

Advancing SDGs in International Investment Agreements: Building Peace and Justice through General Exceptions Clauses

Guy Marcel Nono

Key Points

- General and security exceptions in international investment agreements (IIAs) provide a normative framework in which the United Nations Sustainable Development Goals (SDGs) can be achieved.
- Combatting corruption and reducing arms flows are connected to SDG 16, which recommends peace, justice and strong institutions on the one hand, and the public order and security exceptions contained in IIAs on the other.
- The general and security exceptions in IIAs can facilitate the realization of SDG 16 if correctly interpreted.
- In investment arbitration, the general and security exceptions clauses could be interpreted in such a way as to incorporate sustainable development elements, especially in the context of SDG 16.

Introduction

For more than a decade, there has been a lot of focus on how sustainable development relates to international investment law.¹ The growing trend of including general and security exceptions clauses in IIAs has also been highlighted.² However, the nexus between general IIAs and security exceptions and the achievement of the SDGs has not been explored. These exceptions are directed toward non-economic objectives and “reflect the desire of States to improve the efficiency of the international investment

1 Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Paul Newcombe, eds, *Sustainable Development in World Investment Law* (Alphen aan den Rijn, Netherlands: Kluwer Law International, 2001).

2 See Amelia Keene, “The Incorporation and Interpretation of WTO-Style Environmental Exceptions in International Investment Agreements” (2017) 18:1 *J World Investment & Trade* 62; Andrew Newcombe, “General Exceptions in International Investment Agreements” in Cordonier Segger, Gehring & Newcombe, *supra* note 1 at 355; Céline Lévesque, “The inclusion of GATT Article XX exceptions in IIAs: a potentially risky policy” in Roberto Echandi & Pierre Sauvé, eds, *Prospects in International Investment Law and Policy: World Trade Forum* (Cambridge, UK: Cambridge University Press, 2013) 363. It must be said that the inclusion of general exceptions clauses appears in different forms in IIAs. Some IIAs make express reference to the *General Agreement on Tariffs and Trade*, 15 April 1994, 1867 UNTS 187, 33 ILM 1153, arts XX, XXI (entered into force 1 January 1995), or the *General Agreement on Trade in Services*, 15 April 1994, OJ, L 336, arts XIV, XVI bis (entered into force 1 January 1995) in their corpus while others, without making express reference to them, are, however, inspired by the aforementioned clauses.

About the Author

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regime within a larger vision of a shared commitment to legitimacy and sustainability.”³

The 2015 SDGs are intended to translate the concept of sustainable development into achievable global targets. They direct attention to measures that states can take to ensure the goals are met. It is unclear whether, in the international investment context, certain general and security exceptions in IIAs, notably those on public order and essential security interest, can contribute to the achievement of SDG 16, which deals with peace, justice and the creation of strong institutions.⁴ These exceptions predate the SDGs by several years and deal mostly with combatting corruption and illicit arms flows that could, in the long run, be detrimental to the achievement of SDG 16.

This policy brief discusses the extent to which the general and security exceptions in IIAs could contribute to the achievement of SDG 16. The author offers a brief overview of disputes in which non-economic objectives (mainly the essential security interests and public order exceptions) are raised. The goal is to see if the arbitral tribunals considered the role that the general and security exceptions can play in the achievement of SDG 16. From a more prospective outlook, the brief makes recommendations as to how to promote SDG 16 through the IIAs.

Exploring SDG 16 and the General and National Security Exceptions in IIAs

Like the Millennium Development Goals that preceded them, the SDGs, including SDG 16, derive from the body of international norms that were codified over the past century prior to the adoption

³ Keene, *supra* note 2 at 86.

⁴ Road map towards the implementation of the United Nations Millennium Declaration: Report of the Secretary-General, UNGAOR, 56th Sess, UN Doc A/56/326 (2001) 1 at 7 [2030 Agenda].

of the 2030 Agenda for Sustainable Development.⁵ A closer look at SDG 16 reveals that, to some extent, it addresses the same subject matter as the general or security exceptions in IIAs. SDG 16 is aimed at promoting peaceful societies, reducing illicit arms flows, and combatting corruption and bribery.⁶ These objectives coincide, to some extent, with the essential security interest and public order exceptions contained in IIAs, even if the scope of these exceptions is different from that of SDG 16.⁷ For example, in international investment law, the essential security interests clause in IIAs could be used by states to reduce trafficking in arms or maintain international peace and security. This goal coincides with the aims of SDG 16 stated above. Moreover, the notion of public order codified in IIAs has been interpreted in the arbitral jurisprudence to include the fight against corruption.⁸ Likewise, reduction in public corruption and bribery is the aspiration of Target 16.5 of the SDGs. Combatting corruption and reducing illicit arms flows are cross-cutting goals in the context of SDG 16. The achievement of both goals is fundamental to realizing all the SDGs, especially SDG 16,⁹ and to securing investments. This is so, considering that corruption and illicit arms flows¹⁰ are major impediments to international investments,

which are necessary to create jobs, reduce poverty and ensure economic prosperity.

The Public Order and Essential Security Interest Exceptions in Investment Arbitration and the SDGs

The IIAs and the state contracts with the arbitration clause are the main foundation of claims before the International Centre for Settlement of Investment Disputes (ICSID).¹¹ Cases in which the violation of public order has been most often invoked as grounds for nullity of the contract before the arbitral tribunals are the state contracts or concessions obtained through corruption.¹² Among these cases are *World Duty Free*¹³ and *Metal-Tech Ltd v the Republic of Uzbekistan*.¹⁴ In both cases, corruption was invoked incidentally.

The *World Duty Free* case arose when a foreign investor was illegally expropriated from his company, which had a concession contract for the construction, maintenance and operation of duty-free complexes in Kenyan airports. The arbitral tribunal found that this contract was procured by corruption because the claimant admitted that he won the contract after making a personal donation to the Kenyan president. The tribunal reviewed national legislation, anti-corruption treaties, transnational arbitral awards and domestic jurisprudence,¹⁵ and concluded that corruption is contrary to the international public order of most, if not all, states.¹⁶ On these grounds, the arbitrator rejected the claimant's claim.

5 Rakhyn E Kim, "The Nexus between International Law and the Sustainable Development Goals" (2016) 25:1 RECIEL 15 at 15, 16; 2030 Agenda, *supra* note 4 at 7.

6 The wording of SDG 16 and its targets here is indicative. For the full wording, see the 2030 Agenda, *supra* note 4 at 25.

7 The scope of the IIAs' general and security exceptions is far broader than the scope of SDG 16. For instance, Target 16.4 aims to significantly reduce arms flows, while the IIAs' security exception allows either party to the agreement to take any measures relating to the traffic in arms, ammunition and implements of war, including, for example, denying encouraging domestic investments in this field, without needing to extend national treatment or the most-favoured-nation clause. In addition, under the security exceptions, measures could be taken to reduce the traffic in arms, but they could also be taken to increase it, for instance, by exporting arms to supply allies who may be at war. Furthermore, the exact scope and the constitutive elements of the public order exception, which encompasses the fight against corruption that is at the heart of SDG Target 16.5, remain uncertain. As noted by the WTO panel, the content of the concept of public order "can vary in time and space, depending upon a range of factors including prevailing social, cultural, ethical and religious values"; see *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/R (2004) at para 6.461.

8 *World Duty Free Co Ltd v Republic of Kenya* [2006], 46 ILM 339, ICSID Case No ARB/00/7 at paras 152–55, 157 [*World Duty Free*].

9 See United Nations Office on Drugs and Crime, "Eliminating corruption is crucial to sustainable development" (1 November 2015), online: <www.unodc.org/unodc/en/press/releases/2015/November/eliminating-corruption-is-crucial-to-sustainable-development.html>.

10 This traffic contributes to instability and insecurity around the world.

11 Emmanuel Gaillard, "Chronique des sentences arbitrales" (2009) 136 JDI 333 at 334.

12 Christopher F Dugan et al, *Investor-State Arbitration* (New York: Oxford University Press, 2011) at 641.

13 *World Duty Free*, *supra* note 7.

14 *Metal-Tech Ltd v the Republic of Uzbekistan* [2013], ICSID Case No ARB/10/3 at paras 195, 292, 374 [*Metal-Tech*].

15 *World Duty Free*, *supra* note 7 at paras 143–57.

16 *Ibid* at para 157.

In the *Metal-Tech* case, the claim arose out of the alleged unlawful expropriation of Metal-Tech's investment in Uzbekistan through the government's termination of a raw material supply contract and the cancellation of the claimant's exclusive right to export refined molybdenum oxide. Uzbekistan requested that the arbitral tribunal decline to exercise jurisdiction over this dispute because Metal-Tech's investment was obtained through bribery,¹⁷ which is contrary to public order.¹⁸ The tribunal ruled in favour of the Uzbek government.

The lesson from these two cases in which the respondent states won is that the investment contract is void if it offends international public order. Also in these cases, public order was not invoked on the basis of the general exceptions contained in the IIAs, nor on the basis of the SDGs. The tribunals in both cases did not state if the national public order must comply with international order to make the contract void. Instead, the arbitrator in *World Duty Free* suggested that the prohibition of corruption is a general principle of world investment law.¹⁹ Following this logic, a state might, in the absence of an IIA clause requiring the investor not to participate in corruption, bring an investor before ICSID for corruption of its public agents on the basis of article 36(1) of the ICSID Convention.²⁰ If this were to happen, the arbitrator could apply the general principle that forbids corruption. In this way, corruption could be brought before ICSID as the main issue. Similarly, a company that is under pressure to pay a bribe could appear before ICSID to denounce corruption. In a forward-looking manner, a host state that does not act against corruption or encourages it could trigger non-state entities to bring a case before ICSID against that attitude. In any case, this response should be limited to the denunciation of acts of corruption by foreign investors. An optional additional protocol could be added to the ICSID Convention to facilitate this reform.

Arbitral tribunals have discussed the essential security interest exception in *CMS v Argentine*

*Republic*²¹ and *Enron v Argentine Republic*,²² deciding in the investor's favour. Essential security interest was invoked not as general principle but on the basis of the essential security clause contained in the IIAs.

In *CMS*, the request concerned the alleged suspension by Argentina of a tariff adjustment formula for gas transportation applicable to an enterprise in which CMS had an investment. On the other hand, in *Enron*, the request had to do with certain tax assessments allegedly imposed by some Argentinean provinces on a gas transportation company. The claimants participated in the business through investments in various corporate arrangements. The Argentinean government refused to allow the tariff adjustments in accordance with the US producer price index.

In both cases, Argentina argued that its economic crisis should be interpreted as an essential security interest. However, the specific provisions that it relied upon for this argument did not include economic crisis within the essential security interests concept. Argentina's objective before the tribunal was to exonerate itself from paying compensation to foreign investors for losses resulting from the emergency legal and regulatory measures taken due to that country's economic crisis. Nonetheless, arbitrators indicated that Argentina failed to satisfy the requirements of customary international law under which it could have been exempt from liability on the grounds of a state of necessity.²³

These arbitral awards issued by ICSID show that the security exception has been invoked in cases of economic crisis, even when the relevant circumstances do not fall within the scope of essential security interests in the IIAs. Generally, essential security interests that could be considered are limited to those expressly described in the IIAs, i.e., they are restricted to traffic in arms, war, ammunition, non-proliferation

17 *Metal-Tech*, *supra* note 13 at para 110.

18 *Ibid* at 195.

19 Christoph H Schreuer et al, *The ICSID Convention: A Commentary*, 2nd ed (Cambridge, UK: Cambridge University Press, 2009) at 608.

20 *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966).

21 *CMS Gas Transmission Company v Argentina* (2005), 44 ILM 1205, ICSID Case No ARB/01/8 at 315–31 [CMS].

22 *Enron Corporation and Ponderosa Assets, LP v Argentine Republic* (2007), ICSID Case No ARB/01/3 at paras 195, 292, 374 [Enron].

23 *CMS*, *supra* note 20 at paras 331, 373; *Enron*, *supra* note 21 at paras 313, 339.

of nuclear weapons and other issues that could be a threat to national or international peace.²⁴

It is unclear if the ICSID tribunals would construe the security exceptions differently in cases where the scope of essential security interests is clearly defined and circumscribed in the IIAs. To advance the SDG 16 objectives through this mechanism, it is necessary for arbitrators to recognize the self-judging character of essential security interest exceptions in a limited scope of measures, especially those relating to arms trafficking and non-proliferation of nuclear weapons. This should be the case even in situations where the IIAs do not provide an explicit limitation of the scope of essential security interests.

Recommendations

In many arbitration disputes that deal with public order and essential security interest provisions, the arbitrators neither refer directly to the concept of sustainable development generally nor to the SDGs specifically. However, the IIAs often indicate that they promote development in the broadest terms.²⁵ The arbitral tribunals also do not highlight in their reasoning the potential role that the general and security exceptions in IIAs could play in the achievement of SDG 16. Against this background, and to rectify the shortcoming, the following recommendations could be considered:

- The IIAs' general and security exceptions should be interpreted during arbitration in a fashion that recognizes the need to achieve SDG 16 and especially Targets 16.4 and 16.5.
- Considering the negative impact of corruption on the achievement of the SDGs, the IIAs could expressly deny treaty protection to investments operating in violation of anti-corruption norms.
- Treaty amendment offers a great opportunity to update the investment regime. In reforming

treaty objectives, it could be enshrined that one of the purposes of the IIA is to foster the achievement of the SDGs through investment.

- The preamble to investment treaties could recognize that investments are intended to stimulate the promotion and the protection of the SDGs and vice versa. It should also be stated that investments will be accepted to the extent that they promote the SDGs in general and SDG 16 in particular.

Conclusion

By their nature as hard law, the general and security exceptions in IIAs contribute, to some extent (incidentally), to the achievement of SDG 16 and its Targets 16.4 and 16.5 through an induced effect. Despite the points of convergence between the issues addressed by SDG 16, the specific identified targets, and the general and security exceptions, SDG 16 could not still inform interpretation of such clauses under the rules of treaty interpretation, which are characterized by state voluntarism. Although international tribunals are not required to apply non-binding commitments, the SDGs could simply be cited by the arbitral tribunals to inform and support their decisions. Such an approach would help raise awareness among states and emphasize states' responsibilities in achieving the SDGs.

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24 Diane A Desierto, *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation* (Leiden, Netherlands: Martinus Nijhoff Publishers, 2012) at 169.

25 Yves Nouvel, "Le développement dans le contentieux transnational de l'investissement" in *Société française pour le droit international, ed, Droit international et développement: colloque de Lyon* (Paris: Pedone, 2015) 231 at 241.

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