

General Exceptions in International Investment Agreements

Andrew Newcombe

Assistant Professor, Faculty of Law
University of Victoria, Canada
newcombe@uvic.ca

Draft Discussion Paper

Prepared for BIICL Eighth Annual WTO Conference
13th and 14th May 2008, London

Introduction

The proliferation of international investment agreements (IIAs)¹ and investor-state arbitrations has given rise to concerns that the investment promotion and protection function of the IIA regime might unduly fetter a state's ability to pursue sustainable development policies.² This concern was recently expressed in Professor John Ruggie's April 2008 report as the Special Representative of the United Nations Secretary-General on the issue of human rights and transnational corporations and other business enterprises. The report notes that the expansion of the legal rights of transnational corporations through IIAs "has encouraged investment and trade flows, but it has also created instances of imbalances between firms and States that may be detrimental to human rights." Professor Ruggie cites, in particular, the case of *Piero Foresti, Laura De Carli and others v. Republic of South Africa*,³ an ongoing claim in which Italian investors allege breaches of South Africa's investment treaties with Italy and Luxembourg as a result of South Africa's black economic empowerment laws.⁴

¹ The term IIAs is used to refer to standalone bilateral investment treaties (BITs), bilateral and regional free trade agreements that include foreign investment obligations, and to sectoral treaties, such as the Energy Charter Treaty (ECT), that include investment obligations.

² In a recent article I suggest that, while IIAs are not an impediment to sustainable development, new model agreements could do much more to promote sustainable development. See A. Newcombe "Sustainable Development and Investment Treaty Law" (2007) 8 *Journal of World Investment & Trade* 357.

³ *Piero Foresti, Laura De Carli and others v. Republic of South Africa*, ICSID Case No. ARB (AF)/07/1. For a media report on the claim, see Luke Eric Peterson, "European mining investors mount arbitration over South African Black Empowerment", *Investment Treaty News*, 14 February 2007. Online: <http://www.iisd.org/pdf/2007/itn_feb14_2007.pdf>.

⁴ See *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Entities* (1 April 2008) UN Doc. A/HRC/8/5 at para. 12. For a report raising concerns regarding the international between IIA obligations and the realization of human rights, see H. Mann, "International Investment Agreements, Business and Human Rights: Key Issues and Opportunities" (February 2008). Online: <<http://www.reports-and-materials.org/IISD-Ruggie-Feb-2008.pdf>>.

States have responded in various ways to concerns that IIAs (and international trade obligations more generally) unduly fetter regulatory flexibility and that IIA jurisprudence has favoured investors. First and foremost, states have strenuously defended claims and challenged final awards either in national courts and before International Centre for Settlement of Investment Disputes (ICSID) annulment committees. Second, states have cooperated in issuing joint interpretations of IIA obligations. Second, states have issued joint interpretations of IIA obligations to clarify the scope of obligations.⁵ Third, states, including the US, Canada and Norway, have developed new model IIAs that clarify the meaning and scope of investment obligations in much greater detail.⁶ While the typical BIT runs 8-10 pages, these new models run over 50 pages. Other responses have focused on the process of investor-state arbitration. Australia, for example, refused to agree to investor-state arbitration with respect to the investment chapter of the Australia-United States Free Trade Agreement.⁷ The India-Singapore Comprehensive Economic Co-operation Agreement (India-Singapore CECA) expressly provides that the security exception is non-justiciable, thereby avoiding uncertainties as to the interpretation of self-judging language.⁸ More dramatically, some Latin American states have indicated that they will withdraw from the ICSID Convention or from specific IIAs due to alleged abuses by foreign investors of their rights under these treaties.⁹

This paper focuses on another development in IIA treaty practice—the inclusion of general exceptions to IIA obligations modeled on Art. XX, GATT or Art. XIV, GATS. To date, only a few IIAs in a sea of over 2800¹⁰ have incorporated general exceptions. While treaty practice in this area is embryonic, the inclusion of general exceptions raises a series of legal issues about the scope of IIA obligations. First, the drafting of general exceptions in IIAs is inconsistent. Some IIAs incorporate Art. XX, GATT or Art. XIV, GATS, *mutatis mutandis*. Some incorporate both. The drafting of other general exceptions is based on Art. XX, GATT or Art. XIV, GATS, with minor changes. Second, states that have begun including general exceptions in their IIAs have inconsistent treaty practice. Some of their IIAs include general exceptions and others do not. Third, while it would appear that states have included general exceptions with the intention of providing greater regulatory flexibility to pursue public interest objectives, it is unclear how IIA tribunals will interpret general exceptions.

⁵ In the context of the North American Free Trade Agreement (NAFTA), the NAFTA Free Trade Commission issued an interpretation of certain NAFTA obligations. See Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001). Argentina and Panama have exchanged diplomatic notes stating that the MFN clause in their BIT does not apply to dispute settlement. See *National Grid plc v. The Argentine Republic* (Decision on Jurisdiction, 20 June 2006) at para. 85. IIA awards and decisions referred to in this paper are available on the investment treaty arbitration website maintained by the author (<<http://ita.law.uvic.ca>>).

⁶ The models are available online at <<http://ita.law.uvic.ca/investmenttreaties.htm>>.

⁷ W. Dodge, “Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement” (2006) 39 Vand. J. Transnat’l L. 1 (2006).

⁸ The exchange of letters contemplated in Art. 6.12(4), India-Singapore CECA provides that:
 ...any decision of the disputing Party taken on such security considerations shall be non-justiciable in that it shall not be open to any arbitral tribunal to review the merits of any such decision, even where the arbitral proceedings concern an assessment of any claim for damages and/or compensation, or an adjudication of any other issues referred to the tribunal.

⁹ Bolivia has submitted a notice of denunciation of the ICSID Convention and Venezuela has announced it will withdraw from The Netherlands-Venezuela BIT.

¹⁰ Note by the UNCTAD Secretariat, “International Investment Rulemaking”, 22 May 2007, TD/B/COM.2/EM.21/2.

IIA tribunals have generally emphasized the promotion and protection function of IIAs and construed exceptions narrowly. As a result, arbitral tribunals may interpret general exceptions as providing less regulatory flexibility for legitimate objectives, compared to that under existing IIAs that do not incorporate general exceptions.

My working hypothesis is that the inclusion of general exceptions in IIAs is unlikely to have much practical significance. IIA jurisprudence on core obligations, including national treatment, fair and equitable treatment and expropriation, has recognized the right of states to regulate in the public interest. In cases where a state has inconsistent IIA treaty practice, it seems unlikely that the state intended to undertake radically different investment. Perhaps, the more compelling reasoning for including general exceptions is that they make express, the exceptions for legitimate objectives already reflected in IIA jurisprudence. Further, general exceptions could be seen as an insurance policy against the potential of a tribunal making overreaching interpretations of IIA obligation. Unlike the WTO system, there is no right to appeal IIA awards for error of law. For states concerned about the scope of investment treaty obligations, the inclusion of general exceptions serves as an important check against tribunals that might interpret investment obligations in unexpected ways. The risk is that tribunals might interpret general exceptions as providing less regulatory flexibility than that which is currently permitted in most IIAs.

This paper proceeds in three parts. Part 1 provides a brief overview of IIA treaty practice relating to general exceptions. Part 2 covers the approach IIA tribunals have taken to date in interpreting IIAs. Part III discusses possible interpretations of general exception clauses in IIAs.

1. IIA treaty practice relating to general exceptions

The use of general exceptions clauses in IIAs is not common. The majority of states do not have general exceptions to investment obligations. While a recent study notes that exceptions clauses appear in at least 200 IIAs, the majority of these exceptions (what the authors of the article refer to as ‘non-precluded measures’) relate to specific obligations, such as national treatment, or to specific exceptions for essential security interests, public order, prudential measures or taxation.¹¹ While there is no definitive study on the existence of general exceptions in IIAs, of the more than 2800 IIAs, only a handful—perhaps 25 to 30—contain GATT or GATS-like general exceptions.

Canada is unique amongst OECD states in including Art. XX GATT-like general exceptions in its BITs.¹² There are general exceptions in 18 of Canada’s 24 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, Art. 10 of which provides:

¹¹ W. W. Burke-White & A. von Standen, “Investment Protection in Extraordinary Times: The Interpretation of Non-Precluded Measure Provisions in Bilateral Investment Treaties” (2008) 48(2) *Virginia Journal of International Law* 307.

¹² Canada refers to its BITs as ‘Foreign Investment Protection Agreements’ (FIPAs).

General Exceptions

1. Subject 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.

In contrast to BITs, where general exceptions are rare,¹³ a number of comprehensive bilateral FTAs, particularly those between Asian states, make investment obligations subject to general exceptions.¹⁴ For example, Article 83 of the Singapore-Japan New Age Economic Partnership provides:

Article 83

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;
 - (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.

¹³ Another recent example of a BIT with general exceptions is Jordan-Singapore (2004).

¹⁴ Japan-Singapore New Age Economic Partnership (2003), India-Singapore CECA (2005), Japan-Malaysia Economic Partnership (2005) and Korea-Singapore FTA (2005).

Another approach is to incorporate Art. XIV, GATS in relation to investments. This approach is used in the Panama-Taiwan Free Trade Agreement.¹⁵

The China-New Zealand Free Trade Agreement, signed in April 2008, incorporates both Art. XX, GATT and Art. XIV, GATS.

Article 200 General Exceptions

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.
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. [footnote omitted]

While the above examples are not exhaustive, they are sufficient to illustrate three points. First, Australia,¹⁶ Canada, China, India, Japan and Singapore have inconsistent IIA treaty practice. Some IIAs contain general exceptions and others do not. Second, while there are important differences in the drafting of the provisions, their structure and language is inspired by international trade law treaty practice. Third, Art. XIV, GATS does not include a conservation of natural resources exceptions akin to Art. XX(g), GATT. The absence of a conservation for natural resources exception in GATS is presumably explained by the fact that GATS focuses on market access for services. In principle, it appears unlikely that a state would need to discriminate between service providers on the basis of nationality to allow for the conservation of natural resources. However, given the scope of investment protections, and the fact that investment is likely to have a greater environmental impact, it

¹⁵ Panama-Taiwan (2003), Art. 20.02(2).

¹⁶ Australia's FTA with Singapore has a general exception provision in its investment chapter. However, Australia does not include them in its BITs and there is no general exception provision in the investment chapter of its FTAs with the US.

might be asked whether Art. XX is the more appropriate general exception. The absence of a conservation exception in GATS might explain why in the Thailand-Australia FTA, for the purposes of the investment chapter, Art. XIV, GATS is incorporated *mutatis mutandis* and Art. XX (e)–(g), GATT is also incorporated *mutatis mutandis*.¹⁷

2. The general approach of IIA tribunals to the interpretation of IIA obligations

IIA tribunals have not addressed the interpretation of general exception clauses since these clauses appear in only a small number of treaties and only recently have begun to appear in IIAs. In general, however, the approach in IIA jurisprudence has been to construe express exceptions and defences narrowly and highlight the investment promotion and protection function of IIAs. For example, in *Canfor Corporation v. United States of America and Terminal Forest Products Ltd. v. United States of America*, the tribunal referred to GATT jurisprudence and stated that exceptions in international instruments are to be interpreted narrowly.¹⁸

In a number of decisions and awards,¹⁹ IIA tribunals have interpreted the security exception in Article XI, Argentina-US (1991), which provides as follows:

This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

In *CMS*, *Enron* and *Sempra*, the tribunals held that the requirements for justifying measures as necessary for essential security interests are the same as the elements for invoking the plea of necessity in customary international law.²⁰ For example, in *CMS*, the tribunal states that

¹⁷ See Art. 1601, Thailand-Australia Free Trade Agreement.

¹⁸ (Decision on Preliminary Question, 6 June 2006) at para. 187: “The present Tribunal subscribes to the view expressed by the GATT Panel in *Canada - Import Restrictions on Ice Cream and Yoghurt*: “The Panel . . . noted, as had previous panels, that exceptions were to be interpreted narrowly and considered that this argued against flexible interpretation of Article XI:2(c)(i).” Citing *Canada - Import Restrictions on Ice Cream and Yoghurt*, Report of the Panel adopted at the Forty-fifth Session of the Contracting Parties on 5 December 1989 (L/6568 - 36S/68), 27 September 1989, at para. 59 and citing also *Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products*, CDA-95-2008-01, 2 December 1996, at para. 122: “Exceptions to obligations to trade liberalization must perforce be viewed with caution.”

¹⁹ *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005 [CMS]; *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 [LG&E]; *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007 [Enron]; *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award, 28 September 2007 [Sempra].

²⁰ Art. 25 of the ILC Articles on State Responsibility is generally recognized as codifying the requirements for a plea of necessity under customary international law. Art. 25 provides:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

- (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
- (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

- (a) The international obligation in question excludes the possibility of invoking necessity; or
- (b) The State has contributed to the situation of necessity.

reliance on Art. XI requires compliance with the customary international law conditions for invoking necessity.²¹ Likewise, in *Enron*, in addressing whether Argentina satisfied the requirements of the security exception, the tribunal states that since “essential security interests” is not defined, the term takes its meaning by reference to a state of necessity in customary international law.²² According to the tribunal: “[t]he Treaty thus becomes inseparable from the customary law standard insofar as the conditions for the operation of state of necessity are concerned.”²³ As a result, it stated that Art. XI does not set out conditions different from customary law.²⁴ The tribunal in *Sempra* came to a similar conclusion.²⁵ In *LG&E*, the tribunal, having found that Art. XI applies, found that its conclusion was supported by the fact that Argentina satisfied the conditions for necessity under Art. 25.²⁶ The ICSID *ad hoc* committee decision in *CMS* (Annulment Decision, 25 September 2007) criticizes the *CMS* award for assimilating express treaty exceptions under Art. XI with the excuse of necessity under customary international law.²⁷

In interpreting the fair and equitable treatment, tribunals have regularly relied on IIA titles and preambles. For example, in *Siemens v. Argentina*, the tribunal referred to the title and preamble of Argentina/Germany (1991) and noted that:

The Tribunal shall be guided by the purpose of the Treaty as expressed in its title and preamble. It is a treaty “to protect” and “to promote” investments. The preamble provides that the parties have agreed to the provisions of the Treaty for the purpose of creating favorable conditions for the investments of nationals or companies of one of the two States in the territory of the other State. Both parties recognize that the promotion and protection of these investments by a treaty may stimulate private economic initiative and increase the well-being of the peoples of both countries. The intention of the parties is clear. It is to create favorable conditions for investments and to stimulate private initiative.²⁸

In *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, in the course of interpreting the BIT’s observance of undertakings clause, the tribunal stated that since the purpose of the BIT is to create and maintain favourable conditions for investments, “[i]t is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.”²⁹

²¹ *CMS*, *supra* note 19 at para. 373.

²² *Enron*, *supra* note 19 at para. 333.

²³ *Ibid.*, at para. 334.

²⁴ *Ibid.* at para. 339.

²⁵ *Sempra*, *supra* note 19 at paras. 375-378.

²⁶ *LG&E*, *supra* note 19 at paras 245-258.

²⁷ *CMS Annulment Decision*, para. 130.

²⁸ *Siemens v. Argentina*, *ibid.*, at para. 81. See also *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (Award, 20 August 2007) at para. 7.4.4: “As to the object and purpose of the BIT, the Tribunal notes the parties’ wish, as stated in the preamble, for the Treaty to create favourable conditions for French investments in Argentina, and *vice versa*, and their conviction that the protection and promotion of such investments is expected to encourage technology and capital transfers between both countries and to promote their economic development. In interpreting the BIT, we are thus mindful of these objectives.”

²⁹ *SGS Société Générale de Surveillance v. Republic of the Philippines* (Decision of the Tribunal on Objections to Jurisdiction) at para. 116.

At the same time, other tribunals have cautioned against presumptions in favour of the foreign investor. The tribunal in *Saluka v. Czech Republic* noted, with respect to preamble of Czechoslovakia-Netherlands BIT, that:

This is a more subtle and balanced statement of the Treaty's aims than is sometimes appreciated. The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty's substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations.³⁰

In *Plama v. Bulgaria*,³¹ the tribunal also noted that it “is mindful of Sir Ian Sinclair's warning of the “risk that the placing of undue emphasis on the ‘object and purpose’ of a treaty will encourage teleological methods of interpretation [which], in some of its more extreme forms, will even deny the relevance of the intentions of the parties.”³²

3. The interpretation of general exceptions in IIAs

The interpretation of GATT and GATS-like general exceptions in IIAs raises many interpretative issues that have not been not been addressed to date in IIA jurisprudence. While the interpretation of any specific treaty must be guided by the specific treaty text, three general approaches to the interpretation of general exceptions can be identified.

The first approach would be that general exceptions are intended to provide greater regulatory flexibility to host states in pursuing the specific legitimate objectives established in the exceptions. Since inclusion of GATT and GATS-like provisions in IIAs is quite exceptional, an *effet utile* interpretation might suggest that the intention of the parties in including an express intention is to provide more regulatory space to the host state to regulate than in a traditional IIA.

The second approach would be to view the clause as codifying the type of exceptions already recognized in IIA jurisprudence. For example, IIA national treatment jurisprudence recognizes that states can differentiate between investments on the basis of rationale policy objectives. On this view, the general exceptions provides the tribunal explicit guidance on the how to balance investment protection obligations with the legitimate objectives.

Third, general exceptions might be interpreted restrictively and provide even less regulatory flexibility to host states. One of the reasons that the International Institute for Sustainable Development did not include a GATT Article XX-like general exceptions clause in its *Model International Investment Agreement for Sustainable Development* was the concern that, based on

³⁰ *Saluka Investment BV v. the Czech Republic* (Partial Award, 17 March 2006) at para. 300.

³¹ Decision on Jurisdiction, 8 February 2005.

³² *Plama Consortium Limited v. Bulgaria* (Decision on Jurisdiction, 8 February 2005).

GATT Art. XX jurisprudence, general exceptions in IIAs may be interpreted too narrowly, resulting in a limitation of policy space.³³

The difficulty with the first approach of interpreting general exceptions as providing greater regulatory flexibility is that tribunals are already reading in general exceptions in interpreting IIA obligations and they do so without being constrained by a GATT Art. XX-like closed list of exceptions. The most obvious example is national treatment, where tribunals, in determining whether investors or investment are in like circumstances, have found that where there is a legitimate policy rationale for differentiating investments, not motivated by protectionism,³⁴ the investment are not in 'like circumstances'. In essence, a number of tribunals have read in general exceptions to the national treatment obligation. However, IIA jurisprudence does not provide clear guidance on what amounts to a legitimate policy and the standards by which legitimate policy rationales will be assessed. In *Pope & Talbot v. Canada*, the tribunal referred to the requirement that there be a "reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA."³⁵ The tribunal in *GAMI v. Mexico* took a similar view and stated that the differential treatment must be "plausibly connected with a legitimate goal of policy ... and ... applied neither in a discriminatory manner nor as a disguised barrier to equal opportunity."³⁶

In *S.D. Myers v. Canada*, the tribunal found that, even if the NAFTA investment chapter had Art. XX-like general exceptions, the ban on PCB exports could not be justified under the chapeau of Art. XX given the tribunal's finding that the ban was motivated by protectionism of the domestic PCB industry.³⁷ The concurring opinion expressly notes that:

Article 1102 (National Treatment) of NAFTA is not made subject to an equivalent of Article XX (General Exceptions) of GATT. *Read in its proper context, however, the phrase 'like circumstances' in Article 1102 in many cases does require the same kind of analysis as is required in Article XX cases under the GATT.* The determination of whether there is a denial of national treatment to investors or investments 'in like circumstances' under Article 1102 of NAFTA may require an examination of whether a government treated non-nationals differently in order to achieve a legitimate policy objective that could not reasonably be accomplished by other means that are less restrictive to open trade.³⁸

IIA national treatment jurisprudence generally suggests that states have a fair degree of flexibility in pursuing legitimate policy objectives. Some decisions, such as the NAFTA

³³ See A. Cosbey, "The Road to Hell? Investor Protections in NAFTA's Chapter 11, in L. Zarsky ed., *International Investment for Sustainable Development: Balancing Rights and Rewards* (London; Sterling, VA: Earthscan, 2005).

³⁴ See *Pope & Talbot v. Canada*, Award, 10 April 2001 at paras. 78 and 79 and *GAMI Investments, Inc. v. Mexico*, Final Award, 15 November 2004 at para. 114.

³⁵ *Pope & Talbot, ibid.* at para. 78. The *Pope & Talbot* tribunal found that the exclusion of some provinces and different quota provisions for new entrants has a reasonable nexus with a rational policy and were not discriminatory. See paras. 88 and 93.

³⁶ *GAMI Investments, Inc. v. Mexico* (Final Award, 15 November 2004) at para. 114 [hereinafter GAMI] (ensuring that the sugar industry was in the hands of solvent enterprises).

³⁷ First Partial Award, 13 November 2000 at para. 298.

³⁸ Separate Concurring Opinion, 13 November 2000 at para. 129.

Trucking Case, however, suggest that the differential treatment in question should be no greater than necessary for legitimate regulatory reasons.³⁹

In a recent article on non-discrimination obligations in trade and investment treaties,⁴⁰ Nicholas DiMascio and Joost Paulwelyn, note that unlike GATT, IIAs do not have closed lists of exceptions and do not impose a strict necessity test:

Generally, tribunals were open to any legitimate policy objective, in contrast to the closed list of policy exceptions in GATT Article XX. Finally, tribunals have begun to address the appropriate standard of review for these policies. The majority of tribunals have once again taken a considerably softer approach than the “necessity test” under many GATT Article XX exceptions, looking only for a “reasonable” or “rational” nexus between the measure and the policy pursued.⁴¹

In their view, the absence of express exceptions allows tribunals to consider an unlimited list of legitimate government concerns:

In the investment context, the broad reference to investors “in like circumstances” has consistently enabled tribunals to balance investor interests with an unlimited list of legitimate government concerns--a list far *broader* than the exceptions in GATT Article XX.

In trade disputes, domestic policy considerations are traditionally confined to the limited, exhaustive list of exceptions of GATT Article XX. In our view, however, there is no reason for this limitation, at least not for claims of de facto discrimination. Even before regulating countries find themselves with no defense but to invoke GATT Article XX exceptions (because a national treatment violation has been found), they ought to have the opportunity to explain why differential treatment is based not on nationality, but on other legitimate policy concerns.⁴²

While a comprehensive review of IIA national treatment jurisprudence is beyond the scope of this paper, I agree with DiMascio and Paulwelyn that the heart of the IIA national treatment obligation is the elimination of nationality-based discrimination and that tribunals

³⁹ In the *Trucking Case*, a state-to-state dispute under Chapter 20 of NAFTA, Mexico argued that the US breached its NAFTA national treatment obligations with respect to services and investment because of its refusal to lift a moratorium on the processing of applications authorizing Mexican-owned trucking firms to operate in US border states. The US argued that the Mexican truck transportation regulatory system did not maintain the same rigorous standards as the US system and that, as a result, Mexican service providers were not ‘in like circumstances’ and could be treated differently in order to address a legitimate regulatory objective (para. 242). In addressing this issue, the panel highlights that one of NAFTA’s objectives is to facilitate cross-border economic activity. It held that in light of this purpose, the differential treatment in question should be “no greater than necessary for legitimate regulatory reasons such as safety, and that such different treatment be equivalent to the treatment accorded to domestic service providers.” (para. 258). The tribunal concluded that there was not a legally sufficient basis for permitting ‘in like circumstances’ to act as a blanket moratorium on all Mexican trucking firms (para. 278). With respect to investment, the tribunal held that even though Mexico had not identified a specific Mexican national that the US had rejected, the refusal to permit Mexicans to establish trucking services resulted in less favourable treatment. The US was also held to be in breach of its MFN treatment obligations because no similar moratorium applied to Canadian service providers or investors.

⁴⁰ N. DiMascio and J. Paulwelyn, “Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin” (2008) 102 *American Journal of International Law* 48.

⁴¹ *Ibid.* at 77.

⁴² *Ibid.* at 82-83.

have generally avoided a stricter necessity test. This line of argument suggests that including general exceptions may allow for a stricter review of state measures.

The interpretation of general exceptions raises particularly difficult issues in the case of minimum standard of treatment provisions. With respect to breaches of minimum standards of treatment, including fair and equitable treatment, it is unclear in what circumstances general exceptions would apply. For example, China-New Zealand Free Trade Agreement provides:

Article 143 Fair and Equitable Treatment

1. Investments of investors of each Party shall at all times be accorded fair and equitable treatment and shall enjoy the full protection and security in the territory of the other Party in accordance with commonly accepted rules of international law.
2. Fair and equitable treatment includes the obligation to ensure that, having regard to general principles of law, investors are not denied justice or treated unfairly or inequitably in any legal or administrative proceeding affecting the investments of the investor.
3. Full protection and security requires each Party to take such measures as may be reasonably necessary in the exercise of its authority to ensure the protection and security of the investment.
4. Neither Party shall take any unreasonable or discriminatory measures against the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other Party.
5. A violation of any other article of this Chapter does not establish that there has been a violation of this Article.

On its face, if state conduct breaches the fair and equitable treatment standard defined in the treaty, it is unclear how the general exception clause could be invoked to justify a breach. The measures would have to: (i) fall within one of the enumerated objectives in Art. XX, GATT or Art. XIV, GATS; (ii) not have been applied in a manner that would constitute arbitrary or unjustifiable discrimination; and (iii) not constitute a disguised restriction on international trade or investment. If a measure can be justified under the stringent requirements of a general exception provision, including the chapeau analysis it is difficult to envisage a situation where it would have violated fair and equitable treatment in the first place.

Finally, with respect to expropriation, even if a measure (such as the creation of a park) is necessary for the environment, it is unlikely that an IIA tribunal will interpret a general exception clause as excluding the requirement to pay compensation for the expropriation. In an instrument expressly designed to promote and protect foreign investment, it would be very surprising if parties intended to provide less protection to foreign investors than that accorded under customary international law.⁴³ If an expropriatory measure is necessary to

⁴³ The MAI negotiations provide support for the view that general exceptions are not intended to exclude the obligation to pay compensation. Article VI, General Exceptions of the MAI negotiating text provides that it does not apply to Article IV, 2 and 3 (Expropriation and compensation and protection from strife). The

protect “human, animal or plant life or health”, the state may take the measure, but still must pay compensation.

commentary on the text notes that “majority view was that the MAI should provide an absolute guarantee that an investor will be compensated for an expropriated investment”. Commentary to the MAI Negotiating Text online: <<http://www1.oecd.org/daf/mai/pdf/ng/ng988r1e.pdf>>. Further, the exceptions in the Energy Charter Treaty do not apply to expropriation and compensation to losses.