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Article

Treaty Structure and Public Interest Regulation in International Economic Law

Bradly J. Condon

Senior Fellow, Tim Fischer Centre for Global Trade and Finance, School of Law, Bond University, Australia, and WTO Chair Professor, Faculty of Law, Instituto Tecnologico Autonomo de Mexico (ITAM), Rio Hondo 1, Progreso-Tizapan, Mexico City, Mexico
E-mail: bcondon@gmail.com

ABSTRACT

This article analyzes how treaty structure affects regulatory autonomy by shifting the point in a treaty in which tribunals address public interest regulation. The article also analyzes how trade and investment treaties use a variety of structures that influence their interpretation and the manner in which they address public interest regulation. WTO and investment tribunals have addressed public interest regulation in provisions regarding a treaty's scope of application, obligations and public interest exceptions. The structure of treaties affects a tribunal's degree of deference to regulatory choices. In treaties that do not contain general public interest exceptions, tribunals have excluded public interest regulation from the scope of application of the treaty as a whole or the scope of application of specific obligations. If treaty parties wish to preserve a greater degree of regulatory autonomy, they can limit the general scope of application of a treaty, or the scope of application of specific obligations, which places the burden of proof on the complainant. In cases where the complexity of the facts or the law make the burden of proof difficult to meet, this type of treaty structure makes it more difficult to prove treaty violations and thus preserves regulatory autonomy to a greater degree.

INTRODUCTION

There is no standard template for international economic law treaties. Indeed, there is considerable variation in the structure of different WTO agreements and different international investment agreements (IIAs). Among these treaties, some have a provision setting out the general scope of application and some do not. Some have a general exception for public interest measures and some do not. Some place explicit

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limitations on the scope of specific obligations and others are silent on the scope of specific obligations, leaving the scope to be determined through treaty interpretation or, particularly in the case of IIAs, by reference to customary international law.

Both treaty interpreters and treaty drafters appear to struggle with this variety in treaty structures. In the WTO, there is a body of jurisprudence developing around the issue of whether the general exceptions in GATT Article XX can be applied to other WTO agreements that lack general exceptions or to provisions in China's Protocol of Accession.[1] In IIA practice, some States have begun to introduce general exceptions in their IIAs, borrowing language from the general exceptions of the WTO, with apparent disregard as to whether such transplants are appropriate in the IIA context.[2] The presence or absence of general exceptions also influences the manner in which tribunals interpret and apply general scope provisions, specific obligations and autonomous rights, and how tribunals allocate the burden of proof. As a result of the multiplicity of treaty structures, tribunals address public interest regulation in many different ways and at different points in different treaties.

This article examines how international tribunals have dealt with public interest regulation in treaty provisions regarding scope of application, obligations, and exceptions in WTO law and IIAs. This article asks the following questions. At which point in a treaty text should tribunals address public interest regulation? To what extent can concepts like 'legitimate regulatory distinction' be used as a means of distinguishing between public interest regulations, such as health and environmental protection, and regulations that serve private interests, such as protectionist trade measures and other instances of regulatory capture? To what extent should treaty structure determine the provisions in which tribunals address public interest regulation? How does treaty structure affect the application of the rules of treaty interpretation? What are the implications for treaty design and drafting?

There are four ways to save public interest measures: (i) by finding that the measure does not fall within the scope of application of the treaty as a whole; (ii) by

1 WTO Appellate Body Report, *United States – Measures Relating to Shrimp from Thailand* (*US – Shrimp (Thailand)* and *United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties (US – Customs Bond Directive)*, WT/DS343/AB/R, WT/DS345/AB/R, adopted 1 August 2008; Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China – Publications and Audiovisual Products)*, WT/DS363/AB/R, adopted 19 January 2010; WTO Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China (US – Poultry (China))*, WT7DS3927R, adopted 25 October 2010; Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials (China – Raw Materials)*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, adopted 22 February 2012; WTO Panel Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum (China – Rare Earths)*, WT/ DS431/R, under appeal 8 April 2014.

2 See, for example, 2004 Model Canadian FIPA, Article 2.1 <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf> (accessed 23 February 2014), Article 10.1; *Agreement between Canada and the Republic of Peru for the Promotion and Protection of Investments*, 14 November 2006,< http://www.treaty-accord.gc.ca/text-texte.aspx?id=105078> (accessed 23 February 2014), Article 10; *Agreement between Japan and the Republic of Singapore for a New-Age Economic Partnership*, <http://www.mofa.go.jp/region/asia-paci/singapore/jsepa.html> (accessed 23 February 2014), Article 83; *Free Trade Agreement Between The Government of New Zealand And The Government of the People's Republic of China*, <http://www.chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/index.php> (accessed 23 February 2014), Article 200; *Korea-Australia Free Trade Agreement*, initialled by Chief Negotiators on 10 February 2014, <http://www.dfat.gov.au/fta/kafta/> (accessed 23 February 2014), Article 22.1(3).

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finding that the measure does not fall within the scope of application of a treaty obligation; (iii) by finding that the relevant treaty obligation has not been violated; or (iv) by justifying a violation of an obligation under an exception. In the first two situations the treaty or the obligation does not apply, so there is no need to determine whether there is a violation of an obligation or whether a violation can be justified under an exception. In the third situation, the treaty and the obligation apply, but there is no violation of the obligation. In the fourth situation, the treaty and obligation apply, there is a violation of an obligation, but there is an exception that justifies the violation.

In the context of WTO law, arguments regarding general scope of application are used regarding the Agreement on Technical Barriers to Trade (TBT Agreement)[3] and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement),[4] but tend not to be used for the GATT, which is much broader in scope and, unlike the TBT Agreement and the SPS Agreement, contains general exceptions for public interest regulation. Thus, in the GATT, arguments tend to focus on the scope of the obligations and the application of the exceptions, rather than on the scope of application of the GATT itself. In the TBT Agreement and the SPS Agreement, arguments regarding the scope of application of the agreement as a whole are important, but public interest regulation tends to be addressed in provisions that set out obligations and autonomous rights that have the effect of excluding the application of an obligation in certain circumstances. In the TBT Agreement, these tend to focus on the non-discrimination obligations in Article 2.1, in which the Appellate Body has introduced a legitimate regulatory distinctions test, and the obligation to avoid unnecessary obstacles to trade in Article 2.2, which incorporates language from the general exceptions in GATT Article XX, but is expressed as an obligation. Similarly, arguments in the SPS Agreement tend to focus on obligations that incorporate language from GATT Article XX and set out obligations regarding risk assessment.

The Agreement on Subsidies and Countervailing Measures (SCM Agreement)[5] lacks a general exception and does not incorporate any language from GATT Article XX. Thus, in the case of public interest regulation, arguments regarding the scope of application of the agreement as a whole take on greater importance than in the TBT Agreement and the SPS Agreement. Comparing the GATT, the TBT Agreement, the SPS Agreement and the SCM Agreement, the importance of arguments regarding the general scope of application is greatest for the SCM Agreement and least important for the GATT, with the TBT Agreement and the SPS Agreement falling somewhere in between. This continuum results from the interplay of provisions regarding the scope of application of each agreement and the presence or absence of general exceptions.

In IIAs, most of which lack general public interest exceptions, arguments regarding the scope of application also take on greater importance than in the GATT, since

3 GATT Secretariat, *The Results of the Uruguay Round of Multilateral Trade Negotiations, the Legal Texts* (Geneva, 1994), 121.

4 Ibid, 59.

5 Ibid, 231.

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a finding that the IIA does not apply to the measure avoids a finding of violation. In this regard, arguments regarding the scope of application may be of similar importance in IIAs and the SCM Agreement. However, in the case of IIAs, arguments regarding the right to regulate in the public interest also are used to limit the scope of specific obligations, particularly regarding non-discrimination, the minimum standard of treatment for aliens and the obligation to compensate expropriations. The legitimate regulatory distinction test that the Appellate Body has used in Article 2.1 of the TBT Agreement is similar to arguments used to limit the scope of specific obligations in IIAs. Thus, the importance of arguments based on scope, obligations and exceptions vary with the context and structure of each treaty.

The central argument of this article is that treaty structure affects the type of provision in which tribunals address public interest regulation, which in turn has implications for the allocation of the burden of proof, treaty interpretation, and regulatory autonomy. The article analyzes the effect of treaty structure on regulatory autonomy in WTO law and international investment law because this issue transcends one area of international economic law. While it would be useful to extend this analysis to other treaties, it is beyond the scope of this article to do so. Section I briefly analyzes the relationship between treaty structure and the allocation of the burden of proof in WTO law and international investment law. Sections II to VI analyze how treaty structure affects the manner in which tribunals address public interest regulation in, respectively, exceptions, obligations, general scope provisions, a combination of general scope provisions and obligations, and a *sui generis* treaty structure. Section VII concludes with some observations regarding the importance of treaty structure in designing treaties.

I. TREATY STRUCTURE AND THE BURDEN OF PROOF

Treaty structure determines the type of provisions in which tribunals can address the right to regulate in the public interest. The structure of a treaty—the manner in which its provisions limit the general scope of the treaty's application, limit the scope of positive obligations, establish positive obligations, or establish general or specific exceptions to positive obligations—has important implications for the allocation of the burden of proof between the complainant and the respondent and, subsequently, for regulatory autonomy. Particularly in cases that involve complex factual or scientific issues, the allocation of the burden of proof can play a pivotal role, since unclear or insufficient evidence can lead to a ruling against the party who bears the burden of proof. However, the primary focus of this article is how treaty structure affects the manner in which tribunals address public interest regulation. It is beyond the scope of this article to delve deeply into the complexities of the burden of proof in international economic law. Moreover, it is unnecessary to do so, since the definitive treatise on this subject has already been written.[6] For these reasons, this part will only provide a brief overview of the allocation of the burden of proof in WTO law and international investment law.

6 See Michelle T. Grando, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement* (Oxford: Oxford University Press, 2010).

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WTO jurisprudence regarding the allocation of the burden of proof seems confusing and unpredictable.[7] The Appellate Body's concepts and terminology regarding the burden of proof have been described as 'disturbingly ambiguous and potentially misleading'.[8] Moreover, general statements in the literature on the allocation of the burden of proof can sound deceptively clear. The general rule has been stated to be, 'the burden of persuasion rests on the complaining member as to that member's basic claim and does not shift during the proceedings'.[9] Another formulation is that the complainant must prove its claim and the respondent must then rebut the claim, with the reverse applying to the respondent's defense.[10]

One typology characterizes WTO provisions as falling into three categories: positive rules, affirmative defenses and autonomous rights.[11] The nature of a provision, and the subsequent allocation of the burden of proof, is not always clear, particularly the distinction between exceptions and autonomous rights. Autonomous rights exclude the application of positive obligations,[12] and have also been referred to as 'excluding provisions'.[13] An exception is 'a rule that allows a party to justify its failure to observe an obligation of general application', whereas an autonomous right is 'a rule that permits a party to engage in conduct which is regulated under an alternative scheme of regulation'.[14] In essence, autonomous rights exclude certain measures from the scope of application of positive rules, whereas exceptions justify the violation of positive rules. It would be useful to add a fourth category, consisting of provisions that establish the scope of application of the treaty as a whole. The term 'autonomous right' does not really capture the nature of such general scope provisions. Although a general scope provision also might be described in some cases as a rule 'that permits a party to engage in conduct which is regulated under an alternative scheme of regulation', this is not entirely accurate. There might not be any 'alternative scheme of regulation', since the conduct might not be regulated at all.

WTO jurisprudence says the following about the burden of proof. As a general rule, the party who asserts a fact must provide proof thereof and the burden of proof rests upon the party who asserts the affirmative of a particular claim or defense. If that party presents sufficient evidence to establish a prima facie case, the burden

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7 Michelle T. Grando, 'Allocating the Burden of Proof in WTO Disputes: A Critical Analysis' (2006) 9 Journal of International Economic Law 615.

8 John J. Barceló III, 'Burden of Proof, Prima Facie Case and Presumption in WTO Dispute Settlement' (2009) 42 Cornell International Law Journal 23, at 23.

9 Ibid, at 24. See also Yasuhei Taniguchi, 'Understanding the Concept of Prima Facie Proof in WTO Dispute Settlement', in Merit E. Janow, Victoria Donaldson and Alan Yanovich (eds), *The WTO: Governance, Dispute Settlement & Developing Countries* (Huntington, NY: Juris Publishing, 2008) 553, at 558; David Unterhalter, 'The Burden of Proof in WTO Dispute Settlement', in Merit E. Janow, Victoria Donaldson & Alan Yanovich (eds), *The WTO: Governance, Dispute Settlement & Developing Countries* (2008) 543, at 544; Joost Pauwelyn, 'Evidence, Proof and Persuasion in WTO Dispute Settlement' (1998) 1 Journal of International Economic Law 227, at 252.

10 Barceló, above n 8, at 24.

11 David Unterhalter, 'Allocating the Burden of Proof in WTO Dispute Settlement Proceedings' (2009) 42 Cornell International Law Journal 209, at 210–11.

12 Ibid, at 211.

13 Grando, above n 7, at 619.

14 Unterhalter, above n 11, at 221.

then shifts to the other party to rebut the presumption.[15] The nature and quantity of evidence that is required varies with the measure, provision, and case.[16] What is required to demonstrate a prima facie case is influenced by the nature and the scope of the complainant's claim.[17] The general rule on the allocation of the burden of proof means that a responding Member's measure will be treated as WTO-consistent, until sufficient evidence is presented to prove the contrary.[18]

The burden to prove alleged facts rests with the party alleging those facts, independently of where the burden of proof lies in a specific provision.[19] Thus, the burden of proof to establish alleged facts is not the same as the burden of proof to establish prima facie that a measure falls within the scope of application of a particular agreement or provision, that a measure violates a particular obligation or that a measure meets the requirements of a particular exception. The burden of proof rests with the complainant to support a claim of violation of positive rules that establish a specific obligation, for example those found in GATT Articles I:1, II:1, III:2, III:4, or XI:1.[20] For provisions that establish limited exceptions from obligations, which serve as affirmative defenses, such as those found in GATT Article XI:2, Article XX, or Article XXIV, the burden of proof is on the party asserting the defense.[21] However, where provisions limit the scope of obligations, rather than establishing affirmative defenses, there is not a 'general rule-exception' relationship. In such cases, the burden of proof rests with the complainant.[22]

In *EC – Tariff Preferences*, the Appellate Body explained the distinction between provisions that limit the scope of specific obligations and exceptions that provide an affirmative defense to the violation of a specific obligation. This excerpt helps to explain the perception that the jurisprudence is confusing and unpredictable:

> … In cases where one provision permits, in certain circumstances, behaviour that would otherwise be inconsistent with an obligation in another provision, and one of the two provisions refers to the other provision, the Appellate Body has found that the complaining party bears the burden of establishing that a challenged measure is inconsistent with the provision permitting particular behaviour only where one of the provisions suggests that the obligation is not applicable to the said measure. Otherwise, the permissive provision has been characterized as an exception, or defence, and the onus of invoking it and proving the consistency of the measure with its requirements has been placed

15 WTO Appellate Body Report, *United States – Measures Affecting the Importation of Wool Shirts and Blouses from India (US – Wool Shirts and Blouses)*, WT/DS33/AB/R, adopted 23 May 1997, p 14.

16 Ibid.

17 WTO Appellate Body Report, *Japan – Measures Affecting the Importation of Apples (Japan – Apples)*, WT/DS245/AB/R, adopted 10 December 2003, para 160.

18 WTO Appellate Body Report, *Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products (Article 21.5 – New Zealand and US II) (Canada – Dairy (Article 21.5 – New Zealand and US II))*, WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 3 December 2001, para 66.

19 Appellate Body Report, *Japan – Apples*, above n 17, para 157.

20 Appellate Body Report, *US – Wool Shirts and Blouses*, above n 15, at 15–16.

21 Ibid, 15–16.

22 WTO Appellate Body Report, *European Communities – Trade Description of Sardines (EC – Sardines)*, WT/DS231/AB/R, adopted 23 October 2002, para 275.

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on the responding party. However, this distinction may not always be evident or readily applicable.[23]

The Appellate Body held that the Enabling Clause operates as an 'exception' to GATT Article I:1. By using the word 'notwithstanding', paragraph 1 of the Enabling Clause permits differential and more favorable treatment to developing countries that would otherwise be inconsistent with Article I:1.[24] Thus, the burden of proving the consistency of a measure with the Enabling Clause lies with the respondent, as it generally does with exceptions.[25] However, as a matter of due process, in its request for the establishment of a panel the complainant is required to identify which Enabling Clause provisions the measure contravenes and to support this allegation in its written submissions. [26] Unlike the general exceptions in GATT Article XX, the complainant has to specify which part of the Enabling Clause is contravened, as a matter of due process, in order to convey the 'legal basis of the complaint sufficient to present the problem clearly'.[27] However, because it is an exception, the burden of proof rests with the respondent to show that its measure complies with the requirement of the Enabling Clause. Thus, one must distinguish between burden of proof and due process.

The burden of proof is on the complainant to demonstrate that a measure falls within the scope of an obligation. Article 3.1 of the SPS Agreement establishes the obligation to base SPS measures on international standards 'except' when, in accordance with Article 3.3, there is a scientific justification or a WTO Member establishes a different level of protection in accordance with the risk assessment requirements of Article 5. The Appellate Body held that Article 3.1 of the SPS Agreement simply excludes from its scope of application the kinds of situations covered by Article 3.3, so that the burden of proof rests with the complainant to establish a case of inconsistency with both Article 3.1 and Article 3.3.[28] Similarly, Article 2.4 of the TBT Agreement obliges WTO Members to use relevant international standards as a basis for their technical regulations, 'except' when such international standards would be ineffective or inappropriate for the fulfillment of the legitimate objectives pursued by the measure. The second part of Article 2.4 of the TBT Agreement excludes measures from the scope of application of the obligation in the first part of Article 2.4, so there is no 'general rule-exception' relationship between the first and the second

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23 WTO Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (EC – Tariff Preferences)*, WT/DS246/AB/R, adopted 20 April 2004, para 88.

24 Ibid, para 90.

25 Ibid, para 118.

26 Ibid, paras 110 and 118.

27 Due process rights limit a respondent's right to set out its defence at any point during the panel proceedings with other exceptions, such as GATT Article XX and GATS Article XIV, but a complainant generally is not required to identify in its request to establish a panel the specific exceptions that the respondent could raise. See WTO Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling)*, WT/DS285/AB/R, adopted 20 April 2005, paras 270–72.

28 WTO Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones) (EC – Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para 104.

parts of Article 2.4. Thus, in *EC – Sardines* the Appellate Body held that the complainant bears the burden of proof to establish the inconsistency of a measure with both parts of Article 2.4 of the TBT Agreement.[29] In both sets of provisions, the word 'except' does not establish a 'general rule-exception' relationship, so the burden of proof is on the complainant.[30] Characterizing a provision as limiting the scope of application of a specific obligation increases the degree of deference to public interest decisions by national authorities, by making it more difficult for a complainant to establish WTO inconsistency than it would be in the case of an exception, which would place the burden of proof on the respondent to justify its measure.

Article 3.1(a) of the SCM Agreement prohibits the use of export subsidies. Article 27.2(b) provides that Article 3.1(a) 'shall not apply to' developing countries that comply with Article 27.4. The Appellate Body held that the conditions set forth in Article 27.4 are positive obligations for developing country Members, not affirmative defenses. If a developing country Member complies with Article 27.4, the prohibition on export subsidies in Article 3.1(a) simply does not apply. Thus, the burden is on the complainant to demonstrate that the developing country Member has not complied with at least one of the elements set forth in Article 27.4, in addition to demonstrating a violation of Article 3.1(a).[31] There is no 'general rule-exception' relationship between Article 3.1(a) and Article 27.2(b). The latter limits the scope of the former. Thus, WTO jurisprudence supports the proposition that the complainant bears the burden of proving that an obligation applies in a particular case.

The complainant also bears the burden of proving that a measure falls within the scope of a treaty. However, such general scope provisions are not always clearly indicated as such. For example, the scope of the SCM Agreement is limited by the definition of 'subsidy' in Article 1.1. In *Canada – Renewable Energy* and *Canada – Feed-In Tariff Program*, both the Panel and the Appellate Body found that the complainants did not meet their burden of proving that the SCM Agreement applied to the measure, because they failed to prove the existence of a 'benefit' under Article 1.1(b).[32] Thus, there was no need to examine whether the measure was inconsistent with the prohibition of import substitution subsidies under Article 3.1(b) of the SCM Agreement.

The allocation of the burden of proof also plays a role in preserving regulatory autonomy in IIAs, but the context is distinct from WTO law. For example, national treatment is about competitive opportunities in GATT, but focuses on harm to specific investments in IIAs, rather than abstract competitive opportunities.[33] This

29 Appellate Body Report, *EC – Sardines*, above n 22, para 275.

30 As Grando has observed, the language used is not a clear indicator of the nature of a provision and the subsequent allocation of the burden of proof. Grando, above n 7, at 620–24.

31 WTO Appellate Body Report, *Brazil – Export Financing Programme for Aircraft (Brazil – Aircraft)*, WT/DS46/AB/R, adopted 20 August 1999, paras 140–41.

32 WTO Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector (Canada – Renewable Energy)*, WT/DS412/AB/R, and *Canada – Measures Relating to the Feed-in Tariff Program (Canada – Feed-In Tariff Program)*, WT/DS426/AB/R, adopted 24 May 2013, para 5.219; WTO Panel Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector (Canada – Renewable Energy)*, WT/DS412/R, and *Canada – Measures Relating to the Feed-in Tariff Program (Canada – Feed-In Tariff Program)*, WT/DS426/R, adopted 24 May 2013, paras 7.309–7.319.

33 Nicholas DiMascio and Joost Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' (2008) 102 AJIL 48, at 61, 70.

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difference in object and purpose influences the test of whether a measure accords less favorable treatment.[34] As a general rule, in IIAs the claimant bears the burden of proving likeness and less favorable treatment, whereas the respondent bears the burden of proving that differential treatment is justified for a specific reason (other than an absence of likeness).[35] However, an IIA can explicitly exclude public interest regulation from the scope of application of non-discrimination obligations, thereby shifting the burden of proof to the complainant.[36] In both trade and investment law, the burden is on the complainant to prove nationality-based discrimination. In trade law, proof of less favorable treatment may raise a presumption that the treatment is based on nationality, which the respondent can rebut by proving that the discrepant treatment is the by-product of a legitimate government goal not based on national origin. In contrast, investment tribunals should be more reluctant to accord a presumption of nationality-based discrimination, since the focus is on harm to specific investments in IIAs.[37]

International investment law draws upon customary international law to a greater extent than WTO law. The claimant bears the burden of proof to establish what customary international law requires in the minimum standard of treatment.[38] Moreover, the claimant bears the burden of proof to establish a violation of the minimum standard of treatment, and in particular to prove that a public interest regulation is not a normal part of regulatory evolution that is part of the commercial risk assumed by the investor.[39] The claimant also bears the burden of proof to establish that general regulatory changes amount to expropriation. States have a right to regulate and, as a general rule, the adverse effect of general regulation on investors is not compensable, because it does not amount to expropriation.[40]

Customary international law is also a source of defenses that can avoid the violation of IIAs by precluding wrongfulness, in which the burden of proof is on the party invoking the defense.[41] While the focus of this article is on treaty structure, rather than on customary international law, customary international law needs to be borne in mind in any discussion of the structure of IIAs.

34 Ibid, at 78–80. Also see Jorge E. Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press, 2012), at 319.

35 Viñuales,above n 34, at 318–19, 332; Andrew Newcombe and L. Paradell, *Law and Practice of Investment Treaties* (Kluwer Law International, 2009), at 20.

36 See, for example, Agreement on the Encouragement and Reciprocal Protection of Investments, Protocol, People's Republic of China-Federal Republic of Germany, December 2003, para. 4(a), reproduced in W.W. Burke-White and A. von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' (2008) 48 Virginia Journal of International Law 307 at 327; Viñuales, above n 34, at 334.

37 DiMascio and Pauwelyn, above n 33, at 83–86.

38 *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Award (8 June 2009), paras 601–2.

39 *Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada*, UNCITRAL, Award (2 August 2010), para 137; Viñuales, above n 34, at 312, 375.

40 Viñuales, above n 34, at 305–7.

41 Viñuales, above n 34, at 381–87; Giorgio Sacerdoti, 'BIT Protections and Economic Crises: Limits to Their Coverage, the Impact of Multilateral Financial Regulation and the Defense of Necessity' (2013) 28 ICSID Review 351; Anne van Aaken and Jürgen Kurtz, 'Prudence or Discrimination? Emergency Measures, The Global Financial Crisis and International Economic Law' (2009) 12 Journal of International Economic Law 859; Jürgen Kurtz, 'Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis' (2010) 59 International & Comparative Law Quarterly 325.

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Based on treaty structure, we can categorize the allocation of the burden of proof according to five types of argument. The complainant bears the burden of proving: (i) the treaty applies to a measure (general scope of application); (ii) a specific obligation applies to a measure (scope of obligation); and (iii) the measure violates the applicable obligation. The complainant bears the burden of proving: (iv) a specific exception applies to a measure (scope of exception) and (v) the requirements of the exception have been met. Autonomous rights exclude certain measures from the scope of application of specific obligations, which places the burden of proof on the complainant. Due process considerations are a separate issue.

The following sections analyze how treaty structure affects the manner in which tribunals address public interest regulation in exceptions, obligations, general scope provisions, a combination of general scope provisions and obligations, and a *sui generis* agreement, the Agreement on Trade Related Aspects of Intellectual Property (TRIPS Agreement).[42]

II. ADDRESSING PUBLIC INTEREST REGULATION IN EXCEPTIONS

In the GATT, the jurisprudence has tended to address public interest regulation in the general exceptions of Article XX and, to a lesser extent, in specific exceptions to GATT obligations in Articles I:1 (the Enabling Clause), Article III (Article III:8) and Article XI:1 (Article XI:2), rather than limiting the scope of application of the GATT as a whole or of specific obligations (with the notable exception of *EC – Asbestos*, which addressed a public health measure in the analysis of like products in Article III:4).[43] The same is true of the General Agreement on Trade in Services (GATS), which contains general exceptions in Article XIV that are similar to those set out in GATT Article XX.[44] The existence of general and specific exceptions explains this approach to regulatory autonomy in the GATT and the GATS.

The Appellate Body has stated that the characterization of a provision depends on the customary rules of interpretation of public international law.[45] Using the structure of a particular treaty to determine the point at which tribunals address public interest regulation is consistent with the customary rules of interpretation. The structure of a treaty is part of the context. In particular, the nature or existence of scope provisions and general exceptions form part of the interpretative context. Moreover, the rule of effective treaty interpretation, which flows from the general rule of treaty interpretation in Article 31 of the Vienna Convention on the Law of Treaties,[46] supports the view that the presence of general exceptions that explicitly address public interest regulation makes it inappropriate to address public interest

42 GATT Secretariat, *The Results of the Uruguay Round of Multilateral Trade Negotiations, the Legal Texts* (Geneva, 1994), 321.

43 WTO Appellate Body Reports, *EC – Tariff Preferences*, above n 23; *Canada – Renewable Energy* and *Canada – Feed-In Tariff Program*, above n 32; *China – Raw Materials*,, above n 1; *European Communities – Measures Affecting Asbestos and Asbestos–Containing Products (EC – Asbestos)*, WT/DS135/AB/R, adopted 5 April 2001.

44 GATT Secretariat, *The Results of the Uruguay Round of Multilateral Trade Negotiations, the Legal Texts* (Geneva, 1994), 284. Appellate Body Report, *US – Gambling*, above n 27.

45 WTO Appellate Body Report, *EC – Tariff Preferences*, above n 23, para 98.

46 Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331, in force 27 January 1980.

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regulation in general scope provisions or specific limitations on the scope of specific obligations, since it would diminish the effect of general exceptions and risk making them redundant, at least to some extent.

The jurisprudence has refined the allocation of the burden of proof in the general exceptions of the GATT and the GATS, making it less difficult to justify a public interest measure. A respondent that invokes an affirmative defense to justify an otherwise WTO-inconsistent measure has to demonstrate that its measure satisfies the requirements of the defense. In the general exceptions of GATT Article XX(a), (b), and (d), and GATS Article XIV(a), (b), and (c), the respondent must show that its measure is 'necessary', which requires a determination of whether there are reasonably available, less trade-restrictive alternatives to achieve its objectives.[47] However, to make a prima facie case that its measure is 'necessary', the respondent does not bear the burden to identify less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective, because this would place an overly onerous burden of proof on the respondent.[48] Refining the manner in which the respondent meets its burden of proof on this issue makes it easier to defend public interest regulation in these exceptions. The justification for this refinement may be one of due process, rather than a burden-of-proof issue per se, since the burden of proof remains with the respondent that invokes the exception.

With respect to GATT Article XX(g), the interpretation of the term 'made effective' also has the effect of making it less difficult to justify a public interest measure. It does not require identical treatment of domestic and imported products and does not require that a trade measure be primarily aimed at making domestic restrictions effective.[49] Again, there is no shifting of the burden of proof. The burden of proof is just easier to meet with this interpretation than it would be with an interpretation that placed a more onerous burden on the respondent.

In the absence of jurisprudence that eases the respondent's burden of proof in general exceptions, the existence of general exceptions in a treaty could have the effect of making it more difficult to defend public interest regulation, by placing the burden of proof on the respondent. Treaty structure—the presence or absence of public interest exceptions—affects the degree of regulatory autonomy enjoyed by the parties, because it alters the allocation of the burden of proof. For example, the TBT Agreement and SPS Agreement provide greater regulatory autonomy than the GATT, due to the absence of general public interest exceptions in the first two agreements. However, the TBT Agreement and the GATT, or the SPS Agreement and the GATT, can apply cumulatively to the same measure. In some cases, this might lead a tribunal to conclude that a measure violates one agreement but not the other,

47 See, *inter alia*, WTO Appellate Body Reports, *Brazil – Measures Affecting Imports of Retreaded Tyres (Brazil – Retreaded Tyres)*, WT/DS332/AB/R, adopted 17 December 2007; *EC – Asbestos*, above n 43; *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Korea – Beef)*, WT/DS161/AB/R, adopted 10 January 2001; *US – Gambling*, above n 27; *China – Publications and Audiovisual Products*, above n 1.

48 Appellate Body Report, *US – Gambling*, above n 27, paras 309–310.

49 WTO Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline (US – Gasoline)*, WT/DS2/AB/R, adopted 20 May 1996, 20–21; WTO Appellate Body Report, *China – Raw Materials*, above n 1, para 356.

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based on the burden of proof. One could argue that this was the intention of the parties when they chose the treaty structure. However, tribunals may choose to avoid such conflicting results by refining the allocation of the burden of proof or otherwise using treaty interpretation to ensure that public interest regulation receives the same treatment in different WTO agreements and in IIAs.

III. ADDRESSING PUBLIC INTEREST REGULATION IN OBLIGATIONS

When a treaty does not contain public interest exceptions, public interest regulation can be addressed in general scope provisions or specific limitations on the scope of specific obligations. The point that a tribunal chooses should depend on the treaty structure, the nature of the provisions and the object and purpose of the treaty.

The SPS Agreement provides a good example. In *US – Poultry (China)*, the general scope provisions were interpreted broadly to ensure that a budgetary measure, which had the effect of imposing a discriminatory sanitary restriction, did not escape the disciplines of the SPS Agreement.[50] In such cases, tribunals should not address public interest regulation in the general scope provisions, since that might allow such de facto SPS measures to avoid being subject to WTO disciplines. However, the absence of general exceptions in the SPS Agreement means that public interest regulation cannot be addressed in exceptions. Thus, the structure of the SPS Agreement favors addressing public interest regulation in specific obligations and preserving regulatory autonomy by limiting the scope of specific obligations, rather than limiting the scope of the agreement as a whole.

The TBT Agreement uses a similar structure, and also addresses several categories of public interest regulation, which is why it is appropriate to preserve regulatory autonomy in the TBT Agreement by limiting the scope of specific obligations, as the Appellate Body did when it applied the legitimate regulatory distinction test to limit the scope of application of the obligation to accord no less favorable treatment in Article 2.1.[51] In *US – Tuna II (Mexico)*, the Appellate Body placed the burden of proof on the complainant to demonstrate less favourable treatment in TBT Agreement Article 2.1, for example, by showing 'that the measure is not even-handed'. However, the Appellate Body required the respondent to show that the detrimental impact on imported products stemmed exclusively from a legitimate regulatory distinction.[52] The Appellate Body cited its statement in *Japan – Apples*, distinguishing between 'the principle that the complainant must establish a prima facie case of inconsistency with a provision of a covered agreement' and 'the principle that the party that asserts a fact is responsible for providing proof thereof'.[53] According to the Appellate Body, this combination of principles meant that, although Mexico bore the burden to prove that the dolphin-safe labeling provisions were

50 WTO Panel Report, *US – Poultry (China)*, above n 1.

51 WTO Appellate Body Report, *United States – Certain Country of Origin Labelling Requirements (US – COOL)*, WT/DS386/AB/R, adopted 23 July 2012, para 271; WTO Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US – Tuna II (Mexico))*, WT/DS381/AB/R, adopted 13 June 2012, para 215.

52 Appellate Body Report, *US – Tuna II (Mexico)*, above n 51, para 216.

53 Ibid, para 283; Appellate Body Report, *Japan – Apples*, above n 17, para 157.

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inconsistent with TBT Agreement Article 2.1, the USA had 'to support its assertion that the US 'dolphin-safe' labeling provisions are "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the ocean'.[54]

This approach makes it unclear whether the Appellate Body's incorporation of the legitimate regulatory distinctions test in Article 2.1 is a question of fact, a question of law or some combination thereof. If the legitimate regulatory distinctions test has the effect of limiting the scope of the obligation to provide no less favorable treatment, then the burden of proof should be on the complainant to establish that the measure falls within the scope of the obligation. Placing the burden of proof on the respondent suggests that the legitimate regulatory distinctions test is an exception to the obligation to provide no less favorable treatment. If it is not an exception, is it an autonomous right to make legitimate regulatory distinctions, which would place the burden of proof on the complainant? Presumably, it is not, since the jurisprudence on autonomous rights is based on actual treaty provisions and the legitimate regulatory distinctions test does not appear in the treaty text. The approach of the Appellate Body creates confusion regarding the nature of this test and the allocation of the burden of proof. Perhaps the correct characterization is that already noted above; proof of less favorable treatment may raise a presumption that the treatment is based on nationality, which the respondent can rebut by proving that the discrepant treatment is the by-product of a legitimate government goal not based on national origin.

The Panel in *EC – Seal Products* allocated the burden of proof to the respondent with respect to the legitimate regulatory distinctions test, citing the Appellate Body Report in *US – Tuna II (Mexico)*.[55] The Panel's approach to this analysis was to examine first, what were the relevant regulatory distinctions under the EU Seal Regime, and second, whether such regulatory distinctions were 'legitimate'.[56] The first issue appears to be one of fact (in this case, interpreting municipal law and establishing the facts regarding the nature of seal hunts),[57] whereas the second issue appears to be one of law (the consistency of the measure with the treaty provision). Once again, perhaps the correct characterization is that there is a rebuttable presumption raised by differential treatment of like products.

The Appellate Body has recognized that the balance in the TBT Agreement preamble between the desire to avoid creating unnecessary obstacles to trade and the recognition of the right to regulate mirrors the balance in the GATT between obligations such as national treatment in Article III and the general exceptions in Article XX.[58] Thus, the GATT Article III 'treatment no less favourable' standard prohibits WTO Members from modifying the conditions of competition in the marketplace to

54 Appellate Body Report, *US – Tuna II (Mexico)*, above n 51, para 283.

55 WTO Panel Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seal Products)*, WT/DS400/R, WT/DS401/R, 25 November 2013, para 7.173. Panel Report under appeal on 24 January 2014.

56 Ibid, para 7.174.

57 Ibid, paras 7.175–7.245.

58 WTO Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes)*, WT/DS406/AB/R, adopted 24 April 2012, para 96; Panel Reports, *EC – Seal Products*, above n 55, para 7.583.

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the detriment of imported products, but the same standard in TBT Agreement Article 2.1 does not prohibit a detrimental impact on imports that stems exclusively from a legitimate regulatory distinction, due to the absence of general exceptions in the TBT Agreement equivalent to GATT Article XX.[59] The regulatory distinctions test is an example of structural treaty interpretation that addresses public interest regulation in the scope of an obligation, in the absence of general exceptions.

IV. ADDRESSING PUBLIC INTEREST REGULATION IN GENERAL SCOPE PROVISIONS

When the text of a specific obligation provides little room for limiting its scope of application, and the treaty contains no general exception in which to address public interest regulation, tribunals should address public interest regulation in the general scope provisions. For example, in the SCM Agreement, the text of Article 3 regarding prohibited subsidies does not lend itself to addressing public interest regulation and there are no general exceptions that serve this purpose.[60] Thus, the only means to preserve regulatory autonomy is to limit the general scope of application of the SCM Agreement as a whole, as the Panel and the Appellate Body did in *Canada – Renewable Energy* and *Canada – Feed-In Tariff Program*.[61]

The SCM Agreement only applies to a measure if it constitutes a subsidy within the meaning of SCM Agreement Article 1.1. A 'financial contribution' and a 'benefit' are two separate legal elements in Article 1.1, which together determine whether a subsidy exists.[62] The definition of 'financial contribution' is quite broad, and is the easier part of the definition of subsidy to prove (although it is quite detailed and technical). In *Canada – Aircraft*, the Appellate Body interpreted of the term 'benefit' under Article 1.1(b) as follows: 'a financial contribution will only confer a "benefit", i.e., an advantage, if it is provided on terms that are more advantageous than those that would have been available to the recipient on the market.'[63] The assessment of benefit must examine the terms and conditions of the challenged transaction at the time it is made and compare them to the terms and conditions that would have been offered in the market at that time.[64]

In *Canada – Renewable Energy* and *Canada – Feed-In Tariff Program*, a key issue was which market provides the most appropriate benchmark in determining the

59 Appellate Body Report, *US – Clove Cigarettes*, above n 58, paras 180-182, 215; US – Tuna II (Mexico), above n 51, para 215.; Panel Reports, *EC – Seal Products*, above n 55, para 7.585.

60 This assumes that GATT Article XX is not applicable to the SCM Agreement. See Bradly J. Condon and Tapen Sinha, *The Role of Climate Change in Global Economic Governance* (Oxford: Oxford University Press, 2013), at 61–65.

61 Appellate Body Reports, *Canada – Renewable Energy* and *Canada – Feed-In Tariff Program*, above n 32, para 5.219; Panel Reports, *Canada – Renewable Energy* and *Canada – Feed-In Tariff Program*, above n 32, paras 7.309–7.319.

62 Appellate Body Report, *Brazil – Aircraft*, above n 31, para 156.

63 WTO Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft* (*Canada – Aircraft*), WT/DS70/AB/R, adopted 20 August 1999, para 149.

64 Appellate Body Report, *European Communities – Measures Affecting Trade in Large Civil Aircraft (EC and certain member States – Large Civil Aircraft)*, WT/DS316/AB/R, adopted 1 June 2011, para 838; Appellate Body Report, *United States – Large Civil Aircraft (2nd complaint)*, WT/DS353/AB/R, adopted 23 March 2012, para 636.

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existence and magnitude of a benefit for solar and wind power producers.[65] In the absence of Ontario's feed-in-tariff (FIT) program, a competitive wholesale market for electricity in Ontario could not support commercially viable operations of solar and wind power producers.[66] The Panel rejected the complainants' argument that the analysis of benefit should compare the terms and conditions of participation in the FIT Program with those that would be available to generators participating in a wholesale electricity market where there is effective competition. The majority held that none of the alternatives that had been advanced by the complainants or Canada could be used as appropriate benchmarks against which to measure whether the FIT Program conferred a benefit within the meaning of Article 1.1(b) of the SCM Agreement.[67]

The Appellate Body held that the Panel had erred 'in not conducting the benefit analysis on the basis of a market that is shaped by the government's definition of the energy supply-mix, and of a benchmark located in that market reflecting competitive prices for windpower and solar PV generation'.[68] However, there were insufficient factual findings for the Appellate Body to complete the analysis, so it was unable to determine whether the measure conferred a benefit. Thus, on this issue, the Appellate Body reached the same conclusion as the Panel majority, but for different reasons. The Appellate Body decision indicates that the benefit analysis can still save a measure from the application of the SCM Agreement if no benefit is conferred to one solar or wind power producer compared to others in the market. That is, the government can determine the mix of energy sources without violating the SCM Agreement as long as it does not confer a benefit.

The absence of a general environmental exception in the SCM Agreement makes the role of the benefit analysis important in saving clean energy incentives from violating the SCM Agreement, by excluding them from the scope of application of the SCM Agreement based on the complainant's failure to meet the burden of proof. While the benefit analysis did not explicitly safeguard the right of governments to regulate in the public interest with respect to clean energy incentives, this was the effect of addressing the measure in a general scope provision in which the complainants were unable to meet their burden of proof.

V. ADDRESSING PUBLIC INTEREST REGULATION IN GENERAL SCOPE PROVISIONS AND OBLIGATIONS

Several IIAs, including Chapter 11 of the North American Free Trade Agreement (NAFTA) and the Canadian and US Model Bilateral Investment Treaties, contain a general scope provision that limits their application to measures 'relating to' foreign investors and investments.[69] Cases under NAFTA Article 1101 provide another

65 Panel Reports, *Canada – Renewable Energy* and *Canada – Feed-In Tariff Program*, above n 32, para 7.270.

66 Ibid, paras 7.276–7.277.

67 Ibid, paras 7.309–7.319.

68 Appellate Body Reports, *Canada – Renewable Energy* and *Canada – Feed-In Tariff Program*, above n 32, para 5.219.

69 See, for example, North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America (NAFTA), opened for signature 17 December 1992, 32 ILM 296 (1993) (entered into force 1 January

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example of how tribunals can limit the general scope of application of a treaty to preserve regulatory autonomy. Like the SCM Agreement, NAFTA Chapter 11 does not contain general public interest exceptions. However, unlike the SCM Agreement, NAFTA Chapter 11 provides tribunals with the flexibility to preserve regulatory autonomy by limiting the scope of application of Chapter 11 as a whole or by limiting the scope of application of specific obligations. Arguably, this type of treaty structure preserves a higher degree of regulatory autonomy, because it places the burden of proof on the complainant, rather than placing the burden of proof on the respondent to defend public interest regulation in general exceptions. Since the violation of IIAs can lead to a significant award of damages, the stakes are higher than they are in WTO agreements, since damages are not awarded in the WTO dispute settlement system. This is an important reason to place the burden of proof on the complainant to show that public interest regulation is inconsistent with an IIA. Excluding measures from the general scope of application of an IIA means that the tribunal does not have jurisdiction to apply substantive obligations or exceptions.[70]

In *Methanex v United States*, the tribunal found that Article 1101(1) requires 'something more than the mere effect of a measure on an investor or an investment' and that the term 'relating to' requires a 'legally significant connection' between a measure and an investor or an investment.[71] The scientific and administrative record established that the Governor and the California agencies acted with a view to protecting the environmental interests of the citizens of California, and not with the intent to harm foreign methanol producers. Thus, on the facts of this case, there was no legally significant connection between the US measures, Methanex and its investments. As such, the US measures did not 'relate to' Methanex or its investments as required by Article 1101(1).[72]

However, other tribunals have not used Article 1101 to exclude environmental measures from the general scope of application of NAFTA Chapter 11. In *Glamis Gold v United States*, the Tribunal did not follow the *Methanex* approach to addressing environmental measures, instead simply finding that they did not constitute expropriation or violate the minimum standard of fair and equitable treatment.[73] In *S. D. Myers v Canada*, the Tribunal concluded that there was no legitimate environmental reason for introducing a ban on the export of PCBs; the requirement in Article 1101 was easily satisfied.[74]

The usefulness of general scope provisions in excluding public interest regulation depends on the wording and context of the provision, as well as the allocation of the burden of proof. For example, in *Philip Morris v Uruguay*, the Tribunal held that the

1994), Article 1101; 2004 Model US BIT, Article 2.1 <http://www.state.gov/documents/organization/117601.pdf> (accessed 23 February 2014); 2012 Model US BIT, Article 2.1 <http://www.italaw.com/sites/default/files/archive/ita1028.pdf> (accessed 23 February 2014); 2004 Model Canadian FIPA, Article 2.1 <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf> (accessed 23 February 2014).

70 Sacerdoti, above n 41, at 368. Also see *Methanex Corporation v United States*, NAFTA/UNCITRAL, Award of the Tribunal on Jurisdiction and Merits (3 August 2005), 19–20, 22.

71 *Methanex Corporation v United States*, NAFTA/UNCITRAL, First Partial Award (7 August 2002), para 4.

72 *Methanex v United States*, Jurisdiction and Merits, above n 70, 19–20, 22.

73 *Glamis Gold v United States*, above n 38.

74 *S. D. Myers v Government of Canada*, UNCITRAL, Partial Award (13 November 2000), para 234.

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scope provision in the Switzerland–Uruguay BIT did not exclude post-establishment public interest regulation from the scope of application. It did not create an exception to substantive obligations with respect to investments that had already been admitted in accordance with Uruguayan law.[75] Thus, this scope provision did not exclude post-establishment regulation and, as an exception to the general rule regarding admission of investments, would place the burden of proof on the respondent, even at that stage.

Addressing public interest regulation in a general scope provision may not be the most appropriate approach in IIAs, since public interest measures also can be addressed in the substantive obligations. Indeed, there is a limit to this approach, since the term 'relating to' should not be stretched in order to address issues that arise regarding non-discrimination obligations, regarding expropriation, or regarding the minimum standard of fair and equitable treatment. For example, in IIAs there is usually an obligation to pay compensation for expropriation, even when it is for a public purpose.[76] This is a clear indication that the obligation should apply to public interest measures. Moreover, IIA tribunals have addressed public interest measures by limiting the scope of specific obligations, particularly those regarding non-discrimination, fair and equitable treatment and expropriation. The flexibility that IIA tribunals have to limit the scope of these obligations obviates the need to rely on a general scope provision to preserve regulatory autonomy. This may explain why many IIAs do not use a NAFTA-type general scope provision.

In *Mobil Investments Canada Inc. & Murphy Oil Corporation v Canada*, the tribunal explained that the standard of treatment in customary international law does not require a State to maintain a stable legal and business environment for investments. This standard only protects an investor from changes to the rules governing an investment if those changes may be characterized as arbitrary, grossly unfair or discriminatory, or otherwise inconsistent with the customary international law standard. It does not prevent a public authority from changing the regulatory environment to take account of new policies and needs, even if some of those changes may have far-reaching consequences and effects, and even if they impose significant additional burdens on an investor. It does not provide a guarantee against regulatory change or entitle an investor to expect no material changes to the regulatory framework within which an investment is made. The rules of customary international law only protect against egregious behavior.[77]

The standard is similar regarding expropriation. Under customary international law, where economic injury results from bona fide regulation within the police powers of a State, compensation is not required. Thus, as a general matter, States are not liable to compensate aliens for economic loss incurred as a result of a

75 *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguary*, Decision on Jurisdiction, ICSID Case No. ARB/10/7, 2 July 2013, paras 167–74.

76 *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, (9 May 2003), para 121; *Compañía del Desarrollo de Santa Elena v Republic of Costa Rica* ICSID Case No. ARB/96/1, Award (17 February 2000), 192.

77 *Mobil Investments Canada Inc. & Murphy Oil Corporation v Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012), para 153.

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nondiscriminatory action to protect the public interest.[78] However, once an expropriation has taken place, compensation is due even if it is for a public purpose.[79]

In existing IIAs that lack general exceptions, limiting the scope of application of the treaty or its specific obligations may be the only approach that tribunals can use to preserve regulatory autonomy. The practice with respect to the structure of IIAs varies considerably.[80] Unlike many trade agreements, notably GATT and GATS, most IIAs do not contain comprehensive exceptions for public interest measures. However, recent IIAs have incorporated such general exceptions, based on GATT Article XX and GATS Article XIV.[81] The insertion of GATT exceptions into IIAs creates several interpretative difficulties, some of which arise from the interplay between IIA treaty provisions and customary international law. For example, how can arbitrary discrimination that violates the standard of fair and equitable treatment be justified in the language of the chapeau of GATT Article XX? How can a denial of justice in national courts qualify as necessary? Moreover, a limited enumeration of public interest categories might prove less flexible than simply excluding public interest regulation from the scope of IIA obligations.[82] In addition to allocating the burden of proof to the respondent, exceptions might be interpreted more narrowly than scope provisions or obligations.[83] Thus, in addition to the implications for regulatory autonomy of the allocation of the burden of proof, the differences with respect

78 Howard Mann and Don McRae, International Institute for Sustainable Development, Amicus Curiae Submission, *Methanex v United States* (2004), para 84 <http://www.iisd.org/publications/pub.aspx?id=608> (Accessed 10 August 2012); Restatement of the Law Third: The Foreign Relations of the United States: 'A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police powers of states, if it is non-discriminatory'; cited in *Marvin Roy Feldman v United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002), para 105.

79 *Compañia del Desarrollo de Santa Elena v Republic of Costa Rica* ICSID Case No. ARB/96/1, Award (17 February 2000); *Metalclad Corporation v United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000); *Mexico v Metalclad Corporation* 2001 BCSC 664, para 104.

80 Marie-France Houde, 'Novel Features in Recent OECD Bilateral Investment Treaties', in *International Investment Perspectives: 2006 Edition* (OECD, 2006), 143–81.

81 Andrew Newcombe, 'General Exceptions in International Investment Agreements' in Marie-Claire Cordonier Segger, Markus W. Gehring, Andrew Paul Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International, 2011) 351–70. These IIA provisions include Article 10, *Agreement between Canada and the Republic of Peru for the Promotion and Protection of Investments*, 14 November 2006,< http://www.treaty-accord.gc.ca/text-texte.aspx?id=105078> (accessed 23 February 2014); Article 83, *Agreement between Japan and the Republic of Singapore for a New-Age Economic Partnership*, <http://www.mofa.go.jp/region/asia-paci/singapore/jsepa.html> (accessed 23 February 2014); Article 200, *Free Trade Agreement Between The Government of New Zealand And The Government of the People's Republic of China*, <http://www.chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/index.php> (accessed 23 February 2014); Article 22.1(3), *Korea-Australia Free Trade Agreement*, initialed by Chief Negotiators on 10 February 2014, <http://www.dfat.gov.au/fta/kafta/> (accessed 23 February 2014).

82 Andrew Newcombe, 'The Use of General Exceptions in IIAs: Increasing Legitimacy or Uncertainty', in A. De Mestral and C. Lévesque (eds), *Improving International Investment Agreements* (Routledge, 2012), 268–83.

83 But see Viñuales, above n 34, at 383–84, arguing that exceptions should not be interpreted restrictively in IIAs, based on the general principle that limitations to the sovereignty of States are to be interpreted restrictively or neutrally, in order to preserve sufficient room for the State to exercise its inherent regulatory powers.

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to context, object and purpose, and the nature and sources of substantive obligations and defenses in IIAs makes it preferable to address public interest regulation by clarifying the scope of application of the treaty or its primary obligations, rather than importing general exceptions from trade law.[84]

VI. ADDRESSING PUBLIC INTEREST REGULATION IN *SUI GENERIS* AGREEMENTS

The structure of the TRIPS Agreement does not fit the pattern of any of the foregoing agreements. Unlike the GATT and the GATS, it does not contain general exceptions, other than security exceptions in Article 73.[85] Unlike the SCM Agreement, it does not contain provisions regarding its general scope of application that might be used to exclude public interest measures from its application.[86] As in the TBT Agreement, the TRIPS Agreement sets out general obligations regarding national treatment and most-favored-nation treatment, in which the scope of application might be limited by applying a legitimate regulatory distinctions test to the term 'treatment no less favourable'. However, unlike the SPS Agreement and the TBT Agreement, the TRIPS Agreement establishes specific public interest exceptions and autonomous rights according to the distinct categories of intellectual property rights that are addressed in each of its sections.[87] This structural difference suggests that public interest regulation should be addressed in these exceptions, in which the burden of proof rests with the respondent, except where the TRIPS Agreement protects the public interest through autonomous rights that exclude certain measures from the scope of application of specific obligations, such as Article 27.2, which excludes certain inventions from patentability. Thus, in the TRIPS Agreement, the burden of proof with respect to public interest regulation shifts according to the type of intellectual property right.

VII. CONCLUSION

Tribunals can address public interest regulation at different points in treaties, depending on where this task best fits with the treaty structure. WTO jurisprudence and IIA arbitral decisions have preserved regulatory autonomy in similar ways. The Appellate Body introduced a 'legitimate regulatory distinction' test to serve this purpose in Article 2.1 of the TBT Agreement. Investment tribunals have applied similar tests to limit the scope of application of specific obligations in IIAs. Such limitations on the scope of obligations can serve to preserve regulatory autonomy in treaties in

84 Newcombe, Increasing Legitimacy, above n 82, at 283

85 TRIPS Article 8, which sets out 'principles', does not establish exceptions. TRIPS Article 6 establishes a very narrow exception for exhaustion of intellectual property rights.

86 Article 1 limits the scope with respect to the method of implementation in domestic legal systems, not with respect to the substance or effect of a measure.

87 See Article 13 (copyrights), Article 17 (trademarks), and Article 30 (patents). Arguably, Article 24.4-24.8 (geographical indications), Articles 27.2, 27.3, and 31 (patents), Article 37 (integrated circuits).and Article 40.2 (anti-competitive practices in contractual licenses) establish autonomous rights, rather than exceptions. See also Grando, above n 7, at 633–44 and Frederick M. Abbott, 'WTO Dispute Settlement Practice Relating to the Agreement on Trade-Related Intellectual Property Rights' in F. Ortino and E.-U. Petersmann (eds), *The WTO Dispute Settlement System 1995-2003* (The Hague: Kluwer Law International, 2004) 421, at 443.

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which there are no general exceptions, like the TBT Agreement, or for which general exceptions do not work well, like IIAs. In treaties that lack general exceptions and set obligations in terms that do not lend themselves to scope limitation, such as Article 3.1 of the SCM Agreement, regulatory autonomy might be preserved by limiting the general scope of application of the treaty as a whole. In treaties for which general exceptions do not work well and tribunals can limit the scope of application of specific obligations, such as IIAs, limiting the general scope of application of the treaty may be inappropriate.

The difficulty of meeting the burden of proof does not determine its allocation; the treaty determines its allocation. However, the allocation of the burden of proof does affect the difficulty of challenging or defending a public interest measure. Meeting the burden of proof can be challenging in cases involving complex scientific issues, such as climate change,[88] and other factual issues, such as the interpretation of municipal law.[89] It is also more difficult to prove de facto inconsistency of a measure than it is to prove de jure inconsistency.[90] The extent to which a provision requires quantitative or qualitative evidence also affects the difficulty of meeting the burden of proof.[91] Moreover, it might not be clear what type of evidence will be required to prove one's case.[92] This is one reason why treaty structure matters. The treaty structure determines in which provisions tribunals can address public interest regulation.

International tribunals can and do protect public interest regulation at different points in the treaty text of different treaties. Their task is essentially the same at different points: to determine whether a measure that purports to regulate in the public interest really does and the extent to which it serves other purposes that the treaty is intended to prevent, such as protectionism, import substitution, or otherwise distorting markets to favor domestic interests. Negotiators take such jurisprudence into account in formulating treaty provisions. They also need to be mindful of the effect of treaty structure on the allocation of the burden of proof and the extent to which treaty structure is transferable from one treaty context to another.

Treaty negotiators should consider whether to address public interest regulation in provisions that limit the scope of application of a treaty, rather than in general exceptions, when they want to preserve a greater degree of regulatory autonomy by

88 Appellate Body Report, *Brazil – Retreaded Tyres*, above n 47, para 151.

89 See, for example, WTO Appellate Body Report, *US – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany (US – Carbon Steel)*, WT/DS2133/AB/R, WT/DS213/AB/R/Corr.1, adopted 19 December 2002, paras. 156–7.

90 See, for example, Appellate Body Report, *Canada – Aircraft*, above n 63, para 167. This can arise in scope provisions, obligations and exceptions. For example, the budgetary measure in *US – Poultry (China)* was a de facto SPS measure and thus fell within the scope of the SPS Agreement. Panel Report, *US – Poultry (China)*, above n 1. WTO jurisprudence has established that national treatment obligations apply to both de jure and de facto discrimination. The same is true for the chapeau of GATT Article XX.

91 Appellate Body Report, *United States – Subsidies on Upland Cotton (Article 21.5 – Brazil) (US – Upland Cotton (Article 21.5 – Brazil))*, WT/DS267/AB/RW, adopted 20 June 2008, para 321. See also Appellate Body Report, *Brazil – Retreaded Tyres*, above n 47, and Appellate Body Report, *China – Raw Materials*, above n 1, regarding this issue in the context of GATT Article XX.

92 Bradly J. Condon, 'China – Intellectual Property Rights and the Criminalization of Trade Mark Counterfeiting and Copyright Piracy under the TRIPS Agreement' (2009) 4 Journal of Intellectual Property Law & Practice 618–19.

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placing the burden of proof on the complainant. Of course, the decision regarding the appropriate degree of regulatory autonomy will depend on many factors, including the subject matter and the need to weigh the risks of protectionism against the risks of constraining regulatory autonomy to address serious public interest issues, such as climate change mitigation and public health protection.

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