
Bryan Mercurio
Safeguarding Public Welfare?—Intellectual Property Rights, Health and the Evolution of Treaty Drafting in International Investment Agreements

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ABSTRACT

Despite being included within the scope of International Investment Agreements (IIAs) for many decades, several recent high-profile cases have revealed the extent to which intellectual property rights (IPRs) can be deemed investments under an IIA. With substantive standards and textual language differing between and among the more than 3000 IIAs the situation is highly fragmented. Health advocates are concerned that non-discriminatory measures taken to promote health and safeguard public welfare may be deemed to violate an obligation under an investment treaty. Certain governments have been responsive to this concern and have begun to refine and improve the textual language of treaties. This article evaluates the most recent treaty language used in relation to IPRs and public health, with a particular focus on treaties negotiated by the United States and the European Union. The article finds that governments which are making efforts to safeguard public health and welfare are indeed providing enhanced protection for public welfare measures in key parts of IIAs, namely clauses on expropriation, fair and equitable treatment and through the use of standalone provisions. That being said, the article does identify potentially problematic textual language which warrants further consideration from treaty drafters in the future.

1. INTRODUCTION

While intellectual property rights (IPRs) were only directly incorporated into the international trading regime in 1995 with the creation of the World Trade Organization (WTO), they have always been included within the scope of international investment agreements (IIAs).1 Despite the longstanding link, neither investors nor governments fully appreciated or made use of the connection. The apathy or ignorance of IPRs as an investment is now abating, and the full effects of the link are now being realized by all parties. The realization occurred when Philip Morris filed two high-profile cases challenging public health regulations in host

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1 The term international investment agreement encompasses both bilateral investment treaties (BITs) as well as free trade agreements (FTAs) which include a comprehensive chapter on investment.
nations; more specifically, Philip Morris filed a claim against Uruguay challenging its restrictions on brands and health warnings labelling on cigarette packaging\(^2\) and against Australia challenging its measures requiring the ‘plain packaging’ of cigarettes.\(^3\)

These cases aroused the interest of not only governments and investors but also public health advocates and other commentators, all of whom are now fully aware of the fact that IPRs can be treated as an investment. The result has been the filing of even more health-related cases, most notably Eli Lilly’s claim against Canada challenging its standard for determining the ‘utility’ of an invention in a patent application.\(^4\)

These cases all illustrate several emerging trends, perhaps most notably the blurring of the line between the international trade regime and the international investment regime. In each case, the claimants are asserting a breach of an international trade standard as a basis for the claim under the investment regime. Another recent trend is of reactive negotiating and drafting of language protective of health-related measures in IIAs, most notably in IIAs negotiated by the United States (US) and the European Union (EU).\(^5\) While well-intentioned, such language has served to further blur the lines between the international trade and investment regimes. While the evolution of treaty drafting and inclusion of public-health related IPR measures which seek to keep or claw back policy space and ensure that non-discriminatory public welfare measures are not deemed to be inconsistent with an IIA is undoubtedly a positive trend, the convergence of international trade law and international investment law may create longer-term issues.

The broader point of the article is to emphasize the importance of treaty language. State conduct consistent with the terms of one treaty may violate another, simply due to the addition or deletion of a few words or phrases. States must remain alert to these subtle variations of legal details as they may have significant ramifications. Over time, the evolution of treaty drafting has attempted to add precision and more fully circumscribe the scope of state obligations. But this has created two distinct tiers of treaty obligations: the old model of IIAs which are broadly crafted and almost always interpreted in a manner most favourable to investors and the more recent model which includes language attempting to protect policy space. In all

2 FTR Holdings SA (Switzerland) et al v Uruguay (October 2010).


4 Eli Lilly v Canada (November 2012). Another recently filed claim relating to pharmaceuticals is Apotex v USA (February 2012).

likelihood, future IIAs will introduce a third tier with even more pull-backs and potentially even explicit carve outs/exclusions for some sectors or industries.

The result of such a (non-)system is fragmentation and an invitation for claimants to trawl through the range of complex IIAs with a view to turn treaty shopping in a basic legal strategy. Modern agreements, and particularly the new mega-regional agreements, can reduce the fragmentation through consolidation. In the process, policy space for public welfare initiatives will be better protected and done so in a more far-reaching manner. The trends suggest this is possible, but again this article will demonstrate that modern drafting is (rather worryingly) not entirely without problems.

The article proceeds as follows. Section 2 offers a brief description of how and why IPRs qualify as a covered investment under IIAs. Section 3 demonstrates the shift towards public interests and governmental policy space and against private interests in the most recent IIAs. Focusing primarily on treaties negotiated by the US and EU, Section 3 shows how treaty language is being crafted which offers enhanced protection for public welfare measures in key parts of IIAs, namely clauses on expropriation, fair and equitable treatment (FET) and through the use of stand-alone provisions. While these modern treaties offer the state improved protection and greater policy space than the earlier generation of IIAs, Section 3 also identifies potentially problematic wording in the new clauses which warrant further consideration from treaty drafters and other alternatives. Section 4 concludes.

2. INTELLECTUAL PROPERTY RIGHTS AS AN INVESTMENT

Traditionally aimed at investment promotion and protection, most IIAs define ‘investment’ as covering (and protecting) a wide range and variety of investments. Very often, the ‘investment’ covered by the treaty is defined in a broad and open-ended manner, covering not only the capital that has crossed borders but also virtually all other kinds of assets that can be owned by a foreigner or foreign entity in the territory of the host country. To this end, the arbitral tribunal in Millicom v Senegal characterized the not entirely uncommon definition of investment which ‘shall comprise every kind of asset, including all kinds of rights’ in the Netherlands-Senegal BIT as ‘extremely broad’. The fact that IPRs qualify as a covered investment in most if not all IIAs is beyond reasonable doubt. In some agreements, the link is explicit. In other agreements, the link is indirect or interpreted through reasonable interpretation.

The explicit approach was taken in the first IIA negotiated between Germany and Pakistan in 1959, with Article 8(1)(a) stating ‘[t]he term “investment” shall comprise capital brought into the territory of the other Party for investment in various forms in the shape of assets such as foreign exchange, goods, property rights, patents and technical knowledge’ (emphasis added).7

Modern agreements are even more comprehensive, with a common provision exported from US IIAs defining an investment as ‘every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including

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6 Millicom International Operations BV v The Republic of Senegal, ICSID Case No ARB/08/20, Decision on Jurisdiction of the Arbitral Tribunal, at para 79 (16 July 2010).
7 See also, France–Singapore BIT (1976), art 1.1(d); Japan–Egypt BIT (1978), art 1(d); China–Switzerland BIT (1987), art 1.1(d).
such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk’.  

This broad definition is then followed by examples of forms in which the investment could take and explicitly include ‘intellectual property rights’ and ‘other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges’.  

In such a circumstance, IPRs are unquestionably included within the scope of an ‘investment’ and thus eligible to receive the rights and protections of the IIA.

While not explicitly mentioning IPRs, other agreements include provisions which strongly support the inclusion of IPRs as a covered investment. For instance, some IIAs protect ‘real estate or other property, tangible or intangible, and any related property rights [such as lease, liens and pledges] acquired in the expectation or used for the purpose of economic benefit or other business purposes’ (emphasis added). This approach is taken in a number of agreements, including in the Japan–Mexico FTA as well in the North American Free Trade Agreement (NAFTA).

Such agreements also contain other provisions which directly support the notion that IPRs were intended to be included as a covered investment. For instance, Article 73 of the Japan–Mexico FTA (entitled ‘Intellectual Property Rights’) reads:

1. nothing in the Investment Chapter shall be construed to derogate from rights and obligations under multilateral agreements on IPRs to which the Parties are parties; and
2. nothing in the Investment Chapter shall oblige either Party to extend to investors of the other Party and their investments treatment accorded to investors of a non-Party and their investments by virtue of multi-lateral agreements in respect of protection of intellectual property rights, to which the former Party is a party.

For its part, the NAFTA contains at least two provisions which directly implicate IPRs as an investment. One such provision, Article 1108(5), states that ‘Articles 1102 (NT) and 1103 (MFN) do not apply to any measure that is an exception to, or derogation from, the obligations under Article 1703 (NT in the IP Chapter) as specifically provided for in that Article’.

8 For recent examples, see EU–Singapore FTA, art 9.1(1); CETA, art X.3; Japan–Australia EPA, art 14.2 (f); and Korea–Australia FTA, art 11.28. In other agreements such as Singapore–Japan FTA, Chap 8, art 72(a)–(b) and in EFTA–Korea BIT, art 1.2, the parties have used similar long lists of examples that include IPRs but does not feature terms such as risk or profit expectation. Interestingly, art 1 of the Canada–China BIT uses a positive list for the definition of an investment that includes IPRs and other tangible and intangible rights but thus is complemented by a negative list which clarifies what is not an investment.

9 The exact same or similar language is used in several recent agreements, including US–Korea, art 11.28 (KORUS); US–CAFTA-DR, art 10.28; Australia–Chile FTA, art 10.1; EFTA–Singapore FTA, art 37(b); China–ASEAN, art 1.1(d)(iii); EU–Singapore FTA, art 9.1(1)(g); and CETA, art X.3. See also, China–India BIT, art 1.b.iv (protecting ‘intellectual property rights, in accordance with the relevant laws of the respective Contracting Party’). Several Model BITs also explicitly protect IPRs: see, ie US Model BIT 2012, art 1; Norway Model BIT 2007, art 2.2.vii; German Model BIT 2008, art 1(d).

10 Japan–Mexico FTA, art 96(i)(gg); NAFTA, art 1139(g).

11 The other provisions, art 1110(7), will be discussed below.
Such provisions limit the effect of the investment protections on IPRs, but in doing so signal the intention of the parties to include IPRs within the scope of an ‘investment’ under the relevant agreement. Quite simply, if IPRs were not intended to fall within the scope of an ‘investment’ under the relevant agreement, there would be no such need to provide for any limitations on the effect of the investment agreement on, for instance, multilateral IP obligations.

Other IIAs do not specifically provide for IPRs within the scope of an ‘investment’, but IPRs are nevertheless assumed to fall within the ambit of the IIA for a host of text-based reasons. For instance, almost every agreement provides explicit protection to ‘licenses’ and investor ‘returns’, which would seem to encompass royalties and fees common to IPRs, and broadly define the scope of an ‘asset’, which again would seem to encompass IPRs. It is thus almost a foregone conclusion that IPRs are included within the scope of a covered investment in all IIAs.

The manner in which IPRs are incorporated into IIAs is thus highly fragmented. Some agreements explicitly include IPRs as a covered investment while in others one or more provisions makes it reasonably certain that IPRs are included as a covered investment. In still others, there is no reference to the inclusion or exclusion of IPRs but they are likely to fall within the definition of a covered investment as ‘intangible property’, an ‘asset’ or ‘return’.

Assuming that an IPRs owner is deemed to be an investor which has made a covered investment in the host state the IPRs owner is entitled to the procedural and substantive protections afforded in the treaty. In this light, the substantive rights that are further regulated by the treaty require considerable attention as they may serve to protect investors and investments in IP.

3. TRENDING UP: INCREASED PRECISION

Fragmentation not only features in the definitional part of IIAs but throughout the terms of protection and state obligations. Textual differences between and among the 3000+ IIAs result in significant variances in the level of investor protection and state obligation; the result of which is that state conduct which is consistent with the terms of one treaty may be deemed inconsistent with the terms of another agreement.

One can generally point to trends in treaty drafting in order to explain the differences. Older style agreements, negotiated by most countries until the early 2000s, are vaguely worded and lacking in detail, nuance and sector-specific protections to the host state. Such agreements are generally interpreted by arbitral tribunals as favourable to investors. The second generation of treaty drafting began in earnest in the early 2000s incorporating additional language so as to add precision and interpretive guidance to the text. In some cases, the additional language was an outright pull-back and reaction to an arbitral tribunal decision. In other cases, the enhanced precision meant to serve as a way in which to preserve policy space in sensitive public welfare areas such as health and environmental protection. This second generation agreement is now giving way to a third generation being negotiated into mega-regionals. Third generation treaties will see even further protection for

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governmental policy space—again, most notably in areas such as health and the environment—through the use of even more sector-specific drafting and perhaps even sectoral carve-outs/exclusions.

To illustrate, it is worth briefly looking at the evolution of treaty drafting expropriation and fair and equitable treatment (FET) clauses before turning to stand-alone provisions being negotiated into the most recent mega-regionals. Provisions on expropriation and FET are extremely important to investors, and have played a crucial role in determining the vast majority of investment disputes. Both have also been refined and tailored throughout the years with the evolution of treaty drafting. The remainder of this section will review the evaluation of treaty drafting in these important areas as well as stand-alone provisions beginning to be negotiated into appear select modern treaties.

A. Expropriation

Scholars and commentators have always recognized and accepted that intangible property can be expropriated, and the jurisprudence is also clear on this point. As far back as 1903, tribunals composed under various circumstances have found that the destruction of rights is equivalent to the destruction of tangible property. More recently, IIA tribunals, such as Wena Hotels Ltd v Egypt, have likewise found that expropriation is not limited to tangible property rights but also extends to intangible property rights. In so holding, the arbitrators relied on the case of SPP Middle East v of Egypt, which held that it was an accepted principle in international law that intangible contractual rights could be subject to expropriation. In a different context but in the same vein, the arbitral tribunal in Amco International Finance Corp v Iran concluded that an expropriation ‘which can be defined as a compulsory transfer of property rights, may extend to any right which can be the object of a commercial transaction’. Likewise, the arbitral tribunal in Phillips Petroleum Co Iran v Iran also found that expropriation applies ‘whether the expropriation is formal or de facto and whether the property is tangible, such as real estate or a factory, or intangible, such

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14 See Rudloff Case, Interlocutory Decision, 1903, 9 Reports of International Arbitral Awards (RIAA) 244, 250 (1959); Norwegian Shipowners’ Claims (Norway v United States), Award, 13 October 1922, 1 RIAA 307, 325; Starrett Housing Corp v Iran, 19 December 1983, 4 Iran–US CTR 122.


17 15 Iran–United States CTR, p 89, para 108.
as the contractual rights involved in the present case. More recently, the arbitral tribunal in *White Industries v India* cited with approval *Phillips Petroleum* and held that contractual rights, whether tangible or intangible, are capable of being expropriated.

These rulings demonstrate highly consistent and coherent jurisprudence regarding the applicability of expropriation to intangible property rights. This is logical, as intangible rights have economic value/benefits which State action can obliterate. While none of these decisions related to IPRs, the fact that IPRs are a form of intangible property rights and that IPRs may include an element of foreign investment, it is only natural that IPRs would likewise gain protection under an IIA from expropriation.

The typical expropriation clause is based on the capital-exporting country view that under customary international law, countries are allowed to expropriate foreign investors provided that four conditions are fulfilled: (i) for a public purpose; (ii) on a non-discriminatory basis; (iii) under due process of law; and (iv) based upon the payment of prompt, adequate and effective compensation. Protecting against direct and indirect expropriation, the clause attempts to be comprehensive in scope. Indeed, such factors are simply repeated in most agreements without alteration. Differences, when they exist, relate more to the degree of specificity with which the text deals with compensation and interpretively to the precise meaning and scope given to the concept of due process.

While undoubtedly helpful, the four factors do not resolve every issue. This is particularly true in the case of a measure challenged for being an indirect expropriation. The line separating a legitimate regulatory measure and an indirect expropriation is sometimes difficult to detect; simply, there will be measures which reflect *prima facie* a lawful exercise of powers of governments but nevertheless may impact or affect foreign interests. Not all of these measures will be considered as tantamount to expropriation. For example, a state may subject foreign assets and their use to taxation, restrictions involving licenses and quotas or other measures which result in a devaluation of the value of the asset. While the facts of the case may alter the outcome, in

18 See *21 Iran-United States CTR.*
19 *White Indus Austl Ltd v The Republic of India*, UNCITRAL, Final Award, para 12.3.2 (November 2011).
21 A subset of indirect expropriation known as regulatory expropriation occurs where a measure has been taken for regulatory purposes but the impact is equivalent to expropriation. Regulatory expropriation may also be (but not necessarily is) a form of ‘creeping expropriation’, where it is not an individual act, but rather a series of measures that brings about the expropriatory effect. See, eg *Generation Ukraine v Ukraine* (2005) 44 ILM, at p 404, paras 20.22 and 20.26.
22 Other IIAs which adopt this or similar language include Australia–Hong Kong FTA, art 6.1; KORUS, art 11.6.1; CETA, X.11(1); EU–Singapore FTA, art 9.6(1); China–ASEAN, art 8.1; Singapore–Japan FTA, art 7.72; Korea–Australia FTA, art 11.7; and Australia–Japan EPA, art 14.11. China–Chile BIT, art 4(1)(1); Japan–Hong Kong BIT, art 5(1). See also US Model BIT 2012, art 6.1; Canada 2004 Model BIT art 13(1); German Model Treaty 2008, art 4(2).
principle such measures are not unlawful and do not constitute an indirect expropriation.\textsuperscript{23}

Although a claim of indirect expropriation rarely finds favour with arbitral tribunals, the jurisprudence has not been very clear in delineating the line between a non-compensable regulatory measure and indirect expropriation. In the absence of a clearly articulated standard, three important factors have become critical to the determination of whether a measure is an indirect expropriation—the textual wording of the treaty at issue, the facts of the case and the individual arbitrators involved in the dispute.\textsuperscript{24}

It is the first factor which this article will further explore. The ‘emerging consensus in international law,’\textsuperscript{25} is for States and even no arbitral tribunals to add precision and a principle-based approach to the interpretation of an indirect expropriation, with the following factors to be considered:

i. the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

ii. the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

iii. the character of the government action.

Such wording, often repeated in subsequent agreements,\textsuperscript{26} setting out the assessable factors are undoubtedly helpful to governments instituting non-discriminatory measures such as not unlawful and do not constitute an indirect expropriation.\textsuperscript{23}

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\textsuperscript{23} See Quasar de Valores SICAV SA et al v the Russian Federation, Final Arbitral Award, SCC Case No V (024/2007) 20 July 2012, para 45 (‘Indirect expropriation, of course does not speak its name. It must be deduced from a pattern of conduct, observing its conception, implementation, and effects as such, even if the intention to expropriate is disavowed at every step. The fact that individual measures appear none to be well founded in law or to be discriminatory, or otherwise to lack bona fides, may be important elements of a finding that there has been the equivalent of an indirect expropriation, an expropriation by other means even though there be no need to determine whether the expropriation was unlawful.’).

\textsuperscript{24} See Jan Paulsson, ‘Indirect Expropriation: Is the Right to Regulate at Risk?’ presented to a symposium organised by the OECD, ICDID and UNCTAD, 12 December 2005, Paris, available at <http://www.oecd.org/investment/internationalinvestmentagreements/36055332.pdf> accessed 19 June 2015, p 1 (‘There is no magical formula, susceptible to mechanical application, that will guarantee that the same case will be decided the same way irrespective of how it is presented and irrespective of who decides it.’). On the latter point, significant differences in doctrinal and theoretical approaches exist among arbitrators which could affect the outcome of a dispute. This is not to suggest that arbitrators are biased. On this point, see Charles N Brower and Stephan W Schill, ‘Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?’ (2009) 9 Chicago Journal of International Law 471, 492.


\textsuperscript{26} For instance, Annex X.11(2) of the CETA states that the determination of whether a measure or series of measures constitutes an indirect expropriation ‘requires a case-by case, fact-based inquiry that considers, among other factors: the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred; the duration of the measure or series of measures by a Party; the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations; and the character of the measure or series of measures, notably
measures in the pursuit of better public outcomes, as the language requires tribunals to weigh and balance the nature and potential impact of all three factors prior to making its determination. In this regard, neither firm government action nor economic impact will automatically outweigh the character of state action. However, the provision is not a ‘magic bullet’ and is only of limited assistance insofar as the language employed is fairly vague and provides no direction to arbitrators as to how the factors should be weighed and balanced.

Fragmentation reigns, however, as only a handful of the 3000+ IIAs contain such language. That being said, even more recent IIAs as well as the mega-regionals currently under negotiation have/will introduce even more specific language and criteria to assist arbitrators in determining whether an indirect expropriation requiring compensation has occurred. This drafting trend is notable in regards to health-related measures.

Health-related measures such as the issuance of a compulsory licence for a pharmaceutical product or restrictions and/or limitations to IPRs (such as the revocation of patent rights for applicants that fail to disclose the origins of genetic materials contained in those patents or the requirement that tobacco products be sold in ‘plain packaging’ in a manner which limits the use of a trademark) are inherently susceptible to claims of indirect expropriation. Tailoring of textual clauses attempts to reduce the risk and provide governments with a higher level of certainty that the measures they take will not run afoul of the IIA. For instance, Article 1110(7) of the NAFTA states:

[Expropriation] does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with Chapter Seventeen (IPRs) [of the NAFTA].

With regards to the latter part of the sentence, the clause merely requires a treaty interpreter to simultaneously interpret the IP Chapter of the FTA with the purpose of the clause no doubt being that an IP-related measure consistent with the IP Chapter of the NAFTA should not be deemed to be inconsistent with the Investment Chapter. This makes sense, and explicitly demands consistent application of the whole treaty. The first part of the sentence is more problematic in that it excludes the expropriation clause from any compulsory licence taken in relation to IPRs (most often, patents), regardless of the consistency of the compulsory licence with international obligations existing under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). The parties most
certainly did not intend to exclude from the scope of expropriation a compulsory licence issued without cause.

Indeed, subsequent US-negotiated IIAs refined the text to read:

[The Agreement’s Article on expropriation] does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement (emphasis added).27

The linking of the exclusion to consistency with the TRIPS Agreement at first instance seems entirely appropriate—a compulsory licence granted in consistency with the TRIPS Agreement cannot be deemed to be an expropriation under the IIA. Such language clearly expresses the intent of the exclusion and the will of the parties to maintain consistency across agreements. Upon reflection, however, one discovers that the direct linkage to consistency with the TRIPS Agreement is problematic. Implicit in the exclusion clause is that compulsory licences issued that are not in compliance with the TRIPS Agreement would be an expropriation, but the scope of such an inference is left unstated. For instance, it is not clear whether all compulsory licences which are inconsistent with the TRIPS Agreement automatically be deemed an expropriation.

Even more worrying is the direct link to the TRIPS Agreement. By explicitly bringing the TRIPS Agreement into the interpretation of the IIA provision, the drafters have mandated that the arbitrators interpret the TRIPS Agreement. Arbitrators may or may not be experts in WTO law, and it is dangerous to call upon them to interpret whether a host state’s measure is consistent with the TRIPS Agreement.28

27 See, eg US–Uruguay BIT, art 6.5; US–Panama FTA, art 10.7; US–Australia FTA, art 11.7.5; US–Singapore FTA art 15.6.5; US–Chile FTA, art 10.9.5; KORUS, art 11.6.5. Several IIAs have adopted the exact same language. See, eg China–ASEAN, art 8.6; KAFTA, art 11.7(5); JAEP, art 14.11(6). Art 10.2 (emphasis added).

28 This author has made this point in several other publications. See, eg Mercurio (n 3) 899–900 and 905; Bryan Mercurio, ‘International Investment Agreements and Public Health: Neutralizing a Threat through Treaty Drafting’ (2014) 92(7) Bulletin of the World Health Organization 520, 522. Experience demonstrates the dangers of investment tribunals attempting to interpret WTO jurisprudence. See Jürgen Kurtz, ‘The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents’ (2009) 20 EJIL 749. See also, Robert Howse and Efraim Chalamish, ‘The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz’ (2009) 20 EJIL 1087; Jürgen Kurtz, ‘The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents: A Rejoinder to Robert Howse and Efraim Chalamish’ (2009) 20 EJIL 1095. This is not an argument for the continuation of self-containment between and among the investment and trade law regimes, more so for careful consideration when drawing on or implicating another regime. In this regard, even a strong advocate of cross-fertilization between the various parts of public international law such as Kurtz states that it is ‘deeply regrettable as not every form of cross-systemic borrowing is being conducted sensibly or with due care both by negotiators and adjudicators’. Jürgen Kurtz, ‘Book Review Essay: On Inter-Disciplinary and Inter-Systemic Approaches to International Investment Law’ (2015) 16 The Journal of World Investment and Trade 557, 559.
Even more recently, the EU adopted similar language in agreements with Singapore and in Article X.11 of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, which reads:

5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, to the extent that such issuance is consistent with [TRIPS].

6. For greater certainty, the revocation, limitation or creation of intellectual property rights to the extent that these measures are consistent with TRIPS and Chapter X (Intellectual Property) of this Agreement, do not constitute expropriation. Moreover, a determination that these actions are inconsistent with the TRIPS Agreement or Chapter X (Intellectual Property) of this Agreement does not establish that there has been an expropriation.30

It is unfortunate that the EU not only continues to directly implicate the TRIPS Agreement in relation to the issuance of a compulsory licence, but also now does so in relation to the revocation, limitation or creation of IPRs. While well meaning, such a linkage brings uncertainty to the system. This is a dangerous trend, with the potential to add uncertainty and possibly even embarrassment to and crisis in the legitimacy of the investment regime in the future should a decision of an arbitral tribunal contradict a subsequent decision of the WTO dispute settlement body.31

The innovation of the EU approach, however, is the second sentence of paragraph 6. Specifically, the parties have crafted language denying the reverse implication of a measure deemed not to be compliant with the TRIPS Agreement or IP Chapter in the IIA. Thus, a revocation, limitation or creation of IPRs which is inconsistent with the TRIPS Agreement or the IP Chapter of the IIA does not necessarily result in an expropriation. It may, but the facts would have to be established as in other cases.

Other recent attempts to provide policy space for public welfare appear in Annex 11-B(3)(b) of the KORUS FTA (and numerous subsequent agreements):

Except in rare circumstances, such as, for example, when an action or a series of actions is extremely severe or disproportionate in light of its purpose or effect, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, the environment, and real estate price stabilization (through, for example, measures to improve the housing conditions for low-income households), do not constitute indirect expropriations.32

29 EU–Singapore FTA, art 9.6(3) and Annex 9-C.
30 It has been reported that Canada had proposed but EU not accepted language which would have stated that expropriation ‘does not apply to a decision by a court, administrative tribunal, or other governmental intellectual property authority, limiting or creating an intellectual property right, except where the decision amounts to a denial of justice or an abuse of right’. Canada undoubtedly had the Eli Lilly case in mind when proposing this language, but one wonders whether such broad language would be in the long-term interest of parties.
31 This point was also made in Mercurio (n 3) 899–900.
32 For a similar clause, see Annex 10-B(3)(b) of the Australia–Chile FTA: ‘Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect
Similar language appears in Annex 9-A(2) of the EU–Singapore FTA and Annex X.11(3) of the CETA. While the insertion of such a clause is again no ‘magic bullet’ against claims, it is a clear and powerful indication that the parties do not view non-discriminatory public measures as indirect expropriations. This clause, in combination with the addition of provisions limiting expropriation provisions to situations where the revocation, limitation, or creation is inconsistent with the IP Chapter of the IIA or the TRIPS Agreement significantly narrows and constrains any potential claim for indirect expropriation based on the limitation, revocation or creation of IPRs.

This does not mean that there will not be a claim, only that a claimant will need to successfully argue that the measures of the host nation are discriminatory, not designed and applied to protect legitimate public welfare interests, are inconsistent with the IP Chapter of the IIA or the TRIPS Agreement, etc. Of course, it must be remembered that claims of indirect expropriation are rarely successful and with the addition of these limitation clauses the establishment of a claim would seem to have become substantially more difficult.

The language used to define and limit the concept of an expropriation in modern IIAs in a manner which does not condemn non-discriminatory measures taken to protect public health represents a step in the right direction. Of particular note is the text of the CETA, which builds upon the limitations existing in prior US agreements to protect policy space for public welfare measures. The CETA not only attempts to limit the application of indirect expropriation to public policy measures to rare cases, but also to its application for IP-related measures such as compulsory licences and the revocation or limitation of IPRs. While treaty drafters have yet to find the perfect balance, governments should be given credit for attempting to protect policy space for non-discriminatory public welfare-related measures from the overreach of expropriation.

B. Fair and Equitable Treatment

The typical definition of FET is relatively simple—‘investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment [... ] in the territory of the other Contracting Party’—yet scores of arbitral tribunals have

expropriations.’ See also, US–Chile FTA, Annex 10-D 4.(b); US–Australia FTA, Annex 11-B 4.(b); Korea–Australia FTA, Annex 11-B 5; Canada–China BIT, Annex B.10, art 3; JAEPa, Annex 12, art 4; US Model BIT 2012, Annex B4(b); 2004 Canada Model BIT, Annex B.13(1)(c).

Annex X.11(3) of the CETA reads: ‘For greater certainty, except in the rare circumstance where the impact of the measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.’


Art 2.2 of the Australia–Hong Kong BIT provides a typical example of the provision: ‘Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the area of the other Contracting Party. Neither Contracting Party shall, without prejudice to its laws, in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its area of investors of the other Contracting Party’ (emphasis added). See also, NAFTA, art 1105(1); KORUS, art
revealed the complexity behind such a seemingly simplistic obligation. Tribunals generally tend to limit any theoretical discussion of FET to listing examples of behaviour which violate the standard, rather than actually providing a concrete standard. For instance, the arbitral tribunal in *Waste Management v Mexico* held that conduct violating FET is defined as the following:

Grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.

Likewise, the arbitral tribunal in *Thunderbird* stated that a violation of FET requires conduct which 'cannot be rationally supported by recourse to a legitimate and otherwise non-discriminatory public policy goal'.

Furthermore, tribunals have found that in order to meet the requirements of FET the standard must be applied in a manner which balances the legitimate right of the host country government to exercise its authority in the public interest with the 'legitimate expectations' of the foreign investor. In most cases, legitimate expectations has been viewed as regarding the relative fairness, stability and transparency of the local legal regime as opposed to explicit statements or promises made by the host state. In all of the recently filed IP and health-related claims, the complainant links a violation of an obligation under another international agreement as a violation of the legitimate expectations requirement under FET.

11.5; CAFTA–DR–US FTA, art 10.5; Australia–Chile FTA, art 10.5; EFTA–Singapore, art 39.2; Japan–Mexico FTA, art 60; China–Peru, art 132; China–New Zealand FTA, art 143; China–ASEAN FTA, art 7.

36 See, eg *Total SA v Argentine Republic*, ICSID Case No ARB/04/01, Decision on Liability, 27 December, 2010, para 106. See also, *Spyridon Roussalis v Romania*, ICSID Case No ARB/06/1, Award, 1 December 2011 at 318 (noting that while the undertaking to provide FET to investors and their investments is a standard feature in IIAs, the exact language of such undertakings is not uniform, and the generality of the FET standard beyond general principles (ie transparency, good faith) distinguishes it from other specific obligations undertaken by the parties to a BIT.). Considering the different ways in which FET may be incorporated into IIAs, the tribunal in *Sempra v Argentina* noted that FET is not a clear and precise standard and instead has evolved through case-by-case determinations. See *Sempra Energy International v Argentine Republic*, ICSID Case No ARB/02/16, Award, 28 September 2007, para 296. See also *El Paso Energy International Company v Argentine Republic*, ICSID Case No ARB/03/15, Award, 31 October 2011, para 338.

37 The tribunal in *Mondev v United States* simply observed that the minimum standard of treatment 'applies to a wide range of factual situations, whether in peace or in civil strife, and to conduct by a wide range of State organs and agencies'. See *Mondev International Ltd v United States of America*, ICSID Case No ARB(AF)/99/2, Award, 11 October 2002, para 95.

38 *Waste Mgmt, Inc v United Mexican States*, ICSID Case No ARB(AF)/00/3, Award, para 98 (30 April 30, 2004). For analysis of fair and equitable treatment, see Katia Yannaca-Small, 'Fair and Equitable Treatment Standard: Recent Developments' in August Reinisch (ed), *Standards of Investment Protection* (OUP 2008).

39 See, ie *International Thunderbird Gaming Corporation v Mexico* (Award), Ad Hoc UNCITRAL Arbitral Tribunal, 26 January 2006, para 194.

40 *Saluka Investments BV (Netherlands) v The Czech Republic*, 17 March 2006, paras 301–02.
Long ignored (at least until the early 2000’s), in recent years FET has become a standard claim raised in almost every proceeding and one of the most likely avenues for claimants. In fact, quite a number of claims have succeeded in a claim of a breach of FET even when the claim for an expropriation is dismissed. The likely success of a FET claim depends in large part on the scope of the obligation. With, at least, seven major textual variations (see Figure 1), it is clear from the jurisprudence that minimalist language will result in the most expansive obligations and thus impose a high threshold of protection on the state and in favour of investors.

Most IIAs, however, simply provide for FET without any qualification, reference point or standard by which to determine the content of the standard. This leaves the determination and interpretation unstated, and provides wide latitude to an arbitral tribunal to impose its views. On the other hand, IIAs which add clarity and definition to the standard guide the interpretation of the provision and in so doing have more control over the scope of the clause and provide for increased predictability to both investor and state.

Claimants in all of the major IPR-related disputes have based their FET claim on three arguments: a lack of fairness and proportionality of the measure; the legitimate expectations of the investor; and inconsistencies with the relevant international framework (ie WTO and Paris Convention). While an analysis of those claims is

Figure 1. The Seven Possibilities of fair and equitable treatment


41 Despite the known threat, some governments continue to negotiate in this manner. See, eg China–ASEAN, art 7.2(a).
beyond the scope of this article, it is worthwhile noting the vastly different boundaries of the FET obligation in the Switzerland–Uruguay BIT (No. 2, above), Australia–Hong Kong BIT (No. 3, above) with the NAFTA (No. 7, above) and the effect such differences will have on the tribunal’s interpretive process and outcome.\(^{42}\)

The recently negotiated EU–Singapore FTA and the CETA attempt to further define and narrow the scope of FET by moving beyond the traditional language employed. More specifically, it is worth quoting the entirety of Article X.9 (entitled ‘Treatment of Investors and of Covered Agreements’) of the CETA, which provides:

Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security . . .

A Party breaches the obligation of fair and equitable treatment . . . where a measure or series of measures constitutes:
- Denial of justice in criminal, civil or administrative proceedings;
- Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings.
- Manifest arbitrariness;
- Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
- Abusive treatment of investors, such as coercion, duress and harassment; or
- A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.

The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment may develop recommendations in this regard and submit them to the Trade Committee for decision.

When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.

For greater certainty, ‘full protection and security’ refers to the Party’s obligations relating to physical security of investors and covered investments.

For greater certainty, a breach of another provision of this Agreement, or of a separate international Agreement, does not establish that there has been a breach of this Article.\(^{43}\)

\(^{42}\) See Switzerland–Uruguay BIT, art 3.2; NAFTA, art 1105.1; and Australia–Hong Kong BIT, art 2.2.

\(^{43}\) For a similar, although slightly less detailed, provision see art 9.4 of the EU–Singapore FTA. Of note, the provision contains an enumerated list of potential breaches of FET, limits investors ‘legitimate expectations’ to ‘specific or unambiguous representations . . . so as to induce the investment and which are reasonably relied upon by the investor’ and states that a breach of another article within the agreement or separate international agreement does not establish a breach of FET. On the latter issue, see also China–ASEAN, art 7.3 (‘A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, shall not establish that there has been a breach of this Article’).
The innovations in this provision are striking, as instead of having FET serve as a minimum standard or an ‘evolving concept’ the Article attempts to set a ‘precise and specific standard’ of treatment with the inclusion of a closed list of six instances which gives rise to a breach of FET. Moreover, while the provision includes the notion of an investor’s ‘legitimate expectations’, the parties attempt to limit the concept to situations where the host state has made a specific representation which was relied upon by the investor in making the investment. Finally, it is also noteworthy to mention the explicit statement that a breach of another international agreement does not in and of itself constitute a breach of the FET obligation. Here again, such language strikes at the heart of all the recent IPR-related disputes which assert a breach of FET as a result of a breach of a covered agreement of the WTO or other international agreement (ie Paris Convention).

The intent of the drafters to limit the scope of FET is clear and the provision should be seen as a major step in reclaiming policy space for public welfare measures. It remains to be seen whether Article X.9 will indeed stem the flow of successful FET claims, but it can already be said that the provision represents a real innovation in treaty drafting.

C. Stand-Alone Provisions Promoting Public Welfare

In addition to special provisions relating to expropriation and FET, a minority of recent IIAs have also included or are considering including stand-alone provisions promoting policy space for public welfare measures. The remainder of this section will review three such provisions: a general exception clause; explicit guidance and binding interpretations; and explicit carve outs/exclusions.


In so doing, the CETA is taking a minority view on the proper interpretation of a legitimate expectation, as numerous arbitral tribunals have found it is not about explicit guarantees given to a particular investor but more so about the relative fairness, stability and transparency of the local legal regime. See ie International Thunderbird Gaming Corporation v Mexico (Award), Ad Hoc UNCITRAL Arbitral Tribunal, 26 January 2006, at paras 27 and 147; Occidental Exploration and Production Co v Ecuador (Award), London Court of International Arbitration Case No UN 3467, 1 July 2004; CMS Gas Transmission Company v Argentina (Award), ICSID Case No ARB/01/8, 12 May 2005; CME Czech Republic BV v Czech Republic (Final Award and Separate Opinion), Ad Hoc UNCITRAL Arbitral Tribunal, 14 March 2003; GAMl Investments, Inc v Mexico (Final Award), NAFTA/UNCITRAL Tribunal, 15 November 2004; Técnicas Medioambientales Tzomel SA v The United Mexican States (Award), ICSID Case No ARB(AF)/00/2, 29 May 2003; MTD Equity Sdn. Bhd and MTD Chile S A v Republic of Chile (Award), ICSID Case No ARB/01/7, 25 May 2004. See contra, Glamis Gold (n 26) paras 620 and 766; National Grid v Argentine Republic (Award), Ad Hoc UNCITRAL Arbitral Tribunal, 3 November 2008, at para 173.

It should be noted that a similar limitation appears in other modern agreements, including JAEPA, art 14.5, which provides that in Note 1: ‘The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens’; and in Note 2 states: ‘A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article’. See also KAFTA, art 11.5, and Canada–China BIT, art 4.

Recognition of the importance of public welfare measures can also be seen elsewhere in certain agreements. For instance, the preamble of the investment chapter of the EU–Singapore FTA ‘Reaffirm(s) each Party’s right to adopt and enforce measures necessary to pursue legitimate policy objectives such as social,
(i) General exceptions clause

An alternative approach to crafting exceptions for each substantive issue is to include a general exception clause modelled on Article XIV of the General Agreement on Trade in Services (GATS).\(^48\) Utilized in only a handful of agreements but growing in popularity,\(^49\) such a clause allows measures which are not applied in an arbitrary or unjustifiable manner and not a disguised restriction on investors and investments to be justifiable exceptions to the investment chapter/agreement if the measures fit into certain categories, such as:

a. necessary to protect public morals or maintain public order;
b. necessary to protect human, animal or plant life or health;
c. necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
   i. the prevention of deceptive and fraudulent practices or to deal with the effects of a default on a contract;
   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. aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of investments or investors of any Party;
e. imposed for the protection of national treasures of artistic, historic or archaeological value; or

environmental, security, public health and safety, promotion and protection of cultural diversity . . . . In addition, art 11.30 of the EU–Singapore FTA recognises the ‘importance’ of and calls upon the parties to ‘ensure consistency’ with the Doha Declaration on TRIPS and Public Health and to ‘respect’ the 30 August 2003 Implementation Decision and subsequent amendment of the TRIPS Agreement. Likewise, the preamble to CETA recognizes ‘that the the provisions of this Agreement preserve the right to regulate within their territories and resolving to preserve their flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity’ and the parties commit to ensuring consistency to the Doha Declaration on TRIPS. Similarly, in the preamble to the Canada-China BIT the parties agree ‘to promote investment based on the principles of sustainable development’ and in art 18.3 to ‘recognize that it is inappropriate to encourage investment by waiving, relaxing, or otherwise derogating from domestic health, safety or environmental measures’.

\(^48\) For detailed background information, see Andrew Newcombe, ‘The Use of General Exceptions in IIAs: Increasing Legitimacy or Uncertainty?’ in Armand de Mestral and Celine Levesque (eds), Improving International Investment Agreements (Routledge 2013) 267–83.

\(^49\) It must be emphasized that there are positive aspects to the fragmentation in this regard given the importance of countries tailoring treaty provisions to their own particular risk profile and level of comfort. One example could be in the area of exceptions. The US, for instance, does not include a General Agreement on Tariffs and Trade (GATT) art XX-type exception while other states (such as Canada) do so as a matter of course. The behaviour of both countries is rational. The US provides targeted exceptions to select provisions (i.e. the guarantee of compensation for indirect expropriation) in a manner which reflects its own domestic legal system (modelled on US constitutional law), including a strong level of property protection. Other countries do not offer the same level of constitutional protection for private property and it therefore may be more appropriate for these countries to allow for greater level of policy discretion when it comes to interference of property rights. The author expresses his gratitude to Jürgen Kurtz for raising this issue and persuasively arguing the point.
f. relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.50

Unlike some of the examples highlighted in earlier sections, it is refreshing to see that while the provision borrows language from the WTO Agreement it does not directly reference it.51 This avoids the potential difficulty of a tribunal in deciding whether a measure is inconsistent with any WTO covered agreement while at the same time allows the arbitral tribunal to draw from the rich and extensive jurisprudence in interpreting the WTO’s equivalent exception clauses.52

Disappointingly, a few IIAs inhibit the potential impact of the general exception clause by limiting its applicability. For example, not only does Article 95 of the Switzerland–Japan FTA expressly incorporate Articles XIV and XIVbis of the GATS but it also proceeds to exclude its application to expropriation (Article 91), FET (Article 86) and treatment in case of strife (Article 92). By excluding expropriation and FET from the scope of Article 95, it would seem that ‘the drafters have effectively nullified the potentially great effect the clause could have had on the legality of such issues as compulsory licenses of essential medicines and limitations to IPRs on public health grounds (ie laws and regulations pertaining to mandatory cigarette labelling)’.53

More recently, some IIAs are tailoring the general exception clause to suit particular situations and needs. For instance, Article 9.3(3) of the EU–Singapore FTA limits the applicability of its general exception clause (featuring an enumerated list of exceptions which is similar to but not an exact replica of the text reproduced above) to the obligations arising under national treatment. While this agreement contains targeted limitations throughout the text (see Subsection 3.B above), it is nevertheless curious that the EU found it necessary to include a general exception clause in relation to national treatment but not for other obligations such as expropriation and FET.

50 See, eg China–ASEAN FTA, art 16; JAEPA, art 14.15; Canada–China, art 33. Similarly, art 43 of the EFTA–Singapore FTA provides that ‘nothing in the Investment Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing a measure which is in the public interest, such as measures to meet health, safety or environmental concerns’.

51 Some IIAs, however, do in fact explicitly refer to the WTO GATS Agreement. For instance, EFTA–Hong Kong FTA, art 4.9, states: ‘The rights and obligations of the Parties in respect of general exceptions and security exceptions shall be governed by Article XIV and paragraph 1 of Article XIVbis of the GATS, which are hereby incorporated into and made part of this Chapter, mutatis mutandis.’ See also Switzerland–Japan EPA, art 95. Others, including the Norway Model BIT 2007, s 5, and the Canada Model BIT 2004, art 10, use similar language. The latter approach is adopted in the recent Australia–Japan EPA, art 14.15.


53 Mercurio (n 3) 905. On the other hand, Kurtz makes the point that default rules such as compensation payable for a direct expropriation forced governments to internalize the cost of state action ‘thereby improve[ing] the overall efficiency of government conduct by ensuring a complete evaluation of the impact (both positive and negative) of state action. Kurtz (n 28) 565. Kurtz goes on to point out that a GATT art XX-type exception to a direct expropriation would be inconsistent with the longstanding practice and interpretation of the guarantee from expropriation. ibid 569–70.
Use of the general exception clause appears to be a promising step towards limiting the applicability of investment protections to public-health-related measures and of re-balancing investor rights with policy space for public welfare measures. That being said, such clauses only provide a defence against a claim and again are not a ‘magic bullet’; whether a measure is ‘necessary’, ‘aimed at’ or ‘related to’ the relevant provision can and will be argued as will whether a measure is ‘arbitrary’, ‘unjustifiable’ or ‘a disguised restriction’ on investors or the investment. Here again, it is worth repeating that arbitral tribunals can draw upon the rich jurisprudence of the WTO in interpreting the equivalent exception clauses in its agreements. The bar can be high, but public health advocates can take some comfort in the recognition that life and health can trump substantive IIA obligations.

The general exception clause is a weaker mechanism than some of the limitation clauses detailed above to re-balance the interests of investors with that of the state, but treaty drafters need not and should not feel constrained by the language of the WTO general exception. One useful innovation could be to amend the language so that the exception applies to measures ‘relating to’ (as opposed to the stricter ‘necessary’) the protection of human, animal or plant life or health. Such language would perhaps go some way to assuaging governments and public health advocates that non-discriminatory legitimate regulatory measures would not be deemed to be inconsistent with the agreement. For example, the shift from ‘necessary’ to ‘relating to’ would place all tobacco-related public health measures on firm ground given the decades of studies outlining the risks of smoking, whereas it could be debated whether all measures designed to restrict smoking (or the uptake of smoking) are ‘necessary’ for the protection of public health. The broader point here is that the magic formula has not yet been identified and that further innovations are still welcome.

(ii) Explicit guidance and binding interpretations

Another attempt to carve out policy space for public welfare measures can be seen in textual provisions which provide a role for governmental guidance and binding interpretation of the agreement. This trend is still in its infancy, but best illustrated through the CETA’s ‘Declaration to Investment Chapter Article X.11 Paragraph 6’, which asserts the primacy of domestic courts in determining the ‘existence and validity’ of IPRs and provides that following a review three years after the entry into force of the agreement the parties may issue ‘binding interpretations’ so as to ensure ‘proper interpretation’ of the agreement. The provision reads in full:

54 Chaisse, however, questions the usefulness of a general exception provision, stating they are ‘not a panacea and do[,] not help to better balance investment protection and health protection. Such a clause appears in most cases as either unsuited for the investment law regime (with respect to the national treatment standard) or unnecessary due to the congruence with investment protection standards (fair and equitable treatment and full protection and security). Such a clause may still play a role, albeit limited, in the case of violation by tobacco control regulations of the performance requirements and indirect expropriation investment provisions. A “general exceptions” clause similar to GATT Article XX may still allow states to better address health policy concerns and implement measures targeting tobacco industry. However, the main lesson is that countries having inserted a “general exceptions” clause in their recent IIAs might face some disappointments soon when involved in litigation’. Julien Chaisse, ‘Exploring the Confines of International Investment and Domestic Health Protections– General Exceptions Clause as a Forced Perspective’ (2013) 39(2/3) American Journal of Law & Medicine 332, 360–61.
Mindful that investor state dispute settlement tribunals are meant to enforce the obligations referred to in Article X.17(1): Scope of a Claim to Arbitration of Chapter x (yyy), and are not an appeal mechanism for the decisions of domestic courts, the Parties recall that the domestic courts of each Party are responsible for the determination of the existence and validity of intellectual property rights. The Parties further recognize that each Party shall be free to determine the appropriate method of implementing the provisions of this Agreement regarding intellectual property within their own legal system and practice. The Parties agree to review the relation between intellectual property rights and investment disciplines within 3 years after entry into force of the agreement or at the request of a Party. Further to this review and to the extent required, the Parties may issue binding interpretations to ensure the proper interpretation of the scope of investment protection under this Agreement in accordance with the provisions of Article X.27: Applicable Law and Rules of Interpretation of Chapter x (Investment) (emphasis added).

The Declaration is drafted in extraordinarily strong terms, and provides unprecedented innovations to IIA drafting. The Declaration leaves a domestic court ruling relating to the existence and validity of IPRs as well as a party’s method of implementing their IP system beyond the reach of the agreement. Moreover, in another innovation, the parties agree to review the relationship between IPRs and investment within three years of the agreement coming into force and have allowed for a mechanism which would give the parties the authority to issue binding interpretations in this regard to ensure the ‘proper interpretation of the scope of investment protection’. While such a clause would doom Eli Lilly-like claims challenging the Canadian court’s interpretation of ‘utility’ in patent applications, it is arguably too broad in giving total deference to domestic courts. The WTO and IP Chapters of FTAs include substantive and delineated rules and while the lines are not always defined they remain present. It is not hard to imagine a domestic court crossing the line.

The CETA is not the only recent agreement to establish such a feature. See, eg Canada–China BIT, art 18.2 (specifying that the parties may jointly decide to issue binding interpretations of the agreement); EFTA–Korea Investment Agreement, art 21 (the parties agreed to establish a Committee that endeavours to resolve disputes that may arise regarding the interpretation or application of this Agreement); KAFTA, arts 11.22 and 11.23 (establishing a Joint Committee on similar lines to that in the EFTA–KAFTA).

It should be noted that Canada is arguing that the core complaint revolves around a breach of a substantive obligation from another (IP) Chapter, and that the dispute should be heard not under investor–state but in the government-to-government mechanism used to resolve disputes in the other chapters of the agreement. The argument is thought-provoking but ultimately unlikely to succeed for as long as IPRs qualify as an investment, it is hard to see how use of the dispute settlement mechanism can be denied? See Government of Canada, Statement of Defence, In the Mater of an Arbitration Under Chapter Eleven of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules (1976) between Eli Lilly and Company versus Government of Canada (30 June 2014), specifically pp 32–34.

For instance, questions have arisen whether section 3(d) of India’s Patents Act 1970 exclusion of patents on ‘the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance’ is consistent with art 27 of the TRIPS Agreement. For discussion, see Shamnad Basheer and T Prashant Reddy, ‘The “Efficacy” of Indian Patent Law: Ironing out the Creases in Section 3(d)’ (2008) 5 SCRIPTed 32. This section has been used to invalidate a number of patent applications, most notably Novartis’ application for cancer drug Glivec (imatinib mesylate). See Novartis AG v Union of India (UOI)
That being said, another government—as opposed to investor—could still have recourse through the WTO dispute settlement system or the government-to-government dispute settlement mechanism of the FTA. For this reason, the potential effect of the clause is limited to merely removing the possibility of an investor challenging and seeking compensation for a domestic court ruling.

The CETA provides a more general ‘safety valve’ in the form of Article X.27 (‘Applicable Law and Interpretation’), which gives the parties the right in an investor–State arbitral tribunal to adopt binding interpretations and to make submissions when they are not defendants. The European Commission has stated the reason for this provision ‘is to permit the Parties to control and influence the interpretation of the agreement’ by providing the ‘ability to adopt binding interpretations . . . in the event of errors by the tribunals’.58

In combination, the two provisions provide additional safeguarding of policy space to compliment the tailored provisions appearing in the substantive portion of the text (and, to some extent, detailed earlier in this article). While the CETA is the first agreement to make extensive use of direct guidance and binding interpretations, it can be anticipated that other agreements will follow in an effort to protect policy space for domestic decisions, IPRs, public welfare measures and the like.

(iii) Specific carve-outs/exclusions

Another topical stand-alone measure to protect public welfare measures is the inclusion of specific carve-outs/exclusions from the scope of the IIA. While not yet appearing in any agreement, carve outs/exclusions have been discussed at length in the Trans-Pacific Partnership (TPP) in regards to tobacco.59 Clearly a reaction to the Philip Morris claims against Uruguay and Australia, public health advocates should view the mere fact a carve-out/exclusion is being discussed as a major ‘win’ for health. But this does not mean that carve-outs/exclusions should be drafted into IIAs.

58 European Commission (n 44) 6.
In the context of the TPP, the US first proposed in May 2012 an exception in the form of a ‘safe harbour’ which recognized the ‘unique status of tobacco products’ and would have allowed the health authorities (i.e. US Food and Drug Administration) in TPP member countries to issue ‘origin-neutral, science-based restrictions [on tobacco]’ for public health reasons without the risk of violating the TPP. Predictably, the proposal received criticism from public health advocates, the business community and some members of Congress, with the former arguing the proposal did not go far enough in protecting and promoting health while the latter groups asserted that the proposal is weaker than the ‘necessary’ standard contained in Article XX(b) of the General Agreement on Tariffs and Trade (GATT) and thus would more easily allow measures that hamper US exports.

In August 2013, the US offered a new proposal which would simply insert a simple statement reaffirming that tobacco control measures fall within the scope of the existing general exception for measures necessary to protect human life or health (i.e Article XX(b) of the GATT) and establish a consultation requirement for health ministers to discuss a legal challenge to tobacco control measures. Public health advocates criticized the new proposal as a step-back from the earlier proposal, and most notably opposed the removal of the explicit recognition of the ‘unique status’ of tobacco from a health and regulatory perspective. Likewise, the business community objected to the new proposal as by inference it still ‘singles out’ tobacco as a unique product and did not view special rules for tobacco control measures as necessary or in the long-term US interest.

That same month, Malaysia entered the debate when it proposed a complete carve-out from all TPP obligations for any tobacco control measure. Under its proposal, tobacco companies would be precluded from making use of state-to-state or investor–state dispute settlement to challenge tobacco-related measures. Moreover, Malaysia also proposed to exclude tobacco products from any required tariff reductions negotiated into the TPP. Malaysia softened its stance in an amended proposal

60 Office of the United States Trade Representative, TPP Tobacco Proposal (18 May 2012). This proposal was available on the USTR website but has since been removed. It remains available at <http://www.scribd.com/doc/162101394/2013-08-12-TPP-Tobacco-Proposal> accessed 19 June 2015.
63 ibid.
65 ibid. The US proposal of May 2012 explicitly called for a phase-out of tariffs on tobacco products. See above n 60. It has been argued that this request, as well as allowing challenges to US tobacco control
submitted in December 2013, but the amended proposal is for the most part still supported by public health advocates and vehemently opposed by business interests.

Most recently, in October 2014, the US ‘informally floated’ a proposal which would exclude tobacco-related challenges from the scope of ISDS but not completely carve-out all tobacco-related measures from the TPP. Thus, the proposal would not exclude tobacco-related challenges from being brought under state-to-state dispute settlement nor would it preclude member countries from reducing tariff rates on tobacco products. While this approach seems like a sensible middle ground—it precludes investor claims but does not shield a government from discriminatory tobacco-related measures—the business community is predictably opposed with one industry source quoted as stating: ‘This proposal would unfairly discriminate against a single sector by denying access to due process and other basic and fundamental legal principles . . . It leaves businesses powerless to pursue any opportunity to seek fair compensation from governments. Worse, it sets a terrible precedent opening the door for other trade partners to begin targeting other business sectors for exclusion.’

The industry worries are not without merit. In designing a carve-out/exclusion, governments must be careful to avoid fully shielding all tobacco-related measures from the scope of the agreement and focus on carving out non-discriminatory health-related measures. Simply stated, a restriction on tobacco advertising in order to reduce the ill-effects of smoking should fall within the scope of a carve out whereas the expropriation of a profitable tobacco factory simply to be handed over to the ruling family or crony to operate should not receive protection. Likewise, the recent US–Clove Cigarettes dispute at the WTO highlights the difference between a legitimate regulation taken for public health (in that case, a ban on flavoured cigarettes) from protection of the domestic market (the ban encompasses mainly Indonesian-produced clove cigarettes but does not cover mainly US-produced menthol cigarettes).

The majority of commentators and even governments proposing a carve-out/exclusion for tobacco fail to take account of this crucial difference. This is unfortunate, as so long as tobacco is a legally traded product the industry does deserve due process and the respect from the law. Proposals to carve out tobacco from the scope measures, violates US law. See Harrison Institute for Public Law, Georgetown Law, ‘USTR’s Proposal for Coverage of Tobacco under the Trans-Pacific Partnership Would Violate Executive Order 13193’ 23 August 2013, <http://ash.org/wp-content/uploads/2013/08/USTRs-August-2013-Tobacco-Proposal-and-E-O-13193-August-23-2013-dra-.pdf> accessed 19 June 2015.


68 ibid.


70 See contra, Mitchell and Sheargold (n 59) 5 (concluding that eliminating tobacco from the scope of an agreement or from dispute settlement ‘may also create a risk of abuse—that is, the exclusion from scrutiny of measures that are designed to protect the local tobacco industry against foreign competitors, for example.’).
of an IIA should target legitimate measures taken to protect public welfare/health and avoid shielding discriminatory or protectionist measures. The intent of the carve-outs/exclusions should undoubtedly be aimed at complaints such as those filed by Philip Morris against Uruguay and Australia which do not target discriminatory policies or protectionism but instead are aimed at non-discriminatory measures taken in the interests of public health. The US State Department recognized the distinction between enforcing one’s rights against discriminatory and protectionist policies from that of taking action against non-discriminatory public health measures such as restrictions on the advertising and marketing of tobacco products in a policy statement sent to US embassies in 1998:

Given that tobacco use will be the leading cause of premature death and preventable illness early in the 21st century, there is a need to distinguish between protectionist policies and legitimate health-based actions, so as not to undermine other countries’ efforts to reduce the consumption of tobacco and tobacco products and improve the health of their citizens.71

Finally, it should be mentioned that while tobacco products are unquestionably harmful and pose a number of unique health-related challenges, tobacco is not unique in posing health-related challenges. Many legally traded products are unhealthy and burdensome for public health finances. Likewise, tobacco is not unique in posing a challenge to the order of international economic law. This begs the question of whether tobacco, or any other legally traded product, warrants special rules and whether there is a need for such rules. With appropriate safeguards being discussed and likely to form part of the final version of the TPP it is doubtful that a carve-out/exclusion is needed to protect the ability of governments to regulate tobacco products. This is even more so the case if a general exception clause appears in the final text. Drawing on parallels from trade jurisprudence, the WTO has effectively managed health-related claims involving a range of health hazards from asbestos to retreaded tyres.72 Public welfare measures would be even better safeguarded should the innovation posed above regarding changing the wording of a GATS-type general exception from ‘necessary’ to ‘relating to’ be adopted, as is suggested above. With these safeguards in hand, the risks of carve-outs/exclusions may outweigh the benefits.


4. CONCLUSION

This article reviewed the efforts of certain governments—most notably the US and EU—to better protect policy space and public welfare measures in IIAs. Such efforts represent a genuine attempt to break from the traditional model of investment treaty drafting and should be applauded for advancing the evolution of IIAs in a manner that is more protective of non-discriminatory public welfare measures.73 The new clauses are not, however, free from uncertainty or potential problems. This is especially the case in provisions involving IPRs, where the pullbacks and protections often link the validity of a governmental to adherence with the international standard as set out in the TRIPS Agreement. Uncertainty (or perhaps, not enough certainty for public health advocates) also exists in the clauses modelled on the general exception clauses of the WTO’s GATT and GATS. While such criticisms may uncover potential flaws in the emerging model language, they do not detract from the positive trend in treaty drafting which recognizes the deficiencies of the earlier model and actively seeks to reach a more appropriate balance between investor rights and protections and governmental policy space and ability to take measures to protect public welfare without undue interference. One can only hope that the US, EU and others continue revaluating the textual language of IIAs and inventing new terminology in the quest to reach the most appropriate balance, and that other countries quickly follow suit so that the (non)system of international investment law becomes less fragmented and more coherent and predictable for governments seeking to adequately and securely safeguard public welfare measures.

73 See Mercurio, ‘International Investment Agreements and Public Health’ (n 28) 523. This is in contrast to the earlier model of IIAs, which also attracted criticisms. See, eg Cynthia Callard, Hatai Chitanondh and Robert Weissman, ‘Why Trade and Investment Liberalisation May Threaten Effective Tobacco Control Efforts’ (2001) 10 Tobacco Control 68.