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The Interpretation of General Exceptions in International Trade and Investment Law: Is a Sustainable Development Interpretive Approach Possible

Keywords

International Trade, Investment, Sustainable Development, Treaties, International Economic Law

THE INTERPRETATION OF GENERAL EXCEPTIONS IN INTERNATIONAL TRADE AND INVESTMENT LAW: IS A SUSTAINABLE DEVELOPMENT INTERPRETIVE APPROACH POSSIBLE?

Gabriele Gagliani*

I. INTRODUCTION

Although there is no conclusive evidence of a perfect correlation between the level of income and quality of life, economic growth has a direct connection to development.¹ Economic growth and industrialization can be negative for the environment, but endemic poverty and inequality seem to be strongly connected to ecological and other types of crises.² International trade and foreign direct investment can play a major role in a country's economic, environmental, and social development.³ Whether the multilateral trading system and the investment treaty system, as currently structured, foster development in practice, remains subject to debate.⁴ Lengthy, heated discussions have focused on this subject, questioning for instance whether international investment agreements ("IIAs") between states help attract foreign investment at all.⁵ The purpose of this paper is not to examine arguments and counter arguments on the subject.

Nevertheless, it is worth noting that states have expressed much discontent in respect of this matter.⁶ Some developing countries have complained that their interests and rights, as enshrined in the World Trade Organization ("WTO") Agree-

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1. WTO Secretariat, *World Trade Report 2003* at 79, (2003).

2. *Id.*

3. *Id.* at 82-90; INTERNATIONAL INVESTMENT LAW AND SUSTAINABLE DEVELOPMENT – KEY CASES FROM 2000-2010, at 12 (Nathalie Bernasconi-Osterwalder & Lise Johnson eds., Int'l Inst. for Sustainable Dev. 2011), http://www.iisd.org/pdf/2011/int_investment_law_and_sd_key_cases_2010.pdf [hereinafter INTERNATIONAL INVESTMENT LAW AND SUSTAINABLE DEVELOPMENT].

4. Here, both trade and investment law will be referred to as "systems," imperfect, incoherent systems but nevertheless systems, in the general sense of "a set of things working together as parts of a mechanism or an interconnecting network, a complex whole." Oxford Dictionaries, *System*, OXFORD UNIVERSITY PRESS, <http://www.oxforddictionaries.com/definition/english/system>.

5. For opposing views, compare Liesbeth Colen, Damiaan Persyn & Andrea Guariso, *What Type of FDI Is Attracted by Bilateral Investment Treaties?*, (LICOS Discussion Paper Series, Discussion Paper 346/2014, 2014), <http://www.econ.kuleuven.be/licos/publications/dp/dp346>, with INTERNATIONAL INVESTMENT LAW AND SUSTAINABLE DEVELOPMENT, *supra* note 3, at 12.

ment, have been prejudiced by panels and the Appellate Body together with their development prospects.⁷ Similarly, the system of foreign investment protection, with the unrestrained possibility for foreign investors to bring investment claims against states, has been questioned.⁸ Developing and least-developed countries have emphasized the alleged pressure they were subjected to during the Uruguay Round negotiations.⁹ Also, it is alleged that these countries apparently ignored the real impact of IIAs, the signing of which were perceived as merely photo opportunities during visits of high-level delegations from other countries.¹⁰ Without delving into these claims, simple and unfettered trade liberalization and foreign investment protection do not appear to be necessarily conducive to sustainable development. This is not to imply, contrarily, that the WTO, free trade agreements ("FTAs"), or international bilateral and multilateral investment agreements, should become the primary forum or instruments to promote development, a situation some have warned against.¹¹

Although several proposals to reform the trade and investment systems have been put forward,¹² it seems that the focus has been mainly on the institutional structure of the WTO and investment arbitral tribunals and the drafting of the relevant agreements. The value of these proposals, which have considered, among others, the creation of an obligation (as opposed to the current possibility) for de-

7. See, e.g. Proposal by the African Group, *Kenya - Negotiations on the Dispute Settlement Understanding: Proposal by the African Group to the Special Session of the Dispute Settlement Body*, TN/DS/W/15 (Sept. 25, 2002) [hereinafter DSU African Group]; Proposals on DSU by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania, and Zimbabwe, *Negotiations on the Dispute Settlement Understanding*, TN/DS/W/18 (Oct. 9, 2002) [hereinafter DSU Cuba, et al.].

8. See, e.g., Leandi Kolver, *SA Proceeds with Termination of Bilateral Investment Treaties*, ENGINEERING NEWS, Oct. 21, 2013), <http://www.engineeringnews.co.za/article/sa-proceeds-with-termination-of-bilateral-investment-treaties-2013-10-21>; Sergey Ripinsky, *Venezuela's Withdrawal from ICSID: What it Does and Does Not Achieve*, IISD INVESTMENT TREATY NEWS, (Apr. 13, 2012), <http://www.iisd.org/itm/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/>.

9. Martin Khor, *The Proposed New Issues in the WTO and the Interests of Developing Countries*, THIRD WORLD NETWORK, <http://twm.my/title/mk10.htm>.

10. Lauge N. Skovgaard Poulsen & Emma Aisbett, *When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning*, 65 WORLD POL. 273, 280-81 (2013).

11. Veijo Heiskanen, *Book Review: The World Trade Organization: Legal, Economic and Political Analysis*, Patrick. F. J. Macrory, Arthur. E. Appleton, and Michael. G.. Plummer (Eds.), Springer, 2005, Volumes I-III, 40 J. WORLD TRADE 1149,1153 (2006).

12. William J. Davey, *Reforming WTO Dispute Settlement*, (Univ. of Ill. Pub. L. and Legal Theory Res. Paper No. 04-01, 2004), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=495386; Andreas R. Ziegler & Yves Bonzon, *How to Reform the WTO Decision-Making? An Analysis of the Current Functioning of the Organization from the Perspectives of Efficiency and Legitimacy*, (NCCR Trade Working Paper No. 2007/23, 2007), http://phase1.nccr-trade.org/images/stories/publications/IP2/Working%20Paper%20No%202007_23.pdf; United Nations Conference on Trade and Development, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, Int'l Inv. Agreement Issues Note No. 2 p.4 (June 2013), [hereinafter UNCTD], http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf; Stephan W. Schill, *The Sixth Path: Reforming Investment Law from Within*, (Fourth Biennial Conference of the Society of Int'l Econ. Law (SIEL) Working Paper No. 2014/02, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2446918.

veloped countries to give special attention to problems and interests of developing country Members,¹³ or the clarification and tailoring of IIAs' provisions,¹⁴ is not to be underestimated. Nonetheless, the design and drafting of WTO and investment agreements as they stand at present already partially allow the WTO panels, the Appellate Body, and investment tribunals to address developing and least-developed countries' developmental interests.¹⁵

This paper will focus on the interpretation of general exceptions provisions in international trade and investment law. Under international law, exceptions are justifications that, under certain conditions, exclude a state's responsibility when it would be otherwise engaged for the violation of an international obligation.¹⁶ Exception clauses have been referred to with many terms, such as defenses, non-

13. Davey, *supra* note 12, at 13.

14. UNCTD, *supra* note 12, at 5-6.

15. This distinction between institutional reforms and interpretation by adjudicatory bodies, between creation of the law and interpretation of the law, although clear in theory, is extremely blurred in practice. The interpretation of legal provisions always involves a part of creation by the interpreter. Interpreting the law amounts to some extent to making the law and this is even more so in the realm of international law. See, e.g. INGO VENZKE, *HOW INTERPRETATION MAKES INTERNATIONAL LAW - ON SEMANTIC CHANGE AND NORMATIVE TWISTS* (2012). WTO Panels and the Appellate Body, as well as investment arbitral tribunals, are not the sole interpreters of WTO Agreements and IIAs' provisions. Rather, states are creators of the law, but their interpretation and application of the law also affects what tribunals decide in a particular case. This could happen, for instance, with the creation of specific mechanisms through which states can clarify or resolve disputes on the interpretation or application of treaty provisions. Article 3.9 of the WTO Dispute Settlement Understanding (DSU) and Article IX:2 of the Agreement Establishing the World Trade Organization (the WTO Agreement), indeed allow Members to seek authoritative interpretations of covered agreements' provisions. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3.9, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S 401 [hereinafter 'DSU']; Marrakesh Agreement Establishing the World Trade Organization, art. IX:2, April 15, 1994, 1867 U.N.T.S 154 [hereinafter WTO Agreement]. Under Article 2001 of the *North American Free Trade Agreement* (NAFTA), a Free Trade Commission composed of representatives of the NAFTA parties or their designees, was created with the same purpose. North American Free Trade Agreement art. 2001, Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA]. Similarly, Article 51 of the 2004 *Canada Model Agreement for the Promotion and Protection of Investments* mentions a Commission to the same end. 2004 *Canada Model BIT*, Preamble, Art. 51, ITALAW, <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf>. These are just some examples. Some scholars have also discussed the case for the material distribution of power among State actors to affect the interpretation of international trade law. See Andrew Lang, *WORLD TRADE LAW AFTER NEOLIBERALISM - RE-IMAGINING THE GLOBAL ECONOMIC ORDER* 166 (2011) (explaining an idea perhaps applicable to the investment treaty system as well). In addition, in both trade and investment, one should foresee any potential future interpretation already at the moment of negotiation and drafting of legal provisions. See Asif Qureshi, *Interpreting WTO Agreements for the Development Objective* 95 ICTSD Resource Paper No. 5, (2003). This grants (limited) interpretative power to States and investors which, through their interpretations could drive the agreements (re)negotiation agenda. As a result, one can support the view that neither States nor investment tribunals enjoy ultimate interpretive authority in all circumstances. See Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179 (2010). The adoption of a development-oriented interpretation is the result and responsibility of all actors participating in the trade and investment systems.

16. JAMES CRAWFORD, *BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 563 (8th ed. 2012).

precluded measures clauses, or circumstances precluding wrongfulness. The *nomen iuris* does not alter their purpose, which is to preclude the wrongfulness of a conduct that would otherwise not be in conformity with the international obligations of the state concerned.¹⁷ General exceptions provisions in the WTO context are no different.¹⁸ These provisions allow WTO Members to adopt measures that pursue the promotion and protection of other societal values and interests and are inconsistent with other provisions of the relevant Agreements, justifying them.¹⁹ Currently, General Agreement on Tariffs and Trade ("GATT") and General Agreement on Trade in Services ("GATS")-style general exceptions are included in several IIAs and FTAs in respect of investments.

The main argument of this paper is that a sustainable development interpretive approach to general exceptions (that is, the explicit consideration of states' developmental needs) is possible. When interpreting general exceptions provisions, trade and investment adjudicatory bodies can take into account the developmental condition of the state adopting a measure at issue, the condition of the states affected by the measure (in the case of the WTO), and the developmental objective and impact of the measure itself. In the WTO context, some decisions of the Appellate Body have paved the way in this direction.²⁰ This has been done in a rather implicit way. However, there seems to be enough interpretative space for a more explicit development-oriented approach, as further discussed below. This interpretative approach could have a direct bearing on the interpretation of general exceptions in IIAs and FTAs with an investment chapter, and it could allow consideration on a case-by-case basis of the needs of the specific country under scrutiny. It would avoid the common grouping of developing and least developed countries with very diverse developmental interests and bypass difficulties related to the crystallization of countries' dynamic needs into legal provisions. In sum, it would serve the interests and the needs of developing and least developed countries better.

More specifically, the sustainable development interpretive approach²¹ alluded to in this paper calls for a balancing interpretative technique, which tries to integrate economic development with social development and environmental protection²² in the interpretation of legal provisions. With a view towards achieving

17. U.N. Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries, in Report of the International Law Commission to the General Assembly, U.N. Doc. A/56/10; GAOR, 53rd Sess., Supp. No. 10 (2001), http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

18. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, art. XX [hereinafter GATT]; General Agreement on Trade in Services, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1167, art. XIV [hereinafter GATS].

19. PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* 615 (2d ed. 2008).

20. See discussion *infra* Part B.

21. In this paper, the two terms of 'development' and 'sustainable development' are used interchangeably.

22. Phillippe Sands, *International Courts and the Application of the Concept of "Sustainable De-*

this purpose, adjudicatory bodies should always give due consideration to the developmental situation of the countries concerned and to the developmental impact of the measure at issue in a given case. This interpretative approach should not be conceived of as a way to create new legal obligations.

After some general considerations, the interpretation of exceptions provisions in the WTO context will be discussed. Later in the paper, the inclusion of general exceptions provisions in the investment domain will be examined together with a brief analysis of how general exceptions provisions might be applied in practice in an investment law context. Finally, general conclusions will be drawn.

II. INTERPRETING TRADE AND INVESTMENT GENERAL EXCEPTIONS PROVISIONS: IS A DEVELOPMENT INTERPRETIVE APPROACH POSSIBLE?

A. General Considerations

As already mentioned above, a development-oriented interpretation of general exceptions is possible. WTO panels and the Appellate Body have already done this implicitly. However, a further step towards an explicit development-oriented interpretative approach could also be possible, moving within the borders of general rules of treaty interpretation under international law. The customary rules of treaty interpretation fully support such an interpretative approach. Under Article 31 (1) of the Vienna Convention on the Law of Treaties ("VCLT"), "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."²³ Article 31, together with Article 32, of the VCLT is widely considered a codification of customary rules on treaty interpretation.²⁴ Article 3.2 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") makes the "customary rules of interpretation of public international law" explicitly applicable in the WTO context.²⁵ WTO panels and the Appellate Body have commonly resorted to these rules.²⁶ Indeed, WTO law can be considered a part of

velopment", 3 MAX PLANCK Y.B.U.N.L. 389, 400 (1999).

23. Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1), 1155 U.N.T.S. 331, 340 [hereinafter VCLT].

24. See, e.g. Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad), Judgment, 1996 I.C.J. 6, ¶ 29 (Feb. 3); Kasikili/Sedudu Island (Botswana/Namibia), Judgment, 1999 I.C.J. 1045, ¶ (Dec. 18); Golder v. United Kingdom, 18 Eur. Ct. H.R. at ¶ 29 (1975); OPPENHEIM'S INTERNATIONAL LAW 1271-75 (Robert Jennings & Arthur Watts eds. 1992)

25. Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), *Marrakesh Agreement Establishing the World Trade Organization*, Annex 2, reads as follows:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

DSU, *supra* note 15, at art. 3.2.

26. Appellate Body Report, *United States – Standards for Reformulated and Conventional Gaso-*

public international law.²⁷ Due to its private-public mixed nature, the possibility of applying customary rules of public international law is still an unresolved, controversial point in investor-state arbitration.²⁸ Nevertheless, these disputes relate to treaties and investment tribunals have shown varying degrees of acceptance of the customary rules of treaty interpretation.²⁹

Article 31 (1) of the VCLT makes a clear reference to treaties' objects and purposes, as relevant elements to be taken into consideration.³⁰ These are normally expressed in the preamble of a given agreement, although they could be detected in the operative clauses of the agreement taken as a whole.³¹ However, since Article 31(1) refers to different elements (terms of the treaty, its context, its object and its purpose), it is essential to understand how to consider all these elements together. WTO panels and the Appellate Body have clarified that the principles of interpretation that are set out in Articles 31 and 32 are to be followed in a holistic fashion, "so as to yield an interpretation that is harmonious and coherent and fits comfortably in the treaty as a whole in order to render the treaty provision legally effective."³² This approach has been supported by some developing countries.³³ In the WTO Preamble, WTO Members explicitly recognized the need for fostering development. This has been expressed through the recognition of the need for developing and least-developed countries to develop their economies, the need for raising the standards of living, for ensuring full employment, for growing of real

line, at 17, WT/DS2/AB/R(adopted May 20, 1996) [hereinafter *US – Gasoline*]; Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, ¶ 46, WT/DS50/AB/R, (Dec. 19, 1997); Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, ¶ 42, WT/DS56/AB/R, (adopted Jan. 16, 1998); Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, ¶¶ 61-62, WT/DS213/AB/R, (adopted Dec. 19, 2002).

27. Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535, 538 (2001).

28. See, e.g., *BG Group Plc. v. Republic of Argentina*, Final Award, ¶ 408 (2007) (excluding the applicability of Article 25 of the ILC Draft Articles on State Responsibility in investor-State arbitration since it "relate[s] exclusively to international obligations between sovereign States."). For further discussion on state-to-state and investor-to-state relationship in investment treaty arbitration, see Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BRIT. Y.B. INTL. L. 151 (2003).

29. Compare *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, ¶ 80 (Aug. 3, 2004), (where the Tribunal stated that it was going simply to "adhere" to the rules of interpretation codified in Article 31 (1) of the VCLT), with *Malaysian Historical Salvors Sdn Bhd v. Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, at 56, (Apr. 16, 2009) (where the Committee considered "itself on firm ground in resorting to the customary rules of interpretation of treaties as codified" in the VCLT), and *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 27, (Apr. 29, 2004) (recalling that "other tribunals" used these rules of interpretation), and *Noble Ventures Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, ¶50, (Oct. 12, 2005) (referring to the supplementary means of interpretation as codified in Article 32 of the VCLT).

30. VCLT, *supra* note 23, art. 31(1).

31. Qureshi, *supra* note 15, at 96.

32. Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, ¶ 268, WT/DS350/AB/R, (adopted Feb. 19, 2009).

33. See generally DSU African Group, *supra* note 7; and DSU Cuba et al., *supra* note 7.

income, and for optimally using the world's resources.³⁴

Nonetheless, only through due consideration of developmental concerns is it possible to reach one of the main purposes of the WTO, that is, "to develop an integrated, more viable and durable multilateral trading system," as mentioned in the Preamble of the WTO Marrakesh Agreement.³⁵ In a similar fashion, notwithstanding the uniqueness of each investment treaty, investment treaties often refer to development in one way or the other. In the United States–Azerbaijan Bilateral Investment Treaty,³⁶ both parties recognize that the treatment accorded to investment under the treaty will stimulate the flow of private capital and the economic development of the parties and agree that a stable framework for investment will maximize effective utilization of economic resources and improve living standards, without it being necessary to relax health, safety, and environmental measures of general application. The same concerns are mentioned in the Preamble of the 2012 United States Model Bilateral Investment Treaty, which also includes specific provisions on investment and environment, and investment and labor, respectively at Articles 12 and 13,³⁷ while the 2004 Canada Model Bilateral Investment Treaty expressly mentions in its Preamble the promotion of sustainable development and later contemplates the relation between investment and health, safety, and environmental measures in its Article 11.³⁸

Other countries, such as China, do not make reference to development in their bilateral investment treaties ("BITs"), but mention "mutual benefit"³⁹ and the "increase [of] prosperity in both States,"⁴⁰ which recall the concept of development. In addition, the Preamble of the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"),⁴¹ clarifies that the Contracting States agreed to the ICSID Conven-

34. Marrakesh Agreement Establishing the World Trade Organization, Preamble, April 15, 1994, 1867 U.N.T.S. 154.

35. *Id.*

36. Treaty Between the Government of the United States of America and the Government of the Republic of Azerbaijan Concerning the Encouragement and Reciprocal Protection of Investment, US–Azer., Aug. 1, 1997, S. Treaty Doc. No. 106-47 (2001).

37. 2012 U.S. Model Bilateral Investment Treaty, art. 12-3, 2012, <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> [hereinafter *US-Model BIT*].

38. Canada Model Agreement for the Promotion and Protection of Investments, Preamble, art. 10, 2004, <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf> [hereinafter *Canada Model BIT*].

39. Agreement Between the Government of the People's Republic of China and the Government of the Republic of Albania Concerning the Encouragement and Reciprocal Protection of Investments, China–Alb., Preamble, Feb. 13, 1993, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/8>.

40. Bilateral Agreement for the Promotion and Protection of investments Between the Government of the Republic of Colombia and the Government of the People's Republic of China, Colombia–China, Preamble, Oct. 22, 2008, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/720>.

41. The ICSID Convention established the *International Centre for the Settlement of Investment Disputes* (ICSID), the primary institutional and procedural framework for the settlement of investment disputes between governments and foreign investors. See A. Broches, *The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction*, 5 COLUM. J. TRANSNAT'L L. 263, 264 (1966).

tion's taking into consideration the need for "international cooperation for economic development, and the role of private international investment therein" and the desire "to establish such facilities [for international conciliation and arbitration] under the auspices of the International Bank for Reconstruction and Development,"⁴² whose primary goal is to foster development.⁴³ The idea of a development-oriented interpretation appears to be strengthened also by other provisions of the VCLT. Under Article 31(3)(c) of the VCLT, the interpreter has to take into consideration together with the context, any relevant rules of international law applicable in the relations between the parties.⁴⁴ Treaties' preambles serve to highlight the object and purpose of a treaty, while the need to take into consideration other relevant rules of international law reflects the need of a systematic integration, allowing the interpreter to find appropriate accommodation between conflicting values and interests in the international society.⁴⁵ This is especially relevant when interpreting treaty obligations that interact with other treaties.⁴⁶ In this latter sense, systematic integration might have the same purpose of exceptions in international law: striking a balance between opposite needs or concerns.

Indeed, it is not easy to understand whether the relevant rules referred to in VCLT Article 31(3)(c) are those binding on all parties (say for instance, all WTO Members) or only on some of them.⁴⁷ However, in certain multilateral contexts such as at the WTO, it would be illogical to require the relevant rules to be those that are applicable to all WTO Members.⁴⁸ On a similar line, Article 42 of the ICSID Convention stipulates that in the absence of an agreement between the parties on the rules of law to be applied, "the Tribunal shall apply the law of the Contracting State party to the dispute. . . and such rules of international law as may be applicable."⁴⁹ Given the (at least voiced) support for them, it would be difficult not to see declarations, agreements, and principles of international law on development as relevant and applicable to the economic relations between the parties. The Rio Declaration on Environment and Development ("UNCED"), which in its

42. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Preamble, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

43. See Article I of the International Bank for Reconstruction and Development, which stipulates that the Bank shall be guided in all its decisions by the purposes set out in Article I, in particular, to assist "the reconstruction and development of territories of members;" "to promote the long-range balanced growth of international trade;" and "to conduct its operations with due regard to the effect of international investment on business conditions in the territories of members." Articles of Agreement of the International Bank for Reconstruction and Development, art. 1(i),(iii),(v), Dec. 27, 1945, 60 Stat. 1440, 2 U.N.T.S. 134.

44. Article 31(3)(c) of the VCLT reads as follows: "There shall be taken into account, together with the context: . . . (c) Any relevant rules of international law applicable in the relations between the parties." VCLT, *supra* note 23, at 31(3)(c).

45. Campbell McLachlan, *The Principle of Systemic Integration and Article 31 (3) (c) of the Vienna Convention*, 54 INT'L & COMP. L. Q. 279, 318-19 (2005).

46. Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. INT'L L. 753, 780 (2002).

47. *Id.* at 780-81.

48. *Id.* at 782.

49. ICSID Convention, *supra* note 42, art. 42.

Principle 27 calls attention to sustainable development, implicitly recognizes that at the time of its negotiation there existed a body of international law on sustainable development.⁵⁰ The right to development has also been eminently recognized as an important principle of international law.⁵¹

In light of the above, one should bear in mind that the object and purpose of a treaty as indicated in its preamble should ‘pervade’ all its provisions, including exceptions. This has been confirmed, for instance, by the WTO Appellate Body when it clarified that the language of the Preamble of the WTO Agreement “must add color, texture and shading” to the interpretation of the Agreements annexed to the WTO Agreement, including GATT Article XX.⁵² The Appellate Body has stressed that an exception is another treaty provision that should be interpreted in accordance with its terms, its context, and in light of the object and purpose of the treaty – the ordinary rules of treaty interpretation.⁵³ Investment tribunals have taken into account the ICSID Convention and IIAs’ objects and purposes as indicated in their preambles.⁵⁴ Nevertheless, contrary to what is argued in this paper, some investment tribunals have suggested that in accordance with the investment promotion and protection purpose of IIAs, exceptions to IIAs obligations should be interpreted narrowly.⁵⁵ In *Canfor Corporation v. United States and Terminal Forest Products Ltd. v. United States*, the Tribunal, referring to GATT jurisprudence,⁵⁶ stated that exceptions in international instruments should be interpreted narrowly.⁵⁷ In *CMS v. Argentina*, with regard to the interpretation of the “essential security interest” exception in Article XI of the 1991 Argentina–U.S. BIT, the Tribunal supported the idea of a restrictive interpretation with the reasoning that “If strict

50. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992); Sands, *supra* note 22, at 392.

51. Subrata Roy Chowdhury, *Intergenerational Equity: Substratum of the Right to Sustainable Development*, in *THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW* 233, 233 (Subrata Roy Chowdhury, Eric M.G. Denters & Paul J.I.M. de Waart eds., 1992).

52. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 153, WT/DS58/AB/R, (adopted Nov. 6, 1998) [hereinafter *US–Shrimp*].

53. Appellate Body Report, *United States – Measures Affecting the Cross-Border Supplying of Gambling and Betting Services*, ¶ 291, WT/DS285/AB/R, (adopted Apr. 20, 2005) [hereinafter *US–Gambling*] (general exceptions “affirm the right of Members to pursue objectives identified in the paragraphs of these provisions even if, in doing so, Members act inconsistently with obligations set out in other provisions of the respective agreements, provided that all of the conditions set out therein are satisfied.”); *see also US–Shrimp*, *supra* note 52, ¶ 121 (where the Appellate Body criticized the approach of the Panel in excluding *a priori* certain measures from the scope of the GATT Article XX exception.); ANDREW NEWCOMBE & LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES* 487 (2009).

54. *See, e.g., Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, ¶ 149 (Mar. 15, 2002); *American Manufacturing & Trading Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, ¶ 5.12, (Feb. 21, 1997).

55. NEWCOMBE & PARADELL, *supra* note 53, at 484–85.

56. Panel Report, *Canada – Import Restrictions on Ice Cream and Yoghurt*, ¶ 59, L/6568–36S/68 (Sept. 27, 1989) GATT B.I.S.D. (36th Supp.) [hereinafter *Canada–Restrictions on Ice Cream*].

57. *Canfor Corp. v. United States & Terminal Forest Prods. Ltd. v. United States*, Decision on Preliminary Question, ¶ 187, (June 6, 2006).

and demanding conditions are not required or are loosely applied, any State could invoke necessity to elude its international obligations. This would certainly be contrary to the stability and predictability of the law."⁵⁸

The same restrictive approach, with regard to the same provision of the 1991 Argentina–U.S. BIT, was adopted by the Enron Corporation and Ponderosa Assets, L.P. v. Argentina Tribunal since “. . . any interpretation resulting in an escape route from the obligations defined cannot be easily reconciled with that object and purpose. Accordingly, a restrictive interpretation of any such alternative is mandatory.”⁵⁹ Some commentators have even supported the view that protecting investors’ rights was the only objective of the U.S.–Argentina BIT.⁶⁰ This reading expressly overlooks the recognition in the BIT’s Preamble of the economic development of the parties, the effective use of economic resources, and the contributions to the well-being of workers. Conversely, some investment tribunals, conceding that protection of foreign investment is a necessary element of BITs, significantly noted that it is not the sole aim of investment treaties.⁶¹ Some scholars have also underscored that the presumption of a narrow interpretation of exceptions could be contradicted by the contrary presumption that a restrictive interpretation of treaty obligations is an undue derogation of sovereignty (by way of the *in dubio pars mitio est sequenda* or *in dubio mitius* principle).⁶²

All of these considerations allow one to affirm that a development-oriented interpretation, moving within the borders of the general rules of interpretation of international law and the relevant treaties’ objects and purposes, would not detract from legal certainty and predictability on the one hand, nor would it be a form of judicial activism or excess of power by a WTO panel, the Appellate Body, or an investment arbitral tribunal. This interpretative approach is strictly anchored to the wording of the relevant agreements and moves within the perimeter of the letter of the law. DSU Articles 3.2 and 19.2 stipulate that panels and the Appellate Body, as well as the Dispute Settlement Body, cannot add or diminish the rights and obligations of WTO Members under the covered agreements. The common view is that these provisions preempt panels and the Appellate Body from engaging in judicial activism.⁶³ This issue has been discussed as well in respect of investment

58. CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶ 317 (May 12, 2005), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC504_En&caseId=C4.

59. Enron Corp. v. Argentine Republic, ICSID Case No. ARB/01/03, Award, ¶ 311, May 22, 2007, <http://www.italaw.com/documents/Enron-Award.pdf>.

60. José E. Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, 80-81 (N.Y. Univ. Sch. of Law Inst. for Int’l Law & Justice Working Paper 2008/5, 2008), <http://www.iilj.org/publications/documents/2008-5.AlvarezKhamsi.pdf>.

61. Saluka Inv. BV v. Czech Republic, Partial Award, ¶¶ 296-308 (Perm. Ct. Arb. 2006), http://www.pca-cpa.org/showfile.asp?fil_id=105.

62. NEWCOMBE & PARADELL, *supra* note 53, at 116, 485 (the *in dubio pars mitio est sequenda* or *in dubio mitius* principle, means that since treaty commitments are a derogation of sovereignty, the interpretation favouring a lesser obligation should be favoured).

63. Though the nature and meaning of these provisions is still disputed, *see, e.g.* Lorand Bartels,

tribunals.⁶⁴ Although in IIAs and FTAs with investment chapters there seems to be no provision drafted in a DSU Article 3.2-similar fashion, the jurisdiction of arbitral investment tribunals is limited and depends on the underlying dispute resolution clause(s).⁶⁵ Apparently, judicial activism in investment law has considerably increased over the last decade.⁶⁶ However, as it will be further discussed below, taking into consideration developmental needs would mean to act with due respect for the letter of the law.⁶⁷ A development-oriented interpretative approach, as intended here, does not trespass in the territory of judicial activism or excess of power.

B. The Interpretation of General Exceptions Provisions in the WTO Context

Discussing the state of the WTO as an institution and the challenges of a globalized world on the occasion of the WTO tenth anniversary, the Sutherland Report emphasized, “neither the WTO nor the GATT was ever an unrestrained free trade charter.”⁶⁸ WTO Members are allowed to promote and protect other important societal values and interests, if certain conditions are met.⁶⁹ This is precisely what general exceptions in the GATT and GATS were intended for.⁷⁰ Moreover, the promotion and protection of societal values comes at a certain price, which in economic terms, can be compensated through the economic activity and welfare generated by trade.⁷¹ Sustainable development is a necessity, which encompasses the legitimate objectives of GATT Article XX and GATS Article XIV. The protection of human, animal, and plant life and health; the conservation of exhaustible natural resources; and the protection of national treasures are just a few of the objectives which could be pursued to foster sustainable development. There are some exceptions provisions in the GATT 1994 that explicitly have an economic development rationale,⁷² such as GATT Article XVIII:4 (the infant-industry-protection exception)⁷³ and the Enabling Clause.⁷⁴

Nonetheless, GATT and GATS general exceptions clauses can also be invoked to pursue development-related policies. Although there are some differ-

Applicable Law in WTO Dispute Settlement Proceedings, 35 J. WORLD TRADE L. 499, 499 (2001).

64. PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY: WORLD TRADE FORUM (Roberto Echandi & Pierre Sauvé eds., 2013).

65. Christopher Schreuer, *Jurisdiction and Applicable Law in Investment Treaty Arbitration*, 1 MCGILL J. DISP. RESOL. 1, 2 (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2520501.

66. THE EVOLVING INTERNATIONAL INVESTMENT REGIME, EXPECTATIONS, REALITIES, OPTIONS 19 (José E. Alvarez, et al. eds., 2011).

67. ROBERT HOWSE, THE WTO SYSTEM: LAW, POLITICS AND LEGITIMACY 49 (2007).

68. W.T.O. Rep. by the Consultative Bd. to the Dir.-Gen., *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* ¶ 39 (2004) (Peter Sutherland, et al.) [hereinafter Sutherland Report].

69. VAN DEN BOSSCHE, *supra* note 19, at 616.

70. *Id.*

71. *Id.* at 615.

72. *Id.* at 723.

73. GATT 1994, *supra* note 18, at art. XVIII ¶4.

74. *Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries*, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.), at 203 (1980).

ences between the GATT Articles XX and GATS Article XIV, they have been often cross-referenced,⁷⁵ and many lessons can be learned from the respective case law.⁷⁶ Both GATT and GATS cases have given panels and the Appellate Body the opportunity to clarify the meaning and scope of general exceptions. Here, it is argued that when interpreting general exceptions, it is possible to specifically take into consideration the development condition of the Member that adopted the measure at issue, of the Members affected by that measure, and the developmental impact of the measure(s). As further discussed below, this would be in line with previous WTO case law. In this vein, some commentators have expressed the view that the Appellate Body's decisions, with regard to development, have shifted towards a more balanced approach to trade liberalization.⁷⁷ Others have emphasized the Appellate Body's difficulty in emancipating itself from a rigorous textual approach toward a more holistic approach of treaty interpretation.⁷⁸

It is nonetheless worth noting that this latter view has been debated,⁷⁹ while the former seems to be based on a comparison of panels' decisions with Appellate Body's decisions, and GATT 1947 cases with WTO cases. This does not signal a real shift of the same adjudicatory body *sensu stricto*, and identifies alleged trends by reference to highly disputed decisions, such as *Tuna I*.⁸⁰ Moreover, although the Appellate Body's use of 'sustainable development' has been regarded as a way of dealing with potential conflicts, apparently leading to the construction of a "subtle doctrine of harmony,"⁸¹ this view characterizes the rather 'shy' position of the Appellate Body on sustainable development as a well-constructed explicit position.

Through WTO case law, panels and the Appellate Body have identified some now well-established rules on the interpretation of general exceptions. The two-

75. Appellate Body Report, *European Union – Measures Prohibiting the Importation and Marketing of Seal Products*, n. 1178, WT/DS400/AB/R, WT/DS401/AB/R (adopted June 18, 2014) [hereinafter *EC-Seal Products*]; Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 7.759, WT/DS363/R (Dec. 21, 2009) [hereinafter *China-Publications and Audiovisual Products*]; *US-Gambling*, *supra* note 53, ¶ 291.

76. See, e.g., VAN DEN BOSSCHE, *supra* note 19, at 662-663 (giving specific regard to general exceptions provisions chapeau). For these reasons, whenever a reference is made in this paper to GATT Article XX, it is supporting the idea that the same holds true and applies to GATS Article XIV, and vice versa, where possible and unless otherwise specified.

77. Padideh Ala'i, *Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalization*, 14 AM. U INT'L L. REV. 1129, (1999).

78. Claus-Dieter Ehlermann, *Six Years on the Bench of the 'World Trade Court': Some Personal Experiences as Member of the Appellate Body of the World Trade Organization*, 36 J. WORLD TRADE 605, 615 (2002); Frederico Ortino, *Treaty Interpretation and the WTO Appellate Body Report in US – Gambling: A Critique*, 9 J. Int'l Econ. L. 117 (2006).

79. Asif Qureshi, *Interpreting WTO Agreements for the Development Objective* 98 (ICTSD Resource paper No.5, 2003).

80. Panel Report, *United States – Restrictions on Imports of Tuna*, DS29/R (June 16, 1994) (not adopted).

81. Gabrielle Marceau & Fabio Morosini, *The Status of Sustainable Development in the Law of the World Trade Organization*, in ARBITRAGEM E COMÉRCIO INTERNACIONAL – ESTUDOS EM HOMENAGEM A LUIZ OLAVO BAPTISTA 60, 61 (Umberto Celli Junior, et al. eds., 2013).

tier test to be applied in the interpretation of general exceptions is among them. Interpreting general exceptions clauses consists of a first step, where it is necessary to examine whether the measure(s) at issue comes under one or another of the particular exceptions indicated in the subparagraphs of Article XX; and a second step, where the measure(s) must be further appraised under the introductory clause of Article XX.⁸² The Appellate Body has confirmed this two-tier analysis for the interpretation of GATS Article XIV.⁸³ Accordingly, if one measure is inconsistent with an obligation of the GATT 1994 or the GATS but falls within one of the subparagraphs of GATT Article XX or GATS Article XIV, the way the measure is applied must still be examined under the chapeau.⁸⁴ In fact, the chapeau of both Articles requires that the measures at issue “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.”⁸⁵ The analysis under the specific exceptions under GATT and GATS general exceptions provisions subparagraphs has to be distinguished from the one under the chapeau.⁸⁶ In particular, under general exceptions clauses, depending on the interest or policy sought to be promoted or realized, a different kind or degree of connection between the measure at issue and the interest or policy is required.⁸⁷ As already observed, the GATT is not to be read in clinical isolation from public international law.⁸⁸ Accordingly, GATT Article XX should be read in the light of the Agreement’s object and purpose; and the relationship between a general exceptions provision and other affirmative commitment provisions can be given meaning within this general interpretative scheme only on a case-by-case basis,⁸⁹ depending on the specific provisions breached in the first place.

It follows that the reading of general exceptions depends on the substantive provisions violated in each case, on the affirmative commitments they set out, and their specific relationship with the exceptions.⁹⁰ This case law has positively distanced WTO adjudicatory bodies from the narrow interpretation originally favored

82. Appellate Body Report, *Korea – Measures Affecting of Fresh, Chilled and Frozen Beef*, ¶ 156 WT/DS161/AB/R, WT/DS169/AB/R (adopted Jan. 10, 2001) [hereinafter *Korea – Various Measures on Beef*]; *US – Gasoline*, *supra* note 26, at 22; *US-Shrimp*, *supra* note 52, ¶¶ 119-21.

83. *US-Gambling*, *supra* note 53, ¶ 292. This is not to deny that some differences between the two Articles exist, also with regard to the regulatory autonomy space left to Members under one or the other, *see* Thomas Cottier, et al., *Article XIV GATS: General Exceptions*, in 6 MAX PLANCK COMMENTARIES ON WORLD TRADE LAW, WTO – TRADE IN SERVICES 287 (Wolfrum Rüdiger, et al., eds. 2008).

84. *See, e.g.*, Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶ 215, WT/D332/AB/R (adopted Dec. 17, 2007) [hereinafter *Brazil – Retreaded Tyres*].

85. GATT, *supra* note 18, at art. XX. *See also* GATS, *supra* note 18, at art. XIV.

86. *US-Gasoline*, *supra* note 26, at 22.

87. *Id.* at 18 (stating that “it does not seem reasonable to suppose that WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized.”).

88. *Id.* at 17-18.

89. *Id.* at 18.

90. *Id.*

by some panels. In *Indonesia-Autos*, the Panel, after stressing that the fundamental objective and purpose of the WTO system is trade liberalization, stated that under the WTO system waivers and exceptions have to be interpreted narrowly.⁹¹ To support its general statement, the panel quoted substantial case law in the same direction.⁹² To the contrary, one should avoid fixed interpretations, elaborated *a priori* on the 'one size fits for all' principle. By implication, one can assert that an agreement's object and purpose, as identified in the agreement's preamble, is to be distinguished from general exceptions clauses and has to be regarded as adding to it, rather than already implicitly incorporated in it. The Appellate Body has given a consistent interpretation of general exceptions provisions. The exceptions recognized in Article XX of GATT 1994 embody domestic policies recognized as important and legitimate in character.⁹³ In *U.S.-Shrimp*, recalling that there are some binding principles of interpretation that panels should abide by,⁹⁴ the Appellate Body emphasized that GATT Article XX (g) must be read "in the light of contemporary concerns of the community of nations about the protection and conservation of the environment," a legitimate goal of national and international policy, together with the objective of sustainable development, which is acknowledged in the Preamble of the WTO Agreement and informs the GATT 1994 and other covered agreements.⁹⁵ In *U.S.-Gambling*, the Appellate Body found that Members are not required to negotiate with other affected Members because negotiation is a process and not a reasonable alternative measure *per se*.⁹⁶ However, here, the Appellate Body was discussing the panel's position on the need for Members to negotiate with specific regard to GATS Article XIV(a) public morals and public order exception, not under the chapeau, as it had done in *U.S.-Shrimp*.⁹⁷ The Appellate Body found that it is for the responding party to show that the measure is necessary to achieve objectives relating to public morals and public order.⁹⁸

However, a Member need not identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective.⁹⁹ A measure generally is not "reasonably available" if the Member is not capable of taking it or, due for instance to prohibitive costs or substantive tech-

91. Panel Report, *Indonesia - Certain Measures Affecting the Automobile Industry*, ¶ 5.237-5.238, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, (July 23, 1998) [hereinafter *Indonesia-Autos*].

92. Panel Report, *United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*, ¶ 4.4, DS7/R (July 11, 1991) GATT B.I.S.D. (38th Supp.) (provisions that constitute "an exception to basic principles of the General Agreement had to be interpreted narrowly."); Panel Report, *Norway - Procurement of Toll Collection Equipment*, ¶ 4.5, GPR DS2/R (May 13, 1992) ("Since Article V:16(3) [of the Government Procurement Agreement] was an exceptions provision, its scope had to be interpreted narrowly"); *Canada-Restrictions on Ice Cream*, *supra* note 56, ¶ 59 (the panel "noted, as had previous panels, that exceptions were to be narrowly interpreted").

93. *US-Shrimp*, *supra* note 52, ¶ 121.

94. *Id.*

95. *Id.* ¶ 129.

96. *US-Gambling*, *supra* note 53, ¶ 317.

97. *Id.*

98. *Id.* ¶ 309.

99. *Id.*

nical difficulties, if the measure imposes an undue burden on that Member.¹⁰⁰ Prohibitive costs, substantive technical difficulties, or the burden imposed by a measure implicitly push toward the consideration of the developmental status of a WTO Member. It does not amount nonetheless to an explicit consideration of this status and the related problems that it entails. Further, in *Korea-Various Measures on Beef*, with regard to GATT Article XX(d), the Appellate Body found that the more vital or important the common interests or values pursued are, the easier it would be to accept as “necessary” a measure designed as an enforcement instrument.¹⁰¹ To determine whether a measure, which is not indispensable, is still necessary under Article XX(d), a process of weighing and balancing a series of factors has to be conducted in every case.¹⁰² Here again, developmental goals could be or could encompass vital and important common interests or values that a state might pursue according to the Appellate Body’s interpretation.¹⁰³ Also, a WTO Member’s developmental status could be one of the factors to be taken into account to understand whether a non-indispensable measure is still necessary. Nevertheless, this does not amount to an explicit recognition of sustainable development as a common interest and value pursued nor as an element to be necessarily factored in under a GATT Article XX assessment.

In light of the considerations above, the developmental condition of a WTO member and the bearing of the measure at issue could gain an explicit standing as elements to be taken into account once an assessment under a general exceptions clause is made. The interpretation given to the chapeau of GATT Article XX and GATS Article XIV seems to move along similar lines of general exceptions provisions subparagraphs. The chapeau embodies WTO Members’ recognition of the need to maintain a balance between Members’ rights and obligations.¹⁰⁴ A balance between Members’ rights and obligations depending on the measure at stake and the facts of the case has to be struck, without rendering Members’ right to invoke exceptions imaginary.¹⁰⁵ In *U.S.-Shrimp*, after finding that the measure at issue was justified under GATT Article XX(g), the Appellate Body examined it under the chapeau.¹⁰⁶ It found that the language of the GATT Preamble must add color, texture, and shading to the interpretation of the covered agreements.¹⁰⁷ The Appellate Body also referred to the *Decision of Ministers at Marrakesh to Establish a Permanent Committee on Trade and Environment*,¹⁰⁸ as a development that occurred and which helped elucidate the objectives of the WTO Members. In this way, the need to pay attention to the dynamic and evolutionary relationship between trade and environmental objectives was explicitly recognized.

100. *Id.* ¶ 308.

101. *Korea-Various Measures on Beef*, *supra* note 82.

102. *Id.* ¶ 164.

103. *Id.* ¶ 162.

104. *US-Shrimp*, *supra* note 52, ¶ 156.

105. *Id.* ¶¶ 156, 159.

106. *Id.* ¶ 146.

107. *Id.* ¶ 153.

108. *Id.* ¶ 154.

By the same token, although still not tested, a similar analysis could be applied with regard to other sustainable development objectives. For instance, the GATT Preamble also adds color, texture, and shading to other GATT Article XX subparagraphs; and, as already clarified, sustainable development is one of the WTO Members' objectives. Thus, an adjudicatory body has to give the right weight to the developmental objectives and developmental status of the Member(s) concerned, while also bearing in mind the changing relationship between trade and developmental objectives. Further, when examining whether a measure was an "arbitrary discrimination," the Appellate Body found that the chapeau mandates a Member adopting the measure under appraisal to take into consideration different conditions which may occur in the territories of the Members affected by the measure.¹⁰⁹ The chapeau explicitly refers to "arbitrary or unjustifiable discrimination between countries where the same conditions prevail."¹¹⁰ These conditions might include the developmental status of the Member(s) affected by the measure at issue. Reference to the impact of the measure on the developmental condition of both the Member adopting it and the Member(s) affected might also lead to a market- or sector-specific examination. A developing country might for instance be extremely strong in some sectors, while weak in others. Also, the prevailing conditions do not necessarily require a state-to-state comparison: they could refer to conditions prevailing in specific regions or industries/sectors.

Such an approach might deliver better results in terms of tailored solutions for developmental concerns. The *U.S.-Shrimp* case shows how a developmental measure, in a globalized and interconnected world, where the territorial nature of certain measures is relative, could be taken by a developed country such as the United States, and still benefit or impair developing and least-developed countries' interests. The Appellate Body highlighted the need to negotiate a suitable alternative solution or to try to do it with other Members,¹¹¹ which seems to implicitly impose on the Member adopting the measure to consider other Members' positions and the impact of the measure on their conditions. It remains to be seen whether the need to negotiate with other WTO members is necessary for a measure to be justified under a general exceptions provision or if it simply was an element identified by the Appellate Body based on the specific facts of the case. In any case, the special consideration of WTO Members' developmental status or of a measure developmental impact would be no stranger to the multilateral trading system. For instance, Member States should already give special attention to developing country Members' problems and interests during consultations,¹¹² and panels indicate in their reports the way in which they took account of special and differential treatment provisions.¹¹³ In the chapeau analysis, for a measure not to be an "unjustifiable" discrimination, a Member has to defend or convincingly explain the rationale

109. *Id.* ¶ 165.

110. *Id.* ¶ 120.

111. *Id.* ¶ 168-70.

112. DSU, *supra* note 15, art. 4.10.

113. *Id.* art 12.11.

for any discrimination in the application of the measure.¹¹⁴ Consequently, the measure is an “unjustifiable” discrimination when it does not relate to the pursuit of or goes against the objective that it was provisionally found to legitimately pursue under a paragraph of GATT Article XX.¹¹⁵ In this vein, “arbitrary discrimination,” “unjustifiable discrimination,” and “disguised restriction” might be read side-by-side.¹¹⁶ A measure is specifically a “disguised restriction” if its compliance with a paragraph of a general exceptions clause is in fact a disguise to conceal the pursuit of trade-restrictive objectives.¹¹⁷ The design of the measure, its architecture, and revealing structure are all elements disclosing whether there has been a “protective application” of the measure.¹¹⁸ Hence, it is difficult to see how one could test a measure under the chapeau without evaluating the general situation of the Member adopting the measure at issue, of the Members affected by it, and the result of the application of the measure, which relates also to its developmental impact. Also, one should not forget that the characterization that a Member gives to its own measure is not decisive.¹¹⁹

C. General Exceptions Provisions in International Investment Agreements

International trade law and investment law have been characterized by a high degree of osmosis. Legal concepts and legal reasoning have passed from one field to the other. The Most Favored Nation (“MFN”) treatment obligation, which was first included in treaties of friendship, commerce, and navigation in the realm of trade and has later gained currency in investment law,¹²⁰ is just one of many possible examples. Investment tribunals have proven to be open to persuasion based on legal reasoning developed in GATT and WTO case law.¹²¹ The Appellate Body has rarely made reference to investment tribunals in support of its reasoning.¹²² The historical and conceptual links between trade and investment have made it

114. Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶ 7.260, WT/DS332/R (June 12, 2007).

115. *Brazil – Retreaded Tyres*, *supra* note 84.

116. *US – Gasoline*, *supra* note 26.

117. Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products*, ¶ 8.236, WT/DS135/R (Sep. 18, 2000).

118. *Id.*

119. *Indonesia-Autos*, *supra* note 91, ¶ 14.91.

120. United Nations Conference on Trade and Development, 2010, *Most-Favored-Nation Treatment*, at 9-12, UNCTAD/DIAE/IA (2010), http://unctad.org/en/docs/diaeia20101_en.pdf.

121. *Methanex Corp. v. United States*, ICSID, Final Award of the Tribunal on Jurisdiction and Merits, ¶ 6 (Aug. 3, 2005) (where the Tribunal stated that whilst interpretations given in the context of the GATT are not binding precedent, “the Tribunal may remain open to persuasion based on legal reasoning developed in GATT and WTO jurisprudence, if relevant.” This case has been nonetheless regarded as a case where investment tribunals have been reluctant to rely on WTO case law in the interpretation of specific investment obligations, see ANDREW NEWCOMBE, *General Exceptions in International Investment Agreements*, in SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 351, 364 (Marie-Clair Cordonnier Segger, et al. eds., 2011).

122. Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, at 67 n.313, WT/DS344/AB/R (adopted May 20, 2008) [herein after *US-Stainless Steel from Mexico*].

easy for investment tribunals to turn to trade case law to interpret investment treaties.¹²³ In this context, GATT and GATS-style general clauses are among those legal provisions borrowed by IIAs and FTAs with investment chapters.¹²⁴ Some scholars have estimated that around twenty-five to thirty current IIAs contain GATT and GATS-like general exceptions.¹²⁵ General exceptions applicable to investment appear to be more often included in FTAs with investment chapters.¹²⁶ As for their drafting, these general exceptions provisions vary significantly: for instance, Article 95 of the Switzerland-Japan Free Trade Agreement and Economic Partnership Agreement “incorporates” and “makes part of the Agreement,” *mutatis mutandis*, Articles XIV and XIVbis of the GATS;¹²⁷ while Article 22.1(3) of the 2014 Korea–Australia Free Trade Agreement adopts almost the same language of GATS Article XIV, with some slight changes.¹²⁸ Some commentators have identified four different approaches to the inclusion of general exceptions provisions in IIAs.¹²⁹ However, one should be careful in classifying other types of clauses aimed at promoting some limited legitimate interests such as the environment or cultural and linguistic diversity and public order exception clauses¹³⁰ as some form of general exception clauses, due to their structural diversity.

The introduction of general exceptions provisions in the realm of investment law has bestowed mixed blessings. Some scholars have argued that the inclusion of general exceptions clauses in IIAs and FTAs will not have much practical significance.¹³¹ Some have even gone so far as to qualify their application to invest-

123. Robert Howse & Efraim Chalamish, *The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jurgen Kurtz*, 20 EUR. J. INT'L. L. 1087 (2009), <http://ejil.oxfordjournals.org/content/20/4/1087.full>.

124. See e.g. Framework Agreement of the ASEAN Investment Area art. 13 (Oct. 7, 1998), <http://cil.nus.edu.sg/rp/pdf/1998%20Framework%20Agreement%20on%20the%20ASEAN%20Investment%20Area-pdf.pdf>; Canadian Model BIT art. 10, 2004, <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf>; Norway Draft Model BIT art. 24 (Draft Version 191207, 2007), <http://www.italaw.com/sites/default/files/archive/ita1031.pdf> (now shelved); Damon Vis-Dunbar, *Norway Shelves its Draft Model Bilateral Investment Treaty*, INVESTMENT TREATY NEWS (June 8, 2009), <http://www.iisd.org/itm/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty/>; Free Trade Agreement, Kor.-Austl. art. 22, Dec. 12, 2014, <http://www.dfat.gov.au/trade/agreements/kafta/official-documents/Pages/chapter-22-general-provisions-and-exceptions.aspx>; Investment Treaty, Jordan-Sing. art. 18, May 16, 2004, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1755>.

125. NEWCOMBE, *supra* note 121, at 358.

126. *Id.* at 359.

127. Agreement on Free Trade and Economic Partnership, Japan-Switz., Feb. 19, 2009, <http://www.mofa.go.jp/region/europe/switzerland/epa0902/agreement.pdf>.

128. Free Trade Agreement, Kor.-Austl., Dec. 12, 2014, <http://www.dfat.gov.au/trade/agreements/kafta/official-documents/Pages/chapter-22-general-provisions-and-exceptions.aspx>.

129. Barton Legum & Ioana Pectulescu, *GATT Article XX and International Investment Law, in PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY* 340, 344-48 (Roberto Echarri & Pierre Suavé eds., 2013).

130. *Id.* at 347-48.

131. *Id.* at 351-52; NEWCOMBE, *supra* note 121, at 351.

ment as a “potentially risky policy.”¹³² Conversely, other academics, while specifically addressing public health measures and cautioning that general exceptions are not a “magic bullet” defense against investors’ claims, have judged their inclusion as a promising step for the limitation of investment protection.¹³³ Although the scope and interpretation of general exceptions in investment law is still unclear,¹³⁴ the idea of a positive impact in terms of enhanced public policy space for host states is not to be ignored. This is even more so if one anticipates that the interpretation of general exceptions in the WTO context will likely affect the interpretation of general exceptions and (even) of other types of exceptions in investment law. The inclusions of general exceptions in IIAs and FTAs with investment chapters reasonably carry with them the interpretations provided by panels and the Appellate Body in their reports, which constitute the GATT *acquis* and create legitimate expectations among WTO Members.¹³⁵ This is not to deny that general exceptions provisions need adaptation to the investment reality. Due to the specific circumstances of a case or to other factors, an investment tribunal could well decide to distance itself from the interpretation of general exceptions given at the WTO. In this latter case, the investment tribunal would likely have to detail the reasons on which its position is based, a general obligation of investment tribunals¹³⁶ and even more so in the case of a substantive body of case law on general exceptions, although elaborated in the different context of the WTO.

Thus, in the investment law context there is space to elaborate and further advance the interpretative solutions which have been touched upon at the WTO. In their interpretation of general exceptions articles, investment tribunals have the opportunity to accord due weight to the developmental needs and concerns of the host state and the developmental impact of the measure at issue. The more relevant the developmental condition or interest addressed, the more the tribunal has to be careful in its analysis. No obstacle prevents the adoption of a development-oriented interpretation of general exceptions clauses in the investment realm. The economic underpinning of trade and investment has already provided fertile ground for some convergence in the interpretation of trade and investment legal

132. Céline Lévesque, *The Inclusion of GATT Article XX Exceptions in IIAs: A Potentially Risky Policy*, in PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY 363, 363-70 (Roberto Echarri & Pierre Suavé eds., 2013).

133. Bryan Mercurio, *International Investment Agreements and Public Health: Neutralizing a Threat Through Treaty Drafting*, WORLD HEALTH ORG. BULL., 520, 522 (2014), <http://www.who.int/bulletin/volumes/92/7/13-130955.pdf>.

134. Simon Lester, *Improving Investment Treaties Through General Exceptions Provisions: The Australian Example*, INVESTMENT TREATY NEWS (May 14, 2014), <http://www.iisd.org/itn/2014/05/14/improving-investment-treaties-through-general-exceptions-provisions-the-australian-example/>; NEWCOMBE, *supra* note 121, at 369.

135. *US-Stainless Steel from Mexico*, *supra* note 122, ¶¶ 158-160; Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/D58/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted Nov. 1, 1996) [hereinafter *Japan-Alcoholic Beverages*].

136. For instance, the failure of the award to state the reasons on which it is based is one of the grounds on which either party of an investment arbitral proceedings may request annulment of the award under Article 52 (1) (e) of the ICSID Convention.

instruments.¹³⁷ In this vein, the inclusion of general exceptions provisions in the investment domain might even reveal a quest for greater coherence between trade and investment law. The recent litigation of the *Tobacco Plain Packaging* cases against Australia in different *fora*,¹³⁸ or the Softwood Lumber controversy between the United States and Canada involving trade disputes, investment arbitration, and domestic litigation,¹³⁹ has showed how the two regimes can be entangled. Framing exceptions provisions in the language of GATT and GATS general exceptions could signal that the investment discipline in IIAs and FTAs has been devised to coexist with the relevant trade rules under WTO Agreements.¹⁴⁰ Indeed, there have been some cases such as the GATT *Canada–FIRA* case or *Methanex v. U.S.A.*,¹⁴¹ where trade and investment issues were emerging in front of one and the same adjudicatory body. This is not to disregard the fact that, since trade and investment are different, they are regulated in different ways.¹⁴² It is true that the two regimes promote at time different interests and this could entail the need of somewhat different legal reasoning and logic.¹⁴³ Nonetheless, with all due adjustments, panels and the Appellate Body's interpretative approach to general exceptions clauses might deliver positive, concrete results in investment law.

It has been already briefly mentioned that doubts have been expressed about the inclusion of general exceptions provisions in IIAs and FTAs with an investment chapter.¹⁴⁴ This skepticism has been based on the position of some investment tribunals which, in the absence of express general exceptions to investment

137. Giorgio Sacerdoti, *Trade and Investment Law: Institutional Differences and Substantive Similarities*, 9 JRSLM. REV. LEGAL STUD 1, 1 (2014).

138. See generally Australia – Certain Measures Concerning Trademarks, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, Request for Consultations by Indonesia, WT/DS467/1 (Sep. 25, 2013); Australia – Certain Measures Concerning Trademarks, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, Consultations by Dominican Republic, WT/DS441/1 (July 23, 2012); Australia – Certain Measures Concerning Trademarks, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, Request for the Establishment of a Panel by Honduras, WT/DS435/16 (Oct. 17, 2012); Australia – Certain Measures Concerning Trademarks and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, Request for Consultation by Ukraine, WT/DS434/1 (Mar. 15, 2012); Philip Morris Asia Ltd. v. Commonwealth of Austl. PCA Case No. 2012-12 (the case also has been litigated in Australian courts).

139. See Leonila Guglya, *The Interplay of International Dispute Resolution Mechanisms: The Softwood Lumber Controversy*, 2 J. INT'L DISP. SETTLEMENT 175, 175 (2011).

140. This was apparently the argument used by Alejandro Jara, WTO former Deputy Director-General at the time, when he held a meeting with World Health Organization officials in October 2009, to convince them include in the text they were drafting on non-communicable diseases to incorporate terms related to GATT general exceptions, with a view to avoid potential challenges and incoherence with the multilateral trading system. CRAIG VANGRASSTEK, *THE HISTORY AND FUTURE OF THE WORLD TRADE ORGANIZATION* 174 (2013).

141. Panel Report, *Canada – Administration of the Foreign Investment Review Act*, ¶ 1.3, L/5504 (Feb 7, 1984) GATT B.I.S.D. (30th Supp.).

142. Nicholas Di Mascio & Joost Pauwelyn, *Non-discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT'L L. 48, 48 (Jan. 2008).

143. Howse & Chalamish, *supra* note 123, at 1090.

144. *Id.* at 17-8.

obligations, have apparently considered public policy space as already inherent in substantive provisions and thus have implied them.¹⁴⁵ Further, since general exceptions clauses provide a closed list of legitimate policy objectives, the unintended consequence of their inclusion in IIAs and FTAs might be a limitation of the range of legitimate objectives available to states.¹⁴⁶ The overall result could allegedly be that investment tribunals interpret general exceptions provisions as providing less regulatory flexibility than the one provided by IIAs and FTAs with investment chapters which do not contain similar exception clauses.¹⁴⁷ Investment tribunals have indeed expressed the view that some policy space for states to pursue legitimate objectives is already inherent, for instance, in national treatment obligations.¹⁴⁸ Others have even made reference to GATT 1947 case law to support the view that exceptions should be interpreted narrowly.¹⁴⁹

Though these arbitral decisions are relevant, they have been taken in the absence of general exceptions provisions in the relevant agreements. With their presence, an investment tribunal should distinguish and separate an exception provision from a breached affirmative-commitment provision. This approach would be respectful of the customary rules of treaty interpretation. In fact, one should not confuse the question of whether a violation of a substantive rule exists with the separate one of whether the inconsistency is nevertheless justified.¹⁵⁰ To do otherwise would result in the reduction of whole clauses or paragraphs of a treaty to redundancy or inutility.¹⁵¹ Conversely, all treaty provisions should be interpreted with a view to make them legally effective,¹⁵² including general exceptions provisions. Moreover, the inclusion of general exceptions provisions might be a general signal that states wish to retain more power to pursue public policy goals. In this sense, an exception provision is to be distinguished and held separate from other affirmative commitment provisions. In *China-Raw Material*, the Appellate Body confirmed the necessity to hold this distinction. It found that contrary to China's argument, China could not invoke Article XX of the GATT 1994, which had to be regarded as a separate and distinct provision, since in a given paragraph of China's Accession Protocol to the WTO there was only a reference to a specific Article of the GATT 1994, without mentioning any of its other provisions.¹⁵³ The compari-

145. NEWCOMBE, *supra* note 121, at 357.

146. *Id.* at 356.

147. *Id.*

148. See e.g. *Pope & Talbot Inc. v. Can.* Award on the Merits of Phase 2, ¶ 78 (Apr. 10, 2001); *GAMI Investments Inc. v. Gov't of the United Mexican States*, Final Award, ¶ 114 (Nov. 15, 2004).

149. *Canfor Corp. v. United States & Terminal Forest Prods. Ltd. v. United States*, Decision on Preliminary Question, ¶ 187 (June 6, 2006) (referring to Report of the Panel, *Canada – Import Restrictions on Ice Cream and Yoghurt*, ¶ 59, L/6568-36S/68 (Dec. 5, 1989)).

150. *US-Gasoline*, *supra* note 82, at 23.

151. *Id.*

152. Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, ¶ 268, WT/DS350/AB/R (adopted Feb. 19, 2009) [hereinafter *US-Continued Zeroing*].

153. Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, ¶¶ 288-291, WT/DS394/AB/R, WT/DS395/AB/R, WT/398/AB/R (adopted Feb. 22, 2012) [hereinafter *China Raw Materials*].

son of the language of different provisions of China's Accession Protocol strengthened this conclusion.¹⁵⁴ Hence, although the inclusion of general exceptions provisions could not lead as far as making it overlap with affirmative-commitment provisions, it could very well mold the reading of the overall agreement and help determine the balance of rights and obligations sought in its negotiation.

Some academics have added to the second, already mentioned line of criticism (the one pointing out that general exceptions provide with a limited range of legitimate objectives) that the chapeau would pose a very high threshold for measures to be justified.¹⁵⁵ On the one hand, general exceptions are qualified as general precisely due to the wide range of interest or values that states are allowed to pursue in comparison to other types of exceptions. Thus, the alternative view, that no list is better than a limited list of legitimate objectives, has to be rejected for the reasons above. On the other hand, it is worth remarking that so far there seems to be no conclusive evidence that interpretation provided by investment tribunals generally, with regard to exceptions, is more balanced and less strict than the one provided by panels and the Appellate Body. To the contrary, there are examples of investment tribunals which have adopted narrow interpretations of exceptions.¹⁵⁶ This restrictive interpretation is sometimes premised on the idea that any uncertainty on treaty interpretation should be resolved favoring the protection of covered investments.¹⁵⁷ For instance, the protection of foreign investment has been identified as the only object and purpose of the 1991 Argentina-U.S. BIT.¹⁵⁸ This argument appears overly centered on the alleged position of the United States during negotiation, disregarding that a treaty is the result of the will and expectations of all its parties and completely diminishes the recognition of economic development, of the need to effectively use economic resources and to respect workers' rights in the Preamble of that specific Treaty.¹⁵⁹

WTO panels and the Appellate Body interpretation of general exceptions have already proven influential in the investment treaty system with regard to the interpretation of exceptions. In *Continental Casualty v. Argentina*,¹⁶⁰ the investment arbitral tribunal relied on the method used to interpret GATT general exceptions in the WTO context to interpret the exception contained in Article XI of the 1991 U.S.-Argentina BIT.¹⁶¹ Eventually, the Tribunal adopted, only in part, a WTO-like approach, since it started its analysis of the exception in the relevant BIT without a

154. *Id.* at ¶ 291.

155. Lèvesque, *supra* note 132, at 365; NEWCOMBE, *supra* note 121, at 358.

156. See CMS Gas Transmission Co. v. Argentine Republic, *supra* note 58, at ¶317; Enron Corp. & Ponderosa Assets, L.P. v. Argentina, ICSID Case No. ARB/01/8, Award, ¶ 331 (May 22, 2007).

157. Société Générale de Surveillance S.A. v. Republic of the Phil., ICSID Case No. ARB/02/6, Objections to Jurisdiction, ¶ 116 (Jan. 29, 2004), 8 ICSID Rep. 518 (2005).

158. Alvarez, et al, *supra* note 66, at 80-81.

159. *Id.*

160. Continental Casualty Co. v. Argentine Republic, CISD Case No. ARB/03/9, Award, ¶ 192 (Sep. 5, 2008).

161. See generally Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S. - Arg., Nov. 14, 1991, 31 I.L.M. 124, <http://2001-2009.state.gov/documents/organization/43475.pdf>.

prior analysis of whether any obligation under the BIT had been breached.¹⁶² This decision has raised criticism and praise at the same time. It has been criticized for its alleged shallow analysis of the reasons to adopt a GATT Article XX-like analysis and for the rejection of the customary rule of state of necessity professedly reflected in Article XI of the BIT.¹⁶³ It has been praised for its approach on exceptions and its use of the proportionality method.¹⁶⁴

The Annulment Committee in *Continental Casualty v. Argentina* dismissed in its entirety the application for annulment of Continental Casualty Company (and of Argentina).¹⁶⁵ It is worth stressing that in the annulment proceedings, Continental itself quoted WTO case law, among other cases of international tribunals, to support its view that exception provisions cannot continue to justify breaches of a treaty commitment when the required situation or condition for the justification under the exception no longer exists.¹⁶⁶ Continental then challenged the tribunal's characterization of Article XI of the BIT in light of GATT Article XX.¹⁶⁷ The Annulment Committee considered: that the claimant had relied on the award in *CMS v. Argentina*, which had been subsequently annulled;¹⁶⁸ the reasons for the Tribunal rejected certain parties' arguments were implicit in the considerations and conclusions contained in the award,¹⁶⁹ and that, although Continental argued that the Tribunal had erred in its analysis of the law of the GATT-WTO, the Tribunal

was clearly not purporting to apply that body of law, but merely took it into account as relevant to determining the correct interpretation and application of Article XI of the BIT. Even if it could be established by Continental that the Tribunal reached an erroneous interpretation of Article XI of the BIT based on an erroneous understanding of GATT-WTO law, that would amount only to an error of law, which is not a ground of annulment. . . .¹⁷⁰

A thorough discussion of the *Continental Casualty v. Argentina* case is beyond the scope of this paper. Here, it is sufficient to stress the potential relevance of WTO case law on general exceptions for the interpretation of non-general exceptions provisions in international investment law. In *S.D. Myers v. Canada*,¹⁷¹ the Tribunal extensively referred to GATT case law in order to clarify the meaning

162. Continental Casualty Co.y v. Argentine Republic, *supra* note 160, ¶¶ 160 -61.

163. Jose E. Alvarez & Tegan Brink, *Revisiting the Necessity Defense: Continental Casualty v. Argentina*, in YEARBOOK OF INTERNATIONAL INVESTMENT LAW & POLICY 2010 – 2011 319, 319-21 (2012).

164. Alec Stone Sweet, *Investor – State Arbitration: Proportionality's New Frontier*, 4 L. & ETHICS HUM. RTS. 47, 76 (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569412.

165. Continental Casualty Co. v. Argentine Republic, ICSID Case No. ARB/03/09, Application for Partial Annulment of continental Casualty Company & the Application for Partial Annulment of the Argentine Republic, 114 (Sep. 16 2011).

166. *Id.* ¶108(a).

167. *Id.* ¶ 108(h).

168. *Id.* ¶ 127.

169. *Id.* ¶ 131.

170. *Id.* ¶ 133.

171. *S.D. Myers Inc. v. Government of Canada*, Partial Award, (Nov. 13, 2000).

of the expression "in like circumstances" of NAFTA Article 1102 national treatment provision,¹⁷² and to reach the conclusion that all provisions of NAFTA are complementary.¹⁷³

However, as in *Continental Casualty v. Argentina*, the *S.D. Myers v. Canada* tribunal did not fully embrace a WTO-like reasoning. The Tribunal, when examining whether the national treatment obligation has been violated, considered that "a prima facie finding of discrimination in 'like' cases often takes place within the overall GATT framework, which includes Article XX (General Exceptions). A finding of 'likeness' does not dispose of the case," since GATT Article XX might justify the measure which could pursue a legitimate public policy.¹⁷⁴ It is true that the presence of a general exceptions provision in a given agreement has an impact on the overall reading and interpretation of the agreement. However, the Tribunal here did not seem to reckon that general exceptions provisions come into play only once a violation of another legal provision has been found to exist. The general exceptions provision makes the measure at issue consistent with the Agreement, including with the specific provision, violated in the first instance.¹⁷⁵ Further, the Appellate Body has clarified that the standard for a finding of discrimination under the chapeau of GATT Article XX is not the same of other substantive rules of the General Agreement.¹⁷⁶ These cases confirm that investment tribunals make use of WTO law and legal reasoning. This use might be a selective one, but it could be a way to adapt WTO law to the investment treaty system.

D. Practical Consequences of General Exceptions Provisions in Investment Law

The practical implications of the inclusion of general exceptions provisions in the investment realm are not to be underestimated. A common obligation of host states is the National Treatment obligation. Generally speaking, National Treatment obligations oblige states to accord foreign investors who are nationals of the other state parties to the specific agreement treatment no less favorable than the one they accord, in like circumstances, to their own investors.¹⁷⁷ Doubts have been expressed, for instance, on the effect of general exceptions provisions on investment tribunals' interpretation of the National Treatment obligation contained in Article 1102 of the North American Free Trade Agreement ("NAFTA").¹⁷⁸ It is

172. *Id.* ¶¶ 243-51.

173. *Id.* ¶¶ 291-94.

174. *Id.* ¶ 246.

175. *Id.* ¶ 267.

176. *U.S.-Gasoline*, *supra* note 26, at 23.

177. Rudolf Dolzer, *National Treatment: New Developments*, Symposium Co-Organized by ICSID, OECD and UNCTAD, Making the Most of International Investment Agreements: A Common Agenda, (Dec. 12, 2005),

<http://www.oecd.org/daf/inv/internationalinvestmentagreements/36055356.pdf>.

178. Lèvesque, *supra* note 132, at 364-67; Article 1102 of the NAFTA reads as follows:

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of in-

certainly true that Tribunals have built in the National Treatment provision a space for governments to pursue legitimate public policy goals.¹⁷⁹ Even though investment tribunals have built in this policy space without there being a closed list of legitimate objectives or a chapeau such as the one of a general exceptions provision,¹⁸⁰ the interpreter is always constrained by the text, context, and object and purpose of a given treaty. Since an affirmative commitment provision and a general exceptions clause have to be distinguished, the inclusion of the latter in a treaty might well enlarge this space rather than restrict it.

Perhaps more significantly, there could be measures which, although discriminatory and in violation of a National Treatment obligation, might be “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions” of a given Agreement.¹⁸¹ This specific exception “is susceptible of application in respect of wide variety of ‘laws and regulations’ to be enforced,”¹⁸² thus allowing a significant enlargement of the list of legitimate objectives that a state might pursue under a general exceptions provision. Hence, a measure might be in violation of a national treatment obligation,¹⁸³ but could still be justified under this specific exception. This could be for instance the case under Article 10(b) of the 2004 Canadian Model BIT, where such a measure could be necessary to comply with laws or regulations adopted with a wider sustainable development objective.

Another very common provision in IIAs and FTAs with investment chapters is the fair and equitable treatment obligation. Different formulations and approaches of the fair and equitable treatment obligation have been adopted in in-

vestments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

4. For greater certainty, no Party may:

(a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or

(b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.

North American Free Trade Agreement art. 1102, Dec. 17, 1992.

179. *E.g.*, *GAMI Investments, Inc. v. Government of the United Mexican States*, Final Award, ¶ 114 (Nov. 15, 2004); *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, ¶¶ 170, 182 (Dec. 16, 2002).

180. Lèvesque, *supra* note 132, at 366.

181. GATT, *supra* note 18, art. XX(d); *see also* GATS, *supra* note 18, art. XIV(c).

182. *Korea-Various Measures on Beef*, *supra* note 82, ¶ 162.

183. *See* Report of the Panel, *Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R (July 31, 2000) (although in the end the Panel did not find the measures at issue to be justified under Article XX (d) of the GATT 1994).

vestment treaties. Without taking any position on whether a measure in violation of the fair and equitable standard would necessarily be arbitrary under a general exceptions provision chapeau,¹⁸⁴ it seems relevant to highlight that this standard has been regarded as intentionally made up of vague terms.¹⁸⁵ Indeed, it would grant adjudicators a quasi-legislative authority to enunciate rules necessary to achieve a treaty's object and purpose in a specific dispute.¹⁸⁶ Some investment tribunals have included in this standard foreign investors' legitimate expectations for a stable legal and business framework for investment¹⁸⁷ and even protection against general and nationality-based discrimination.¹⁸⁸ As noted by some in respect of investors' legitimate expectations,¹⁸⁹ there could be measures which violate foreign investors' legitimate expectations, but which still could be applied in an arbitrary or unjustifiably discriminatory manner and thus be justified under a general exceptions provision. This could hold equally true in the case of measure which generally discriminate among foreign investors.

The full protection and security (or "most constant protection and security")¹⁹⁰ standard is also often included in investment treaties. Some investment tribunals have extended this standard of treatment beyond the duty to ensure physical security and protection from private parties and the host state and its organs' actions.¹⁹¹ Apparently, this standard does not require the host state to provide absolute protection to the foreign investment,¹⁹² but rather to exercise due diligence in discharging its duty (as opposed to a strict liability standard).¹⁹³ Some arbitral tribunals have stressed that the liability of the host state on the basis of its full protection and security standard obligation depends on the host state's resources.¹⁹⁴

184. For a clear position on this issue see Legum & Pectulescu, *supra* note 129, at 355.

185. Charles H. Brower, *Structure, Legitimacy and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 66 (2003).

186. *Id.*

187. See *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 154 (May 29, 2003) [hereinafter *Tecmed S.A.*]; *Occidental Exploration and Production Co. v. The Republic of Ecuador*, UNCITRAL Case No. UN 3467, Final Award, ¶ 196 (July 1, 2004); *PSEG Global, Inc. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, ¶¶ 240, 253 (Jan. 19, 2007).

188. *Glamis Gold, Ltd. v. United States of America*, ICSID, Award, ¶ 542, 232-33 n. 1087 (June 8, 2009).

189. Legum & Pectulescu, *supra* note 129, at 356.

190. *Eg.*, Energy Charter Treaty art. 10(1), Apr. 16, 1998, OJ L 69.

191. Extending for instance to "security and legal protection," *CME Czech Republic B.V. v. The Czech Republic*, Partial Award, ¶ 613 (Sept. 13, 2001); to a State's obligation to guarantee "stability in a secure environment, both physical, commercial and legal," *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, ¶ 729 (July 24, 2008); and to the duty for the state to have a "functioning system of courts and legal remedies available to the investor," *Frontier Petroleum Services Ltd. v. The Czech Republic*, Final Award, ¶ 273 (Perm. Ct. Arb. 2010).

192. Legum & Pectulescu, *supra* note 129, at 356 (quoting RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 149 (2008)).

193. *Frontier Petroleum Services Ltd.*, *supra* note 191, ¶ 270; *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, ¶ 164 (Oct. 12, 2005).

194. *Pantehniki S.A. Contractors & Engineers (Greece) v. Albania*, ICSID Case No. ARB/07/21, Award, ¶¶ 71-84, (July 30, 2009).

Although this appears a sound interpretative stance, there seems to be no authority indicating that in a case where no violence is involved, a relative liability standard would be applied.¹⁹⁵ The consequence is that although relative, the degree of diligence imposed on the host state is still a high one and might prove disproportionate to the developing condition of the host state.¹⁹⁶ It should therefore not be excluded that a development-oriented interpretation of a general exceptions provision might still justify a measure which does not meet a, reasonable but yet high, full protection and security standard.

Finally, the inclusion of general exceptions provisions in the investment realm might have some relevance for regulatory actions and expropriations as well. It has been contended that general exceptions provisions will not add much to the analysis of compensation for expropriation, unless they are regarded as a codification of customary international law on the matter.¹⁹⁷ Although one can assert that general exceptions provisions do not codify any customary law rule on the exclusion of compensation in the case of expropriation,¹⁹⁸ some deeper reflections are much needed. Investment tribunals have adopted different attitudes on the issue of the compensation to be paid in case of regulatory measures affecting investment covered by a given treaty. Some arbitral tribunals have excluded compensation where the regulatory measures had been taken for a public purpose and in accordance with due process, unless other specific conditions subsisted.¹⁹⁹ Others have deemed that the public purpose of a regulatory measure does not affect its qualification as an expropriation and the right to compensation of the investor.²⁰⁰ As indicated above, one could see the inclusion of general exceptions clauses in IIAs and FTAs as a call for investment tribunals to be moderated when faced with a public policy measure, something that even those expressing doubts have recognized.²⁰¹

Although a measure could be justified under a general exceptions provision, with the consequence of its legitimacy under a given treaty, all modern investment treaties address preconditions and, more importantly, consequences of expropriation.²⁰² As a result, normally compensation has to be paid in the case of expropria-

195. Frontier Petroleum Services Ltd., *supra* note 191, ¶ 271.

196. Mahnaz Malik, *The Full Protection and Security Standard Comes of Age: Yet Another Challenge for States in Investment Treaty Arbitration?*, International Institute for Sustainable Development Best Practices Series, 5 (Nov. 2011), http://www.iisd.org/pdf/2011/full_protection.pdf.

197. Legum & Pectulescu, *supra* note 129, at 362.

198. Lèvesque, *supra* note 132, at 367.

199. See, e.g., “Tecmed S.A.,” *supra* note 187, ¶ 119; “Feldman,” *supra* note 179, ¶ 103; *Methanex Corporation*, *supra* note 119, ¶ 7; *Lauder v. The Czech Republic*, Final Award, ¶ 198 (Sept. 3, 2001).

200. *Compañía del Desarrollo de Santa Elena S.A. v. The Republic of Costa Rica*, Final Award, ICSID Case No. ARB/96/1, ¶ 72 (Feb. 17, 2000); *ADC Affiliate Ltd. v. The Republic of Hungary*, Award, ICSID Case No. ARB/03/16, ¶ 424 (Oct. 2, 2006).

201. NEWCOMBE, *supra* note 121, at 357.

202. RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 40 (2d ed. 2012).

tion, even if this latter is legal.²⁰³ General exceptions provisions might nonetheless be factored into the interpretation of the entire investment treaty; and thus make the objective pursued through a specific measure an important element to be taken into consideration in the calculation of the compensation due, in particular a developmental goal sought by a developing or less-developed country. This is true even though many investment treaties provide for specific guidance on the calculation of the value of the expropriated investment,²⁰⁴ and some investment tribunals have excluded that the public purpose of a measure affects the amount of compensation due.²⁰⁵ However, as mentioned above, since general exceptions provisions inclusion will inevitably have an impact on the overall reading of a given treaty and the balance between investors' rights and host states' ability to regulate, it might increase the chances of a measure to be regarded as a regulatory measure for which compensation is not due, rather than an indirect expropriation. Indeed, each treaty-based provision should be read and interpreted in its specific context,²⁰⁶ and the inclusion of general exceptions might be regarded as a step towards enlargement of states' sovereign power to pursue public policies.

Although one of the fundamental elements for such a characterization is whether a substantial deprivation of an investment has occurred,²⁰⁷ other elements have been stressed in some cases. In the *Oscar Chinn* case, the Permanent Court of International Justice ("PCIJ") considered the interventions of the Belgian Government in the market of shipping trade in the Congo River in the 1930s, which led Mr. Chinn to wind his transport and shipbuilding business up, to be non-compensable measures.²⁰⁸ The key consideration of the PCIJ was that the position of Mr. Chinn was not a vested right. Nonetheless, the Court reasoned that "favorable business conditions and goodwill are transient circumstances . . . [and] the interest of transport undertakings may well have suffered as a result of a general trade depression and the measures taken to combat it."²⁰⁹ In *Fireman's Fund v. Mexico*, the arbitral tribunal held that none of the claims of the investor satisfied the concept of expropriation under the NAFTA and international law in general and the investment had been risky.²¹⁰ One might wonder whether the scope of protection provided by an investment treaty overall, thus specifically considering the exceptions contained in it, has an impact on the risk of the investment (as considered in the *Fireman's Fund* case) and on investors' expectations (as in the *Oscar Chinn* case), with particular regard to the regulation foreseeability. The matter

203. The legality of expropriation rests upon the cumulative fulfillment of certain requirements which normally are a) that the measure serves a public purpose, b) the measure must not be arbitrary or discriminatory, c) principles of due process have been followed in the adoption of the measure, d) there must be prompt, adequate and effective compensation, *id.* at 42.

204. RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* 109-12 (1995).

205. *Compañía del Desarrollo*, *supra* note 200, ¶ 71.

206. See DOLZER & SCHREUER, *supra* note 202, at 51.

207. *Id.* at 48.

208. *Oscar Chinn Case*, 1934 P.C.I.J. (ser. A/B) No. 63 (Dec. 12).

209. *Id.* at 88.

210. *Fireman's Fund Insurance Company v. The United Mexican States*, ICISID Case No. ARB(AF)/02/01, Award, ¶ 218 (July 17, 2006).

needs further reflection and, as shown, could have a direct bearing on the justification of host states' regulatory measures. Although in the past different measures have been deemed to be expropriatory actions, governments must have a space to act in the public interest and this is difficult if any affected business may seek compensation.²¹¹

III. CONCLUSION

At a moment when both the trade and investment systems face criticism, it seems timely and appropriate to explore the full potential of general exceptions provisions. This is even more so if one bears in mind that these provisions are now present in both systems, despite their different geographies, and that a sustainable development interpretative approach is possible and even desirable. Such an interpretative approach could indeed create more general action that would better address each country's specific developmental concern. Developing and least-developed countries have very diverse needs and problems. A development-oriented interpretation of general exceptions provisions would make it possible to further differentiate among countries and to focus on sector or industry-specific solutions. In addition, legal provisions often prove inadequate to catch the dynamic dimension of development. The extremely rapid change of countries' economic, environmental, and social conditions prevent legal provisions addressing developmental interest from being really effective. For instance, in the 1960s the Republic of Korea was among the poorest countries in the world. By the end of 2011, it was predicted to be richer than the European Union on average.²¹² Although so far it seems a unique example of a rapid development within a working life, other developing countries have experienced rapid growth. At the other end of the spectrum, some developing and least-developed countries have been hit hard by the recent economic and financial crisis,²¹³ contradicting development forecasts. Legal provisions tend to crystallize at one moment in time. A development interpretative approach to general exceptions might offer the opportunity to reconsider countries' developmental interest in the light of their changed condition and, as showed by the Appellate Body with regard to the environment,²¹⁴ in the light of the contemporary (changing) concerns of the community of nations on development.

Beyond these considerations, the insertion of general exceptions provisions in the investment realm might represent another step toward convergence of trade and investment law. These provisions represent a *trait d'union* with values and concerns underpinning other fields of international law. This idea is supported also by the inclusion in some IIAs of other provisions tackling environmental and social issues.²¹⁵ In this sense, a reconceptualization of investment law towards a bal-

211. "Feldman," *supra* note 179, ¶ 103.

212. *South Korea's Economy – What Do You Do When You Reach the Top?*, THE ECONOMIST, (Nov. 12, 2011), <http://www.economist.com/node/21538104>.

213. Bruno Gurtner, *The Financial and Economic Crisis and Developing Countries*, 1 INT'L DEV. POL'Y 189 (2010).

214. *US-Shrimp*, *supra* note 52, ¶ 129.

215. See *US Model BIT*, *supra* note 37; *Canada Model BIT*, *supra* note 38.

anced socially and environmentally responsible international investment legal framework seems to be already underway.²¹⁶ In a context of multiplicity of treaties and of arbitral tribunals, where each treaty has an individualized interpretation and a single related ad hoc arbitral tribunal is constituted, one might wonder whether consistency is achievable at all.²¹⁷ Despite the legitimacy of such doubts, one can still hope for greater coherence and consistency both within and outside the trade and investment law systems. The apparent willingness of arbitrators to receive guidance in their interpretation of investment treaties,²¹⁸ the influence of the WTO rules and case law on other dispute settlement mechanisms,²¹⁹ and the growing mutual attraction between international trade and investment law²²⁰ make it possible to expect further integration, also in the interpretation of general exceptions provisions.

216. KATE MILES, *THE ORIGINS OF INTERNATIONAL INVESTMENT LAW* 382 (2013).

217. Yas Banifatemi, *Consistency in the Interpretation of Substantive Investment Rules: Is It Achievable?*, in *PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY* 200, 202-04 (Roberto Echandi & Pierre Sauvé eds., 2013).

218. James Crawford, *Similarity of Issues in Disputes Arising Under the Same or Similarly Drafted Investment Treaties*, in *PRECEDENT IN INTERNATIONAL ARBITRATION* 97, 99-100 (Emmanuel Gaillard & Yas Banifatemi eds., 2007).

219. Gabrielle Marceau, Arnau Izaguerri & Vladyslav Lanovoy, *The WTO's Influence on Other Dispute Settlement Mechanisms: A Lighthouse in the Storm of Fragmentation*, 47 *J. OF WORLD TRADE* 481 (2013).

220. Mary. E. Footer, *On the Laws of Attraction: Examining the Relationship Between Foreign Investment and International Trade*, in *PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY* 105 (Roberto Echandi & Pierre Sauvé eds., 2013).