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INVESTMENT COMMITTEE****The future of Investment treaties – Track 1 sustainability cluster****Illustrative case study on goals and challenges in treaty policy – exceptions clauses****Note by the Secretariat**

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## 1. Introduction to the sustainability cluster of Track 1 work on investment treaties

1. The environment for international economic policies has been transformed in recent years. In these changed circumstances, one key goal for Track 1 discussions is to provide an opportunity for a wide-ranging discussion about the interaction of treaties addressing investment with sustainable development and possible ways to improve it.

2. There are many elements to the transformed economic and social environment for government investment policies and their impact on sustainable development. The ongoing Covid-19 pandemic has had profound social and economic consequences. Apart from Covid-19, accelerating environmental crisis is widely seen as the most urgent challenge faced by our societies. To achieve climate goals, global emissions of greenhouse gases must be approximately halved by 2030, and reach net zero by around 2050. An OECD working paper has found that over a quarter of CO<sub>2</sub> emissions are linked to international trade.<sup>1</sup> Governments are taking or considering a range of initiatives to tackle these challenges and investment policies, including investment treaties, need to be part of them.

3. Expectations from treaties addressing investment have changed. Today, as recognised for example at the 2021 Meeting of the OECD Council at Ministerial level (MCM), the trade and investment agenda must benefit all including the middle class and workers. New models for treaty policy have been developed. For example, Brazil emerged into investment treaty policy in the 2010s with a new model and has concluded several treaties focused on facilitation of FDI. It seeks to promote active inter-governmental coordination to facilitate FDI, including by SMEs, and to prevent and resolve possible disputes without ISDS. Recent treaties such the 2019 USMCA, 2020 Regional Comprehensive Economic Partnership (RCEP) and the EU-Japan Economic Partnership Agreement have seen a broader resurgence of interest in the use of state-to-state dispute settlement (SSDS) for investment protection dispute settlement. The Netherlands adopted a new model investment treaty in 2019 that seeks more actively to address business responsibilities; the model, however, is not yet reflected in any renegotiated treaties. More recently, Canada has produced a new model treaty in 2021 with express attention to women, SMEs and indigenous peoples.

4. At the same time, exposure to ISDS claims in advanced economies, a major development in recent years that has generated a range of reforms and proposals, appears likely to decline over the medium term. Investment treaty relationships providing for ISDS between advanced economies have traditionally been rare. Long the principal exception, the 1994 NAFTA relationship between Canada and the US, has generated over 45 ISDS claims (practically all of the exposure of both governments to claims).<sup>2</sup> Such claims will cease in 2023 under the USMCA. The alleged *inter se* application of the Energy Charter Treaty (ECT) between EU member states has been the other principal source of numerous claims between

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<sup>1</sup> Yamano, N. and J. Guilhoto (2020), "CO<sub>2</sub> emissions embodied in international trade and domestic final demand: Methodology and results using the OECD Inter-Country Input-Output Database", OECD Science, Technology and Industry Working Papers, No. 2020/11, p.6 <https://doi.org/10.1787/8f2963b8-en>.

<sup>2</sup> Seventeen of the 20 claims against the US have been brought by alleged Canadian claimants; 30 of the 31 ISDS claims against Canada have originated from alleged US claimants. See UNCTAD, Investment Dispute Settlement Navigator.

advanced economies since 2007.<sup>3</sup> Its application to those relationships has been largely terminated by a series of decisions by the Court of Justice of the European Union, the European Commission and EU Member States.<sup>4</sup> Apart from the CPTPP, efforts dating from the 2010s to include investment protection with ISDS in new treaties between advanced economies have generally been unsuccessful or postponed. Depending on how governments and societies conceive of their national or regional interest and their policy responsibilities including with regard to sustainable development, the reduced future exposure of advanced economies to investment treaty claims in ISDS may affect the debate over treaty policy and reform, as well as future negotiations.

5. As governments address this new environment, they are considering an expanded range of tools to address sustainable development in their treaty policy. In recent years, governments have paid greater attention to this issue and have negotiated a series of provisions aimed at safeguarding public interests. Governments have crafted clearer treaty language during negotiations on the purposes of treaties as set out in preambles. They have made choices about substantive obligations and their drafting, and implementation through ISDS, SSDS, the domestic courts or other mechanisms. Trade and investment agreements increasingly include environment, labour, anti-corruption and sustainable development provisions and chapters. In some states, domestic courts are applying global public anti-money laundering and anti-corruption policies to decisions on the review and enforcement of ISDS arbitral awards. Governments are also implementing policies on the degree of government post-treaty action to monitor and intervene on the interpretation and application of treaties in practice, at home and abroad. Tools such as submissions in cases as non-disputing treaty Parties, joint government interpretations, treaty amendments, treaty replacement through renegotiation or the termination of treaties are all also relevant.

6. Many governments have taken a range of actions in these areas that merits consideration and discussion. The rationale for the approaches taken or not taken to date can be explored. The degree of impact of different approaches can be compared. Proposals for additional or different actions can be considered. These inquiries will assist governments as they consider the need for further efforts to promote and achieve sustainable development.

7. This paper provides background for an illustrative case study on goals and challenges in achieving sustainability in treaty policy. It examines the growing use of exceptions clauses in investment treaties since the 2000s. Governments have increasingly employed such clauses including to address interests in sustainable development and have relied on them in explaining their treaty policies to the public. Many of the clauses are incorporated from or inspired by general exceptions clauses in the GATT or GATS. However, the efficacy of exceptions-based approaches in investment treaties has been questioned. One 2018 study finds that “although public policy exceptions are becoming more prominent in treaty practice—in

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<sup>3</sup> For example, the vast majority of the 47 ECT claims against Spain have been brought by claimants allegedly from other EU Member States. *Id.*

<sup>4</sup> The other G7 state, Japan, has low exposure to ISDS generally notably due to low levels of inward foreign investment. See, e.g., Takeo Hoshi and Kozo Kiyota, [Potential for Inward Foreign Direct Investment in Japan](#), National Bureau of Economic Research Working Paper 25680 (Mar. 2019), p.1 (Japan had an “inward FDI stock to GDP ratio [of] 4.2 percent in 2015, far below the OECD average of 50.4 percent”).

2016 every third newly concluded treaty contained such a clause—they are largely missing in action.”<sup>5</sup>

8. In the recent *Eco Oro* case, one of the few ISDS cases to consider the effects of an exceptions clause, a general exceptions clause analogous to art. XX of the GATT was interpreted contrary to the submissions of the two treaty Parties to find that compensation, the usual remedy in ISDS today, remains payable by the government in the usual manner even when the general exceptions clause applies.<sup>6</sup> In this uncertain context, it is important for governments and stakeholders to explore lessons to be drawn from experience with exceptions clauses as they consider how to align investment treaties and sustainable development.<sup>7</sup>

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<sup>5</sup> See Wolfgang Alschner & Kun Hui, [Missing in Action: General Public Policy Exceptions in Investment Treaties](#) (2018) (finding ISDS respondents often fail to raise exceptions appropriately; tribunals also either ignore them or adopt interpretations that lessen their impact).

<sup>6</sup> *Eco Oro Minerals Corp. v. Colombia*, [Decision on jurisdiction, liability and directions on quantum](#) (9 Sept. 2021).

<sup>7</sup> Future meetings under Track 1 will address other elements of investment treaties and sustainable development. For example, the 2022 Investment Treaty Conference scheduled for 7 March 2022 will address climate change and investment treaties. Major economies have recently made high-level commitments to integrate climate action across all their foreign and security policies, and in particular in their trade policies. However, concrete actions to integrate climate policy into investment treaties generally remain to be determined and implemented, even as fossil fuel interests are increasingly held by private companies and hedge funds along with state-owned enterprises. Business responsibilities will be addressed at a jointly organised meeting by the OECD Investment Division and the Centre on Responsible Business Conduct in the first semester of 2022. In addition, other components of Track 1 work on the future of investment treaties will address their potential role in liberalising and facilitating FDI, including in key sectors, and the increasing use and potential use in trade and investment agreements of a broader range of implementation mechanisms for government commitments and business responsibilities.

## 2. Illustrative case study on goals and challenges in treaty policy– exceptions clauses

9. Many governments are faced with strong and increasing demand in investment treaties to safeguard the capacity and incentive for governments to adopt measures protecting public health, the environment, labour standards or human rights. Since the early 2000s, governments have responded in part by incorporating an increasing range and variety of exceptions clauses in their investment treaties.

10. Many trade agreements have long included exceptions. The well-known Article XX of the GATT dates from 1947 and is replicated in many other trade agreements. In contrast, early investment treaties contained few exceptions. The range of such clauses has grown in recent years.

11. Exceptions clauses in international economic law have been described by a proponent of such clauses as having the purpose of “elucidat[ing] the socio-political values that are so vital and compelling to the parties that they transcend economic and commercial interests. ... [H]ard exceptions for public goals ... clearly signal[] that negotiators have grappled with multiple concerns and competing objectives.”<sup>8</sup>

12. Exceptions clauses raise many issues. This section first provides a brief overview of some types of exceptions clauses in investment treaties.<sup>9</sup> It then addresses a cross-cutting issue – the effects of exceptions clauses when they are applicable.

### 2.1. Overview of exceptions clauses

13. Exceptions clauses or special regimes, including in older investment treaties, have notably addressed essential security, taxation or financial services. More recently, since the 2000s, exceptions clauses in investment treaties have also sought to provide policy space for regulations protecting public health, the environment and other public interests. As trade law and investment law have grown closer, notably through the development of integrated trade and investment agreements, trade law experience with general exceptions clauses has been an important reference.<sup>10</sup> General exceptions clauses are often found in a separate chapter of an

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<sup>8</sup> J. Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press, 2016), p. 169, 170.

<sup>9</sup> The general term “exceptions clause” is used loosely here solely for purposes of discussion. Some or all clauses discussed here may constitute a limitation on the scope of a provision rather than an exception to it. Other clauses may constitute other types of provisions.

<sup>10</sup> Exceptions clauses in investment treaties have drawn attention from a number of academic commentators including some comparative approaches. See, e.g., J. Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press, 2016); Andrew D. Mitchell, J. Munro and T. Voon, [Importing WTO general exceptions into international investment agreements: Proportionality, myths and risks](#) (2017 draft); Alschner and Hui, *supra*; C. Henckels, [Permission to act: The legal character of general and security exceptions in international trade and investment law](#) (2020).

overall trade and investment agreement rather than in the investment chapter and sometimes include a clause defining their application to the investment and other chapters.

14. The 1947 GATT contained articles setting out general exceptions (art. XX) and security exceptions (Art. XXI) to the obligations in the treaty, and those provisions have been maintained until today at the WTO with only minor changes. The 1994 GATS, applicable to trade in services including in a mode based on foreign investment, also contains a similar although not identical range of exceptions in Arts. XIV (general exceptions) and XIVbis (security exceptions).<sup>11</sup>

15. The general exceptions clauses regularly form part of WTO litigation. The interpretation of the clauses and its evolution is the subject of much detailed scholarly and government attention. The stable language in the provisions facilitates detailed summaries of the provisions and key interpretations over time.<sup>12</sup> Interpretations have evolved. The WTO Appellate Body has overruled a number of first-instance panel findings that applied an overly-stringent necessity test under key Art. XX provisions. It has made findings about the scope of protected policy areas such as exhaustible natural resources. Recent major preferential trade agreements often continue to incorporate directly the existing GATT or GATS provisions, sometimes with clarifications to ensure coverage of certain categories of measures as determined in WTO Appellate Body interpretations. At the same time, the GATT lists of protected policy areas may not reflect new policy challenges not foreseen in the past or changes to earlier challenges.

16. In contrast to stable WTO and preferential trade agreement provisions, coupled with a degree of evolving interpretation, there is a profusion of different approaches to the language in exceptions clauses in investment treaties. Variety in this area generally predates interpretation of the clauses in cases which, as noted, has been rare in ISDS until recently. A few recent ISDS cases have begun to interpret exceptions clauses including contrary to submissions by treaty Parties in some cases.

17. Describing the many variations in investment treaty exceptions clauses is challenging. The discussion below primarily focuses on general exceptions, with occasional references to other exceptions or regimes.

18. A first distinction is between (i) treaties that expressly incorporate GATT or GATS general exceptions clauses; and (ii) treaties that include general exceptions clauses appearing to be inspired by those provisions but without a direct reference and with modifications. Among other consequences, the different approaches could affect, for example, whether WTO case interpretations and other materials could be considered to be incorporated. The 2011 Japan-India EPA (arts. 11(1)-(2)) expressly incorporates GATT art. XX and GATS arts. XIV and XIVbis into its investment chapter without any modification. In contrast, Canada's 2004 Model investment treaty incorporated a GATT-style general exception but with modifications and no express reference. The EU-UK Trade and Cooperation Agreement uses both approaches. It expressly incorporates GATT art. XX. It also contains a second GATS-inspired clause also applicable to investment protections.

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<sup>11</sup> Annex 1 sets out the text of GATT Art. XX and GATS Art. XIV for reference.

<sup>12</sup> See, e.g., WTO Analytical index: Interpretation and application of WTO agreements, [GATT 1994 – Article XX \(Jurisprudence\)](#); id., [GATS – Article XIV \(Jurisprudence\)](#).

19. A second distinction is the scope of application of general exceptions to the investment treaty (or investment chapter in a broader treaty). Some treaties apply the general exceptions to the whole investment treaty or investment chapter<sup>13</sup> and others only to selected investment obligations.

20. Most exceptions clauses applicable to the whole treaty or chapter are subject to ISDS (as well as SSDS). However, some recent treaties between major economies use general exceptions applicable to an entire investment chapter subject only to SSDS. See RCEP, art. 17.12. Some recent EU treaties providing only for SSDS contain post-entry investment protection provisions notably covering discrimination and performance requirements. The treaties incorporate GATT provisions applicable to the investment provisions.<sup>14</sup> The Brazil-India BIT (art. 23) also applies the exceptions to an entire treaty providing only for SSDS. Use of SSDS is often accompanied by limits on damages remedies.

21. Some general exceptions have limited application to selected investment obligations. In the CETA, WTO-style general exceptions apply broadly across several chapters of the treaty. However, they have limited application to the Investment chapter. They apply to the market access, performance requirements and non-discrimination provisions in the Investment chapter. They do not apply to Section D of CETA's investment chapter, which includes clauses on fair and equitable treatment (FET) and expropriation. The EU-Singapore GATT-style exceptions clause applies only to the non-discrimination national treatment provision. Art. 2.3(2) (the treaty omits MFN).

22. Other treaties do not use general exceptions analogous to GATT provisions for any part of the investment chapter or treaty. Many older investment treaties and a substantial number of recent treaties omit any general exceptions clause. In trade and investment agreements with a general exceptions clause, this approach is achieved by excluding its application for the investment chapter as a whole. For example, the USMCA, CPTPP, the Additional Protocol to the Pacific Alliance, the US-Australia FTA and NAFTA have general exceptions clauses in their Exceptions chapters, but they do not apply to the investment chapter. The 2012 US Model BIT does not include a general exceptions clause. It contains exceptions or special regimes for taxation, financial services and essential security. Canada's new 2021 model investment treaty does not include general GATT-style exceptions.<sup>15</sup> Many of these treaties still include exceptions or special regimes for taxation, financial services and essential security.

23. A third area for many variations in general exceptions clauses involves changes from GATT or GATS language. They include modifications to the GATT or GATS "chapeaux" setting out the conditions under which the exceptions are available. They also include changes to the sub-paragraphs setting out the protected policy objectives and the required nexus between the measure at issue and the policy objective.

24. The "chapeaux" in the GATT and GATS focus on discrimination – they exclude the exception when there is "arbitrary discrimination". Some treaties such as the 2016 Indian Model BIT (art. 32.1) have a chapeau focused on discrimination – the chapeau requirement is

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<sup>13</sup> See, e.g., Japan-India EPA, art. 11; Canada-Peru FTA, art. 2201.

<sup>14</sup> See EU-UK TCA (art. 412(1)); EU-China CAI, Section 6, subsection (2), art. 4(2).

<sup>15</sup> See 2021 Canada Model FIPA.

that measures should be applied on a “non-discriminatory” basis.<sup>16</sup> Other investment treaties take a narrower approach to a general exception by excluding its application whenever there is “arbitrary” action without regard to whether there is discrimination.<sup>17</sup>

25. In addition to cases of arbitrary discrimination, the GATT Art. XX bars reliance on the exception for “disguised restrictions on international trade”; GATS Art. XIV similarly bars reliance for “disguised restrictions on trade in services”. These references are modified in some investment treaties to refer to restrictions on investment rather than trade.

26. Some investment treaties make only minor modifications to the chapeau. In the EU-UK TCA (art. 412(2)), for example, the only difference with GATS art. XIV is the addition of a prohibition on disguised restrictions on “investment liberalisation” as well as on “trade in services”.<sup>18</sup>

27. With regard to the lists of protected policy areas, investment treaty provisions vary in the policy areas in sub-paragraphs of GATT Art. XX or GATS Art. XIV that are reproduced, modified or clarified. For example, the Australia-Thailand FTA (art. 1601) applies sub-paragraphs (e)-(g) of Art. XX to the Investment chapter, including the sub-paragraph (g) provision on exhaustible natural resources, but omits the sub-paragraph (b) provision applicable to protection of human, animal or plant life or health. In contrast, the 2016 Japan-Iran BIT (art. 13) includes language from the sub-paragraph (b) provision applicable to protection of human, animal or plant life or health, but omits language from the sub-paragraph (g) provision on exhaustible natural resources.

28. The nexus requirements also vary in some treaties from the GATT language in the sub-paragraphs of Art. XX or Art XIV. They include requirements that excepted measures be “necessary”, “related to”, or “designed and applied for” or “appropriate”. The first two terms appear in the GATT and have been subject to intensive interpretation in WTO cases.

29. In addition to the many different approaches to general exceptions clauses, governments have also innovated with other types of clauses. The CPTPP (art. 29.5), for example, contains a sectoral carve-out allowing governments to deny coverage with respect to claims challenging a tobacco control measure. Australia and Singapore amended their FTA to explicitly exclude tobacco control measures from the scope of ISDS.<sup>19</sup> The Australia–Hong Kong SAR China BIT carves out measures concerning or related to a number of Australian pharmaceutical and health insurance schemes as well as tobacco-related measures.<sup>20</sup>

30. The EU has proposed a sectoral carve-out to exclude or to phase out future coverage for new and existing investment in fossil fuels in the context of high-profile negotiations to

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<sup>16</sup> See also 2017 Hong Kong SAR China-ASEAN IIA (art. 9.1) (“arbitrary or unjustifiable discrimination”).

<sup>17</sup> See, e.g., 1996 Canada-Ecuador BIT, art. XVII(3).

<sup>18</sup> EU-UK TCA (art. 412(2)) (“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on investment liberalisation or trade in services ...”).

<sup>19</sup> Singapore-Australia FTA, art. 22.

<sup>20</sup> See Australia–Hong Kong SAR China BIT, footnote 13 to Section C.

modernise the ECT.<sup>21</sup> The proposals have been opposed by some other ECT Parties. Many of the other 2500 investment treaties in force apply in similar fashion to fossil fuels as the ECT. There do not yet appear to be similar reform proposals for other investment treaties although major economies have made recent high-level commitments to integrate climate policy across the full range of trade policies.

31. Some treaties without general exceptions or with partially-applicable clauses have alternative clauses of more general application but of at most uncertain effects. NAFTA and a range of other treaties include an article providing that the investment provisions or chapter should not be construed to prevent a NAFTA government from adopting an environmental measure “otherwise consistent with this Chapter”.<sup>22</sup> On its face, the provision restates the obligation to ensure that all environmental measures comply with the treaty. Its meaning has been contested in a number of cases, but it has not been recognised as having effect as an exception.

32. While as noted the general exceptions clause in CETA does not apply to absolute standards like FET, the treaty contains a general right to regulate clause. It states that ‘the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.’<sup>23</sup> General statements of this nature may require interpretation.<sup>24</sup>

33. Some treaties includes both general exceptions and additional provisions. The 2020 Brazil-India BIT contains a general exceptions clause (art. 23). It also contains separate provisions on the environment, labour affairs and health. The latter provision contains self-judging language.<sup>25</sup>

34. A few preliminary conclusions can be drawn from this summary overview. In contrast to the stable GATT and WTO practice with longstanding exceptions clauses, there are many different approaches to exceptions clauses in investment treaties. Policies continue to evolve. The explanations for the different approaches between trade and investment and within investment treaties are difficult to discern. The degree of expected exposure to claims under multilateral trade agreements vs bilateral investment agreements may affect the level of government interest in protecting certain policy areas. Decisions on general exceptions clauses are also related to decisions and expectations about more specific clauses or regimes. For

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<sup>21</sup> See European Union text proposal for the modernisation of the Energy Charter Treaty (Feb. 2021).

<sup>22</sup> NAFTA, art. 1114(1); see US 2012 Model BIT, art. 12(5); Additional Protocol to Pacific Alliance, art. 10.31(a), CPTPP, art. 9.16.

<sup>23</sup> CETA, art. 8.9(1); EU-Singapore, art. 2.2(1).

<sup>24</sup> See, e.g., Michael Trebilcock, Robert Howse and Antonia Eliason, *International Trade Regulation* (4th ed. 2012), pp. 496-97 (noting with regard to general references to a right to regulate in the GATS that “this ‘right to regulate’ is subject to any specific limitation or disciplines as exist or may be negotiated; thus the ‘right to regulate’ begs the critical question of how little or how much the exercise of this right will be constrained or qualified by any particular set of GATS disciplines”).

<sup>25</sup> *Id.* art. 22(1) (“Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining or enforcing any measure it deems appropriate to ensure that investment activity in its territory is undertaken in a manner according to labor, environmental and health law of that Party, provided that this measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction.”)

example, the omission of FET or a relatively narrow approach to it, the most frequent basis for claims and awards, may affect the perceived need for general exceptions clauses.<sup>26</sup> Some differences may be linked with the choice of SSDS, with general incorporation of the GATT provisions appearing to be more frequent when only governments will bring claims and choose adjudicators.

35. While general exceptions clauses have proliferated in recent treaties, they remain rare in the overall treaty pool. The co-existence of treaties with and without exceptions clauses, and with many different clauses, can make interpretation complex and uncertain. As for broadly-worded substantive obligations, there is broad scope for interpretive discretion.

36. Despite the attention to exceptions clauses in treaty drafting and public presentations of investment treaties, they appear to have had little publicly discernible impact to date. It is possible that they come into play in the many pre-dispute negotiations over possible claims. But the lack of visible impact may give rise to criticism from some that the clauses remain akin to whitewashing or greenwashing.

37. Analysis for the FOI Roundtable has demonstrated that in domestic law, it is much more difficult for business or investors to obtain damages remedies against governments than to obtain non-pecuniary remedies (such as the grant of a new hearing). For example, it is well established in common law countries that a breach of public law is generally not sufficient to ground a tort (non-contractual) claim for damages<sup>27</sup>; civil law jurisdictions generally achieve similar outcomes limiting damages remedies through a range of doctrines.<sup>28</sup> Courts have demonstrated awareness of the impact of claims on the public purse and regulatory incentives. If the policy concerns generally limiting damages remedies against governments in domestic

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<sup>26</sup> For example, the US, which as noted does not apply general exceptions clauses, has repeatedly set out its relatively narrow interpretation of the FET provision in its post-NAFTA treaties and in submissions in cases. The FET provision is limited to the minimum standard of treatment under customary international law (MST-FET). State practice and *opinio juris* must be shown by the claimant. Prior arbitral cases are rejected as a source of state practice. Only a denial of justice in adjudicatory proceedings is clearly accepted as a MST-FET violation and a denial of justice normally requires exhaustion of domestic remedies. Arbitral interpretations such as legitimate expectations are rejected due to an absence of demonstration of general state practice. See generally Gaukrodger, D. (2017), "Addressing the balance of interests in investment treaties: The limitation of fair and equitable treatment provisions to the minimum standard of treatment under customary international law", OECD Working Papers on International Investment, No. 2017/03, <https://doi.org/10.1787/0a62034b-en> (surveying NAFTA government interpretations of FET); see also, e.g., *Gramercy Funds Management LLC v. Peru*, [Submission of the United States of America](#) (21 June 2019), paras. 30-49 (non-disputing party submission). More recently, in the USMCA, FET claims generally can only be brought by governments in SSDS, placing a further restraint on expansive interpretations.

<sup>27</sup> See Law Commission, *Administrative Redress: Public Bodies and the Citizen: A Consultation Paper* (2008) §§ 3.100-3.101 ("Traditionally, the function served by judicial review has not been to award compensation. The power of the Administrative Court to order monetary compensation is subject to tight restrictions.")

<sup>28</sup> See OECD, [Government perspectives on investor-state dispute settlement: a progress report](#) (14 December 2012), p.10 ("the legal doctrines, rules and approaches that have the effect of favouring primary [non-pecuniary] remedies and making damages difficult to obtain for investors vary between the countries surveyed, but the outcome in terms of remedies is uniform in all countries surveyed"); see generally David Gaukrodger & Kathryn Gordon, [Investor-State Dispute Settlement: A scoping paper for the investment policy community](#), OECD Working Paper on International Investment 2012/03, pp. 24-27 & Annex 4 (analysing access to damages remedies against governments in domestic law).

law are relevant, the contrast between non-pecuniary remedies at the WTO or in SDDS and monetary damages in ISDS could be an important consideration in standards for general exceptions clauses and other provisions.

## 2.2. Effects of exceptions clauses in investment treaties

38. While exception clauses are a growing part of investment treaty practice, they have rarely been at issue in litigated cases until recently. Some major treaties with numerous exception clauses are not yet in force. Current arbitral interpretations of many treaties allows broad scope for treaty shopping; beneficial owners and claimants may continue to favour using older treaties without express exceptions. As noted, some commentators have suggested that exceptions clauses have remained largely ineffective in practice due to approaches to advocacy as well as to interpretations by ISDS arbitrators.

39. The conditions under which exceptions apply vary widely. Their application may be triggered by particular subject areas, particular government measures, or by reference to particular treaty provisions. However, one cross-cutting issue is the effect that an exceptions clause has when it is triggered. It is vital to understand what the effects of an exceptions clause will be when it applies. This section reviews examples of treaty language addressing the effects of exceptions clauses and then considers some policy issues raised by recent interpretations.

### *2.2.1. Treaties with exceptions clauses appear to often use GATT type language to describe the effects of exceptions clauses, but variations have become more frequent*

40. Treaty language in this area reflects a number of variations. Many exceptions clauses state that “nothing in the Agreement should be construed to prevent” governments from taking certain actions under certain conditions. All general exceptions clauses directly incorporating GATT or GATS language, such as the Japan-India EPA, take this form. General exceptions clauses in investment treaties apparently inspired by GATT Art. XX also typically take this form. For example, art. 33(2) of the 2012 Canada-China investment treaty provides that subject to certain conditions, “nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining measures” necessary to achieve certain environmental or other policy goals.<sup>29</sup> The EU-UK TCA (art. 412(1)) uses similar language. Some essential security and financial services exceptions also take this form.<sup>30</sup> This can include provisions whose application is self-judging.

41. Some “nothing ... prevents” type clauses include additional provisions addressing their effects. The NAFTA financial services exception takes a “nothing ... prevents” form. NAFTA art. 1410. The treaty language suggests that the provision was understood as

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<sup>29</sup> See also, e.g., India Model BIT art. 32.1 (“Nothing in this Treaty shall be construed to prevent the adoption or enforcement by a Party” of certain measures relating to public order, the environment and other subjects); 2012 US Model BIT, art. 18 (“Nothing in this Treaty shall be construed ... to preclude a Party from applying” certain measures relating to peace and security, or essential security interests). Some provisions state that certain measures may be taken. See, e.g., CETA Art. 28.4. (EU “may impose” safeguard measures for a period of up to 180 days that affect transfer payments by investors.). Exceptions to performance requirements have taken this form. See, e.g., CPTPP, art. 9.10(3)(d).

<sup>30</sup> See, e.g., Argentina-US, Art. XI; EU-Singapore Investment Agreement, art. 4.5.

constituting a potential defence to a claim.<sup>31</sup> The CETA language addressing the effects of the exceptions for prudential measures relating to financial services is similar, but with further detail on effects.<sup>32</sup>

42. The 2012 US Model BIT (art. 20(1)) contains a similar clause providing that “Notwithstanding any other provision of this Treaty, a Party shall not be prevented from adopting or maintaining” certain measures. It is applicable in the area of financial services. It adds a provision stating that “[w]here such measures do not conform with the provisions of this Treaty, they shall not be used as a means of avoiding the Party’s commitments or obligations under this Treaty.” The impact of this clause may require interpretation. It appears to incorporate a question of government intent. The US Model continues to indicate that it is understood that the provision can be a defense to a claim.<sup>33</sup>

43. Some “nothing ... prevents” exceptions clauses contain additional language indicating that they have no impact on the application of the investment chapter.<sup>34</sup> Other “nothing ... prevents” clauses expressly exclude compensation when they apply.<sup>35</sup>

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<sup>31</sup> See NAFTA art. 1415 (intergovernmental expert committee “shall decide the issue of whether and to what extent [the exception] is a valid defense to the claim”).

<sup>32</sup> CETA, art 13.16(1) (“This Agreement does not prevent a Party from adopting or maintaining reasonable measures for prudential reasons ...”), art. 13.21(5) (inter-governmental committees can decide “whether and to what extent Article 13.16(1) is a valid defence” to the claim and if a valid defence determination is made, the claim is deemed to be withdrawn and the proceedings are discontinued).

<sup>33</sup> See *id.* art. 20(3)(a).

<sup>34</sup> See Additional Protocol to Pacific Alliance, art. 18.2 (“Orden Público”) and n.1 (“Sin perjuicio de lo establecido en el presente Artículo, las Partes entienden que los derechos y obligaciones derivados del Capítulo 10 (Inversión) serán aplicables.”) (“Without prejudice to what is provided for in this Article, the Parties understand that the rights and obligations derived from Chapter 10 (Investment) will apply”).

<sup>35</sup> See CETA art. 8.9(4) (“For greater certainty, nothing in this Section shall be construed as preventing a Party from discontinuing the granting of a subsidy or requesting its reimbursement where [certain conditions exist], or requiring that Party to compensate the investor therefor.”) (footnote omitted).

44. Other provisions state that “no investor may submit a[n] [ISDS] claim” under the treaty or under particular articles without addressing SSDS.<sup>36</sup> Other provisions state that certain measures “shall not be subject to the dispute settlement provisions” governing ISDS or SSDS.<sup>37</sup> Some treaties require dismissal of claims where an exceptions clause applies.<sup>38</sup> Some provisions state that a treaty or provision “does not apply” to defined types of measures.<sup>39</sup> Other provisions state that certain measures “do not constitute a breach” of the treaty or of certain articles.<sup>40</sup>

45. Some treaties address the effects of exceptions clauses and other clauses in general provisions on the remedies available through dispute settlement. The 2020 Brazil-India BIT (art. 19.2) states that the role of arbitrators in SSDS is to interpret the treaty and decide on compliance. Awards of compensation are excluded. Other recent treaties providing only for SSDS also place general limits on the role of adjudicators, leaving issues of compensation to agreement between governments. In the EU-Japan EPA and the RCEP for example, SSDS dispute settlement panels for trade, investment market access and investment protection cases are tasked with determining the facts and liability, but not remedies.<sup>41</sup>

46. Some clauses do not include language on their effects. The recent right to regulate clauses in EU and Canadian treaties are example of such clauses. They reaffirm the right to regulate in various areas without addressing the possible impact of the clause on claims or outcomes.

47. This non-exhaustive survey of treaty provisions on the effects of exceptions clauses allows for some preliminary observations. First, as in exceptions clauses generally, there is considerable variety in treaty language on effects especially compared to the WTO context. Second, many exceptions clauses use the “nothing ... prevents” language on effects also found in the GATT/WTO agreements. Some more precise clauses expressly address claims in ISDS or SSDS, breaches or remedies. While some provisions expressly preserve the application of investment provisions, other expressly exclude possible aspects of their application.

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<sup>36</sup> See, e.g., CETA 8.18(3) (an investor “may not submit a claim under [the Section governing ISDS]” if the investment has been made through corruption or certain other misconduct). See also NAFTA, Note to Article 1501 (Competition Law): “no investor may have recourse to investor-state arbitration under the Investment Chapter for any matter arising under this Article.”

<sup>37</sup> See CPTPP, Annex 9-H (certain Australian government decisions on whether or not to approve a foreign investment “shall not be subject to the dispute settlement provisions” governing ISDS or SSDS.)

<sup>38</sup> See, e.g., CPTPP, art. 29.5 (“For greater certainty, if a Party elects to deny benefits with respect to ... claims [challenging a tobacco control measure], any such claim shall be dismissed.”)

<sup>39</sup> See, e.g., India 2015 Model BIT art. 2.4 (“This treaty shall not apply to” local government measures, certain types of laws, etc.).<sup>39</sup>

<sup>40</sup> See, e.g., art. 8.9(3) CETA (certain government decisions relating to subsidies do “not constitute a breach of the provisions of [Section D – investment Protection]”).

<sup>41</sup> EU-Japan EPA, arts. 21.13 (default terms of reference for panel are to “decide on conformity of the measure” with relevant provisions and to issue a report); RCEP, arts. 19.12(3) & (4). The panel under RCEP “may suggest ways in which the Responding Party could implement the findings and determinations”.

### 2.2.2. Interpretation of clauses on the effects of exception clauses

48. As noted, there has been limited consideration of exceptions clauses in ISDS. They have rarely been found to apply. In this context, the issue of their effects has not arisen. However, two recent ISDS cases have begun to make findings about the effects of the clauses including in particular of GATT-style “nothing ... prevents” language.

49. The International Court of Justice (ICJ) has held that treaty provisions stating that a treaty “shall not preclude” certain measures operate when triggered to block any finding of breach of the treaty. In the *Oil Platforms* case, the ICJ addressed an exceptions clause that provided that the treaty at issue “shall not preclude” certain essential security measures.<sup>42</sup> The ICJ held that if the clause applies, “it must hold that no breach of Article X, paragraph 1, of the Treaty has been established.”<sup>43</sup> It is widely recognised that the effect of Art. XX of the GATT 1994, where it applies, is to exempt WTO Members from obligations under the GATT.<sup>44</sup>

50. In ISDS, an ICSID annulment committee relied on the ICJ *Oil Platforms* decision in finding that the “shall not preclude the application ... of measures ... “ clause in Art. XI of the Argentina-US BIT<sup>45</sup>, where it applies, bars any finding of breach.<sup>46</sup> The annulment committee was equally clear in finding that where the exceptions clause applies, all compensation is excluded.<sup>47</sup> In *Fireman’s Fund v. Mexico*, the tribunal interpreted the

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<sup>42</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, p. 161. The clause was Art. XX(1)(d) of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran.

<sup>43</sup> *Id.*, para. 34. The ICJ relied on an earlier ICJ case addressing similar treaty language in the same manner. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, I.C.J. Reports 1986, p. 14 at paras. 225, 272.

<sup>44</sup> See *EC-Asbestos* panel report § 3.474 (“Article XX allows Members an exemption from their obligations under the General Agreement subject to certain conditions.”).

<sup>45</sup> Article XI provides as follows: “This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.”

<sup>46</sup> *CMS Gas Transmission Co. v. Argentina*, Decision of the *Ad Hoc* Committee on the application for annulment of the Argentine Republic § 133 (“to take the words of the International Court of Justice in a comparable case, if the Tribunal was satisfied by the arguments based on Article XI, it should have held that there had been ‘no breach’ of the BIT”) (citing *Oil Platforms*, para 34); *id.* § 129 (the exceptions clause “is a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply”). The committee was composed inter alia of a former ICJ President (Gilbert Guillaume), a former ICJ Judge (Nabil Elaraby) and the rapporteur for the ILC Draft Articles on State Responsibility (James Crawford).

<sup>47</sup> *Id.* § 146 (“the Tribunal should have considered what would have been the possibility of compensation under the BIT if the measures taken by Argentina had been covered by Article XI. The answer to that question is clear enough: Article XI, if and for so long as it applied, excluded the operation of the substantive provisions of the BIT. That being so, there could be no possibility of compensation being payable during that period.”)

“Nothing ... prevents” provision on financial services regulation in NAFTA Article 1410(1) as an exemption from substantive liability.<sup>48</sup>

51. The recent *Eco Oro* decision interpreted a general exception with GATT-style “nothing ... prevents” type wording applicable to measures to protect human, animal or plant life and health.<sup>49</sup> The majority of the tribunal found that damages remain payable where a tribunal finds a FET violation even when the exceptions clause applies.<sup>50</sup> It construed the provision as merely permissive:

the Tribunal construes Article 2201(3) as being permissive, ensuring a Party is not prohibited from adopting or enforcing a measure to protect human, animal or plant life and health, provided that such measures are not arbitrary or unjustifiably discriminatory between investment or between investors or a disguised restriction on international trade or investment. ... Equally, however, there is no provision in Article 2201(3) permitting such action to be taken without the payment of compensation.”<sup>51</sup>

52. The *Eco Oro* majority relied on the 2017 *Bear Creek* award.<sup>52</sup> In that case, the tribunal similarly considered that the absence of an express provision barring compensation in the exceptions clause meant that it did not affect the obligation to compensate. The case involved a finding of indirect expropriation rather than a FET violation as in *Eco Oro*.<sup>53</sup>

53. The ICJ, WTO, *CMS* and other cases appear to make clear that it is reasonable to interpret a “does not prevent” type clause as one barring liability. At the same time, the proliferation of different language to address the effects of exceptions clauses includes approaches that are more precise on the issue of the availability of ISDS, liability or compensation. In *Eco Oro*, both treaty Parties expressly stated in submissions to the tribunal that the exceptions clause, where applicable, precluded liability and any award of damages.<sup>54</sup>

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<sup>48</sup> *Fireman’s Fund Insurance Co. v. Mexico*, para 168 (“The Tribunal concludes with respect to prudential measures that Article 1410 of the NAFTA provides a defence to the State Party if a tribunal has found a challenged measure to constitute an expropriation in violation of Article 1110 of the NAFTA.”).

<sup>49</sup> See Canada-Peru FTA, art. 2201.

<sup>50</sup> The third arbitrator did not find Colombia liable under the substantive obligations. He expressly declined to address the exceptions clause.

<sup>51</sup> *Eco Oro Minerals Corp. v. Colombia*, [Decision on jurisdiction, liability and directions on quantum](#) (9 Sept. 2021), para. 829.

<sup>52</sup> *Bear Creek Mining Corp. v. Peru*, Award (30 Nov. 2017), paras. 477-478.

<sup>53</sup> The *Bear Creek* tribunal also interpreted the general exceptions clause to have a further effect on the treaty in precluding the application of certain interpretive arguments. The tribunal interpreted arguments distinguishing the exercise of government police powers from indirect expropriation as proposed “exceptions”. It held that the general exceptions clause was an exclusive list of exceptions and precluded reliance on any other “exceptions”. Arguments based on police powers could consequently be disregarded. *Id.*, paras. 473-74.

<sup>54</sup> See *Eco Oro Minerals Corp. v. Colombia*, [Non-Disputing Party Submission of Canada](#) (27 Feb. 2020), para. 16 (“If the general exception applies, then there is no violation of the Agreement and no State liability. Payment of compensation would therefore not be required.”); *Eco Oro*, *supra*, para. 362 (noting Colombia’s argument that the clause bars a finding of breach where it applies).

The *Eco Oro* majority did not address the impact of the treaty Party agreement on the meaning of the clause before applying its different interpretation.

54. Although most investment treaties say nothing about applicable remedies other than for expropriation, damages compensation is the usual remedy in ISDS. An interpretation that an applicable exceptions clause has no impact on liability or damages would leave the exceptions clause with little practical effect, including on sustainable development. It is generally recognised that investment treaties allow governments to regulate in violation of the treaty providing they pay compensation; an exceptions clause would not appear to be needed for that limited purpose.

### Issues for discussion<sup>55</sup>

- How do you evaluate the contribution to date of exceptions clauses in investment treaties to advancing sustainable development? Does your government use exceptions clauses? If so, for what purposes?
- What lessons can be drawn from the comparative experience with exceptions clauses at the WTO and in investment treaties?
- What explains the evolution, variations and uncertainty associated with investment treaty policies on exceptions clauses? Can regulators be given meaningful guidance about how they will apply?
- If applicable, have you expected and do you expect “nothing ... prevents” type exceptions clauses, when they apply, to preclude compensation being payable in ISDS? Should governments react to the new theory in *Bear Creek* and *Eco Oro* and if so, how?
- A number of recent major treaties have aligned investment protection remedies with trade remedies, relying on non-pecuniary remedies or government-agreed remedies. Should governments consider addressing available remedies rather than seeking to use exclusion clauses?
- What broader conclusions for future policies on sustainability can be drawn from the experience with exceptions clauses and their effects over the last two decades?

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<sup>55</sup> These issues for discussion are also reproduced in the agenda for the 27 October 2021 meeting under Track 1.

### 3. Conclusion

55. Governments need to draw lessons from their experiences and policies to date as they develop their future investment and treaty policies. The recent evolution of the interpretation of the effects of widely-used forms of exceptions clauses may suggest that additional focused government attention to the issue of how best to protect policy space for sustainable development is necessary. Clauses presented as of core importance to the protection of policy space, and widely seen as reasonably effective in other contexts, have been found in ISDS to be of little or no impact. Government decisions will include whether to react to or acquiesce in those interpretive outcomes. Beyond tentative conclusions about policies on exceptions clauses, the experience with them may also suggest broader lessons for governments and others in a context of more urgent sustainable development and environmental challenges than in earlier periods.

56. In addition to the direct impact of policies, demonstrating their effects is becoming increasingly important in order to preserve and strengthen public support for policies.<sup>56</sup> Perceived failure of investment treaties or ISDS to create appropriate regulatory and business incentives, or visibly to support sustainable development outcomes, may affect support for trade agreements and open markets more broadly.

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<sup>56</sup> See Alan Beattie, [Are trade rules stopping us from saving the planet?: Environmental campaigners are taking fresh aim at investment treaties and trade agreements](#), Financial Times (7 Oct. 2021).

## Annex A. Text of general exceptions in the GATT and GATS

### GATT - Article XX

#### *General Exceptions*

57. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (c) relating to the importations or exportations of gold or silver;
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
- (e) relating to the products of prison labour;
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
- (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the Contracting Parties and not disapproved by them or which is itself so submitted and not so disapproved;
- (i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;
- (j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The Contracting Parties shall review the need for this sub-paragraph not later than 30 June 1960.<sup>57</sup>

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<sup>57</sup> Interpretive note to sub-paragraph (h) omitted.

## GATS - Article XIV

### *General Exceptions*

58. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(a) necessary to protect public morals or to maintain public order;[original footnote 5]

[text of original footnote 5]: The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

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

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

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

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

(iii) safety;

(d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective [original footnote 6] imposition or collection of direct taxes in respect of services or service suppliers of other Members;

[Text of original footnote 6]: Measures that are aimed at ensuring the equitable or effective imposition or collection of direct taxes include measures taken by a Member under its taxation system which:

(i) apply to non-resident service suppliers in recognition of the fact that the tax obligation of non-residents is determined with respect to taxable items sourced or located in the Member's territory; or

(ii) apply to non-residents in order to ensure the imposition or collection of taxes in the Member's territory; or

(iii) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures; or

(iv) apply to consumers of services supplied in or from the territory of another Member in order to ensure the imposition or collection of taxes on such consumers derived from sources in the Member's territory; or

(v) distinguish service suppliers subject to tax on worldwide taxable items from other service suppliers, in recognition of the difference in the nature of the tax base between them; or

(vi) determine, allocate or apportion income, profit, gain, loss, deduction or credit of resident persons or branches, or between related persons or branches of the same person, in order to safeguard the Member's tax base.

59. Tax terms or concepts in paragraph (d) of Article XIV and in this footnote are determined according to tax definitions and concepts, or equivalent or similar definitions and concepts, under the domestic law of the Member taking the measure.

(e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.