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The problems of interpreting GATT Article XXI(b)(iii) in Russia – Traffic in Transit

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Abstract

Purpose: This paper aims to further study the panel report in Russia – Traffic in Transit regarding the interpretation and application of 1994 general agreements on tariffs and trade (GATT) Article XXI(b). It analyses the threshold applied by the panel in applying Article XXI(b)(iii) and further discusses the potential problem that may arise in the future dispute. This study also investigates the notion of emergency and security interest and its development in international law. Design/methodology/approach: This normative research uses a qualitative legal methodology. This study conducts desk analysis of primary legal materials and existing literature to assess the concept of security interest within the World Trade Organization (WTO) framework. Findings: This paper finds that the panel in Russia – Traffic in Transit applied subjective and objective test in reviewing Russia's invocation of GATT Article XXI(b)(iii). Despite the adjectival self-judging clause and the political tension of the dispute, the panel is capable to review its application. This study further finds that the term security interest and emergency in international relations still leaves the possibility of open interpretation. Research limitations/implications: Because of the normative research approach, the research results lack empirical data and implications. Therefore, future research is encouraged to inquire on the empirical research. Originality/value: This paper fulfils the need to study and explore security exception clause within the WTO framework as a normative rule of law and in the wider conceptual notion of security and emergency in international law. © 2021, Emerald Publishing Limited.

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The problems of interpreting GATT Article XXI(b)(iii) in *Russia – Traffic in Transit*

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Abstract

Purpose – This paper aims to further study the panel report in *Russia – Traffic in Transit* regarding the interpretation and application of 1994 general agreements on tariffs and trade (GATT) Article XXI(b). It analyses the threshold applied by the panel in applying Article XXI(b)(iii) and further discusses the potential problem that may arise in the future dispute. This study also investigates the notion of emergency and security interest and its development in international law.

Design/methodology/approach – This normative research uses a qualitative legal methodology. This study conducts desk analysis of primary legal materials and existing literature to assess the concept of security interest within the World Trade Organization (WTO) framework.

Findings – This paper finds that the panel in *Russia – Traffic in Transit* applied subjective and objective test in reviewing Russia's invocation of GATT Article XXI(b)(iii). Despite the adjectival self-judging clause and the political tension of the dispute, the panel is capable to review its application. This study further finds that the term security interest and emergency in international relations still leaves the possibility of open interpretation.

Research limitations/implications – Because of the normative research approach, the research results lack empirical data and implications. Therefore, future research is encouraged to inquire on the empirical research.

Originality/value – This paper fulfils the need to study and explore security exception clause within the WTO framework as a normative rule of law and in the wider conceptual notion of security and emergency in international law.

Keywords WTO, Interpretation, *Russia – Traffic in Transit*, security exception

Paper type Case study

1. Introduction

1994 general agreements on tariffs and trade (GATT) legal framework is designed to facilitate its state parties ability to respond to situations beyond international trade (Messerlin, 2005). In situation of emergencies – such as natural disasters, pandemic, financial crisis and war – rules that would apply in normal circumstances cannot always be upheld, especially if the emergency threatened the existence of the State (Garcia-Santaolalla, 2021). GATT facilitates its state parties' ability to respond to unexpected situation through its "escape clauses," where conducts that would otherwise be inconsistent with GATT are precluded if acted pursuant to the requirement of the escape clause. This delicate balance between performance of treaty obligation and flexibility to respond to unexpected situation is at the core interest of GATT (Pelc, 2009).

While the escape clause under GATT Article XIX (*safeguards*) and Article XX (*general exception*) had developed in the jurisprudence of World Trade Organization (WTO) Dispute Settlement Body ("WTO-DSB"), the security exception contained in Article XXI had not received further discussion. Scholars and WTO member were particularly concerned with

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Investor-State dispute settlement (ISDS) cases and India: affronting regulatory autonomy or indicting capricious state behaviour?

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Abstract

Purpose – The dominant narrative in the investor-State dispute settlement (ISDS) system is that it enables powerful corporations to encroach upon the regulatory power of developing countries aimed at pursuing compelling public interest objectives. The example of Phillip Morris, the tobacco giant, suing Uruguay's public health measures is cited as the most significant example to prove this thesis. The other side of the story that States abuse their public power to undermine the protected rights of foreign investors does not get much attention.

Design/methodology/approach – This paper reviews all the ISDS cases that India has lost to ascertain the reason why these claims were brought against India in the first place. The approach of the paper is to study these ISDS cases to find out whether these cases arose due to abuse of the State's public power or affronted India's regulatory autonomy.

Findings – Against this global context, this paper studies the ISDS claims brought against India, one of the highest respondent-State in ISDS, to show that they arose due to India's capricious behaviour. Analysis of these cases reveals that India acted in bad faith and abused its public power by either amending laws retroactively or by scrapping licences without following due process or going back on specific and written assurances that induced investors to invest. In none of these cases, the foreign investors challenged India's regulatory measures aimed at advancing the genuine public interest. The absence of a "Phillip Morris moment" in India's ISDS story is a stark reminder that one should give due weight to the equally compelling narrative that ISDS claims are also a result of abuse of public power by States.

Originality/value – The originality value of this paper arises from the fact that this is the first comprehensive study of ISDS cases brought against India and provides full documentation within the larger global context of rising ISDS cases. The paper contributes to the debate on international investment law by showing that in the case of India most of the ISDS cases brought were due to India abusing its public power and was not an affront on India's regulatory autonomy.

Keywords India, BIT, Investment treaty, ISDS, Regulation, Bilateral investment treaties, Retroactive taxation

Paper type Research paper

1. Introduction

The virulent critics of international investment law chastise the investor-State dispute settlement (ISDS) [1] for maximizing investor protection and protecting the economic interests of neo-colonial powers i.e. of countries with a high level of economic development to the detriment of poorer nations (Schultz and Dupont, 2014). Arguably, over-powered foreign investors use the ISDS mechanism to bring treaty-based claims against States that encroach upon their sovereign right to regulate in public interest like the protection of public health and the environment (Tienhaara, 2011). The most significant and influential example in this regard is *Philip Morris*, the corporate tobacco giant, suing Uruguay for its sovereign

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The legal guarantees to protect foreign investment in Jordan

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Abstract

Purpose – This paper aims to indicate that the foreign investment system in Jordan includes many provisions that create an appropriate environment for encouraging foreign investments and grant a distinctive treatment for the foreign investor that allows them the status equal to the national investor.

Design/methodology/approach – This study deals with the protection provided by the Jordan Government for foreign investments to attract foreign investment by studying the guarantees given by Jordan including many legal principles that encourage investment. The legal guarantees for the foreign investor enhance the confidence of the foreign investor in the host country.

Findings – The system provides a lot of guarantees with respect to non-commercial risks to which the foreign investor may be exposed.

Originality/value – The paper also clarifies that the role played by bilateral agreements in the field of investments, as these agreements give foreign investments a measure of protection through the guarantees and they are considered as incentives for the investor.

Keywords Jordanian law, Foreign investments, Bilateral investment agreements, Legal guarantees, Foreign investor, Bilateral agreements, Legal system, National investor, Legal status, Legal principles, Jordanian Government, Arab countries

Paper type Research paper

1. Introduction

Jordan is one of the Arab countries most affected by the financial crises. This type of challenge leads to an attempt to pursue an economic policy based on foreign investments to confront the problems faced by the national economy. Consequently, Jordan has put in place many laws related to foreign investment, to provide maximum protection and assurance to foreign investors, as well as to provide exemptions and large-scale benefits (Abu, 2016). In addition to the international laws, Jordan has signed several bilateral agreements aimed at protecting and encouraging investment, to gain the confidence of the foreign investor (Al-Samarrai, 2006). Alomran (2019) investigated elements that were not part of commercial transactions and investors' expectations that impacted their investment in the host country such as nationalization, seizure and expropriation. Their research looked at the constitutional and legislative provisions as one of the main causes for foreign investment protection in Jordan's Hashemite Kingdom.

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