

Exploring the Confines of International Investment and Domestic Health Protections—Is a General Exceptions Clause a Forced Perspective?

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I. INTRODUCTION

The international law of foreign investment is one of the fastest-growing areas of international economic law with several bilateral investment treaties or preferential trade agreements, including an investment chapter, negotiated every year. At the same time, new cases are being lodged at an exponential rate.¹ Thanks to the remarkable effectiveness of its law, the investment regime has become a center of attraction not only for the settlement of disputes strictly related to investment but also problems between governments concerning matters including those of non-economic dimensions. The nature of the international arbitral process is entirely different from a national court process; it is an international tribunal governed by an international convention, mandated to inquire into the conduct and responsibility of a State in light of its treaty and customary international law obligations.² This could result in significant State liability and could impact regulatory regimes and policy goals, attracting considerable criticism.³

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¹ Investment treaties provide various dispute resolution mechanisms, “one of the most important of which is international investor-state arbitration which entitles an injured investor to sue the host government for damages because of a violation of treaty standards and rights.” Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT’L L.J., 427, 446 (2010). A supervising body may assist in appointing arbitrators, determining the place of arbitration, determining costs and arbitrator fees, and so forth, and will itself charge a fee for the performance of these functions. The most common supervisory bodies referred to in investment-enabling institutions are the International Centre for the Settlement of Investment Disputes (ICSID) and the International Chamber of Commerce’s (ICC) International Court of Arbitration; each body has its own set of arbitration rules. *See id.* at 446-47 n.91. *Ad-hoc* arbitrations most often follow the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL). *See id.*

² In the *Canfor v. United States* Order of the Consolidation Tribunal, the Tribunal noted the general trend in investor-State arbitration is transparency of process, a trend to which the tribunal itself subscribed. *See Canfor Corporation v. United States*, UNCITRAL, Order of the Consolidation

The potential use of investment arbitration to challenge tobacco regulations has become a source of controversy in Trans-Pacific Partnership (TPP) negotiations⁴ while regulation of investor-State dispute settlement (ISDS) was a key issue in the recent Korea-U.S. (Korus) Free Trade Agreement (FTA).⁵ While investor-state dispute settlement is advocated by the U.S. Business Coalition for the TPP, there is also much resistance. At present, Australia has rejected ISDS in the TPP, and it remains to be seen how far this view will influence the other TPP parties.⁶ It is too early to say if Australia's change in policy has affected other countries.

It is more likely that multiplication of investment disputes combined with some questionable awards has gradually led some governments to question the benefit of arbitration.⁷ As stressed by Professor Lo, a "tension" is emerging between the goal of attracting investment (and hence to protect foreign investors), and seems to prevail over non-economic concerns, and other public policy aims, which may be impacted in the process.⁸ There has been some progress made on redesigning investment institutions to take into account issues of public policy nature.⁹ The increases in transparency and accountability to date, however, have come about on an ad hoc basis and are mainly restricted to practice within the North American Free Trade Agreement (NAFTA). While changes to arbitral rules, particularly in ICSID, suggest a positive trend, they are still fairly limited.

As a consequence, a new trend is emerging in treaty practice consisting of including a "general exceptions" clause, which governments hope will provide greater regulatory flexibility and serve pursuing public interest objectives such as tobacco restrictions. Interestingly, investment treaties are importing such a clause

Tribunal, ¶ 139 (Sept. 7, 2005); see also *Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanz.*, ICSID Case No. ARB/05/22, Procedural Order No. 2, at 5 (May 24, 2006).

³ Even if disputes do not result in regulatory rollback, there are other possible policy implications, which are harder to measure.

⁴ See Tania Voon & Andrew Mitchell, *Time to Quit? Assessing International Investment Claims Against Plain Tobacco Packaging in Australia*, 14 J. INT'L ECON. L. 515, 517-18 (2011) (discussing attempts by tobacco companies to discredit Australia's TPP plain packaging scheme by looking to international investment law).

⁵ Much of the debate regarding the ISDS provisions of the KORUS FTA is viewed as an outgrowth of political posturing prior to the parliamentary and presidential elections next year rather than legal or economic arguments. But the developments in Korea have potentially lasting effects throughout our (Asia-Pacific) region and beyond (especially in the context of Japan joining TPP negotiations).

⁶ Australia is trying to persuade other TPP members to do away with ISDS in the investment chapter. See DEP'T OF FOREIGN AFFAIRS & TRADE, GILLARD GOVERNMENT TRADE POLICY STATEMENT: TRADING OUR WAY TO MORE JOBS AND PROSPERITY 14 (2011), available at <http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html>. The reason for doing so according to Australia is that ISDS is not required to secure foreign direct investment (FDI) into TPP countries and they confirm this through an independent study. Leon E. Trakman, *Investor State Arbitration or Local Courts: Will Australia Set a New Trend?*, 46 J. WORLD TRADE 83 (2012). This is an interesting issue for the developing members of the TPP to seriously consider and they may have to conduct a study to confirm or rebut Australia's findings.

⁷ Similarly, the Australia-US FTA does not contain an investor-state dispute settlement clause (ISDS), although other Australian PTAs—e.g. the Singapore-Australia FTA—contain such a clause.

⁸ See Chang-fa Lo, *External Regime Coherence: WTO/BIT and Public Health Tension as an Illustration*, 7 ASIAN J. WTO INT'L HEALTH L. & POL'Y 263, 276 (2012).

⁹ For instance, recent agreements negotiated by the United States and Canada suggest a recognition of potential investment-environment conflicts, although it remains debatable as to whether the additions and clarifications in these agreements go far enough. In terms of arbitration institutions, there is certainly a growing consensus that that they require a higher degree of transparency and accountability than has been traditionally accepted.

from World Trade Organization (WTO) law. The text of GATT Article XX GATT recognizes that:

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, nothing in this Agreement [the GATT] shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . .

(b) necessary to protect human, animal or plant life or health; . . .

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption . . .¹⁰

In the current analysis, I will not discuss the fact that there is a risk of fragmentation in interpreting such clauses, as it goes beyond the scope of this Article.¹¹ This Article focuses the analysis on the ramifications of the recent investment treaty practice, including “general exceptions” in investment treaties in light of increasing attention paid by governments to tobacco controls. This Article fundamentally tries to answer whether the “general exceptions” clause found in investment treaties can be an efficient tool for governments to develop national health policies. It is an important question, both at policy and theoretical levels, as investment treaties grant significant rights to foreign investors, such as tobacco companies, while many governments are willing to develop tobacco control measures which would echo those enforced by Uruguay and Australia, two countries subject to investors’ claims.

II. TOBACCO AS A FOREIGN INVESTMENT: EXPLORING THE INTERNATIONAL LAW APPLICABLE

Tobacco companies have had marketing activities in many countries throughout the world helped by the movement of trade liberalization (WTO and Preferential Trade Agreements (PTAs)) and liberalization of investment rules (investment treaties), which have provided them with the opportunity to expand their operations.¹² As any investors, tobacco companies can use international investment agreements (IIAs) in order to access foreign markets and protect their investments which may take various forms, such as capital invested in the host countries, factories, shops, the final product.¹³ The investment protection clauses found in

¹⁰ General Agreement on Tariffs and Trade, art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

¹¹ However, it is worth mentioning that general exceptions incorporated in investment treaties may not be interpreted in the same manner than within WTO, which raises the issue of diverging interpretation for similar provisions.

¹² See generally Riyaz Dattu, *A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment*, 24 *FORDHAM INT’L L.J.* 275 (2000) (discussing investment liberalization); Edward D. Mansfield et al., *World Trade Report 2011. The WTO and Preferential Trade Agreements: From Co-Existence to Coherence*, 11 *World Trade Rev.* 327 (2012) (discussing trade liberalization).

¹³ See Javier Garcia Olmedo, *The Use of Tobacco Trademarks Versus Public Health: A New Trend in Investor-State Arbitration*, 15 *INT’L ARB. L. REV.* 42 (2012).

investment-enabling institutions are vague and open-ended.¹⁴ As a result, tribunals are left with a large scope to interpret these norms. Clarifications or exceptions flesh out some of the detail of vaguely worded provisions in investment agreements and make it more clear how public policy regulations should be treated under them.¹⁵ I first review the international standards in favor of foreign investors (II.A) and then provide a mapping of the “general exceptions” clause in recent treaty practice (II.B).

A. THE INTERNATIONAL STANDARDS IN FAVOR OF FOREIGN INVESTORS

The international regime for foreign investment has become increasingly dependent upon international treaties, which constitute a patchwork of agreements and provisions that address the regulation of investment.¹⁶ This “treatification”¹⁷ shows the significant recalibration of international investment law over the last years. According to the United Nations Conference on Trade and Development (UNCTAD) studies and statistics, the network of international investment agreements (IIAs) has been expanding considerably over the last decade, amounting by the beginning of 2013 to more than 2800 Bilateral Investment Treaties (BITs), whereas fewer than 400 BITs existed by the end of the 1990s.¹⁸

In terms of substance, investment treaty practice shows that

nearly all international investment agreements cover the following nine topics: (1) definitions and scope of application; (2) investment promotion and conditions for the entry of foreign investments and investors; (3) general standards for the treatment of foreign investors and investments; (4) monetary transfers; (5) expropriation and dispossession; (6) operational and other conditions; (7) losses from armed conflict or internal disorder; (8) treaty exceptions, modifications, and terminations; and (9) dispute settlement.¹⁹

These diverse provisions are important to reassure foreign investors that they will be able to reap the benefits of their investment,²⁰ and no trend denies such an approach,

¹⁴ See generally Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1584 (2005).

¹⁵ See Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179, 179 (2010) (“As investment treaties create broad standards rather than specific rules, they must be interpreted before they can be applied. Investor-state tribunals have accordingly played a critical role in interpreting, hence developing, investment treaty law.”).

¹⁶ Of course, the WTO has not directly tackled the broad issue of foreign investment rules. Instead, GATT and the WTO have dealt with a narrow set of very specific issues, which has left nations to formulate their own policies through BITs. The WTO, however, handles two agreements that address investment directly: the Agreement on Trade-Related Investment Measures (TRIMs) and the most important the General Agreement on Trade in Services (GATS). On the attempts at crafting multilateral disciplines on investment, see Debashis Chakraboty, Julien Chaisse & Jaydeep Mukherjee, *Deconstructing Services and Investment Negotiations: A Case Study of India at WTO GATS and Investment Fora*, 14 J. WORLD INVESTMENT & TRADE 44 (2013). See also David Collins, *A New Role for the WTO in International Investment Law: Public Interest in the Post-Neoliberal Period*, 25 CONN. J. INT'L L. 1 (2009).

¹⁷ See Jeswald W. Salacuse, *The Treatification of International Investment Law*, 13 LAW & BUS. REV. AM. 155 (2007).

¹⁸ JAMES ZHAN ET AL., UNITED NATIONS CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2012, 199 annex tbl.III.1 (2012) (listing IIAs as of mid-June, 2012).

¹⁹ Salacuse, *supra* note 1, at 432.

²⁰ International investment regulation is an example *par excellence* for fragmentation in an important area of international economic law. Despite this similarity in structure and areas of substantial convergence, there are also areas characterized by wide variation in the substantive

although evidence on the extent to which investment decisions are influenced by investment treaties is mixed.²¹

B. MAPPING THE USE OF EXCEPTIONS IN INVESTMENT TREATIES RECENT PRACTICE

Clarifications or exceptions flesh out some of the detail of vaguely worded provisions in investment agreements and clarifies how public policy regulations should be treated under them. These types of provisions are mainly found with relation to two clauses: performance requirements and expropriation. The Canadian Model Foreign Investment Promotion and Protection Agreement (FIPA)'s section (2) in Article 7 on performance requirements states, "A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with paragraph 1(f)."²² American agreements tend to adopt a more detailed GATT Article XX-like exception.²³

In order to provide a mapping of the "general exceptions" clause in recent investment rule-making, I have used the *BITsel Index*²⁴ to locate and identify these investment treaties that either incorporate WTO "general exceptions" clause or merely take inspiration from the same WTO provision. This mapping would not be complete without a review of some specific clauses aiming at protecting a specific interest, such as health protection.

1. Instruments Incorporating WTO "General Exceptions" Clause

The incorporation means that the investment treaty simply uses the wording of WTO law and even makes explicit reference to this model. Some IIAs incorporate Article XX, GATT *or* Article XIV, General Agreement on Trade in Services (GATS), *mutatis mutandis*. Some others incorporate both, which shows a very inconsistent treaty practice.

provisions. See Julien Chaisse et al., *The Regulatory Framework of International Investment: The Challenge of Fragmentation in a Changing World Economy*, in *THE PROSPECTS OF INTERNATIONAL TRADE REGULATION – FROM FRAGMENTATION TO COHERENCE* 417, 417-51 (Thomas Cottier & Panagiotis Delimatsis eds., 2011).

²¹ The extent to which BITs actually attract increased flows of foreign direct investment is disputed. According to Salacuse & Sullivan, entering a BIT with the United States of America would nearly double a country's FDI inflows. Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67 (2005). However, entering BITs with other OECD countries had no significant effect on FDI. See *id.* at 105-11. Another important study concludes that there is "little evidence that BITs have stimulated additional investment." Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a Bit . . . and They Could Bite* 22 (World Bank Dev. Research Grp., Research Working Paper No. 3121, 2003), available at <http://elibrary.worldbank.org/content/workingpaper/10.1596/1813-9450-3121>.

²² MODEL CANADA FOREIGN INVESTMENT PROMOTION AND PROTECTION AGREEMENT, ART. 7, available at <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf>.

²³ GATT, *supra* note 10, at art. XX. This provision justifies deviations from all WTO rules, in particular, but not exclusively, from the constitutional principle of national treatment and from the key prohibition of quantitative restrictions. *Id.*

²⁴ *Do Bilateral Investment Treaties Increase Foreign Direct Investment Flows*, BITSEL INDEX, www.cuhk.edu.hk/proj/BITsel (last visited Feb. 8, 2013). For a commentary on this Index, see Julien Chaisse & Christian Bellak, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Preliminary Reflections on a New Methodology*, 3 TRANSNAT'L CORPS. REV. 3 (2011).

Example No. 1: The New Zealand-Malaysia Free Trade Agreement was signed in Kuala Lumpur on October 26, 2009.²⁵ Chapter 10 covers investment and chapter 17 covers exceptions. Chapter 17 and its Article 17.1 are about General Exceptions. The Agreement states:

1. For the purposes of Chapters 2 through 10, (Trade in Goods, Rules of Origin, Customs Procedures and Cooperation, Trade Remedies, Sanitary and Phytosanitary Measures, Technical Barriers to Trade, Trade in Services, Movement of Natural Persons, and Investment) of this Agreement, Article XX of GATT 1994 and its interpretive notes and Article XIV of GATS (including its footnotes) are incorporated into and made part of this Agreement, *mutatis mutandis*.

2. The Parties understand that the measures referred to in Article XX(b) of GATT 1994 and Article XIV(b) of GATS include measures necessary to protect human, animal or plant life or health, and that Article XX(g) of GATT 1994 applies to measures relating to the conservation of living and non-living exhaustible natural resources.

3. For the purposes of Chapters 2 through 10, (Trade in Goods, Rules of Origin, Customs Procedures and Cooperation, Trade Remedies, Sanitary and Phytosanitary Measures, Technical Barriers to Trade, Trade in Services, Movement of Natural Persons, and Investment) of this Agreement, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade in goods and services or investment, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures necessary to protect national works or specific sites of historical or archaeological value, or to support creative arts of national value.²⁶

Example No. 2: The New Zealand-China FTA was signed on April 7, 2008 in Beijing, after negotiations that spanned fifteen rounds over three years.²⁷ It entered into force on October 1, 2008, after ratification by the New Zealand Parliament.²⁸ It regulates foreign investment in Chapter 11 and addresses the exceptions in chapter 17. It is in the latter chapter that Article 200.1 provides “general exceptions” to incorporating WTO law and covering investment matters. Article 200 reads as follows:

1. For the purposes of this Agreement, Article XX of GATT 1994 and its interpretative notes and Article XIV of GATS (including its footnotes) are incorporated into and made part of this Agreement, *mutatis mutandis*.

²⁵ New Zealand-Malaysia Free Trade Agreement, Oct. 26, 2009 [2010] NZTS 09, *available at* http://www.parliament.nz/NR/rdonlyres/EF72A49B-246D-4775-88EB-1606723EC005/209843/DBHOH_PAP_22632_NewZealandTreatySeriesMalaysiaNewZ.pdf.

²⁶ *Id.* art. 17.1.

²⁷ Free Trade Agreement Between the Government of New Zealand and the Government of the People’s Republic of China, Apr. 7, 2008 [2008] NZTS 19, *available at* http://www.parliament.nz/NR/rdonlyres/EAF7A717-6DD2-4A77-833A-7C1A86B42A33/202439/DBHOH_PAP_22061_NewZealandTreatySeriesFreeTradeAgr.pdf.

²⁸ *Id.*

2. The Parties understand that the measures referred to in Article XX(b) of GATT 1994 and Article XIV(b) of GATS, as incorporated into this Agreement, can include environmental measures necessary to protect human, animal or plant life or health, and Article XX(g) of GATT 1994, as incorporated into this Agreement, applies to measures relating to the conservation of living and non-living exhaustible natural resources, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in goods or services or investment.

3. For the purposes of this Agreement, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade in goods or services or investment, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures necessary to protect national works or specific sites of historical or archaeological value, or to support creative arts of national value.

4. Nothing in this Agreement shall prevent the Parties from taking any necessary measures to restrict the illicit import of cultural property from the other Party under the framework of the United Nations Educational, Scientific and Cultural Organization ("UNESCO") Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, done at Paris on 14 November 1970.²⁹

Example No. 3: In the FTA concluded by the European Free Trade Association (EFTA)³⁰ and Hong Kong, China, a similar option has been chosen.³¹ Chapter 4 addresses investment matters and its Article 4.9 on "Exceptions" states: "The rights and obligations of the Parties in respect of general exceptions and security exceptions shall be governed by Article XIV and paragraph 1 of Article XIV *bis* of the GATS, which are hereby incorporated into and made part of this Chapter, *mutatis mutandis*."³²

Example No. 4: The Free Trade Agreement (FTA) signed between Peru and Singapore entered into force in August 2009.³³ Chapter 10 addresses investments and Chapter 18 addresses exceptions:

²⁹ *Id.* art. 200.

³⁰ The EFTA is a free trade organization between four European countries that operates in parallel with the European Union (EU). The EFTA was established on May 3, 1960 as a trade bloc-alternative for European states who were either unable or unwilling to join the then-European Economic Community (EEC) which has now become the EU. *See The European Free Trade Association*, EFTA, <http://www.efta.int/about-efta/the-european-free-trade-association.aspx> (last visited Apr. 11, 2013).

³¹ *See* Free Trade Agreement Between the EFTA States and Hong Kong, China, EFTA-H.K., art. 4.9, June 21, 2011, European Free Trade Ass'n, *available at* <http://www.efta.int/free-trade/free-trade-agreements/hong-kong.aspx>.

³² *Id.*

³³ *Overview of Peru (PESFTA)*, IE SINGAPORE, http://www.fta.gov.sg/fta_pesfta.asp?hl=3 (last visited Feb. 27, 2013).

For purposes of Chapter 10 (Investment), Chapter 11 (Cross-Border Trade in Services), Chapter 12 (Temporary Entry for Business Persons) and Chapter 13 (Electronic Commerce) 18-1, Article XIV of the GATS (including its footnotes) is incorporated into and made part of this Agreement, mutatis mutandis. The Parties understand that the measures referred to in Article XIV(b) of the GATS include environmental measures necessary to protect human, animal, or plant life or health.³⁴

It is important to emphasize the fact that some other “general exceptions” clauses found in PTAs, although incorporating the WTO law and covering large portions of the PTA, do not cover the investment chapter. It is the case of the U.S.-Singapore FTA.³⁵ Such PTAs are logically excluded from the analysis.

2. Inspiration from WTO “General Exceptions” Clause

Some other investment treaties do not cite the WTO model but employ a wording so close that the inspiration is obvious.

Example No. 1: The Singapore-Jordan Bilateral Investment Treaty (BIT) was concluded on April 29, 2004 and came into force on August 22, 2005.³⁶ On the same day, respectively, the Singapore-Jordan Free Trade Agreement was also concluded and entered into force.³⁷ Article 18 states that

[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination, between the Parties where like conditions prevail, or a disguised restriction on investments in the territory of a Party by investors of the other Party, nothing in this Treaty shall be construed to prevent the adoption or enforcement by a Party of measures:

- (a) necessary to protect public morals or to maintain public order;
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Treaty including those relating to:
 - (i) the prevention of deceptive and fraudulent practices or to deal with the effects of fraud on a default of contract;

³⁴ Peru-Singapore Free Trade Agreement, Peru-Sing., art. 18.1(2), May 29, 2008, Org. of Am. States, http://www.sice.oas.org/TPD/PER_SGP/Final_Texts_PER_SGP_e/index_e.asp#top.

³⁵ United States-Singapore Free Trade Agreement, U.S.-Sing., ch. 15, art. 21.1, May 6, 2003, Office of the U.S. Trade Representative, <http://www.ustr.gov/trade-agreements/free-trade-agreements/singapore-fta/final-text>.

³⁶ Bilateral Investment Treaty Between the Government of Hashemite Kingdom of Jordan and the Government of the Republic of Singapore, Jordan-Sing., May 16, 2004, http://www.worldtradelaw.net/fta/agreements/JorSing_BilInvTreaty.pdf [hereinafter BIT Jordan-Sing.].

³⁷ Specifically, [t]he SJFTA and the BIT form part of a broader Framework on Closer Economic Partnership between Singapore and Jordan, which also includes a Technical Support Agreement signed in October 2003 and a Memorandum of Understanding in Cultural and Tourism Cooperation signed during the Official Visit of then Prime Minister Goh Chok Tong to Jordan in February 2004.

Overview of Hashemite Kingdom of Jordan (SJFTA), SING. FTA NETWORK, http://www.fta.gov.sg/fta_sjfta.asp?hl=5 (last visited Apr. 12, 2013).

(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;

(iii) safety;

(d) imposed for the protection of national treasures of artistic, historic or archaeological value;

(e) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.³⁸

Example No. 2: Canada is unique amongst OECD states in including Article XX GATT-like general exceptions in its BITs. There are general exceptions in eighteen of Canada's twenty-four BITs. Further, Canada's new model BIT, released in 2003, also contains general exceptions. The new Canadian model was used as the model for the 2007 Canada-Peru BIT, Article 10, which provides:

1. [s]ubject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:

(a) to protect human, animal or plant life or health;

(b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or

(c) for the conservation of living or non-living exhaustible natural resources.³⁹

Example No. 3: Article 83 of the Singapore-Japan New Age Economic Partnership provides:

1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Party, or a disguised restriction on investments of investors of a Party in the territory of the other Party, nothing in this Chapter shall be construed to prevent the adoption or enforcement by either Party of measures:

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

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

(c) necessary to secure compliance with the laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contract;

³⁸ BIT Jordan-Sing., *supra* note 36, at art. 18.

³⁹ Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments, Can.-Peru, art. 10, Nov. 14, 2006, *available at* http://unctad.org/sections/dite/ia/docs/bits/canada_peru.pdf.

- (ii) the protection of the privacy of the individual in relation to the processing and dissemination of personal data and the protection of confidentiality of personal records and accounts;
- (iii) safety;
- (d) relating to prison labour;
- (e) imposed for the protection of national treasures of artistic, historic, or archaeological value;
- (f) to conserve exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.⁴⁰

3. Specific Provisions Aimed at Protecting a Specific Legitimate Interest

Rather than a “general exceptions” provision this kind of clause appears as a rule of construction or non-operative text. We consider whether there is any protection offered to non-economic standards (be they environmental, labor, etc.). Preambles and non-binding statements are these kinds of specific provisions. For example, the Netherlands’ 2004 Model BIT states, “Considering that these objectives can be achieved without compromising health, safety and environmental measures of general application.”⁴¹

More important than general opening statements are provisions within the text of the agreement that relate to the environment, and these can be found in several recent investment agreements.

Because BITs grant strong protection to investors of either state’s party operating in the territory of the other party, they may impinge upon human rights enforcement in several ways. Therefore, states may face conflicting international legal obligations under the two regimes. As a result, a BIT without any such provision may be considered to have great impact on foreign direct investment (FDI) flows, whereas any provision in a BIT seeking to protect human rights, environment, etc., may be considered as having a lower impact.

In Norway’s BIT model, such concerns are reflected in a provision that reads:

The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures or core labour standards. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention of an investment of an investor.⁴²

The Central America–Dominican Republic Free Trade Agreement (CAFTA–DR) contained an article that specifically refers to the relationship of the agreement with multilateral environmental agreements (MEAs). Article 17.12(1) of the CAFTA–DR states:

⁴⁰ Agreement Between Japan and the Republic of Singapore for a New-Age Economic Partnership, Japan-Sing., art. 83, Jan. 13, 2002, Ministry of Foreign Affairs of Japan, <http://www.mofa.go.jp/region/asia-paci/singapore/jsepa.html>.

⁴¹ ORG. FOR ECON. CO-OPERATION & DEV. [OECD], INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS: A COMPANION VOLUME TO INTERNATIONAL INVESTMENT PERSPECTIVES 182 (2008).

⁴² Draft MODEL NORWEGIAN BILATERAL INVESTMENT TREATY art. 11 (2007), available at <http://www.asil.org/ilib080421.cfm>.

The Parties recognize that multilateral environmental agreements to which they are all party play an important role in protecting the environment globally and domestically and that their respective implementation of these agreements is critical to achieving the environmental objectives of these agreements. The Parties further recognize that this Chapter and the ECA can contribute to realizing the goals of those agreements. Accordingly, the Parties shall continue to seek means to enhance the mutual supportiveness of multilateral environmental agreements to which they are all party and trade agreements to which they are all party.⁴³

In the Austria BIT Model (Article 4 and 5) which has never been formally published but widely commented by experts:

The Contracting Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement

“The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labour laws.” Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labour rights referred to in paragraph 2 as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

(2) For the purposes of this Article, “labour laws” means each Party’s statutes or regulations, that are directly related to the following internationally recognized labour rights: (a) the right of association; (b) the right to organize and to bargain collectively; (c) a prohibition on the use of any form of forced or compulsory labour; (d) labour protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labour, and (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.⁴⁴

The incorporation and insertion of WTO law general exceptions into investment treaties is the recent trend I intend to test in the next section. Does it work and can it

⁴³ The Dominican Republic-Central America-United States Free Trade Agreement, art. 17.12, Aug. 5, 2004, Office of the U.S. Trade Representative, <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>.

⁴⁴ CHRISTIAN BELLAK & SUSANNE MAYER, INWARD FDI IN AUSTRIA AND ITS POLICY CONTEXT 5 nn.9-10 (2010), available at http://www.vcc.columbia.edu/files/vale/documents/Austria_IFDI_Final.pdf.

allow states to adopt tobacco controls, which would contradict some of their investment commitments but be justified under an exception regime? Domestic tobacco controls that contradict investment treaties could of course try to be justified under customary international law, which defenses have been discussed by a number of international tribunals.⁴⁵ The Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, however, classifies certain acts and omissions of States causing damage to an alien as “wrongful,”⁴⁶ except where there is a “sufficient justification”⁴⁷ for the conduct. A “sufficient justification” is defined as “[t]he actual necessity of maintaining public order, health, or morality in accordance with laws enacted for that purpose”⁴⁸ A justification will be insufficient, however, where

the measures taken against the injured alien clearly depart from the law of the respondent State or unreasonably depart from the principles of justice or the principles governing the action of the authorities of the State in the maintenance of public order, health, or morality recognized by the principal legal systems of the world.⁴⁹

As a result, customary international law limits the exceptions to the general maintenance of public order, safety, health, and morality, whereas the list in GATT Article XX is more extensive and somewhat different. For example, it enumerates the protection of “animal or plant life or health,” “the protection of patents, trade marks and copyrights, and the prevention of deceptive practices,” “national treasures of artistic, historic or archaeological value,” and “conservation of exhaustible natural resources,” among others.⁵⁰

III. CONCEPTUALIZING THE “GENERAL EXCEPTIONS” CLAUSE: A TOOL TO FAVOR NATIONAL TOBACCO CONTROLS?

In order to assess the relevance of the public choice to include an Article XX-like provision in investment treaties and whether it can help governments to regulate tobacco, I need to present the “general exceptions” in their context of origin, i.e. the international trade context.⁵¹ The creation within the WTO framework of an obligatory dispute settlement mechanism whose rulings are binding has modified the entire international economic structure.⁵² The Dispute Settlement Body (DSB)⁵³

⁴⁵ The Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens has been cited by a number of IIA tribunals as an authoritative statement of certain aspects of the minimum standard of treatment.

⁴⁶ Special Rapporteur on State Responsibility, *First Rep. on State Responsibility – Review of Previous Work on Codification of the Topic of the International Responsibility of States*, Int’l Law Comm’n, U.N. Doc.A/CN.4/217 and Corr.1 and Add.1 Annex VII at 143 (1969) (by Roberto Ago) [hereinafter Special Rapporteur, *State Responsibility*], available at http://untreaty.un.org/ilc/guide/9_6.htm (Article 3 of the Draft Convention on the International Responsibility of States for Injuries to Aliens).

⁴⁷ *Id.* (Article 4 of the Draft Convention on the International Responsibility of States for Injuries to Aliens).

⁴⁸ *Id.* (Article 4, subsection 2 of the Draft Convention on the International Responsibility of States for Injuries to Aliens).

⁴⁹ *Id.*

⁵⁰ GATT, *supra* note 10, at art. XX.

⁵¹ See Lorand Bartels, *The WTO Legality of the Application of the EU’s Emission Trading System to Aviation*, 23 EUR. J. INT’L L. 429, 450-51 (2012).

⁵² Julien Chaisse, *Non-Trade Norms in WTO Litigation*, in NORMER LE MONDE: L’ENONCIATION DES NORMES INTERNATIONALES 213 (Yves Schemel & Wolf-Dieter Eberwein eds., 2009).

makes the WTO “an integration organization, rooted in contemporary international law. In simple terms, the WTO’s sophisticated dispute settlement mechanism makes it a distinctive organization.”⁵⁴ Its intrinsic dynamism has led WTO and its organs to judge matters of prime importance in sectors that seem to bear no relation to trade, but whose solution is essential for the natural expansion of its goals.⁵⁵ “[T]he WTO tends to attract legal issues which are located, by their nature, at the periphery of trade-related issues”⁵⁶ and raises the issue of the delicate balance between equal treatment, trade liberalization, and the pursuit of other legitimate policy goals, which balance was part of the GATT regime since its origin.

Through the famous Article XX of the GATT,⁵⁷ the WTO system explicitly addresses deviations from key trade principles and from all provisions of the GATT 1994, in particular the deviation from the basic prohibition to operate quantitative import and export restrictions under Article XI.⁵⁸ As emphasized by Professor Wang, “the objective and purpose of the general exceptions are to maintain a balance of the right of any Member to invoke an exception—taking a measure inconsistent with the substantive provisions of another article—and the substantive rights of other Members. This is so because the application of any exception means an erosion of the rights of other Members.”⁵⁹ In the practice of WTO law, Article XX of the GATT 1994 is one of the most important provisions which will require to present the general exceptions clause in light of more than a decade of jurisprudence

⁵³ The WTO DSB is established by the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU, Annex 2). This agreement provides for the establishment of panels and the Appellate Body to deal with disputes between members which both form the DSB. See John H. Jackson, *The WTO Dispute Settlement Understanding – Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT’L L. 60, 60-64 (1997); see also John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to “Buy Out”?*, AM. J. INT’L L. 109, 109-125 (2004).

⁵⁴ Pascal Lamy, *The Place of the WTO and Its Law in the International Legal Order*, 17 EUR. J. INT’L L. 969, 970 (2006). Indeed, the dispute settlement practice followed by WTO since 1995 shows that the purpose of judicial organs responsible for resolving disputes is a reminder of the legality rather than the protection of particular interests of the contracting governments. What the DSB does is to monitor legality at the international level. See Julien Chaisse & Debashis Chakraborty, *Implementing WTO Rules Through Negotiations and Sanctions: The Role of Trade Policy Review Mechanism and Dispute Settlement System*, 28 U. PA. J. INT’L L. 153, 168 (2007).

⁵⁵ However, the WTO is at a disadvantage because all its decisions have to be taken by consensus which paralyses the progress of negotiations.

In light of the stagnating World Trade Organization (WTO) negotiations, this article argues that WTO should not only focus on the development of new rules or the resolution of disputes, but should also develop “soft law” on the basis of informal mechanisms as the successful experiences of the International Competition Network or the International Monetary Fund demonstrate. In this respect, WTO should extend and refine the role of its Trade Policy Review Mechanism (TPRM) in order to be able to address essential issues of contemporary economic concerns and, hence, remain at the centre of global governance.

Julien Chaisse & Mitsuo Matsushita, *Maintaining the WTO’s Supremacy in the International Trade Order: A Proposal to Refine and Revise the Role of the Trade Policy Review Mechanism*, 16 J. INT’L ECON. L., 1, 1 (2013).

⁵⁶ Chaisse, *supra* note 52.

⁵⁷ For a comprehensive presentation of the GATT general exceptions, see GUIGUO WANG, *RADIATING IMPACT OF WTO ON ITS MEMBERS’ LEGAL SYSTEM: THE CHINESE PERSPECTIVE* 140-51 (2011).

⁵⁸ See GATT, *supra* note 10, at art. XI. It justifies deviations from rules, in particular, but not exclusively, from the principle of national treatment and from the prohibition of quantitative restrictions. *Id.* Similar deviations also exist under the GATS. See Bartels, *supra* note 51, at 460-61.

⁵⁹ WANG, *supra* note 57, at 142.

to understand the likely application under investment treaties.⁶⁰ I will briefly present Article XX (III.A) and explain how it is applied in WTO litigation (III.B) further detailing the specific circumstances in which it can be applied (III.C).

A. ANATOMY OF GATT ARTICLE XX

Article XX is composed of two distinct parts:

- First, it contains an enumeration of specific motives and conditions for restricting trade, listed in paragraphs (a) through (j). Not all of them are of equal practical importance. The critical provisions which are frequently invoked in practice—as WTO members have become increasingly concerned with environmental and human health issues as well as with the protection of intellectual property rights—refer to measures necessary to protect human, animal or plant life and health (paragraph b), measures necessary to secure compliance with laws relating to the protection of patents, trademarks and copyrights, and the prevention of deceptive practices (paragraph d), and measures relating to the conservation of exhaustible natural resources (paragraph g). Moreover, protection of public morals is provided for (paragraph a). This latter paragraph may gain, along with banning imports from prison labour (paragraph e), increased importance in relation to the protection of human rights.⁶¹
- Second, Article XX contains a general provision, the so-called chapeau, which applies in addition to the specific motives.⁶²

A similar structure can be found in Article XIV of the GATS, which provides for general exceptions in trade services. It is modeled on Article XX of the GATT 1994 and permits members to deviate from obligations set forth in the agreement and to adopt measures necessary to protect public morals (paragraph a), measures necessary to protect human, animal or plant life and health (paragraph b), and—different from Article XX of the GATT 1994—measures necessary to prevent deceptive and fraudulent practices or to deal with the effect of a default on services contracts and measures necessary to protect privacy and confidentiality in connection with the transmission of data (paragraph (c)).⁶³ Moreover, paragraph (e) refers to agreements on the avoidance of double taxation.⁶⁴ Article XIV of the GATS also contains a chapeau that applies to all measures referred to in paragraphs (a) through (e).⁶⁵

B. A THREE-STEP ANALYSIS

According to consistent GATT 1947 and WTO practice, the correct interpretation and application of Article XX of the GATT 1994 follows a three-step

⁶⁰ See Carlos M. Correa, *Implementing National Public Health Policies in the Framework of WTO Agreements*, 34 J. WORLD TRADE 89 (2000).

⁶¹ See GATT, *supra* note 10, at art. XX.

⁶² See *id.*

⁶³ General Agreement on Trade in Service, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, art. XIV, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 284 (1999), 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].

⁶⁴ *Id.*

⁶⁵ *Id.*

examination.⁶⁶ First, it is to be determined whether the policy pursued by the member with the adoption of the measure in question falls within the range of policies and motives enumerated in paragraphs (a) through (j). Second, the measure, depending on the specific paragraph, needs to be either “necessary”⁶⁷ for or “relating to”⁶⁸ the pursuit of the policy. Third, the measure needs to be applied in conformity with the chapeau.⁶⁹

The Appellate Body illustratively confirmed this three-step analysis in the *U.S.—Import Prohibition of Certain Shrimp and Shrimp Products* case⁷⁰ and stressed that the sequence of steps in the analysis of a claim of justification under Article XX reflects not inadvertence or random choice “but rather the fundamental structure and logic of Article XX”.⁷¹ Subsequently, such an interpretation has been constantly reiterated, as demonstrated by the 2012 Appellate Body ruling in *China—Measures Related to the Exportation of Various Raw Materials*.⁷²

C. THE PROTECTION OF HEALTH UNDER ARTICLE XX

In state practice, the motives and policies relating to the protection of the environment and of human, plant, and animal health are of particular importance. In the following, we focus on Article XX paragraphs (b) and (g), which protect human, animal, or plant life or health and the conservation of exhaustible natural resources respectively,⁷³ with a view to explain the WTO approach to protection of health and national policy determinations under Article XX, the background against which

⁶⁶ See Xinjie Luan & Julien Chaisse, *Preliminary Comments on the WTO Seals Products Dispute: Traditional Hunting, Public Morals and Technical Barriers to Trade*, 22 COLO. J. INT’L ENVTL. L. & POL’Y 79 (2011).

⁶⁷ In order to fall within the ambit of subparagraph (b) of Article XX, a measure must “necessary for the protection of human, animal or plant life or health.” GATT, *supra* note 10, at XX(b). In *EC—Asbestos*, the Appellate Body was called upon to elaborate on the correct meaning and application of paragraph (b) of Article XX of the GATT 1994. See Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001). After having determined that the French measure “protects human . . . life or health” within the meaning of Article XX(b), it turned to examine whether the measure was “necessary” for the protection of public health. *Id.* ¶ 164. This dispute marks the first decision under the WTO regime in which an otherwise inconsistent measure was found by a panel or the Appellate Body to be justified under Article XX(b) of the GATT 1994. The Appellate Body seized the opportunity to clarify, and to slightly refine, the findings of the panel in relation to the necessity test in Article XX(b). For more information, see SIMON LESTER, BRYAN MERCURIO & ARWEL DAVIES, *WORLD TRADE LAW: TEXT, MATERIALS AND COMMENTARY* 363-415 (2d ed. 2012).

⁶⁸ In order to fall within the ambit of subparagraph (g) of Article XX, a measure must relate “to the conservation of exhaustible natural resources.” GATT, *supra* note 10, at XX(g). “The term ‘relat[e] to’ is defined as ‘hav[ing] some connection with, be[ing] connected to.’” Appellate Body Report, *China—Measures Related to the Exportation of Various Raw Materials*, ¶ 355, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (Jan. 30, 2012) [hereinafter Appellate Body Report, *China*] (citing 2 SHORTER OXFORD ENGLISH DICTIONARY 2519 (W.R. Trumble & A. Stevenson eds., 6th ed. Oxford University Press 2007)).

⁶⁹ “[T]he purpose and object of the introductory clauses of Article XX is generally the prevention of ‘abuse of the exceptions of . . . Article [XX].’” Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, 22 WT/DS2/AB/R (Apr. 29, 1996).

⁷⁰ See Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 111-124, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter Appellate Body Report, *Shrimp*].

⁷¹ *Id.* at ¶ 119.

⁷² Appellate Body Report, *China*, *supra* note 68, at ¶ 354.

⁷³ This Article does not discuss the paragraph (a) which protects public morals and paragraph (d) which essentially deals with marketing regulations and intellectual property rights. First, these other paragraphs of Article XX of the GATT 1994 have gained less importance. Second, there are simply not relevant in the context of tobacco control.

Arbitral Tribunals would have to interpret and apply the incorporated general exceptions in investment treaties.⁷⁴

The case *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*⁷⁵ gave an overview of the interpretation and application of Article XX(b) and (g) of the GATT 1994.⁷⁶ As one observer noted,

During the course of the GATT proceedings, the United States argued *inter alia* that Thailand restrictions prohibiting cigarette imports were inconsistent to the GATT articles which prohibit quantitative restrictions and other forms of protection. The Thai government attempted to justify their ban on imported cigarettes under GATT Article XX The government feared that the country's efforts to control smoking -- and consequently smoking related illnesses -- would be hindered by an increase in total cigarette sales that result from competition between domestic and imported cigarettes if the latter were allowed to be imported. It cited medical and scientific research which showed that cigarettes are unhealthy products that can cause cancer and numerous other smoking-related diseases.

The United States insisted that the Thai import restrictions constituted arbitrary or unjustifiable discrimination, or disguised restrictions on international trade -- abuses of the Article XX health exception for protectionist purposes. The GATT panel concluded in favor of the United States. It noted that Thailand did not restrict domestic production and sales of cigarettes, and found that Thailand's ban was not "necessary" because other, non-discriminatory measures were available to control the quantity and quality of cigarettes for public health reasons. Prompted by this panel report, Thailand entered into an agreement with the United States whereby foreign cigarettes can now be imported freely into Thailand and will be accorded national, non-discriminatory treatment.⁷⁷

⁷⁴ For a comprehensive review of all the WTO cases dealing with tobacco products, see Chang-fa Lo, *supra* note 8, at 266-68.

⁷⁵ Specifically,

The United States, a large tobacco producing country, campaigned to expand cigarette exports to make up for declining demand in the United States due to increased awareness of health/environmental risks associated with smoking. The U.S. Cigarette Exporters Association (CEA) has targeted markets traditionally closed to foreign cigarette imports. The association, appealing through the office of the United States Trade Representative (USTR), alleged that the target countries' restrictive trade policies with respect to tobacco constitute unfair trade practices, which warrant the imposition of retaliatory sanctions. The U.S. government appealed the case to the GATT and eventually Thailand was forced to open its cigarette import market in order to avoid U.S. sanctions The complaint alleged that Thailand's state-owned tobacco company (the Thailand Tobacco Monopoly) unfairly restricted imports and sales of foreign cigarettes. Thai officials maintained that the prohibition of foreign cigarettes was a legitimate measure "necessary to protect the health of Thai citizens."

Julie Ferguson, *Cigarette Import Ban in Thailand*, TED CASE STUDIES (Jan. 11, 1997), <http://www1.american.edu/ted/cigar.htm>.

⁷⁶ Panel Report, *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R-37S200 (Oct. 5, 1990).

⁷⁷ Ferguson, *supra* note 75; see also Panel Report, *supra* note 76, ¶¶ 12, 22, 23, 51, 77.

But the meaning and scope of Article XX(b) was again prominently discussed, together with Article XX(g), in the two cases relating to the importation of tuna.⁷⁸ These reports, both of which were not adopted, represented the first cases in which panels addressed the tense interrelation of the multilateral trading system under the GATT 1947 framework and the protection of the environment.⁷⁹ These panel reports were of substantial catalyzing effect but did not yet succeed in finding a consistent manner of interpreting and applying Article XX of the GATT to environmental issues.

It was only with the WTO and the establishment of the Appellate Body that a new approach towards Article XX(b) and (g) of the GATT was adopted. Earlier, in *U.S.—Reformulated Gasoline*, the Appellate Body for the first time construed paragraph (g) and strictly applied the basic principle of interpretation as expressed in the Vienna Convention on the Law of Treaties (VCLT) that the words of a treaty, like the GATT and its Article XX, “are to be given their ordinary meaning, in their context and in the light of it.”⁸⁰ The Appellate Body then turned to the phrase “if such measures are made effective in conjunction with restrictions on domestic production or consumption.”⁸¹ The Appellate Body relied on the fact that those rules were “promulgated or brought into effect together with restrictions on domestic production or consumption of natural resources.”⁸² Even though Brazil and Venezuela had presented arguments suggesting that it was necessary that the purpose of the baseline establishment rules was to ensure the effectiveness of restrictions on domestic production, the Appellate Body did not consider this to be necessary.⁸³ In particular, the Appellate Body did not consider that, in order to be justified under Article XX(g), measures “relating to the conservation of exhaustible natural resources” must be primarily aimed at rendering effective restrictions on domestic production or consumption.⁸⁴ Instead, the Appellate Body read the terms “in conjunction with” and “quite plainly” as “together with” or “jointly with” and found no additional requirement that the conservation measure be primarily aimed at making effective certain restrictions on domestic production or consumption.⁸⁵

In *EC-Asbestos*,⁸⁶ the Appellate Body was called upon to elaborate on the correct meaning and application of paragraph (b) of Article XX of the GATT 1994. After having determined that the French measure “protects human . . . life or health” within the meaning of Article XX(b), it turned to examine whether the measure was “necessary” for the protection of public health.⁸⁷ This dispute marks the first decision under the WTO regime in which an otherwise inconsistent measure was found by a panel or the Appellate Body to be justified under Article XX(b) of the

⁷⁸ See Panel Report, *United States—Restrictions on Imports of Tuna* DS21/R – 39S/155 (Sept. 3, 1991); see also Panel Report, *United States—Restrictions on Imports of Tuna*, DS29/R (June 16, 1994).

⁷⁹ *Id.*

⁸⁰ Appellate Body Report, *supra* note 69, at 17. For a detailed analysis of the Appellate Body’s usage of the VCLT, see Bryan Mercurio & Mitali Tyagi, *Treaty Interpretation in WTO Dispute Settlement: The Outstanding Question of the Legality of Local Working Requirements*, 19 MINN. J. INT’L L. 275 (2010).

⁸¹ Appellate Body Report, *supra* note 69, at 19.

⁸² *Id.* at 20.

⁸³ See *id.* at 20-21.

⁸⁴ See *id.*

⁸⁵ *Id.*

⁸⁶ Appellate Body Report, *European Communities—Measures Affecting Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001). The dispute concerned the French prohibition of the manufacture, processing, sale, import, placing on the domestic market and transfer under any title of asbestos fibers and products containing them. See *id.* ¶¶ 1-2.

⁸⁷ *Id.* ¶¶ 164-175.

GATT 1994. The panel decided that chrysotile asbestos fibers and PCG fibers were like products but accepted the different treatment to be justified under Article XX of the GATT 1994.⁸⁸ The Appellate Body had justified differential treatment under Article III of the GATT 1994,⁸⁹ but it nevertheless seized the opportunity to clarify and slightly refine the findings of the panel in relation to the necessity test in Article XX(b).⁹⁰

In essence, the Appellate Body reached two conclusions of fundamental significance with respect to the protection of health and national policy determinations which involve societal value judgments as to whether to accept a risk and, if not, what measure to select. First, it noted, “[I]t is undisputed that WTO Members have the ‘right to determine the level of protection of health that they consider appropriate in a given situation.’”⁹¹ Second, the Appellate Body suggested that there may be divergent levels of scrutiny with which a panel needs to analyze whether a measure is “necessary” or not.⁹² The degree of deference then could depend on the relative importance of the various objectives or interests at stake.⁹³

IV. ASSESSING THE IMPACT OF A “GENERAL EXCEPTIONS” CLAUSE ON GOVERNMENT TOBACCO CONTROLS

In order to fall within the ambit of subparagraph (g) of Article XX, a measure must relate to the protection of human health. The term “relate to” is defined as “hav[ing] some connection with, be[ing] connected to”⁹⁴ which implies that the test can be relatively easily passed. In the pioneering *U.S.—Shrimp* case, the Appellate Body held that U.S. Section 609 was “a measure made effective in conjunction with the restrictions on domestic harvesting of shrimp,” as is further required by Article XX(g) of the GATT 1994.⁹⁵ More recently, the Appellate Body has found that, for a

⁸⁸ *See id.* at ¶ 192.

⁸⁹ *See id.*

⁹⁰ The Appellate Body indicated that:

In our view, France could not reasonably be expected to employ *any* alternative measure if that measure would involve a continuation of the very risk that the Decree seeks to “halt.” Such an alternative measure would, in effect, prevent France from achieving its chosen level of health protection. On the basis of the scientific evidence before it, the Panel found that, in general, the efficacy of “controlled use” remains to be demonstrated. Moreover, even in cases where “controlled use” practices are applied “with greater certainty,” the scientific evidence suggests that the level of exposure can, in some circumstances, still be high enough for there to be a “significant residual risk of developing asbestos-related diseases.” The Panel found too that the efficacy of “controlled use” is particularly doubtful for the building industry and for DIY enthusiasts, which are the most important users of cement-based products containing chrysotile asbestos. Given these factual findings by the Panel, we believe that “controlled use” would not allow France to achieve its chosen level of health protection by halting the spread of asbestos-related health risks. “Controlled use” would, thus, not be an alternative measure that would achieve the end sought by France.

Id. ¶ 174 (citation omitted).

⁹¹ *Id.* ¶ 168 (emphasis added).

⁹² *See id.* ¶¶ 169-175.

⁹³ The 2007 Brazil-Tyres backs up Asbestos and uses a clear test when looking at necessity since the complaining party needs to identify possible alternatives. Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 7212 WT/DS332/R (June 12, 2007).

⁹⁴ *See supra* note 67.

⁹⁵ Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 145 WT/DS58/AB/R (Oct. 12, 1998). The Appellate Body, however, subsequently established that the U.S. measure was not applied in line with the chapeau of Article XX. *Id.* ¶ 112.

measure to relate to conservation in the sense of Article XX(g), there must be “a close and genuine relationship of ends and means.”⁹⁶

In order to see whether an Article XX-like provision can allow governments to implement tobacco controls, it is first necessary to illustrate the kind of measures they can adopt. These government tobacco control measures are easily defined as “hav[ing] some connection with” health protection (4.1).

As we explained above, however, Article XX of the GATT 1994 (or any Article XX-like provisions) contemplates a two-tiered analysis of a measure that a Member seeks to justify under that provision.⁹⁷ If it is relatively easy to demonstrate that the challenged measure falls within the scope of one of the subparagraphs of Article XX, it is more difficult to further establish that the tobacco control measure at issue satisfies the requirements of the chapeau of Article XX.⁹⁸ IIAs enshrine a series of obligations on the parties aimed at ensuring a stable and favorable business environment for foreign investors.⁹⁹ These obligations pertain to the treatment that foreign investors and their investments are to be afforded in the host country by the domestic authorities, as well as ensure that foreign investors have the ability to perform certain key operations related to their investment.¹⁰⁰ In order to establish whether tobacco control measures can satisfy the requirements of the chapeau of Article XX, we need to analyze the interactions between investment key standards and the “general exceptions” key requirements that Article XX is not applied in a manner which would constitute “a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail”¹⁰¹ and is not “a disguised restriction on international trade.”¹⁰² While proceeding to these tests, one must bear in mind that where a treaty provision introduces an exception to established general rules of law, a strict, even restrictive, interpretation is required as underscored by investment tribunals.¹⁰³ Equally important from methodological perspective, I will base the analysis on a wide definition of each standard.¹⁰⁴ Results of such detailed

⁹⁶ Appellate Body Report, *China*, *supra* note 68, ¶ 355.

⁹⁷ GATT, *supra* note 10, at art. XX.

⁹⁸ As noted by Bartels,

[A] somewhat more difficult question is whether the measure would also meet the additional requirements set out in the Chapeau of Article XX. There are three such conditions: a measure may not be applied in a manner constituting unjustifiable discrimination or arbitrary discrimination between countries where the same conditions prevail, or be a disguised restriction on trade.

Bartels, *supra* note 51, at 451.

⁹⁹ See ZHAN ET AL., *supra* note 18, at 136.

¹⁰⁰ See *id.*

¹⁰¹ GATT, *supra* note 10, at art. XX.

¹⁰² *Id.*

¹⁰³ See *Noble Ventures, Inc. v. Rom.*, ICSID Case No. ARB/01/11, Award, ¶ 55 (Oct. 12, 2005).

Also, in *Sempra v. Argentine Republic*, the Tribunal held that a restrictive interpretation of an escape route from the defined obligations is mandatory. See *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶ 373 (Sept. 28, 2007). More specifically, the *Lemire v. Ukraine* Tribunal noted that the reservation at issue required prior notification and held that “notification of limiting laws and regulations is not simply a formality: it is a fundamental requirement in order to guarantee that investor's enjoy legal certainty, and States cannot invoke the exception *ex post facto*, surprising the investor's good faith.” *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, ¶ 49 (Mar. 28, 2011).

¹⁰⁴ Investment standards definitions and scopes may vary from one treaty to another. However, in order to circumvent this methodological difficulty, I will base each test on a broad (but realistic) definition which gives the standard a wide scope of application. By the same token, it will help to assess the general exceptions clause impact as it is precisely in relation with a powerful investment standard that the exception should be capable to play a role. If the general exceptions clause can

analysis show that some tobacco controls are deviations from investment disciplines that could be justified under a “general exceptions” clause (4.2), while many tobacco controls could not be so justified (4.3).¹⁰⁵

A. GOVERNMENT TOBACCO CONTROLS

Tobacco control is implemented at the national level by way of policy and practice dedicated to controlling (i.e. restricting) the growth of tobacco use and thereby reducing the morbidity and mortality it causes. Several countries have been implementing tobacco controls throughout the world, and it would be impossible to review each national policy and practice.

For the purpose of this analysis, I would refer to tobacco control as a priority area for the World Health Organization (WHO) through the Framework Convention on Tobacco Control (FCTC).¹⁰⁶ This convention recommends a number of controls, which can be seen as a benchmark for many countries, such as Australia, Uruguay, or Canada, which recently passed laws to better control tobacco.¹⁰⁷

Table 1. FCTC Requirements Based on National Actions Which May Contradict Investment Treaties Requirements¹⁰⁸

Topic	Measure	Provisions
Demand reduction	Tax and other measures to reduce tobacco demand.	Articles 6 & 7
Passive smoking	Obligation to protect all people from exposure to tobacco smoke in indoor workplaces, public transport and indoor public places.	Article 8
Regulation	The contents and emissions of tobacco products are to be regulated and ingredients are to be disclosed.	Article 10
Packaging and labeling	Large health warning (at least 30% of the packet cover, 50% or more recommended); deceptive labels (“mild,” “light,” etc.) are prohibited.	Articles 9 & 11
Awareness	Public awareness for the consequences of smoking.	Article 12
Tobacco advertising	Comprehensive ban, unless the national constitution forbids it.	Article 13
Minors	Restricted sales to minors.	Article 16

justify a deviation from a wide international standard, it would obviously do the same with a narrower standard.

¹⁰⁵ Moreover, Mercurio makes the point that it is “dangerous” to import trade law directly into the investment law context. Bryan Mercurio, *Awakening the Sleeping Giant: Intellectual Property Rights in International Investment Agreements*, 15 J. INT’L ECON. L. 871, 905 (2012).

¹⁰⁶ WHO Framework Convention on Tobacco Control [FCTC], *opened for signature*, June 16, 2003, 2302 U.N.T.S. 166. On the FCTC, see Javier Garcia Olmedo, *The Use of Tobacco Trademarks Versus Public Health: A New Trend in Investor-State Arbitration*, 15 INT’L. ARB. L. REV. 42, 48-49 (2012). See also Benn McGrady, Philip Morris v. Uruguay: *The Punta del Este Declaration on the Implementation of the WHO Framework Convention on the Implementation of the WHO Framework Convention on Tobacco Control*, 2 EUR. J. RISK REG. 254 (2011).

¹⁰⁷ See WHO FCTC, *supra* note 106, at arts. 6-17.

¹⁰⁸ See *id.* at arts. 6-13, 16.

The “treatment” granted to investors encompasses all sorts of laws, regulations, and practices from public entities that apply to or affect the foreign investors or their investments. In *Suez, Barcelona and Interagua v. Argentina*, the tribunal explained that the “ordinary meaning [of the word ‘treatment’] within the context of investment includes the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty.”¹⁰⁹ All public entities are bound by the international obligations, including the federal and sub-federal governments, and where applicable, local authorities, regulatory bodies, and entities that exercise delegated public powers.¹¹⁰ Measures adopted by private actors can also—although rather exceptionally—fall under the scope of international agreements when such private measures can ultimately be attributed to a governmental entity.¹¹¹ The set of obligations is rather consistent amongst the greater number of IIAs. The core provisions found in an investment agreement typically include a most-favored nation treatment obligation, the granting of national treatment, an obligation to provide fair and equitable treatment (FET) as well as protection and security to foreign investors, and an obligation to allow international transfers of funds. While the substance of these principles remains the same throughout the great number of investment agreements, the precise scope and reach of each obligation depends on the precise wording featured in each case. Because BITs are very diverse in their provisions and the way the existing provisions are drafted, they give birth to a broad kaleidoscope of legal obligations and hence regulatory effects, which are reviewed below in the context of the application of a general exceptions clause.

B. TOBACCO CONTROLS AS DEVIATIONS WHICH MAY BE JUSTIFIED

1. Tobacco Controls Resulting in Indirect Expropriation

Historically, expropriation regulated by international investment protection law was understood as involving direct expropriations when “the state deliberately takes that investment away from the investor.”¹¹² In recent years, indirect expropriations have become a part of international legal investment protection rules and are, in practice, the main cause of treaty violations. There is, however, no clear definition of indirect expropriation and necessary criteria which would be provided by investment treaties.¹¹³ Last decade’s jurisprudence has demonstrated that indirect expropriations fall short of actual physical taking of property but result in the effective loss of management, use, or control, or a significant depreciation of the value of the assets

¹⁰⁹ *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, ¶ 55 (May 16, 2006).

¹¹⁰ See WHO FCTC, *supra* note 106, at art. 9.

¹¹¹ Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, UN GAOR, 56th Sess., U.N. Doc A/RES/56/83, at 3 (Jan. 28, 2002), available at http://www.un.org/ga/search/view_doc.asp?symbol=A/res/56/83 (stating in Chapter II, Article 5 that the conduct of a non-public person or entity that is empowered by the law of the State will be considered to be an act of the State).

¹¹² *Gemplus, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, ¶ 8-23 (June 16, 2010) (holding that a direct expropriation occurs if the state deliberately takes that investment away from the investor and finding that in terminating a concession the respondent effected an expropriation).

¹¹³ Julien Chaisse, *Promises and Pitfalls of the European Union Policy on Foreign Investment – How Will the New EU Competence on FDI Affect the Emerging Global Regime?*, 15 J. INT’L ECON. L. 51, 66 (2012).

of a foreign investor.¹¹⁴ Indirect expropriation can be further divided into regulatory takings, which are “those takings of property that fall within the police powers of a State, or otherwise arise from State measures like those pertaining to the regulation of the environment, health, morals, culture, or economy of a host country.”¹¹⁵ The issue of regulatory takings is a particular point of concern from the perspective of tobacco control, as well as other sensitive areas of public policy.

Despite a number of decisions by tribunals, the line between the concept of indirect expropriation and governmental regulatory measures not requiring compensation has not been clearly articulated. The determination of indirect expropriation very much depends on the specific facts and circumstances of the case.¹¹⁶ There are, however, three main criteria that arbitrators are likely to consider in evaluating a measure as recently summarized in the *Burlington Resources v. Ecuador* Decision on Liability. This decision clarifies the criteria to apply and notes that the following requirements must be met in order to find an indirect expropriation: (i) “a substantial deprivation of the value of the whole investment” (i.e. the degree of interference with the property right (including interference with the investor’s reasonable investment-backed expectations); (ii) “a permanent measure” (i.e. the duration of the measure); and (iii) “a measure not justified under the police power doctrine” (which basically is review of the measure purpose).¹¹⁷

In light of the law of expropriation, one can think of some FCTC requirements which may contradict international law of foreign investment. For instance, while the issue of demand reduction (FCPC Articles 6 and 7) invites governments to apply tax to reduce tobacco demand, the likely induced profit diminution could be read as an expropriation of the producers-investors. Indirect expropriation could also be the result of measures on packaging and labeling (FCPC Articles 9 and 11) since the suggested large health warning may affect the intellectual property rights (trade marks) of the foreign investors. These basic FCPC recommendations seem to contradict the protection granted to foreign investors under investment treaties, which raises the question of the effect of an Article XX-like provision.

Can an Article XX-like provision help to find a better balance between investor protection and health protection? Or on a more practical perspective: will an Article XX-like provision allow states to control tobacco? If an expropriation is deemed to

¹¹⁴ As stated by Gemplus Arbitral Tribunal, “an indirect expropriation occurs if the state deliberately deprives the investor of the ability to use its investment in any meaningful way.” *Gemplus, S.A.*, ICSID Case No. ARB(AF)/04/3, ARB(AF)/04/4, ¶ 8-23.

¹¹⁵ United Nations Conference on Trade and Development, Geneva, Switz., Jan. 2000, *Taking of Property*, 12, U.N. Doc. UNCTAD/ITE/IIT/15 (2000) [hereinafter UNCTAD].

¹¹⁶ Of course, although there are some variations

in the way some arbitral tribunals have distinguished legitimate non-compensable regulations having an effect on the economic value of foreign investments and indirect expropriation requiring compensation, examination reveals that, in broad terms, they have identified the following criteria which look very similar to the ones laid out by the recent agreements: (i) the degree of interference with the property right; (ii) the character of governmental measures, *i.e.*, the purpose and the context of the governmental measure; and (iii) the interference of the measure with reasonable and investment-backed expectations.

Catherine Yannaca-Small, OECD, “*Indirect Expropriation*” and the “*Right to Regulate*” in *International Investment Law*, in *INTERNATIONAL INVESTMENT LAW: A CHANGING LANDSCAPE* 43, 54 (2005), available at <http://browse.oecdbookshop.org/oecd/pdfs/product/2005141e.pdf>; see also Anne Van Aaken, *International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis*, 12 J. INT’L ECON. L. 507, 510-12 (2009).

¹¹⁷ See *Burlington Res. Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, ¶ 471 (Dec. 14, 2012).

have occurred, then according to customary international law and most investment agreements there are three conditions that must be satisfied in order for the taking to be lawful: it must be for public purpose, non-discriminatory, and compensation must be paid.¹¹⁸ The customary international law doctrine of police powers limits the list of legitimate purposes to public order, morals, and health.¹¹⁹ On the other hand, GATT Article XX refers, in addition to other justifications, especially to the protection of “human, animal or plant life or health,” which is often assimilated to the protection of the environment.¹²⁰ Public purpose is fairly straightforward, and typically a tribunal will accept a host country’s determination of what is considered in the public interest. Non-discrimination requires that any taking should not unreasonably single out a particular person or group of people, such as measures of retaliation or reprisal against another state or a particular racial group. Compensation tends to be the most controversial and difficult of the conditions.¹²¹ In the context of tobacco controls, these three criteria mean that States are not liable to compensate aliens for economic loss incurred as a result of non-discriminatory action taken for a public purpose. Hence, the very slight expansion provided by general exceptions will not add much to the existing regime except, perhaps, to provide a codification of customary international rules.

2. Performance Requirements in Tobacco Production

Performance requirements are generally used by countries to influence the behavior of investors.¹²² Most investment treaties prohibit “imposing or enforcing certain performance requirements, such as export requirements and domestic content rules, in connection with the establishment, acquisition, expansion, management, conduct or operation of investments.”¹²³ They also prohibit “using the specified performance requirements as conditions attached to advantages such as subsidies, including tax incentives.”¹²⁴

In the context of tobacco control, it is hard to imagine a performance requirements which would be recommended by the FCTC. Even the imposition of tax and other measures to reduce tobacco demand (Articles 7 and 8) are in no way similar to performance requirements. I actually see none induced by the WHO convention.

¹¹⁸ Yannaca-Small, *supra* note 116, at 45.

¹¹⁹ UNCTAD, *supra* note 115, at 12.

¹²⁰ GATT, *supra* note 10, at art. XX.

¹²¹ There is a long-standing international debate over compensation that generally falls on a North-South divide. Industrialized countries have long advocated the so-called ‘Hull formula’ as a means to calculate compensation. See Yannaca-Small, *supra* note 116, at 44 n.1.

¹²² Two types of performance requirements have been identified: mandatory performance requirements and other performance requirements which are based on conditions that an investor must meet to secure a government subsidy or incentive. See Yong-Shik Lee, *Foreign Direct Investment and Regional Trade Liberalization: A Viable Answer for Economic Development?*, 39 J. WORLD TRADE 701, 707 (2005).

¹²³ *NAFTA – Chapter 11 – Investment*, FOREIGN AFF. & INT’L TRADE CAN., <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/gen-nafta.aspx?view=d> (last modified Jan. 2, 2013); see also Accord Entre le Gouvernement de la Republique Francaise et le Gouvernement D’Ukraine sur L’Encouragement et la Protection Reciproques des Investissements, Ukr.-Fr., art. II(6), May 3, 1994, http://unctad.org/sections/dite/ia/docs/bits/france_ukraine_fr.pdf (prohibiting “performance requirements . . . which specify that goods or services must be purchased locally”).

¹²⁴ *NAFTA – Chapter 11 – Investment*, *supra* note 123.

One may, however, imagine a State wishing to require the foreign investment to export part of what it produces. Such a performance requirement (which is very hypothetical) would be in violation of the international investment obligations. Technically, a general exceptions clause may play an important role in providing a legal defense allowing the state to maintain such a performance requirement. It is doubtful, however, whether the FCPC and public health proponents would support such a measure consisting in attracting a foreign investor to producer tobacco destined at being sold on foreign markets.

C. TOBACCO CONTROLS AS DEVIATIONS IMPOSSIBLE TO JUSTIFY

1. National Treatment

The principle of national treatment prohibits discrimination on the grounds of nationality¹²⁵ and, more generally, any discrimination between investors and investments made domestically and those from other countries.¹²⁶ Together with the most-favored nation (MFN) obligation, it forms the fundamental principle of non-discrimination in investment law.¹²⁷ In practice, Arbitral Tribunals analyze national treatment by determining whether the parties involved were in like situations, and comparing the treatment being received by foreign investments with the treatment received by local investors.¹²⁸ It is also important to stress that the national treatment has a different regime in trade and investment contexts. In this regard, Arbitral tribunals repeatedly highlighted the different purposes of national treatment in the trade and investment context and the difference between the terms “in like situations” in the BIT and “like products” in the WTO.¹²⁹ It is a first indication that interplays of national treatment clauses and general exceptions are not likely to be similar in trade and investment contexts.

Here, it is important to remember that GATT Article XX contains an “exception to the exception” restricting its application to measures that are “*not applied in a*

¹²⁵ *Champion Trading Co. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Award, ¶¶ 128, 156 (Oct. 27, 2006).

¹²⁶ *See Occidental Exploration & Prod. Co. v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award, ¶ 173 (July 1, 2004) (stating that “the purpose of national treatment is to protect investors as compared to local producers, and this cannot be done by addressing exclusively the sector in which the particular activity is undertaken”).

¹²⁷ The scope and practical relevance of NT is to a large extent dependent on the reading of the term “like circumstances.” Its definition essentially sets the benchmark for national regulatory freedom to treat certain imported products differently from domestically produced. Indeed, “[o]ften the definition of national treatment is qualified by the inclusion of the provision that it only applies in ‘like circumstances’ or ‘similar circumstances.’ As the situations of foreign and domestic investors are often not identical, this language obviously leaves room open for interpretation.” *EXPANSION OF TRADE AND FDI IN ASIA: STRATEGIC AND POLICY CHALLENGES* 127 (Julien Chaisse & Philippe Gugler eds., 2009)

¹²⁸ *See, e.g., Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pak.*, ICSID Case No. ARB/03/29, Award, ¶¶ 389-90 (Aug. 27, 2009) (holding that the tribunal must first assess whether the investor was in a “similar situation” to that of other investors, and if that requirement is met, then the tribunal must further inquire whether the investor was granted less favourable treatment than other investors); *BG Grp. Plc. v. Republic of Arg.*, UNCITRAL, Final Award, ¶¶ 355-56 (Dec. 24, 2007) (stating that a measure that breaches national or MFN treatment would be unavoidably “discriminatory” for the purposes of the BIT standard).

¹²⁹ *Occidental Exploration & Prod. Co.*, LCIA Case No. UN3467, ¶¶ 175-176. Later in 2009, *Bayindir v. Pakistan* Award considered that the treaty clause must be interpreted in an autonomous manner, independently from trade law considerations. *See Bayindir Insaat Turizm Ticaret Ve Sanayi A.S.*, ICSID Case No. ARB/03/29, ¶¶ 389, 402.

manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail."¹³⁰ All exceptions listed in the paragraphs of Article XX of the GATT 1994 are further qualified by the chapeau of Article XX. It sets out the general test which, in addition to the requirements stipulated in the respective paragraphs, needs to be fulfilled by a measure in order to justify a violation of another provision of the GATT 1994. As long as the exceptions set forth in the paragraphs were interpreted narrowly, the chapeau was of little relevance. When this changed at the dawn of the WTO, the provision became operationally important. As a result, under GATT/WTO law, certain forms of discrimination may be "justifiable," and one can imagine states restricting goods imported for health reasons. It is legitimate and Article XX will play its role.¹³¹ For instance, in order to protect consumers from fruits contaminated by disease it is legally possible to deviate to the obligation not to impose quantitative restrictions.

The "general exceptions" clause makes sense in the trade context in order to prevent the important from the country where the fruits are affected by the disease. However, why would a foreign investor (operating in the host country) be the main cause of a virus and why discriminating him or her would solve the health related problem? The comprehensive ban recommended by the FCPC (Article 13) in terms of tobacco advertising, if only applied to foreign tobacco producers-investors may be an issue but it is unrealistic to imagine that a host country would legitimately pass such a law without discrimination intention. The same is also true for all the other measures recommended in the FCTC such as the tax and other measures to reduce tobacco demand (Articles 6 and 7), the obligation to protect all people from exposure to tobacco smoke in indoor workplaces, public transport and indoor public places (Article 8) or the contents of tobacco products which are to be regulated (Article 10). In the context of investments, however, no scenario comes to mind which would lead to any reasonable justification for a State to treat investments differently in this situation, solely on the basis of the nationality of their ownership.

2. Fair and Equitable Treatment

An investor's investment decision is not made on the basis of the legal situation in a given host state at the time of the investment alone, but on the expectation that he will be treated fairly and equitably in the future. The FET standard is expressed in different ways.¹³² Some treaties contain a bare reference to FET; others link FET to

¹³⁰ GATT, *supra* note 10, at art. XX. For instance, the Appellate Body then deliberated whether U.S. Section 609 was exercised in a manner constituting "arbitrary discrimination between countries where the same conditions prevail." Appellate Body Report, *Shrimp*, *supra* note 70, ¶ 150. It concluded that the measure was applied in a manner which amounted to "a means not just of 'unjustifiable discrimination,' but also of 'arbitrary discrimination' between countries where the same conditions prevail, contrary to the requirements of the chapeau of Article XX. *Id.* ¶ 184. Under the facts of this case, "[t]he measure, therefore, [was] not entitled to the justifying protection of Article XX of the GATT 1994." *Id.* ¶ 184.

¹³¹ An appropriate illustration is the Japan-Apples case. It is possible to deviate from Art XI for health and safety, but the chapeau always in play to ensure not just protectionism. *See* Panel Report, *Japan—Measures Affecting the Importation of Apples*, WT/DS245/AB/R (June 23, 2005). For a commentary, see Committee on Trade and Environment, *Note by the Secretariat: GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, Paragraphs (b), (d) and (g)*, WT/CTE/W/203 (Mar. 8, 2002).

¹³² The *Total v. Argentina* tribunal noted that the undertaking of the host country to provide fair and equitable Treatment to the investors of the other party and their investments is a standard feature in BITs, although the exact language of such undertakings is not uniform, and the generality of the fair and equitable Treatment standard distinguishes it from specific obligations undertaken by the

international law or to customary international law. Still others include the standard in a clause that also contains prohibitions against arbitrary and discriminatory acts and/or a “non-impairment” obligation. These different formulations may lead to different interpretative outcomes.¹³³ In order to violate FET, a State should have a national regulation that would treat the investor in an unjust manner. For instance, the *Alpha Projectholding v. Ukraine* award considers that the principle of fair and equitable treatment includes the obligation to avoid arbitrary government action, regardless of whether there is any discriminatory element involved.¹³⁴ The *Roussalis v. Romania* award, citing the *Rumeli Telekom v. Kazakhstan* award, finds that conduct that is arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process will breach the fair and equitable treatment standard.¹³⁵ The *SAUR v. Argentina* decision on Jurisdiction and Liability summarizes earlier cases and finds that fair and equitable treatment is closely linked to the prohibition on arbitrariness and discrimination.¹³⁶

In light of investment rule-making and jurisprudence, one can easily identify many FCTC requirements which may contradict the international law of foreign investment and the broad protection granted under the FET. For instance, the tax and other measures to reduce tobacco demand (Articles 7 and 8), if imposed without notice to the foreign investors (arbitrariness) or subject to successive amendments (lack of consistent action) or even a comprehensive ban in terms of tobacco advertising (Article 13) are measures which may breach the FET standard. To the extent that many FCTC requirements may be implemented by states in a manner which would be unjust, foreign investors could invoke the FET before arbitrators with good hope to succeed in their international claim.

At first sight, one may conclude that Article XX-like provisions could be the relevant legal basis to justify such national measures. GATT Article XX contains an “exception to the exception,” however, restricting its application to measures that are “not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.”¹³⁷ As a result, it would be conceptually impossible to justify a violation of FET by a general exceptions clause. Indeed, arbitrariness is consubstantial to FET violation and falls to satisfy the “exception to the exception” which renders FET and general exceptions clause congruent.

parties to a BIT. *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, ¶ 106 (Dec. 27, 2010).

¹³³ In this regard, *Sempra Energy Int'l v. Argentine Republic* notes that fair and equitable treatment is not a clear and precise standard and that it has evolved by case-by-case determinations. *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶ 296, (Sept. 28, 2007). Recently, *El Paso Energy Int'l Co. v. Argentine Republic*, citing the CMS Annulment Decision, agrees that there is variation in the practice of arbitral tribunals in relation to the fair and equitable standard. *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, ¶ 338, (Oct. 31, 2011).

¹³⁴ *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, ¶ 420 (Nov. 8, 2010).

¹³⁵ *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, ¶ 314 (Dec. 7, 2011).

¹³⁶ *SAUR Int'l S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, ¶¶ 485-88 (June 6, 2012).

¹³⁷ GATT, *supra* note 10, at art. XX.

3. Full Protection and Security

The most common expression of the full protection and security standard is in the form of “full protection and security.” However, different variants are also found, such as “full protection and full security,” “constant protection and security,” “protection and security” or “physical protection and security,” which have not greatly impacted the way the standard is applied.¹³⁸

The extent of the protection was first discussed in the *Saluka v. Czech Republic* award which noted that the “full protection and security” standard applies essentially when the foreign investment has been affected by civil strife and physical violence.¹³⁹ All tribunals agree that the standard applies, at least, in situations where actions of third parties involving either physical violence or the disregard of legal rights occur. In this connection, full protection and security requires that the State exercise due diligence to prevent harm to the investor. However, the standard does not grant the investor an “insurance against all and every risk,” as noted recently in the *Vannessa Ventures v. Venezuela* award.¹⁴⁰ International law has interpreted this due diligence to consider that although the host State is required to exercise an objective minimum standard of due diligence, the standard of due diligence is that of a host State in the circumstances and with the resources of the State in question (a modified objective standard).¹⁴¹ This extension has been endorsed by subsequent tribunals.¹⁴² More recently, the scope has of the full protection and security concept has been extended to providing a legal framework that offers legal protection to investors—including both substantive provisions to protect investments and appropriate procedures that enable investors to vindicate their rights.¹⁴³

¹³⁸ *Parkerings-Compagniet v. Republic of Lithuania* found that it is generally accepted that the variation of language between the formulation “protection” and “full protection and security” does not make a significant difference in the level of protection a host State is to provide. *Parkerings-Compagniet AS v. Republic of Lith.*, ICSID Case No. ARB/05/8, Award, ¶ 354 (Sept. 11, 2007).

¹³⁹ *Saluka Invs. BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, ¶ 483 (March 17, 2006).

¹⁴⁰ *Vannessa Ventures Ltd. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB(AF)/04/6, Award, ¶ 223 (Jan. 16, 2013).

¹⁴¹ *Pantehniki S.A. Contractors & Eng'rs v. Republic of Alb.*, ICSID Case No. ARB/07/21, Award, ¶ 81 (July 28, 2009) (citing Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties* 310 (2009)); see also *Parkerings-Compagniet AS*, ICSID Case No. ARB/05/8, ¶ 81-84.

¹⁴² For instance, *Paushok v. Government of Mongolia* notes that “legal protection” clause has been raised in a number of BIT cases and has sometimes been interpreted, as a stand-alone clause; as aiming at the physical protection of persons or assets against illegal actions by third parties; in the case before the tribunal the treaty provides clearly for “full legal protection to investments of investors of the other Contracting Party” and there is therefore no reason to limit the protection guaranteed to mere physical protection. *Paushok v. Gov't of Mong.*, UNCITRAL, Award on Jurisdiction and Liability, ¶ 326 (Apr. 28, 2011); see also *Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, ¶ 281 (May 16, 2012) (accepting that “full protection” may, in appropriate circumstances, extend beyond the traditional standard focused on physical security).

¹⁴³ *Frontier Petroleum Servs. Ltd. v. Czech Republic*, UNCITRAL, Final Award, ¶ 263 (Nov. 12, 2010).

There are no FCTC requirements, which may lead to a national measure conflicting with the full protection and security standard. However, it is possible to conclude that, with respect to the FET, an Article XX-like provision is equally irrelevant in investment treaties. As already stressed, the general exceptions in GATT Article XX exclusively encompass measures that are “not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination.”¹⁴⁴ Accordingly, if a measure is not reasonable, it does not fall within Article XX of the GATT. Similarly, the full protection and security standard can be violated if the State did not accord reasonable protection to foreign investors. As for the FET, we have essential congruence between the exceptions under GATT Article XX and the full protection and security standard.

V. CONCLUSION

This Article discussed the interaction of “general exceptions” clauses, such as GATT Article XX, with public interest objectives, such as tobacco restrictions. In the WTO context, Article XX has served as a last resort stopgap measure, not as a proactive environmental or health policy instrument. This type of clause puts the burden of proof on the party accused of violating non-discrimination principles, and success with using the Article in the GATT has not been high. While in Article XX fitting into one of the enumerated settings has not been hard, meeting the “good faith” clause of the chapeau has not been easy. It seems to have caught many arbitrary and disguised restrictions on trade. In the practice of the WTO law, GATT Article XX plays a tremendous role in WTO litigation to balance free trade requirements and other public policy goals, such as health, which is a source of inspiration for international investment treaties, but does not seem to be the ideal tool to ensure that tobacco controls do not violate investment treaty commitments.

There is hardly a walk of life untouched directly or indirectly by international investment regulation. As economic interdependence grows, the welfare and livelihood of peoples are largely influenced by it around the globe. In this regard, this Article has shown that several FCTC requirements may contradict the existing international investment treaties. As the recent examples of Australia and Uruguay demonstrate, governments may face difficulties implementing FCTC recommendations while being obliged to respect their international investment treaties commitments. In such a scenario, a “general exceptions” clause similar to GATT Article XX is not a panacea and does not help to better balance investment protection and health protection. Such a clause appears in most cases as either unsuited for the investment law regime (with respect to the national treatment and most favored nation treatments) or unnecessary due to the congruence with investment protection standards (fair and equitable treatment and full protection and security). Such a clause may still play a role, albeit limited, in the case of violation by tobacco control regulations of the performance requirements and indirect expropriation investment provisions. A “general exceptions” clause similar to GATT Article XX may still allow states to better address health policy concerns and implement measures targeting tobacco industry. The main lesson, however, is that countries having inserted a “general exceptions” clause in their recent IIAs might face some disappointments soon when involved in litigation. It clearly shows the significance of the commitments undertaken by governments under investment

¹⁴⁴ GATT, *supra* note 10, at art. XX.

agreements. This also means that countries need to pay attention when designing a health law in order not to inadvertently be caught by investment tribunals.

Finally, this Article also generates additional questions for future research. The limited legal basis provided by general exceptions clauses to develop and implement tobacco controls should pave the way for refined and revised policy orientations. In view of better controlling the tobacco industry in its investment activities, it seems that new ways should be explored, such as the insertion of specific exceptions (additional and specific clauses or provisions aiming at protecting a specific legitimate interest which should be binding), addressing health and tobacco issues or, perhaps, a better link established with the FCTC convention.¹⁴⁵ Such a link could take the form of a provision establishing a presumption of validity of any health related domestic measures. The domestic tobacco regulations could be presumed, subject to rebuttal, not to create an unnecessary obstacle to international trade or investment if they are set in accordance with FCTC international standards. Such a presumption, inspired from Article 2(5) of the Agreement on Technical Barriers to Trade¹⁴⁶ could, however, well serve the need to preserve domestic regulatory space in view of addressing national health policy issues such as tobacco controls while establishing a connection with already existing WHO recommendations and treaties, such as the FCTC.

¹⁴⁵ The presumption enshrined in the Agreement on Technical Barriers to Trade probably is the best example. Several other WTO agreements, however, explicitly refer to other international agreements which indicates that investment treaties could employ the same technique. Many treaties have become part of the corpus of WTO law by incorporation and therefore serve as a direct or immediate source of law in WTO dispute settlement proceedings. These treaties include, most prominently, the substantive provisions of the major international intellectual property conventions referred to in the Agreement on Trade-Related Aspects of Intellectual Property Rights, namely the Paris Convention, the Berne Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits (the latter never per se having entered into force). See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

¹⁴⁶ The TBT Agreement addresses the question of scientific justification necessary for technical regulations that might inhibit international trade. Article 2.4 obliges, in principle, to use international standards where they exist. Agreement on Technical Barriers to Trade art. 2.4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120 [hereinafter TBT Agreement]. Article 2.5 provides that technical regulations are presumed, subject to rebuttal, not to create an unnecessary obstacle to international trade if they are either based on a risk assessment or set in accordance with relevant international standards. *Id.* At art. 2.5. In this connection, the TBT Agreement explicitly mentions the International Organization for Standardization (ISO). See generally Bernhard Jansen & Maurits Lugard, *Some Considerations on Trade Barriers Erected for Non-Economic Reasons and WTO Obligations*, 2 J. INT'L ECON. L. 530 (1999) (discussing four categories of trade barriers meant to protect non-economic interests).