Kluwer Arbitration Blog

# What Next for Interpreting General Exceptions in International Investment Agreements? Canada's Non-Disputing Party Submission in Eco Oro Minerals v Colombia

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On 27 February 2020, Canada availed itself of the opportunity provided by Article 827(2) Canada-Colombia FTA ("**FTA**") to make a non-disputing party submission [1]("**NDPS**") in *Eco Oro Minerals v Colombia*. The case concerns issues arising out of a mining restriction imposed to establish an environmental conservation zone. It was initiated in late 2016; hearings took place in January 2020.

As the home state of the investor, Canada focused on imparting its views on the interpretation of the expropriation standard, the interaction between the FTA's different provisions on exceptions, and the relationship between the general exceptions and the treaty's substantive standards (some of these issues relate to aspects of the ICSID tribunal's questions that will be addressed in the parties' post-hearing briefs).

This post will focus solely on the issue of interoperability of the WTO-like general exception in Article 2201 of the FTA[2] with the substantive obligations.

**NDPS in investor-state arbitration**

NDPSs are generally understood as an aid for tribunals in interpreting an IIA and as a means of 'enlighten[ing] [them] in their decision-making process' [¶47]. However, as commented elsewhere on this blog, some tribunals have also held that NDPSs may function as a form of 'subsequent practice' under Article 31(3) of the VCLT. In contrast, it has been argued by arbitrator Brower in his *Messa* opinion [¶30] that interpretations set out in NDPSs cannot be regarded as an authentic interpretation as they would hardly ever differ from the interpretation advanced by the respondent State.

Nevertheless, Alschner and Hui call for investors' home states to engage more actively in interpreting treaty-based exceptions by filing NDPSs. States have not always made use of such an opportunity. In the *Bear Creek* case, where a general exceptions clause had been invoked for example, Canada submitted a NDPS in which it omitted to comment on how general exceptions should be applied in the Canada-Peru FTA.

Canada's submission in the *Eco Oro* case is particularly relevant because Canada is one of the countries that most frequently inserts WTO-like exceptions in its IIAs. Some authors consider exceptions akin to WTO law as an opportunity for instilling flexibilities into investment treaties normally considered too rigid and pro-investor. Those opposing this view assert that substantive standards inherently contain built-in policy considerations developed through arbitral interpretation. Henckels, for example, explains that the inclusion of a WTO-like exception poses a risk of tribunals construing an exception's explicitly defined policy objectives as the sole policy space parties agreed on, to the exclusion of standards-embedded considerations.

Mitchell, Munro and Voon further argue, *inter alia*, that the transposition of WTO-like exceptions into IIAs risks undermining host states' policy objectives in unintended ways, unless carefully delineated in the treaty alongside clarifications. Newcombe similarly questions what benefit inserting the rigorous 'necessity' test from Article XX GATT into investment treaties would bring, other than a more stringent standard of review. Against the backdrop of such concerns, Canada's submission is seen as a welcomed contribution.

**The relationship between general exceptions and substantive obligations: general exceptions as a 'safety net'**

While acknowledging that similar considerations related to policy space would apply for exceptions and obligations, Canada's NDPS in *Eco Oro* emphasised that 'whether a measure is justified under [an exception] is a distinct enquiry that must be viewed through a different lens' from the substantive standards evaluation. It further maintained that 'legitimate regulatory actions will rarely need to be justified on the basis of the general exception […] because they will not constitute breaches of the investment obligations in the first place.'

The relevance of these statements lies in the fact that Canada recognised a role for policy space considerations as self-standing and independent assessments for both exceptions and substantive obligations. In this way, Canada introduces much needed clarity by indicating the order of operation for the two types of norms—exceptions operate after a *prima facie* breach of an investment standard has been established; they are triggered after a finding of breach, and operate to inquire if there are grounds for not finding a state liable despite that breach.

This view is commendable as it fosters a sound interpretation of how legal norms operate particularly given that some investment tribunals are known for conflating the operation of exceptions with exemptions. An example of this phenomena is the *CMS Annulment Committee*'s finding [¶129] that where an exception is to be applied, the substantive obligations would not. This is to say that the Committee saw an exception to function as a carve out, delimiting the scope of the application of substantive obligations, and not as justifying the preliminarily found breach of an investment obligation.

In this respect, Canada's submission provides an understanding of exceptions that safeguards against conflating exceptions with carve-outs. It also underlines the importance of assessing public policy space as a consideration when applying both substantive standards and exceptions, and not one to the exclusion of the other. Canada summarises such a view by proposing that general exceptions operate as 'a final "safety net" to protect the State's exercise of regulatory powers in pursuit of the specific legitimate objectives identified in the exceptions.'

**Exceptions and the scope of the primary obligations**

Canada's submission also states that the exception 'cannot be used to broaden the scope of the primary obligation' as '[t]he Parties' intention was never to limit the scope of legitimate policy objectives that States can pursue and that would not breach the investment obligations in the first place.' Such a clarification of the intentions of the parties is particularly relevant due to the mentioned risk of arbitrators only considering narrowly enlisted policy objectives of the exception as relevant objectives, to the exclusion of broadly interpreting substantive standards.

This view can be juxtaposed with the finding of a tribunal in the *Bear Creek* case [¶473] that effectively discarded standards-embedded policy space as soon as it had found the existence of explicit exceptions in the Canada-Peru FTA. The tribunal essentially reduced the public policy space analysis solely to the level of exceptions. Needless to say, the NDPS's statement by Canada – as one of the parties to a similar treaty – may impact future arbitral analyses construing the public policy space within an IIA's substantive obligations and exceptions provisions. This should be considered a positive development for safeguarding host state regulatory autonomy.

**Value of interpretative annexes in safeguarding public policy space**

An FTA's annexes usually provide useful interpretative guides and potential public policy considerations for the application of its substantive investment obligations. Depending on how detailed an annex is, one could argue that it effectively plays the role of an exception, which makes its operation in relation to exceptions *stricto sensu* unclear. Due to the concerns raised that exceptions might become unusable if a clarifying annex for the expropriation obligation is included, Canada's explanation as to the applicability of Annex 811.2 FTA *vis à vis* exceptions and standard of expropriation is valuable.

The submission clarified that the environmental measure in question needs to first be assessed within the ambits of the Annex so as to determine if there is compensable expropriation, after which assessment (and in the case that a breach is found), analysis of the exceptions clause would ensue. Interpreting an investment obligation guided by an annex arguably widens the first stage of analysis of policy space even beyond the breadth of the built-in policy space, before falling onto a 'safety net' of any exception. Based on this approach, using annexes could thus be seen as a way of broadening the scope of the preliminary assessment and avoiding potentially narrow exceptions scrutiny altogether.

**Concluding remarks**

Canada's submission is a constructive addition to the discussion on the operation of WTO-like general exceptions in the investment legal regime. By providing the view of another party to the FTA, in addition to the respondent state, Canada undoubtedly aids the interpretation of the relevant provisions of the Canada-Colombia FTA.

Canada argues for interpreting a regulatory measure in accordance with investment obligations,

aided by Annex 811.2 FTA and if need be the exceptions clause. This proposition lays out the interpretative steps to be followed in order to harmoniously assess the public policy space Colombia and Canada originally encapsulated in the FTA. Canada ultimately posits that such an evaluation 'will not limit the State's ability to regulate in the public interest for the protection of the environment'.[3)]

This allows for tribunals to infer from the NDPS and respondent state's subsequent comments the intended meaning parties to the FTA attributed to the disputed clauses. The NDPS is therefore invaluable as it clarifies the contours of important concepts and minimises the risks of the tribunal misconstruing the appropriate operation of the exceptions, annexes interpreting substantive norms and the built-in policy space within investment obligations.

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References

**?1** Accessing the link requires a subscription.

?2 Article 2201 FTA contains exceptions to both trade and investment chapters. The investment-related clause, Article 2201(3) FTA, is akin to Article XX GATT albeit with investment regime adjustments—the chapeau is modified and only three subparagraphs with policy objectives are enlisted, containing ‘necessary’ as a nexus.

?3 It should be noted that material submissions of the parties are not publicly available, and thus, the question of the extent to which Canada’s submission contributes to Colombia’s position in ascertaining the protection of the environment with its measures remains unclear.

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