

# Most 'old' BITs do not contain exceptions

For example, the UK-Argentina BIT only contains 'exceptions' to the MFN provision, and those exception only deal with issues covered by customs unions and double taxation treaties:

- These are not genuine exceptions, but provisions designed to deal with overlaps between agreements

Contrast with the WTO Agreements such as GATT:

- Article XX (General Exceptions)
- Article XXI (Security Exceptions)

# When ‘old’ BITs do contain exceptions, the meaning is often unclear

For example, Article XI US-Argentina BIT provides that:

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

In the Argentinian financial crisis cases, different tribunals came to different views about whether the crisis implicated ‘essential security interests’ and the whether Argentina’s measures were necessary.

# When ‘old’ BITs do contain exceptions, they are not always effective

Article 2(1) of the Uruguay-Switzerland BIT provides that:

Each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party and admit such investments in accordance with its law The Contracting Parties recognize each other's right not to allow economic activities for reasons of public security and order, public health or morality, as well as activities which by law are reserved to their own investors.

In *Philip Morris v Uruguay*, the tribunal rejected Uruguay's arguments that this provision created a public health exception.

# Clarifying different types of exceptions carve-outs

Exclusions from scope of application - e.g. ACIA Article 3(4)(a)

- Most provisions of the agreement do not apply to taxation measures

Limits on the ability to bring claims to ISDS - e.g. Article 32(a) of ACIA

- investors cannot bring a claim for breach of Article 7(Performance requirements) to ISDS

Exceptions to substantive obligations – e.g. Articles 17 and 18 of ACIA



# ACIA as an example

## Article 17 - General Exceptions

1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Member States or their investors where like conditions prevail, or a disguised restriction on investors of any other Member State and their investments, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures:
  - (a) necessary to protect public morals or to maintain public order;
  - (b) necessary to protect human, animal or plant life or health; ...

# ACIA as an example

## Article 18 – Security Exceptions

Nothing in this Agreement shall be construed:

- (a) to require any Member State to furnish any information, the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any Member State from taking any action which it considers necessary for the protection of its essential security interests, including but not limited to:
  - ... (iii) action taken in time of war or other emergency in domestic or international relations;
  - (iv) action taken so as to protect critical public infrastructure ...
- (c) to prevent any Member State from taking any action pursuant to its obligations under the United Nations Charter for the maintenance of international peace and security.



# Considerations in drafting exceptions to substantive obligations

Are concerns better dealt with through a limit on scope of application, or through revising substantive obligations themselves (e.g. FET)?

What should there be exceptions for – e.g. public health?; environmental measures?

Should such provision provide an exception to all the obligations contained in the agreement or only some of them?

What criteria should be applied to control use of the exception – e.g. must the measure be non-discriminatory to fall within an exception?

What standard of review should be applied to determine if a measure fall within an exception – e.g. must the measure be ‘necessary’ to protect public health, or is it enough that the objective is to prevent damage to public health?

Who decides?