



INTERNATIONAL COMMISSION OF JURISTS – OFFICE OF THE
ATTORNEY GENERAL MYANMAR
WORKSHOP

DEFENDING THE STATE REGULATORY ROLE: DEFENCES IN INVESTMENT TREATY LAW

Harpreet Kaur Dhillon
Practice Fellow
Centre for International Law
National University of Singapore

(1.1) Basic Principles of Treaty Interpretation

- Vienna Convention on the Law of Treaties
- Includes customary international rules of *treaty interpretation*

Article 31, General Rules of Interpretation

1. 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.
2. The context...comprise[s] (a) text, including preamble and annexes, (b) agreement in connection with treaty's conclusion, (c) a related instrument accepted by all State parties.
3. There shall be taken into account, together with the context: (a) subsequent agreement of interpretation or application, (b) subsequent State practice, (c) "any relevant rules of international law applicable in the relations between parties."

Article 32, Supplementary Means of Interpretation

Negotiating history or exchange between parties can be used to help determine meaning of the provision in certain, limited, instances.

(1.2) Basic Principles of Treaty Interpretation

- **Philippines-Myanmar BIT (1998)**

Article I, Promotion, Admission and Protection of Investments

“... Such investments shall be accorded equitable and reasonable treatment.”

Ordinary meaning of text

+

No general or specific exceptions (context)

+

Encourage investment (object and purpose)

=

Broad view of FET.

- Context: text of the treaty → other provisions of the treaty.
- Carve-outs or exceptions (i.e. no breach if measure is necessary to protect public order) is part of the context of interpreting the provision.

(1.3) Basic Principles of Treaty Interpretation

- No exceptions ≠ no defences
- Defences in customary international law.
 - State-practice
 - *Opinio juris*
- Customary international law applies to investment treaties.
 - Treaties are instruments of international law
 - ‘Applicable law’ of investment treaties usually includes ‘principles/rules of international law’.

Example: **Myanmar-China BIT (2002), Article 9(7)**

“7. The Tribunal...shall adjudicate in accordance with the law of the Contracting Party to the dispute, including its conflict of laws, the provisions of this Agreement as well the applicable principles of international law.”

(1.4) Basic Principles of Treaty Interpretation

To recap:

Ordinary meaning of text
+
General or specific exceptions or carve-outs? (context)
+
Object and purpose
+
Applicable law? Principles of international law?
=
?

(2.1) Role of Domestic Law in Investment Treaties?

- Domestic law is important in investment disputes.
- Included in ‘applicable law’ provision of investment treaties.
- See again: **Myanmar-China BIT (2002), Article 9(7)**
“7. The Tribunal...shall adjudicate in accordance with the law of the Contracting Party to the dispute, including its conflict of laws, the provisions of this Agreement as well the applicable principles of international law.”
- Customary principles that domestic law cannot be used to justify a breach of international law.
 - Vienna Convention, Article 27
 - International Law Commission’s Articles on State Responsibility, Articles 3 and 32

(2.2) Role of Domestic Law in Investment Treaties?

- Tribunal will have to examine domestic law to decide whether there has been a breach.
 - Case-study: *AWG Group v. Argentine Republic*
- Issue: Can States refer to domestic law in their investment treaties to their benefit?

Example A

Article 2(3): “Without prejudice to its laws and regulations, neither Contracting Party shall take any unreasonable or discriminatory measures against the management, maintenance, use...[.]”

Article 3(2): “Without prejudice to its laws and regulations, each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment not less favourable...[.]”

[**Myanmar-China BIT (2002)**]

(2.3) Role of Domestic Law in Investment Treaties?

- Issue: Can States refer to domestic law in their investment treaties to their benefit?

Example B

An investment is...

“...every kind of asset invested by investors one Contracting Party in accordance with the laws and regulations of the other Contracting Party...”.

[**Myanmar-China BIT (2002),
Myanmar-Israel (2014)**]

- This reference to domestic law requires the investor to, in establishing the investment, and also in running it, to comply with domestic law.
- It still respects the hierarchy between national and international law, and it's not being used to justify a violation of international law.
- It is to the State's advantage.
- Where else in the treaty can this be done?

(3.1) Defences: Customary international law?

- Issue: What if the treaty does not identify exceptions or defences?
- There are a few customary international law defences available.
- They have strict requirements that the Respondent-State bears the burden of proving its measure satisfies.
- Important example: defence of necessity.

- **International Law Commission's Articles on State Responsibility:**

- Article 25, *Necessity*

- 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness...unless the act:

- (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and...

- 2. In any case, necessity may not be invoked...if:...

- (b) the State has contributed to the situation of necessity.

“Essential interest”?

“Grave and imminent peril”?

(3.2) Defences: Customary international law?

- Respondent-State bears the burden to show:
 - 1) Defence is available (in custom)
 - 2) What are its requirements?
 - 3) How are they to be applied?
 - 4) That its case falls within it.

(Cases: *Impregilo v. Argentina* / *EDF v. Argentina*)

(4.1) Defences: Taxation measures

- Whether customary or treaty defence, burden of proof is on the State invoking the defence to show its actions fit within the defence.
- Case-study: Taxation

Example A: **Myanmar-China BIT (2002)**, *Article 3(4)(b)*

4. “(FET, NT, MFN) shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party [the benefit of]: ... (b) any [international tax agreement].”

Example B: **ASEAN+China Agreement (2010)**, *Article (3)(4)(a)*

“This Agreement shall not apply to:

(a) any taxation measure (except)

...

(ii) [expropriation and disputes regarding that]....

(b) [government procurement]

(c) [government subsidies or grants]

(d) [government services]

...[.]”

(4.2) Defences: Taxation measures

- What is a taxation measure? And what law do you apply in answering this question?
- Question is governed by international law.
- (1) A law (2) that imposes a liability on classes of persons (3) to pay money to the State (4) for public purposes.

Case-study: *Burlington Resources v Ecuador*

See also, *EnCana v Ecuador / Duke Energy v Ecuador*.

- Treaty may require investor to refer the matter to tax authorities, and decision of tax authorities has weight on tribunal's decision.
- Or State-parties to the treaty to consult whether taxation measure has effect equivalent to expropriation: see ASEAN+China, Article 14(9):
“the disputing Party and the non-disputing Party shall, upon request from the disputing Party, hold consultations with a view to determining whether the taxation measure in question has an effect equivalent to expropriation or nationalisation. Any tribunal that may be established under this Article shall accord serious consideration to the decision of both Parties under this Paragraph.”

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(5.1) Defences: General exceptions in treaty

- **ASEAN+China (2010)**

Article 16, General Exceptions

“1. Subject to the requirement that such measures are not applied in a [arbitrary or unjustifiably discriminatory] manner [between like investors or investments] or a disguised restriction on investors [or investments], nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Party of measures:

(a) necessary to protect public morals or to maintain public order¹⁰;

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

...

(e) Imposed for the protection of national treasures of artistic or historical or archaeological value...”.

10: “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.”

(5.2) Defences: General exceptions in treaty

- “Necessary to protect public morals or to maintain public order”.
- What must the State show? The measure cannot have been applied:
 - 1) In an arbitrary or unjustifiably discriminatory way between like investors or investments (no discrimination);
 - 2) It cannot be a disguised restriction on trade (other motivations); and
 - 3) It’s “necessary”;
 - 4) To protect public morals or maintain public order;
 - 5) Public order exception “only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society”.
- No discrimination?:

Content of measure

vs

How measure was applied

Restrict cigarette sale

vs

Restrict foreign imports only

(5.3) Defences: Public morals or public order

- What is ‘public morals’?: Societal and community morals of that country.
- What is ‘public order’?:

“Preservation of the fundamental interests of a society, as reflected in public policy and law”.

Case-study: *US-Gambling*

The Panel then referred to Congressional reports and testimony establishing that “the government of the United States consider[s] [that the Wire Act, the Travel Act, and the IGBA] were adopted to address concerns such as those pertaining to money laundering, organized crime, fraud, underage gambling and pathological gambling.” On this basis, the Panel found that the three federal statutes are “measures that are designed to ‘protect public morals’ and/or ‘to maintain public order’...

- Tribunal looks specifically at “what is reflected in public policy and law” in that country.

(5.4) Defences: 'Maintaining Public Order'

- *What kind of interests?*: specific to each country, and list is not closed.
- *Genuine?*: Lead-up to the measure well-documented?
- *Sufficiently serious?*: Direct relationship between anticipated effect of measure and public order interest.
- It will look at the State's evaluation of how serious the threat is, and it will be slow to reject the defence on the basis of 'sufficiently serious' unless there is convincing evidence a less stringent measure or measures could have been used.

(5.5) Defences: 'Necessity'

- A requirement common to a number of treaty defences.
- Overlap with customary international law requirements of Necessity.
- What the State must show →
 1. Identify the connection between the measure and the public interest – what is the level of protection the measure is trying to achieve;
 2. Identify the negative effect of the measure;
 3. Identify whether there were “reasonable alternative” measures which would not have breached the obligation.
- “*Reasonable alternatives*” →
 - Can achieve nearly the same degree of protection of the interest as the measure tries to do.
 - (US-Gambling) “An alternative measure may be found not to be ‘reasonably available’, however, where it is merely theoretical in nature, for instance, where the responding Member **is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties.**”

(5.6) Defences: 'Human, animal or plant health'

- What does the 'necessity' test look like when State and tribunal has to evaluate scientific facts and figures?

Case-study: Cigarettes

- Thailand imposed a ban on cigarette imports
- Wanted to protect public from harmful and addictive substances (Objective 1), and it wanted to reduce consumption of cigarettes in Thailand (Objective 2)
- Breach of obligation not to restrict quantity of imports, and national-treatment type obligation.
- Issue: Whether Thailand could use the human health defence?
 - *Step 1*: Identify public interest objective → cigarettes harm health, reduce harmful use of cigarettes
 - *Step 2*: Identify desired level of protection → Eliminate harmful ingredients in some cigarettes, reduce consumption of all others.
 - *Step 3*: Consider reasonable alternatives that would reach same level of protection but not breach →
 - [Objective 1] Disclose ingredients + ban on harmful cigarettes**
 - [Objective 2] Control advertising + sale within country**

(6) Relationship between treaties and int'l law

- Relationship between two investment treaties (i.e., the ASEAN+China and the Myanmar-China Treaty):

Vienna Convention

Article 30(3)

“When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended...the earlier treaty applies *only to the extent that its provisions are compatible* with those of the later treaty.”

ASEAN+China

Article 23

“*Nothing in this Agreement shall derogate from* the existing rights and obligations of a Party under any other international agreements to which it is a party.”

- Relationship between investment treaty and other international obligations of the State: Applicable law provision – ‘other rules of international law’.

(7) Defences: Security Exceptions

ASEAN+China

Article 17, Security Exceptions

“Nothing in this Agreement shall be construed:

(a) [to require disclosure contrary to essential security interests]

(b) to prevent any party from taking any action which **it considers necessary** for the protection of its essential security interests, **including but not limited to:**

...

(ii) [traffic in arms, ammunitions...]

(iii) [protecting critical public infrastructure form sabotage]

...

(8) Regulatory space: Other treaty-tools?

- Use of reservations and 'lists of non-conforming measures'.
- Protection of sectors or industries: sector-specific chapters or carve-outs.

(9) ISDS: Counterclaims

ICSID Arbitration Rules

Article 46

“Except at the parties otherwise agree, the Tribunal shall, if request by a party, determine any incidental or additional claims or counterclaims **arising directly out of the subject-matter** of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the **jurisdiction of the Centre.**”

UNICTRAL Arbitration Rules

Article 21, Statement of Defence

...

“3. In its statement of defence...the Respondent may make a counterclaim...provided the **arbitral tribunal has jurisdiction.**”

Tribunal must be able to assume jurisdiction – must be connected to the main claims in the dispute.

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Thank you for your attention!

Harpreet Dhillon

Practice Fellow

NUS Centre for International Law

harpreet.dhillon.22@gmail.com