemical producer, the tribunal scrutinized the environmental justifications for the host state's chemical ban in very close detail, concentrating on the seriousness of the predicament. The tribunal concluded that the government had undertaken a careful assessment of the measure in response to a widespread and potentially serious contamination of large volumes of ground and surface water and that action was taken in the best interests of citizens, not in order to harm foreign producers.[43] Together these decisions signify a prudent if somewhat unpolished approach to public policy-oriented defences made by governments in the absence of clear treaty-based guidance in IIAs.

---

[40] E.g. Lester, above n 37

[41] A Newcombe, "General Exceptions in International Investment Agreements" Draft Discussion Paper, British Institute of International and Comparative Law (13/14 May 2008) <http://www.biicl.org/files/3866_andrew_newcombe.pdf> citing the example of Canfor Corporation v. United States of America and Terminal Forest Products Ltd. v. United States of America (Decision on Preliminary Question, 6 June 2006) at [18]

[42] First Partial Award, 13 November 2000, 8 ICSID Reports 18

[43] First Partial Award, 7 August 2002, 7 ICSID Reports 239 at [V.20]

One reason for this cautious take on public policy justifications by investment tribunals may be that IIAs tend not to have closed lists of exceptions like the GATT/GATS, nor do they impose a strict necessity test linking the objective to the instrumentation used to attain it. The method undertaken by investment arbitrators has been accordingly praised by commentators who note that generally investment tribunals were willing to consider a wider range of legitimate public policy objectives (e.g. the environment, crime prevention, minority rights) and then to evaluate them based on their reasonable or rational connection to the measure and the policy pursued, much as in *Myers* and *Methanex*. This approach does offer flexibility in that it acknowledges that a government must act in the best interests of its citizens in all sorts of legitimate situations. The more restricted technique of WTO panels under GATT Article XX or GATS Article XIV is consequently unjustified, some believe, particularly in the context of de facto discrimination against foreign investors where governments deserve the chance to explain why differential treatment of the foreign investors is based not on nationality, but on some other worthy ground.[44] While affording governments greater room to enact laws in the public interest is a laudable goal, this could be achieved with more jurisprudential certainty. This would foster predictability and in turn process-oriented legitimacy through a greater number of designated general exceptions in conjunction with precision in the connecting language.

V Improving the General Exceptions for the Investment Context

The presumed intention of states including trade-originated general exceptions in their IIAs is one of greater regulatory freedom on the part of the host states.[45] It is not evident that this will always be the case because it is not clear how such provisions will be applied by arbitrators sitting on investment tribunals in the absence of more discrete guidelines. Some of the difficulties associated with the use of general exception provisions and associated WTO

[44] DiMascio and Pauwelyn, above n 39 at 76

[45] Newcombe, above n 41 at 2

caselaw in the arena of investment treaty arbitration could be mitigated through minor modifications.

i) Increasing the number of listed general exceptions

As noted above, investment tribunals have not been constrained by designated exceptions such as those specified in WTO law. In order to preserve this flexibility while achieving the greater legal certainty engendered by the GATT/GATS enumerated list, some further spheres of regulatory activity should be specified. Some obvious areas for coverage would be the environment as it is understood in the 21st century, possibly encapsulating climate change. The prevention of modern crimes such as on-line fraud, identity theft and more traditional activities such as smuggling could be added, as could measures taken to deal with financial crises. Express reference to the allowing of states to fulfil their existing obligations under other international treaties, such as those relating to indigenous rights or the environment could also be listed. A clear reference to cultural preservation would offer useful guidance to arbitration tribunals, particularly if this were supplemented by language regarding measures undertaken to protect the interests of indigenous rights, minority rights or human rights generally – issues that did not attract the attention of GATT negotiators in the 1940s.

ii) Applying the general exceptions to all provisions in the IIA

In order to maximize their effectiveness in improving the overall legitimacy of arbitration as a forum for the resolution of disputes between investors and states, general exceptions contained in IIAs should apply to the entire range of protections offered by the relevant instrument. This must include guarantees against expropriation without compensation as well as fair and equitable treatment, not simply the non-discrimination obligations (which tend to be the focus of general exception analysis in WTO jurisprudence). Claims of expropriation and fair and equitable treatment often embrace issues of discrimination that may be justifiable on legitimate grounds, just as they may disclose genuine efforts by governments to address public policy goals. This could offer badly needed clarity to the notoriously obscure concepts of regulatory

expropriation as well as what constitutes "wilful disregard of due process of law"[46] by host states under the fair and equitable treatment standard.

iii) Consistency in the qualifying language

As noted above, investment tribunals considering defences to IIA obligations have not been bound by linking language such as "necessary" or "related to" that is found in the text of the GATT. Different linking language has led to much debate, both by the panels and Appellate Body as well as scholars.[47] It is not clear that the two connecting phrases reflect conscious decisions of GATT drafting parties or that they must even be construed to indicate functionally different legal burdens, although "necessary" is normally viewed as imposing a stricter test than "relating to." New IIAs including WTO-inspired general exceptions could resolve this ambiguity and avoid the confusing situation of an implicit hierarchy of societal values by specifying one clear standard for the nexus between the desired goal and the measure used to fulfil it.

iv) Clarification regarding remedies

In the WTO context failure to justify a measure through the general exceptions leads to an obvious result – the measure must be eliminated from the respondent state's laws or else modified in some way. The effect of a public policy justification in the investment context is less evident. In situations where a host state's measure is necessary for the public welfare, it is unlikely that an arbitral tribunal would interpret a general exception clause as negating the requirement to pay compensation for the expropriation as this is a principle of customary international law. Instead the existence of a valid justification based upon a general exception could be viewed as a mitigating factor that should reduce a claim for compensation. The

[46] Elettronica Sicula SpA (ELSI) (US v Italy) ICJ Reports (1989) at [128]

[47] See e.g. van den Bossche, above n 13 at 554

strongest justifications could lower the compensation payable to a nominal amount. This continuum of compensation would reflect the need for investors to bear some of the burden of the risk that their activities could interfere with public policy goals.

VI Conclusion

Investment treaty arbitrators (whether they are chosen by parties like normal investment treaty arbitration or appointed like judges as per the TTIP's new proposal) cannot adjudicate in a publicly-minded way if they do not have the tools to do so. Encouragingly, some new IIAs have included general exceptions modelled on those of the WTO's GATT and GATS. This is a crucial new development in international investment law because it recognizes the importance that social policy plays in the regulatory treatment of foreign investors, issues that are increasingly featuring in investor-state arbitration and which underpin numerous critiques of the system's legitimacy.

Wary of surrendering its sovereignty to international arbitrators in light of the Philip Morris action mentioned above, Australia has debated whether to include investor-state dispute settlement provisions in its future IIAs.[48] Fear of arbitrator's disregard of public policy concerns may cause other countries to follow this route. A better strategy than rejecting investment treaty arbitration outright, restructuring it along the lines of a domestic court, or perhaps most alarmingly, prematurely settling claims in fear of massive damages awards would be to draft IIAs that contain general exceptions framed in language of GATT Article XX and GATS Article XIV. These provisions, along with their enumerated exceptions and anti-protectionist balancing, would empower arbitrators to consider issues such as a host state's genuine concern for the wellbeing of its citizens when enacting laws that affect the commercial interests of foreign firms.

[48] "Philip Morris Files for Arbitration over Intellectual Property Dispute With Australia", Investment Treaty News, International Institute for Sustainable Development, 12 January 2012. Under the TPP state parties may choose to deny the benefits of the ISDS provisions to claims against tobacco control measures.

Given the explosion of investor-state disputes brought before arbitration tribunals and the acceptance of IIAs as instruments of global economic policy, the time has come for international investment law to draw its own "line of equilibrium" in the assessment of public policy norms in order to escape the blurred approach that characterizes much investment arbitration on this issue today. This demarcation can be achieved by borrowing the well-established language and jurisprudence of the general exceptions developed over decades in the trade context by the GATT/WTO dispute settlement system and placing it into modern IIAs, such as has been done in ground breaking mega regional economic agreements like the TTIP and the TPP. For their part, arbitrators must be willing to engage with these principles in order to assess the purpose and impact of a wide range of measures. This would in turn help enhance the legitimacy of investment arbitration, placing greater emphasis on recognized public policy concerns as a counterpoint to investor protection and safeguarding the essential "right to regulate" where this is pursued in the genuine public interest.[49]

Investment treaty arbitration can secure its place as a vital instrument of public international law not by isolating itself as a functionally autonomous regime shaped exclusively by the parties to the dispute but by embracing legal principles developed in other disciplines, notably trade and the WTO. Crafting an entirely new system of dispute settlement, as in the EU's investment court TTIP proposal, while politically popular, overreaches - the veritable sledgehammer to crack a walnut. A simpler solution to legitimize investment arbitration that is based on emphasizing the well understood principles of GATT Article XX and GATS Art XIV is in order. In this way it may somewhat ironically be trade and investment law's treatment of the non-economic *social* issues that ultimately integrates the two chief regimes of international economic law and brings cohesion to the world's most important systems of commercial dispute resolution.

[49] It is noteworthy that the draft Investment Chapter of TTIP contains an express right to regulate for "legitimate policy objectives" including public health and safety (Art 2.1).