General Exception Clauses in International Investment Law

The Recalibration of Investment Agreements via WTO-Based Flexibilities
Levent Sabanogullari

General Exception Clauses in International Investment Law

The Recalibration of Investment Agreements via WTO-Based Flexibilities

Nomos
Acknowledgements

This work was originally submitted as a dissertation to the Faculty of Law at Ruprecht-Karls-Universität Heidelberg in 2014. The doctorate was successfully completed with a *viva voce* examination in 2016. Further smaller updates were made up to December 2017.

Having spent the greater part of four years in the preparation of this work, no one could be more conscious than me of its errors and imperfections, for which I alone assume full responsibility. Throughout the years, I was fortunate enough to receive valuable assistance from a number of persons to whom I owe much and more: to my doctoral supervisor Professor Dr. Dres. h.c. Burkhard Hess for his constant encouragement, invaluable scholarly guidance and his unfaltering support; to Professor Dr. Dres. h.c. Rüdiger Wolfrum for his thoughtful remarks and a careful second revision of the manuscript; to Professor Jürgen Kurtz who first suggested the topic and who rendered much appreciated assistance in its development; and to Professor Dr. Jörn Griebel who gave freely of his time and scholarship in commenting on earlier versions of this work. My thanks also go to the esteemed members of the Advisory Committee of the International Max Planck Research School for Successful Dispute Resolution (IMPRS-SDR); in particular to Sir Michael Wood KCMG and to Mr. Brooks Daly, as well as to many others for their insightful comments on various parts of this work. Finally, I would like to thank Professor Stacie I. Strong for the prompt preparation of the linguistic evaluation of my work.

In addition, I would like to express my appreciation to the IMPRS-SDR, a doctoral program organized by Heidelberg University, the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, and the Max Planck Institute for International, European and Regulatory Procedural Law in Luxembourg, which generously supported the preparation of this work with a scholarship and allowed me to advance my research without financial worries. I am similarly grateful to the FAZ-IT-Foundation for funding the last months of my research and permitting me to bring my work to a timely finish. I should also like to thank the German Academic Exchange Service for supporting my intellectually stimulating research stay at Melbourne University Law School. Moreover, I am indebted to the German-American Fulbright Commission, the German Na-
Acknowledgements

I would like to express my gratitude to the National Academic Foundation and the Dr. Wilhelm Westhaus Foundation for funding my graduate studies at New York University Law School, where first ideas and preliminary thoughts for this work began to ripen.

I have been privileged to have my first professional experience in international arbitral proceedings during my studies. For this, I wish to express my gratitude to Professor Dr. Karl-Heinz Böckstiegel who offered me ample opportunities to explore the practical ramifications of my research as his Tribunal Assistant in treaty- and contract-based arbitrations.

Last but not least, I am deeply grateful to my parents and my brother, who continuously accompanied and supported me along the way. It is to them that I owe my deepest thanks for their loving help and their inexhaustible encouragement and patience. This work is dedicated to them.

The Hague, July 2018

Levent Sabanogullari
Table of Contents

Table of Figures .......................... 17

List Of Abbreviations ...................... 19

Chapter One  Introduction .................. 21

A. Introduction to the Research Theme ........................................ 21
B. The Right to Regulate in the Public Interest and International Investment Law ........................................................... 23
   I. The Right to Regulate in the Public Interest Under General International Law ...................................................... 23
   II. The Right to Regulate and the Legitimacy Crisis of International Investment Law .................................................. 25
   III. Case Study: Philip Morris Asia Ltd. v. The Commonwealth of Australia (“Plain Tobacco Packaging”) .................. 29

C. Scope and Terminology .................... 39
   I. General Exceptions, Security Exceptions, Specific Exceptions, and Other Similar Provisions .......................... 40
      1. General Exception Clauses .................................................. 40
      2. Security Exception Clauses ................................................. 42
      3. Obligation-Specific Exception Clauses .................................. 44
      4. Interpretive Guidelines ...................................................... 45
      5. Provisions on the Relaxation of Standards .......................... 46
   II. Exceptions, Reservations, and Non-Precluded Measures ............. 47
      1. Exception Clauses and Non-Precluded Measures Clauses ........ 48
      2. Exceptions and Reservations .............................................. 49

D. Structure and Research Methodology .... 50

Chapter Two  International Investment Treaty Practice Relating to General Exception Clauses .................................................. 53

A. Stocktaking .................................. 54
   I. General Exception Clauses in Bilateral Investment Treaties ........ 54
## Table of Contents

II. General Exception Clauses in Preferential Trade and Investment Agreements ........................................ 58
   III. General Exception Clauses in IIAs .............................................................. 64

B. Typology .................................................................................................................. 67
   I. General Exception Clauses Based on Article XX GATT or Article XIV GATS ...................... 67
      1. Article XX GATT-like General Exception Clauses .............................................. 68
         a. The Canadian FIPA Program ................................................................. 70
         b. Other IIAs with Article XX GATT-like General Exception Clauses ........... 74
      2. Article XIV GATS-like General Exception Clauses ........................................... 75
         a. Article XIV GATS-like General Exception Clauses Incorporating Elements of Article XX GATT 77
         b. General Exception Clauses Incorporating Article XIV GATS by Reference .... 78
      3. General Exception Clauses Incorporating both Article XX GATT and Article XIV GATS .... 80
   II. Sui Generis General Exception Clauses ................................................................. 81
      1. Sui Generis General Exception Clauses in BITs .................................................. 82
         a. The Mauritian BIT Program ................................................................. 82
         b. The Singaporean BIT Program ............................................................. 84
         c. The Japanese BIT Program ..................................................................... 85
         d. The Indian BIT program ..................................................................... 87
         e. The Turkish BIT Program .................................................................... 88
         f. Other Sui Generis General Exception Clauses in BITs ............................ 89
      2. Sui generis General Exception Clauses in Other International Investment Agreements .... 92
         b. The General Exception Clause in the Investment Agreement for the COMESA CIA 95
   III. Conclusion .......................................................................................................... 96

C. The Anatomy of General Exception Clauses .............................................................. 97
   I. The Placement of General Exception Clauses in IIAs ............................................. 98
   II. Key Terms in General Exception Clauses ............................................................. 99
      1. Permissible Objectives .................................................................................... 99
         a. Protection of Human, Animal or Plant Life or Health and Other Health-related Objectives 100
b. Compliance with Laws and Regulations not Inconsistent with the Agreement 101

c. Conservation of Exhaustible Natural Resources 101

d. Protection of Public Order 101

e. Protection of Public Morals 102

f. Protection of the Environment 102

g. Protection of National Treasures of Artistic, Historic, or Archaeological Value 103

2. Nexus Requirements 103

   a. Necessary 104
   b. Relating to / Related to 105
   c. Imposed for 105
   d. Designed and Applied to / for 105
   e. Directed to 105
   f. Which it Considers Necessary 106
   g. No Nexus Requirements 106

3. Safeguards against Abusive Invocation 106

   a. “Chapeau” Requirements 107
      aa. Arbitrary or Unjustifiable Discrimination 108
      bb. Disguised Restrictions on International Investment (or Trade) 109
   b. Other Good Faith and Non-Discrimination Requirements 110
   c. Notification Requirements 111
   d. No Safeguards against Abuses 112

III. Conclusion 113

D. The Relevance of this Chapter’s Conclusions for the Remaining Study 114
Chapter Three  The Presence or Absence of General Exception Clauses in International Trade and Investment Law – a Historical Narrative of Different Economic Ideologies

A. The Presence of General Exception Clauses in International Trade Law 116

I. A Brief Historiography of General Exception Clauses in International Trade Agreements 117
1. General Exception Clauses in Bilateral Commercial Treaties of the Nineteenth and Early Twentieth Century 117
2. General Exception Clauses in the First Multilateral Trade Agreements of the 1920s 121
3. General Exception Clauses in the General Agreement on Tariffs and Trade 1947 125
4. General Exception Clauses in the General Agreement on Tariffs and Trade 1994 and in the General Agreement on Trade in Services 129

II. General Exception Clauses and Embedded Liberalism in the Postwar International Trade Regime 132
1. Embedded Liberalism as the Prevailing Institutional Design of the Postwar International Trade Regime 132
2. The Presence of General Exception Clauses as Manifestation of Embedded Liberalism in the GATT/WTO Regime 134

B. The Absence of General Exception Clauses in International Investment Agreements 136

I. The Absence of General Exception Clauses in the First Wave of IIAs in the 1960 and 1970s 136
1. Foreign Investment Protection under Customary International Law Prior to the Conclusion of the First IIAs 136
2. Impetus for the BIT Movement after World War II 139
3. The Emergence of the First IIAs 144
4. The Absence of General Exception Clauses in the First IIAs 146

II. The Absence of General Exception Clauses during the Proliferation of IIAs in the 1990s 147
1. The Proliferation of IIAs after the Cold War 148
## Table of Contents

2. The Ascendancy of Neoliberalism as the Prevailing Design of IIAs Concluded in the 1990s 149
3. The Absence of General Exception Clauses as Corollary of the Neoliberal Design of IIAs 151

### III. The Appearance of General Exception Clauses in a New Generation of IIAs

1. The Gradual Retreat of Neoliberal Premises from IIA Drafting Practice 152
2. The Inclusion of General Exception Clauses and other Defenses to Responsibility 154

### Chapter Four

The Role, Rationales, and Risks of General Exception Clauses in International Investment Law 156

A. The Role of General Exception Clauses in International Investment Agreements 156

B. The Rationales for General Exception Clauses in International Investment Agreements 160
   
   I. Stability of the International Investment Law Regime through Greater Regulatory Flexibility 160
   
   II. Increase in Predictability and Legitimacy of the System of Investment Treaty Adjudication 165

C. The Risks and Shortcomings Associated with General Exception Clauses in International Investment Agreements 170
   
   I. General Exception Clauses are Inherently Prone to Bad Faith Invocations 171
   
   II. General Exception Clauses Only Codify the Regulatory Flexibility that Already Exists in Current IIA Jurisprudence 177
   
   III. General Exception Clauses Lead to Less Regulatory Flexibility thanExists in Current IIA Jurisprudence 180
   
   IV. General Exception Clauses are Superfluous since Negative Lists Already Provide for Sufficient Regulatory Flexibility 184
   
   V. General Exception Clauses Will Make the Outcome of International Investment Disputes More Unpredictable 186
II. The Case for a Cross-Regime Fertilization as regards General Exception Clauses 237
   1. Comparable Texts of IIA General Exception Clauses and Article XX GATT or Article XIV GATS 237
   2. Comparable Purposes of IIAs and the GATT/GATS and of General Exception Clauses Contained Therein 239
   3. Structural Differences between Investor-State Arbitration and WTO Dispute Settlement 241
      a. Multilateral System vs. Bilateral Treaty Network 243
      b. Inter-State vs. Investor-State Dispute Settlement 243
      c. Permanent Adjudicators and Institutions vs. ad hoc Arbitrations 245
      d. Appellate Review vs. Annulment 245
      e. Prospective Remedies vs. Retrospective Remedies 246
   4. Appraisal 248
III. The Possibility of Accounting for WTO Jurisprudence during Investment Treaty Interpretation 250
C. The Interpretation of Key Terms in General Exception Clauses 253
   I. Permissible Objectives 254
      1. Protection of Human, Animal or Plant Life or Health and Other Health-Related Objectives 254
      2. Securing Compliance with Laws and Regulations 256
      3. Conservation of Living or Non-Living Exhaustible Natural Resources 257
      4. Protection of Public Morals 259
      5. Maintenance of Public Order 260
      6. Protection of National Treasures of Artistic, Historic, or Archaeological Value 261
      7. Protection of the Environment 262
      8. Other Explicit Permissible Objectives 263
   II. The Nexus Requirements 263
      1. Necessary 264
         a. The WTO Approach to Necessity 264
         b. The WTO Approach to Necessity in International Investment Law 267
      2. Related to / Relating to 269
      3. Imposed for 270
      4. Designed and Applied to / for 270
Table of Contents

5. Directed to 271
6. Which it Considers Necessary 271
7. No Nexus Requirement 272

III. The Introductory Clause ("Chapeau") 272
   a. Application of the Measure 273
   b. Arbitrary or Unjustifiable Discrimination 274
   c. Between Investments or between Investors (Where Like Conditions Prevail) 275
   d. Disguised Restriction of International Trade (or Investment) 275

3. The Relevance of the Chapeau to the Analysis of Nexus Requirements 277

IV. Notification Requirements 278

D. The Impact of Inconsistent Investment Treaty Practice 279
   I. The Impact of the Inclusion or Omission of General Exception Clauses in a Treaty on the Interpretation of Other Investment Disciplines in the Same Treaty 281
   II. The Interpretive Impact of the Inclusion or Omission of General Exception Clauses Across Different Treaties in the Same Treaty Program 283

E. Conclusion 288

Chapter Six The Relevance of General Exception Clauses for Selected Individual Standards of Treatment 290

A. General Exception Clauses and the Prohibition of Uncompensated Expropriation 290
   I. General Exception Clauses and the Obligation to Pay Compensation 290
   II. General Exception Clauses and Annexes on Indirect Expropriation 295

B. General Exception Clauses and the Fair and Equitable Treatment Standard 298
   I. General Exception Clauses and the International Minimum Standard of Treatment 298
   II. General Exception Clauses and the Protection of an Investor’s Legitimate Expectations 300
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>C. General Exception Clauses and the National Treatment Standard</td>
<td>303</td>
</tr>
<tr>
<td>I. Non-Discrimination Elements in General Exception Clauses</td>
<td>303</td>
</tr>
<tr>
<td>and the National Treatment Standard</td>
<td></td>
</tr>
<tr>
<td>II. General Exception Clauses and the Flexibility Provided under the</td>
<td>304</td>
</tr>
<tr>
<td>Prevailing Interpretation of the National Treatment Standard</td>
<td></td>
</tr>
<tr>
<td>Chapter Seven Conclusion</td>
<td>306</td>
</tr>
<tr>
<td>ANNEX I: General Exception Clauses in Current IIAs</td>
<td>309</td>
</tr>
<tr>
<td>ANNEX II: Zusammenfassung In Deutscher Sprache</td>
<td>403</td>
</tr>
<tr>
<td>Table Of Cases</td>
<td>411</td>
</tr>
<tr>
<td>Bibliography</td>
<td>419</td>
</tr>
</tbody>
</table>

Table of Contents
Table of Figures

<table>
<thead>
<tr>
<th>Figure</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Figure I:</td>
<td>BITs with General Exception Clauses between 1999 and 2016</td>
<td>56</td>
</tr>
<tr>
<td>Figure II:</td>
<td>Newly Concluded BITs (with general exceptions since 2000)</td>
<td>56</td>
</tr>
<tr>
<td>Figure III:</td>
<td>Newly Concluded PTIAs (with exceptions) since 2005</td>
<td>60</td>
</tr>
<tr>
<td>Figure IV:</td>
<td>PTIAs with general exceptions 2004 and general 2016</td>
<td>60</td>
</tr>
<tr>
<td>Figure V:</td>
<td>Total Number of IIAs with General Exceptions 2004 and 2016</td>
<td>65</td>
</tr>
<tr>
<td>Figure VI:</td>
<td>Typology of General Exception Clauses</td>
<td>96</td>
</tr>
<tr>
<td>Figure VII:</td>
<td>Permissible Objectives in IIA General Exceptions</td>
<td>100</td>
</tr>
<tr>
<td>Figure VIII:</td>
<td>Nexus Requirements in IIA General Exceptions</td>
<td>104</td>
</tr>
<tr>
<td>Figure IX:</td>
<td>Safeguards against Abusive Invocation in IIA General Exception Clauses</td>
<td>107</td>
</tr>
</tbody>
</table>
List Of Abbreviations

¶ / ¶¶ paragraph / paragraphs
APTA Asia Pacific Trade Agreement
Art(s.) Article(s)
ASEAN Association of South East Asian Nations
BIT bilateral investment treaty
BGBl Bundesgesetzblatt (Federal Law Gazette)
Cth Commonwealth of Australia
ECT Energy Charter Treaty
ed. / eds. editor / editors
et seq. and the following
FCN friendship, commerce, and navigation
FET fair and equitable treatment
FIPA foreign investment promotion and protection agreement
FTA free trade agreement
GA General Assembly
GATS General Agreement on Trade in Services
HCA High Court of Australia
ICSI D International Centre for Settlement of Investment Disputes
ICSID Convention Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IIA international investment agreement
ICJ International Court of Justice
ILC International Law Commission
ILM International Legal Materials
Inc. Incorporation (business)
LCIA London Court of International Arbitration
L.N.T.S. League of Nations Treaty Series
### List Of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ltd.</td>
<td>limited company</td>
</tr>
<tr>
<td>MAI</td>
<td>Multilateral Agreement on Investment</td>
</tr>
<tr>
<td>MFN</td>
<td>most favored nation</td>
</tr>
<tr>
<td>No.</td>
<td>number</td>
</tr>
<tr>
<td>Res.</td>
<td>Resolution</td>
</tr>
<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
</tr>
<tr>
<td>p. / pp.</td>
<td>page / pages</td>
</tr>
<tr>
<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
</tr>
<tr>
<td>PM</td>
<td>Philip Morris Asia Ltd.</td>
</tr>
<tr>
<td>PTIA</td>
<td>preferential trade and investment agreement</td>
</tr>
<tr>
<td>s / ss</td>
<td>section / sections</td>
</tr>
<tr>
<td>Stat.</td>
<td>United States Statutes at Large</td>
</tr>
<tr>
<td>TDM</td>
<td>Transnational Dispute Management</td>
</tr>
<tr>
<td>TPP Act</td>
<td>Tobacco Plain Packaging Act 2011 (Cth)</td>
</tr>
<tr>
<td>TRIMS Agreement</td>
<td>Agreement on Trade-Related Investment Measures</td>
</tr>
<tr>
<td>TRIPS Agreement</td>
<td>Agreement on Trade-Related Intellectual Property Rights</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
</tr>
<tr>
<td>US</td>
<td>United States</td>
</tr>
<tr>
<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties, 23 May 1969</td>
</tr>
<tr>
<td>WHO</td>
<td>World Health Organization</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organization</td>
</tr>
</tbody>
</table>
Chapter One  Introduction

A.  Introduction to the Research Theme

The subject of this study is the examination of the appearance of general exception clauses in a new generation of international investment agreements (IIAs). General exception clauses act as justifications for domestic measures that would normally be prohibited under international investment law. When a host State takes a regulatory measure to pursue non-economic objectives, such as e.g. the promotion of public health or the protection of the environment, these measures may conflict with the goal of investment protection under IIAs. This begs the legal question: Can these prima facie treaty violations be remedied because they advance a legitimate non-economic objective? Addressing this tension between investment protection and the pursuance of non-economic objectives in international investment law by means of general exception clauses is the main focus of this study.

Non-economic objectives are of high importance to States. They possess an intrinsic value that States are obliged to protect vis-à-vis their populations, even if their pursuance would amount to a violation of the States’ international obligations. Viewed from the perspective of the international investment law regime, however, domestic measures aimed at the furtherance of a legitimate public interest, like any other governmental measure, may impair foreign investment. A host State that wishes to protect animal and plant life or the environment in a certain area may find itself at odds with the business interests of a foreign investor that has acquired nearby land in order to develop it as a tourist and recreational resort. Foreign tobacco producers may see the commercial utility of their investment in the form of intellectual property rights threatened in light of go-

---

1 The term “International Investment Agreement” (IIA) is used throughout this text to refer to treaties signed by two or more countries to protect and promote investments made by one country’s investors in another country. It encompasses classical stand-alone bilateral investment treaties (BITs) as well as bilateral or regional preferential trade and investment agreements (PTIAs) and sectorial agreement that contain investment obligations.
vernamental plans to promote public health by regulating tobacco packaging. This is where general exception clauses for the pursuance of non-economic objectives become relevant. In their absence, domestic public interest measures will often be considered unlawful under an applicable IIA. In consequence, the host State will be held liable to pay damages to the foreign investor for the impairment of the investor’s property rights.

The topic is not of purely academic interest. Quite to the contrary, in their role as law- and policy-makers States have to assess on a daily basis whether their regulatory measures will attract liability under international investment law. How to properly reconcile investment protection and non-economic objectives within the IIA framework is thus very much a practical problem. The enquiry is considerably complicated by the fact that international investment tribunals have not yet converged on a dominant approach to this question. While some tribunals are inclined to consider public interest justifications, others focus solely on the adverse economic effect of the measure. Part of the problem is that classical international investment law does not provide for obvious openings to which host States’ public interest considerations may readily be attached.

This situation has given rise to considerable dissatisfaction among States and calls for a substantial reform of the system have been voiced. Some States have threatened to abandon international investment law altogether. Others have been less radical and have embarked upon the recalibration of their IIAs in search of a more adequate balance between investment protection and non-economic objectives. In this process, the inclusion of general exception clauses in IIAs has become the means of choice of a growing number of States. General exception clauses allow States to pursue non-economic public policy goals at the expense of their international investment law obligations under the circumstances specified in each individual clause and, therefore, assist in balancing the competing interests of host States and foreign investors.

Yet, their appearance in IIAs is comparatively recent. Nevertheless, it is not too early to predict that their inclusion will have significant implications for the international investment regime as a whole. While IIAs have long been understood as strong instruments of investment protection and promotion, the presence of defenses to liability for the pursuance of non-economic policy objectives calls this into question. Caution is particularly salient in order that the result of the necessary balancing process between investment interest and non-economic objectives does not unduly frustrate...
the system’s goal of investment protection and undermine the investment
treaty regime as a whole.

In fact, the question as to how to properly reconcile investment protec-
tion and non-economic objectives within the IIA framework has policy
implications that go well beyond the legal dimension of an individual con-

flict. Only if international investment law can demonstrate that its horizon
is not restricted to investment protection and investment promotion but
that it is also able to take into account broader non-economic objectives
that are of paramount importance to the State community, is it likely to
continue its unprecedented success story.

B. The Right to Regulate in the Public Interest and International
Investment Law

General international law recognizes that States possess the sovereign
right to regulate within their territories for the benefit of their populations.
The question of how this general right to regulate is to be reconciled with
the constraints that international investment law poses on the regulatory
flexibility of host States is a matter of some debate and has given rise to
what some perceive to be a legitimacy crisis of international investment
law.

I. The Right to Regulate in the Public Interest Under General
International Law

Under general international law, a State has the inherent sovereign right to
regulate in the public interest of its population unless either it has abridged
this power, for instance by entering into a binding international agreement,
or to do so is prohibited by another rule of international law. The most
fundamental articulation of this principle can be found in the seminal Lo-
tus case of 1927 before the Permanent Court of International Justice, in
which the Court held that:

“International law governs relations between independent States. The rules of
law binding upon States therefore emanate from their own free will as expres-
sed in conventions or by usages generally accepted as expressing principles of
law and established in order to regulate the relations between co-existing in-
dependent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.”

This *Lotus* principle expresses the fundamental presumption that what is not prohibited under international law is necessarily permitted or at least tolerated by it. It has been affirmed in subsequent case law of the International Court of Justice, for instance in the famous *Nicaragua* decision in which the Court explained that:

“A State’s domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law. Every State possesses a fundamental right to choose and implement its own political, economic and social system”

The principle is also reflected in the more recent jurisprudence of the International Court of Justice. When confronted with the question of the legality of the unilateral declaration of independence of Kosovo, the Court argued that Kosovo’s actions are permissible under international law since no rule of international law prohibits them. In sum, therefore, if State action is not expressly prohibited by international law, it is consequently tolerated. Assuming there is no applicable international legal commitment, States are thus allowed under international law to regulate to advance the public welfare of their population.

Applying this general principle to international investment law, the question arises whether and to which extent States have eliminated their sovereign right to regulate in the public interest by entering into IIAs. On this issue, there is considerable disagreement between proponents and crit-

---

2 *The Case of the S.S. Lotus (France v. Turkey)*, P.C.I.J. Series A No. 10 (1927), Judgment of 7 September 1927, p. 18.
5 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, I.C.J. Reports 2010, 403, ¶84 (“The Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law.”).
ics of the current system of international investment law. While the proponents argue that IIAs do not substantially impair the State’s ability to engage in good faith and non-discriminatory regulation, the critics perceive the deprivation of regulatory flexibility as one of the core reasons of what they view as a legitimacy crisis of international investment law.

II. The Right to Regulate and the Legitimacy Crisis of International Investment Law

The reasons for the current legitimacy crisis of international investment law are rooted in a number of fundamental developments that have taken place since the conclusion of the first IIAs some fifty years ago and some forty years after the inclusion of the first investor-State dispute settlement mechanism in IIAs. They have led to growing State discontent with the path international investment law has taken.

First, the number of concluded IIAs has skyrocketed in the past decades. As of the end of 2016, 3324 IIAs had been concluded by the State community, accounting for approximately eight times more than were in force some twenty years earlier.⁷ At the same time, the number of investment disputes brought under these treaties has risen significantly. At least 767 treaty-based investment disputes were publicly known by the end of 2016, which means that approximately seven times more disputes were arbitrated than fifteen years earlier.⁸ Moreover, developed States have increasingly become the target of investment arbitrations in recent years.⁹ This is a significant development considering that IIAs were long characterized by a certain asymmetry in the treaty Parties. While formally imposing identical obligations on both Parties, the assumption on part of developed States has been that in practice all obligations fell on the developing State Party. This perception has changed in recent years and, inevitably, the risk of being sued under an applicable IIA has grown for developing countries and developed countries alike.

---

⁹ See, e.g., UNCTAD, Recent Developments in Investor-State Dispute Settlement, IIA Issues Note No.1, May 2013, p. 2.
However, investment disputes have not only changed in quantitative terms but also as regards their quality. While the initial focus of IIAs lay on the protection of foreign property against unlawful expropriations, foreign investors nowadays increasingly use international investment law as a means to challenge a broad range of host States’ regulatory policies, including, but not limited to, measures adopted to protect the environment, to promote public health, to implement national energy policies, and to combat economic crises.

In consequence of this development, investment disputes have become more complex. Arbitrators are increasingly confronted not only with the legal dimension of a given dispute but are also asked to deal with the broader policy rationales that a challenged State measure purports to implement. This gives rise to a whole range of difficulties. For one, it is often argued that investment arbitrators with a predominantly commercial arbitration background lack the basic expertise that is required to adequately assess the public interest considerations motivating the majority of challenged State measures. The concern here is that tribunals may give too little weight to justification in the form of general public interest considerations and thereby curtail the role of States as primary regulators. More importantly, the issue also raises concerns as regards the tribunals’ lack of democratic accountability. The investor-State dispute settlement mechanism empowers foreign investors to bypass local courts and seek compensation before international tribunals. It hence allows them to second-guess and challenge regulatory measures taken for the furtherance of the public good that were enacted by the host State’s parliamentary assembly as the democratically elected representation of the State’s population.

The situation is aggravated by the fact that tribunals have only partially been inclined to consider public interest justifications put forward by host States. The majority has adopted an expansive, investor-friendly interpretation of IIA obligations, referencing the investment protection and promotion objectives of IIAs, and has largely disregarded the public interest in their enquiry of a violation. In light of this, criticisms have been voiced that BITs would constitute imbalanced instruments that focus solely on investment protection at the expense of the interests of the host State. It also resulted in a considerable split in the different strands of jurisprudence. In the absence of an appellate mechanism to remedy incoherent rulings, this has contributed to growing legal uncertainty in practice. The ensuing unpredictability of the outcome of an investment case poses significant re-
strictions on the sovereign regulatory power of host States that they may have not foreseen or intended when they entered into their IIAs.

Considered jointly, these developments have led to a deep State dissatisfaction with the investment treaty system as it currently stands. This dissatisfaction is not so much about the outcome of the cases but focuses on the underlying reasoning. In view of the manifold divergent lines of jurisprudence, it has become practically impossible for States to get an accurate sense of what their risk-profile is when undertaking legislation in areas that may touch upon foreign investment. Considering what is at stake, namely the very sovereignty of host States to enact regulation within their territories to benefit their populations without being second-guessed by democratically unaccountable international tribunals, this situation may result in what is known as a “regulatory chill”.

The widespread dissatisfaction has encouraged States to scrutinize their continued membership in the investment treaty network. First notions of a rising “legitimacy crisis” of the system of international investment law appeared in the aftermaths of the cases relating to the Argentine financial crisis 2001-2002. Unsurprisingly, the initial blow to the system then also came from Latin American countries. In April 2007, Bolivia was the first country to notify the International Center for the Settlement of Investment Disputes (ICSID) of the withdrawal of its consent to submit arbitrations relating to natural resources to investor-State dispute settlement under the ICSID Convention. Ecuador followed suit and announced in early 2008 that it would denounce some of its BITs. Also Nicaragua and Venezuela have signaled that they intend to terminate existing BITs. The implications of these steps, taken almost a decade ago, have long been underestimated by the State community and by academic commentators. Most developed States have regarded them as singular actions that were triggered by domestic political considerations rather than by a genuine legal dissatisfaction with the system. It certainly has not helped that the steps were

10 The term “chilling effect” or “regulatory chill” describes a scenario in which States are “unwilling to undertake legitimate regulation for fear of lawsuits from investors.” See UNCTAD, World Investment Report 2003: FDI Policies for Development: National and International Perspectives, p. 111.
taken by developing, and thus capital-importing, countries that had been critical of the notion of foreign investment for some time. This perception of the investment community has only changed more recently when Australia, in reaction to an investment challenge to its tobacco plain packaging legislation, announced in 2011 that it would not include investor-State dispute settlement mechanisms in its future IIAs.\(^\text{13}\) The inference is that domestic courts are more appropriate bodies than international tribunals to solve investment disputes between host States and foreign investors.\(^\text{14}\)

Australia thus became the first developed, capital-exporting State – and therefore natural supporter of international investment law – to announce its intention to abandon the system of investor-State dispute settlement. However, it has not remained the only country to reconsider its exposure to investment claims. In fact, States’ discontent with the current system has become increasingly visible in recent years. In late 2012 and 2013, South Africa terminated some of its BITs in reaction to an investment challenge to its affirmative action policy in the mining sector.\(^\text{15}\) Indonesia has announced that it will terminate more than sixty of its BITs to prevent the exploitation of the investor-State dispute settlement mechanism by multinational companies.\(^\text{16}\) Perhaps most significantly, in early 2014 Germany – another traditional supporter of comprehensive foreign investment protection – surprised many by declaring its intention to veto the inclusion of an investor-State dispute settlement mechanism in the landmark Transatlantic Trade and Investment Partnership Agreement (TTIP Agreement) prior to the suspension of the negotiations between the United States of America and the European Union. One may well speculate whether Germany’s opposition had its roots in the arbitration that the Swedish energy

---

15 Piero Foresti, Laura de Carli & Others v. The Republic of South Africa, ICSID Case No. ARB(AF)/07/01, Award, 4 August 2010.
company Vattenfall has brought against Germany for the German decision to phase-out nuclear energy in 2011.\textsuperscript{17}

In light of recent developments in international investment law, State opposition to the current system of investor-State dispute settlement is growing. While some States chose to turn their backs on the system to one degree or another, others are exploring ways to more adequately reconcile investment protection with legitimate non-economic policy concerns of host States. One such instrument that is employed by a growing number of States is the inclusion of general exception clauses for the pursuance of non-economic objectives as defenses to liability.

III. Case Study: Philip Morris Asia Ltd. v. The Commonwealth of Australia (“Plain Tobacco Packaging”)

The arbitration \textit{Philip Morris Asia Ltd. v. The Commonwealth of Australia} is an insightful example of the above causes and implications of the legitimacy crisis. It constitutes one of the most prominent recent conflicts between investment protection and the host States’ regulatory flexibility to pursue policy objectives and is included here to demonstrate how easily conflicts can arise when host States regulate for the public good.

On 29 April 2010, the Australian Government announced its decision to introduce plain packaging of tobacco products.\textsuperscript{18} This decision was implemented by the Australian Parliament through the enactment of the Tobacco Plain Packaging Act 2011 (Cth) (TPP Act), which received Royal Assent on 1 December 2011. Most of its substantive provisions entered into force on 1 October 2012, with the remainder applying from 1 December 2012.\textsuperscript{19}

\begin{flushleft}

\textsuperscript{18} Sometimes more accurately referred to as “generic”, “standardized” or “homogenous packaging.”.

\textsuperscript{19} \textit{Tobacco Plain Packaging Act 2011 (Cth)}, s 2.
\end{flushleft}
The TPP Act imposes significant restrictions on the color, shape, finish and other details of retail packaging of tobacco products.\(^{20}\) In particular, all outer and inner surfaces of the retail packaging must have a matt finish and be in a particular shade of drab dark brown or as prescribed by regulation.\(^{21}\) Trademarks and other marks, such as graphics, symbols or letters, are precluded on tobacco products or retail packaging with the exception of the "brand, business or company name" as well as the variant name which may continue to appear in a specified location, standard color, font style and size.\(^{22}\) Decorative ridges, colored glue, inserts, noises, scents and other creative means of circumventing these requirements are prohibited as well.\(^{23}\) The sale, supply, purchase, packaging or manufacturing of non-compliant products or products packed in non-compliant retail packaging may draw criminal offences and civil penalties.\(^{24}\)

The stated legislative objectives are twofold: First, plain packaging is intended to improve public health, including by discouraging smoking initiation, encouraging smoking cessation, discouraging relapse and reducing exposure to second-hand smoke.\(^{25}\) Moreover, the TPP Act implements Australia’s obligations as a party to the World Health Organization Framework Convention on Tobacco Control.\(^{26}\) Plain packaging is expected to achieve these objectives by reducing the appeal of tobacco products to customers, increasing the effectiveness of health warnings on the retail packaging of tobacco products and reducing the ability of the retail packaging of tobacco products to mislead customers about the harmful effects of smoking or using tobacco products.\(^{27}\)

Given the likely implications of the TPP Act, it is not surprising that tobacco companies have consistently expressed their opposition to plain packaging and have announced their intention to challenge respective legislation in domestic and international fora. Domestically, international tobacco companies contested the TPP Act under Section 51(xxxi) of the

---

20 *Tobacco Plain Packaging Act 2011 (Cth)*, s 18.
21 *Tobacco Plain Packaging Act 2011 (Cth)*, s 19.
23 *Tobacco Plain Packaging Act 2011 (Cth)*, ss 18, 23, 24, 25.
25 *Tobacco Plain Packaging Act 2011 (Cth)*, s 3(1)(a).
27 *Tobacco Plain Packaging Act 2011 (Cth)*, s 3(2).
Constitution of Australia, arguing that the TPP Act would amount to an unconstitutional acquisition of the tobacco companies’ intellectual property rights and goodwill on unjust terms. Section 51(xxxi) grants the Australian Government the power to make laws with respect to “the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.” The provision thus does not only confer a power on the government but also makes the acquisition of property contingent on a constitutional guarantee of just compensation. The High Court of Australia rejected this challenge on 15 August 2012 by a six to one majority. The reasoning was published on 5 October 2012.\textsuperscript{28} The Court held that while the intellectual property rights of the trademark owners were “property” capable of attracting the protection of Section 51(xxxi), no acquisition existed since the TPP Act does not involve a proprietary gain on the part of Commonwealth. Specifically, it neither confers a proprietary interest or benefit in the packaging nor does it create a legal relation between the Government and the retail packaging.\textsuperscript{29} The TPP Act was therefore held to be consistent with Section 51(xxxi) of the Constitution of Australia. This outcome has been expected in the light of established Australian constitutional doctrine. In contrast, assessments of the prospects of the dispute resolution proceedings on the international stage have varied.

Before the WTO, Australia’s plain packaging legislation was under challenge by Ukraine, Honduras, the Dominican Republic, Indonesia, and


Cuba which on 17 August 2012, 17 October 2012, 14 November 2012, 3 March 2014, and 14 April 2014 respectively launched disputes with Australia concerning the consistency of the TPP Act with Australia’s international obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights, the Agreement on Technical Barriers to Trade, and the General Agreement on Tariffs and Trade 1994. The complainants argue that Australia’s plain packaging legislation breaches these Agreements as it is more trade-restrictive than necessary and unjustifiable infringes on trademark rights. A closer legal examination of the various complaints put forward goes well beyond the confines of this study. For the present purposes, it is sufficient to note that the majority

30 *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, Request for the Establishment of a Panel by Ukraine, WT/DS434/12, 17 August 2012.

31 *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, Request for the Establishment of a Panel by Honduras, WT/DS435/17, 17 October 2012.

32 *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, Request for the Establishment of a Panel by the Dominican Republic, WT/DS441/16, 14 November 2012.

33 *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, Request for the Establishment of a Panel by Indonesia, WT/DS467/16, 6 March 2014.

34 *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, Request for the Establishment of a Panel by Cuba, WT/DS458/15, 14 April 2014.


of commentators agree that the WTO challenges are ultimately unavailing.  

Similarly, according to a confidential interim report which was leaked in the first half of 2017, the identically composed panels found that the Act constituted a legitimate public health measure.

In addition to the above, on 21 November 2011, the tobacco company Philip Morris Asia Limited (PM) commenced international investment arbitral proceedings against the Commonwealth of Australia, maintaining that various violations of the 1993 Hong Kong – Australia BIT occurred. The tribunal has been constituted as of 15 May 2012. In particular, PM asserted that Australia unlawfully expropriated its investment (Article 6(1) of the BIT), has treated PM’s investment unfairly and inequitably (Article 2(2) BIT), failed to accord PM’s investment full protection and security (Article 2(2) BIT), unreasonably impaired PM’s investment (Article 2(2) BIT) and infringes the BIT’s observation of undertakings (“umbrella”) clause (Article 2(2) BIT).  

For the sake of brevity, only the prospects of the expropriation claim, Article 6(1) BIT, and the allegation of a violation of the fair and equitable treatment standard, Article 2(2) BIT are considered below. Arguably, these two would have been PM’s strongest claims, had the dispute proceeded to the merits stage.

As concerns the expropriation claim, in the absence of a clear-cut definition, investment tribunals have framed the assessment of whether an indirect expropriation has occurred by evaluating a number of different factors. These factors include the degree and duration of interference with the investment, the deprivation of control of the use or enjoyment of the in-

---

38 For an extensive discussion of WTO issues raised by this dispute refer to, for instance, Shmatenko, 4 Czech Yearbook of International Law 27 (2013); Voon/Mitchell, in: Voon et al. (eds.), Public Health and Plain Packaging of Cigarettes: Legal Issues 109 (2012); and Voon/Mitchell, 22 Public Law Review 218 (2011).


41 See, e.g. Alpha Projektholding v. Ukraine, ICSID Case No. ARB/07/16, Award, 8 November 2010, ¶408; AES Summit Generation v. Hungary, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶14.3.1-14.3.3; Suez v. Argentina, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, ¶122-123.
vestment,⁴² and the legitimate expectations of investors.⁴³ Other tribunals also took into account the State’s intention,⁴⁴ whether the measure was taken for a legitimate purpose⁴⁵ and whether the measure was proportionate considering the public interest sought and the interference with the investment.⁴⁶

PM contends that Australia’s plain packaging legislation amounts to an indirect expropriation because it substantially deprives PM of the value of its shares and destroys the commercial value of its intellectual property and goodwill.⁴⁷ Australia counters that its legislation constitutes a non-dis-

⁴² For example Toto Costruzioni Generali v. Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, ¶185; Biwater Gauff (Tanzania) v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶452; LG&E Energy Corp v. Argentina, ICSID Case No. ARB 02/1, Decision on Liability, 3 October 2006, ¶199; Azurix v. Argentina, ICSID Case No. ARB/01/12, Award, 14 July 2006; SD Myers v. Canada, First Partial Award, 13 November 2000, ¶¶280, 287; Pope & Talbot v. Canada, Interim Award, 26 June 2000, ¶96.

⁴³ See, e.g. Grand River Enterprises Six Nations Ltd v. United States of America, Award, 12 January 2011, ¶¶127, 141; Methanex v. United States of America, Final Award, 3 August 2005, Part IV, Chapter D, ¶7; Metalclad v. Mexico, Award, ICSID Case No. ARB(AF)/97/1, 30 August 2000, ¶107.

⁴⁴ For instance Siemens v. Argentina, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶270.

⁴⁵ Also known as the “police powers” doctrine. For example employed in Suez v. Argentina, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, ¶¶147-148; Fireman’s Fund Insurance Company v. Mexico, ICSID Case No. ARB(AF)/02/01, Award, 17 July 2006, ¶176(j); Saluka Investments v. Czech Republic, Partial Award, 17 March 2006, ¶¶254-255; Técnicas Medioambientales Tecmed v. Mexico, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶119; Patrick Mitchell v. The Democratic Republic of Congo, ICSID Case No. ARB/99/7, Decision on Annulment, 1 November 2006; Pope & Talbot v. Canada, Interim Award, 26 June 2000, ¶99.

⁴⁶ LG&E Energy Corp v. Argentina, ICSID Case No. ARB 02/1, Decision on Liability, 3 October 2006, ¶¶189, 195; Fireman’s Fund Insurance Company v. Mexico, ICSID Case No. ARB(AF)/02/01, Award, 17 July 2006, ¶176(j); Técnicas Medioambientales Tecmed v. Mexico, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶¶122, 132.

criminatory, *bona fide* regulation for the protection of public health and thus cannot amount to compensable expropriation.⁴⁸ The prospects of success of PM’s expropriation claim therefore seem to depend on the line of reasoning that the tribunal will be inclined to follow.⁴⁹ If the tribunal adopts a purely economic reading of the expropriation standard, arguably the prevailing interpretation, it will find an adverse impact on the economic value or a substantial deprivation of the use, control or enjoyment of the investment sufficient to constitute indirect expropriation. In that case, PM may prevail since, while formally retaining title to its intellectual property rights, it is no longer able to use them in a meaningful way to distinguish its products from the products of its competitors. On the other side, if the tribunal were to sign up to the strand of jurisprudence that the regulatory objective of the plain packaging legislation must be considered in the expropriation analysis as well, Australia’s chances of success grow as long as it can prove that the TPP Act constitutes a non-discriminatory regulation intended to protect public health. In light of the diverging lines of jurisprudence, it is difficult to foresee how the tribunal will decide on the issue.

With regard to the fair and equitable treatment standard, tribunals assess governmental regulation according to the principles of reasonableness, consistency and transparency. Among other things, the standard has been interpreted to protect legitimate expectations of the investor by preventing host States from making *ex post* changes in the legal framework applicable to the investment.⁵⁰ PM points to the adverse impact that plain packaging would have on its investment and maintains that the legislation does not have a demonstrable utility to improve public health to balance this impairment. Therefore, PM alleges that Australia has violated its legitimate

---


expectations for investing in Australia.\textsuperscript{51} Australia on the other hand denies the existence of legitimate expectations on part of PM and submits that the plain packaging legislation is reasonably based on a broad range of scientific reports and studies which prove the beneficial effect of plain packaging on public health.\textsuperscript{52} In practice, the fair and equitable treatment standard has often been accorded an expansive reading and has become one of the sharpest weapons of investors. Again, the outcome of the challenge is unforeseeable and depends on whether the tribunal adopts an expansive or a narrower reading of the standard.\textsuperscript{53}

The investment claim is probably of most concern to Australia. Unlike in the Australian Constitution, the concept of “(indirect) expropriation” is defined very broadly under investment treaties. Unlike in the WTO system, no exception exists under the majority of Australian BITs for measures aimed at the protection of public health.\textsuperscript{54} This is a regrettable shortcoming considering that Australia regularly incorporates general exception provisions explicitly allowing public health measures in its PTIAs but refrains from including similar clauses in its BIT program.\textsuperscript{55} In particular, the applicable 1993 Hong Kong – Australia BIT does not contain a pertinent general exception provision.

The ramifications of the PM arbitration against Australia have the potential to change the whole landscape of international investment law.\textsuperscript{56} It led Australia to announce in its trade policy statement of 2011 that it would not include investor-State dispute settlement mechanisms in its future agreements.\textsuperscript{57} The statement underlined that Australia would not “support provisions that would constrain the ability of Australian govern-


\textsuperscript{52} Philip Morris Asia Limited v. The Commonwealth of Australia, PCA Case No. 2012-12, Australia’s Response to the Notice of Arbitration, 21 December 2011, ¶¶47-50.


\textsuperscript{54} For a similar assessment see Kurtz, 27 ICSID Review 65, 71-72 (2012).

\textsuperscript{55} For details see Chapter Two, Part A, II.

\textsuperscript{56} Cf. Ng, 2 European International Arbitration Review 41, 49 (2013).

ments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses.” Furthermore, it expressly stated that “[t]he Government has not and will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products [...]”

While other States have previously turned their back on the current system of international investment protection, Australia represented the first capital-exporting and Western country to announce this step. Although the Australian government reverted to a case-by-case assessment of IIAs in late 2013, this sudden hostility of a former natural proponent of the system reveals the growing discontent of a larger number of States with how poorly the current international investment regime accommodates regula-

---


59 Australian Government, Department of Foreign Affairs and Trade, Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity, 14 April 2011, p. 14. For the argument that investor standing in BIT dispute settlement is the most central feature of such treaties, see Schill, in: Waibel, et al. (eds.), The Backlash against Investment Arbitration 29 (2010). After the Gillard government lost power in general elections in 2013, Australia started considering investor-State dispute settlement on a case-by-case basis. On 8 April 2014, signed the Korea – Australia PTIA, which includes an investor-State dispute settlement mechanism in Chapter 11, Section B. In this respect, the Australian Government contends that it “has ensured the inclusion of appropriate carve-outs and safeguards in important areas such as public welfare, health and the environment” which will promote “investor confidence and certainty in both countries.” It thus explicitly uses the inclusion of general exceptions for non-investment policy objectives as an argument which has allowed it to agree to further investor-State dispute settlement, see http://dfat.gov.au/trade/agreements/kafta/fact-sheets/pages/korea-australia-free-trade-agreement-kafta-key-outcomes.aspx (last visited 12 November 2017). The general exception provision applicable to the investment chapter is found in Article 22(1) of the Korea – Australia PTIA. Subsequently, Australia also agreed to the inclusion of ISDS provisions in a number of other agreements, including the PTIA with China.
tory concerns of host States.\textsuperscript{60} It certainly makes it more difficult for advocates of the system to marginalize the increasing State opposition.\textsuperscript{61}

As demonstrated in more detail below,\textsuperscript{62} Australia’s defense profile in the PM arbitration would have benefited greatly from the inclusion of a general exception provisions. In fact, such a clause would have provided for much needed legal certainty as regards the outcome of the case, and might have also prevented PM from bringing a futile claim in the first place.\textsuperscript{63}

The PM tribunal eventually bifurcated the proceedings by procedural order dated 14 April 2014, reviewing the parties’ arguments on jurisdiction and admissibility in a preliminary stage. In December 2015, the tribunal rejected PM claims as inadmissible, following Australia’s argument that PM Asia embarked on treaty-shopping by acquiring shares in PM Australia in the full knowledge of the government’s decision in 2010 to introduce plain packaging.\textsuperscript{64} As a consequence of this decision, the tribunal did not need to, and did not, pronounce itself on the merits of the dispute and, therefore, on the substantive relationship between plain tobacco packaging and investment protection. Instead, it dismissed the case on procedural grounds. Although this may appear unsatisfactory to stakeholders who were anxiously expecting the outcome of this case, the tribunal was obliged to address the Australian objections to jurisdiction and admissibility before embarking upon a substantive analysis, and unanimously upheld them. Consequently, there was no basis for the Tribunal to embark on an analysis of the merits.\textsuperscript{65}

\textsuperscript{60} As Sornarajah, in: Trakman/Ranieri (eds.), Regionalism and International Investment Law 475, 475 (2013) highlights, it is remarkable that Australia took this step even before any adverse arbitral award was made against it.

\textsuperscript{61} See Kurtz, 27 ICSID Review 65, 85 (2012).

\textsuperscript{62} See \textit{infra} Chapter Seven.


\textsuperscript{64} See Philipp Morris Asia Limited v. The Commonwealth of Australia, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, para. 588.

\textsuperscript{65} The Tribunal in the parallel arbitration Philipp Morris Brands Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, had to address similar or identical issues and rendered an award on the merits. The Claimant in that matter argued that measures taken for the public benefit may still result in an expropriation, which “is further emphasized by the lack of any provision in the BIT pro-
C. Scope and Terminology

Before embarking upon a closer analysis of general exception clauses in the current investment treaty landscape, it is necessary to define what is meant if this study refers to general exception clauses.

In fact, several kinds of exceptions and defenses to IIA obligations exist, both by means of express treaty provisions and under applicable customary international law. While a 2007 study has shown that express exception clauses appear in at least 200 IIAs to date, the definition of the term is by no means unambiguous. The majority of these clauses deals with essential security interests of the host State, excludes specific economic sectors from the application of the IIA, or applies only to specific obligations as opposed to the IIA in general. Only a minority of mostly recently concluded IIAs entails clauses with a general scope of application that encompass exceptions for a variety of non-economic public policy objectives. The latter are also referred to as general exception clauses and are the main focus of the present study. As such, they are readily distinguishable from security exceptions, other more limited IIA exception clauses and other similar provisions, the treatment of which exceeds the confines of this study.

Providing for ‘carve-outs, exceptions or saving presumptions for public health or other regulatory actions’ as they existed in other IIAs (Award, 8 July 2016, para. 184). The tribunal found that the Respondent enjoyed a “margin of appreciation” when making public policy determinations (Award, 8 July 2016, paras. 399-401) and ultimately dismissed the claims. In a concurring and dissenting opinion, Mr. Gary Born, one of the three members of the tribunal, harshly criticized the majority for their use of the “margin of appreciation” doctrine as “[n]either mandated [n]or permitted by the BIT or applicable international law”. (Concurring and Dissenting Opinion of Gary Born, 8 July 2016, para. 87). Despite the award, the question as to how to properly reconcile the regulatory powers of a State with its investment obligations therefore remains highly contentious.

Customary international law defenses against liability under an IIA include necessity, consent, force majeure, acquiescence and estoppel; for an overview see Newcombe/Paradell, Law and Practice of Investment Treaties, pp. 510-528 (2009).

I. General Exceptions, Security Exceptions, Specific Exceptions, and Other Similar Provisions

1. General Exception Clauses

General exception clauses are a comparatively recent phenomenon in international investment treaty practice. A growing number of States include them in their IIAs in order to balance investors’ rights with regulatory concerns of the host State. By permitting host States to take measures necessary for or relating to an exhaustive list of politically motivated non-investment policy objectives without incurring liability under the IIA, general exception provisions enshrine the States’ sovereign right to regulate in the covered public interest areas. Thereby, they constitute a compromise in cases of normative conflicts between the two sometimes-competing goals of comprehensive investment protection on the one hand and the pursuance of legitimate non-economic public welfare objectives on the other hand. Rather than asking a tribunal to intuitively balance these potentially opposing objectives in determining whether a breach of a substantive treaty provision has occurred, the clause directs the tribunal to specific requirements that public interest measures need to comply with in order to derogate from the host State’s treaty obligations. General exception clauses are “general” since they apply to the IIA as a whole as opposed to only a limited number of particular treaty obligations. As long as the contested measure falls under the listed exceptions and fulfills all other prerequisites of the clause, the host State is relieved from the duty to pay compensation for the violation of any or most substantive IIA disciplines.

68 The following section seeks to give a working definition of general exception provisions in IIAs subject to more comprehensive elaborations in subsequent chapters.

69 For details on the prevalence rates see infra Chapter Two, Part A.

70 Occasionally, the text of the clause provides for substantive provisions that are excluded from its ambit. For instance, Article 14 of the Japan – Thailand FTA (signed 3 April 2007, entered into force 1 November 2007) excludes the issue of compensation for damages suffered during armed conflict or a state of emergency from the general exception provision. Similarly, Article 24(1) of the Energy Charter Treaty (signed December 1994, entry into force 16 April 1998) provides that the general exception clause does not apply to the provision dealing with compensation for losses encountered during war or armed conflict (Article 12 ECT) or the expropriation provision (Article 13 ECT).
Interestingly, IIA general exception clauses are often, but not necessarily, based on or incorporate similar provisions found in WTO treaties, in particular Article XX GATT and Article XIV GATS.\(^{71}\) Probably the most prominent example of this practice is Article 10 of the Canadian Model FIPA 2004, which closely resembles Article XX of the GATT in significant part and provides as follows:

“**Article 10 – General Exceptions**

1. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:
   (a) to protect human, animal or plant life or health;
   (b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or
   (c) for the conservation of living or non-living exhaustible natural resources.”

As demonstrated by the above example, general exception clauses usually consist of three elements: First, they encompass a list of non-investment public welfare objectives for the pursuance of which a deviation from the IIA is allowed. The kind and number of the protected values, and thus the general exception clauses’ scope, varies depending on the regulatory needs of the States and the major concerns prevalent in their respective civil societies.\(^{72}\) Secondly, general exception clauses regularly stipulate the required relationship between the contested State measure and the pursued objective the State has to establish for the measure to qualify under the exception.\(^{73}\) And lastly, general exceptions often incorporate safeguards against abusive invocation.\(^{74}\)

---

71 For details on the typology of IIA general exception clauses see *infra* Chapter Two, Part B.
72 For details see *infra* Chapter Two, Part C, II, 1.
73 For details see *infra* Chapter Two, Part C, II, 2.
74 For details see *infra* Chapter Two, Part C, II, 3.
2. Security Exception Clauses

It is imperative to distinguish general exception provisions from security exceptions clauses. Security exceptions are more frequently used in IIAs than general exception clauses and feature prominently in arbitral proceedings involving the Argentine financial crisis 1998-2002. They relieve the host State from its duty to comply with its treaty obligations in extraordinary times of political, national or international emergency or social disorder. Examples of such situations classically include war, armed conflict, civil strife, and threats to international peace or security, but have been interpreted to also encompass severe economic depressions. A prime example of a security exception clause is Article 18 of the U.S. Model BIT 2012. It reads as follows:

“Article 18: Essential Security
Nothing in this Treaty shall be construed:
1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or
2. to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests. “

Comparable to the aforementioned general exceptions, security exceptions typically apply to all obligations under an IIA and relieve the host State from liability for the violation of any of them. In contrast to general exception provisions, however, security exceptions do not elucidate politically motivated policy objectives which take precedence over the treaty in

75 Security exception clauses are sometimes also referred to as “necessity clauses” or “emergency clauses”.
76 For a recapitulation of the pertinent arbitrations see infra Chapter Five, Part A, II, 1.
77 Other security interests that are from time to time enumerated in security exceptions include the non-proliferation of nuclear materials, traffic in arms, and other emergencies in international relations.
cases of normative conflict. Rather, security exceptions codify the intrinsic right of States to act in the face of imminent peril to its existence. They express the subjective impossibility of a host State to comply with its international investment law obligations in situations of national or international emergency in which compliance with the treaty cannot no longer be reasonably expected. In such extraordinary situations, which threaten essential core interests of the State, security exceptions provide the host State with the necessary regulatory flexibility to react without running the risk of incurring liability under the IIA for its actions. The disparity in the objectives is demonstrated by the difference in the protected values compared to general exceptions. Moreover, security exceptions regularly include self-judging language, which prevents tribunals from fully reviewing whether the criteria for a successful invocation of the clause have been met. They thereby grant greater deference to host States to pursue objectives that lie at the heart of a State’s existence. In these instances, tribunal scrutiny is arguably limited to a mere good faith review in accordance with Articles 26 and 27 of the Vienna Convention on the Law of Treaties 1969. Similar self-judging language is uncommon in general exception provisions.

82 The only self-judging provision this study was able to identify among the reviewed general exceptions is Article 5 of the Framework Investment Agreement in AP-
Chapter One Introduction

Since the protected values as well as the object and purpose of security exceptions differ decisively from those of general exceptions, they require a differential research approach, which goes beyond the confines of this study. However, although the results on the former clauses are not necessarily transportable to the latter, this study still looks into the way investment tribunals have interpreted security exceptions to conjecture how general exception provisions might be approached in the future.\(^{83}\)

3. Obligation-Specific Exception Clauses

On occasion, States also use more limited exception provisions to exclude measures taken for legitimate public policy considerations, such as public order, public health or public morality, from the scope of a more limited number of IIA obligations. These obligation-specific exception clauses are mostly attached to the non-discrimination provisions of national treatment and most-favored-nation treatment. For instance, Article 3(7) of the Germany – El Salvador BIT reads in its authentic German version:

“[…]\( \) Maßnahmen, die aus Gründen der öffentlichen Sicherheit und Ordnung, der Volksgesundheit oder Sittlichkeit zu treffen sind, gelten nicht als weniger günstige Behandlung im Sinne dieses Artikels.” \(^{84}\)

The permissible objectives of these obligation-specific clauses sometimes overlap with general exception provisions and, akin to the latter, relieve the host State from liability for the violation of the specific obligations they are attached to. Unlike general exceptions, however, they only apply to a comparatively limited set of substantive IIA obligations and not to the IIA as a whole. Since the same measure may amount to a violation of several investment treaty standards and considering that it does not matter to the host State whether it incurs liability for the violation of one or the other obligation, they understandably provide less regulatory flexibility than general exceptions. Therefore, they appear to be a less adequate tool to address State concerns about the sovereignty-limiting effect of investment treaties.

\(^{83}\) See infra Chapter Five, Part A, II, 1.

4. Interpretive Guidelines

General exception clauses are sometimes also distinguished from what may be referred to as “interpretive guidelines”. As an example, Article 12(5) of the U.S. Model BIT 2012 provides:

“Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.”

The provision’s wording vaguely resembles the language found in general exception provisions but cannot be considered to be such. It shares the characteristic with general exception clauses that both deal with environmental (or other public welfare) concerns of the host State. This, however, is where the commonalities end. As can be seen from the above sample text, the clause is tautological in that it only applies to measures “otherwise consistent with this Treaty”. This is somewhat confusing, considering that there does not seem to be room of application for a treaty provision that purports to allow the host State to take a public policy measure which would be consistent with the IIA in the first place. Commentators therefore submit that the clauses merely constitute a guideline that substantive obligations should be interpreted in a way that recognizes the legitimacy of environmental protection. In light of the aforementioned, however, one may well question whether they have any practical effect at all.

89 See Knox, 45 Wake Forest Law Review 101, 127, fn. 123 (2010) designating such clauses as “perfectly meaningless”. But see also S.D. Myers v. Canada, Separate
Chapter One Introduction

The above version must be contrasted from a similar but decisively different version of the clause, which can be found in Article VIII of the Colombia Model BIT 2007, and which stipulates:

“Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure that it considers appropriate to ensure that an investment activity in its territory is undertaken in accordance with the environmental law of the Party, provided that such measures are proportional to the objectives sought.”

Compared to the previous version, the tautological qualifier that the State measure must be “otherwise consistent” with the Agreement is missing in this provision. Rather, it allows the host State to take measures it considers appropriate to ensure due compliance with its environmental laws provided they are proportionate. Unlike its above relative, this provision may relieve a host State from liability for a treaty breach.90

5. Provisions on the Relaxation of Standards

More recent IIAs sometimes also include provisions that, similar to general exceptions, refer to non-economic policy objectives such as public health or environmental protection, but which, unlike general exception clauses, merely seek to deter State Parties from encouraging foreign investment by relaxing domestic health, safety and environmental measures. An example is Article 4 of the Turkey – Tanzania BIT 2011, which reads:

____________________

Opinion Schwartz, 12 November 2000, ¶¶117-118, where the arbitrator stated that the similarly worded Article 1141(1) NAFTA may be viewed “ […] as acknowledging and reminding interpreters of Chapter 11 (Investment) that the parties take both the environment and open trade very seriously and that means should be found to reconcile these two objectives and, if possible, to make them mutually supportive.”.

90 The provision found its way into Article VII(4) of the Colombia – Belgium-Luxembourg Economic Union (signed 4 February 2009). Note, however, that e.g. Article 13(5) of the Colombia – India BIT (10 November 2009) and Article 15(1) of the Colombia – Japan BIT were also signed after the adoption of the Model BIT but contain a more classical general exception provision modeled on Article XX GATT and Article XIV GATS. Other Colombian BITs signed after the adoption of the Model BIT do not include either form of general exceptions, see, e.g., the Colombia – United Kingdom BIT (signed 17 March 2010).
“Article 4 Health, Safety and Environmental Measures
The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety and environmental measures. Accordingly, a Party should not waive or offer to waive or otherwise derogate from such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.”

Some take these clauses to constitute rules of interpretation or non-operative treaty text.91 Their purpose is to prevent a regulatory “race to the bottom” in sensitive policy areas for the sake of investment promotion.92 To achieve this goal, they work merely intergovernmentally and allow one State Party to request consultations with the other Party if the latter has presented an inappropriate environment for foreign investment.93 In other words, they do not grant rights to foreign investors. In contrast to general exceptions, these provisions do not exempt States from their IIA obligations.

II. Exceptions, Reservations, and Non-Precluded Measures

In addition to the different kinds of exception clauses and similar provisions, IIAs often also use heterogeneous terminology to designate similar or even identical types of provisions. This linguistic heterogeneity is rooted not least in the large amount of IIAs drafted, negotiated and concluded by a multiplicity of States in a variety of languages.

93 Note, however, that most of these clauses are excluded from the state-to-state dispute settlement mechanism and are subject only to consultations between the Parties, see Potestá, in: Treves, et al. (eds.), Foreign Investment, International Law and Common Concerns 193, 205 (2014).
1. Exception Clauses and Non-Precluded Measures Clauses

Sometimes, IIA exception provisions use the terminology “non-precluded measures” to designate State measures that qualify under the exception. Such language particularly appears in the U.S. BIT program. An example is the above-mentioned Article 18 of the U.S. Model BIT 2012, which expressly “preclude[s]” measures that the host State considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace and security or the protection of its own essential security interests from the IIA’s application. Based on this terminology, some commentators generally refer to exception clauses as “non-precluded measures clauses” (or “NPM clauses”). They do so despite the fact that the specific preclusion-terminology, which gave rise to this designation, is not necessarily reproduced in the bulk of the clauses they examine. The terminology thus does not appear to be compelling.

What is more, absent express treaty language to this effect, the designation may lead to confusion in light of the International Law Commission’s Draft Articles on State Responsibility, which also make reference to “circumstances precluding wrongfulness” when codifying the customary international law defenses to the breach of international obligations. For these reasons, this study refrains from using the formulation “non-precluded measures clause” or “NPM clause” and adopts the more comprehensive term “exception” when it addresses provisions that relieve the host State from the duty to comply with its IIA obligations.

96 For instance, Nolan and Sourgens examine clauses featuring in the Indian or Japanese BIT program, which do not use the preclusion-terminology in their text but still refer to them as “non-precluded measures clauses”. See Nolan/Sourgens, in: Sauvant (ed.), Yearbook on International Investment Law & Policy 2010-2011 362, 374, 378 (2011).
2. Exceptions and Reservations

Some commentators also caution that the terminologies “exception” and “reservation” were employed inconsistently in international investment treaty practice.\(^\text{98}\) Both terms would often be used interchangeably and referred to clauses that yield essentially similar practical effects.\(^\text{99}\) To distinguish the two, they submit that reservations, as opposed to exceptions, would typically be separately listed for each State, tailored to the national policies and priorities and would therefore often be asymmetrical.\(^\text{100}\) That being said, the use of the term “reservation” in the context of a general exception provision is uncommon. Reservations usually differ from general exceptions in that they limit the coverage of the IIA and thus the jurisdiction of the tribunal in general as opposed to exempting the host State from liability in individual instances which are principally regulated by the treaty.\(^\text{101}\)

If, extraordinarily, the term “reservation” is employed, the respective clause has to be distinguished from reservations to a treaty as regulated in the Vienna Convention on the Law of Treaties 1969. Reservations in the latter sense are unilateral statements made by one treaty party at the time of the ascension to or the conclusion or ratification of a multilateral treaty. Their purpose is to exclude or modify the application of certain treaty provisions to that State.\(^\text{102}\) In contrast, reservations in an IIA were negotiated by both parties to the IIA prior to signature or entry into force of the treaty so as to exclude certain State measures or subject matters from its scope. The excepted sectors depend on where heightened concerns about foreign

\(\text{98}\) See *Newcombe/Paradell*, Law and Practice of Investment Treaties, p. 482 (2009).

\(\text{99}\) For an example of interchangeable use, see, *e.g.*, *Dolzer/Stevens*, Bilateral Investment Treaties, p. 73 (1995).

\(\text{100}\) On the use of reservations in IIA treaty practice see *UNCTAD*, Preserving Flexibility in IIA: The Use of Reservations (2006) and *VanDuzer/Simons/Mayeda*, Integrating Sustainable Development into International Investment Agreements, p. 226 (2012).

\(\text{101}\) See *Sacerdoti*, 28 ICSID Review 351, 369-370 (2013).

\(\text{102}\) Article 2(1)(d) VCLT defines reservations to a treaty as follows: […] a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”.
Chapter One Introduction

Ownership exist in the respective societies. To prevent confusion, this study thus solely uses the term “exception”.

D. Structure and Research Methodology

The study is organized as follows.

Chapter One provides a general introduction to the topic of general exception clauses in international investment law. Exploring the background of the current legitimacy crisis of the international investment regime, the Chapter shows how States have started recalibrating their international investment agreements to address the perceived shortcomings of the system. The tension between the host States’ right to regulate in the public interest and comprehensive foreign investment protection by IIAs is highlighted by a case study on the pending arbitration Philip Morris Asia Ltd. v. The Commonwealth of Australia. Subsequently, general exception clauses are distinguished from other forms of exception provisions that regularly appear in IIAs to delimitate the scope of the study.

Chapter Two follows with empirical research on the prevalence and typology of general exception provisions in the current investment treaty landscape, which forms the foundation for the present study. The Chapter firstly distinguishes between general exception provisions found in classical bilateral investment treaties and general exception clauses included in bi- and multilateral preferential trade and investment agreements to discern the trend of a growing inclusion of general exception provisions in newly-concluded IIAs. A further distinction is then drawn between provisions modeled on Article XX of the General Agreement on Tariffs and Trade (GATT 1994) and / or Article XIV of the General Agreement on Trade in Services (GATS) respectively on the one hand and sui generis exception provisions on the other hand. The aim is to demonstrate how States use, adapt, and customize WTO-norms in investment treaty reform. Thereafter, the Chapter breaks down the frequency of the respective key terms of general exception provisions, namely their permissible objectives, nexus requirements, and safeguards against abusive invocations, used in investment general exceptions to give an overview on the scope of general exception provisions currently included in IIAs.

103 See Newcombe/Paradell, Law and Practice of Investment Treaties, p. 506 (2009).
On this basis, Chapter Three investigates the reasons for the notable discrepancy between the popularity of general exception clauses in the international trade regime, where they are routinely incorporated into treaties, and their absence in the first generations of international investment agreements. The Chapter first traces the evolution of general exception clauses in the world trading regime, starting from their first appearances in bilateral commercial treaties in the nineteenth century, over the first multilateral trade agreements in the 1920s, to the GATT 1947 and the modern WTO agreements GATT 1994 and GATS. This development is then contrasted with the prevailing historical circumstances prompting the conclusion of the first generations of international investment agreements in which general exception provisions were missing. To explain this discrepancy between the two systems of international economic law, the study discusses the unique historical circumstances prompting the creation of the two modern systems of international trade and investment law as well as the divergent economic ideologies shaping the two regimes – embedded liberalism in the international trade realm and neoliberalism in the international investment regime.

The role, rationales and risks of general exception clauses are examined in the following Chapter Four with a view to assisting treaty negotiators in their decision whether or not to include them into their IIAs. Starting from the proposition that general exception provisions enhance the host State’s regulatory flexibility and shift the economic risk of adverse State action in the covered policy areas back to the foreign investor, it is argued that they increase the stability and legitimacy of as well as legal certainty in the international investment law regime. These rationales are then balanced with the risks generally associated with the inclusion of general exceptions. In particular, the risk of abusive invocation, the apprehension that general exceptions will actually lead to limited instead of additional regulatory flexibility, and the concern that general exception will increase legal uncertainty are rebutted in turn.

Chapter Five deals with the interpretation of general exception provisions. The first question to be addressed with recourse to jurisprudence on IIA obligations in general, security exception clauses and other exception provisions is whether tribunals may be expected to adopt a broad or a narrow initial interpretation of general exceptions. Secondly, the impact of inconsistent treaty practice on the interpretation of contemporaneous IIAs is examined. Thirdly, past uses of WTO jurisprudence in investment adjudication, in particular as regards the national treatment standard, the most-
favored-nation standard, and security exception clauses, are analyzed in order to distill the criteria tribunals employ to decide whether and to which extent a cross-regime fertilization with the law of the Word Trade Organization is appropriate and legitimate. These criteria are then applied to the case of investment general exception provisions. In this context, the study also advises investment tribunals on the most appropriate interpretation of a number of selected key terms of general exceptions.

The relevance of general exception clauses for selected individual standards of treatment is analyzed in Chapter Six. With regard to the expropriation standard, the effect of the successful invocation of a general exception clause on the obligation to pay compensation is examined. Another focus lies on the interaction between general exceptions and annexes on indirect expropriation. Concerning the fair and equitable treatment standard, a possible congruence between certain requirements contained in the introductory (“chapeau”) paragraphs to the majority of general exceptions and the customary international minimum standard of treatment is addressed. Moreover, the Chapter addresses the impact of general exception clauses on the protection of the legitimate expectations of an investor. Finally, the relationship between general exception provisions and the national treatment standard, in particular the extent to which the similar criteria may lead to redundancies, is examined.

Chapter Seven concludes.
General exception clauses for the pursuance of non-economic policy objectives have become an increasingly common sight in today’s IIA landscape. In spite of this, no comprehensive study on the prevalence, typology and key terms of IIA general exception clauses exists to date. This Chapter makes an attempt at filling this lacuna. By providing pertinent facts and figures on the use of general exceptions in contemporary IIAs, it serves as a basis for the further chapters of this study, which draw on the conclusions presented here in their argumentations.

The research for this chapter has been complicated by the difficulty of obtaining the relevant texts of recently concluded BITs and PTIAs. While some countries maintain regularly updated and commendable webpages containing relevant information on their IIA programs, others provide little, no, or outdated data. Nowadays, the task has been somewhat facilitated by the introduction of the “International Investment Agreement Navigator” of the United Nations Conference on Trade and Development (UNCTAD). However, the database contains a disclaimer, noting that “[w]hile every effort is made to ensure the accuracy and completeness of its content, UNCTAD assumes no responsibility for eventual errors or omissions in these data.” In addition, the database does not provide information on all presently concluded IIAs, and it maintains, incorrectly, that 234 of these include “general public policy exceptions for public health and the environment”. Against this background, the observations presented in this Chapter are understood not to be comprehensive but

104 But see Burke-White/Von Staden, 48 Virginia Journal of International Law 307 (2008) and Nolan/Sourgens, in: Sauvant (ed.), Yearbook on International Investment Law & Policy 2010-2011 362 (2011) for the most recent studies on non-precluded measures clauses in IIAs, both with a focus on essential security exceptions.
105 Note that the purpose of this Chapter thus is not the interpretation of general exception clauses or of the individual elements contained therein. These topics will be addressed in infra Chapter Five.
rather to be an estimate of the prevalence of general exception clauses in investment treaty-making.

A. Stocktaking

The rate of prevalence of general exception provisions in international investment agreements depends on the type of treaty examined. Differences occur between general exception clauses contained in classical bilateral investment treaties and general exception clauses found in preferential trade and investment agreements.

I. General Exception Clauses in Bilateral Investment Treaties

The use of general exception clauses in bilateral investment treaties is still uncommon.\textsuperscript{107} By the end of 1999, 1856 BITs had been concluded between States,\textsuperscript{108} out of which this study has identified 38, a small fraction, that contain general exception provisions. This represented a mere estimated two percent of the total BIT universe at that point in time.

In the course of the proliferation of BITs over the last decade, the total number of concluded BITs has consistently grown from 1856 BITs at the end of 1999 to 2957 concluded BITs by the end of 2016.\textsuperscript{109} Among these newly concluded 1101 BITs, at least 76, or 6.9 per cent, incorporate general exceptions. This brings the total number of BITs with general exceptions by the end of 2016 to a minimum of 114 out of 2957, accounting for

\textsuperscript{107} See, e.g., Austrian Model BIT (2008); Danish Model BIT (1991); Dutch Model BIT (1997); French Model BIT (2006); German Model BIT (2008); Italian Model BIT (2003); United Kingdom Model BIT (2008); and US Model BIT (2012) most of which are reproduced in: Brown (ed.), Commentaries on Selected Model Investment Treaties (2013). See also the collection of earlier model BITs in Dolzer/Stevens, Bilateral Investment Treaties, pp. 167-253 (1995). None of these model treaties contains general exceptions.


A. Stocktaking

roughly 3.86 percent of the total number of concluded BITs.\textsuperscript{110} It also means that out of 114 BITs containing general exceptions that were concluded in total until the end of 2016, 76 – considerably more than half – have been concluded in the new millennium.\textsuperscript{111} Despite the recent decline in the number of BITs concluded yearly the number of annually concluded BITs with general exceptions did not significantly alter, varying steadily between one and eight per year in the last decade.\textsuperscript{112}

While these numbers demonstrate a discernable modest trend towards States being increasingly inclined to negotiate general exceptions in the last decade, their occurrence in bilateral investment treaties remains scarce. The reasons for this notable absence are arguably related to the historical development of and the prevailing economic ideology influential for the first generations of BITs and are more fully explored below.\textsuperscript{113}

\begin{itemize}
\item \textsuperscript{110} For details see Annex I. Refer to figure I for a graphical illustration. Note that at least two Canadian FIPAs with general exceptions concluded in 2013 need to be added to this number. Also note that according to \textit{UNCTAD}, World Investment Report 2013: Global Value Chains: Investment and Trade for Development, p. 229 the Japan – Kuwait BIT (signed in 2012) also contains a general exception provision, bringing the number to concluded BITs with general exceptions in 2012 to six out of twenty. Unfortunately, the BIT is solely available in Japanese language online.
\item \textsuperscript{111} These numbers roughly correspond with UNCTAD’s data, according to which 7\% of the BITs concluded between 1959 and 2010 and 43\% of the BITs concluded between 2011 and 2016, see UNCTAD World Investment Report 2017: Investment and the Digital Economy, p. 122. Unfortunately, UNCTAD does not reveal how it arrived at these figures.
\item \textsuperscript{112} See figure II for a detailed graphical overview.
\item \textsuperscript{113} See \textit{infra} Chapter Three, Part B, I and II.
\end{itemize}
While these numbers demonstrate a discernible modest trend towards States being increasingly inclined to negotiate general exceptions in the last decade, their occurrence in bilateral investment treaties remains scarce. The reasons for this notable absence are arguably related to the historical development of and the prevailing economic ideology influential for the first generations of BITs and are more fully explored below.114

Figure I: BITs with General Exception Clauses between 1999 and 2016

Figure II: Newly Concluded BITs (with general exceptions since 2000)\textsuperscript{114}

\textsuperscript{114} Figures according to the respective UNCTAD World Investment Reports from 2005 to 2016. Includes only BITs for which texts are available.
Most of the pertinent BITs with general exceptions are contained within the treaty program of countries that regularly incorporate general exception provisions in their BITs. Out of 114 BITs that comprise general exceptions, 36 treaties were concluded by Canada\textsuperscript{115}, and another 28 by Mauritius.\textsuperscript{116} Several other countries include such provisions on occasion in their treaty programs. General exceptions can, for example, be found in BITs concluded by Colombia,\textsuperscript{117} India,\textsuperscript{118} Japan,\textsuperscript{119} New Zealand,\textsuperscript{120} Singapore,\textsuperscript{121} Switzerland,\textsuperscript{122} and Turkey.\textsuperscript{123}

Common characteristics of these States are hard to identify. From an economic point of view, the inclination to include general exceptions does not seem to depend on the level of development of the treaty parties or

\begin{thebibliography}{99}
\bibitem{115} For instance Article XVII of the Canada – Armenia FIPA (signed 8 May 1997, entered into force 29 March 1999); Article 18 of the Canada – Serbia FIPA (signed 1 September 2014, entered into force 24 April 2015).
\bibitem{116} For example Article 2 of the Mauritius – Romania BIT (signed 20 January 2000, entered into force 20 December 2000); Article 3 of the Mauritius – Madagascar BIT (signed 6 April 2004, entered into force 29 December 2005); and Article 12 of the Mauritius – Zambia BIT (signed 14 July 2015, entered into force 6 May 2016).
\bibitem{117} For instance Article 8 of the Colombia – Peru BIT (signed 11 December 2007); Article 13 of the Colombia – India BIT (signed 10 November 2009); and Article 15 of the Colombia – Japan BIT (signed 12 September 2011).
\bibitem{118} For example Article 12 of the India – France BIT (signed 2 September 1999, entered into force 17 May 2000); Article 12 of the India – Bosnia and Herzegovina BIT (signed 12 September 2006, entered into force 14 February 2008); and Article 13 of the India – Senegal BIT (signed 3 July 2008, entered into force 17 October 2009).
\bibitem{119} For example Article 16 of the Japan – Korea BIT (signed 22 May 2002, entered into force 1 January 2003); Article 13 of the Japan – Iran BIT (signed 5 February 2016); and Article 15 of the Japan – Israel BIT (signed 1 February 2017.).
\bibitem{120} For example Article 8 New Zealand – Hong Kong BIT (signed 6 July 1995); and Article 5 New Zealand – Argentina BIT (signed 27 August 1999).
\bibitem{121} For instance Article 11 of the Singapore – Mauritius BIT (signed 14 March 2000; entered into force 19 April 2000) and Article 27 of the Singapore – Burkina Faso BIT (signed 27 August 2014)).
\bibitem{122} For instance Article 11 of the Switzerland – United Arab Emirates BIT (signed 3 November 1998, entered into force 16 August 1999); and Article 20 of the Switzerland – Republic of Korea BIT (signed 15 December 2005, entered into force 1 September 2006).
\bibitem{123} For example Article 6 of the Turkey – Nigeria BIT (signed 2 February 2012); Article 5 of the Turkey – Bangladesh BIT (signed 12 April 2012); and Article 5 of the Turkey – Rwanda BIT (signed 3 November 2016).
\end{thebibliography}
whether the States are capital-exporting or capital-importing. Geographi-
cally speaking, with India, Japan, Mauritius, New Zealand, and Singapore,
one can identify a certain preponderance of States from the Asia-Pacific
region. Considering, however, that the largest pertinent BIT programs
stems from Canada and Mauritius and that countries from Latin America
and Europe also occasionally include general exceptions in their BITs, this
prevalence is not especially pronounced.

II. General Exception Clauses in Preferential Trade and Investment
Agreements

In recent times, the IIA universe has become more complex. In addition to
classical BITs as self-standing investment protection and promotion agree-
ments, States are increasingly coupling provisions on international trade
and international investment in preferential trade and investment agree-
ments.\textsuperscript{124} Although, quantitatively, BITs still dominate the international in-
vestment law landscape, in terms of economic importance one can observe
a gradual shift towards a more integrated and regional approach to treaty
making.\textsuperscript{125} While the numbers of newly concluded bilateral investment
treaties have declined over the last few years, the recent overall growth in
the number of concluded investment agreements is largely attributable to

\textsuperscript{124} UNCTAD refers to these preferential trade and investment agreements as “other
International Investment Agreements” as international agreements with invest-
ment provisions other than BITs, including comprehensive economic partnership
agreements and regional or bilateral trade agreements with separate investment
chapters, see \textit{UNCTAD}, World Investment Report 2012: Towards a New Genera-
tion of Investment Policies, p. 84. However, Preferential Trade and Investment
Agreements (PTIAs) appears to be the more appropriate and precise designation
considering that they include both trade and investment obligations and establish
preferential treatment between the Parties. See, e.g., \textit{Schill/Jacob}, in Sauvant
(ed.), Yearbook on International Investment Law and Policy 2011-2012 141, 144
(2013) for identical terminology. Others refer to them as “trade and investment
agreements” or “TIAs”, see, e.g., \textit{De Mestral/Falsafi}, in: \textit{De Mestral/Lêvesque}

\textsuperscript{125} \textit{UNCTAD}, World Investment Report 2012: Towards a New Generation of Invest-
ment Policies, p. 84.
the proliferation of such preferential trade and investment agreements.\textsuperscript{126} Some countries even shift their focus away from BITs and are exclusively concluding PTIAs.\textsuperscript{127} Considering also that a lot of these treaties have more than two – and sometimes up to eleven – signatory States, this investment treaty category has to be considered even more important.\textsuperscript{128}

Looking at general exception clauses in these PTIAs, the aforementioned trend towards a growing inclusion of general exceptions in newly concluded IIAs becomes even more apparent. UNCTAD conflates the variety of different kinds of PTIAs in the category “other International Investment Agreements” or, more recently, “treaties with investment provisions” (TIPs) and provides pertinent figures from 2005 onwards. According to this, at the end of 2004 209 “other IIAs” had been concluded by States, out of which this study identified a number of eight that incorporate general exceptions applicable to the investment portion of the agreement. This accounts for 3.83 percent of the total.\textsuperscript{129} Since 2005, however, this number has experienced an exponential growth. A peak was reached in 2007, during which nine out of the twelve concluded “other IIAs” included general exceptions, but the years before and after also saw a steady growth in the number of concluded “other IIAs” with general exceptions.\textsuperscript{130} Out of 158 “other IIAs” concluded between 2005 and the end of 2016, at least 50 incorporate general exceptions applicable to the investment chapter, which amounts to roughly 31.6 percent of all “other IIAs” concluded in this time period. By the end of 2016, therefore, at least 64 out of 367 “other IIAs”, or approximately 17.4 percent, contained general exceptions. This figure goes well beyond the 2005 ratio and distinctly illustrates the current trend in international investment treaty making, ac-

\textsuperscript{127} See Baetens, in: Hofmann, et al. (eds.), Preferential Trade and Investment Agreements 91, 93 (2013), referring to the example of Chile.
\textsuperscript{128} See for instance the Taiwan – El Salvador – Honduras PTIA (signed 7 May 2007, entered into force 1 March 2008) for a trilateral treaty or the ASEAN – Australia – New Zealand PTIA (signed 27 February 2009, entered into force 1 January 2010) for a treaty with eleven signatory countries.
\textsuperscript{130} For details refer to figure III.
cording to which general exception clauses have become an inherent part of newly concluded PTIAs.131

These figures become even more significant when one considers that they are based on available data from UNCTAD, which includes a broad variety of agreements in its “other IIAs” category that entail varying degrees of investment related provisions. The spectrum encompassed in this ranges from agreements incorporating investment obligations classically found in fully-fledged BITs, to agreements with merely limited investment-related provisions that focus, for instance, on investment liberalization in certain industries or market access, to treaties concentrating solely on investment cooperation on the inter-governmental level and agreements only providing for a future negotiating mandate on investment issues.133

Unfortunately, the figures were only broken down into these quite distinct

---

131 See figure IV for a graphic comparison.
132 Figures according to the respective UNCTAD World Investment Reports from 2005 to 2017.
treaty categories in UNCTAD’s World Investment Reports since 2012. By means of example, the 2012 Report stated that out of fourteen newly concluded “other IIAs” in 2011, only nine included broad obligations commonly found in classical BITs, while two entailed more limited investment-related provisions and the remaining three focused merely on investment cooperation or stipulated a future negotiation mandate on investment.\textsuperscript{134} The 2013 Report found that only two of ten concluded “other IIAs” contained BIT-equivalent provisions.\textsuperscript{135} Considering that general exceptions are likely to appear only in the portion of “other IIAs” that is sufficiently BIT-alike to require the incorporation of defenses to liability for the violation of substantive obligations and taking into account that the inclusion of BIT-akin investment chapters in free trade agreements is a recent development of the last decade, one may comfortably assume that the relevant percentage of other IIAs that include general exception provisions is probably higher than the available figures reveal.\textsuperscript{136}

Geographically, compared to the BIT programs, a much larger range of countries incorporate general exception provisions into their PTIAs. Aus-

\begin{itemize}
\item \textsuperscript{134} \textit{UNCTAD}, World Investment Report 2012: Towards a New Generation of Investment Policies, p. 84. See, e.g., Article 14.5 of the Malaysia – Chile PTIA which stipulates a negotiation mandate on investment matters without entailing investment protection obligations. For a similar mandate, consult Article 51 of the ASEAN – Japan PTIA which envisages the establishment of a Sub-Committee on Investment to discuss and negotiate provisions for investment.
\item \textsuperscript{136} But see \textit{De Mestral/Falsafi}, in: De Mestral/Lévesque (eds.), Improving International Investment Agreements 115, 116 (2013), who estimate that only close to 40 PTIAs existed by 2013. The authors do not provide information on how they ascertained the total.
\end{itemize}
For example Chapter 15, Article 1 of the ASEAN – Australia – New Zealand PTIA (signed 27 February 2009, entered into force 1 January 2010); Article 12.18 of the Australia – Malaysia PTIA (signed 22 May 2012, entered into force 1 January 2013); and Article 9.8 of the Australia – China PTIA (signed 17 June 2015, entered into force 20 December 2015).

For instance Article 28.3 of the Canada – European Union Comprehensive Economic and Trade Agreement (signed 30 October 2016, provisionally entered into force 21 September 2017); Article 2201 of the Canada – Colombia PTIA (signed 21 November 2008, entered into force 15 August 2011); and the Canada – Honduras PTIA (signed 5 November 2013, entered into force 1 August 2009).

For example Article 192 of the Chile – Japan PTIA (signed 27 March 2007, entered into force 3 September 2007).

For instance Article 200 of the China – New Zealand PTIA (signed 7 April 2008, entered into force 1 October 2008); and the China – Singapore PTIA (signed 23 October 2008, entered into force 1 January 2009), which incorporates the relevant provisions of the ASEAN – China Investment Agreement.

For example Article 2201 of the Canada – Colombia PTIA (signed 21 November 2008, entered into force 15 August 2011); Article 5.8 of the EFTA – Colombia PTIA (signed 28 November 2008, entered into force 1 July 2011); and Article 21.1(2) of the Colombia – Republic of Korea PTIA (signed 21 February 2013).

For instance Article 21.02 of the Costa Rica – Panama PTIA (signed 7 August 2007, entered into force 23 November 2008); and Article 18.2 of the Singapore – Costa Rica PTIA (signed 6 April 2010).

For example Article 10 of the Malaysia – Japan PTIA (signed 13 December 2005, entered into force 13 July 2006); and Article 17.1 of the Malaysia – New Zealand PTIA (signed 26 October 2009, entered into force 1 August 2010).

For instance Article 71 of the New Zealand – Singapore PTIA (signed 14 November 2000, entered into force 1 January 2001); Article 15.2 of the New Zealand – Thailand PTIA (signed 19 April 2005, entered into force 1 July 2005); and Article 20.2 of the New Zealand – Korea PTIA (signed 23 March 2015, entered into force 20 December 2015).

For example Article 6.11 of the India – Singapore PTIA (signed 29 June 2005, entered into force 1 August 2005); and Article 12.1 of the India – Malaysia PTIA (signed 18 February 2011, entered into force 1 July 2011).

For instance Article 11 of the Indonesia – Japan PTIA (signed 20 August 2007, entered into force 1 July 2008).

For example Article 10 of the Japan – Thailand PTIA (signed 3 April 2007, entered into force 1 November 2007); Article 8 of the Japan – Brunei PTIA (signed 18 June 2007, entered into force 31 July 2008); and Article 95 of the Japan – Switzerland PTIA (signed 19 February 2009, entered into force 1 September 2009).
regularly or occasionally. Interestingly, some of these countries, for instance Australia, incorporate general exception clauses in the investment chapters of their PTIAs, but not in their BITs. Additionally, several regional PTIAs concluded under the auspices of the ASEAN framework\textsuperscript{153}, the APTA framework,\textsuperscript{154} by the EFTA,\textsuperscript{155} and the within the COMESA\textsuperscript{156} include general exceptions applicable to investment obligations.

\textsuperscript{148} For instance Article 21.02 of the Panama – El Salvador PTIA (signed 6 March 2002, entered into force 11 April 2003); Article 21.02 of the Panama – Costa Rica PTIA (signed 7 August 2005, entered into force 23 November 2008); and Article 21.02 of the Panama – Honduras PTIA (signed 15 June 2007, entered into force 9 January 2009).

\textsuperscript{149} For instance Article 21.2 of the Republic of Korea – Singapore PTIA (signed 4 August 2005, entered into force 2 March 2006); and Article 24.1 of the Korea – Peru PTIA (signed 21 March 2001, entered into force 1 August 2011).

\textsuperscript{150} For example Chapter 8, Article 21 of the Singapore – Australia PTIA (signed 17 February 2003, entered into force 28 July 2003); Article 18.2 of the Singapore – Costa Rica PTIA (signed 6 April 2010).

\textsuperscript{151} For example Article 19.02 of the Taiwan – Guatemala PTIA (signed 22 September 2005, entered into force 1 July 2006); and Article 16.02 of the Taiwan – El Salvador – Honduras PTIA (signed 7 May 2007, entered into force 1 March 2008).

\textsuperscript{152} For instance Article 15.2 of the Thailand – New Zealand PTIA (signed 19 April 2005, entered into force 1 July 2005); and Article 10 of the Thailand – Japan PTIA (signed 3 April 2007, entered into force 1 November 2007.).

\textsuperscript{153} For example Article 17 of the ASEAN Comprehensive Investment Agreement (signed 26 February 2009, entered into force March 2012); Article 16 of the ASEAN – China Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation (signed 15 August 2009, entered into force 15 February 2010); and Article 20 of the ASEAN – Korea Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation (signed 2 June 2009, entered into force 1 January 2010). The ten ASEAN Member States are Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Viet Nam.

\textsuperscript{154} Article 5 of the Framework Agreement on the Promotion, Protection and Liberalization of Investment in APTA Participating States (signed 15 December 2009). APTA Participating States include Bangladesh, China, India, Republic of Korea, Laos, Sri Lanka, Nepal, and Philippines.

\textsuperscript{155} For instance Article 4.9. of the EFTA – Korea PTIA (signed 15 December 2005, entered into force 1 September 2006); and Article 4.14 of the EFTA – Ukraine PTIA (signed 24 June 2010, entered into force 1 June 2012). EFTA Member States are Iceland, Liechtenstein, Norway, and Switzerland.

\textsuperscript{156} Article 22 of the Investment Agreement of the Common Market for Eastern and Southern Africa Common Investment Area. Member States include Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Ke-
As evidenced by the above list of countries, the predominance of countries from the Asia-Pacific region is much more pronounced when it comes to PTIAs than in the context of classical BITs. Nonetheless, the significant number of countries from Latin America, Africa, North America, and Europe proves that the inclusion of general exceptions in IIAs is not a merely regional phenomenon but takes place on a global scale with more and more countries jumping the bandwagon. In particular, the inclusion of general exception clauses modeled on WTO provisions in the EU – Canada Comprehensive Economic Partnership Agreement and the Draft EU – U.S. Transatlantic Trade and Investment Partnership Agreement\textsuperscript{157} – two of the most important PTIAs currently under negotiation – demonstrate that general exception clauses will become a common sight in future PTIAs. The comprehensive list of countries also shows that a country’s level of economic development or its classification as capital-importing or capital-exporting plays a tangential role in the question of how likely the country is to incorporate general exceptions in its PTIAs.\textsuperscript{158}

III. General Exception Clauses in IIAs

The pertinent figures reveal that general exception provisions remain an uncommon sight in both bilateral and other international investment treaties. Among the ocean of 3324 BITs and PTIAs concluded by the end of 2016,\textsuperscript{159} this study has identified only a small minority of 178 that incorporate general exception provisions.\textsuperscript{160} Notwithstanding this, there is still a discernable trend towards the growing inclusion of general exceptions in newly concluded IIAs, albeit on a comparatively modest level,

\textsuperscript{157} For details see \textit{infra} Chapter Two, Part B, I, 2, a.
\textsuperscript{158} See also \textit{Schill/Jacob}, in Sauvant (ed.), \textit{Yearbook on International Investment Law and Policy} 2011-2012 141, 157-158 (2013) who observe that “grouping countries into either capital-exporting or capital-importing countries” for the purpose of analyzing their investment treaty-making strategy disappears as international investment treaty-making in the past decade has become increasingly complex due to “the interaction of multiple and multidirectional interests.”.
\textsuperscript{160} See figure V for a graphical illustration.
with more than half of the pertinent agreements concluded in the last decade.

This trend is particularly recognizable when it comes to recently concluded PTIAs. Here, almost one third of all concluded agreements in the last ten years include general exceptions applicable to investment obligations. While their absolute number remains limited in comparison to the BIT universe, their recent proliferation, contrasted with the recent decline in the number of newly concluded BITs, and viewed in conjunction with the fact that some of them have significantly more than two signatory countries highlights their relevance in the current and future investment treaty landscape. Nevertheless, a similar tendency of treaty negotiators to include general exceptions is also visible, although less apparent, in the context of classical bilateral investment treaties where the number of BITs with general exceptions has also grown steadily over the past years.

On the basis of the available data a comparison of the relative prevalence of the general exceptions clauses in investment chapters of PTIAs and the distribution of such clauses in BITs reveals that PTIAs are roughly five times more likely than BITs to include a general exceptions provision that applies to investment obligations. Correspondingly, a larger number of countries include general exceptions in their PTIAs compared to the number of countries that include them in their BITs. The reasons for this considerably greater popularity of general exception clauses in PTIAs are arguably related to two factors. First, most comprehensive IIAs regulate both trade and investment matters and were concluded within the last ten years. As has been demonstrated above, this is roughly the time frame in which general exception clauses have come to the attention of a growing audience of treaty drafters in general international investment law. Secondly, as elaborated below in more detail, 162 general exception clauses originate in treaties dealing with international trading relations. It therefore seems only natural that State parties are more susceptible to draft and negotiate trade-like general exception provisions applicable to investment matters in comprehensive economic agreements, which cover both trade and investment issues.

As regards the geographical distribution of countries that include investment general exceptions, a certain predominance of Asian-Pacific countries becomes apparent, in particular in the context of PTIAs but also with regard to BITs. This observation is in line with a 2011 WTO report which highlights that Asian WTO members are among the most active in

\[ \text{Figure V: Total Number of IIAs with General Exceptions 2004 and 2016} \]

On the basis of the available data a comparison of the relative prevalence of the general exceptions clauses in investment chapters of PTIAs and the distribution of such clauses in BITs reveals that PTIAs are roughly five times more likely than BITs to include a general exceptions provision that applies to investment obligations. Correspondingly, a larger number of countries include general exceptions in their PTIAs compared to the number of countries that include them in their BITs. The reasons for this considerably greater popularity of general exception clauses in PTIAs are arguably related to two factors. First, most comprehensive IIAs regulate...
both trade and investment matters and were concluded within the last ten years. As has been demonstrated above, this is roughly the time frame in which general exception clauses have come to the attention of a growing audience of treaty drafters in general international investment law. Secondly, as elaborated below in more detail,\textsuperscript{161} general exception clauses originate in treaties dealing with international trading relations. It therefore seems only natural that State parties are more susceptible to draft and negotiate trade-like general exception provisions applicable to investment matters in comprehensive economic agreements, which cover both trade and investment issues.

As regards the geographical distribution of countries that include investment general exceptions, a certain predominance of Asian-Pacific countries becomes apparent, in particular in the context of PTIAs but also with regard to BITs. This observation is in line with a 2011 WTO report which highlights that Asian WTO members are among the most active in entering into regional and preferential trade agreements, many of which carry investment chapters with significant legal commitments.\textsuperscript{162} Naturally, the more PTIAs a country signs, the more likely it is that higher rates of general exception clauses appear in these treaties. But also more generally, “a marked increase in the treaty-making activity of Asian countries, including China, India, Japan, and the Republic of Korea” in recent years may be observed and has led commentators to the conclusion that “developments [in international investment law] are no longer exclusively coined by traditional European and North American capital exporting countries.”\textsuperscript{163} The inclusion of general exception clauses is one of these developments that influence the investment treaty landscape. This growing influence of Asian IIAs on international investment law notwithstanding, the figures reveal that the inclusion of general exceptions is a global phenomenon, with a growing number of countries and regional organizations from all over the world including them in their IIAs. Economic character-

\textsuperscript{161} See infra Chapter Three, Part A, I.
istics of the respective countries seem to play only a negligible role in this regard.

These figures in mind, one should bear in mind that, at the time of this study, no arbitration proceedings examining IIA general exceptions is publicly known. However, in keeping with the growing incorporation of such clauses in IIAs, the emergence of pertinent cases in the future is inevitable. Usually when an investor brings a claim against a host State for allegedly violating IIA obligations, the defending State denies its liability. If the IIA contains a general exception provisions, the State will presumably argue in the alternative that even if a *prima facie* violation of IIA obligations has occurred, it is allowed to derogate from it under the general exception provision. Tribunals will thus sooner or later have to consider whether the State’s invocation of an exception provision is justified. Additionally, one may well speculate as to whether and to what extent the existence of an applicable general exception provision leads to this lack of jurisprudence on the issue, deterring foreign investors from challenging public interest measures in the first place.

**B. Typology**

I. General Exception Clauses Based on Article XX GATT or Article XIV GATS

The majority of general exception clauses in IIAs copy the basic characteristics and structure of Article XX GATT and Article XIV GATS. An introductory clause containing prohibitions of arbitrary or discriminatory treatment and disguised restrictions on investment is followed by an enumeration of permissible objectives that need to be linked to the measure via a nexus requirement. More specifically, 113 out of 178 general exception provisions examined are modeled on or incorporate either or both WTO provisions. While the extent of the incorporation and its specifics vary, they share an enumeration catalog of several non-economic policy areas in which governmental regulation that is sufficiently related is considered consistent with the IIA subject to the requirement that such regulation does not amount to either arbitrary or unjustifiable discrimination, or to a disguised restriction on international trade or investment. Since States have the choice between two different WTO general exception models which differ in the details albeit not in the general structure, one
may distinguish between Article XX GATT-like general exception clauses, Article XIV GATS-like general exception clauses, and general exception clauses that incorporate both Article XX GATT and Article XIV GATS.

1. Article XX GATT-like General Exception Clauses

One drafting practice of IIA general exceptions is to orientate them on Article XX GATT. For reference and convenience, it is reproduced below:

“**Article XX: General Exceptions**
Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
(a) necessary to protect public morals;
(b) necessary to protect human, animal or plant life or health;
(c) relating to the importations or exportations of gold or silver;
(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
(e) relating to the products of prison labour;
(f) imposed for the protection of national treasures of artistic, historic or archaeological value;
(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the
CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved:*

(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

(j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.”

Article XX GATT has the advantage over Article XIV GATS of having a comparatively large list of permissible objectives, including two objectives to which environmental considerations may be attached. Notwithstanding, comparatively few States favor the GATT- over the GATS-model, although these States, in particular Canada, have concluded a higher number of individual IIAs 52 of the examined 178 IIAs – among them 41 BITs and eleven PTIAs – include general exception clauses orientated on Article XX GATT.
a. The Canadian FIPA Program

Canada regularly incorporates general exception clauses into its FIPAs, the only OECD member country to date to do so. It began this practice as early as 1994, when it signed the first Canadian FIPA to include a general exception provision with the Ukraine. In fact, Canada has included a general exception provision in every bilateral investment treaty it has signed since the adoption of the NAFTA, notably including its recent FIPA with China and the Comprehensive Economic and Trade Agreement between Canada and the European Union. The latest additions to the program are the Canada – Guinea FIPA, which entered into force on 27 March 2017, and the Canada – Mongolia FIPA, which became effective on 24 February 2017. To date, at least 36 out of 38 Canadian FIPAs and six out of 15 concluded Canadian PTIAs contain a general exception provision.

One may distinguish between two model general exception provisions in the Canadian FIPA program: While the current version of the clause

---

164 Canada refers to its BITs as “Foreign Investment Protection Agreements” (FIPAs).
165 Turkey is following suit in recent years however.
166 Article XVII(3) of the Canada – Ukraine FIPA (signed 24 October 1994, entered into force 24 July 1995).
167 So observed also by Lévesque, 44 Canadian Yearbook of International Law 249, 271 (2006).
168 Part D, Article 33(2) of the Canada – China FIPA (signed 9 September 2012, entered into force 1 October 2014); Art. 28.3 (1) and (2) of the Canada – EU Comprehensive Economic and Trade Agreement (signed 30 October 2016, provisionally entered into force 21 September 2017).
169 Article 18(1) of the Canada – Guinea FIPA (entered into force 27 March 2017); Article 17(1) of the Canada – Mongolia FIPA (entered into force 24 February 2017).
dates back to 2004, when Canada presented its then-new model FIPA, an earlier and slightly different provision was used in Canadian FIPAs concluded prior to 2004. In the drafting of both provisions, Canada orientated itself closely on Article XX of the GATT 1994. Both the pre-2004 and the current model provision are sufficiently similar, but vary in the details. The pre-2004 version, taken from Article XVII(3) of the Canada – Armenia FIPA, virtually identical examples of which can be found in fifteen other Canadian FIPAs, reads as follows:

**Article XVII Application and General Exceptions**

1. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:
   (a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
   (b) necessary to protect human, animal or plant life or health; or
   (c) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.\(^\text{172}\)

The text of the provision resembles the model of Article XX GATT, with some amendments that Canada made during the drafting process. The most obvious observation is that Canada only chooses to include selected policy objectives of Article XX GATT. Moreover, the introductory paragraph of the clause does not talk about “discrimination”. Instead, it prohibits the application of measures in an “arbitrary or unjustifiable manner”.\(^\text{173}\) In addition, Article XX lit. (g) GATT only entails an exception for the conservation of “exhaustible natural resources.” The addition that these resources may be either “living or non-living” found in the above Canadian clause is absent in the WTO provision. This clarification is derived from the jurisprudence of the WTO Appellate Body, which interpret-

\(^{172}\) Article XVII(3) of the Canada – Armenia FIPA (signed 8 May 1997, entered into force 29 March 1999). Only Article XVII(3) of the Canada – Thailand FIPA (signed 17 January 1997, entered into force 24 September 1998) differs from the others in that it entails two additional exceptions for national treasures and products in general or local short supply.

\(^{173}\) Emphasis added.
ed the exception broadly and ruled that the exception does not only apply to “mineral” or “non-living” resources but also to “living species which may be susceptible to depletion, such as sea turtles.”

Furthermore, even before listing the permissible objectives, Canada inserted the clarification that environmental measures were also to be included within the clause’s scope. This is again in line with pertinent WTO Appellate Body jurisprudence, which, despite the fact that the protection of the environment is not explicitly mentioned among Article XX GATT’s permissible objectives, has explained on numerous occasions that a range of environmental policies may fall within the realm of either the protection of human, animal, or plant life or health (Article XX lit. (b) GATT) or the conservation of exhaustible natural resources (Article XX lit. (g) GATT). These pointed modifications demonstrate that States do not simply “copy and paste” the WTO provisions into their IIAs but rather customize them according to their needs and in reaction to accepted jurisprudence of the WTO Appellate Body.

In 2004, Canada presented its then-new model FIPA, which comprises an updated version of the general exception clause. Since then, twenty BITs and six PTIAs that contain either the model general exception provision or an almost identical provision, have been concluded. It reads as follows:

Article 10 – General Exceptions
1. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:

(a) to protect human, animal or plant life or health;
(b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or
(c) for the conservation of living or non-living exhaustible natural resources.

This new general exception provision follows the Article XX GATT model even more faithfully than its predecessor. The changes to the introductory sentence in particular bring the formulation closer to the wording of the introductory paragraph of Article XX GATT. In the remainder, however, some important amendments have been made in the drafting process. Apart from the addition of the previously acknowledged “living or non-living” clarification in Article 10(1) lit. (c), the most significant modification is the departure from the text of the GATT regarding the required link between the State action and the permissible objective in the same subparagraph. Article 10(1) lit. (c) Canadian Model FIPA 2004 stipulates that the measure must be “necessary” for the pursuance of the permissible objective, while Article XX lit. (g) GATT demands that the measure need only be “relating to” the conservation of exhaustible natural resources. The latter formulation arguably requires a much looser connection between the challenged measure and the pursued non-economic objective than the “necessary” threshold. Substituting the language “relating to” with “necessary to” therefore makes it harder for the State to justify its measure under the exception. It may be for this reason that Canada decided to leave out its previously prerequisite, derived from Article XX GATT, that the challenged measure must also be related to domestic restriction on natural resources.177

As concerns general exception clauses in Canadian PTIAs, all of them combine the textual amendments found in the 2004 model FIPA with the expression of the understanding of the treaty parties that the protection of human, animal or plant life or health may include environmental mea-

---

sures, which relates back to a similar clarification in the pre-2004 model FIPA version.178

Interestingly, Canada and the European Union have also agreed to the inclusion of general exceptions based on Article XX of the GATT and applicable to the Investment Chapter of the Canada – European Union Comprehensive Economic and Trade Agreement (CETA) signed in October 2016 and provisionally entered into force on 21 September 2017.179

b. Other IIAs with Article XX GATT-like General Exception Clauses

General exceptions modeled on Article XX GATT can also be found in Colombian treaty practice. Like Canada, Colombia does not transplant the GATT exception provision word for word but rather revises it in the drafting process. In fact, amendments identical to the ones found in the Canadian treaty practice are noticeable. For instance, Article 8(1)(c) of the Colombia – Peru BIT modifies the original language to the effect that a State measure must be “necessary for” as opposed to “relating to” the conservation of natural resources and adds the clarification that such resources may be both “living and non-living”.180

Likewise, the formulation of Article 13 of the Colombia – India BIT draws heavily on Article XX GATT.181 However, it leaves out the exception for laws and regulations not inconsistent with the agreement and adds an exception for the maintenance of public order, accommodating permissible objectives originally found in Article XIV lit. (a) GATS into the Article XX GATT-like clause.

In contrast, Article 27(1) of the Colombia – Singapore BIT is modelled on Article XIV GATS, but incorporates the permissible objective of the

178 Article 2201 of the Canada – Peru PTIA (signed 28 May 2008, entered into force 1 August 2009); Article 2201 of the Canada – Colombia PTIA (signed 21 November 2008, entered into force 15 August 2011); Article 23.02 of the Canada – Panama PTIA (signed 14 May 2010).
180 Article 8(1) of the Colombia – Peru BIT (signed 11 December 2007, entered into force 30 December 2010).
181 Article 13(5) of the Colombia – India BIT (signed 10 November 2009, entered into force 3 July 2013).
conservation of exhaustible natural resources found in Article XX GATT.182

2. Article XIV GATS-like General Exception Clauses

Another popular model for the drafting of general exception clauses in IIAs is Article XIV GATS. For reference and convenience, it is reproduced below:

“Article XIV: General Exceptions
Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
(a) necessary to protect public morals or to maintain public order; 5
(b) necessary to protect human, animal or plant life or health;
(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
(iii) safety;
(d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of oth-

182 Article 27(1) of the Colombia – Singapore BIT (signed 16 July 2013, not yet entered into force).
er Members;

(e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.

FN 5: The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

FN 6: Measures that are aimed at ensuring the equitable or effective imposition or collection of direct taxes include measures taken by a Member under its taxation system which:

(i) apply to non-resident service suppliers in recognition of the fact that the tax obligation of non-residents is determined with respect to taxable items sourced or located in the Member's territory; or

(ii) apply to non-residents in order to ensure the imposition or collection of taxes in the Member's territory; or

(iii) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures; or

(iv) apply to consumers of services supplied in or from the territory of another Member in order to ensure the imposition or collection of taxes on such consumers derived from sources in the Member's territory; or

(v) distinguish service suppliers subject to tax on worldwide taxable items from other service suppliers, in recognition of the difference in the nature of the tax base between them; or

(vi) determine, allocate or apportion income, profit, gain, loss, deduction or credit of resident persons or branches, or between related persons or branches of the same person, in order to safeguard the Member's tax base.”

49 of the examined IIAs entail exceptions based on Article XIV GATS. It is noteworthy that they mostly appear in PTIA investment chapters with some appearing in BITs. Indeed, Article XIV GATS seems to be the natural choice to serve as a model provision for investment treaty drafters since the GATS Agreement also covers the delivery of services through the commercial presence of the supplier within the territory of the host State, which is a mode of supply essentially identical to the investment
While Article XIV GATS thus appears to be more suitable for the investment context at first glance, one of its major disadvantages is the limited number of permissible objectives compared to Article XX GATT. Among others, Article XIV GATS does not include exceptions for the conservation of exhaustible natural resources or the protection of national treasures of artistic, historic or archaeological value.

### a. Article XIV GATS-like General Exception Clauses Incorporating Elements of Article XX GATT

The majority of the IIA general exceptions drafted along the lines of Article XIV GATS are complemented by additional policy objectives originally derived from Article XX GATT. As an example of this drafting practice, Article 1601 of the Australia – Thailand PTIA provides:

**Article 1601**

For purposes of Chapters 8 — 10, Article XIV of GATS is incorporated into and made part of this Agreement, *mutatis mutandis*.  

3. Article XX (e) – (g) of GATT 1994 is incorporated into and made part of Chapter 9, *mutatis mutandis*.  

Article 1601 accompanies the incorporation of Article XIV GATS with Article XX lit. (e), (f) and (g) GATT, which contain exceptions for products of prison labor, the protection of national treasures, and the conservation of natural resources that do not appear in the original version of Article XIV GATS. Similar additions, although mostly limited to the exceptions for conservation of natural resources and the protection of national treasures of artistic, historic or archaeological value, can be found in a large number of other IIAs general exceptions, making this drafting common treaty practice.  

Furthermore, the same practice can also be identi-

---

183 Known as “mode 3 services.” For the extent to which the GATS Agreement applies also to foreign investment see for instance Peter, Multilateral Rules on Cross-Border Investment and the World Trade Organization, pp. 107-109 (2009).


185 See, e.g., Article 83(1) of the Japan – Singapore PTIA (signed 13 January 2002, entered into force 30 November 2002); Article 15.2 of the New Zealand – Thailand PTIA (signed 19 April 2005, entered into force 1 July 2005); Chapter 8, Ar-
fied in Article 24 of the Draft Norwegian Model BIT of 2007. Considering that foreign investment may have a considerable impact on the environment, it seems indeed prudent to add the Article XX GATT-conservation exception even if the chosen model provision is Article XIV GATS.

b. General Exception Clauses Incorporating Article XIV GATS by Reference

Some PTIAs incorporate Article XIV GATS fully or in relevant part by means of reference, making it applicable *mutatis mutandis*. An example is Article 1(2) of Chapter 15 of the ASEAN – Australia – New Zealand PTIA:

**Chapter 15 General Provisions and Exceptions**

**Article 1 General Exceptions**

2. For the purposes of Chapter 8 (Trade in Services), Chapter 9 (Movement of Natural Persons) and Chapter 11 (Investment), Article XIV of GATS including its footnotes shall be incorporated into and shall form part of this Agreement, *mutatis mutandis*.186

186 Chapter 15, Article 1(2) of the ASEAN – Australia – New Zealand PTIA (signed 27 February 2009, entered into force 1 January 2010). See also Article 5.8 of the EFTA – Colombia PTIA (signed 28 November 2008, entered into force 1 July 2011); Article 4.14 of the EFTA – Ukraine PTIA (signed 24 June 2010, entered into force 1 June 2012); Article 11 of the Japan – India PTIA (signed 16 February 2011, entered into force 1 August 2011); and Article 4.9 of the EFTA – Hong Kong PTIA (signed 21 June 2011, entered into force 1 October 2012); and Article 21.1(2) of the Colombia – Republic of Korea PTIA (signed 21 February 2013).
This incorporation by reference technique bears the disadvantage that States can neither adapt Article XIV GATS to the investment setting nor modify it according to their individual needs. Instead, they are, at least \textit{a priori}, stuck with the expression of an exhaustive list of non-economic public interests as articulated in the WTO treaty. Yet again, a review of the treaty practice shows that States, in order make amendments, sometimes attach interpretive statements or clarifications following the general exceptions. For instance, in order to include environmental concerns within the ambit of the clause, some provisions explicitly stipulate that “[t]he Parties understand that the measures referred to in Article XIV(b) of GATS include environmental measures necessary to protect human, animal, or plant life or health.”\textsuperscript{187}

Lastly, some provisions that incorporate Article XIV GATS do so only in a partial manner. An example of many identically copied provisions is Article 21.02 of the Panama – Honduras PTIA, which only includes Article XIV lit. (a), (b), and (c) GATS, being arguably the most frequently relied on policy ends. It states:

\textbf{Artículo 21.02 Excepciones generales}

2. Se incorporan a este Tratado y forman parte integrante del mismo, los literales (a),(b) y (c) del Artículo XIV del AGCS, para efectos de:

(c) el Capítulo 10 (Inversión); [...]\textsuperscript{188}

\textsuperscript{187} See, e.g., Article 18.1 of the Singapore – Panama PTIA (signed 1 March 2006, entered into force 24 July 2006); Article 18.1 of the Singapore – Peru PTIA (signed 28 May 2008, entered into force 1 August 2009); Article 18.2 of the Singapore – Costa Rica PTIA (signed 6 April 2010); Article 159 of the Costa Rica – China PTIA (signed 8 April 2010, entered into force 1 August 2011); and Article 24.1 of the Korea – Peru PTIA (signed 21 March 2011, entered into force 1 August 2011); Article 21.1(2) of the Colombia – Republic of Korea PTIA (signed 21 February 2013).

3. General Exception Clauses Incorporating both Article XX GATT and Article XIV GATS

Furthermore, twelve IIAs – exclusively PTIAs – fully incorporate both Article XX GATT and Article XIV GATS.\textsuperscript{189} This is predominately done via incorporation by reference. Instead of reproducing the text of the WTO general exceptions, the IIA contains a provision which makes them part of the investment agreement \textit{mutatis mutandis}. An example of this practice is Article 200 of the New Zealand – China PTIA, which provides in relevant part:

\textbf{“Article 200 General Exceptions”}

1. For the purposes of this Agreement, Article XX of GATT 1994 and its interpretative notes and Article XIV of GATS (including its footnotes) are incorporated into and made part of this Agreement, \textit{mutatis mutandis.”}\textsuperscript{190}

Cumulatively incorporating both Article XX GATT and Article XIV GATS assures that the treaty parties have a comprehensive list of permissible objectives at their disposal that have been tried and tested in the context of international trade. Again, the incorporation by reference technique introduces the problem that States cannot adapt or modify the WTO exceptions to their needs in any way. Despite this, just like in the context of Article XIV GATS incorporation, treaty practice reveals that States some-

\textsuperscript{189} Article 1601 of the Australia – Thailand PTIA (signed 5 July 2004, entered into force 1 January 2005); Article 10 of the Japan – Malaysia PTIA (signed 13 December 2005, entered into force 13 July 2006); Article 192 of the Japan – Chile PTIA (signed 27 March 2007, entered into force 3 September 2007); Article 10 of the Japan – Thailand PTIA (signed 3 April 2007, entered into force 1 November 2007); Article 8 of the Japan – Brunei PTIA (signed 18 June 2007, entered into force 31 July 2008); Article 11 of the Japan – Indonesia PTIA (signed 20 August 2007, entered into force 1 July 2008); Article 126 of the Malaysia – Pakistan PTIA (signed 8 November 2007, entered into force 1 January 2008); Article 200 of the New Zealand – China PTIA (signed 7 April 2008, entered into force 1 October 2008); Article 17.1 of the New Zealand – Malaysia PTIA (signed 26 October 2009, entered into force 1 August 2010); Article 12.1 of the India – Malaysia PTIA (signed 18 February 2011, entered into force 1 July 2011); Chapter 24, Article 1, of the New Zealand – Thailand PTIA (signed 10 July 2013, entered into force 1 December 2013).

\textsuperscript{190} Article 200 of the New Zealand – China PTIA (signed 7 April 2008, entered into force 1 October 2008).
times attach interpretive statements or clarifications to this effect in a footnote or in a separate paragraph following the incorporation by reference. For instance, Article 200(1) of the New Zealand – China PTIA, as quoted above, provides in its second paragraph that environmental measures may fall under the protection of human, animal, or plant life or health and that the conservation of exhaustible natural resources may encompass both living and non-living resources. However, not all treaties that incorporate WTO exceptions by reference contain such interpretations or clarifications. Those that do not needlessly miss an opportunity to custom-tailor and improve the clauses in the IIA context.\textsuperscript{191}

II. Sui Generis General Exception Clauses

Most commentators unduly narrow the universe of IIA general exception provisions for the pursuance of non-economic policy objectives to those which are inspired by Article XX GATT or Article XIV GATS.\textsuperscript{192} Although it holds true that the majority of the IIAs examined use these WTO provisions as models for their general exceptions, a still comparatively high number of 65 treaties employ \textit{sui generis} clauses that often contain fewer and different permissible objectives, distinct nexus requirements and fewer, different, or no safeguards against abusive invocations of the provision than exist under WTO law. In their apparent simplicity, they more resemble provisions found in bilateral commercial treaties of the nineteenth and early twentieth century than their more complex modern counterparts.\textsuperscript{193} From their design, they also sometimes bear a striking resemblance to security exception provisions and mix essential security interests of the host State with more normative policy objectives.\textsuperscript{194}

\textsuperscript{191} Interpretations or clarifications are for instance lacking in Article 126 of the Malaysia – Pakistan PTIA (signed 8 November 2007, entered into force 1 January 2008).
\textsuperscript{193} See \textit{infra} Chapter Three, Part A, I, 1 for details.
\textsuperscript{194} Similarly, Article 45 of the Charter for the defunct International Trade Organization, which served as basis for Article XX GATT, still included both essential security and safety, as well as normative policy objectives.
Since States tend to employ identical or similar version of the same general exception provision with a certain frequency in a larger number of their BIT or PTIA program.

1. Sui Generis General Exception Clauses in BITs

a. The Mauritian BIT Program

Mauritian BITs feature *sui generis* general exception provisions not orientated on Article XX GATT or Article XIV GATS with surprising regularity. Twenty-eight out of 44 concluded Mauritian BITs\(^\text{195}\) include a respective provision. Article 11(2) of the Mauritius – Barbados BIT may serve as an example of a whole series of Mauritian BITs, providing as follows:

**Article 11 Application of Other Rules**

2. The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interest, or to the protection of public health or the prevention of diseases in pests and animals or plants.\(^\text{196}\)

The first particularity to strike the eye is the complete absence of an introductory paragraph or similar safeguards against arbitrary, discriminatory or generally abusive invocation of the exception.\(^\text{197}\) This is arguably related to the fact that the clause protects both essential security interests and

\(^{195}\) Total number of Bilateral Investment Treaties concluded by Mauritius by 3 May 2017 according to the webpage of the National Investment Promotion Agency of the Government of Mauritius (http://www.investmauritius.com/downloads/ippa.aspx, last visited 12 November 2017). Note that the text of some of the recently concluded BITs is not accessible online so that the total number of Mauritian BITs with general exceptions likely is higher.

\(^{196}\) Article 11 of the Mauritius – Barbados BIT (signed 28 September 2004, entered into force 22 November 2009).

\(^{197}\) Only Article 12 of the Mauritius – Czech Republic BIT (signed 5 April 1999, entered into force 6 May 2000) subjects the application of the general exceptions to a good faith and nondiscrimination review. Article 12 of the Mauritius – Turkey BIT (signed 7 February 2013, entered into force 30 May 2016) is modelled on the Turkish model clause and limits its application to “non-discriminatory legal measures”.

82
more normative public welfare goals. States may feel that for security exceptions, such introductory qualifications are misplaced. Furthermore, the list of permissible non-economic objectives is comparatively short and exhausts itself in the protection of public health and the prevention of diseases and pests in animals or plants.  

198 In fact, the permissible objectives resemble the objectives found in nineteenth and early twentieth century bilateral commercial treaties more than they match the language of Article XX GATT or Article XIV GATS.  

199 In that vein, the title of the majority of the provisions is “Prohibitions and Restrictions” rather than “General Exceptions”. Another peculiarity is that the host State, in deviation from the more common “necessity” threshold, is required to demonstrate that its actions are “directed to” the achievement of the permissible objective – a nexus requirement almost exclusively used in general exceptions found in Mauritian and Singaporean BITs.  

200 Interestingly, however, Mauritian BITs that are publicly available solely in French use the word “nécessaire”, which corresponds to the English word “necessary”, to describe the required relationship between State measure and the policy end pursued by it instead of using equivalent language to “directed to.”  

201 Apart from this, the English and French language versions of the clauses are essentially identical.

198 Exceptions are Article 11 of the Mauritius – China BIT (signed 4 May 1996, entered into force 8 June 1997) and Article 3 of the Mauritius – Madagascar BIT (signed 6 April 2004, entered into force 29 December 2005) which extend the clause’s scope to the protection of the environment.  

199 See also Bayer, Das System der deutschen Handelsverträge von 1853 und 1914, pp. 254-255 (2004) who observes that German bilateral trade treaties of the nineteenth and twentieth century contained such language and who briefly compares it to the modern Article XX GATT.  

200 Apart from the Mauritius – Barbados BIT, see also Article 11 of the Mauritius – China BIT (signed 4 May 1996, entered into force 8 June 1997); Article II of the Mauritius – Indonesia BIT (signed 3 March 1997; entered into force 28 March 2000); and Article 14 of the Mauritius – Economic Union of Belgium and Luxembourg BIT (signed 30 November 2005, entered into force: 26 January 2010).  

201 See for instance Article 12 of the Mauritius – Chad BIT (signed 18 May 2001) and Article 12 of the Mauritius – Comoros BIT (signed 18 May 2001). But see also Article 12 of the Mauritius – Czech Republic BIT (signed 5 April 1999, entered into force 6 May 2000) and Article 11 of the Mauritius – Switzerland BIT (signed 26 November 1998, entered into force 21 April 2000) which use the word “necessary” in their English versions. See also Article 13 of the Mauritius – Egypt BIT (signed 25 June 2014, entered into force 17 October 2014), which does not feature any nexus requirement.
b. The Singaporean BIT Program

Singapore has concluded 44 BITs\textsuperscript{202} of which nine incorporate a general exception provision. Six of them employ virtually identical language, reading as follows:

**Article 11 Prohibitions and Restrictions**

The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action where such prohibitions, restrictions or actions are directed to:

(a) (…)
(b) the protection of public health; or
(c) the prevention of diseases and pests in animals or plants.\textsuperscript{203}

The wording of the Singaporean provision resembles the above Mauritian exception clauses. The complete absence of substantive or procedural safeguards against abuses in the clause is most striking. This is again arguably related to the fact that the clause lumps in security and public welfare objectives. Additionally, it only allows measures for the protection of a limited set of health-related welfare objectives to which the measure must be directed, the later being a less stringent requirement than the prevailing necessary standard. The clause is therefore an example of a general exception provision granting considerable regulatory flexibility to the host State to derogate from its BIT obligations.

The three more recently concluded Singaporean BITs with Jordan, Burkina Faso, and Nigeria reveal that there has been a shift in the treaty practice, away from sui generis exceptions, to the GATS model with inspi-

\textsuperscript{202} Total Number of Bilateral Investment Treaties concluded by Singapore according to the UNCTAD International Investment Agreement Navigator (as of November 2017).

\textsuperscript{203} Article 11 of the Singapore – Viet Nam BIT (signed 29 October 1992).

84
rations from Article XX GATT. The same can be seen in Singapore’s PTIA program which also adheres closely to the GATS model.

c. The Japanese BIT Program

Japan is a signatory to 28 BITs out of which ten contain a general exception provision. In addition, ten Japanese PTIAs contain general exceptions. Some of the provisions are modeled on Article XIV GATS, others incorporate both Article X GATT and Article XIV GATS, while others depart from this clause. The latter sui generis general exception provisions stand out in that they refrain from including either the traditional chapeau paragraph or similar prohibitions of arbitrary or discriminatory invocation. Instead, they stipulate that a State measure qualifies under the exception as long as it is necessary to protect one of the enumerated permissible objective, the host State does not use the measure as a means of avoiding its treaty obligations, and the investor’s home State has been duly notified about the measure prior to its enactment or as soon as possible thereafter. An example can be found in Article 18 of the Japan – Laos BIT, which employs this technique, providing:

204 Article 18 of the Singapore – Jordan BIT (signed 16 May 2004, entered into force 22 August 2005); Singapore – Burkina Faso BIT (signed 27 August 2014); Singapore – Nigeria BIT (signed 4 November 2016).
205 See, e.g., Article 18.1 of the Singapore – Peru PTIA (signed 28 May 2008, entered into force 1 August 2009); Article 16.2 of the Singapore – Taiwan PTIA (signed 7 November 2013, entered into force 19 April 2014).
206 Total number of bilateral investment treaties concluded by Japan according to the UNCTAD International Investment Agreements Navigator (as of November 2017).
207 For instance Article 15 of the Japan – Israel BIT (signed 1 February 2017); Article 17 of the Japan – Uzbekistan BIT (signed 15 August 2008, entered into force 24 September 2009); and Article 19 of the Japan – Peru BIT (signed 21 November 2008, entered into force 10 December 2009).
208 For example, Article 11 of the Japan – Indonesia PTIA (signed 20 August 2007, entered into force 1 July 2008).
Article 18 General and Security Exceptions

1. Notwithstanding any other provisions in this Agreement other than the provisions of Article 10, each Contracting Part may:
   (a) (…)
   (b) (…)
   (c) take any measure necessary to protect human, animal or plant life or health;
   (d) (…)
   (e) take any measure imposed for the protection of national treasures of artistic, historic or archaeological value.

2. In cases where a Contracting Party takes any measure, pursuant to paragraph 1 above, that does not conform with the obligations of the provisions of this Agreement other than the provisions of Article 13, that Contracting Party shall not use such measure as a means of avoiding its obligations.

3. In cases where a Contracting Party takes any measure, pursuant to paragraph 1 of this Article, that does not conform with the obligations of the provisions of this Agreement other than the provisions of Article 13, that Contracting Party shall, prior to the entry into force of the measure or as soon thereafter as possible, notify the other Contracting Party of the following elements of the measure: (a) sector and sub-sector or matter; (b) obligation or article in respect of the measure; (c) legal source of the measure; (d) succinct description of the measure; and (e) purpose of the measure. 210

The requirement to notify the other treaty Party if either State takes a measure pursuant to the general exception that would otherwise not conform to the IIA is a peculiarity shared by most Japanese BITs and IIAs, irrespective of their adherence to the GATS or the sui generis model. The above clause is an example of a more demanding notification requirement, which obliges the host State to share detailed information of the installed measure such as the sector or sub-sector it applies to, the treaty obligation in respect of the measure, the legal source of the measure, its object and purpose, and a succinct description with the investor’s home State. Sometimes, the clauses are drafted in a less sophisticated manner and merely demand that the host State makes a reasonable effort to notify the other

State party to the IIA of a description of such measure. For instance, Article 11(3) of the Japan – Indonesia PTIA states:

3. In cases where a Party takes any measure pursuant to paragraph 1 or 2, that does not conform with the obligations under Chapter 5 other than Article 66, the Party shall make reasonable effort to notify the other Party of the description of such measure either before the measure is taken or as soon as possible thereafter.  

The Indian BIT program

Another country that occasionally includes *sui generis* general exceptions in its BITs is India. Nine out of 67 Indian BITs entail a respective provision. An example of the Indian model general exception can be derived from Article 12 of the India – Czech Republic BIT, which provides:

**Article 12 Exceptions**

2. The provision of this Agreement shall not in any way limit the right of either Contracting Party in cases of extreme emergency to take action in accordance with its laws applied in good faith, on a nondiscriminatory basis, and only to the extent and duration necessary for the protection of its essential security interests, or for the prevention of diseases and pests in animals or plants.

The Indian model clause is characterized by a very limited set of permissible policy ends, allowing the host State to take non-conforming measures almost exclusively for the prevention of diseases affecting animals or plants and only occasionally also for public health reasons. Again, the permissible objectives resemble the permissible objectives found in early...
bilateral commercial treaties rather than the modern WTO provisions. To prevent abuses, it further stipulates that the measure must be in accordance with the host State’s laws applied in good faith,215 on a non-discriminatory basis, and to the extent and duration that it is necessary for the achievement of the permissible purpose. This is the case in spite of the fact that this general exception clause also conflates security and public welfare permissible objectives. The specification that the “necessary” nexus requirement relates to the extent and duration of the measure and thus offers direction as to the proper interpretation of the necessity threshold is also noteworthy and is almost exclusively found in Indian BITs.

e. The Turkish BIT Program

Turkey concluded several new BITs in recent years eleven of which include an identical *sui generis* general exception provision. While these eleven treaties still represent an exception among a large number of 94 signed Turkish BITs216 as the latest treaties include general exceptions a lot speaks in favor of the proposition that Turkey has become the latest addition to the pool of countries that will routinely include general exceptions in their future BITs. Turkish general exception clauses follow one model and read as follows:

**Article 5 General Exceptions**

1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any non-discriminatory legal measure:
   a) designed and applied for the protection of human, animal or plant life or health, or the environment;

215 Or sometimes “in accordance with [the host State’s] laws normally and reasonably applied”, see for instance Article 12 of the India – Italy BIT (signed 23 November 1995, entered into force 26 March 1998).

b) related to the conservation of living or non-living exhaustible natural resources.

The Turkish general exception provision is unique for several reasons. For one, it only covers “legal measures” of the host State as opposed to any kind of State measure. In addition, it stipulates that the legal measure must be “designed and applied” for the protection of human, animal or plant life or health, or the environment, in order to be covered by the clause. This nexus requirement has so far only been employed, for similar objectives, in the general exceptions provision of the Investment Agreement for the Common Market for Eastern and Southern Africa and does not appear in the remainder of WTO or IIA general exceptions. In contrast, the “related to” requirement that is also used in connection with the conservation of living or non-living exhaustible natural resources resembles the traditional “relating to” language in Article XX GATT. Like other countries, Turkey also decided to amend its permissible objectives in conformity with pertinent WTO Appellate Body jurisprudence and added the clarification that “exhaustible natural resources” may be both “living and non-living”. Moreover, it has explicitly listed the protection of the environment as an independent policy end in the same subparagraph in which the protection of human, animal, or plant life or health is found. Lastly, Turkish general exceptions set out that to fall under the exception the State measure must not be discriminatory, providing for some substantive protection against abuses.

f. Other Sui Generis General Exception Clauses in BITs

Occasionally, States draft general exception provisions solely for use in a single IIA. Since they refrain from employing the specific formulations twice, these clauses seem to be a unique result of the particular treaty negotiations the background and underlying political motives of which may not be transferable to a different negotiation setting. These general exception clauses are further evidence of the fact that States not only give due

217 Article 5 of the Turkey – Gabon BIT (signed 18 July 2012) and most recently Article 5 of the Turkey – Rwanda BIT (signed 3 November 2016).

consideration to the relationship between investment protection and other non-investment welfare objectives in the negotiation process, but also custom-tailor the exception provisions according to their individual regulatory needs in the respective circumstances.

The first example of such a one-off clause is Article 5 of the Argentina – New Zealand BIT. It provides as follows:

**Article 5 Exceptions**

3. The provisions of this Agreement shall in no way limit the right of either Contracting Party to take any measures (including the destruction of plants and animals, confiscation of property or the imposition of restrictions on stock movement) necessary for the protection of natural or physical resources or human health, provided such measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination.\(^ {219} \)

The clause is unique in that it gives examples of State measures which may be permissible under the exception, enumerating specific acts such as the destruction of plants and animals, the confiscation of property or the imposition of restrictions on stock movement. This list is non-exhaustive as evidenced by the use of the term “including”. In addition, the articulation of the legitimate objectives is unusual and speaks of “the protection of natural or physical resources or human health”, while the more frequently employed formulation, with seemingly similar coverage, would have been “the conservation of exhaustible natural resources” and “the protection of human, animal, or plant life or health” as embodied in the text of Article XX lit. (b) and (g) GATT. In contrast, the prohibition of arbitrary or unjustifiable discrimination in the last section of the clause resembles the first part of the classical GATT or GATS *chapeau* paragraph.

The next example of a clause that has only been employed once is drawn from Article 8 of the Hong Kong – New Zealand BIT. It reads:

**Article 8 Exceptions**

3. The provisions of this Agreement shall not in any way limit the right of either Contracting Party to take measures directed to the protection of its essential interests, or to the protection of public health, or to the prevention of diseases and pests in animals and plants, provided that such

\(^ {219} \) Article 5 of the Argentina – New Zealand BIT (signed 27 August 1999).
measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination.\footnote{Article 8 of the Hong Kong – New Zealand BIT (signed 6 July 1995).}

Comparing it to the previous clause, Article 8 features some marked differences. First, the permissible objectives “public health” and “the prevention of diseases and pests in animals or plants” differ from the above clause and are formulations that are frequently found in other \textit{sui generis} exception provisions and provisions found in nineteenth and early twentieth century bilateral commercial treaties. Moreover, instead of “necessary” the expression “directed to” denotes the required degree of connection between the challenged measure and the permissible objective, whereas the prohibition of arbitrary or unjustified discrimination is identical.

Another one-of-a-kind general exception clause can be found in Article 11 of the Switzerland – United Arab Emirates BIT, a clause that is not exactly replicated in any other BIT of either country. The clause is very straightforward, enabling the host State to take any action necessary for, among others, reasons of public health or morality. Safeguards against abuses are absent. Its design again much more resembles security exceptions apart from the inclusion of the two classical public welfare objectives of public health and public morality. It reads as follows:

\textbf{Article 11 Other rules and special commitments}

4. Nothing in this Agreement shall be construed to prevent a Contracting Party from taking any action necessary for reasons of public security and order, public health or morality.\footnote{Article 11 of the Switzerland – United Arab Emirates BIT (signed 3 November 1998, entered into force 16 August 1999).}

A final example is Article 14(2) of the Finland – Zambia BIT. It contains a \textit{chapeau} provision and a number of permissible of objectives also found in other general exception clauses. Noteworthy is that it does not stipulate the required link between the measure and the permissible end by means of a nexus requirement.

\textbf{Article 14 General Derogations}

2. Provided that such measures are not applied in a discriminatory or arbitrary manner or do not constitute a disguised restriction on foreign investment, nothing in this Agreement shall be construed to prevent a
Contracting Party from adopting measures to maintain public order, or to protect public health and safety, including environmental measures necessary to protect human, animal or plant life.\textsuperscript{222}

2. Sui generis General Exception Clauses in Other International Investment Agreements

While not as frequent as in BITs, \textit{sui generis} general exception clauses sometimes also appear in other IIAs and are found in particular in the Energy Charter Treaty and the Investment Agreement for the Common Investment Area of the COMESA.

a. The General Exception Clause in the Energy Charter Treaty

The Energy Charter Treaty 1998 establishes a legal framework for cross-border commercial energy activities including rules on foreign direct investment.\textsuperscript{223} While its main purpose is to protect investors and investments from political risks associated with investing in another country, it also entails a general exception provision excluding the host States’ liability for treaty breaches under certain conditions. Article 24 of the Energy Charter Treaty reads as follows:

\begin{quote}
\textbf{Article 24}\n
\end{quote}

\textsuperscript{222} Article 14(2) of the Finland – Zambia BIT (signed 7 September 2005).
Article 24

(1) This Article shall not apply to Articles 12, 13 and 29.224

(2) The provisions of this Treaty other than

a. those referred to in paragraph (1); and

b. with respect to subparagraph (i), Part III of the Treaty shall not preclude any Contracting Party from adopting or enforcing any measure

(i) necessary to protect human, animal or plant life or health;

(ii) essential to the acquisition or distribution of Energy Materials and Products in conditions of short supply arising from causes outside the control of that Contracting Party, provided that any such measure shall be consistent with the principles that

a. all other Contracting Parties are entitled to an equitable share of the international supply of such Energy Materials and Products;

b. and any such measure that is inconsistent with this Treaty shall be discontinued as soon as the conditions giving rise to it have ceased to exist; or

(iii) designed to benefit Investors who are aboriginal people or socially or economically disadvantaged individuals or groups or their Investments and notified to the Secretariat as such, provided that such measure

a. has no significant impact on that Contracting Party’s economy; and

b. does not discriminate between Investors of any other Contracting Party and Investors of that Contracting Party not included among those for whom the measure is intended,

(iv) provided that no such measure shall constitute a disguised restriction on Economic Activity in the Energy Sector, or arbitrary or unjustifiable discrimination between Contracting Parties or between Investors or other interested persons of Contracting Parties. Such measures shall be duly motivated and shall not nullify or impair any benefit one or more other Contracting Parties may reasonably expect un-
Apart from the commitment to the protection of human, animal, or plant life or health common to a large number of IIA general exceptions in Article 24(2)(b)(i) ECT, the clause also allows measures essential for the acquisition or distribution of energy materials and products as specific energy-related permissible objective, Article 24(2)(b)(ii) ECT, and measures designed to benefit socially or economically disadvantaged investors, Article 24(2)(b)(iii) ECT. The chapeau-like paragraph is contained at the end of the clause and it is complemented by the conditions that State measures shall be “duly motivated” and shall not “nullify or impair any benefit one or more other Contracting Parties may reasonably expect under this treaty to a greater extent than strictly necessary to the stated end,” thereby tightening the required degree of connection between measure and policy end as stated in the previous paragraphs. While thus being inspired by the general structure of Article XX GATT / Article XIV GATS, Article 24 ECT has been tailored to meet the necessities of the subject addressed by the treaty – namely the energy sector.

Finally, of crucial importance is the scope of the exception clause, which, according to Article 22(1) ECT, does not cover the expropriation provision and thereby avoids the controversy of whether the inclusion of general exceptions into an IIA and the ensuing indemnification of the host State for violations of the treaty put the investor in a less favorable position than it would be in under the customary international law minimum standard for the treatment of aliens. Perhaps even more importantly for the present purposes, according to Article 22(1)(b) ECT the exception for the protection of human, animal or plant life or health does not apply to “Part Three of the Treaty”, which is the portion of the ECT that contains most, if not all, of the important investment obligations, such as the fair and equitable treatment standard, the full protection and security standard, the umbrella clause (all Article 10(1) ECT), the national treatment and

224 Article 12 deals with compensation for losses, Article 13 is the expropriation provision and Article 29 deals with interim measures on trade-related matters.
226 See infra Chapter Six, Part A, I for a discussion on the interaction between general exception clauses and the obligation to pay compensation for expropriatory actions.
most-favored-nation treatment provision (Article 10(3) ECT) and others. Accordingly, the added regulatory flexibility by virtue of Article 22 ECT is largely limited to the energy-related objectives identified in the clause.

b. The General Exception Clause in the Investment Agreement for the COMESA CIA

During their twelfth summit on 22 and 23 May 2007, the Heads of State and Government of the Member States of the Common Market for Eastern and Southern Africa have adopted the Investment Agreement for the COMESA Common Investment Area. It also includes a general exception clause recognizing the Member States’ right to restrict investment obligations for the pursuance of several non-economic policy objectives. The provision reads as follows:

**Article 22 General Exceptions**

1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between investors where like conditions prevail, or a disguised restriction on investment flows, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures:
   (a) designed and applied to protect national security and public morals;
   (b) designed and applied to protect human, animal or plant life or health;
   (c) designed and applied to protect the environment; or
   (d) any other measures as may from time to time be determined by a Member State, subject to approval by the CCIA Committee.  

The first paragraph of the provision resembles the chapeau of Article XIV GATS outlawing arbitrary and unjustifiable discrimination between investors where like conditions prevail as well as disguised restrictions on investment flows. The particularities of the clause are found in the subsequent elaboration of the permissible objectives. Notable here is the unusu-

---

al selection of the legitimate policy goals, listing not only the protection of the environment but also an extraordinarily broad exception for “any other measure as may from time to time be determined by a Member State, subject to approval by the CCIA Committee.” In addition, the clause stipulates that the measure must be “designed and applied” to protect the policy objective, which is a comparatively uncommon nexus requirement found otherwise only in recently concluded Turkish BITs.

III. Conclusion

As demonstrated, Article XX GATT and Article XIV GATS serve as major inspiration for the majority of general exception clauses in IIAs. Out of 178 examined provisions contained in IIAs signed by 2017, 49 are based on Article XIV GATS, 52 are modeled on Article XX GATT, and 12 incorporate both provisions by reference, bringing the total number of IIA general exception drafted on WTO models to 113. This accounts for approximately 63.5 percent of the total. Conversely, this means that States decided to draft *sui generis* general exception clauses not based on the WTO models in 65 or 36.5 per cent of the examined instances. Furthermore, States favor *sui generis* or Article XX GATT-like exception provisions for inclusion in their BITs and prefer a drafting based on Article XIV GATS when it comes to their PTIAs.

<table>
<thead>
<tr>
<th>Typology of General Exception Clauses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article XIV GATS-like</td>
</tr>
<tr>
<td>Article XX GATT-like</td>
</tr>
<tr>
<td>Article XX GATT &amp; Article XIV GATS</td>
</tr>
<tr>
<td>Sui Generis</td>
</tr>
</tbody>
</table>

*Figure VI: Typology of General Exception Clauses*

---

228 For instance Article 5 of the Turkey – Gabon BIT (signed 18 July 2012).
Clauses modeled on Article XX GATT and Article XIV GATS, for the larger part, deviate considerably from their WTO models. States do not blindly import the WTO general exceptions into the investment realm on face value, but rather make pointed amendments to the text of the provisions. While some of the textual amendments are merely designed to adjust the WTO provisions to the investment setting, a greater number adds or leaves out permissible objectives, exchanges less stringent for more onerous nexus requirements, or incorporates established WTO Appellate Body jurisprudence in the clause. This is evidence of a dynamic dialogue between treaty negotiators and WTO adjudicatory bodies and the acceptance of the latter’s jurisprudence by the former. Added elements that frequently reoccur include clarifications that exhaustible natural resources within the meaning of Article XX lit. (g) GATT may be “living and non-living”; that the exception for the protection of human, animal or plant life or health as embodied in Article XX lit. (b) GATT and Article XIV lit. (b) GATS may encompass pertinent environmental measures; and the replacement of the terminology “relating to” with “necessary”.

In part, States also draft *sui generis* exception clauses in their entirety, which protect similar but often fewer and differently framed non-economic objectives. They sometimes also employ distinct nexus requirements, and often include less pronounced or no safeguards against abuses. This again emphasizes that States do not solely rely on WTO provisions but also negotiate genuine investment law general exceptions.

What is more, the study also highlights that there is not a uniform treaty provision that forms the baseline for the interpretation of general exception clauses. Rather, general exception clauses differ from treaty program to treaty program, and sometimes even from treaty to treaty within the same treaty program. The interpretation of each clause thus has to be approached individually according to the clause’s individual terms. Depending on the particularities of the respective clause, the utility of past decisions may therefore be of limited value.

C. The Anatomy of General Exception Clauses

As outlined above, the greater part of the general exception clauses share similar characteristics and may be grouped accordingly. That being established, the clauses still vary as to their details. It therefore seems prudent to have a closer look at the placement of general exception clauses in IIAs,
which may have an impact on the interpretation, as well as at the variety of key terms used in IIA general exceptions, which form the basis for any interpretation.

I. The Placement of General Exception Clauses in IIAs

The majority of international investment agreements are composed of the treaty text including annexes, sometimes an attached protocol, and occasionally an accompanying exchange of notes. The main body of the treaty text usually contains the substantive protections and procedural provisions, whereas protocols attached to this mostly represent interpretive clarifications concerning the treaty’s substantive obligations and the exchange of notes deals with potentially remaining issues. It does not come as a surprise, therefore, that general exception provisions are typically found in the main body of the treaty text together with the other substantive provisions. While general exceptions in BITs are easily found as a result, their placement in PTIAs that do not deal with investment issues alone but also regulate trade in goods, trade in services, and other areas of international economic relations, may vary. Some include the general exceptions applicable to investment obligations directly in the investment chapter, others place them in a separate chapter entitled “General Provisions” at the beginning or “Exceptions” towards the end of the agreement. Only occasionally are general exceptions placed in a treaty’s annex. None of the reviewed general exceptions appeared in an attached protocol or an accompanying exchange of notes.


231 See, e.g., Article 12.18 of the Australia – Malaysia PTIA (signed 22 May 2012, entered into force 1 January 2013).

232 See, e.g., Article 11 of the Japan – India PTIA (signed 16 February 2011, entered into force 1 August 2011).


II. Key Terms in General Exception Clauses

From the findings above, it has already become clear that general exception clauses in IIAs vary just as much as the substantive protections do. The specific formulation is important as it determines the clause’s interpretation and invocation and thereby ultimately the extent to which States may derogate from their investment obligations for the pursuance of non-economic policy considerations. The particularities of the specific wording therefore ultimately also influences the protection accorded to foreign investors and, in turn, the regulatory freedom available to the host State. The more flexibility the clause grants to the host State, i.e. the broader the list of permissible objectives and the looser the nexus requirements are, the less pronounced the treaty protection for foreign investors is and vice versa.\footnote{For more details see infra Chapter Four, Part C, II.}

A closer examination is warranted.

The body of general exception clauses can be divided into three different elements that appear, in varying formulation, with certain regularity in almost all general exception provisions and are of crucial importance to the host State’s capacity to rely on these defenses to liability. These elements include (1) a list of permissible objectives protected by the clause, i.e. those non-investment objectives for which the host country is allowed to derogate from its IIA obligations, (2) nexus requirements as an indication of the required link or degree of connection between the challenged measure and the permissible objective sought through that measure, (3) and a variety of substantive and procedural safeguards to prevent abusive invocations of the clause.

1. Permissible Objectives

The examined IIA general exception clauses protect various permissible non-investment objectives for the pursuance of which the host State is relieved from its investment law obligations in cases of normative conflict. The ones that are likeliest to become important in investment arbitration include, in descending order of frequency of use in IIAs, a variety of health-related objectives, the compliance with laws and regulations not inconsistent with the Agreement, the conservation of natural exhaustible re-

\begin{quote}
235 For more details see \textit{infra} Chapter Four, Part C, II.
\end{quote}
sources, the protection of public order, the protection of public morals, the protection of the environment, and the protection of national treasures or artistic, historic or archaeological value.

**Permissible Objectives**

<table>
<thead>
<tr>
<th>Objective</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Health-related objectives</td>
<td>177</td>
</tr>
<tr>
<td>Compliance with laws and regulations not inconsistent</td>
<td>108</td>
</tr>
<tr>
<td>Conservation of exhaustible natural resources</td>
<td>93</td>
</tr>
<tr>
<td>Public order</td>
<td>71</td>
</tr>
<tr>
<td>Public morals</td>
<td>70</td>
</tr>
<tr>
<td>Protection of the environment</td>
<td>54</td>
</tr>
<tr>
<td>Protection of national treasures of...</td>
<td>44</td>
</tr>
</tbody>
</table>

**Figure VII: Permissible Objectives in IIA General Exceptions**

a. Protection of Human, Animal or Plant Life or Health and Other Health-related Objectives

The most frequently protected permissible objectives are health-related. 177 of 178 examined general exception provisions contain some form of this, albeit in different formulations. Since the majority of clauses are modeled on Article XX GATT or Article XIV GATS, it is unsurprising that the most frequent expression used is the “protection of human, animal or plant life or health” as provided for in the WTO Agreements.236 Less frequently but still fairly regularly, IIA clauses protect “public health” and once also “human health”,237 both of which are almost always complemented by the “prevention of diseases and pests in animal or plants”.238

236 See, e.g., Article 19.02 of the Taiwan – Guatemala PTIA (signed 22 September 2005, entered into force 1 July 2006); or Article XVII(3) of the Canada – Romania BIT (signed 8 May 2009, entered into force 23 November 2011).
237 Article 5(3) of the Argentina – New Zealand BIT (signed 27 August 1999).
b. Compliance with Laws and Regulations not Inconsistent with the Agreement

The second most common permissible objective protected by the examined general exception clauses is compliance with laws and regulations not inconsistent with the [this] Agreement. IIA general exceptions list it in 108 instances. However, none of the clauses modeled on Article XX GATT refer to the list of non-exhaustive examples entailed in the WTO provision,\(^{239}\) while exception clauses modeled on Article XIV GATS almost always list laws and regulations relating to the prevention of deceptive or fraudulent practices, the protection of the privacy of the individual, and safety.\(^{240}\)

c. Conservation of Exhaustible Natural Resources

While Article XX lit. (g) GATT protects measures relating to the conservation of exhaustible natural resources, Article XIV GATS does not include this policy end. Therefore, only 93 clauses either modeled on or incorporating elements of Article XX GATT feature this permissible objective. Some of them keep the exception related to domestic restrictions on natural resources,\(^{241}\) while others do not include this caveat.\(^{242}\) Moreover, the clarification that exhaustible natural resources may be both “living and non-living” recurs frequently in a significant number of IIAs.

d. Protection of Public Order

71 times, the examined general exception provisions contain an exception for the protection of public order. Public order is a permissible objective that is usually featured in security exception provisions. Its enumeration in

\(^{239}\) For instance Article 2201(3) of the Canada – Peru PTIA (signed 28 May 2008, entered into force 1 August 2009).

\(^{240}\) See, e.g., Article 4.14 of the EFTA – Ukraine PTIA (signed 24 June 2010, entered into force 1 June 2012), incorporating Article XIV GATS.

\(^{241}\) See, e.g., Article 16 of the ASEAN – China PTIA (signed 15 August 2009, entered into force 15 February 2010).

\(^{242}\) See, e.g., Part D, Article 33(2)(a) of the Canada – China FIPA (signed 9 September 2012).
Article XIV lit. (a) GATS explains its prominence in general exception clauses for non-economic (and non-security) public welfare objectives. That being said, a considerable number of IIAs contain security exception clauses alongside a general exception clause. Therefore, IIAs more frequently protect public order than the given figure reveals.

e. Protection of Public Morals

On 70 occasions, the examined general exception clauses protect either public morals\(^{243}\), a formulation that appears in both WTO general exception clauses, or, less frequently, public morality.\(^{244}\)

f. Protection of the Environment

A particularity of the drafting of Article XX GATT and Article XIV GATS is the lack of an explicit commitment to the protection of the environment as one of the permissible objectives.\(^{245}\) To address this shortcoming, investment treaty drafters, particularly those who use *sui generis* IIA general exceptions, deviate from the WTO provisions in that they explicitly include the protection of the environment as a permissible objective.\(^{246}\) Others take into account that the WTO Appellate Body recognized that the pursuance of environmental policies might fall within the realm of either the protection of human, animal, or plant life or health (Article XX lit. (b) GATT) or the conservation of exhaustible natural resources (Article XX

---

243 See, e.g., Article 33 in conjunction with Article 49 of the EFTA – Singapore PTIA (signed 26 June 2002, entered into force 1 January 2003).
244 See, e.g., Article 11(4) of the Switzerland – United Arab Emirates BIT (signed 3 November 1998, entered into force 16 August 1999).
245 That being said, Article XX lit. (b) and lit. (g) GATT have been utilized as gateway provisions for introducing environmental considerations into the WTO system, see *Matz-Lück/Wolfrum*, in: Wolfrum, et al. (eds.), Max Planck Commentaries on World Trade Law, Vol. 5, WTO – Trade in Goods, Article XX (g) GATT, ¶2 (2011).
246 See, e.g., Article 11 of the Mauritius – China BIT (signed 4 May 1996, entered into force 8 June 1997).
lit. (g) GATT)\textsuperscript{247} and endorse this jurisprudence in their draft by means of interpretive clarification or footnotes.\textsuperscript{248} In total, 54 provisions contain an explicit commitment to the protection of the environment.

g. Protection of National Treasures of Artistic, Historic, or Archaeological Value

Finally, 44 of the examined general exception clauses protect national treasures of artistic, historic or archaeological (or cultural) value as provided for in Article XX lit. (f) GATT.\textsuperscript{249}

2. Nexus Requirements

Nexus requirements are used to denote the required link between the challenged State measure and the permissible objective. Some of them derive from the model provision of Article XX GATT and Article XIV GATS, while others appear exclusively in IIA general exceptions. In descending order of frequency, the employed nexus requirements are “necessary”, “relating to” or “related to”, “directed to”, “imposed for”, “designed and applied for”, and “which it considers necessary”. A small number of permissible objectives lack a specific nexus requirement and are merely connected with the word “to”.\textsuperscript{250}

\textsuperscript{248} See, e.g., Article 159(2) of the Costa Rica – China PTIA (signed 8 April 2010, entered into force 1 August 2011), which states that “The Parties understand that the measures referred to in Article XIV(b) of GATS include environmental measures necessary to protect human, animal, or plant life or health...”.
\textsuperscript{249} See, e.g., Chapter 8, Article 21 of the Singapore – Australia PTIA (signed 17 February 2003, entered into force 28 July 2003).
\textsuperscript{250} See figure VIII for an illustration of the prevalence of the different nexus requirements.
By far the most frequently used language to describe the required degree of connection between the permissible objective and the challenged State measure is the “necessity” requirement. IIA general exceptions use it on 409 occasions. At the same time, it is the most onerous nexus requirement that States employ in investment general exceptions. None of the examined treaties features narrower formulations although such language would be conceivable, for instance that a measure must be “strictly necessary” for the pursuance of the permissible objective. Conversely, the survey shows that a number of more permissible nexus requirements would have been available. Nonetheless, IIAs use the necessity threshold requirement in a predominate fashion and for a broad range of permissible objectives, sometimes as the exclusive nexus requirement.

Such language appears only in Article 22 of the Energy Charter Treaty (signed December 1994, entered into force 16 April 1998), which uses the traditional necessity threshold but goes on to state that a State measure “shall not nullify or impair any benefit one or more other Contracting Parties may reasonably expect under this Treaty to an extent greater than is strictly necessary to the stated end.” (emphasis added).
b. Relating to / Related to

The condition that a State measure must be “relating to” or “related to” the non-economic goal is the second most common nexus requirement. It is used in conjunction with 67 permissible objectives and appears mainly in the context of the exception for the conservation of exhaustible natural resources, mirroring the language used in Article XX lit. (g) GATT.

c. Imposed for

In 37 instances IIAs require that a State measure must be “imposed for” the permissible objective to qualify under the exception. In line with Article XX lit. (f) GATT, this nexus requirement is exclusively used in conjunction with the protection of national treasures of artistic, historic, archaeological, or cultural value.

d. Designed and Applied to / for

The formulation “designed and applied to / for” appears 27 times and is exclusively found in general exceptions in Turkish BITs and in the Investment Agreement for the Common Market for Eastern and Southern African States. There is no equivalent in the WTO Agreements.

e. Directed to

In 20 cases the examined IIAs require that a measure must be “directed to” the permissible objective. This language is a sui generis creation that does not appear either in the GATT or the GATS general exception provision and is featured solely in general exceptions in the BIT programs of a number of countries.

252 For instance Article 5 of the Turkey – Bangladesh BIT (signed 12 April 2012) and Article 5 of the Turkey – Cameroon BIT (signed 24 April 2012).


254 “Directed to” language is, for instance, employed in general exceptions found in Mauritian and Singaporean BITs.
Which it Considers Necessary

Interestingly, the Framework Agreement on the Promotion, Protection and Liberalization of Investment within the Asian-Pacific Trade Agreement is the only IIA which employs “which it considers necessary” language for the five objectives of its general exception clause.\textsuperscript{255}

g. No Nexus Requirements

Finally, a small number of IIAs refrain from including special nexus requirements for nine individual permissible objectives altogether. Instead they merely use the words “to” or “for” to denote the required link.

3. Safeguards against Abusive Invocation

In addition to the list of permissible objectives and the elaboration of the required degree of connection, the majority of IIA general exception clauses also include requirements that are specifically drafted to prevent arbitrary, discriminatory or generally abusive invocations of the exceptions by the host State. With a view to these explicit safeguards against abusive invocations of general exceptions,\textsuperscript{256} one may distinguish between the traditional chapeau requirements as entailed in Article XX GATT and Article XIV GATS, which are mirrored in the general exceptions modeled on these provisions, other good faith or non-discrimination requirements that appear exclusively in BIT general exception clauses, notification requirements as a form of procedural safeguards, and provisions that do not incorporate explicit safeguards against abusive invocations at all.\textsuperscript{257}

\textsuperscript{255} Article 5 of the Framework Investment Agreement in APTA Participating States (signed 15 December 2009).

\textsuperscript{256} The designation as “explicit safeguards against abusive invocation” does not necessarily mean that the elements presented in the following section are the only available mechanisms that make misuses of exception harder. In fact, nexus requirements may also be interpreted narrowly so as to make misuses exceedingly difficult. For details see \textit{infra} Chapter Four, Part D, I, 2.

\textsuperscript{257} See figure IX for an illustration of the prevalence of the different safeguards.
Safeguards against Abusive Invocation

<table>
<thead>
<tr>
<th>Safeguards against Abusive Invocation</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>GATT/GATS-like Chapeau Requirements</td>
<td>120</td>
</tr>
<tr>
<td>No Substantive Safeguards</td>
<td>36</td>
</tr>
<tr>
<td>Other Good Faith or Non-Discrimination Requirements</td>
<td>22</td>
</tr>
<tr>
<td>Notification Requirements (solely or complementary)</td>
<td>13</td>
</tr>
</tbody>
</table>

**Figure IX:** Safeguards against Abusive Invocation in IIA General Exception Clauses

a. “Chapeau” Requirements

As shown above, 120 of the examined 178 general exception provisions, and therefore the majority, are modeled closely on Article XX GATT and Article XIV GATS respectively or cumulatively. This is most cogently reflected in the formulation of the introductory paragraph, the “chapeau” provision, the main aim of which is to prevent abusive invocations of the general exceptions.258 In order to do so, it prohibits States from taking measures that amount to arbitrary and unjustifiable discrimination or a disguised restriction on international investment (or trade).

---

Arbitrary or Unjustifiable Discrimination

The prohibition of arbitrary and unjustifiable discrimination appears in varying formulations in a considerable number of IIA general exceptions. Original language of Article XX GATT ("arbitrary or unjustifiable discrimination between countries where the same conditions prevail") and Article XIV GATS ("arbitrary or unjustifiable discrimination between countries where like conditions prevail") is found in clauses that incorporate these provisions without amendments. However, the sole reference to countries where the same or like conditions prevail does not seem to fit properly in investment disputes where the relevant comparators in the discrimination inquiry are not only capital-importing and / or exporting countries but also foreign (and domestic) investors and their investments. To reflect this different investment setting, States modify their IIA general exceptions accordingly. Formulations that are employed include the application of measures in an "arbitrary or unjustifiable manner", "arbitrary or unjustifiable discrimination between investments or between investors", "arbitrary or unjustifiable discrimination against the other Contracting Party", "arbitrary or unjustifiable discrimination against the investor of the other Contracting Party", and "arbitrary or unjustified discrimination against persons of the other Party."

259 See, e.g., Article 126 of the Malaysia – Pakistan PTIA (signed 8 November 2007, entered into force 1 January 2008), which incorporates both Article XX GATT and Article XIV GATS.

260 See, e.g., Annex I, III(2) of the Canada – Costa Rica FIPA (signed 18 March 1998, entered into force 29 September 1999) as an example of all Canadian FIPAs prior to the Canadian Model FIPA 2004.

261 For instance Article 2201(3) of the Canada – Colombia PTIA (signed 21 November 2008, entered into force 15 August 2011); similarly also Article 19 of the Protocol on Investment to ANZCERTA (signed 16 February 2011).


263 See, e.g., Article 13(5) of the Colombia – India BIT (signed 10 November 2009).

Similarily, the language used to outlaw disguised restrictions differs from clause to clause. Provisions that merely incorporate the WTO exceptions by reference or without textual amendments speak of “disguised restrictions on international trade”\textsuperscript{265} or “disguised restrictions on trade in services”\textsuperscript{266} respectively. This one-on-one incorporation of the GATT or GATS provisions leaves the States stuck with the WTO terminology, whose references to “international trade (in goods)” and “trade in services” seem misplaced against the investment background. Therefore, while the majority of States decided to orientate themselves on the WTO provision they also chose to make appropriate textual amendments in the drafting process to adapt the clauses’ language to the investment setting. Modified in this manner, the clauses disallow, for instance, “disguised restrictions on international trade or investment”,\textsuperscript{267} “disguised restrictions on investments of investors of a Party in the territory of the other Party”,\textsuperscript{268} “disguised restrictions on investors and investment,”\textsuperscript{269} or a “disguised restriction on investment flows.”\textsuperscript{270}

\textsuperscript{265} The language of GATT Article XX as incorporated by reference by \textit{e.g.} Article 12.1(1) of the India – Malaysia PTIA (signed 18 February 2011, entered into force 1 July 2011).
\textsuperscript{266} The language of GATS Article XIV as incorporated by reference by \textit{e.g.} Chapter 15, Article 1 of the ASEAN – Australia – New Zealand PTIA (signed 27 February 2009, entered into force 1 January 2010).
\textsuperscript{267} See mainly the Canadian FIPA and PTIA programs, Article 10 of the Canadian Model FIPA, but also Canadian FIPAs concluded previously such as \textit{e.g.} Article XVII(3) of the Canada – Armenia FIPA (signed 8 May 1997, entered into force 29 March 1999).
\textsuperscript{268} See, \textit{e.g.}, Article 6.11(1) of the India – Singapore PTIA (signed 29 June 2005, entered into force 1 August 2005); and similarly Article 19 of the Japan – Peru BIT (signed 21 November 2008, entered into force 10 December 2009).
\textsuperscript{269} See, \textit{e.g.}, Article 20 of the EFTA – Korea PTIA (signed 15 December 2005, entered into force 1 September 2006); and Article 10.18(1) of the Korea – India PTIA (signed 7 August 2009, entered into force 1 January 2010). Similarly also Article 17 of the ASEAN Comprehensive Investment Agreement (signed 26 February 2009, entered into force March 2012).
\textsuperscript{270} See, \textit{e.g.}, Article 5 of the Investment Agreement in APTA Participating States (signed 15 December 2009) or Article 12.18 of the Australia – Malaysia PTIA (signed 22 May 2012, entered into force 1 January 2013).
b. Other Good Faith and Non-Discrimination Requirements

22 IIAs, exclusively BITs, do not provide for safeguards against abuses as found in the classical GATT- or GATS-chapeau paragraph but instead encompass other, different forms of good faith or non-discrimination requirements that serve essentially similar purposes. Article 12 of the India – Bosnia and Herzegovina BIT incorporates several of these *sui generis* conditions and stipulates:

**Article 12 Exceptions**
The provision of this Agreement shall not in any way limit the right of either Contracting Party in *cases of extreme emergency* to take action *in accordance with its laws applied in good faith, on nondiscriminatory basis by giving the same treatment to all investors in the like situations*, and only to the extent and duration necessary for the protection of its essential security interests, or for the prevention of diseases and pests in animals and plants.\(^{271}\) (Emphasis added).

To prevent abusive invocations, Article 12 requires that the State action is taken only “in cases of extreme emergency”, “in accordance with [the host State’s] laws applied in good faith”,\(^{272}\) and “on a non-discriminatory basis by giving the same treatment to all investors in the like situations.”\(^{273}\) Other BITs entail similar, though differently worded conditions and may require that the action is taken ”in accordance with [the host State’s] laws normally and reasonably applied”\(^{274}\) or that the State measure itself rather than its application is “non-discriminatory.”\(^{275}\)

---

272 For another example see Article 12 of the Mauritius – Czech Republic BIT (signed 5 April 1999, entered into force 6 May 2000).
275 For example Article 5 of the Turkey – Pakistan BIT (signed 22 May 2012).
c. Notification Requirements

Thirteen of the 178 examined general exception provisions entail different variations of notification requirements. Three provisions rely solely on these procedural safeguards, while the other ten incorporate them as a complement to the substantive protections against abusive invocation. Notification requirements oblige the Party taking a measure or action pursuant to the general exception provision to inform the other Party either before said measure or action is taken or as soon as possible thereafter. The required richness of detail depends on the specific formulation and varies from clause to clause. The simplest form of this drafting practice can be found, for instance, in Article 15(3) of the Japan – Colombia BIT, which reads as follows:

“Article 15 General and Security Exceptions
3. In cases where a Contracting Party takes any measure, pursuant to paragraph 1, that does not conform with the obligations under this Agreement other than Article 12, that Contracting Party shall endeavor to, as soon as possible, notify the measure to the other Contracting Party.”

The clause entails only a general notification requirement and does not mention which specifics and details of the measure the State has to provide in its notification. Similar basic notification obligations can be found in five other examined IIAs.

Other clauses stipulate more stringent information requirements. For instance, Article 18(3) of the Japan – Laos BIT envisages as follows:

---

276 Also note that the general exception provision in the draft Multilateral Agreement on Investment, Article VI(4) MAI, stipulated a duty to notify the other treaty Parties about measures or actions taken pursuant to the article.
277 Article 15(3) of the Japan – Colombia BIT (signed 12 September 2011).
278 See Article 83(2) of the Japan – Singapore PTIA (signed 13 January 2002, entered into force 30 November 2002); Article 8(4) of the Japan – Brunei PTIA (signed 18 June 2007, entered into force 31 July 2008); Article 11(3) of the Japan – Indonesia PTIA (signed 20 August 2007, entered into force 1 July 2008); Article 10.18(4) of the Korea – India PTIA (signed 7 August 2009, entered into force 1 January 2010); and Article 12.18(2) of the Australia – Malaysia PTIA (signed 22 May 2012, entered into force 1 January 2013).
“Article 18 General and Security Exception Clauses

3. In cases where a Contracting Party takes any measure, pursuant to paragraph 1 of this Article, that does not conform with the obligations of the provisions of this Agreement other than the provisions of Article 13, that Contracting Party shall, prior to the entry into force of the measure or as soon thereafter as possible, notify the other Contracting Party of the following elements of the measure: (a) sector and sub-sector or matter; (b) obligation or article in respect of the measure; (c) legal source of the measure; (d) succinct description of the measure; and (e) purpose of the measure.”

Notification requirements of this type of clause are much more sophisticated compared to the prior provision. They require the installing party to provide the other Contracting Party with details on a number of elements of the measure including a succinct description of the measure, its purpose and legal source, the infringed obligations under the treaty as well as the affected industrial sector or sub-sector. Similarly extensive notification requirements are found in six of the other IIAs examined.

d. No Safeguards against Abuses

Lastly, a comparatively high number of 36 of the examined IIAs, all of which are BITs, do not provide for explicit substantive safeguards against abuses at all.

280 Article 16(3) of the Japan – Korea BIT (signed 22 May 2002, entered into force 1 January 2003); Article 15(3) of the Japan – Viet Nam BIT (signed 14 November 2003, entered into force 19 December 2004); Article 99(2) of the Japan – Philippines PTIA (signed 9 September 2006, entered into force 11 December 2008); Article 17(2) of the Japan – Uzbekistan BIT (signed 15 August 2008, entered into force 24 September 2009); Article 19 (2) of the Japan – Peru BIT (signed 21 November 2008, entered into force 10 December 2009); and Article 95(4) of the Japan – Switzerland PTIA (signed 19 February 2009, entered into force 1 September 2009).
281 This does not necessarily mean that these general exception clauses invite or encourage misuses. Even in the absence of explicit safeguards against abuses, tribunals may read implicit safeguard mechanisms into other elements of the provisions.
III. Conclusion

The examination of the permissible objectives general exception clauses protect reveals that States seem to be mostly concerned about the impact of investment arbitration on the health of their population. While they use varying language to achieve this goal, all of the provisions examined allow States to derogate from investment obligations for the pursuance of health-related measures, which encompass the protection of humans, animals and plants alike. Some of them, however, only cover measures that combat diseases or pests in animals or plants. Moreover, explicit exceptions for the protection of the environment or of interpretative footnotes or clarifications to this effect over and above what the WTO model provisions entail are found in 54 of the examined clauses emphasizes that the preservation of regulatory space for the pursuance of environmental concerns in the context of investment arbitration is also critical to a large number of States. In addition, the comparatively frequent inclusion of exceptions for the conservation of natural resources and the protection of national treasures of artistic, historic or archaeological value exceeding the number of provisions modeled on Article XX GATT, where the exceptions are originally derived from, shows that these policy areas are also of concern to States and that States add to the exceptions of the WTO model provisions where they perceive a regulatory need to do so.

Furthermore, the analysis of the employed nexus requirements evidences that States favor the requirement that a State measure must be necessary for the pursuance of the permissible objective in order to qualify under the exception by a clear margin. The necessity condition is featured in 409 permissible objectives. States even go as far as to substitute other nexus requirements found in the original WTO exceptions that the IIA clauses are modeled on by the necessity threshold. Remarkably, they do this despite the fact that the necessity requirement imposes the most onerous conditions on the justification of State measures in IIA exceptions. This again underlines that States are willing to substitute requirements of the original WTO models where they see room for improvement. Additionally, the incorporation of more demanding nexus requirements than envisaged in the GATT or GATS shows that the majority of States do not view general exceptions as a means to circumvent their investment obligations through the backdoor, but instead are aware of the inherent risks of abuse generally associated with such clauses and search for ways to ensure that a derogation is only possible in exceptional and reasonable cases.
Apart from that, the wealth of diverse nexus requirements exclusive to the investment realm underscores the finding that States do not solely rely on the import of WTO exception provisions in their IIAs but also draft original investment general exceptions.

As concerns the safeguards against abusive invocations, the figures show that the larger part 120 out of the 178 examined clauses entail some sort of substantive protections either modeled on the GATT or GATS chapeau paragraph or independently of it. The former prohibit measures that amount to arbitrary or unjustifiable discrimination or disguised restrictions on economic activity in a variety of different formulations, while the latter appear in the form of other good faith or non-discrimination requirements which essentially serve the same purpose, albeit less comprehensively. This demonstrates that most States insist on the inclusion of both nexus and non-discrimination or good faith requirements. Conversely, the numbers mean that a comparatively high number of 36 provisions do not comprise explicit substantive safeguards against abuses at all. In part, this is probably due to the conflation of security and public welfare objectives in a single clause. A total of 13 exception provisions comprise simple or sophisticated notification requirements unknown to the WTO provisions, obliging the installing State to notify the investor’s home State of a measure that is only compatible with the IIA by virtue of the exception clause, as a form of procedural safeguards against abuses.

D. The Relevance of this Chapter’s Conclusions for the Remaining Study

The purpose of the present Chapter was to provide pertinent facts and figures on the use of general exception clauses in current IIA treaty practice. The above results constitute a detailed insight into current IIA treaty drafting practice and offer empirical information on the current state of the IIA treaty landscape as regards general exceptions that may be of interest to States, as treaty negotiators, investment tribunals, as treaty interpreters, investment lawyers, professionally occupied in the field, and investment and trade law scholars researching new developments on the intersection between international trade and investment law. Two findings are of particular importance: First, the Chapter demonstrated that the inclusion of general exception clauses has become increasingly common treaty practice in both BITs and PTIAs with a growing number of geographically and economically diverse States including general exceptions in their IIAs every
year. The presented numbers not only describe a new trend in IIA treaty practice but also illustrate the need for academic study on the topic.

Second, for the most part, IIA negotiators in the drafting of IIA general exception clauses orientate themselves on the characteristic and tried-and-tested design of Article XX GATT and/or Article XIV GATS. While some IIAs merely copy and paste the WTO provisions or make them directly applicable by reference, most IIA general exception clauses differ from the WTO model provisions in the details, for the most part incorporating elements derived from the jurisprudence of the WTO Appellate Body. These findings not only shed light on the treaty negotiating process and affirm the States’ acceptance of the WTO adjudication on general exceptions, but also raise the question of why general exception clauses are so well-established in international trade agreements as to warrant their transplantation into the investment realm, but were not included in IIAs until comparatively recently.\footnote{282}

What is more, the above conclusions also form the indispensable empirical bases for the following chapters of this study. In Chapter Four, the statistical data provides a more informed basis for the discussion of questions arising from the conclusion of general exception clauses in IIAs, for example for the evaluation of the argument surrounding whether general exceptions are inherently prone to bad faith invocations undermining the very purpose of the investment law regime in the long run.\footnote{283} Moreover, the fact that States frequently model IIA exceptions on WTO provisions assists in making the case in favor or against a cross-regime fertilization between WTO and investment law and jurisprudence in the interpretation of IIA general exceptions in Chapter Five.\footnote{284} And finally, the analyses on the distribution of the permissible objectives protected by IIA general exception clauses, of the different nexus requirements entailed in such clauses and on the safeguards against abusive invocation built into the majority of IIA general exception clauses constitute the necessary points of reference for the Chapter Five on the interpretation of the individual elements of IIA general exceptions.\footnote{285}

\footnotesize
\begin{footnotes}
\item[282] The question is addressed in \textit{infra} Chapter Three.
\item[283] See \textit{infra} Chapter Four, Part D.
\item[284] See \textit{infra} Chapter Five, Part B.
\item[285] See \textit{infra} Chapter Five, Part C.
\end{footnotes}
Recalling one of the most noteworthy conclusions drawn in Chapter Two, IIA general exception clauses often incorporate or are modeled on the WTO provisions Article XX GATT or Article XIV GATS. While this, for one, evidences an ongoing form of legal transplantation between the realms of international trade and investment law, it also presupposes that the use of general exception clauses, while still in its infancy in IIA treaty practice, is an established and well-recognized treaty practice in international trade agreements. In fact, the practice of including general exceptions in WTO agreements must be so well established and recognized as to suggest or warrant their transplantation from the trade treaty system to the investment treaty world. This necessarily begs the question, addressed in this Chapter, as to the reasons for this notable discrepancy in the distribution of general exception clauses across international trade and investment law, i.e. their presence in the former but usually not in the latter legal regime.

A. The Presence of General Exception Clauses in International Trade Law

The inclusion of general exception clauses is a common and long-established treaty practice in international trade agreements.

286 See supra Chapter Two, Part B, III for details.
A Brief Historiography of General Exception Clauses in International Trade Agreements

General exception clauses can trace their roots back to their first appearances in bilateral trade treaties concluded as early as the nineteenth century, when such agreements mushroomed. As a recurring element in bilateral treaty practice at that time, general exception clauses then found their way into the first multilateral trade agreements negotiated in the early twentieth century and, later, to today’s WTO agreements where they have a major impact on the current trade dispute settlement system.

I. General Exception Clauses in Bilateral Commercial Treaties of the Nineteenth and Early Twentieth Century

Following the Napoleonic Wars, the industrial revolution and the displacement of mercantilism by liberal economic theory, the middle of the nineteenth century witnessed a rapid growth in the number of bilateral commercial agreements, which spread trade liberalization across the United States and Europe.\(^{287}\) Despite their bilateral nature and notwithstanding the absence of an overarching institutional framework, these agreements, which were often referred to as treaties of friendship, commerce, and navigation (FCN),\(^{288}\) effectively created a multilateral trading system based on free cross-border exchange of goods by the early 1860s.\(^{289}\) Together with this proliferation of a network of FCN treaties, the first express general exceptions for non-economic policy reasons to the general rule of trade liber-

---

\(^{287}\) The proliferation of such agreements was heralded by the Cobden-Chevalier free trade treaty between the United Kingdom and France (signed on 23 January 1860 and named after the main British and French originators of the treaty, Richard Cobden MP and Michel Chevalier), see Winham, The Evolution of International Trade Agreements, p. 25 (1992). For a more detailed account of the historical events see Condliffe, The Commerce of Nations, pp. 220-224 (1950).

\(^{288}\) While the majority of these treaties were titled as treaties of friendship, commerce, and navigation, other terms, for instance the words “amity” or “peace” were used as well, making the term “FCN treaty” a generic one.

alization appeared. The Treaty of Peace, Friendship, and Commerce between Madagascar and the United States of America of 1881 contains one of the earlier examples of this practice. While initially stipulating in its Article IV(1) that commerce between the people of the two countries “shall be perfectly free”, the treaty thereafter sets out an exception to this general rule in its Article IV(9), which reads:

“9. And should it be found at any time that any other articles of an injurious nature, tending to the injury of the health or of morals of Her Majesty’s subjects, are being imported, Her Majesty’s Government shall have the right to control, restrict or prohibit the importation in like manner, after giving due notice to the United States Government.”

The treaty thus accorded the Government of Madagascar the right to exceptionally restrict or prohibit commerce between the two countries, which was previously declared to be “perfectly free”, if the imported goods turned out to be injurious to the health or the morals of the Malagasy population – two policy objectives which still appear with a certain regularity in contemporary general exception provisions. The only prerequisite for the invocation of the clause was that Madagascar had to give due notice to the United States Government prior to the adoption of such measures. The reasons as to why one of the earliest examples of a general exception clause for non-economic policy objectives appeared in a treaty between a developed and a developing country and confers the unilateral right to restrict imports solely to the Malagasy Government – the developing country party – with no corresponding right offered to the developed country remain a matter of speculation. Madagascar may have been particularly concerned about the import of (certain) U.S. goods and may have thus insisted on the inclusion of the exception. Conversely, the United States may not have expected substantial imports from Madagascar and therefore may not have perceived a need for a reciprocal right to restrict imports. It seems also plausible that Madagascar did not sign many bilateral commercial treaties in the nineteenth century and was therefore able to dedicate exceptional care and attention to the negotiations of the individual treaty so as to custom-tailor it to its specific needs.

291 Similar notification requirements may be found in a number of contemporary general exception provisions, see supra Chapter Two, Part C, II, 3, c.
292 Similarly one-sided general exception provisions are no longer in use.
General exceptions became an even more common sight in bilateral commercial agreements concluded in the first decades of the twentieth century.\textsuperscript{293} Compared to modern provisions, however, exception clauses of that time were mostly limited, allowing States to derogate from their trade liberalization obligations to protect public health or to prevent the spread of animal diseases or the destruction of crops or plants by pest infestation.\textsuperscript{294} This highlights that the main policy concerns of States at the time

\textsuperscript{293} Economic treaties concluded after 1919 were also well documented by the then newly founded League of Nations in the League of Nations Treaty Series as a result of Article 18 of the Covenant of the League of Nations, which required that: “Every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered.”.

related to the health of their population and the potentially detrimental effect of cross-border trade in comestible goods on domestic stockbreeding and agriculture. In fact, the protection of public health and the prevention of the spread of animal diseases and the destruction of crops or plants, which could have easily resulted in a famine in the nineteenth century, lie at the core interest of the State. Their paramount importance gives an indication why States felt the need to include exceptions to safeguard against what may be considered typical dangers of cross-border trade. These objectives were often complemented by security exceptions that allowed for derogations from the treaty in times of war or in the face of threats to pub-

ticle 7 of the Treaty of Commerce and Navigation between Albania and Italy, 20 January 1924, 44 L.N.T.S. 359, 365; Article 7 of the Provisional Commercial Convention between Hungary and Italy, 20 July 1925, 45 L.N.T.S. 39, 45; Article 2 of the Commercial Treaty between Switzerland and Austria, 6 January 1926, 46 L.N.T.S., 341, 343; Article 9 of the Commercial Convention between Austria and Poland, 25 September 1922, 59 L.N.T.S., 307, 313; Article VI of the Treaty of Friendship, Commerce and Navigation between Norway and Siam, 16 July 1926, 60 L.N.T.S., 36, 40; Article 5 of the Commercial Convention between the Kingdom of Italy and the Latvian Republic, 25 July 1925, 60 L.N.T.S., 93, 95-97; Article 11 of the Treaty of Friendship, Commerce and Navigation between Italy and Siam, 9 May 1926, 61 L.N.T.S. 215, 221; Article 11 of the Treaty of Commerce and Navigation between Estonia and the Economic Union of Belgium and Luxembourg, 28 September 1926, 62 L.N.T.S., 433, 441; Article 3 of the Provisional Commercial Convention between Greece and Switzerland, 29 November 1926, 63 L.N.T.S. 27, 31; Article 6 of the Commercial Convention between Greece and Sweden, 10 September 1926, 63 L.N.T.S. 37, 41; Article 10 of the Convention of Commerce and Navigation between Greece and Italy, 24 November 1926, 63 L.N.T.S. 51, 59-61; Article 2 of the Commercial Treaty between Switzerland and Czechoslovakia, 16 February 1927, 64 L.N.T.S., 7, 11; Article XIX of the Commercial Treaty between the Kingdom of Hungary and the Czechoslovak Republic, 31 May 1927, 65 L.N.T.S. 63, 75; Article 4 of the Commercial Convention between Switzerland and the Turkish Republic, 4 May 1927, 67 L.N.T.S. 141, 145; Article 4 of the Commercial Convention between the Czechoslovak Republic and the Turkish Republic, 31 May 1927 71 L.N.T.S. 335, 339; Article 6 of the Treaty of Commerce and Navigation between the German Reich and the Kingdom of the Serbs, Croats and Slovenes, 6 October 1927, 77 L.N.T.S. 48, 52; Article 6 of the Convention of Commerce and Navigation between Greece and Norway, 29 June 1927, 82 L.N.T.S. 193; Article V of the Treaty of Friendship, Commerce and Navigation between the Kingdom of Siam and the German Reich, 7 April 1928, 85 L.N.T.S. 338, 341; Article 14 of the Commercial Treaty between Austria and France, 16 May 1928, 88 L.N.T.S. 21, 29; Article 14 of the Treaty of Commerce and Navigation between Italy and Hungary, 4 July 1928, 92 L.N.T.S. 117, 127. This list does not purport to be complete.
lic security or safety, and by exceptions for products produced or traded under State monopolies. Safeguards against abusive invocation of the general exceptions were largely unknown.

2. General Exception Clauses in the First Multilateral Trade Agreements of the 1920s

After the First World War, in the 1920s, several international conferences were convened which aimed at the conclusion of the first multilateral trade agreements. During the negotiations, non-economic policy exceptions to the overall objective of trade liberalization were routinely considered for inclusion in the treaties. The first references appeared during the Genoa Conference of 1922 which contemplated a reduction in import and export prohibitions by means of a draft treaty. Although the treaty failed to attain widespread agreement, it still anticipated certain non-economic policy exceptions to the general rule of trade liberalization for, among other things, “the purpose of providing for national necessities, the safeguarding of public health, morals or security, or the protection of animals and plants from pests and diseases.”

One year later, in 1923, the International Convention Relating to the Simplification of Customs Formalities became the first general multilateral trade agreement that entered into force. It was adopted by another international conference between 35 countries. While its main objective was to facilitate cross-border trade by the reduction of excessive and arbitrary customs formalities, in its Article 17 it contained non-economic exceptions to this purpose for measures “which contracting states may take to ensure the health of human beings, animals or plants.”

295 Generally on the Genoa Conference see Saxon Mills, The Genoa Conference (1922); specifically on discussions on exception provision during the Conference see Charnovitz, 38 Virginia Journal of International Law 689, 705 (1997-1998).
297 International Convention Relating to the Simplification of Customs Formalities, 3 November 1923, 30 L.N.T.S. 373.
298 International Convention Relating to the Simplification of Customs Formalities, 3 November 1923, 30 L.N.T.S. 373, 399. Additionally, the protocol of the Convention clarifies that the Convention does not affect obligations under international agreements of the Parties “relating to the preservation of the health of human beings, animals or plants.”
These conferences paved the way for another multilateral conference in 1927, when the International Convention for the Abolition of Import and Export Prohibitions and Restrictions was negotiated. It is particularly important for the present purposes as its Drafting Committee gave an indication as to the reasons for the inclusion of general exceptions in the treaty. The Convention represented the most ambitious attempt to promote international cooperation in economic matters in a time in which the international economic system, despite steady improvements from 1923 to 1927, stood on the verge of a total breakdown. In order to attain the greatest possible acceptance among States, the Convention was drafted so as to avoid touching the most sensitive commercial interests of the leading trading nations at the time. Partially for this reason the treaty also permitted States to protect “vital interests of the country” and in particular allowed for a number of comparatively sophisticated exceptions to its general objective of abolishing all import and export restrictions. The treaty negotiators hence seemed to expect that accession to and compliance with international trading rules may be enhanced by allowing States to deviate from such rules if they conflict with paramount societal welfare considerations. The drafting of Article 4 of the Convention that was adopted on this basis has been influential for subsequent general exception clauses and explicitly provides as follows:

“Article 4
The following classes of prohibitions and restrictions are not prohibited by the present Convention, on condition, however, that they are not applied in such a manner as to constitute a means of arbitrary discrimination between

beings, animals or plants (particularly the International Opium Convention), the protection of public morals or international security”, 30 L.N.T.S. 373, 409.

299 International Convention for the Abolition of Import and Export Prohibitions and Restrictions, 8 November 1927, 97 L.N.T.S. 393. The Convention was quickly signed by the most important European trading countries but failed to achieve the necessary number of signatories and therefore never entered into force.


302 Article 5 of the Convention.
foreign countries where the same conditions prevail, or a disguised restriction on international trade:
1. Prohibitions or restrictions relating to public security.
2. Prohibitions or restrictions imposed on moral or humanitarian grounds.
3. Prohibitions or restrictions regarding traffic in arms, ammunition and implements of war, or, in exceptional circumstances, all other military supplies.
4. Prohibitions or restrictions imposed for the protection of public health or for the protection of animals or plants against disease, insects and harmful parasites.
5. Export prohibitions or restrictions issued for the protection of national treasures of artistic, historic or archaeological value.
6. Prohibitions or restrictions applicable to gold, silver, coins, currency, notes, banknotes or securities.
7. Prohibitions or restrictions designed to extend to foreign products the régime established within the country in respect of the production of, trade in, and transport and consumption of native products of the same kind.
8. Prohibitions or restrictions applied to products which, as regards production or trade are or may in future be subject within the country to State monopoly or to monopolies exercised under State control.”

It is obvious that this provision has had a considerable influence on the later drafting of Article XX of the General Agreement on Tariffs and Trade not only as regards the introduction of additional permissible non-economic objectives compared to older treaties, but more importantly considering that, for the first time, exceptions to trade liberalization were subjected to the additional prerequisites that they did not constitute “arbitrary discrimination between foreign countries where the same conditions prevail, or a disguised restriction on international trade.” While the main body of the clause was clearly inspired by previous treaty practice, the insertion of these additional requirements constitutes a notable break with the earlier common practice of most bilateral trade treaties. It acknowledged the need to include safeguards against abusive invocation of broadly formulated exception provisions. The wording that was chosen closely resembles what would later become the introductory paragraph to Article XX GATT.

303 International Convention for the Abolition of Import and Export Prohibitions and Restrictions, 8 November 1927, 97 L.N.T.S. 393, 403-405.
Moreover, it is well worth highlighting that even an ambitious treaty such as this Convention, calling for the abolition of all import and export restrictions within a timeframe of six months, acknowledged that exceptions for legitimate governmental measures in several non-economic public policy areas are entirely proper.\footnote{Cf. Charnovitz, 25 Journal of World Trade Law 37, 42 (1991).} In fact, the Drafting Committee recognized that these policy exceptions “have been admitted through long-established international practice, as recorded in a large number of commercial treaties, to be indispensable and compatible with the principle of freedom of trade.”\footnote{Economic Committee of the League of Nations, Abolition of Import and Export Prohibitions and Restrictions, Commentary and Preliminary Draft International Agreement, League of Nations Doc. C.E.1.22. 1927 II.13. p. 21 (1927).} The Committee thus presented two reasons for the inclusion of general exceptions. First, it took recourse to a long-established international practice in bilateral commercial agreements. Second, it recognized that exceptions for public policy reasons were not only “compatible” with the principle of free trade but explicitly stated that they were actually “indispensable”,\footnote{As rightly emphasized by Charnovitz, 38 Virginia Journal of International Law 689, 706 (1997-1998).} presumably in order to attain widespread acceptance of the treaty.

Although the Convention never entered into force, it was still pioneering for subsequent bilateral and multilateral trade treaties with regard to general exceptions, the majority of which contained similar, albeit not always quite as sophisticated, exceptions to free cross-border trade for a broader range of public policy considerations.\footnote{See for instance: Article XV of the Treaty of Commerce and Navigation between Finland and Turkey, 12 August 1929, 96 L.N.T.S. 239, 247; Article 7 of the Treaty of Commerce and Navigation between the Kingdom of the Serbs, Croats and Slovenes and the Czechoslovak Republic, 14 November 1928, 97 L.N.T.S. 37, 41; Article 4 of the Commercial Treaty between the Economic Union of Belgium and Luxemburg and Switzerland, 26 August 1929, 105 L.N.T.S., 9, 13; Article 3 of the Provisional Commercial Agreement between the Netherlands and Roumania, 29 August 1930, 108 L.N.T.S. 177, 181; Article 8 of the Commercial Agreement between the High Commissioner for South Africa and the Governor-General of Mozambique regulating the Commercial Relations between Swaziland, Basutoland and the Bechuanaland Protectorate and the Portuguese Colony of Mozambique, 18 February 1930, 108 L.N.T.S., 393, 398; Article 10 of the Convention between Roumania and the Turkish Republic regarding Establishment, Commerce and Navigation, 11 June 1929, 112 L.N.T.S. 139, 147; Article XV of the Treaty of Commerce and Navigation between Estonia and Turkey, 16 September
3. General Exception Clauses in the General Agreement on Tariffs and Trade 1947

In the period following the Second World War, bilateral commercial treaties became increasingly marginalized as a source of rights under international law, even if some still remain in force to date. Their influence on the liberalization of cross-border trade gradually dwindled with the creation of the General Agreement on Tariffs and Trade 1947\(^\text{308}\) as a more

---


Chapter Three The Presence or Absence of General Exception Clauses

specialized and comprehensive multilateral trade treaty.309 Under the shadow of the severe worldwide economic depression of the 1930s (the “Great Depression”), which was triggered by growing protectionism of most of the large trading nations and is regarded to be one of the reasons leading to the Second World War,310 the main purpose of the GATT 1947 was to deter countries from falling back into protectionism by outlawing the use of non-tariff barriers to cross-border trade and by gradually reducing tariffs through multilateral negotiations.311

The GATT 1947 replicated most provisions formerly found in bilateral commercial treaties and complemented them with more comprehensive rules on trade regulation, some of which in turn have themselves become model provisions for subsequent bilateral and regional trade agreements.312 It constituted a compromise between the American position, promoting a very liberal economic policy, and the British position, which was mainly concerned about the States’ capacity to intervene in and manage the national economy in the interests of domestic stability.313 With Article XX, the GATT 1947 contained a broad exception clause, permitting governmental measures restricting cross-border trade that are necessary for, relating to, or imposed for a large number of permissible non-economic public policy objectives as long as their pursuance does not amount to arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. Since the original GATT session in 1947, there has been only one minor amend-

309 Some States have continued concluding bilateral trade treaties after the creation of the GATT. In these instances, a provision in the FCN treaty stipulates that the GATT shall take precedent in cases of conflict, refer for instance to Article XXI (3) of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Korea, 8 UST 2217.
ment to Article XX GATT during the review session in 1955. In its amended form, which is still in force today, Article XX GATT reads as follows:

“Article XX: General Exceptions
Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
(a) necessary to protect public morals;
(b) necessary to protect human, animal or plant life or health;
(c) relating to the importations or exportations of gold or silver;
(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
(e) relating to the products of prison labour;
(f) imposed for the protection of national treasures of artistic, historic or archaeological value;
(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

314 Protocol Amending the Preamble and Parts II and III of the General Agreement on Tariffs and Trade, 10 March 1955, 278 U.N.T.S. 200. In particular, the original “short supply” exception for trade restrictions that were essential to fair distribution of products in short supply, to price controls and orderly liquidation of surpluses “subsequent to the war” was eliminated and replaced by the new subparagraph (j).
(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;*

(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

(j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.”

The negotiation history of Article XX GATT is not very elucidating. It is largely based on a similar provision, Article 45, in the Geneva draft of the Charter for the defunct International Trade Organization (ITO). 315 All measures exempted under Article XX from the GATT prohibitions are subjected to the prohibition of discrimination among supplying countries for arbitrary or unjustifiable reasons and to the requirement that measures are not applied in a manner that would constitute a disguised restriction on

international trade. This introductory qualification, which would later become known as “chapeau” provision, was borrowed from the parallel clause of Article 4 of the International Convention for the Abolition of Import and Export Prohibitions and Restrictions of 1927. It was modified to the extent that the GATT prohibition of “arbitrary and unjustifiable discrimination” does not only apply to “foreign countries” but instead incorporates national treatment and most-favored-nation treatment obligations.316 Interestingly, its inclusion was explicitly proposed by the United Kingdom in order to prevent abuses of the general exceptions.317

4. General Exception Clauses in the General Agreement on Tariffs and Trade 1994 and in the General Agreement on Trade in Services

Article XX of the GATT 1947 subsequently remained untouched during the Uruguay Round negotiations318 and was taken over into the revised GATT 1994, which formed the reference point for several new agreements embodied under the umbrella of the World Trade Organization. In this process, Article XX GATT served as a model for the equivalent exception provision of Article XIV included in the new General Agreement on Trade in Service regulating cross-border trade in services. Article XIV GATS reads:

“Article XIV General Exceptions
Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination

318 The Uruguay Round was the 8th round of multilateral trade negotiations conducted within the framework of the GATT, taking place from 1986 to 1994. It came into effect in 1995 and transformed the GATT into the World Trade Organization. While the GATT 1994 still exists as the WTO treaty for trade in goods, it was complemented by a considerable number of agreements, including the Agreement Establishing the WTO, as an umbrella treaty, the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Investment Measures (TRIMS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Agreement on Technical Barriers to Trade (TBT), and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS).
between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
(a) necessary to protect public morals or to maintain public order;  
(b) necessary to protect human, animal or plant life or health;
(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
   (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
   (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
   (iii) safety;
(d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members;
(e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.

FN 5: The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

FN 6: Measures that are aimed at ensuring the equitable or effective imposition or collection of direct taxes include measures taken by a Member under its taxation system which:
   (i) apply to non-resident service suppliers in recognition of the fact that the tax obligation of non-residents is determined with respect to taxable items sourced or located in the Member's territory; or
(ii) apply to non-residents in order to ensure the imposition or collection of taxes in the Member's territory; or

(iii) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures; or

(iv) apply to consumers of services supplied in or from the territory of another Member in order to ensure the imposition or collection of taxes on such consumers derived from sources in the Member's territory; or

(v) distinguish service suppliers subject to tax on worldwide taxable items from other service suppliers, in recognition of the difference in the nature of the tax base between them; or

(vi) determine, allocate or apportion income, profit, gain, loss, deduction or credit of resident persons or branches, or between related persons or branches of the same person, in order to safeguard the Member's tax base.”

The similarities between the two provisions are particularly striking when it comes to their introductory paragraphs, which employ almost identical language. Similar language and structure is also used in respect of the listed permissible objectives. However, the WTO Member States apparently held the view that service regulation, due to the absence of border measures, requires an altered approach than the regulation of trade in goods, which is reflected in the fewer number and the different kind but potentially broader scope of the enumerated legitimate public purposes.319 Nonetheless, what is important for the present purposes is that the similarities demonstrate that the WTO Member States still consider the long-established approach to the reconciliation of economic liberalization and non-economic objectives of the GATT 1947 and its preceding treaties, which in turn was inspired by earlier bi- and multilateral trade treaties, to be appropriate to face the challenges of the contemporary world.320

319 For instance, the exception for the maintenance of public order is arguably broader than most exceptions under Article XX GATT. Additionally, Article XIV GATS includes exceptions for the protection of fair competition, privacy and taxation absent in Article XX GATT and of particular importance in the regulation of services, cf. Cottier/Delimatis/Diebold, in: Wolfrum, et al. (eds.), Max Planck Commentaries on World Trade Law, Vol. 6, WTO – Trade in Services, Article XIV GATS, ¶6 (2008).

320 See Zleptnig, Non-Economic Objectives in WTO Law, p. 105 (2010). As a side note, the legitimacy of the pursuance of non-economic objectives that may con-
II. General Exception Clauses and Embedded Liberalism in the Postwar International Trade Regime

To recapitulate the preliminary conclusions, the presence of general exceptions in modern international trade law is, for one, the result of a long-established historical tradition, which dates back to the late nineteenth century. Subsequent treaties built upon their predecessors, borrowed general exception provisions from them and developed them further with each generation. For some treaties, there also exists an indication as to legislative intent behind the inclusion of exceptions to free trade. From that, one may infer that the drafters found general exceptions for important societal welfare considerations of paramount importance to secure acceptance of and widespread participation in multilateral trade treaties.

In the following, it is argued that similar motives were formative for the prevailing institutional design of the postwar international trade regime, which seeks to strike a balance between multilateral trade liberalization and the provision of adequate regulatory flexibility for the individual participating State.

1. Embedded Liberalism as the Prevailing Institutional Design of the Postwar International Trade Regime

Analyzing the policy orientation of the postwar international economic order and the social compromise it rested upon, John Gerard Ruggie, a renowned U.S. scholar of International Relations, coined the term “embedded liberalism”.321 In his seminal paper Ruggie explains that, after the

---

321See Ruggie, 36 International Organization 379, 393 (1982). The term describes the policy orientation of the GATT at least during the first two decades of its existence, see Lang, World Trade Law After Neoliberalism, p. 190 (2011).
Second World War, one of the primary objectives in the restructuring of international relations was to devise an economic system that would prevent inter-State rivalries and the repetition of the catastrophic events that had led to the Great Depression of the 1930s and were considered reasons for the outbreak of hostilities. Free trade was the means of choice and expected not only to enhance general prosperity by taking advantage of the concept of comparative advantage but also to create interdependence among States and thereby increase common interests and raise the price of aggression. In light of the devastating experience with excessive domestic protectionism in the interwar years, liberal multilateral trading rules were thus intended to act as a guarantor for international peace and stability. At the same time, States expected the yet-to-be-created international economic regime to offer sufficient domestic regulatory flexibility for them to be able to address and alleviate the social drawbacks of a liberal international economic system on their populations. They also expected it to stimulate the economy and, in particular, to promote full employment despite the instability potentially caused by economic fluctuations in major trading partners. Importantly, therefore, the newly created economic system did not consider cross-border trade as an end unto itself but was rather viewed as a contribution to societal welfare.


323 For the intellectual case in favor of free trade in general see Irwin, Against the Tide (1996). This position was mainly proposed by the U.S. side and is usually identified with the figure of the U.S. politician Cordell Hull, who was a major influence on the American postwar economic planning, see Gardner, Sterling-dollar diplomacy, pp. 12-23, 101 (1956).


325 See Ruggie, 36 International Organization 379, 395 (1982); Steffek, Embedded Liberalism and Its Critics, pp. 42-43 (2006); Lang, World Trade Law After Neoliberalism, p. 194 (2011). This economic thinking was considerably influenced by the writings of John Maynard Keynes and found its biggest proponent in the United Kingdom, see Gardner, Sterling-dollar diplomacy, pp. 24-39, 103 (1956).

326 See Steffek, Embedded Liberalism and Its Critics, pp. 42-43 (2006). In fact, the prevailing view of the negotiators of the international trade regime was cogently summarized by Viner, 25 Foreign Affairs 612, 613 (1947) as follows: “There are
combination of these two positions resulted in the compromise of “embedded liberalism”.

Ruggie consequently identified two potentially opposing principles in the postwar international trade system: The doctrine of multilateralism on the one hand and the protection of domestic social policies on the other. Multilateralism in the system means that States work together in the creation and implementation of international economic institutions designed to promote international market integration moving towards a more open and liberal multilateral trading system. At the same time, the economic system left sufficient regulatory autonomy in the hands of the States for them to pursue core economic and social values, ideas, and objectives deemed to be relevant in the respective civil societies to safeguard domestic peace and stability. As a consequence thereof, it was generally accepted that States should proactively use their powers to achieve policy goals such as full employment, economic growth and welfare of their citizens. In fact, State intervention in market processes, if necessary to achieve these goals, was considered entirely proper.

The term “embedded liberalism” hence describes how markets were embedded into society, how economic liberalism was embedded into international institutions, and how entrepreneurial and corporate activities were embedded into a regulatory environment of social and political constraints.

2. The Presence of General Exception Clauses as Manifestation of Embedded Liberalism in the GATT/WTO Regime

To strike the envisaged balance between the principles of reduction of trade barriers on the one hand and domestic interventionist policies on the other hand, the text of the original GATT affirmed its general commitment

---

few free traders in the present-day world, no one pays any attention to their views, and no person in authority anywhere advocates free trade.”.
327 See Ruggie, 36 International Organization 379, 393 (1982).
328 See Harvey, A Brief History of Neoliberalism, p. 10 (2005).
329 See Harvey, A Brief History of Neoliberalism, p. 10 (2005).
332 See Harvey, A Brief History of Neoliberalism, p. 11 (2005); Lang, 9 Journal of International Economic Law 81, 87-88 (2006); Kalderimis, 7 Transnational Dispute Management, p. 6 (2010).
to the former but also included “safeguards, exemptions, exceptions and restrictions” to protect a variety of “domestic social policies.” While some are designed to enhance domestic stability, others to promote particular non-economic values above the goal of trade liberalization. The drafters of the GATT/WTO foresaw that the protection of societal interests such as public health, public morals, natural resources and other concerns frequently presupposes the adoption of trade-restrictive measures, which directly conflict with the GATT/WTO’s trade liberalization obligations. In these instances, the drafters acknowledged the need to strike a balance between the two sometimes-competing objectives of trade liberalization and non-economic public interests in order to safeguard domestic social stability and increase State commitment to the international trade law regime.

To a considerable extent, this balance is sought and found by the inclusion of general exception clauses such as Articles XX GATT and XIV GATS as one manifestation of the concept of embedded liberalism in international trade law. They allow States to adopt, maintain or enforce legislation and measures necessary to pursue public policy objectives other than trade liberalization, even though these measures may be inconsistent with their obligations under international trade agreements. Provided that the specific requirements of the exception are fulfilled, they thus allow States to give priority to the enumerated societal values and interests over the goal of trade liberalization. Thereby, they combine multilateral trade liberalization with the provision of domestic regulatory flexibility and hence promote State commitment to the system.

In conclusion, the presence of general exception clauses in the current GATT/WTO regime is attributable not only to simple adherence to the above-demonstrated long-standing historical practice. It is rather also evi-
dence and element of the current system’s prevailing institutional design of embedded liberalism, which was explicitly intended to strike a compromise between trade liberalization and domestic stability in order to encourage States to participate in the system.

B. The Absence of General Exception Clauses in International Investment Agreements

In stark contrast to the system of international trade law, general exceptions for non-economic objectives to investment protection obligations have not found their way into the first wave of IIAs. Even to date, only a fraction of IIAs currently in force expressly recognize the host State’s right to derogate from its investment obligations for the pursuance of non-economic public welfare objectives by means of general exceptions.\(^{337}\) The reasons for this notable omission are closely related to the historical and ideological context in which IIAs emerged and the political and economic necessities of the respective times.\(^{338}\)

I. The Absence of General Exception Clauses in the First Wave of IIAs in the 1960 and 1970s

1. Foreign Investment Protection under Customary International Law Prior to the Conclusion of the First IIAs

Prior to the conclusion of the first IIAs, the protection of foreign direct investment has been only incidentally addressed in international agreements.\(^{339}\) Instead, the main source for rules on investment protection in

\(^{337}\) For details see supra Chapter Two, Part A.

\(^{338}\) For readers that are not well acquainted with the history of the international investment law regime, the following section will also provide a brief summary of the BIT movement.

\(^{339}\) See Diehl, in: Reinisch/Knahr (eds.), International Investment Law in Context 7, 7 (2008). That being said, some international agreements that were mainly occupied with establishing bilateral trade relations also included a small portion on the protection of property (as opposed to investment) of nationals of one State in the territory of the other State, obliging the treaty partners to uphold certain minimum standards, in particular during time of war. For details see Vandeveldt, Bila-
this era was customary international law. In the early twentieth century, when capital-exporting States were in need of a legal doctrine to justify the pursuance of claims of their nationals in order to protect their nationals’ economic interests abroad, they maintained the view that a customary international minimum standard for the treatment of aliens existed.

These rules obliged host States to treat foreigners in accordance with an absolute international minimum standard irrespective of how the State treats its own nationals. Disputes had to be settled in accordance with this external international standard by neutral tribunals sitting abroad. In addition, home States were allowed to exercise diplomatic protection and interfere in the domestic affairs of the host State if the treatment fell short of the standard expected.

While the proponents of this minimum standard were the major European States and the United States, other countries, mainly from Latin America, contested the existence of customary international rules on foreign investment protection. In an attempt to resist the alleged abuse of diplomatic protection and other forms of intervention of capital-exporting States, they insisted on the “Calvo doctrine” according to which international law does not accord greater rights to foreigners than it does to nationals.

### Footnotes


341 See for a classical description of the contents of the minimum standard Root, 4 American Journal of International Law 517, 521 (1910). In the meanwhile, a State’s right to exercise diplomatic protection over its nationals was recognized as an “elementary rule of law” by the Permanent Court of International Justice in Mavrommatis Palestine Concessions (Greece v. United Kingdom), P.C.I.J., Judgment of 30 August 1924, Series A, No. 2, 1924, p. 12, ¶21. For a more critical appraisal refer to Guha Roy, 55 American Journal of International Law 863 (1961).

342 Apart from the exercise of diplomatic protection, this sometimes provided the legal justification for intervention in the domestic affairs of the host State including the threat or outright use of military force (known as “gun-boat diplomacy”), see Newcombe/Paradell, Law and Practice of Investment Tribunals, p. 9 (2009).

343 Named after the distinguished Argentine jurist Carlos Calvo who was the first to propose this new perspective in 1868, arguing that: “The responsibility of Go-
 tionals. Customary international law, it was put forward, would not pro-
vide for an independent international standard of protection but only im-
posed a national treatment obligation on host States. Accordingly, foreign
investors would only be entitled to the treatment that the host State ac-
corded to its own nationals under domestic law and they had to seek re-
dress for grievance exclusively before domestic courts.\footnote{344} The proposition
of obligations that went beyond the above was criticized as an interference
with the host State’s internal affairs and a violation of the sovereign equal-
ity of States.\footnote{345}

Even to the extent that countries agreed on the existence and scope of
customary international rules on alien property protection, the offered pro-
tection for foreign investment remained limited. The protection granted
under the minimum standard was vague and, as the term suggests, not
very demanding.\footnote{346} It was directed at the protection of “aliens” in general,
as opposed to “investors” in particular and mostly concerned itself with
common risks that individuals may encounter abroad, encompassing the
concept of denial of justice and unlawful detention without outlawing the
expropriation of alien property in general.\footnote{347} Moreover, traditional doc-

vernments towards foreigners cannot be greater than that which these Govern-
ments have towards their own citizens.” See Calvo, Le droit international théorique
et pratique, 5th ed., III, p. 138 (1896) as translated by Shea, The Calvo Clau-
se, p. 19 (1955). Also more recently on the Calvo Clause and its potential reap-
pearance in the 21st century, see Shan, in: Shan, et al. (eds.), Redefining Sover-
eignty in International Economic Law, 248 (2008). On different implementa-
tion mechanisms of the Calvo doctrine, see Salacuse, The Three Laws of International

\footnote{344} See Shea, The Calvo Clause, p. 19 (1955); Shaw, International Law, p. 824
(2008); Sornarajah, 3 Trade, Law & Development 203, 210 (2011).

\footnote{345} See Shea, The Calvo Clause, p. 19 (1955); Vandevelde, 12 UC Davis Journal of
International Law and Policy 157, 159 (2005-2006); Dolzer/Schreuer, Principles

\footnote{346} See Vandevelde, 12 UC Davis Journal of International Law and Policy 157, 169
(2005-2006) characterizing the customary law protection as seriously deficient
who characterize international investment law shortly after the Second World
War as “an ephemeral structure consisting largely of scattered treaty provi-
sions, a few questionable customs, and contested general principles of law.” See also Sa-
lacuse, The Three Laws of International Investment, p. 329 (2013), Griebel, In-
ternationales Investitionsschutzrecht, pp. 24-26 (2008) and Shaw, International
Law, pp. 824-825 (2008) with further references and case examples.

B. The Absence of General Exception Clauses in International Investment Agreements

trine did not consider these rules rights of the foreign investor but viewed them as obligations owed to the alien’s home State. Nonetheless, the minimum standard still provided for the host State’s obligation to pay compensation for expropriations, even if they were taken in the public interest. Customary law did not envisage exceptions to this principle for legitimate public welfare objectives. Likewise, the host State could not justify the infringements of other fundamental legal positions of aliens, such as e.g. the denial of justice by local courts, by recourse to exceptions for legitimate policy objectives.

In conclusion, although the customary protection was comparatively limited and not uncontested, it provided for some basic guarantees to aliens, including foreign investors, the violation of which, albeit for the pursuance of the public interest, gave rise to international responsibility of the host State.

2. Impetus for the BIT Movement after World War II

Against the background of the traditional customary international law protection of foreign investment outlined above, the end of the Second World War brought about three global developments that each played a decisive role in the international debate over the future investment policy. The first development was the increase of international investment in the post-war era. In view of the limited customary international law protection, capital-exporting “first world” countries embarked on efforts to create international rules on foreign investment protection and facilitation. Since multilateral efforts to create appropriate frameworks, most prominently

348 See fundamentally the Permanent Court of International Justice in Mavrommatis Palestine Concessions (Greece v. United Kingdom): “By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own rights, its right to ensure, in the person of its subjects, respect for the rules of international law [...]”, P.C.I.J., Judgment of 30 August 1924, Series A, No. 2, p. 12, ¶21.

The second event was the spread of communism to Eastern Europe and China after the end of the Second World War, creating a faction of “second world” countries that rejected the liberal market policies of the Western world. Under the influence of the communist political and economic philosophy, these countries aspired to create an economic system in which economic development was to be achieved through extensive governmental regulation as opposed to the reign of the free market. In line with this idea, the new communist countries embarked upon sweeping nationalizations of the private sector, including but not limited to foreign-held investments.\footnote{Instead, lump sum settlements were negotiated between the communist countries and the investors’ home countries, which provided for less than full compensation, cf. Vandevelde, \textit{Bilateral Investment Treaties}, pp. 41-42 (2010).} Compensation for nationalized property, it was argued, was not owed since the seizure was necessary for the restructuring of the national economies along communist or socialist lines, giving rise to the question of whether nationalizations constituted a different form of property appropriation than that which was covered by the existing customary rules on expropriation.\footnote{See \textit{Newcombe/Paradell}, \textit{Law and Practice of Investment Tribunals}, pp. 18-19 (2009).} Ultimately, these countries strongly opposed liberal in-

---


354 See Newcombe/Paradell, Law and Practice of Investment Tribunals, pp. 18-19 (2009).

355 Instead, lump sum settlements were negotiated between the communist countries and the investors’ home countries, which provided for less than full compensation, cf. Vandevelde, Bilateral Investment Treaties, pp. 41-42 (2010).
vestment policies, and encouraged other, in particular developing countries, to follow their example.

The third event was the process of decolonization, which led to an abrupt increase in the number of economically underdeveloped “third world” States in Africa and Asia as actors in the international sphere. Protective of their newly gained independence and suspicious of their former colonial rulers and other developed States, these countries regarded foreign investment as an inherently exploitative means of neocolonialism that unduly interfered with their internal affairs and, in particular, with national sovereignty over their natural resources.\textsuperscript{356} In consequence, they reduced the amount of incoming foreign investment from developed countries and began expropriating foreign-held assets, which mainly belonged to investors from developed countries.\textsuperscript{357} As a preliminary observation, therefore, communist and developing countries embarked upon massive expropriations and nationalizations of Western-owned assets in the immediate aftermath of the Second World War.

In addition to these expropriations, the legal threat to foreign investment flowed from this partition of the world which manifested itself at the latest in the 1970s,\textsuperscript{358} when communist and developing countries, confident of their numerical majority in the United Nations General Assembly (UNGA),\textsuperscript{359} joined in an attempt to establish a general right to expropriate or nationalize foreign investment without obligatory compensation of the fair market value of the expropriated assets. These efforts culminated in the adoption of a General Assembly resolution on the Declaration on the

\footnotesize{\textsuperscript{356} See \cite{Salacuse2013}, The Three Laws of International Investment, p. 324 (2013).\textsuperscript{357} See \cite{Newcombe2009}, Law and Practice of Investment Tribunals, pp. 18-19 (2009); \cite{Vandevelde2010}, Bilateral Investment Treaties, pp. 46-47 (2010); \cite{Salacuse2013}, The Three Laws of International Investment, p. 325 (2013). See also \cite{Elkins2010}, in: Waibel, et al. (eds.), The Backlash against Investment Arbitration 369, 372 (2010) with examples of nationalizations.\textsuperscript{358} But also note that the UNGA already acknowledged the peoples’ and nations’ right to permanent sovereignty over their natural resources when it passed GA Res. 1803 (XVII), 14 December 1962, UN Doc. A/5217 (1962). The Resolution affirmed that the admission of foreign investment was subject to the authorization, restriction and prohibition of the State, \textsuperscript{¶2}. Note however, that the Resolution still stated that (albeit only appropriate) compensation for expropriatory actions “shall” be paid to the owner, \textsuperscript{¶4}.\textsuperscript{359} In which each UN Member States possesses one vote, cf. article 18(1) UN Charter.}
Establishment of a New International Economic Order proclaiming the “full permanent sovereignty” of States over economic activities and its natural resources, including “the right of nationalization or transfer of ownership to its nationals.” Notably, an obligation to pay compensation for expropriated foreign assets was not mentioned. Later, the General Assembly also passed the “Charter of Economic Rights and Duties of States” which called for unfettered sovereignty of every State over its resources and economy. In particular, it provided for the right of each State “[t]o nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent.” This was remarkable for a number of reasons. First, the Charter employs non-mandatory language in stating that compensation “should” but not that it “must” or “shall” be paid. Second, under the Charter the expropriating State only owes “appropriate” compensation to the expropriated foreigner, which is not necessarily equivalent to the fair market value of the expropriated assets and far away from a “full, prompt and adequate” standard advocated by the developed world. And lastly, the amount of compensation due is made dependent on the domestic law of the host country.

Chapter Three The Presence or Absence of General Exception Clauses

---

360 Declaration on the Establishment of a New Economic Order, GA Res. 3201(S-VI), 1 May 1974, UN Doc. A/RES/3201(S-VI), reprinted in 13 ILM 1974, 715.
361 ¶4(e) of the Declaration on the Establishment of a New Economic Order.
363 Article 2(2)(2)(c) of the Charter of Economic Rights and Duties of States.
365 Most clearly articulated by the American Secretary of State Cordell Hull in response to Mexican expropriations between 1915 and 1940, stating that: ”The Government of the United States merely adverts to a self-evident fact when it notes that the applicable precedents and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor.” Reproduced in Lowenfeld, International Economic Law, p. 478 (2008).
which may well provide for no or limited compensation, rather than on an independent standard of international law.\textsuperscript{366}

These UNGA resolutions clearly contradicted the developed countries’ perception of the content of the customary international minimum standard and posed a challenge to the traditional western view of international law. Although UNGA resolutions are generally not binding as a matter of international law and are merely recommendatory in nature,\textsuperscript{367} they may still be viewed as evidence of State practice\textsuperscript{368} and / or \textit{opinio juris},\textsuperscript{369} which form the constitutive elements of customary international law.\textsuperscript{370} Changes in either or both may thus lead to changes in customary law. It lies in the very nature of customary international law, which is not static but rather exists in an uncodified state of constant flux, that it is susceptible to such changes.

In light of nationalization and expropriations of foreign-held property following the Second World War and these developments in the UNGA, the concerns of developed countries about the future level of protection granted to their investors abroad under customary international law grew.\textsuperscript{371} While the traditional customary protection already had its deficiencies, they now also saw this minimum protection of foreign investors exposed to the threat of a change in customary international law brought about by the efforts of developing and communist countries with the result

\begin{itemize}
    \item \textsuperscript{366} See Vandevelde, 12 UC Davis Journal of International Law and Policy 157, 168 (2005-2006).
    \item \textsuperscript{367} However, some UNGA resolutions of a more administrative nature may be binding, see, e.g., Article 17 UN Charter.
    \item \textsuperscript{368} See Shaw, International Law, pp. 115-116. (2008) with examples.
    \item \textsuperscript{369} See \textit{Legality of the Treat or Use of Nuclear Weapons}, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996, pp. 254-255, ¶70 in which the International Court of Justice stated that “[General Assembly Resolutions] can, in certain circumstances, provide evidence important for the establishing of a rule or the emergence of an \textit{opinio juris}.” See also already the \textit{Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)}, Judgment of 27 June 1986, I.C.J. Report 1986, pp. 14, 99, ¶188.
    \item \textsuperscript{370} See generally instead of many Shaw, International Law, pp. 72 et seq. (2008) with further references.
    \item \textsuperscript{371} See Dolzer/Schreuer, Principles of International Investment Law, p. 5 (2012) who identify an “insecurity about the customary international rules governing foreign investment” in this time period.
\end{itemize}
that uncompensated or inappropriately compensated expropriations would have been conceivable.372

3. The Emergence of the First IIAs

In considerable part as a defensive reaction to expropriations and nationalizations of foreign-held property without the payment of adequate compensation after the Second World War and to the threat of unwarranted changes in their perception of customary international law, developed countries responded by enshrining the level of foreign investment protection as they perceived it appropriate by means of binding treaties.373 Unlike customary international law, those were not susceptible to unsolicited unilateral or multilateral changes. In comparison to the customary international law protection of foreign investment, treaties offered a more promising means of preventing unlawful expropriations and other interferences with foreign investment. In particular, developed countries hoped that the creation of a network of treaties that embraced the prompt, adequate, and effective compensation standard for expropriations would prove that this standard was a norm of customary international law.374

372 As noted by Kurtz, 59 International and Comparative Law Quarterly, 325, 345, fn. 110 (2010). In particular, the launch of the U.S. BIT program was explicitly triggered by this motivation, see Dolzer, in: Arsanjani, et al. (eds.), Looking to the Future 705, 708 (2011); Vandevelde, 21 Cornell International Law Journal 201, 209 (1988). Similar motivations may be assumed for other Western countries.


374 These were at least the hopes of the United States according to one of the early U.S. BIT negotiators Vandevelde, 12 UC Davis Journal of International Law and Policy 157, 171 (2005-2006); Vandevelde, 21 Cornell International Law Journal 201, 209-211 (1988). See also Alvarez/Khamsi, in: Sauvant (ed.), Yearbook on International Investment Law and Policy 2008-2009 379, 411-412, 414 (2009);
The above motivation of developed States behind the conclusion of the first BITs, namely to protect their nationals’ investments abroad in reaction to past and on-going expropriations and the threat to alterations in the customary law protection, is evidenced by the fact that most BITs during that period were concluded between a developed State and a developing State ("North-South BITs"). Typically, negotiators from developed countries drafted the treaty text according to their preferences, which was then offered to their developing country counterparts for signature with the possibility of making only minor changes if any at all. This approach reflected the contemporary perception of developed States that BITs, while formally imposing identical obligations on both parties, were nonreciprocal in nature because in practice all obligations fell on the developing country. Conversely, BITs between developed States ("North-North BITs") or between developing States ("South-South BITs") were largely unknown in this time period.

Moreover, the motivation of developed States in the conclusion of BITs is further confirmed by the design of the BITs of that first wave of IIAs, which strongly resemble one another. They dealt only with the protection of foreign investment while non-investment issues were consciously left out because of an apprehension that the inclusion of the latter might become a source of disagreement during the treaty negotiations and could have made the treaties too complex for smooth negotiations. This approach expressed the desire of developed States that BITs would lead to genuine commitments on investment protection to the benefit of their investors.


See also Kalderimis, 7 Transnational Dispute Management, p. 8 (2010) who uses the history of the U.S. BIT program as a “general approximation of the history of BITs generally.”


This understanding of the nature and purpose of the first BITs at the time of their conclusion in the 1960s and 1970s provides an explanation for the absence of general exception clauses for the pursuance of non-investment policy objectives in them. Developed countries, the main proponents of investment treaties that largely dictated their terms to developing countries, envisioned BITs to reflect a genuine and unconditional commitment to foreign investment protection. The treaties were solely intended to guarantee the protection of developed country’s nationals’ investments in the territory of the developing country party in times of an increasingly hostile ideological and regulatory investment environment.\footnote{378 See Vandevelde, Bilateral Investment Treaties, p. 57 (2010); Kurtz, in: Schill (ed.), International Investment Law and Comparative Law 243, 250 (2010); Vandevelde, 12 UC Davis Journal of International Law and Policy 157, 170 (2005-2006).} At the latest with the adoption of the New International Economic Order and the Charter of Economic Rights and Duties of States by the UNGA, their purpose was furthermore to counter the attempts of developing and communist States to bring about changes in the customary international law foreign investment protection and enshrine a level of protection desirable to developed countries. The inclusion of defenses to liability such as general exception provisions, which would allow the host State to derogate from its investment obligations for the pursuance of non-economic objectives, did not have a place in these treaties that were meant to be exclusive instruments of investment protection.\footnote{379 Cf. Kurtz, in: Schill (ed.), International Investment Law and Comparative Law 243, 250 (2010).}

This applies all the more considering that BITs in this time were largely concluded between a developed State and a developing State. The developed countries’ negotiators likely believed in the supremacy of their domestic regulatory and legal systems for the settlement of investment disputes and, in any event, the case of investors from developing countries investing in developed countries was largely unexpected. Therefore, the chief negotiators probably discounted the possibility that their home States would become respondents in international investment disputes in the foreseeable future. BITs were thus perceived and constructed as effectively asymmetrical and non-reciprocal instruments. If, however, developed
countries never considered that they themselves might be in need of exceptions to treaty obligations in order to justify their own regulatory behavior, it is even more understandable that they were not prepared to jeopardize the granted investment protection of their investors abroad by the inclusion of defenses to liability. The negotiators of the GATT, on the other hand, seemed to have envisaged that their respective States would have to defend their actions before GATT panels and therefore included a list of permissible exception to the treaty. 380

What is more, the first BITs were meant to codify the Western perception of the customary international law minimum standard. As explained above, the latter does not provide for exceptions to the general rule that expropriations, even if taken in the public interest, need to be compensated. Similarly, other outrageous violations of basic rights of an alien, such as the denial of justice by domestic courts, cannot be justified by recourse to legitimate public welfare objectives under the customary minimum standard of protection. Close adherence to the customary model may have been an additional reason why BIT negotiators did not consider the inclusion of general exceptions. 381

II. The Absence of General Exception Clauses during the Proliferation of IIAs in the 1990s

Due to continued skepticism of developing countries towards the notion of foreign investment and the non-reciprocal nature of BITs, the number of newly concluded BITs only grew modestly in the decades after their appearance with only 386 BITs being concluded between 1959 and 1989. 382 It was only in the late 1980s when the ideological environment for foreign investment changed rapidly with the end of the Cold War and the triumph

381 See Alvarez/Brink, in: Sauvant (ed.), Yearbook on International Investment Law and Policy 2010-2011 319, 342 (2011) view this as one of the main reason for the omission of general exceptions.
of the capitalist social and economic order over the communist. The subsequent years witnessed the ascendancy of economic neoliberalism as the prevailing economic ideology of the 1990s.

1. The Proliferation of IIAs after the Cold War

With the collapse of the Soviet bloc, the end of the Cold War saw the capitalist market system triumphant over the communist system as the single system still standing. The abandonment of planned economies in favor of liberal market economies by former communist States in the post-Cold War era fueled the emergence of a new and almost universal international consensus on the desirability of a liberal international investment policy between developed and developing countries. Foreign capital was no longer perceived as a threat to the national sovereignty of developing countries but rather seen as an opportunity to foster economic growth and development. In addition, due to a huge privatization wave in former communist countries following the fall of the Soviet bloc, developing countries felt the need to start competing for foreign capital and thus endeavored to create more favorable investment conditions. The debt crisis of the 1980s and the ensuing scarcity of public loans available to developing countries certainly also further facilitated the new endorsement of foreign capital. Even to the extent that public loans or other benefits were available, international institutions such as the International Monetary Fund or the World Bank only granted them if developing countries agreed to fulfill certain conditions for successful economic growth that were clearly inspired by the neoliberal zeitgeist, among them the economic opening of the country with respect to trade and investment, deregulation and the enhanced protection of property rights.

---

383 For an extensive account of the historical events and reasons that have led to this consensus refer to Vandevelde, 19 Michigan Journal of International Law 373 (1998) and Vandevelde, Bilateral Investment Treaties, pp. 59-63 (2010).


385 These conditions are referred to as “Washington Consensus” – a term that was coined in 1989 by the economist John Williamson who was the first to describe a set of ten policy prescriptions that he identified as the standard reform package.
For these reasons, developing countries abandoned their former hostility towards foreign investment and began creating more favorable investment climates to attract foreign capital. In line with this shift, BITs witnessed an exponential growth and reached their “global era” with more and more countries from the former Communist block, from Asia, and from Latin America joining the constantly growing treaty network in order to become more attractive to foreign investment. This has led to a sudden proliferation of BITs and resulted in the creation of more than 3200 IIAs to date and a growing number of investment arbitrations.

2. The Ascendancy of Neoliberalism as the Prevailing Design of IIAs

Concluded in the 1990s

In terms of economic theory, the decade following the fall of the Soviet bloc is often referred to as the highpoint of economic neoliberalism. The concept of neoliberalism resurfaced in international economic policy during the global recession of the 1970s, when its proponents strived to replace embedded liberalism as the prevailing economic model and experienced its prime in the early 1990s. The neoliberal body of thoughts is not uniform and consists of various different strands of ideas, which share a number of common characteristics. Broadly speaking, the advocates of a neoliberal economic order seek to install a free and open market economy with strong private property rights and based on heightened trade, investment and financial liberalization. They promote deregulation and privatization as well as a general decrease in the public sector. Neoliberalism accords no role to the regulatory State beyond the establishment and pro-

promoted for developing countries by the U.S. Government, the International Monetary Fund and the World Bank, both of which are based in Washington D.C. For its history, see Williamson, 40 Finance & Development 10 (2003).


387 So designated by Vandevelde, Bilateral Investment Treaties, p. 59 (2010).


391 See Harvey, A Brief History of Neoliberalism, p. 64 (2005).
tection of property rights.\textsuperscript{392} State intervention in economic and social matters is not completely outlawed but certainly discouraged. The State should largely relinquish control of the economy, which is to be transferred from the public to the private sector. The solely legitimate purpose of State action is the creation and maintenance of an appropriate institutional framework for the exercise of individual entrepreneurial freedoms and skills.\textsuperscript{393}

During its heyday in the 1990s, neoliberal thought was not confined to economic theory but also had an impact on public international law in general and international investment law in particular.\textsuperscript{394} Its influence is, in fact, very visible in investment treaties concluded throughout the 1990s.\textsuperscript{395} Muthucumaraswamy Sornarajah summarized the pertinent characteristics as follows:

- (a) a belief in the liberalization of the flows of foreign investment on the assumption that such flows will lead to the creation of assets within the host State and thereby lead to its economic development;
- (b) the uniform acceptance of the beneficial effects of foreign investment flows to the exclusion of its negative effects, consequently justifying absolute protection of such investment;
- (c) the need for safeguards of property rights in the host State, particularly property brought in or acquired by the foreign investor;
- (d) the securing of judicial safeguards for such property through external arbitration in the absence of a court system in the host State that would provide secure protection in the face of executive or political displeasure; and
- (e) the redefinition of the rule of law to encapsulate these neo-liberal ideas.” (footnotes omitted).\textsuperscript{396}

\textsuperscript{392} See Spears, 13 Journal of International Economic Law 1037, 1041 (2010).
\textsuperscript{393} A more comprehensive attempt at a definition of neoliberalism is found in Harvey, A Brief History of Neoliberalism, p. 2 (2005).
Indeed, especially older IIAs usually contain perambulatory statements expressing the beliefs of the parties that foreign investment is mutually beneficial to their economic development and therefore warrants encouragement and protection. Along these lines, IIAs often include broad definitions of “investor” and “investment” followed by comprehensive elaborations on standards of treatment that need to be accorded to foreign investors and their investment, among others national treatment, fair and equitable treatment, most-favored-nation treatment, full protection and security, and treatment in accordance with the international minimum standard. These are flanked with standards of protection on the prohibition of expropriations without compensation, the repatriation of profits, and the preservations of undertakings of the State vis-à-vis the investor. Together, these provisions provide extensive international law protection to foreign investors and foreign-held investment. Moreover, BITs regularly provide for a compliance mechanism allowing foreign investor to unilaterally initiate arbitral proceedings before international ad hoc tribunals usually without directing them to exhaust local remedies first. The above-outlined characteristics of neoliberalism are thus clearly discernable in the provisions found consistently in IIAs.\textsuperscript{397}

3. The Absence of General Exception Clauses as Corollary of the Neoliberal Design of IIAs

The absence of general exception provisions in IIAs concluded since the 1990s is in line with the neoliberal base design of most parts of the contemporary investment treaty regime.\textsuperscript{398} In a legal regime that, based on the assumption that the exclusively beneficial effects of foreign investment will lead to economic development of the host country, which in turn will result in growing world-wide prosperity, contemplates the absolute protection of foreign-held property as its foremost goal, naturally, there is no

\textsuperscript{397} Naturally, most of these provisions are also found in IIAs concluded prior to the 1990s. However, those were not the product of a uniform endorsement of the beneficial effects of foreign investment. Rather, they resulted from the one-sided desire of developed countries to enshrine a certain level of investment protection.

place for exceptions for the pursuance of non-economic policy objectives that may relativize said protection in individual cases. What is more, the neoliberal economic philosophy condemns State intervention into the economy of any kind. Adherence to it therefore presupposes that no exceptions that would allow States to deviate from liberalizing treaty obligations are permissible.

Therefore, even to the extent that States might have been aware of the potentially harmful effect of the investment law system on their regulatory flexibility, they may have, under the impression of the neoliberal zeitgeist, reasoned that the advantages of a system of absolute investment protection accorded to their investors abroad outweigh its potential disadvantages and thus refrained from including general exceptions in their IIAs. Conversely, however, this is not necessarily to say that the omission of general exceptions was a conscious decision uniformly taken by all States for the same reasons. It may well be that the neoliberal spirit of time and the uniform endorsement of the benefits of foreign capital for the reasons listed above lured States into discounting the narrowing impact of IIAs on the regulatory sovereignty of the host State. Considering, too, that developed countries were yet to become respondents in a significant number of investment cases, it is actually likely that awareness of the repercussions of limitless investment protection was not fully developed in the investment community yet. The omission of general exceptions for the pursuance of non-investment objectives in sensitive policy areas may thus also have been the unconscious result of lacking foresight on part of the State community.

III. The Appearance of General Exception Clauses in a New Generation of IIAs

Having established the likely causes for the absence of general exception clauses in IIAs concluded until the 1990s399, their appearance in IIA primarily in the last decade calls for an explanation.

399 See supra Chapter Two, Part A.
1. The Gradual Retreat of Neoliberal Premises from IIA Drafting Practice

Since the late 1990s, one has been able to witness a gradual retreat of neoliberalism that is not confined to the investment law regime but extends to public perception at large. A succession of financial crises in Latin America, Asia and Russia, and Brazil started exposing the weaknesses of a complete liberalization of markets as contemplated by neoliberal policies.\(^{400}\) While these marked the beginning of the retreat of neoliberalism from public opinion, the process gathered considerable pace with the global economic crisis of 2008 the effects of which are still felt today.\(^{401}\)

Roughly in the same timeframe, in the international investment law regime, State concerns over exceedingly broad investment protection obligations grew in response to several challenges to sensitive legislative and administrative State measures which host States have defended as implementing legitimate public welfare objectives.\(^{402}\) Controversial and allegedly overly broad interpretations of investment obligations in favor of foreign investors in these and other cases led to a growing displeasure of States with the path international investment adjudication was taking.\(^{403}\) What is more, prompted by the rise of developing countries as capital-exporters, developed countries have increasingly become the host States for foreign investment and consequently also the target of investment arbitrations, making them realize the need for regulatory flexibility in areas of public concern.\(^{404}\) These developments generally resulted in a questioning of the benefits of entering into investment treaties in both capital-exporting and capital-importing countries.

In reaction to the perceived shortcomings, few States have chosen to withdraw altogether from the system of investment protection or from si-


\(^{402}\) For examples see Spears, 13 Journal of International Economic Law 1037, 1038 (2010).

\(^{403}\) See Spears, 13 Journal of International Economic Law 1037, 1040 (2010).

The majority of States, however, are exploring different options as to how to strike a balance between the preservation of sufficient domestic policy space on the one hand while simultaneously reiterating their commitment to the original goals of investment protection and promotion on the other hand. In doing so, they progressively forgo the premise that foreign investment yields a solely beneficial effect and that the State shall consequently abstain from interfering with it. Instead, more and more States subscribed to the view that investment protection and promotion is not a means unto itself but that treaties should rather strive to strike a more adequate balance between the classical investment protection and promotion goals and other important non-economic public welfare objectives.

2. The Inclusion of General Exception Clauses and other Defenses to Responsibility

Striving to implement this newly aspired balance, States have started recalibrating their IIAs. Recent IIA practice thus frequently includes a variety of safeguards and defenses to responsibility, exempting State measures taken for national security reasons or in the public interest from liability for violations of treaty obligations. Their inclusion evidences an attempt on the part of States to strike a more adequate balance between the original objective of investment protection and the regulatory needs of host States in areas of public concern. Notably, the inclusion of general exception clauses is but one example of this trend. Other approaches include the refinement of substantive guarantees and the insertion of non-economic po-

---

405 For a more detailed account of the current legitimacy crisis and States’ reactions to it see supra Chapter One, Part B, II.
407 See also infra Chapter Four, Part A, II.
408 For examples of different kinds of exception provisions see supra Chapter One, Part C, I.
409 For instance by the addition of annexes that give interpretive guidance on the proper construction of individual standards of treatment. One example is the use of interpretive clarifications in an annex to the IIA which specifies that a variety of public interest measures do not amount to indirect expropriations, see, e.g., prominently Annex B(4)(b) of the U.S. Model BIT 2012.
olicy objectives into the preambles of new IIAs. The various methods to incorporate public interest considerations into IIAs lend support to the proposition that the ideas connected to economic neoliberalism are gradually retreating from the system of international investment law.

B. The Absence of General Exception Clauses in International Investment Agreements


The Role, Rationales, and Risks of General Exception Clauses in International Investment Law

A. The Role of General Exception Clauses in International Investment Agreements

Upon their conclusion, IIAs constrain the sovereign right of host States to control the process of foreign investment within their territory in favor of binding international rules on investment protection. They create a more favorable and attractive investment climate in countries with a high degree of perceived political risk that lack a track record as stable investment destinations. To achieve this goal, the treaty Parties to an IIA have to commit to binding rules drafted with hard and precise terms so as to guarantee predictability and stability of the legal system as opposed to interpretive confusion and legal uncertainty. Moreover, the IIA has to provide for credible sanction and enforcement mechanisms in case the host State reneges on its guarantees in international law, thereby raising the ex post costs of non-compliance. The more convincingly an IIA vouches for the desired stability and predictability the better it serves its primary goals to protect and to attract investment.

414 See Van Aaken, 12 Journal of International Economic Law 507, 520-521 (2009); Van Aaken, in: Waibel et al. (eds.), The Backlash against Investment Arbitration 537, 544-545 (2010). Notwithstanding the legitimate question to which extent IIAs fulfill these requirements or rather entail ambiguous terms which contribute to legal uncertainty, IIAs make the host State’s commitment to investment protection more credible.
415 See Van Aaken, in: Waibel et al. (eds.), The Backlash against Investment Arbitration 537, 544 (2010) noting that the host State’s commitment is particularly strong when no exhaustion of local remedies is required. See also Elkins/Guzman/Simmons, in: Waibel, et al. (eds.), The Backlash against Investment Arbitration 369, 381-382 (2010).
At the same time, States require IIAs to allow for sufficient regulatory flexibility in order to react to unforeseen circumstances in individual cases. Overly rigid commitments that provide a lack of sufficient leeway to relax them in individual cases may deter or even prevent States from pursuing legitimate non-investment interests. Depending on the relative importance of the non-investment concern, States may consequently feel the need to abandon the system of international investment law and search for the desired flexibility to pursue it outside of the regime. In such instances, States might choose to cease their participation in the system of international investment law, decide not to conclude new IIAs or renounce existing ones, or simply stop complying with adverse rulings. In the long run, this would undermine the very purpose of investment protection. Conversely, an excessive provision of flexibility for host States would lead to softer and weaker IIA commitments, which would ultimately also frustrate the objectives of investment protection and promotion.

For these reasons, IIAs necessarily need to represent a trade-off between credible ex ante commitment, which guarantees stability and predictability of the legal framework and adequate ex post flexibility for host States to safeguard their sovereignty. Finding the appropriate balance between predictability and stability on the one hand and regulatory flexibility on the other is key to the long-term success of the international investment law system. This balance is hard to find. In recent years, international investment law has given rise to concerns that the current system of international investment law unduly restricts the exercise of the

---

sovereign right to regulate in the public interest and is thus marked by overcommitments and inflexibility on part of the host States.

One method of addressing these concerns is to enhance the available flexibility in IIAs by incorporating explicit flexibility instruments into the treaty text. Despite their utility, the use of such instruments in IIAs remains uncommon in contemporary IIA treaty practice, in particular in comparison with the law of the WTO, which makes use of a variety of flexibility mechanisms. Nevertheless, several possible options to improve flexibility in IIAs exist and are increasingly employed by States. One of them is the incorporation of general exception provisions in IIAs.

Naturally, the degree of regulatory flexibility offered by general exceptions depends not only on the respective wording and structure of the individual exception provision but also on the interpretation accorded to its terms by investment tribunals. Making the invocation conditional upon the fulfillment of multiple requirements with demanding formulations creates less flexibility on part of the host State than the use of fewer requirements and more lenient language. Likewise, a narrow reading that involves a substantive review of State invocations of the clause offers less flexibility than a broad interpretation of the exception’s terms and the exercise of deference to the host State’s action. That being said, the very existence of a howsoever drafted and interpreted general exception provision in and of itself offers the host State more regulatory flexibility under the IIA than exists in its absence.


424 See Van Aaken, 12 Journal of International Economic Law 507, 526-527 (2009); Van Aaken, in: Waibel et al. (eds.), The Backlash against Investment Arbitration 537, 546 (2010); Sornarajah, The International Law on Foreign Investment, p. 223 (2010); Kennedy, 4 Czech Yearbook of International Law 3, 22 (2013). See also generally for non-precluded measures clauses Ranjan, 2 Asian Journal of International Law 21, 24 (2012). Other options include security exception provisions, the attachment of interpretive annexes and generally a more sovereignty-friendly interpretation of vague terms in substantive IIA provisions.

Closely related to the trade-off between commitment and flexibility in IIA’s is another effect of general exception clauses relating to the risk allocation between host State and foreign investor.\textsuperscript{426} Under domestic law as well as under customary international law, it is the foreign investor who bears the economic risk of adverse State action and its associated costs.\textsuperscript{427}

An IIA offers broader protection for foreign investment than domestic or customary international law and additionally provides an international forum in which investors can pursue their compensation claims against the State. If the State violates its obligations, the investor has got an enforceable right to damages. Its existence thus shifts the economic risk of adverse State action from the foreign investor towards the host State.\textsuperscript{428} If, however, the protection under the IIA is qualified by a general exception provision, States are accorded considerably more freedom to take measures in pursuit of the enumerated public welfare objectives even if such action impairs foreign investment. The existence of a general exception clause therefore reallocates the economic risk of adverse State action to the investor as long as the requirements of the clause are fulfilled.\textsuperscript{429} As a consequence thereof, investors will have to price in the risk of adverse but legitimate State interference with their property rights into the costs of the investment and demand a risk premium in the form of higher returns from their investment.\textsuperscript{430}

\begin{itemize}
\item \textsuperscript{426} Generally for non-precluded measures clauses see Burke-White/Von Staden, 48 Virginia Journal of International Law 307, 401 (2007); Van Aaken, 12 Journal of International Economic Law 507, 524 (2009).
\item \textsuperscript{427} Cf. Burke-White/Von Staden, 48 Virginia Journal of International Law 307, 401 (2008).
\item \textsuperscript{429} Generally for non-precluded measures clauses Burke-White/Von Staden, 48 Virginia Journal of International Law 307, 401-402 (2008); Ranjan 2 Asian Journal of International Law 21, 25 (2012).
\item \textsuperscript{430} Generally for non-precluded measures clauses Burke-White/Von Staden, 48 Virginia Journal of International Law 307, 402 (2008).
\end{itemize}
The Rationales for General Exception Clauses in International Investment Agreements

I. Stability of the International Investment Law Regime through Greater Regulatory Flexibility

The inclusion of general exception clauses in IIAs offers greater regulatory flexibility for host States and thereby stabilizes the international investment law regime for a variety of reasons.

General exception provisions assist in more adequately balancing the sometimes-competing interests of foreign investors and host States. Foreign investors, on the one side, are primarily interested in the field of international investment law because it provides for an additional layer of protection against arbitrary interferences with their property. Thereby, it creates a more stable and predictable legal investment framework, minimizing the economic risk of their activities. In contrast, the interests of host States go beyond the generally recognized objectives of investment protection and promotion and encompass a general increase in the overall welfare of their population that is commonly, but not necessarily, associated with increased inbound investment.

While these objectives of investors and States may conflate at times, they have a considerable potential to conflict with each other. Mediating these tensions and developing a workable balance between the competing interests of foreign investors and host States is one of the most important challenges in contemporary international investment law. General exception clauses assist in this balancing process by directing the tribunals’ attention to a set of requirements, specifying under which circumstances non-investment objectives take precedence over investment obligations in case of conflict.431

These observations may also be reformulated from the perspective of State sovereignty. One of sovereignty’s specific aspects is that the State possesses the supreme and ultimate power to exclusively regulate its internal affairs, including the regulation of economic activities in its territory,

Particularly, sovereignty comprises the State’s capacity to ensure the quality of regulation its citizens demand in any given area of domestic policy. That being said, an integral part of this sovereignty is the sovereign’s power to constrain itself for the future by subjecting itself to binding international obligations, which limit its future discretion in the covered subject matters. The extent of these limitations may be substantial and depends on the specificities of the international regime the State has decided to subject itself to. Naturally, the less invasive the legal regime is on a State’s sovereignty and the greater the associated benefits are, the more likely States are to participate or stay in the system and vice versa.

Generally speaking, participation in the international investment law regime considerably constrains a State’s sovereignty and may thus be characterized as fairly intrusive, especially when compared to the system of world trade law. The foremost reason for this is that international in-

---


434 See Dolzer/Schreuer, Principles of International Investment Law, p. 20, 22 (2012); Lowe, in: Shan, et al. (eds.), Redefining Sovereignty in International Economic Law, 77, 80 (2008) and explicitly for States entering into an IIA see Bento, 24 The American Review of International Arbitration 271, 290 (2013) and Bijlmakers, 23 The American Review of International Arbitration, 245, 249 (2012) with the latter referencing the Case of the SS “Wimbledon” (U.K. v. Japan), P.C.I.J. Reports 1923, Series A, No 1, 17 August 1923, p. 25 in which the Court held that “the right of entering into international engagements is an attribute of State sovereignty” even if the State, by concluding the treaty, “undertakes to perform or refrain from performing a particular act.”.

vestment protection has the potential to become relevant in almost every field of domestic regulatory autonomy. This is most evident in the expansive scope of application of most IIAs, which offer their protection to broadly defined concepts of “investment”, generally encompassing every kind of asset, made by a broad notion of foreign “investor”, including natural and moral persons as well as direct and indirect forms of ownership or effective control of the investment. In addition, IIAs generally include far-reaching substantive commitments that are susceptible to potentially overly broad interpretations, such as the prohibition of direct and indirect forms of “expropriation”, an opaque obligation to accord foreign investors “fair and equitable treatment”, obligations to refrain from “arbitrary” or “discriminatory” treatment, to provide “full and constant protection and security,” and to accord national treatment as well as most-favored-nation treatment to foreign investors and investments. Notably, these obligations are one-sided in that they direct the host State to accord extensive protection to the investors’ economic activities without subjecting the latter to any obligations at all.

What is more, a large majority of IIAs do not provide for a political filter to litigation, for instance by restricting access to the dispute settlement mechanism to States, but rather empowers private parties to enforce their rights directly before international tribunals. Taking into account the lack of a true appeal mechanism to remedy incoherent or plainly wrong decisions and the retrospective nature of remedies, usually monetary dam-


ages, in international investment law, one may conclude that the regime’s impact on the sovereignty of its participating States is considerable. While the positive effects of the system on making countries more attractive for foreign investment should not be underestimated, the outlined impact on State sovereignty is of concern to a growing number of States that have respond to it either by recalibrating their IIAs or by abandoning the system altogether.

General exception clauses alleviate these constraining effects on sovereignty. They enable States to participate in the system while permitting them to preserve certain core aspects of their national sovereignty. By allowing States to retain the supreme and exclusive regulatory authority over the covered public interests as long as the provision’s requirements are fulfilled while concurrently offering them the possibility to affirm their general commitment to the overarching objective of investment protection, general exception clauses limit the intrusive effects of the investment regime on State sovereignty.

Through the inclusion of general exceptions, States also emphasize that they recognize the importance of non-investment interests for their society. The protection and promotion of certain core societal values, such as the protection of human life, health, the environment, morality or the cultural heritage, is not only a right and prerogative of the State but also constitutes a duty towards its population and a vital raison d’être for the modern State. These policy objectives share an intrinsic importance that makes it indispensable to recognize and protect them within the framework of international investment law to enhance the regime’s legitimacy.

General exception clauses thus ensure that international commitments to investment protection do not prevail at the expense of the protection of other societal core values that States are obliged to protect vis-à-vis their populations. As a trade-off to agreeing to be bound by an IIA, general ex-

443 See Zleptnig, Non-Economic Objectives in WTO Law, p. 93 (2010); for the argument that non-precluded measures clauses touch on core domestic functions of the State see also Burke-White/Von Staden, 48 Virginia Journal of International Law 307, 403 (2007).
ceptions grant States the express ability to derogate from their investment obligations if they conflict with other legitimate policy concerns that States consider more important than investment protection in individual cases. As long as IIAs do not provide for appropriate mechanisms for the balancing between investment and non-investment objectives, States will perform the inevitable balancing process considerably less subtly extraneous to the international investment law regime. In other words, if States cannot find the essential regulatory flexibility within the system of international investment law, they will turn their back on the system and look for said flexibility outside of it. General exceptions are therefore crucial instruments to foster State commitment to the system of international investment law. They provide incentives for States to sign up to or stay within the system of international investment law and thereby ultimately help to stabilize the system as a whole.

Interestingly, the proposition that general exception clauses are of fundamental importance to the stability of the legal system is much more accepted in the WTO system where they were included from the outset. WTO scholars even go so far as to argue that in the absence of general exception clauses “[S]tates would hardly ever agree to be bound by trade agreements” characterizing them as “indispensable conditions[s] without which states would not accept to be bound by trade agreements” and as “critical to the existence and operation of trade-liberalizing agreements.”

In the international investment law system, the perception of general exception provisions differs somewhat. For reasons more fully developed above, they were neither deemed necessary at the inception of the IIA movement nor during the time of its proliferation. To date, international investment law practitioners and scholars view them with mixed feelings. Certainly, the impressive success story of the international investment law

444 See Kalderimis, 7 Transnational Dispute Management, p. 18 (2010).
446 See Zleptnig, Non-Economic Objectives in WTO Law, p. 88 (2010).
447 See Zleptnig, Non-Economic Objectives in WTO Law, p. 89 (2010).
449 See supra Chapter Three, Part B, I and II.
regime in the last decades seems to prove that States considered neither general exceptions in particular nor the reconciliation of investment and non-investment interests more generally as indispensable for the system’s expansion. However, recent developments illustrate how the views of a growing number of States on the matter are changing. This development has the potential to destabilize the whole legal regime by forcing States out of the system if they intend to favor non-investment objectives over investment objectives. These conflicts might be resolved if States had the possibility to legitimately pursue such objectives at the expense of their IIA obligations by means of an express general exception clause. It is for this reason that general exception clauses are also partially viewed as a response to a perceived bias in favor of investor interests.\textsuperscript{450}

II. Increase in Predictability and Legitimacy of the System of Investment Treaty Adjudication

Intertwined with the above considerations on stability and flexibility is the increase in the predictability and legitimacy of the system of investment treaty adjudication.

The distinction between permissive State conduct and prohibited impairment by the State is sometimes difficult to draw in international investment law. The determination is particularly complicated when it comes to measures that States take in alleged furtherance of public policy goals such as the protection of the environment or the promotion of public health. In similar instances, and in the absence of a general exceptions provision, tribunals have adopted a variety of different approaches to the question of whether and how to take into account societal welfare considerations alleged by the host State in defense of the complaint brought by the investor with no apparent consensus emerging. While some tribunals have been inclined to consider legitimate non-discriminatory governmental purposes to varying degrees in determining a breach of a number of different IIA standards,\textsuperscript{451} others have dismissed them as irrelevant in light of the

\textsuperscript{450} See \textit{Bijlmakers}, 23 The American Review of International Arbitration 245, 254 (2012).

\textsuperscript{451} For instance \textit{Methanex v. United States}, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV, D, ¶7, stating that “as a matter of general international law, a non-discriminatory regulation for a public purpose, which is
overarching objectives of investment protection and promotion, making it exceedingly difficult for investors and host States to evaluate the prospects of success of arbitrations challenging public interest measures. This deficiency contributes considerably to divergence and ambiguity in investment jurisprudence and jeopardizes legal certainty and predictability, both of which are essential for a stable and fruitful investment climate. The resulting legal uncertainty undermines the legitimacy of the system of international investment law.

The inclusion of general exception provisions mitigates this uncertainty to the advantage of investors and States. The advantages for host States are straightforward and related to the above observations on stability and

enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.” For an elaborate criticism of the tribunals’ adopted methodology see Kurtz, in: Douglas, et al. (eds.), The Foundations of International Investment Law, pp. 41-46 (2014). See also Brower, II, in: Sauvant (ed.), Yearbook on International Investment Law & Policy 2008-2009 347, 364 (2009) who characterizes the tribunal’s decision as an “outlier that reinforces the erratic (as opposed to systematic) consideration of the public interest in investment treaty disputes.”.


flexibility. The incorporation of a comprehensive list of public policy objectives, which the host State may legitimately pursue, puts it into a position to assess the concrete impact of the IIA on its regulatory power even before ratification. More specifically, general exceptions allow host States to foresee for which policy objectives they may legitimately regulate and when regulatory activity may attract IIA liability.

Notably, the host State, as a treaty party, may also influence the negotiations and the ultimate wording of the clause so as to include all or most of the policy objectives whose pursuance it deems most important in its society. General exceptions thus reduce the interpretive role of tribunals in favor of an enlarged role of States.455 This may further assist in the prevention of future conflicts between domestic regulation and the IIA in sensitive policy areas. Moreover, this timely knowledge may avoid a so-called “regulatory chill” from arising.456

While at first glance general exception clauses do not necessarily appear to work in favor of foreign investors, they may ultimately also benefit from the increased legal certainty associated with the inclusion of general exceptions. General exceptions offer foreign investors a means by which to ascertain the extent of rights the treaty parties have chosen to grant them under an IIA. 457 This assessment becomes important with regard to an investor’s risk management. The foremost reason for investors to invest in a foreign country is to make a profit.458 Unsurprisingly, they are therefore interested in an accurate assessment of the commercial and political risks affecting the potential investment. “Risk” in this sense may be defined as the likelihood that expected returns of the investment will not be

456 The term “regulatory chill” describes a scenario in which States may prove “unwilling to undertake legitimate regulation for fear of lawsuits from investors.” See UNCTAD, World Investment Report 2003: FDI Policies for Development: National and International Perspectives, p. 111.
realized.\textsuperscript{459} As a general rule, the greater the risk is the higher the required profit has to be. Prior to making an investment, a prudent investor thus needs to assess both the commercial feasibility as well as the political risk of an investment project.\textsuperscript{460} In order to measure the political risk, the investor needs to price in the probability of future state conduct with a potentially detrimental impact on its investment. In this instance, the investor needs to be put in a position in which she is able to differentiate as clearly as possible between permissive future governmental regulation and internationally prohibited future impairment by the host State. On the basis of the existing jurisprudence, this is a complicated task and the result is necessarily speculative and dependent not only on the specific circumstances of the case but also on the composition of the tribunal. The determination is facilitated considerably, however, if the applicable IIA contains a general exception clause with an exhaustive list of public policy goals and defined circumstances under which the State may favor them over its international duty to protect foreign investment. Such clauses highlight the conceivable future political risks that the investor may face in the host country in the future and thereby caution investors against these risks. They enable investors to take these risks into account prior to making the investment and to price them in accordingly in the expected investment costs and revenues. Ultimately, therefore, the foreign investor does not only suffer disadvantages under the host State’s prerogative to pursue policy objectives entailed in general exceptions but also benefits from the increased legal certainty that comes along with general exception clauses.\textsuperscript{461}

Additionally, general exception clauses bolster the legitimacy of the investment treaty interpretation process by providing express points of refe-


rence to which public interest considerations pursued by the challenged measures of the host State may be attached.462

To date, direct opportunities for tribunals to consider such legitimate public interests in IIA texts have been limited.463 This gap is one of the reasons for incoherent rulings with a split between those tribunals, which dismiss the policy making power of the host State as a defense to an IIA claim and others that try to attach public policy considerations as an element in the enquiry as to whether a violation of various substantive investment disciplines has occurred. While the main concentration of the former raft of jurisprudence on the detrimental economic effect of a State measure may yield unsatisfactory results in particular cases, the subsequent line of argumentation faces the difficulty that the absence of adequate treaty language in the large majority of IIAs embodying the public interest has required legal reasoning which finds no or little reflection in the treaty text of different provisions.464 The lack of pertinent “windows” for the consideration of public interests thus not only undermines the legitimacy of investment adjudication but also aggravates the existing legal uncertainty.465

By providing an express textual point of reference for the consideration of non-economic objectives and by explicitly allowing States to invoke them as a defense to allegations of treaty violations, general exception clauses off

Moreover, general exception clauses limit claims that are frivolous or unmeritorious as to the merits. While domestic legal systems usually provide for mechanisms to sort out such claims on an expedient basis, the current dispute settlement system of international investment forces States to undergo potentially lengthy and costly litigation to defend themselves against such claims even if they appear to have little or no prospect of success from the outset.466 Procedural instruments that can be used against such abusive litigation have only been introduced recently and only par-

464 See Kalderimis, 7 Transnational Dispute Management, p. 11 (2010).
tially both within the ICSID system and by a number of discontent States in new model IIAs or multilateral investment agreements. Experience with these new procedural rules is therefore still limited.

General exception provisions may help remedy these shortcomings and deter investors from bringing unmeritorious and frivolous claims that lack a sound legal basis or are otherwise unreasonable. They strengthen the host State’s defense profile in investment arbitration proceedings involving defensible public policy measures and thereby shift the investor’s calculation as to whether to initiate an investment dispute or accept the measure as an exercise of the host State’s regulatory power. An investor that has to take into account a State’s likely reliance on an explicit general exception provision will evaluate the prospect of success of its legal challenge in a different light than an investor that builds its hopes on the off-chance that a rogue tribunal will favor the investor’s unmeritorious line of argument.

C. The Risks and Shortcomings Associated with General Exception Clauses in International Investment Agreements

Bearing in mind the various rationales, an assessment of potential risks and shortcomings associated with the inclusion of general exception clauses into IIAs will enable a balanced evaluation of the desirability of such clauses in future IIAs.

467 See ICSID Rule Article 41(5). Contrast this rule, for instance, with the widely used 2010 UNCITRAL Arbitration Rules which do not contain a similar provision despite their recent amendment.

468 In particular, the United States have incorporated a particular procedure to address preliminary objections by the respondent State in their IIA and FTA treaty practice, see for instance Articles 28.4 and 28.5 of the 2012 U.S. Model BIT and Articles 10.20.4 and 10.20.5 of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR, signed 5 August 2004, entry into force for the United States, El Salvador, Guatemala, Honduras and Nicaragua during 2006, for the Dominican Republic on 1 January 2007 and for Costa Rica on 1 January 2009).

469 For a recent insightful study on the status quo see Potestà/Sobat, 3 Journal of International Dispute Settlement 137 (2012).
C. The Risks and Shortcomings Associated with General Exception Clauses

I. General Exception Clauses are Inherently Prone to Bad Faith Invocations

Concerns as regards a perceived danger of abusive invocations of general exception clauses in IIAs are deeply rooted in the international investment law community. Respective objections not only for legal but also for policy reasons are remarkably common during informal discussions. The most frequently articulated apprehension is that general exception clauses would have the potential to severely undermine the original purpose of investment protection by creating loopholes for host States to pursue protectionist goals under the disguise of non-economic policy objectives to the ultimate detriment of foreign investment protection and promotion. In essence, the argument suggests that general exception clauses with their vague and general terms would be overly broad and therefore inherently prone to bad faith invocations since they would allow host States to deviate from their IIA obligations under certain circumstances. This slippery slope problem would ostensibly open the floodgates for potential abuses and excessive protectionism cloaked as legitimate pursuance of public interests. In turn, this would ultimately herald the beginning of the end of international investment law and the protection it accords to foreign investment.

While, *prima facie*, the existence of a certain risk of abuses is inherent to exception provisions, the validity of the associated concerns is hard to assess. In light of the comparatively recent emergence of general exception clauses in IIAs and the consequent absence of investment jurisprudence on this issue to date no evidence is available to either support or rebut this criticism. However, while no pertinent jurisprudence has yet been handed down in international investment law, ample judicial and practical experience with general exception clauses exists in the law of the GATT/WTO. Since the majority of investment general exceptions are modeled on


the GATT and GATS exception provisions\textsuperscript{472} it seems prudent to examine whether abuses of the general exception provisions in the WTO have occurred or whether a comparison with the WTO would suggest that the dreaded danger of misuse is overstated.

Similar concerns to the above are indeed easy to make out both in the drafting history of the early GATT 1947 as well as in the recent jurisprudence of the WTO Appellate Body and pertinent scholarship. From the drafting history, it is apparent that the negotiating Parties were conscious of the risk of abuses and introduced specific treaty language in order to alleviate and counter these concerns.\textsuperscript{473} As regards WTO jurisprudence, the Appellate Body has addressed the looming danger of misuse of the exceptions on numerous occasions, but has simultaneously continually emphasized that this concern is taken into account and reflected in the WTO Agreements and the adopted interpretation.\textsuperscript{474} Similarly, academics have noticed that general exceptions “could be used to justify practices that have as their secret goal preventing import competition,” but at the same time have noted that “[Article XX GATT] therefore includes clauses designed to protect against such abuse.”\textsuperscript{475}

On the other hand, what is largely lacking in WTO scholarship and jurisprudence are complaints about past or current misuse of the exceptions, retrospective studies or accounts of successful abusive invocations, and calls for reform because of a perceived or actual danger of misuse of the WTO general exceptions. This absence suggests that the current wording of WTO general exception clauses and the interpretation accorded to them by the WTO Appellate Body are successful in preventing abuses in the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{472} See \textit{supra} Chapter Two, Part B, I.
\item \textsuperscript{473} At the 1946 London Session of the Preparatory Committee, the delegates were conscious of the danger of abuse and proposed the inclusion of a qualification preceding the exceptions which would later be slightly modified and become known as the “\textit{chapeau}” clause, see UN Docs. EPCT/C.II/32, p. 11 (1946) and EPCT/C.II/50, p. 7 (1946). In fact, this introductory paragraph was derived from the earlier International Convention for the Abolition of Import and Export Prohibitions and Restrictions of 1927. See \textit{supra} Chapter Three, Part A, I, 2 for details.
\end{itemize}
\end{footnotesize}
realm of international trade law. This is also significant for the investment regime since WTO general exceptions are often transplanted into IIAs with minor textual amendments or are incorporated by reference. For these reasons it seems worthwhile to shed some more light on the specific features and safeguards against abuses built into such clauses in the following section in order to explain the international investment law community and alleviate some of its concerns.

The reluctance of investment scholars and practitioners seems to stem from an oversimplification of the expected effect and dangers flowing from the inclusion of general exceptions in IIAs rather than from negative practical experiences. Contrary to the misconception, the mere existence of a general exception provision in an IIA does not provide the host State with an all-purpose tool to compromise the investment protection and promotion function of IIAs whenever it desires to do so in exercise of its absolute discretion. Quite to the contrary, as evidenced above, the danger of abusive invocation has been (and still is) apparent to international economic treaty negotiators since the 1920s, which is why States have been able to react to it and draft exception provisions accordingly so as to minimize such risks. Before a host State can rely on the exception, it has to demonstrate that it satisfies all these requirements and safeguards. Compliance with these requirements is fully judicially reviewable by the investment tribunal. Only one of the examined 178 general exception clauses contains self-judging language that largely exempts the clause’s invocation from judicial review by investment tribunals.

Several features and safeguards against abusive invocation are included in the diverse variation of exception clauses based on the Article XX GATT or Article XIV GATS models.

First, general exception provisions are inherently “limited” in the sense that they entail an exhaustive list of pre-defined permissible regulatory ob-

476 See supra Chapter Three, Part A, I, 2. Prior to the imposition of these requirements, it was acknowledged that unconditional exception provisions might have been easily misused by introducing economic protection under the guise of public policy considerations, cf. Jackson, World Trade and the Law of the GATT, p. 741 (1969).

477 Namely Article 5 of the Framework Investment Agreement in APTA Participating States (signed 15 December 2009). Pertinent language such as “it [the State] considers necessary” is more frequently employed in security exceptions and has been interpreted to largely preclude judicial scrutiny of the State’s decision to invoke the exception.
jectives the pursuance of which allows the State to derogate from its IIA obligations. This closed list approach acts as an inherent safeguard against abuses by precluding States from fashioning custom-fit policy objectives to make an individual measure justifiable under the exception provision.\(^{478}\)

After a measure has been found to fall within one of the permissible objectives, general exception provisions further require compliance with “nexus” requirements. These prerequisites specify the required link or degree of connection between the challenged measure and the permissible objective sought by that measure. The very existence of the necessity requirement shows that the host State cannot invoke the general exception clause to defend just any regulatory measure that remotely relates to the permissible objective. Rather, in the vast majority of cases, States may invoke the exception only for those measures that constitute the least restrictive alternative to achieve the sought objective. This constitutes an additional obstacle against abusive invocations of the general exception clause.\(^{479}\)

In a third step, the contested is assessed against the introductory paragraph usually preceding the list of permissible exceptions. This “chapeau” clause forms an additional – and possibly the most important – precaution against abusive invocations. In doing so, it contains three requirements that the host State must abide by if it intends to rely on the exception provision. To comply with the chapeau, the host State’s measures must not be applied in a manner which constitutes:

– arbitrary discrimination between investments or investors (where like conditions prevail); or
– unjustifiable discrimination between investments or investors (where like conditions prevail); or
– a disguised restriction of international investment (or trade).\(^{480}\)

Even general exception clauses that do not contain a chapeau, for the most part, feature other good faith, non-discrimination, or notification requirements.\(^{481}\)

\(^{478}\) See Chapter Five, C, I.
\(^{480}\) On the range of textual variations of the chapeau provision see supra Chapter Two, Part C, II, 3. See also infra Chapter Five, Part C, III.
\(^{481}\) See supra Chapter Two, Part C, II, 3 and infra Chapter V, Part C, III.
Finally, the distribution of the evidentiary burden of production, i.e. for the question as to which party carries the duty to prove or disprove the existence of a disputed fact, further complicates misuses of general exceptions.\(^\text{482}\) As a general principle of law, accepted as such in the jurisprudence of international courts and tribunals,\(^\text{483}\) the claimant bears the obligation to produce the evidence its complaint relies on and to disprove the existence of all available defenses.\(^\text{484}\) In turn, the respondent carries the duty to provide evidence for any additional circumstances which could justify its conduct.\(^\text{485}\) IIA tribunals seem to have adopted this approach in the interpretation of other exception provisions, requiring the State to prove that its measure falls within the exception.\(^\text{486}\) In the context of general exception clauses, this would mean that the invoking State carries the burden of production.

The standard distribution of the burden of production in the context of WTO general exceptions is more complex. Nonetheless, it may be informative for the interpretation of similarly framed IIA general exceptions.\(^\text{487}\) Generally, after the complaining party has made a *prima facie* case of in-

---

\(^{482}\) The more frequently used term “burden of proof” is ambiguous in this context. As elements of the concept of “burden of proof” one may distinguish between the burden of production (sometimes also called “onus of proof”), which determines which party carries the duty to prove or disprove the existence of a disputed fact, and the “standard (or burden) of persuasion”, i.e. which standard of evidence the moving party is required to meet in order to satisfy the court or tribunal of the existence of the contested fact. Therefore, in this context the more specific term “burden of production” is favored. On this critical distinction see *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, I.C.J. Reports 90, Judgment of 6 November 2003, Separate Opinion of Judge Roselyn Higgins, ¶33.

\(^{483}\) See *Cheng*, General Principles of Law as Applied by International Courts and Tribunals, pp. 326-335 (1953).

\(^{484}\) Cf. the latin maxim “*semper necessitas probandi incumbit ei qui agit*” (“The necessity of proving always lies with the person who brings charges”).

\(^{485}\) Also called “affirmative defense” since the defendant affirms part of the plaintiff’s complaint but offers additional facts which justify its conduct.


consistency of a measure with the WTO Agreement, the burden of providing evidence that its measure satisfies the requirements stipulated in Article XX GATT is incumbent on the respondent State.\footnote{On the rule that a party invoking an exception or defense has to prove that the conditions therein are met see already \textit{Canada – Administration of Foreign Investment Review Act}, Panel Report, BISD 30S/140, adopted on 7 February 1984, ¶5.20; \textit{United States – Section 337 of the Tariff Act of 1930}, Panel Report, BISD 36S/345, adopted on 7 November 1989, ¶5.27; \textit{United States – Measures Affecting Alcoholic and Malt Beverages}, Panel Report, BISD 39S/206, adopted on 19 June 1992, ¶¶5.41, 5.52. Confirmed by the WTO Appellate Body in \textit{United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India}, Appellate Body Report, WT/DS33/AB/R, adopted 23 May 1997, pp. 14-16; on the burden of proof as regards the \textit{chapeau} paragraph see also \textit{United States – Standards for Reformulated and Conventional Gasoline}, Appellate Body Report, WT/DS2/AB/R, adopted on 20 May 1996, pp. 22-23; for Article XIV GATS see \textit{United States – Measures Affecting the Cross-Borders Supply of Gambling and Betting Services}, Appellate Body Report, adopted 20 April 2005, WT/DS285/AB/R, ¶¶309-311. See also more generally on the burden of proof in WTO dispute settlement \textit{Barcélo III}, 42 Cornell International Law Journal 23 (2009) and \textit{Pauwelyn}, 1 Journal of International Economic Law 227 (1998), each with further references. Critical of this approach is \textit{Grando}, 9 Journal of International Economic Law 615, 650-655 (2006).} Depending on the progress and particularities of the case and the submitted evidence, however, this burden may shift back to the complainant State. For instance, once the respondent State is able to establish a \textit{prima facie} case that its actions seek to promote a legitimate and non-protectionist policy goal, the complaining State is expected to rebut this presumption.\footnote{See \textit{United States – Measures Affecting the Cross-Borders Supply of Gambling and Betting Services}, Appellate Body Report, adopted 20 April 2005, WT/DS285/AB/R, ¶¶309-311.} A one-on-one adoption of this sequence to the investment setting should be mindful of the fact that trade disputes, in contrast to investment disputes, involve State parties on both sides which can both be expected to be generally familiar with public policy topics and to be equally capable of proving its or disproving the other Party’s case.

For the present purposes, however, it is sufficient to conclude that the burden of production for the reliance on general exception clauses generally rests with the respondent State invoking the exception. Adopting this principle in investment disputes, the burden of producing evidence that all requirements of IIA general exception provisions are fulfilled rests on the regulating host State after the complaining investor has made a \textit{prima facie}
case of an IIA infringement. As respondent in an investment dispute, the host State is thus required to provide sufficient evidence to satisfy the tribunal that the challenged measure is appropriately connected to the achievement of one of the exhaustively enumerated policy goals and fulfills all further requirements. This is adequate since it is upon the better-informed party to adduce evidence of its regulatory goals. This allocation of the burden of production makes potential misuses even more difficult.

II. General Exception Clauses Only Codify the Regulatory Flexibility that Already Exists in Current IIA Jurisprudence

Some commentators maintain that general exception clauses are unlikely to have much practical impact on investment adjudication since they would merely codify the regulatory flexibility that already exists in the current investment jurisprudence. According to this argument, they have only an essentially declaratory effect. The starting point of this argument is the view that sufficient regulatory flexibility for host countries already existed within the prevailing interpretation of a number of substantive IIA provisions as adopted by investment tribunals. In particular, it is argued that many IIA obligations feature implied exceptions for policy reasons that are essentially similar to an explicit general exception clause. The most frequently quoted example is the interpretation of the national treatment standard. Here, it is put forward, tribunals have held

491 Which evidence is deemed to be “sufficient” is decided by the distinct “burden of persuasion”.
493 See Newcombe/Paradell, Law and Practice of Investment Treaties, p. 505 (2009); generally for this view also Schill, 72 ZaöRV 261, 299-301 (2012) without reference to general exceptions.
that investments are not in “like circumstances” and thus declined State liability in cases where a legitimate policy rationale for the differential treatment exists that is not motivated by protectionist considerations.\textsuperscript{495} Support for this position comes from the tribunal in \textit{S.D. Myers v. Government of Canada}, which explicitly reasoned that the challenged State measures could not be saved even if NAFTA Chapter Eleven – the applicable IIA – provided for a Article XX GATT-like general exception provision since it would not satisfy the \textit{chapeau} requirements.\textsuperscript{496} The concurring opinion expressly notes on the proper interpretation of the national treatment standard:

“All Article 1102 (National Treatment) of NAFTA is not made subject to an equivalent of Article XX (General Exceptions) of GATT. Read in its proper context, however, the phrase ‘like circumstances’ in Article 1102 in many cases does require the same kind of analysis as is required in Article XX cases under the GATT. The determination of whether there is a denial of national treatment of investors or investments ‘in like circumstances’ under Article 1102 of NAFTA may require an examination of whether a government treated non-nationals differently in order to achieve a legitimate policy objective that could not reasonably be accomplished by other means that are less restrictive to open trade” (Emphasis added).\textsuperscript{497}

The argument hence concludes that general exceptions merely made explicit what already implicitly existed in IIA obligations. Notwithstanding, it acknowledges that general exceptions are not entirely irrelevant but might still provide useful guidance to tribunals and guard against overly broad interpretations of substantive IIA obligations.\textsuperscript{498}

One has to concede that a certain degree of regulatory flexibility already exists within the current international investment case law. Without a doubt, certain lines of jurisprudence on the interpretation of various protection standards acknowledge the host States’ right to regulate in the public interest to one degree or another and consequently decline to find liability for non-discriminatory, \textit{bona fide} measures that are aimed at the general welfare. It is however not entirely candid to impute an ostensibly

\textsuperscript{495} See \textit{Newcombe/Paradell}, Law and Practice of Investment Treaties, p. 505 (2009).
\textsuperscript{496} \textit{S.D. Myers, Inc. v. Government of Canada}, First Partial Award, 13 November 2000, ¶298.
universally accepted interpretive approach from selected jurisprudential lines while concealing other strands of jurisprudence that have taken a radically different approach to the issue, neglecting the public interest in their violation enquiry and focusing solely on the economic effect of the challenged measure. A more accurate summary of the current jurisprudence would be that the amount of regulatory flexibility accorded to host States in substantive IIA provisions varies and is a matter of interpretation left to each individual tribunal. There is no certainty that an investment tribunal will interpret the substantive obligations in a way that offers sufficient flexibility to accommodate the regulatory needs of host States. The absence of a doctrine of binding precedent or of an appellate review in investment treaty arbitration further adds to the problem. The extent to which regulatory powers may be used to legitimately deprive investors of their investment is thus unpredictable. In fact, even within a single tribunal’s reasoning it is uncertain as to if, when, and to what extent public policy considerations may be pursued by the host State under the respective IIA obligations.

For instance, a tribunal following the “police powers” doctrine in the context of its indirect expropriation enquiry, and thus taking into account the public interest, may disregard the same policy concerns in its deliberations on the fair and equitable standard of treatment.

Also, apart from this, it is erroneous to claim that general exception provisions merely codify already existing regulatory flexibility. Their scope is more expansive than this in that there is room for considerations of public policy objectives in the interpretation of substantive IIA standards. While recourse to general exceptions may justify any violation of the IIA, public interest considerations are confined to violations of a limi-

499 See Kalderimis, 7 Transnational Dispute Management, p. 15 (2010).
502 For instance the tribunal in LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶¶121-131 finding a violation of the FET standard and ¶¶185-200 for the application of the police powers doctrine relieving the State from liability in the indirect expropriation analysis.
ted set of substantive treaty guarantees, e.g. the prohibition of uncompen-
sated expropriations or the national treatment standard, which may be re-
ceptive to a pertinent reading to one degree or another.\textsuperscript{503} In contrast, in-
fractions of other protection standards cannot be remedied as easily by
means of interpretation. This is problematic for host States, for which it is
essential to know whether a regulatory measure will attract liability under
the IIA in general rather than whether a measure violates one protection
standard but possibly not the other.\textsuperscript{504} General exception provisions there-
fore have a particular relevance over and above the flexibility that may al-
ready exist in contemporary arbitral awards.

Even if one were to accept the proposition that sufficient regulatory
flexibility existed on the level of the obligation, there is no reason why
such flexibility should not equally exist on the level of the exception. Gen-
eral exceptions need not necessarily be seen as an alternative to flexibility
within the interpretation of investment obligations but may also be viewed
as complementary backstops that guard against rogue tribunals and make
sure that the public interest is taken into account. In the absence of a single
dominant jurisprudential line neither host States nor investors know with
any certainty whether a public interest measure will attract liability. This
situation results in legal uncertainty, which is ultimately detrimental to the
exercise of regulatory flexibility. Therefore, even if one were to accept
that sufficient regulatory flexibility already exists on the level of the obli-
gation, the added legal certainty and predictability of the outcome of an
investment dispute in critical areas of public policy would be reason
enough for States to include general exception clauses.

III. General Exception Clauses Lead to Less Regulatory Flexibility than
Exists in Current IIA Jurisprudence

Other commentators go even further than the above and argue that the in-
clusion of general exception clauses in IIAs would limit host States’ regu-
latory flexibility even beyond what prevails in the current jurispru-
dence.\textsuperscript{505} This variation of the argument starts from the same proposition

\textsuperscript{503} See Ranjan, 2 Asian Journal of International Law 21, 56 (2012).
\textsuperscript{504} See Ranjan, 2 Asian Journal of International Law 21, 55 (2012).
\textsuperscript{505} See Lévesque, in: Echandi/Sauvé (eds.), Prospects of International Investment
Law and Policy 363, 364 (2013); Alvarez/Brink, in: Sauvant (ed.), Yearbook of
that ample flexibility to accommodate regulatory preferences by host
countries exists within the current investment jurisprudence. Noting that
general exception clauses feature closed lists of permissible objectives, it
is concluded that they do not recognize a general right to regulate for the
public benefit.\textsuperscript{506} Building on this, it is argued that host States would find
their regulatory discretion limited to the public interests identified exhaustively in the clause and consequently be prevented from pursuing policy
objectives not contained therein. In contrast, the number of legitimate gov-
ernmental policies open for consideration in assessing a violation of sub-
stantive IIA provisions would be unlimited and thus much broader.\textsuperscript{507}
With regard to the necessity threshold requirement, it is maintained that
investment tribunals, in the construction of the substantive IIA obligations
such as the national treatment standard, have adopted a standard of review
that is considerably softer than the necessity threshold featured in most
IIA general exceptions. Instead, tribunals taking into account legitimate
policy rationales in the national treatment enquiry required only a “reason-
able nexus to rational government policies”,\textsuperscript{508} “legitimate public policy
measures that are pursued in a reasonable manner”,\textsuperscript{509} reasonable distinc-
tions or “a rational justification”,\textsuperscript{510} or a plausible connection with a legiti-
mate policy goal.\textsuperscript{511} These would constitute considerably less stringent

\begin{thebibliography}{9}
\bibitem{notes} International Investment Law and Policy 2010-2011 319, 357 (2011); \textit{DiMascio/
Pauwelyn}, 102 American Journal of International Law 48, 76, 82-83 (2008); \textit{Cos-
\par
\textsuperscript{506} For a clause providing for a general right to regulate see Article 12 of the Draft
\par
\textsuperscript{507} See \textit{Lèvesque}, in: Echandi/Sauvé (eds.), Prospects of International Investment
Law and Policy 363, 366 (2013); \textit{DiMascio/Pauwelyn}, 102 American Journal of
International Law 48, 76, 82-83 (2008); \textit{Alvarez/Brink}, in: Sauvant (ed.), Year-
\par
\textsuperscript{508} \textit{Pope & Talbot Inc. v. The Government of Canada}, Award on the Merits of Phase
2, 10 April 2001, ¶78.
\par
\textsuperscript{509} \textit{S.D. Myers v. Canada}, First Partial Award, 13 November 2000, ¶246.
\par
\textsuperscript{510} \textit{Marvin Roy Feldman Karpa v. United Mexican States}, ICSID Case No.
ARB(AF)/99/1, Award, 16 December 2002, ¶¶170, 182.
\par
\textsuperscript{511} \textit{GAMI Investments, Inc. v. The Government of the United Mexican States}, Final
Award, 15 November 2004, ¶114.
\end{thebibliography}
Moreover, subjecting the clauses’ invocation to compliance with the requirements of the chapeau paragraph was another factor which made successful invocation of the clause even harder. This applied all the more given the likelihood of a strict interpretation accorded to general exceptions. With a view to these considerations, commentators conclude that the inclusion of general exceptions actually calls for stricter review of State measures than currently required by IIA jurisprudence. It would thus further limit legitimate governmental action for the public interest instead of promoting it.

Before addressing the main thrust of the argument that general exceptions actually narrow the regulatory flexibility of the host State instead of promoting it, it has to be borne in mind that general exceptions apply to the IIA as a whole, while pertinent interpretation that takes into account the public interest is only possible for a limited number of protection standards. Furthermore, the latter is only undertaken if the respective tribunal chooses to do so and not all tribunals are inclined to follow this approach. This line of argumentation is thus exposed to similar criticisms that the argument above attracts, in that it is not entirely honest to claim that suffi-


513 The above tribunals only examined whether the measures were applied in a discriminatory manner, see Lévesque, in: Echandi/Sauvé (eds.), Prospects of International Investment Law and Policy 363, 366 (2013); Lévesque, 44 Canadian Yearbook of International Law 249, 273 (2006).


cient – or more – regulatory flexibility to pursue public interest considerations is always available in IIA adjudication.

Also, apart from the aforementioned, it remains unclear as to why the inclusion of general exceptions in IIAs should constrain tribunals that wish to take into account the public interest and alter their interpretive approach to substantive obligations. The proponents of the above argument seem concerned that tribunals will regard general exceptions as exhaustive elaborations of public policy objectives that may be pursued under the IIA. This apprehension is based on the assumption that if the public interest were already considered on the level of the obligation there would no longer be any need to turn to general exception provisions. Such a reading of substantive obligations would appear to make the exception effectively redundant, which in turn would violate the principle of effectiveness in treaty interpretation and hence cannot have been intended by States. Tribunals might therefore feel obliged to consider the public interest exclusively within their general exception enquiry so as to give effect to the provisions.

This argument neglects that there are many reasons for States to retain the regulatory flexibility that may exist on the level of the obligation in addition to the regulatory flexibility available through the inclusion of general exception provisions. The latter would consequently not be rendered redundant if the public interest is (also) considered in the interpretation of substantive standards. The first reason is that States may customize general exception provision to their regulatory needs and priorities, and direct the tribunals’ attention towards them instead of leaving these sensitive policy questions to the interpretation of ad hoc constituted arbitral tribunals with no democratic legitimacy and little or no professional experience in the concerned policy fields. States may use general exceptions to explicitly subject the whole of the IIA (as opposed to only those standards that are susceptible to appropriate interpretation) to a limited range of policy options that they, and not the arbitrators, have deemed appropriate. States may also want to expressly stipulate the appropriate standard of review for individual policy ends instead of leaving this task to the arbitrators. In addition, States may decide to stipulate a different burden of proof for the

pursuance of some policy ends in the general exception other than the substantive obligations.

The second reason relates to the fact that general exception clauses are inherently limited in that they contain closed lists of permissible objectives. If they were to be seen as exhaustive enumerations of public interest objectives relevant under an IIA, States would be locked into a list of policies that would remain fixed for decades given the difficulties of treaty amendment. To avoid this, general exceptions should not be approached as exhaustive stipulations of the public interest in an IIA, but rather as points of reference for tribunals, which ultimately make their interpretive task in arbitrations involving the public interest easier.

Moreover, there is an important normative difference between assuming that a non-discriminatory and non-arbitrary measure aimed at general welfare is illegal but justified by virtue of a general exception and ruling that the said measure did not violate the host State’s international obligations in the first place. Although the ultimate result may be the same, both moral condemnation and public perception differ significantly.\textsuperscript{518} It is for this additional reason that States may have an interest in tribunals already considering the public purpose, where possible, on the level of the obligation. General exceptions would then work as a complementary backstop to ensure that the public welfare objective is taken into account and to stipulate specific requirements for individual public interests.

IV. General Exception Clauses are Superfluous since Negative Lists Already Provide for Sufficient Regulatory Flexibility

As a further argument as to why general exception clauses may not be needed in international investment law, José Alvarez and Tegan Brink point to the fact that BIT drafters frequently decide to use negative lists approaches to carve out certain parts of their regulatory or economic sectors from the application of the IIA or individual obligations thereof.

specifically listed in annexes to the IIA.\textsuperscript{519} IIA treaty drafting practice would thus already offer alternatives to general exception clauses to ensure sufficient regulatory flexibility to host States that are more adequate to address State concerns than the former.\textsuperscript{520}

However, the elaboration of an exhaustive and accurate negative list of relevant industries and economic sectors involves the commitment of enormous professional resources over the course of a considerable time period. This is difficult to master, particularly for smaller and lesser-developed countries with sometimes poorly staffed or not fully or pertinently qualified international legal departments which lack the expertise and resources to develop a negative list that preserves sufficient flexibility for future public policies.\textsuperscript{521} Even developed States occasionally struggle with this task. It is comprehensible that the selection of a limited number of policy areas in which the State wishes to preserve its regulatory flexibility by means of a general exception provision is much less demanding than the elaboration of a comprehensive list of existing and future sectors and measures that shall be excluded from the IIA’s coverage. The inclusion of general exception clauses in IIAs therefore offers a less resource-intensive and time-consuming alternative to the negative list approach and also allows lesser-developed countries to adequately preserve their regulatory freedom.

\begin{thebibliography}{99}
\end{thebibliography}
Chapter Four The Role, Rationales, and Risks of General Exception Clauses

V. General Exception Clauses Will Make the Outcome of International Investment Disputes More Unpredictable

Finally, a number of commentators are concerned that the introduction of trade-based general exceptions into IIAs raises as many questions as they purport to answer and would therefore make the outcome of investment disputes involving the public interest more unpredictable than it already is. These commentators perceive a significant uncertainty about the way in which general exception clauses that were originally derived from international trade agreements are going to be applied in the international investment law context by investment tribunals. Criticism is particularly engendered by ambiguous formulations within the *chapeau* paragraph of a number of general exception provisions, the uncertain relevance of possibly overly strict trade law tests in the interpretation of IIA general exceptions, and unclear interactions between general exceptions and classical IIA protection standards such as the prohibition of unlawful expropriation or the minimum standard of treatment. For these reasons it is contended that the balancing of investor rights and public welfare objectives should be addressed by other means or that the inclusion of general exception clauses in IIAs should at least be carefully considered.

522 See Newcombe, in: De Mestral/Lévesque (eds.), Improving International Investment Agreements 267, 268, 276-279 (2013) highlighting in particular the differences between international trade and international investment law. See also Sornarajah, The International Law on Foreign Investment, pp. 223-224 (2010) who fears that “tribunals will have to rely on subjective perceptions of whether the safeguard measures or exceptions apply” resulting in “inconsistency in their decisions.” Worried about “a risk of fragmentation in interpreting such clauses” is also Chaisse, 39 American Journal of Law & Health 332, 334 (2013).


A more comprehensive rebuttal of the single elements of this line of argument is found below.\textsuperscript{526} For the present purposes it is sufficient to address the general thrust of the argument, which is that the insertion of general exception clauses based on provisions found in international trade agreements adds to legal uncertainty in investment law adjudication instead of creating a more predictable legal framework. It seems only natural, and therefore certainly holds true, that the first-time introduction of new provisions into a comprehensive legal regime involves the danger of interpretive confusion and divergent early rulings. Legal terms, be they old or new, are usually drafted in comparatively vague terms since they are supposed to be, and indeed must be, open to interpretation by the adjudicator, who needs to apply the necessarily abstract norm to the facts of the individual case. Divergent rulings are a regular, albeit sometimes unpleasant, element of the interpretive process until an established jurisprudence with persuasive legal reasoning develops. Therefore, the above criticism seems generic in that it holds true for the introduction of almost every new treaty term.\textsuperscript{527}

The majority of IIA general exceptions, as rightly observed by the above commentators and as is part of their criticism, are drafted closely on WTO model provisions in the GATT and GATS. This, it is argued, aggravated the problem, since the legal consequences of a transposition of a trade law norm into the investment context were unclear. While this argumentation reveals a particular focus on potential disadvantages of the clauses’ trade law backgrounds, it fails to appreciate the advantages stemming from the extensive WTO litigation and research experience with general exceptions. Article XX GATT has existed for approximately sixty years, while Article XIV GATS has existed for approximately twenty years. Together, they look back on vast amounts of jurisprudence and academic analysis. In particular in the last two decades, the WTO Appellate Body has managed to develop a nuanced approach to the interpretation of WTO general exception provisions, which has led to an established ju-

\textsuperscript{526} See \textit{infra} Chapter Five, Part B for the relevance of trade law for the construction of IIA general exception clauses, \textit{infra} Chapter Five, Part C, III, 2 for guidance on the interpretation of the \textit{chapeau} paragraph and \textit{infra} Chapter Six, Part A for the an analysis of the interactions between the expropriation standard and IIA general exception clauses.

risprudence that essentially meets with approval of WTO Member States and academic commentators. IIA general exceptions modeled on or copying WTO general exceptions should benefit from this experience. These drafting techniques suggest that investment tribunals should take recourse to the established WTO jurisprudence on Article XX GATT and Article XIV GATS in order to construe the mostly similarly framed IIA general exception provisions. State approval of the WTO jurisprudence is confirmed particularly in cases in which treaty drafters change or add to the text of the original GATT or GATS provision in order to incorporate the jurisprudence of the WTO Appellate Body. Such recourse promises a higher degree of consistency in the early rulings of investment tribunals and would hence mitigate the feared interpretive uncertainty.

---

528 See Schneidermann, 2 Journal of International Dispute Settlement 471, 490 (2011) who more generally notes that “[h]aving recourse to world trading regime precedent is to look for a reliable and steady ally whose internal rationality differs little from the investment rules regime.” See also Mitchell/Henckels, 14 Chicago Journal of International Law 93, 163 (2013) who submit that “WTO law provides a rich source of jurisprudence for guiding investment tribunals in their analysis of the concept of necessity […] WTO tribunal have, over the years, amassed a body of case law that displays institutional sensitivity and is appropriately deferential to national autonomy.”.


Chapter Five  The Interpretation of General Exception Clauses

Chapter Five examines interpretive questions that arise once investment tribunals are called upon to adjudicate for the first time on general exception clauses. Answers to these questions will be decisive in determining the extent to which States will be able to preserve their regulatory flexibility in the covered policy areas as well as in establishing the scope of investment protection guaranteed under current and future IIAs including a general exception provision.

Before embarking upon a Chapter which deals with the interpretation of international investment norms, it is important to recall that the interpretation of investment treaties is undertaken before ad hoc tribunals constituted for each particular case. In the absence of a doctrine of binding precedent in international investment law, these tribunals are not bound by previous arbitral decisions, although they usually discuss, rely on, or distinguish their case from previous rulings. While these specifics of the system of investor-State dispute resolution already complicate the task of identifying a common interpretative approach, the manifold formulations and variations of general exception clauses across the range of different IIAs make it even more difficult to establish a per se rule for their interpretation. However, in general, and as with the interpretation of any other rule of international law, one must bear in mind that their construction needs to be guided by the traditional customary rules of treaty interpretation as codified in Articles 31 and 32 VCLT.

533 See generally on the faithful codification of the customary rules on treaty interpretation in the VCLT Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment of 20 April 2010, I.C.J. Reports 2010, p. 14, 36, ¶¶64-65. So acknowledged by investment tribunals in e.g. Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award, 8 December 2008, ¶77; Methanex Corporation v. United States of America, Final Award of the Tribunal on Jurisdic-
VCLT, a tribunal must invariably begin its enquiry in good faith with the ordinary meaning of the treaty text under review. Thereafter, this textual reading has to be considered in light of the context of the treaty terms and the object and purpose of the treaty clause in question. The context of the treaty encompasses not only its text, but also includes its preamble, annexes, subsequent agreements between the parties on the interpretation of the treaty, and other factors. Moreover, according to Article 31(3) lit. (c) VCLT, a treaty interpreter shall also take into account, together with the context, any relevant rules of international law applicable to the relations between the treaty parties. Lastly, under Article 32 VCLT the tribunal may also consider the preparatory work of the treaty provision and the circumstances under which it was concluded as supplementary means of interpretation either to confirm the meaning ascertained by the application of Article 31 VCLT or if that application led to an ambiguous or manifestly absurd or unreasonable result.

A. The Future General Interpretive Approach to General Exception Clauses by IIA Tribunals

To date, no investment award involving a general exception clause has been made publicly available. In the sparse literature on the topic, in particular Andrew Newcombe frequently raises the question of whether future tribunals will adopt a narrow, broad, or balanced interpretation of IIA general exception clauses. Indeed, in light of the current lack of pertinent case law, this question is of immediate relevance to investors and host
States that are keen to know how general exception provisions in an applicable IIA are likely to be approached once a dispute arises. It should also be of interest to other States that are still considering whether or not to include general exception clauses in their future IIAs.

I. The Interpretive Approach to Investment Provisions in IIA

Jurisprudence

The first indication of how tribunals may approach general exceptions in the future may be inferred from their interpretive approach to investment provisions at large. As recalled above, together with the ordinary meaning of the treaty terms in their context, a treaty’s object and purpose is the primary guide for interpretation listed in Article 31(1) VCLT. Investment tribunals have thus frequently looked into the object and purpose of IIAs in order to interpret obligations assumed under them by host States and have given significant weight to their findings. In their examinations, one can identify a general tendency to postulate that the protection of the rights of foreign investors is the predominant purpose of IIAs and that IIA provisions have to be interpreted in compliance with this overarching objective. It is only in rare instances that tribunals have looked for the rationale of IIAs beyond the objectives of investment promotion and protection. The most noteworthy examples of this tendency in the relevant jurisprudence are depicted in more detail in the following.

The award in *Siemens A.G. v. The Argentine Republic* serves as an example. When discussing its general interpretive approach, the tribunal first made a show of arguing that the relevant BIT between Argentina and Ger-


many should be interpreted neither liberally nor restrictively since neither interpretive method was mentioned in Article 31(1) VCLT, only to then explicitly state that the guiding purpose of the BIT is the protection and promotion of investments:

“The Tribunal shall be guided by the purpose of the Treaty as expressed in its title and preamble. It is a treaty “to protect” and “to promote” investments […] The intention of the parties is clear. It is to create favorable conditions for investments and to stimulate private initiative.”

More examples can be found in investment tribunals’ interpretations of the fair and equitable treatment standard. The tribunal in *Azurix Corp. v. The Argentine Republic*, for example, adopted an expansive interpretation with reference to the investment protection and promotion purpose of the BIT, rejecting the argument that bad faith or outrageous or egregious conduct on part of the host State is a necessary prerequisite for a FET violation:

“The standards of conduct agreed by the parties to a BIT presuppose a favorable disposition towards foreign investment, in fact, a pro-active behavior of the State to encourage and protect it. To encourage and protect investment is the purpose of the BIT. It would be incoherent with such purpose and the expectations created by such a document to consider that a party to the BIT has breached the obligation of fair and equitable treatment only when it has acted in bad faith or its conduct can be qualified as outrageous or egregious.”

Similarly, in order to justify an FET interpretation that was favorable for the complaining investor, the tribunal in *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* referred to the BIT’s preamble and considered that the FET standard should be understood to require

“treatment in an even-handed and just manner conducive to fostering the promotion of foreign investments. Its terms are framed as a pro-active statement ‘to promote’, ‘to create’, to ‘stimulate’ rather than prescriptions for a passive behavior of the State or avoidance of prejudicial conduct to the investor.”

538 *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶372.
A similar pro-investor interpretive approach has been chosen in tribunals’ interpretations of BIT umbrella clauses. In *SGS Societe de Surveillance v. Republic of the Philippines*, the tribunal justified its expansive reading of such a clause by arguing that:

“[t]he object and purpose of the BIT supports an effective interpretation of [the relevant BIT provision]. The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended “to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other”. It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.”\textsuperscript{540}

The tribunal in *Noble Ventures, Inc. v. Romania* argued in the teleological interpretation of an umbrella clause:

“The object and purpose rule also supports such an interpretation. While it is not permissible, as is too often done regarding BITs, to interpret clauses exclusively in favour of investors, here such an interpretation is justified.”\textsuperscript{541}

From a policy perspective, it is questionable whether the insistence on a dominant purpose of investment protection really captures the objectives of IIAs exhaustively.\textsuperscript{542} On closer examination, there is sufficient evidence to suggest that the purpose of IIAs goes beyond the mere protection of foreign investment and encompasses broader State interests, such as economic cooperation and sustainable economic development.\textsuperscript{543} Moreover, the adopted interpretive methodology is open to criticism, as it appears to be at odds with the rules on treaty interpretation laid down in Article 31 VCLT that it purports to implement.\textsuperscript{544} The starting point of every inter-

\textsuperscript{540} *SGS Societe de Surveillance v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, ¶116.

\textsuperscript{541} *Noble Ventures, Inc. v. Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005, ¶52.


\textsuperscript{543} For details see supra Chapter Four, Part A, II.

interpretation must be the text of the treaty according to its ordinary meaning, which only subsequently has to be considered in the light of its context and its object and purpose, as per Article 31(1) VCLT. Bypassing the treaty text and putting an alleged object and purpose first to shed light on the words would expose the interpretative process to the risk of favoring subjective conceptions as to how the system should work over objective expressions apparent in the text.  

However, it should not be forgotten that, in rare instances, tribunals acknowledge that IIAs also serve a development function. Among the frequently quoted examples is that of the tribunal in *Amco Asia Corporation and Others v. Republic of Indonesia*, which stated that:

> “the [ICSID] Convention is aimed to protect, to the same extent and with the same vigour the investor and the host State, not forgetting that to protect investments is to protect the general interest of development and of developing countries.”

Similarly, the tribunal in *Joseph Charles Lemire v. Ukraine* used the preamble to explore object and purpose of the applicable IIA, arguing as follows:

> “The object and purpose of the BIT – the third interpretive criterion – is defined in its Preamble: the parties “desir[e] to promote greater economic cooperation between them, with respect to investments by nationals and companies of one Party in the territory of the other Party” and recognize that the BIT “will stimulate the flow of private capital and the economic development of the Parties”. The main purpose of the BIT is thus the stimulation of foreign investment and of the accompanying flow of capital. But this main purpose is not sought in the abstract; it is inserted in a wider context, the economic development for both signatory countries. Economic development is an objective which must benefit all, primarily national citizens and national companies, and secondarily foreign investors. Thus, the ob-

---

545 See *Franck*, 73 Fordham Law Review 1521, 1578 (2004); *Kurtz*, 59 International and Comparative Law Quarterly, 325, 351 (2010). Similarly, the tribunal in *Pla-ma Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, ¶193 cautioned that it “is mindful of Sir Ian Sinclair’s warning of the “risk that the placing of undue emphasis on the ‘object and purpose’ of a treaty will encourage teleological methods of interpretation [which], in some of its more extreme forms, will even deny the relevance of the intentions of the parties.”.

546 *Amco Asia Corporation and Others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 23 September 1983, 1 ICSID Reports 389, 400, ¶23.
ject and purpose of the Treaty is not to protect foreign investment per se, but as an aid to the development of the domestic economy. And local development requires that the preferential treatment of foreigners be balanced against the legitimate right of Ukraine to pass legislation and adopt measures for the protection of what as a sovereign it perceives to be its public interest.”

Notwithstanding these instances, references to the development perspective of IIAs in investment awards remain scarce. The predominant interpretive approach of investment tribunals thus is one in favor of the protection of foreign investor’s rights that is skeptical of arguments that may comprise such protection. From this investor-friendly assumption follows the presumption that IIA provisions offering protection to foreign investors or investment should meet with an expansive, investor-friendly interpretation and, conversely, that exception clauses compromising this protection are preferably approached with skepticism and thus are to be accorded a narrow interpretation. In light of the above, one may therefore expect future tribunals to be more likely to adopt a restrictive rather than an expansive reading of general exception clauses.

548 See Schill, 72 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 261, 292 (2012), who acknowledges though that references to development policies remain exceptional in investment jurisprudence.
550 In favor of a presumption of a restrictive interpretation of security exception see, e.g., Dolzer, in: Arsanjani, et al. (eds.), Looking to the Future 705, 709 (2011). See also the examination of the interpretation accorded to a security exception provision in the Argentine arbitrations as prime examples of the skepticism of investment tribunals towards exception clauses infra Chapter Five, Part A, II, 1.
II. The Interpretative Approach to Exceptions to IIA Obligations in IIA Jurisprudence

Instructive for the future interpretive approach to general exceptions may also be the interpretive approach that tribunals have taken in relation to other exceptions to IIA obligations.

1. Interpretative Approaches to Security Exception Clauses – the Argentine Arbitrations

The Argentine arbitrations that arose in the aftermaths of Argentina’s financial crisis of 2000/2001 have been the first to expose the heavy burden placed upon IIA tribunals by the current IIA drafting, which largely does not offer host States defenses for alleged misconduct in pursuance of public welfare objectives. They provide context to the political backlash against the system of international investment protection.\(^{551}\) The arbitrations involve a virtually identical pattern of fact, which has been briefly and cogently summarized by Alec Stone Sweet as follows:

“After throwing off an oppressive military dictatorship (1973-85), Argentina sought both to democratize and to build a more market-oriented economy. In the early 1990s, it embraced the BIT regime, ratified the ICSID Convention, and began privatizing its extensive portfolio of State-run companies and utilities. By 1994, 90% of these holdings had been successfully privatized, virtually all of it with foreign participation. Argentina was able to attract foreign direct investment by, among other reforms, pegging its currency to the dollar, and promising that capital could move freely across borders. In addition, the various privatization laws and decrees gave investors the right to participate in decisions that would affect revenues, such as the fixing of utility rates, and the provision of certain services. During the 1999-2002 period Argentina experienced an economic meltdown of cataclysmic proportions, precipitated by an exploding budget deficit, a balance of payments crisis, and mounting foreign debt. In 2001, Argentina began taking measures to meet the crisis, including: deep budget cuts; renegotiation of foreign debt (which did not stave off default); successive devaluations of the currency, which eventually ended in allowing the peso to float on the markets; draconian limits on withdrawals from bank accounts, and “Pesification,” the forced conversion of dollar deposits into pesos. December 2001 saw riot-

In response, the Argentine Government passed an Emergency Law that abrogated the ability to convert the peso, the Argentine currency, which immediately dropped in value by almost 70 percent. Two further elements that were introduced by this Emergency Law gave rise to dozens of later claims by foreign investors: First, it mandated that tariffs in certain utility sectors would no longer be calculated in U.S. dollars but in devalued pesos. In addition, the contractual right of the investor to adjust the tariffs in accordance with U.S. inflation was unilaterally terminated by Argentina. Foreign investors challenged these measures, claiming that the IIA expropriation provision, the fair and equitable treatment standard, the umbrella clause as well as the prohibition of arbitrary and discriminatory treatment and various other substantive commitments were violated.

Of particular interest for the present purpose are the arbitrations brought under the 1991 U.S. – Argentina BIT, which were concerned with a treaty security exception that had never been adjudicated upon before in investment arbitration. In all arbitral proceedings, Argentina has ultimately been unsuccessful in its jurisdictional challenges and proceeded to invoke defenses based on domestic Argentine constitutional law, customary international law and the BIT in the merits stages. Most interestingly for the present purposes, Argentina relied on Article XI – the BIT’s national security exception clause – which allows the host State to take emergency measure necessary for, inter alia, the “maintenance of public order” or for the protection of its “essential security interests.” Article XI reads:

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

There were five initial awards in which the tribunals were called upon to decide on the applicability of the exception clause to the given pattern of

facts, all within the ICSID system. All five were also subjected to a subsequent annulment application. Although the arbitrations involved the same security exception provision, the five tribunals were divided on the requirements for its invocation and their proper interpretation. Jürgen Kurtz has provided a useful categorization of these awards according to the dominant interpretive methodology employed as follows.

a. The Initial Interpretive Approach in CMS, Enron, and Sempra

Although the details in their legal reasoning differ, the tribunals in the CMS, Enron and Sempra arbitrations shared the view that guidance for the interpretation of the security exception clause of Article XI of the U.S.–Argentina BIT should be taken from the customary international law requirements for reliance on the plea of necessity. It is commonly agreed


556 CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶¶315, 317; Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Award, 28 September 2007; Continental Casualty v. Argentine Republic, ICSID Case No. ARB/03/9, Award, 5 Sep-
that the latter are reflected and codified in Article 25 of the International Law Commission’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts,\textsuperscript{557} which reads as follows:

\textit{“Article 25. Necessity”}

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
   (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
   (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
   (a) the international obligation in question excludes the possibility of invoking necessity; or
   (b) the State has contributed to the situation of necessity.”\textsuperscript{558}

To satisfy the requirements of Article 25 ILC the State must thus prove that the breach of its international obligation is (1) “the only way for the State to safeguard an essential interest against a grave and imminent peril”; that the violation (2) “does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole”; (3) that the breached obligation does not “exclude the possibility of invoking necessity”; and (4) that “the State has [not] contributed to the situation of necessity.” Article 25 ILC acts as a general defense that is applicable to the breach of any international legal obligation that does not have the character of a preemptory norm of international law.\textsuperscript{559} Its application is thus not restricted to the investment

\textsuperscript{557} See \textit{Case Concerning the Gabčíkovo-Nagymaros Project} (Hungary v. Slovakia), Judgment of 25 September 1997, I.C.J. Reports 1997, 7, 40, ¶51 (on ILC Draft Article 33, the predecessor to Article 25 ILC).

\textsuperscript{558} ILC Draft Articles on State Responsibility, 80.

\textsuperscript{559} Article 26 ILC further specifies that a state of necessity cannot be used to preclude the wrongfulness of the breach of a peremptory norm of international law.
realm but extends to international law at large. Against the background of this expansive scope and given the ensuing potential for abusive invocation, the conditions for an application of the customary necessity defense are extremely strict. It is only applicable in exceptional circumstances and, as the ILC has noted, “will only rarely be available to excuse non-performance of an obligation.”

These considerations, however, did not deter the CMS, Sempra, and Enron tribunals from reading stringent customary international law requirements into the treaty defense. Thereby, the tribunals conflated the interpretation of the treaty with the customary necessity plea despite the clear textual differences between Article 25 ILC and Article XI of the BIT. The CMS tribunal first purported to analyze the requirements of the necessity plea separately from the treaty exception only to then draw extensively on customary principles in its interpretation of the treaty exception without offering any justification for this approach. The Sempra and Enron tribunals were more straightforward; after having established that Argentina did not meet the customary necessity standard, they reasoned that they did not need to undertake any further analysis of Article XI of the BIT because “the Treaty provision is inseparable from the customary law standard as the definition of necessity and the conditions for its operation are concerned” and “given that this Article does not set out conditions different from customary international law.”

This exceedingly narrow interpretive approach of conflating the treaty provision with the customary defense is apparent throughout the tribunals’ analyses: The wording of Article XI BIT first requires the host State to

---


561 See CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶¶315-352 and ¶¶353-378 respectively.


demonstrate that an “essential security interest” is at stake. In this respect, the tribunals initially adopted a seemingly broad definition of what qualifies as such an interest, rejecting the argument that the clause is limited to national security concerns of an international nature by arguing that customary international law does not exclude major economic crises from the definition.\(^{564}\) In their subsequent reasoning, however, the tribunals considerably narrowed the scope of Article XI with reference to Article 25 ILC. Based on the customary law requirement that the State may only safeguard its essential interests against a “grave and imminent peril”, the tribunals held that Argentina’s financial crisis would be insufficient to qualify as such. Instead, the tribunals required the existence of “profoundly serious conditions” such as “a major breakdown, with all its social and political implications”\(^{565}\), a “total economic and social collapse”\(^{566}\) or a threat to the “very existence of the State and its independence”\(^{567}\) in order surpass the threshold of a “grave and imminent peril” and thereby qualify as essential security interest under Article XI. This was presented as the first reason for rejecting Argentina’s treaty-based defense.

Moreover, in determining whether the governmental measures were “necessary” under Article XI the tribunals imported another decidedly restrictive condition of Article 25(1)(a) ILC, which demands that the State measure must have been the “only way” to safeguard its interests, again despite there being no such requirement in the text of Article XI BIT. Determining that Argentina had alternative and less onerous means at its disposal to address its financial breakdown, this is presented as the second reason for refusing the application of the treaty defense. In particular, the tribunals found that Argentina had “a variety of alternatives, including


\(^{565}\) CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶319.

\(^{566}\) CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶355.

dollarization of the economy, granting direct subsidies to the affected populations or industries and many others.\textsuperscript{568} and that “there are always many approaches to address and correct such critical events, and it is difficult to justify that none of them were available in the Argentine case.”\textsuperscript{569} The problem with this approach is that there are always multiple conceivable responses to any given emergency, especially with the advantage of hindsight. This overly restrictive reading of Article XI BIT has thus already rendered the treaty exception effectively redundant.\textsuperscript{570}

Secondly, the condition under Article 25(2)(b) ILC that the State must not have “contributed to the situation of necessity” was imported into the interpretation of Article XI BIT – again despite there being no textual point of reference – and formed an additional reason to reject Argentina’s defense based on its allegedly “substantial” contribution to its financial crisis.\textsuperscript{571} Drawing on customary rules embodied in Article 27(b) ILC, the tribunals lastly found that compensation would be due even where Argentina’s violations of the BIT were justified by virtue of Article XI BIT, even though such a residual duty to pay compensation is not envisaged by Article XI.\textsuperscript{572}
None of these requirements derived from customary international law as codified in Articles 25 and 27 ILC finds an equation, a reflection or an obvious point of reference in the text of Article XI of the BIT. Nonetheless, the interpretation adopted by the tribunals in CMS, Sempra, and Enron is heavily informed by these prerequisites. It therefore constitutes an exceedingly restrictive interpretative approach to an exception provision with the imposed conditions making it highly unlikely that the treaty exception will ever apply. Even if it applied, it would actually be ineffective given that the obligation to pay compensation for violations of the BIT would persist in any event.

In fact, strict criteria for invocation are comprehensible as a feature of the customary international law necessity defense, which is applicable to virtually all international obligations, save peremptory norms. Their seemingly casual adoption into the interpretation of the treaty defense of Article XI, however, begs a question regarding its appropriateness. It is therefore unsurprising that the tribunals’ legal methodology has attracted harsh criticism in scholarship but also in subsequent annulment rulings. In a particularly pointed manner, the ad hoc Committee constituted in the CMS annulment proceedings held obiter dicta that conflating Article XI of the U.S.–Argentina BIT with the customary international law defense of necessity constituted a “manifest error of law” (albeit not “a manifest excess of power”) on part of the CMS tribunal. It then annulled the award for the failure to state reasons in the context of the tribunal’s umbrella clause


574 CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment, 25 September 2007, ¶130, noting however at ¶136 that, while the CMS tribunal applied Article XI “cryptically and defectively”, there is no manifest excess of power and thus no reason for annulment. Interestingly, the ad hoc Committee was composed of distinguished members of the legal professional such as Judge
Likewise, the *ad hoc* Committee in the *Sempra* annulment proceedings explicitly reasoned that customary international law on the state of necessity differed materially from Article XI of the BIT and therefore could not guide the latter’s interpretation. Since the *Sempra* tribunal conflated the two standards, the *ad hoc* Committee decided that the tribunal “made a fundamental error in identifying and applying the applicable law” and annulled the award for an excess of powers. Finally, it was also one of the reasons given by the *ad hoc* Committee in *Enron* to annul the award that the tribunal’s analysis of the applicable customary international law on necessity appeared so “unclear” as to constitute a failure to apply the applicable law or a failure to state reasons. The *Enron* annulment committee also remarked that host States should be allowed to favor a more effective measure of achieving the objective, even if this measure

---

**Gilbert Guillaume** (former President of the International Court of Justice), Judge **Nabil Elaraby** (former Judge at the International Court of Justice), and Professor **James Crawford** (ILC Special Rapporteur on State Responsibility).

575 **CMS Gas Transmission Company v. Argentine Republic**, ICSID Case No. ARB/01/8, Decision of the *Ad Hoc* Committee on the Application for Annulment, 25 September 2007, ¶97. Note that this means that the Committee did not annul the original award on the tribunal’s interpretation of the security exception provision.

576 **Sempra Energy International v. Argentine Republic**, ICSID Case No. ARB/02/16, Decision on the Argentine Republic’s Application for Annulment of the Award, 29 June 2010, ¶¶208-209. The decision to annul the award has been harshly criticized in the literature, which accuses the tribunal of having acted *ultra vires* as an appellate body in reviewing the merits of the case and annulling the award because it disagreed with the tribunal’s interpretation of the law. See for instance **Lamm**, *Internationalization of the Practice of Law and Important Emerging Issues for Investor-State Arbitration*, The Hague Academy of International Law, Opening Lecture, Private International Law Session 2011, 354 Collected Courses, 9, 53. The claimants have submitted the dispute to a new tribunal under Article 52(6) ICSID Convention.

577 **Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets L.P. v. Argentine Republic**, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, ¶¶384, 393-394. This annulment decision is also subject of considerable criticism for allegedly overstepping its role in unduly embarking upon appellate review of the *Enron* award. See for instance **Lamm**, *Internationalization of the Practice of Law and Important Emerging Issues for Investor-State Arbitration*, The Hague Academy of International Law, Opening Lecture, Private International Law Session 2011, 354 Collected Courses, 9, 55. As in the other cases, the claimants have submitted the dispute to a new tribunal in accordance with Article 52(6) ICSID Convention.
has a greater negative impact on foreign investors, over less effective measures, in spite of their lesser impact on foreign investors.\textsuperscript{578}

b. The Interpretive Approach in LG&E

Faced with very similar facts, the decision in \textit{LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic}\textsuperscript{579} diverged from the rulings in \textit{CMS, Enron} and \textit{Sempra}, finding that Argentina may, at least for a defined time period, avail itself of the treaty exception of Article XI.\textsuperscript{580} One reason for this outcome was the adoption of a different methodology in the interpretation of the security exception clause, treating it as a distinct defense.

Unlike its peers, the \textit{LG&E} tribunal applied the BIT’s essential security provision first as a separate treaty-based defense and only thereafter resorted to customary international law as a subsidiary means to support its prior findings.\textsuperscript{581} Similarly to its peers, it adopted a broad reading of what constitutes “essential security interests” and reasoned that the application of Article XI BIT is not confined to situations involving military action or war but may also involve economic emergencies.\textsuperscript{582} In distinction from the above awards, the tribunal took the “necessity” nexus requirement to mean that the State must have had “no choice but to act” and that the adopted measures were appropriate in addressing the problems at hand.

\begin{flushright}
\textsuperscript{578} Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, ¶371.
\textsuperscript{579} LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006.
\textsuperscript{580} LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶229.
\textsuperscript{581} LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶¶204, 245.
\textsuperscript{582} LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶¶237-238.
\end{flushright}
even though other alternatives might have existed.\textsuperscript{583} It rather cursorily stated that Argentina’s measures were “necessary and legitimate” under Article XI, taking into account the urgency of the measure, their expedited drafting process and Argentina’s consideration of the interests of foreign investors.\textsuperscript{584} One looks in vain for further reasoning as to the alleged legitimacy and necessity of Argentina’s measures.\textsuperscript{585} Instead, having satisfied itself that the requirements of Article XI of the BIT were fulfilled, the tribunal continued to rule that Argentina was also excused from liability under the customary necessity plea, finding that “an economic recovery package was the only means to respond to the crisis”\textsuperscript{586} although “a number of ways to draft the economic recovery plan” were conceivable, giving ample leeway to host States to choose among several reactions to economic crises.\textsuperscript{587} On the question of compensation, the tribunal also departed from the other rulings and rejected the application of Article 27 lit. (b) ILC, deciding that the investor should instead bear the losses it encountered during the state of emergency.\textsuperscript{588} The decision thus represents a less stringent reading of the security exception clause that shows more deference to the host State’s decisions.

\textsuperscript{583} LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶239.

\textsuperscript{584} LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶¶239-241.

\textsuperscript{585} Critical of the lack of argumentation or references to earlier decisions: Binder, in: Treves, et al. (eds.), Foreign Investment, International Law and Common Concerns 71, 80 (2014); Von Staden, 2 Czech Yearbook of International Law 207, 213 (2011); Kurtz, 59 International and Comparative Law Quarterly 325, 356 (2010); Desierto, 31 University of Pennsylvania Journal of International Law 827, 850 (2010). Despite this still endorsing the decision as “the most favorable interpretation” is Kasenetz, 41 George Washington International Law Review 709, 732 (2010).

\textsuperscript{586} LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶257.

\textsuperscript{587} LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶¶257-259.

\textsuperscript{588} LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶264.
c. The Interpretive Approach in Continental Casualty

Lastly, the reasoning found in the subsequent decision *Continental Casualty Company v. The Argentine Republic* \(^{589}\) differs significantly from the reasoning in *CMS, Sempra, Enron* as well as from the one found in *LG&E*. Amid the backdrop of the *CMS* annulment ruling, the *Continental* tribunal began by considering Argentina’s necessity defense instead of assessing the claims of treaty breach. It particularly stressed the differences between the treaty and the customary law defenses, arguing that Article XI U.S. – Argentina BIT is a primary norm of international law whose successful invocation would remove the relevant State action from the scope of the BIT, while Article 25 ILC constituted a secondary norm of international law whose operation would merely justify an existing breach of the underlying BIT obligation. \(^{590}\) As a consequence of these differences, the tribunal concluded that the conditions for successful application of the two defenses could not be identical, also emphasizing that the strict conditions in Article 25 ILC are explained by the fact that it is applicable “in any context against any international obligation.” \(^{591}\) Subsequently, the tribunal confirmed that economic emergency situations generally qualify both under the concept of “public order” and under the term “essential security interest” used in Article XI. \(^{592}\) Notably, the tribunal then went on to reject an objective review and acknowledged the existence of a “significant margin of appreciation for the State applying the particular measure” in the assessment because “a time of grave crisis is not the time for nice judgments, particularly when examined by others with the disadvantage of hindsight.” \(^{593}\)

\(^{589}\) *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008.

\(^{590}\) *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶¶162-166; acknowledging, however, at ¶168 that the practical result of applying Article XI or the customary plea of necessity is the same.

\(^{591}\) *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶167.

\(^{592}\) *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶174 and ¶178 respectively.

The tribunal continued to evaluate whether Argentina’s measures were “necessary” for the maintenance of public order or the protection of its essential security interests. Here, the tribunal borrowed heavily from WTO jurisprudence in order to interpret Article XI of the U.S. – Argentina BIT. After recalling its view that the treaty norm and the customary plea are distinct defenses, the tribunal argued that Article XI BIT originated from parallel exception clauses in U.S. FCN treaties, which in turn reflected the formulation of Article XX GATT. Because of these commonalities between the BIT, the GATT, and the preceding network of bilateral treaties of friendship, commerce, and navigation the tribunal found reliance on WTO jurisprudence on the concept of “necessity” “more appropriate” than reference to customary international law. Applying principles derived from WTO Appellate Body jurisprudence, the tribunal went on to enquire as to whether Argentina’s emergency measures were the least restrictive means reasonably available in order to establish whether they were necessary to achieve the legitimate aims within the meaning of Article XI. In the determination of whether Argentina had reasonably available alternatives at its disposal that would have been equivalently effective, the tribunal stressed that it would go beyond its mandate “to pass judgment upon Argentina’s economic policy during 2001-2002”, “to make any political or economic judgment on Argentina’s policies and of the measures adopted to pursue them” or “to censure Argentina’s sovereign choices as an independent state.” It further held that “a margin of discretion and appreciation” should be afforded to autho-

599 Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶199.
rities to determine the necessity of a measure. Moreover, the tribunal deemed it immaterial for its decision whether Argentina itself had contributed to the state of necessity. This broad discretion in mind, the tribunal determined that Argentina’s emergency measures materially contributed to the protection of its economy. The tribunal found this sufficient to uphold most, albeit not all, of the measures as necessary to protect Argentina’s essential security interests, absolving Argentina of all liability. It was explicitly deferential with respect to Argentina’s measures, stating that it could not substitute its judgment for Argentina’s, but would only determine whether other reasonable alternatives were available.

d. Preliminary Conclusions

From the different interpretive methodologies presented above, the one apparent in the rulings in CMS, Enron, and Sempra constitutes the narrowest approach to the interpretation of security exception clauses, conflating the customary necessity defense with the treaty exception and importing the former’s exceedingly strict requirements into the latter.

One likely reason for this rigid interpretation probably is the tribunals’ assumption that the protection of the rights of investors even in times of economic emergencies is the dominant purpose of IIAs and that only a narrow interpretation of the security exception clause, as a possible escape route for the host State from its IIA obligations, would comply with that.

600 Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶233, fn. 351.
602 Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶304. The argumentation of the tribunal was upheld by the subsequently established annulment committee, see Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, 16 September 2011, ¶¶110-143.
603 For other possible reasons for the tribunals’ approach see Kurtz, 59 International and Comparative Law Quarterly 325, 348-350 (2010).
alleged purpose. In this context, the award in the Enron arbitration is particularly revealing, in which the tribunal openly acknowledged that

“the object and purpose of the Treaty is, as a general proposition, to apply in situations of economic difficulty and hardship that require the protection of the internationally guaranteed rights of its beneficiaries. To this extent, any interpretation, resulting in an escape route from the obligations defined cannot be easily reconciled with that object and purpose. Accordingly, a restrictive interpretation of any such alternative is mandatory.”

This teleological approach to the interpretation of security exceptions faces the same methodological difficulties as the expansive readings of substantive IIA provisions by investment tribunals discussed above. Nevertheless, it still represented the dominant interpretive methodology when tribunals were first called upon to decide on the proper invocation of a security exception clause. Seen individually, it therefore reveals a certain tendency of investor-State tribunals to initially approach exceptions to investment obligations, including future general exception clauses, with considerable skepticism.

The awards in LG&E and Continental Casualty feature a more deferential approach that permits greater discretion to the host State.


605 Enron Corporation Ponderosa Assets L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶331; also note the logical flaw in the tribunal’s reasoning: As Kurtz, 59 International and Comparative Law Quarterly, 325, 350-351 (2010) rightly points out: “The Enron Tribunal begins by asserting its own claim as to the dominant purpose of the treaty, being one of protection of the rights of investors. This remains a key, untested assumption in the jurisprudence of investor-State arbitral tribunals. The Tribunal then fashions a default, restrictive interpretative preference to comply with that claimed purpose.” (emphasis in original). See also Kurtz, in: Calamita, et al. (eds.), The Future of ICSID and the Place of Investment Treaties in International Law 165, 170 (2013) for the same criticism.

606 See supra Chapter Five, Part A, I.
A large number of cases are still pending against Argentina in relation to the measure taken during the economic crisis and it remains to be seen which interpretive approach will prove to be dominant.\textsuperscript{607} What is clear, in particular from the CMS, Sempra and Enron annulment decisions, is that IIA security exception clauses must be interpreted as independent defenses to liability with requirements that differ from the narrow prerequisites of the necessity defense under customary international law. Therefore, while the current state of the jurisprudence does not necessarily mean that future tribunals will adopt a particularly deferential interpretation of security exceptions, it rules out the continuation of an extremely narrow reading of security exception clauses with recourse to customary law. Having said this, it is noteworthy to recall that three out of the initial five tribunals that were endowed with the task of interpreting an IIA security exception provision for the first time adopted an extremely narrow interpretive approach. It took the initiation of subsequent annulment proceedings on part of the host State to rectify this narrow interpretation.

Another tribunal has considered Article XI subsequent to the above arbitrations, holding that Argentina was not able to avail itself of the treaty defense because it contributed to the economic crisis, thus following an approach that narrows the availability of the security exception in economic crises.\textsuperscript{608} An impulse of investor-State tribunals to approach exceptions to investment obligations with skepticism is thus clearly discernable in the jurisprudence of security exceptions and may well also play a role once tribunals are called upon to apply the first IIA general exception provisions.

\textsuperscript{607} See the list of pending cases at https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?gE=s&rtlty=ST4 (last visited 12 November 2017).

Chapter Five The Interpretation of General Exception Clauses

2. Interpretive Approaches to Other Exceptions in IIA Jurisprudence

a. United Parcel Service of America, Inc. v. Government of Canada

In the arbitration in *United Parcel Service of America, Inc. v. Government of Canada*, the tribunal had to decide on the applicability and breadth of the cultural industries exception of NAFTA. The claimant alleged that a postal subsidy program – the Publications Assistance Program (PAP) – provided by the Canadian government to eligible Canadian magazines and non-daily newspapers sent by mail in Canada for delivery in Canada accorded preferential treatment to Canada Post in violation of the national treatment obligation of Article 1102 NAFTA since publishers had to use Canada Post in order to receive federal assistance under the program.\(^609\) Canada countered that even if UPS were in like factual circumstances to those of Canada Post and treated differently, there would be no violation of Article 1102 NAFTA since the subsidy program would fall under the cultural industries exemption of Article 2106 and Annex 2106 NAFTA. In response, UPS asserted that the exception applied only to cultural industries themselves, *i.e.* the magazines and non-daily newspapers publishers, but not to the delivery mechanism, which would be a “discrete and essentially severable” aspect of the subsidy scheme.\(^610\) Any other interpretation, it is contended, would unduly expand the bounds of cultural industries. Article and Annex 2106 NAFTA provide that:

“**Article 2106: Cultural Industries**

Annex 2106 applies to the Parties specified in that Annex with respect to cultural industries.

**Annex 2106: Cultural Industries**

Notwithstanding any other provision of this Agreement, as between Canada and the United States, any measure adopted or maintained with respect to cultural industries, except as specifically provided in Article 302 (Market Access – Tariff Elimination), and any measure of equivalent commercial effect taken in response, shall be governed under this Agreement exclusively in accordance with the provisions of the Canada – United States Free Trade Agreement. The rights and obligations between Canada and

\(^{609}\) *United Parcel Services, Inc. v. Canada*, Award on the Merits, 24 May 2007, ¶¶157-158.

\(^{610}\) *United Parcel Services, Inc. v. Canada*, Award on the Merits, 24 May 2007, ¶159.
any other Party with respect to such measures shall be identical to those applying between Canada and the United States.”

The tribunal rejected UPS’s claim and emphasized the breadth of the cultural industries exception. In particular, the expansive language of Article and Annex 2106 NAFTA as well as the State Parties’ clear intentions to exclude domestic cultural policies from the ambit of NAFTA were held to require only that the measure be “in connection with cultural industries” to qualify under the exception.\(^{611}\) The tribunal went on to stress that application of the cultural industries exception to the delivery aspect of an otherwise valid and exempt measure would not unreasonably extend the exception’s scope.\(^{612}\) For these reasons, the tribunal found that the subsidy scheme fell within the scope of the cultural industries exception and was therefore excepted from the NAFTA investor-State dispute settlement procedures.\(^{613}\) It thus adopted what may be considered an expansive interpretation of the exception.

b. Canfor and Terminal Forest v. United States of America

In the Decision on the Preliminary Question by the tribunal in *Canfor and Terminal Forest v. United States of America* the tribunal had to decide on its jurisdiction and assess whether Article 1901(3) NAFTA acts as an exception to NAFTA Chapter Eleven and bars the claimant investor from initiating arbitration under the investment chapter with respect to a State

\(^{611}\) United Parcel Services, Inc. v. Canada, Award on the Merits, 24 May 2007, ¶¶161-162.

\(^{612}\) United Parcel Services, Inc. v. Canada, Award on the Merits, 24 May 2007, ¶170.

\(^{613}\) United Parcel Services, Inc. v. Canada, Award on the Merits, 24 May 2007, ¶172.

Note, however, the Separate Statement of Dean Ronald A. Cass who opinioned that the Canadian Publications Assistance Program is not excluded from discipline under Article 1102 NAFTA by virtue of either the cultural industries exception of Article and Annex 2106 NAFTA or the subsidies exception of Article 1108(7)(b) NAFTA, see United Parcel Services, Inc. v. Canada, Award on the Merits, Separate Statement of Dean Ronald A. Cass, 24 May 2007, ¶¶154 and 164 respectively.
Chapter Five The Interpretation of General Exception Clauses

Party’s anti-dumping and countervailing duty law. Article 1901(3) NAFTA provides:

“Article 1901: General Provisions

(…) 3. Except for Article 2203 (Entry into Force), no provision of any other Chapter of this Agreement shall be construed as imposing obligations on a Party with respect to the Party’s antidumping law or countervailing duty law.”

Approaching this question, the tribunal deemed it necessary to underline that, as a general rule, exception provisions are to be interpreted narrowly. Developing this interpretative assumption further, the tribunal thus suggested that the express exclusion of Article 1901(3) NAFTA should generally be approached restrictively, which would make its application more unlikely in the given case. Having considered that, however, the tribunal ultimately found sufficient evidence to rule that, even on the basis of a narrow interpretation of Article 1901(3) NAFTA, the provision was still triggered in the present case to the effect that it excluded a Party’s antidumping and countervailing duty law from challenges under NAFTA Chapter Eleven.

IV. Digression: The Interpretative Approach to General Exception Clauses in GATT/WTO Jurisprudence

Since the majority of IIA general exceptions are modeled on WTO provisions, it seems worthwhile to also have a look at the evolution of the interpretative approach to exception clauses in GATT/WTO jurisprudence.


While GATT 1947 and early WTO jurisprudence leaned towards a restrictive interpretation of exceptions, the WTO Appellate Body has subsequently dismissed this interpretation and adopted a more nuanced approach to the issue. This development may be indicative for the route that investment jurisprudence may take. Highlighting it in advance may enable investment tribunals to avoid the early pitfalls befallen by the GATT/WTO dispute settlement system.

Initially, GATT Panels tended to favor a restrictive standard of exceptions provisions, referencing the general interpretive principle according to which exceptions to treaty obligations must be construed narrowly.617 This restrictive approach was also supported in contemporary scholarship, which agreed that exceptions to the GATT should generally meet with a narrow interpretation.618 Any broad interpretation, it was put forward, would frustrate the GATT’s primary object and purpose of trade liberalization.619

In the course of time, however, the WTO Appellate Body rejected this narrow interpretation by the earlier GATT Panels. According to the AB, the mere characterization of a provision as an “exception” in and of itself neither warrants a stricter nor a more expansive interpretation than accorded to any other treaty provision. Instead, the interpretive process should solely be guided by the applicable customary rules of treaty interpretation as required by Article 3.2 DSU, examining the ordinary meaning of the treaty language, in its context, and in light of the treaty’s object and purpose. Nothing in the rules of treaty interpretation stipulates a presumption that treaty exceptions must be interpreted more narrowly than other treaty

619 See Klabbers, Jurisprudence in International Trade Law: Article XX of GATT, 26 Journal of World Trade 63, 88 (1992), who discerns “a large consensus that Article XX calls for a restrictive interpretation.”.
provisions. After this, WTO Panels and the AB itself have frequently recalled this statement of the WTO AB.

With regard to Article XX GATT, the AB refined this general approach to exception provisions in *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, criticizing the Panel’s narrow interpretation of the *chapeau* clause as follows:

“The consequences of the interpretive approach adopted by the Panel are apparent in its findings. The Panel formulated a broad standard and a test for appraising measures sought to be justified under the *chapeau*; it is a standard or a test that finds no basis either in the text of the *chapeau* or in that of either of the two specific exceptions claimed by the United States. The Panel, in effect, constructed an *a priori* test, that purports to define a category of measures which, *rationae materiae*, fall outside the justifying protection of Article XX’s *chapeau*.”

In the following, the AB went on to stress:

“the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX... and the substantive right of the other Members under the GATT 1994... Similarly, because the GATT 1994 itself makes available the exceptions of Article XX, in recognition of the legitimate nature of the policies and interests there embodied, the right to invoke one of the exceptions is not to be rendered illusory.”

In *United States–Standard for Reformulated and Conventional Gasoline*, the AB advocated a similar kind of balancing between the general pro-

---

visions of the GATT and the exception of Article XX GATT, explaining that:

“The context of Article XX(g) includes the provisions of the rest of the General Agreement, including in particular Articles I, III, and XI; conversely, the context of Articles I and III and XI includes Article XX. Accordingly, the phase ‘relating to the conservation of exhaustible natural resources’ may not be read so expansively as seriously to subvert the purpose and object of Article III:4. Nor may Article III:4 be given so broad a reach as effectively emasculating Article XX(g) and the policies and interests it embodies. The relationship between the affirmative commitment set out in, e.g. Article I, III and XI, and the policies and interests embodied in the ‘General Exceptions’ listed in Article XX, can be given meaning within the framework of the General Agreement and its object and purpose by a treaty interpreter only on a case-to-case basis, by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members themselves to express their intent and purpose.”624 (original emphasis).

Therefore, instead of focusing on a doubtful legal principle that exceptions shall always be interpreted restrictively, the AB reflected upon the proper function of Article XX GATT within the overall treaty structure and its interrelationship with the substantive obligations of the GATT. This approach recognizes the legitimate purpose that exceptions for societal welfare considerations fulfill to achieve the overall goal of increasing economic liberalization and balances them against the trade liberalization objective on a case-by-case basis.625 It is therefore to be commended as a good example for investment tribunals.

V. Conclusion

The selected examples from investment jurisprudence show a clear disposition of investment tribunals towards an investor-friendly interpretation of IIA norms. Looking at the interpretation of investment provisions in general, it cannot be denied that tribunals have a certain tendency to overstate the investment protection and promotion objectives to justify an expansive interpretation of investment obligations to the benefit of foreign investment. The same impulse is readily apparent in the early jurispru-

625 See Zleptnig, Non-Economic Objectives in WTO Law, p. 109 (2010).
dence on security exceptions, although subsequent (annulment) decisions suggest that future tribunals might adopt a more nuanced interpretive approach. This has, in principle, also been confirmed by investment tribunal decisions on other exception provisions in IIAs. Although these examples do not purport to be exhaustive, they are sufficient to illustrate the point that investment tribunals are drawn towards an expansive interpretation of IIA standards favoring investors and, correspondingly, to a restrictive interpretation of exception provisions that allow deviations from IIA obligations. The adoption of a wide interpretation of general exception clauses by tribunals therefore seems unlikely. On the contrary, a narrow interpretation of general exceptions in the first arbitrations involving general exceptions is a very real possibility.\textsuperscript{626}

Were tribunals to adopt such a deliberately narrow interpretative approach of general exceptions this would be open to legitimate contestation. Apart from finding no reflection in the Vienna Convention on the Law of Treaties, presumptions about the interpretation of treaty obligations or exceptions are also more generally to be taken with a pinch of salt.\textsuperscript{627} A presumption of a broad (presumably “effective”) interpretation of treaty obligations (and consequently a narrow reading of exceptions to these obligations) can be countered by a similar presumption available in international adjudication in favor of a narrow reading of obligations as derogations from State sovereignty (and conversely a broad interpretation of exceptions as provisions safeguarding State sovereignty).\textsuperscript{628} The best interpretative approach therefore is to abandon such interpretive presumptions and to instead closely follow the customary rules of treaty interpretation as reflected and codified in the VCLT. This means to interpret general exception provisions in good faith according to the ordinary meaning of their terms, in their context and in the light of their object and purpose.

\textsuperscript{626} Lévesque, 44 Canadian Yearbook of International Law 249, 274 (2006) points out that especially foreign investors are likely to argue that general exception provisions, as exceptions to treaty obligations, should meet with a narrow interpretation.

\textsuperscript{627} See Newcombe/Paradell, Law and Practice of Investment Treaties, p. 485 (2009).

B. The Case for a Cross-Regime Fertilization between the jurisprudence of the WTO and the International Investment Law Regime

In discussions on whether a cross-regime fertilization between the jurisprudence of the WTO and international investment law is feasible and advisable, the existence of a profound legal separation between the two systems of international trade and investment law is frequently taken as a given among investment lawyers and introduced as a counter-argument. Indeed, the assumption of a clinical separation of both legal regimes possesses some superficial appeal: After all, foreign direct investment and cross-border trading activities are regulated in discreet treaties with distinct characteristics, specialized dispute settlement systems, and different stakeholders. Notwithstanding, several factors – both legal and non-legal – indicate that this gap is not as insurmountable as is often believed and that one can, in fact, witness a growing convergence between the two legal systems.629

First, international trade and international investment law share a common history that dates back to the time immediately after the Second World War.630 At a specially convened conference in Havana in 1947, the UN Conference on Trade and Employment presented a draft Charter for an International Trade Organization, which would have regulated and liberalized trade and investment in one comprehensive treaty.631 When the at-


tempt failed, the international community agreed on the creation of the GATT 1947 as a comprehensive multilateral trade agreement, while foreign investment was consciously left out and later became regulated in a series of bilateral treaties. For this reason, international trade and investment law have been characterized as “twins separated at birth”.

The historical attempt to regulate trade and investment in a single comprehensive agreement after the Second World War does not come as a surprise from a practical point of view. Cross-border trade and foreign direct investment are sometimes alternative, but increasingly complementary and interdependent ways of servicing foreign markets. In the age of globalization, multinational enterprises effortlessly cross borders and invest in foreign countries to subdivide their production so as to minimize the overall production costs and export the final products back into their home country. They may also create subsidiaries abroad to facilitate their market access in foreign countries. And they export and import goods within the firm in order to supply their affiliates. These activities are often part of a single commercial operation. The separation of cross-border trade and foreign direct investment across the boundary of international trade and investment law is thus a legal fiction that is hard to sustain in today’s globalized economy. Governments have recognized this inseparability and fre-

632 See Broude, in: Echandi/Sauvé (eds.), Prospects in International Investment Law and Policy 139, 139 (2013). While the “Lottie-and-Lisa”- is analogy is an intriguing one, one should add that trade and investment resemble more fraternal than identical twins.


635 See Kalderimis, 7 Transnational Dispute Management, p. 1 (2010).
quently design their measures with both trade and investment objectives in mind.636

In fact, the close relationship between trade and investment in real world practice is reflected by the fact that the two regimes partially cover the same subject matter. The Agreement on Trade-Related Investment Measures (TRIMS)637 is probably the most obvious example of this overlap. Another is the provision of services through the commercial presence of a foreign supplier, which is not only regulated by the WTO GATS (also known as “mode 3” services) but also constitutes a classical investment scenario that is protected by IIAs. Intellectual property rights usually fall under the definition of investment in IIAs, but are also covered by the WTO TRIPS Agreement. This may give rise to complicated cases in which one measure may be expressly allowed by a WTO agreement, but potentially prohibited by an equally applicable BIT. The grant of compulsory licenses is one example of this substantive intersection of the two treaty regimes. It is expressly allowed under Article 31 TRIPS, but may be considered an indirect expropriation of an investor’s intellectual property rights, which fall within the definition of investment of most IIAs, since the economic value of the patent is effectively hollowed out.638 In light of the substantive overlap, some commentators and investors have contemplated the idea of bringing violations of WTO law directly before investment tribunals, arguing either that investors may have standing to bring a claim against host States for a breach of WTO law by invoking fair and equitable treatment provisions that guarantee “treatment in accordance

636 See Steger, in: Echandi/Sauvé (eds.), Prospects in International Investment Law and Policy 156, 159-160 (2013) giving the examples of attracting foreign investment in the automobile industry by providing exemptions on imports of automobiles from the same company abroad and special tariff programs that are designed to attract foreign investment in renewable energy generation projects.


638 For a closer examination of this intersection between WTO and investment law see Gibson, 25 American University International Law Review 357 (2010).
with international law” or that the breach of WTO obligations may fall under the protective umbrella of an observation of undertakings clause.

Considering the above, it is also not surprising that the same State measure may come within the jurisdiction of both legal systems. This overlapping of jurisdictions has resulted in the institution of parallel proceedings in several cases. However, investors’ attempts to challenge genuine trade measures before investment tribunals have not been successful thus
Interestingly, States have also started using trade benefits to enforce investment awards. More conscious of the inseparability of trade and investment, States have also increasingly negotiated preferential trade and investment agreements that cover trade and investment issues comprehensively as opposed to specialized trade or investment treaties that deal with the subjects separately. By the end of 2016, 367 PTIAs have been concluded and it is generally expected that this treaty category will become more important in the future while the numbers of newly concluded BITs per year are witnessing a gradual decrease.

In light of the above, it does not come as a surprise that general exception clauses would not be the first examples of a cross-regime fertilization of international trade and investment jurisprudence. In fact, the reference to WTO decisions in IIA adjudication is more widespread than investment commentators tend to acknowledge.

I. The Use of WTO Jurisprudence in Past IIA Adjudication

1. The Use of WTO Jurisprudence in the Interpretation of the Investment National Treatment Standard

Investment tribunals have mostly been occupied with cross-references to WTO jurisprudence in the context of the national treatment standard, which is one of the most important substantive standards that is shared across the two regimes. The pertinent jurisprudence offers a mixed pic-

643 On the U.S. attempt to suspend Argentina’s trade benefits for Argentina’s purported failure to comply with ICSID awards see Rosenberg, 44 Georgetown Journal of International Law 503 (2013). With reference to this case and further examples see also Tietje, in: Echandi/Sauvé (eds.), Prospects in International Investment Law and Policy 166, 169 (2013).
644 See supra Chapter Two Part A, II, 2.
ture. While some tribunals have been open to draw on WTO jurisprudence in interpreting investment national treatment provisions as a guide to determining when investors or investments are in “like circumstances”, others have been more hesitant to do so.

The first tribunal to refer to WTO law in its consideration of the investment national treatment standard was the one in *S.D. Myers, Inc. v. Government of Canada*. 646 It found interpretive guidance on the meaning of “like circumstances” in Article 1102 NAFTA in the WTO Appellate Body’s decision on “like products” in *Japan—Alcoholic Beverages*, particularly emphasizing that it was necessary “to keep in mind the overall legal context in which the phrase appears.” 647 Interestingly, the tribunal held that a notable systematic difference between the two regimes is the absence of Article XX GATT in NAFTA Chapter Eleven. 648

Half a year later, the *Pope & Talbot, Inc. v. Canada* tribunal considered at length several WTO decisions on likeness in its interpretation, but ultimately dismissed Canada’s proposition to use what Canada advocated to be the WTO test for the purpose of determining discrimination in the investment context. 649 At the outset of its national treatment analysis the tribunal in *Martin Roy Feldman Karpa v. United States of Mexico* tribunal was also open to consider WTO case law and remarked that the language in Article 1102 NAFTA is “analogous” to that found in Article III GATT. 650

650 *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶165. Interestingly, the tribunal in ¶177 also cited the WTO Appellate Body Report in *United States–Measures Af-
Other tribunals have been less enthusiastic. The tribunal in *Occidental Exploration and Production Company v. Ecuador*, although “mindful of the discussion of the meaning of like products in respect of national treatment under GATT/WTO”, eventually dismissed the relevance of WTO law for investment purposes as “not specifically pertinent” for the issue at hand.\(^{651}\) It firstly argued with the allegedly different object and purpose of the two obligations, reasoning that the WTO national treatment standard intends to protect imported products, while the investment provision is meant to protect exported products from indirect taxes in their country of origin.\(^{652}\) Thereafter, it compared the language “in like situations” used in the BIT provision with the text of the GATT/WTO provision “like products” and decided that they were markedly different – from here it ultimately concluded that the WTO test is not importable into the investment realm.\(^{653}\)

The tribunal in *Methanex Corporation v. United States of America* initially seemed open towards relevant WTO jurisprudence and generally considered that it

> “may derive guidance from the way in which a similar phrase in the GATT has been interpreted in the past. Whilst such interpretations cannot be treated by this Tribunal as binding precedents, the Tribunal may remain open to persuasion based on legal reasoning developed in GATT and WTO jurisprudence, if relevant.”\(^{654}\)

Having established this general rule, the tribunal nevertheless went on to distinguish the language “like circumstances” used in Article 1102 NAFTA from “like products” found in Article III GATT. It reasoned that the drafters of the NAFTA were well aware of the GATT terminology “like products” and had used language such as “like goods” in other chap-
ters of the NAFTA concluding that if they had intended a reference to the GATT approach in the investment chapter, they would have expressly adopted language to this effect.\footnote{Methanex Corporation v. United States of America, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV, Chapter B, ¶¶30-34.} Since they did not do so, they must have intended to create “distinct regimes for trade and investment.”\footnote{Methanex Corporation v. United States of America, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV, Chapter B, ¶35, stating that “the intent of the drafters [of NAFTA was] to create distinct regimes for trade and investment.”} It therefore ultimately discarded the WTO-likeness test in its enquiry.\footnote{Methanex Corporation v. United States of America, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV, Chapter B, ¶38.}

The tribunal in \textit{Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan} affirmed the ruling in \textit{Occidental} and also considered that the BIT national treatment clause must be interpreted in an autonomous manner, independent of the WTO approach.\footnote{Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶¶389, 402. Considering the tribunal’s reading to be based on a “simplistic notion” taken from Methanex and to be “strained and implausible” is Kurtz, 20 European Journal of International Law 1095, 1098 (2009).} This conclusion was also drawn by the tribunal in \textit{Merrill & Ring Forestry L.P. v. Canada}, which discarded the pertinence of WTO law in their likeness enquiry, albeit without express mention of \textit{Occidental} or other awards. The tribunal particularly pointed to the different purposes of the WTO and NAFTA Chapter Eleven, which “includes matters that go beyond trade so as to provide for broader mechanisms of economic integration and coordination of economic policies”.\footnote{Merrill & Ring Forestry L.P. v. The Government of Canada, Award, 31 March 2010, ¶¶85-87.}

Conversely, the tribunal in \textit{Corn Products International, Inc. v. The United Mexican States} found the fact that the WTO Appellate Body had decided that the products in question were “like products” within the meaning of Article III(4) GATT “highly relevant” for the application of the NAFTA national treatment provision.\footnote{Corn Products International, Inc. v. The United Mexican States, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, 15 January 2008, ¶122.} Also the tribunal in \textit{Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia} adopted the trade law approach to
identifying which sectors were relevant when deciding whether less favorable treatment had occurred.\textsuperscript{661} It distinguished the clause in the applicable treaty from the clause applied by the tribunal in \textit{Occidental v. Ecuador} on the basis of a divergence in wording. Since the treaty at hand lacked language such as “like situations” or “like products”, the tribunal felt free to adopt the WTO approach.\textsuperscript{662}

While tribunals thus have not converged on a dominant approach over the course of time, one can still discern from the above awards that tribunals compared the texts, the systematic differences, and the object and purposes of the national treatment standards in trade and investment law to decide whether or not to take recourse to WTO jurisprudence.

The comparison of the two standards has also been the subject of academic literature.\textsuperscript{663} Regardless of their respective conclusions as to whether inspiration from WTO jurisprudence is appropriate or not, commentators generally caution that any comparative exercise needs to be closely attentive to textual differences, to any potentially differing object and purposes, and has to take into account systematic differences across the two regimes.\textsuperscript{664} They thus developed criteria similar to the catalogue adopted by the investment tribunals.

\begin{itemize}
\item \textsuperscript{661} Sergei Paushok, \textit{CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia}, Award on Jurisdiction and Liability, 28 April 2011, ¶¶313-316.
\item \textsuperscript{662} Sergei Paushok, \textit{CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia}, Award on Jurisdiction and Liability, 28 April 2011, ¶313.
\item \textsuperscript{664} See Dolzer/Schreuer, Principles of International Investment Law, 2\textsuperscript{nd} ed., p. 206 (2012); Kurtz, in: Schill (ed.), International Investment Law and Comparative Law 243, 250-255 (2010); Kurtz, 20 European Journal of International Law 749, 755-759 (2009); Howse/Chalamish, 20 European Journal of International Law 1087, 1088, 1090 (2009). Alvarez/Brink, in: Sauvant (ed.), Yearbook on International Investment Law and Policy 2010-2011 319, 332 (2011) also caution that incorrect reliance on WTO jurisprudence in the context of national treatment will likely have a more limited impact than in the context of the interpretation of general exception provisions since only few investment arbitrations are decided on the construction of a non-discrimination standard alone, while successful invoca-
\end{itemize}
Chapter Five The Interpretation of General Exception Clauses

2. The Use of WTO Jurisprudence in the Interpretation of the Investment Most-Favored-Nation Treatment Standard

The most-favored-nation treatment standard is another typical substantive commitment of modern international economic law that exists in the trade and the investment realm alike. Its general purpose is to ensure that the parties to a treaty treat each other no less favorably than they deal with third parties.665 Similar to the national treatment standard, while the language and the context of MFN provisions vary across the two systems, sufficient commonalities exist that may warrant a comparative recourse to the law of the WTO.

Recognizing the potential merit of a comparative approach, the United Nations International Law Commission established a Study Group in 2009 co-chaired by Donald M. Mc. Rae and A. Rohan Perera,666 which, in part, is explaining the implications of WTO jurisprudence on the interpretation of MFN treatment in international investment law.667 The Study Group was reconstituted in subsequent years668 and reviewed various papers that were prepared according to the framework set out in 2009. Although con-

666 International Law Commission, Report of the International Law Commission on the Work of its Sixty-first session (4 May to 5 June and 6 July to 7 August 2009), UN Doc. A/64/10, ¶209. Since 2012, the study group is under the sole chairmanship of Mr. Donald M Mc. Rae, see International Law Commission, Report of the International Law Commission on the Work of its Sixty-fourth session (7 May to 1 June and 2 July to 3 August 2012), UN Doc. A/67/10, ¶243.
clusive results on the relationship between trade and investment MFN treatment standards have not been published to date, the Study Group reaffirmed in its latest report its intention “to study further the question of MFN in relation to trade in services under GATS and investment agreements.”

Investment tribunals have not yet considered adopting a comparative approach to the interpretation of the MFN standard across the two systems. This is regrettable considering the wealth of WTO jurisprudence on, for instance, the notion of “likeness” or the meaning of terms such as “less favorable” treatment, including an extensive list of measures that have already been examined in the context of the GATT MFN standard.

Nonetheless, the topic has attracted some academic attention. Walid Ben Hamida, for instance, assesses whether and how WTO experience with MFN clauses may be helpful in determining whether an investor can use the MFN provision in order to rely on more favorable dispute settlement provisions accepted by the host State in its other IIAs – a question of considerable debate among investment scholars, with tribunals taking diverging viewpoints. Also on the scope of application of the MFN provision, Jürgen Kurtz examined in particular whether the strong economic and political case for the inclusion of MFN treatment in the international trade realm is automatically transportable to the investment setting. He finds that, while, historically, MFN treatment with respect to trade in goods has been a cornerstone in the efforts to rebuild the international economy in the aftermath of the Second World War, the MFN principle has only played a marginal role in the beginnings of the international in-


vestment law system which were predominately characterized by a commitment to the protection of foreign investors against unlawful expropriations.\textsuperscript{673} Moreover, barriers to trade in goods such as quantitative restrictions or tariffs usually apply at the border, while State measures affecting foreign investment activities take effect after the entry into the host State and may take any form, resulting in a much bigger regulatory impact of investment law compared to trade law.\textsuperscript{674} Seen in the context of other fundamental structural differences between the realms of trade and investment, such as the different breadth of access to the dispute settlement processes and the absence of general exceptions for public policy objectives in most IIAs, \textit{Kurtz} concludes that a high level of sensitivity is required by investment tribunals when deciding how to interpret the MFN standard in the future.\textsuperscript{675}

Generally, scholars thus seem to agree that a comparative approach to MFN treatment across the two regimes may be fruitful in addressing problems with the interpretation and application of MFN provisions in international investment law. At the same time, they raise awareness of the undeniable differences between the two systems and caution that the clear-cut economic and normative case for a broad interpretation of the MFN standard in international trade law may not be easily transportable into the interpretation of the investment standard. The work of the ILC and scholarship tend to agree that investment law may benefit from a cross-regime fertilization with the jurisprudence of the WTO.

\textsuperscript{673} See \textit{Kurtz}, 5 The Journal of World Investment & Trade 861, 865-866 (2004); \textit{Kurtz}, in: Weiler (ed.), International Investment Law and Arbitration 523, 526-527 (2004). For an account of the historical setting in which the first IIAs were concluded see \textit{supra} Chapter Three, Part B, I.


3. The Use of WTO Jurisprudence in the Interpretation of the Investment Security Exception Clauses

As elaborated in more detail above, the tribunal in Continental Casualty v. Argentina also drew on WTO case law on Article XX GATT in order to construe the security exception clause of Article XI of the U.S. – Argentina BIT 1991. In particular, the tribunal’s approach to the question when a measure is “necessary” to achieve one of the permissible objectives was heavily informed by pertinent decisions of the WTO Appellate Body. The Continental Casualty tribunal forms an exception among its peers in that it felt comfortable to reference WTO jurisprudence on general exceptions while other tribunals occupied with the same question preferred to take recourse to customary international law on the state of necessity. The tribunal reasoned in particular that:

“Since the text of Art. XI derives from the parallel model clause of the U.S. FCN treaties and these treaties in turn reflect the formulation of Art. XX GATT 1947, the Tribunal finds it more appropriate to refer to the GATT and WTO case law which has extensively dealt with the concept and requirements of necessity in the context of economic measures derogating to the obligations contained in the GATT, rather than to refer to the requirements of necessity under customary international law.”

The statement suggests that the tribunal found the wording of the provisions as well as their contextual function sufficiently similar to justify a comparative interpretive approach. This bold recourse to WTO case law has been endorsed in academic writings for its recognition of a certain margin of appreciation of the host State in the balancing between investment protection and legitimate regulatory State interests. For instance, Stone Sweet applauds the award for undertaking the “mature form of proportionality analysis” developed in the WTO for the interpretation of Arti-

---

676 See supra Chapter Five, Part A, II, 1, c.
677 For this reason, the Continental Casualty arbitration has been described as “a first example of adjudicatory cross-fertilization in international economic law” by Reinisch, in: Dekker/Hey (eds.), 41 Netherlands Yearbook of International Law 137, 152 (2010).
Article XX GATT, which offers “the best available doctrinal framework with which to meet the present challenges to the BIT-ICSID system.” In the same line, Burke-White and Von Staden consider that the WTO approach to the concept of necessity “offers perhaps the best middle ground for balancing the legitimate expectations of both states and investors.”

The decision, however, has also attracted criticism in the scholarship for a variety of reasons. They largely turn on an alleged inappropriateness of reference to WTO general exception jurisprudence in the construction of an IIA security exception though, and are not directed at the general feasibility of recourse to WTO jurisprudence in investor-State proceedings per se. Among others, it is contended that the two cross-referenced clauses were historically, textually, and conceptually different and thus not comparable. If at all, the tribunal should have referred to the GATT security exception Article XXI GATT. Additionally, it is asserted that Article XI of the BIT was merely meant to affirm existing customary rules and that thus recourse to custom would have been more appropriate. Only occasionally have critics put forward that international trade and investment


\textit{Hirsch}, 19 European Journal of International Law 277 (2008).}

It has been suggested that the tribunal’s inclination towards international trade law was prompted by the professional background of its presiding arbitrator, \textit{Giorgio Sacerdoti}, who was a member of the WTO Appellate Body from 2001 to 2009.\footnote{For a general introduction to the use of sociological analysis in international law see \textit{Hirsch}, 55 University of Toronto Law Journal 891 (2005). For a sociological approach to international trade law see \textit{Hirsch}, 19 European Journal of International Law 277 (2008). For international investment law (and its uneasy relationship with human rights law in particular) see \textit{Hirsch}, in: Shany/Broude (eds.), Multi-Sourced Equivalent Norms in International Law 211, 219 (2011); \textit{Hirsch}, in: Douglas, et al. (eds.), The Foundations of International Investment Law, p. 12 (2014).} This suggestion seems plausible. The basis of this consideration is the assumption that legal interactions between different branches of law may also be analyzed as social interactions between the relevant legal communities.\footnote{\textit{Hirsch}, in: Shany/Broude (eds.), Multi-Sourced Equivalent Norms in International Law 211, 219 (2011); \textit{Hirsch}, in: Douglas, et al. (eds.), The Foundations of International Investment Law, pp. 12-13 (2014).} One can assume that socio-cultural similarities between the relevant decision-makers as well as sharing similar characteristics may raise the likelihood of cross-regime borrowing.\footnote{Cf. the list of factors mentioned by \textit{Hirsch}, in: Shany/Broude (eds.), Multi-Sourced Equivalent Norms in International Law 211, 219-226 (2011) and \textit{Hirsch}, in: Douglas, et al. (eds.), The Foundations of International Investment Law, pp. 13-15 (2014).} Sociological factors that may be relevant in this regard include not only career paths, but also the process of socialization, ideology, link to certain social movements or professional position, heritage, the use of terminologies, differences in legal cultures, and the general relationship between the communities (mistrust, antagonism).\footnote{\textit{Hirsch}, in: Shany/Broude (eds.), Multi-Sourced Equivalent Norms in International Law 211, 219 (2011); \textit{Hirsch}, in: Douglas, et al. (eds.), The Foundations of International Investment Law, pp. 13-15 (2014).} More specifically, it may be argued that a more pronounced socio-cultural proximity between

\textit{B. The Case for a Cross-Regime Fertilization}

the communities of international trade and investment law should enhance the inclination of the relevant decision-makers to mutually incorporate rules of the other legal sphere. In turn, this may result in a closer normative proximity between these branches of international economic law, paralleling the close socio-cultural proximity of its social communities. These factors may very well have played a role in the *Continental Casualty* decision.691

4. Other Applications of WTO Law in IIA Adjudication

Although the above examples are the most important examples of when tribunals did, could or should have taken recourse to the jurisprudence of the WTO, the instances in which WTO adjudication has been found to be relevant in investor-State arbitrations are not limited to just these. For example, tribunals took recourse to WTO case law in their enquiry as to whether the host State had imposed performance requirements692 and when interpreting the concept of “legitimate expectations” in the context of the fair and equitable treatment standard.693

Cross-fertilization with WTO jurisprudence is by no means restricted to substantive standards, though, and also appears in procedural matters. For instance, in *Methanex Corporation v. United States of America*, the tribunal drew heavily on the example of the WTO in justifying its decision to permit *amicus curiae* briefs.694 Other tribunals have relied on WTO prece-

691 However, the decision in *Continental Casualty* is not an anomaly. Another former member of the WTO Appellate Body was appointed as arbitrator in *Abalclat and Others v. Argentina* and issued a deeply critical dissent of the majority’s decision; See *Abalclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, Dissenting Opinion of Abi-Saab, 28 October 2011.


---

234
dents to establish the existence of an obligation of the Parties to provide
evidence and to explain the reasons if the State wants to withhold informa-
tion.695

While these examples do not purport to be a comprehensive account of
all instances in which investment tribunals considered WTO law and juris-
prudence, they may serve to complete the above picture.696

5. Conclusion

Contrary to the opinion of some commentators, who submit that invest-
ment tribunals are generally reluctant to rely on international trade law in
their reasoning,697 the above examples prove that investor-State tribunals

---

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.
v. Argentine Republic (formerly Aguas Argentinas S.A., Suez, Sociedad General
de Aguas de Barcelona, S.A., and Vivendi Universal, S.A. v. Argentine Republic,
ICSID Case No. ARB/03/19, Response to a Petition for Transparency and Parti-
cipation as Amicus Curiae, 19 May 2005, ¶22 and Suez, Sociedad General de
Aguas de Barcelona S.A. and InterAgua Servicios Integrales del Agua S.A. v. Ar-
gentine Republic (formerly Aguas Provinciales de Santa Fe S.A. Suez, Sociedad
General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales del
Agua S.A. v. Argentine Republic), ICSID Case No. ARB/03/17, Order in response
to a Petition for Participation as Amicus Curiae, 17 March 2006, ¶21, which both
reference parallel procedures of the WTO DSM. Other tribunals affirmed the Me-
thanex conclusions with only cursory reference to WTO jurisprudence, see
United Parcel Service of America, Inc. v. Canada, Decision of the Tribunal on
Petitions for Intervention and Participation as Amici Curiae, 17 October 2001,
¶¶61-64.

695 S.D. Myers, Inc. v. Canada, Procedural Order No. 10, 16 November 1999, Expla-
natory Note ¶5; Pope & Talbot, Inc. v. Canada, Decision by Tribunal, 6 Septem-
ber 2000, ¶1.6; Merrill & Ring Forestry L.P. v. Canada, Decision of the Tribunal
on Production of Documents, 18 July 2008, ¶19 citing Canada – Measures Affect-

696 For more comprehensive overviews refer to Marceau/Izaguirri/Lanovoy, 47
Journal of World Trade 481 (2013) and Tereposky/Maguire, in: Rovine (ed.),
Contemporary Issues in International Arbitration and Mediation – The Fordham

204 (2012); Newcombe/Paradell, Law and Practice of Investment Treaties, p.
an “identifiable and troubling opposition to the use of WTO law in investor-state
arbitration.”.
in actual fact take recourse to WTO jurisprudence in the interpretation and
application of norms and principle that exist in a similar manner in both
legal regimes as a means of bolstering the legitimacy of their argument
more frequently than maybe expected.\textsuperscript{698} One likely reason for this cross-
regime borrowing is the functional closeness of the concerned terms and
concepts across the two legal systems.\textsuperscript{699}

To the extent that tribunals have been more reluctant to draw upon
WTO jurisprudence, they have mainly distinguished the specific invest-
ment provisions in question from similar WTO provisions on the basis of
an allegedly decisively different wording, a distinct object and purpose,
and structural differences between the two systems.\textsuperscript{700} Scholars generally
agree with these criteria. As a preliminary conclusion, therefore, the incli-
nation of investment tribunals to cross-reference WTO jurisprudence in
the interpretation of IIA general exceptions – and the legitimacy of any
cross-borrowing – will depend on comparisons between the provisions’ re-
spective wording and between their object and purpose as well as on an
analysis of how the structural differences between the WTO regime and
the investment system may influence the respective interpretations.\textsuperscript{701}

\begin{itemize}
\item \textsuperscript{698} A similar conclusion is reached by \textit{Marceau/Izaguerrri/Lanovoy}, 47 Journal of
World Trade 481, 488, 505, 529 (2013); \textit{Tereposky/Maguire}, in: Rovine (ed.),
Contemporary Issues in International Arbitration and Mediation – The Fordham
Settlement 471, 488 (2011) even submits that 18 out of 26 investment awards that
reference WTO jurisprudence he identified “cite WTO cases with some measure
of approval.”.
\item \textsuperscript{699} See \textit{Marceau/Izaguerrri/Lanovoy}, 47 Journal of World Trade 481, 505, 529
(2013), singling out in particular the concept of “necessity”.
\item \textsuperscript{700} An additional reason for this reluctance may be the risk arbitrators are running of
exposing their award to subsequent challenges if the Parties did not invoke WTO
precedents themselves; see \textit{Marceau/Izaguerrri/Lanovoy}, 47 Journal of World Tra-
dev 481, 485 (2013) with reference to \textit{Continental Casualty Company v. The Ar-
gentine Republic}, ICSID Case No. ARB/03/9, Decision on the Application for
Partial Annulment, 16 September 2011.
\item \textsuperscript{701} For a proposal to use similar criteria to assess the potential for a cross-fertilizati-
on between the jurisprudence on trade law general exceptions of different treaties
see \textit{Wolfrum}, in: Wolfrum, et al. (eds.), Max Planck Commentaries on World Tra-
\end{itemize}
These criteria strikingly resemble the customary rules of treaty interpretation codified in Article 31 VCLT.\textsuperscript{702}

II. The Case for a Cross-Regime Fertilization as regards General Exception Clauses

1. Comparable Texts of IIA General Exception Clauses and Article XX GATT or Article XIV GATS

The majority of IIA general exception provisions either incorporates or is modeled on Article XX GATT or Article XIV GATS.\textsuperscript{703} In particular, the technique of incorporation by reference is a strong indicator that States intend investment tribunals to consider the body of WTO jurisprudence in their deliberations.\textsuperscript{704} The same holds true with regard to general exceptions whose wording has been adapted to the investment setting in the treaty negotiation process and thus does not fully reflect the WTO language. Naturally, WTO general exceptions cannot be adopted word-by-word by IIA treaty drafters. Amendments to the language, such as \textit{e.g.} the substitution of the terminology “international trade” with “investments or investors”, are necessary to cater for the fact that treaties deal with investment and investors as opposed to trade in goods or services.\textsuperscript{705} Other textual amendments, such as the codification of WTO jurisprudence on \textit{e.g.} the addition of “living and non-living” to the exception for exhaustible natural resources, strongly imply that States are open to the idea of taking into account WTO jurisprudence. Even José Alvarez and Tegan Brink, two of the most outspoken critics of the reference to WTO jurisprudence in the construction of IIA security exceptions consider that:

\textsuperscript{702} Article 31 VCLT reads: “A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”.

\textsuperscript{703} See \textit{supra} Chapter Two, Part B, I.

\textsuperscript{704} See, \textit{e.g.}, Article 1(2) of Chapter 15 of the ASEAN – Australia – New Zealand PTIA (signed 27 February 2009, entered into force 1 January 2010), which reads: “For the purposes of Chapter 8 (Trade in Services), Chapter 9 (Movement of Natural Persons) and Chapter 11 (Investment), Article XIV of GATS including its footnotes shall be incorporated into and shall form part of this Agreement, \textit{mutatis mutandis}.”.

\textsuperscript{705} See Kennedy, 4 Czech Yearbook of International Law 3, 17 (2013).
“[w]hen comparable texts exist, WTO case law may be able to provide useful guidance to BIT interpreters on how the substantive subject matter of exceptions, such as “exhaustible natural resources,” should be defined (a matter on which consistency in international agreements is important), as well as on the standard of review with respect to necessity in the context of a provision that contains a similar, albeit not identical, controlling “chapeau.””

There is thus a strong textual argument in favor of reliance on WTO jurisprudence by investment tribunals to the extent that the IIA general exception clauses either incorporate or are modeled on Article XX GATT or Article XIV GATS.

Whether these considerations are automatically transportable to the interpretation of sui generis IIA general exceptions is less clear. It seems possible that the chapeau of the WTO general exceptions has affected the interpretation of the entire norm and the degree of deference accorded to States under the clauses even though evidence to this effect is hard to identify in the case law. In particular, the chapeau might have put the WTO Appellate Body in a position to adopt a comparatively broad interpretation of the individual public policy objectives and the nexus requirements, granting more deference to the host State, since it acted in a corrective manner and provided for protection against abusive invocation by

---

706 Alvarez/Brink, in: Sauvant (ed.), Yearbook on International Investment Law and Policy 2010-2011 319, 344 (2011). Also not that they consider the language found in the introductory paragraph to Article 10 of the Canadian Model FIPA “obviously similar to that of GATT Article XX” although Article 10 substitutes the text “arbitrary or unjustifiable discrimination between countries where the same conditions prevail” with “arbitrary or unjustifiable discrimination between investments or between investors” to account for the investment setting; See Alvarez/Brink, in: Sauvant (ed.), Yearbook on International Investment Law and Policy 2010-2011 319, 345 (2011).


host States. Tribunals should be mindful of this when they intend to consider WTO jurisprudence in the interpretation of IIA general exception clauses that do not entail such an extensive protection against abuses or none at all. Whether the safeguards entailed in the *sui generis* provision are substantially comparable to the WTO *chapeau* should be an important factor in the decision concerning the extent to which reliance on WTO jurisprudence is appropriate.

2. Comparable Purposes of IIAs and the GATT/GATS and of General Exception Clauses Contained Therein

Secondly, in their comparative enquiry as to whether to draw on WTO case law investment tribunals have considered both the object and purpose of the obligation in trade and investment law respectively as well as the object and purpose of the underlying legal regime as a whole.

Some commentators characterize the goals of international trade and investment law as decisively different so that a conclusion reached in one regime is not readily transferable to the other. Trade law is concerned with “overall welfare, efficiency, liberalization, state-to-state exchanges of market access and trade opportunities” (concentrating on “macro-issues”), whereas international investment law centers on investment protection (as opposed to liberalization) and individual rights (as opposed to state-state exchanges of market opportunities and thus focusing on “micro-issues”). However, this differentiation confuses the structure of and the means employed by the two systems with the objectives pursued by them. It is true that international trade law contemplates a reduction of tariffs and other barriers to cross-border trade while international investment law focuses on the reduction of risks of investment abroad through

---

709 For details on the different safeguards against abuses built into general exception clauses see *supra* Chapter Two, Part C, II, 3.


extensive private property protection. Nonetheless, it is not accurate to argue that trade law is solely occupied with State interests while investment law deals solely with the protection of private interests. WTO State-to-State disputes are often pursued in representation of private claimants and thus regularly protect individual rights of private economic actors at least indirectly.\footnote{712} Conversely, the object and purpose of contemporary IIAs (which are likely the investment treaties containing general exceptions) is not exhaustively reflected in the classical foreign investment protection objective but encompasses broader notions of sustainable economic development, which eventually leads to growing general welfare and prosperity.\footnote{713} Despite the different nuances, international trade law and international investment law in fact share the goal of increasing general welfare and prosperity through liberalized international economic activity, although they pursue it with different means.\footnote{714} The common overall purpose of the two regimes hence does not warrant a differential interpretive approach to general exceptions.

Turning to a comparison of the object and purpose of general exception clauses across international trade and investment law, no significant difference exists: Some contend that the purpose of Article XX GATT was to enable discrimination based on nationality and that this purpose was of no avail in investment law since the latter is meant to protect property rights

\footnote{713}{See \textit{infra} Chapter Four, Part A, II.}
against any kind of improper governmental interference. However, this argument does not capture the purpose of Article XX GATT comprehensively since it, similarly to the argument above, confuses the means employed by general exceptions with the aims pursued by them. International trade law obligations primarily focus on the protection from discrimination based on nationality, while international investment law protects foreign investment in an absolute manner without requiring discriminatory intent on part of the host State. General exceptions in both legal systems allow States to derogate from their treaty obligations upon their successful invocation. To do so, they necessarily permit nationality-based discrimination in international trade law and any kind of interference with foreign investment in international investment law, both of which would normally be outlawed by the respective legal systems. This does not change the fact that, in both legal regimes, the objectives of general exceptions are strikingly similar: To elevate the specified non-economic values over the goals of trade liberalization or investment protection respectively in cases of normative conflict.

In sum, therefore, the objectives of general exceptions in trade and investment law are sufficiently comparable to enable a cross-fertilization of the respective jurisprudence.

3. Structural Differences between Investor-State Arbitration and WTO Dispute Settlement

As a third criterion, tribunals have been mindful of structural differences between the investor-State arbitration system and the world trading dispute settlement scheme when deciding whether cross-regime borrowing is appropriate. The different structures may have an impact on the legal i-


terpretation of general exceptions adopted in the respective regime and thus need to be considered when applying trade jurisprudence in the investment context. This truism is often explicitly highlighted in academic literature, which usually only briefly touch upon the appearance of general exception provisions in recent IIAs. However, most of the commentators are satisfied with generically cautioning against reliance on WTO jurisprudence without appropriate attention to the structural differences between the two legal systems without referring to what they consider to be the pertinent differences between investment law and trade law. In the alternative, if they mention allegedly decisive differences, but do not or only cursorily explain why these differences do have, might have, or should have an impact on the interpretation of general exceptions across the two regimes as if the issue was self-explanatory. Their words of caution, which may well be interpreted as criticisms of what they fear may turn out to be a too casual reliance on WTO jurisprudence, thus appear to be not well founded.

Nonetheless, there are of course structural differences between trade and investment dispute settlement that may have an impact on the interpretation of obligations assumed under the respective legal regime.


720 The following section draws on the comparison between the WTO dispute settlement regime and the international investment arbitration system undertaken in Sabanogullari, 8 Transnational Dispute Management (2011).
a. Multilateral System vs. Bilateral Treaty Network

The first noteworthy difference between the world trading system and international investment law are the legal foundations the systems rest upon. The WTO regime is a multilateral system. It consists multiple agreements, which are annexed to the Marrakesh Agreement Establishing the World Trade Organization.\textsuperscript{721} They all apply equally and are equally binding on all WTO Member States.\textsuperscript{722} This setting has enabled a consistent jurisprudence free from contradictions.

In contrast, international investment law is based on a network of more than 2957 BITS, complemented by another 367 PTIAs.\textsuperscript{723} They all contain substantially similar provisions, which however may vary as to their details. The same holds true to the extent that they feature general exception provisions.\textsuperscript{724} It follows that tribunals need to have regard to the particularities of each individual general exception provisions and to compare them with the WTO model provision to decide whether reference to WTO precedent is appropriate.

b. Inter-State vs. Investor-State Dispute Settlement

Another structural difference relates to the access to the dispute settlement systems. In the world trading regime such access is limited to States.\textsuperscript{725} Although GATT/WTO disputes often affect the economic interests of private actors, it remains a prerogative of States to initiate proceedings.\textsuperscript{726} States thus retain the sole discretionary power to decide which types of

\textsuperscript{721} Marrakesh Agreement Establishing the World Trade Organization (signed on 15 April 1994, entry into force on 1 January 1995).


\textsuperscript{723} See supra Chapter Two, Part A, I and II respectively.

\textsuperscript{724} See supra Chapter Two for an account of the different variations of IIA general exception provisions.


conflicts are brought before WTO dispute settlement. In taking this decision, they are likely to consider not only legal aspects but also possible political repercussions. For instance, a State would arguably be less inclined to challenge a foreign State measure if that challenge increased the risk of creating a precedent and facing a similar challenge to its regulatory behavior in the future.\textsuperscript{727} States therefore act as inherent political filters to the trade dispute settlement system.\textsuperscript{728}

In contrast, private foreign investors are regularly granted the right to initiate arbitral proceedings against the host States under an applicable IIAs.\textsuperscript{729} There is hence no State filter in investor-state dispute settlement.\textsuperscript{730} Governmental influence is limited to the drafting of an IIA. Unlike States, investors likely care little about political restraints and only consider economic factors in their decision whether to initiate arbitration.\textsuperscript{731} Considering also that the focus of international investment law shifted from protection against expropriations in its inception\textsuperscript{732} to challenging regulatory State measures in general nowadays, this broad access to investor-State dispute settlement results in a greater potential for the initiation of proceedings against a multiplicity of State measures.\textsuperscript{733} This may have a restraining effect on the regulatory flexibility of host States since every State measure may be exposed to the potential risk of expensive litigation.\textsuperscript{734}


\textsuperscript{729} See Kurtz, 5 The Journal of World Investment & Trade 861, 869 (2004); Karl, supra note 38, at 232.

\textsuperscript{730} See Kurtz, 20 European Journal of International Law 749, 757 (2009).

\textsuperscript{731} See Kurtz, 5 The Journal of World Investment & Trade 861, 869 (2004); Van Aaken/Kurtz, 12 Journal of International Economic Law 859, 861 (2009).

\textsuperscript{732} See supra Chapter Three, Part B, I, 2.

\textsuperscript{733} See Kurtz, 5 The Journal of World Investment & Trade 861, 870 (2004).

\textsuperscript{734} See Karl, in: Shan, et al. (eds.), Redefining Sovereignty in International Economic Law 225, 232 (2008).}
c. Permanent Adjudicators and Institutions vs. ad hoc Arbitrations

Another key difference between the trade and investment dispute settlement systems is their respective structure. With the WTO Appellate Body, the world trading system includes a standing body composed of seven members elected for four-year terms with the possibility of one reappointment for another four-year term.\(^{735}\) Each member is required to be a person of “recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally.”\(^{736}\) While not a requirement, members are mainly public officials.\(^{737}\) Additionally, the WTO is equipped with a permanent legal secretariat, which provides assistance to its Member States.

In contrast, investment arbitration is decentralized and takes place before arbitral tribunals constituted on an \textit{ad hoc} basis once a dispute arises. The composition of these tribunals changes from case to case.\(^{738}\) Naturally, this makes the emergence of a uniform approach to the interpretation of individual obligations more difficult. Unlike in the WTO system, it is also noteworthy that most investment arbitrators have a private law commercial arbitration background. This may result in a perceived need to establish and legitimize international investment law as an independent legal area, including the rejection of established WTO precedent.\(^{739}\) Arbitrators need to be mindful of this danger when approaching the question of whether or not to reference WTO cases.

d. Appellate Review vs. Annulment

The WTO encompasses a complex system to settle disputes between its Member States concerning their rights and duties under WTO law. After initial unsuccessful consultations, the Complainant State may refer the dis-

\(^{735}\) See Article 17(2) DSU.

\(^{736}\) See Article 17(3) DSU.


\(^{738}\) In fact, repeated appointments of one individual in consecutive arbitrations may foster doubts as to her impartiality and may thus form the basis of challenge proceedings.

pute to a WTO panel for adjudication. Upon the issuance of the panel’s report, the parties to the dispute have the right to appeal it with regard to errors of law. The dispute then comes before a standing Appellate Body, which guarantees consistency in the application of the law and remedies erroneous interpretations of substantive standards in the first instance. This contributes to legal certainty.

International investment law does not have an appeal mechanism. This lack probably relates to the general aim of (commercial rather than investment) arbitration to accelerate proceedings for economic reasons. The International Center for the Settlement of Investment Disputes (ICSID), for instance, only provides for an annulment mechanism based on procedural flaws, but not for a substantive scrutiny in form of an appeal. Other fora do not even provide as much. The creation of a proper appeal mechanism de lege ferenda has been hotly debated for some time now, but it still remains far away from actual implementation. Shortcomings in the interpretation of investment law are therefore harder to remedy and have contributed to a body of divergent arbitral awards, which has resulted in legal uncertainty. In turn, this has narrowed the scope of state regulatory power by increasing the risks States are facing when trying to experiment with their regulatory discretion.

e. Prospective Remedies vs. Retrospective Remedies

Further differences can be identified in the respective remedy schemes. Remedies in the WTO realm are prospective in nature. The losing State has to remove the offending measure within a “reasonable period of time” and has to bring it into conformity with its WTO obligations. Only if a State fails to comply with this obligation can the Dispute Settlement Body

741 Article 52(1) ICSID.
745 Article 19(1) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).
exceptionally authorize the prevailing State to resort to unilateral counter-measures in the form of trade retaliation.\textsuperscript{746} The retaliation does not necessarily have to target the industry that is treated more favorably under the WTO-inconsistent regulatory scheme and is thus intergovernmental in nature.\textsuperscript{747} Furthermore, the losing State may choose how to bring its measure into conformity with WTO law and may, hence, not necessarily make the changes the prevailing State would have wished for. Since the consequences of non-adherence are thus comparatively weak, WTO Member States retain a considerable amount of their regulatory flexibility.\textsuperscript{748}

In contrast, remedies in the investment realm are retrospective in nature.\textsuperscript{749} Tribunals award compensation in form of monetary damages to the mistreated investor, which usually consists of prompt, adequate and effective compensation.\textsuperscript{750} If the dispute was heard under the premises of the International Center for the Settlement of Investment Disputes, decisions are also directly enforceable in all Member States of the ICSID Convention.\textsuperscript{751} But also if the arbitration takes place in a different forum, the widely ratified New York Convention on the Recognition of Foreign Arbitral Award of 1958\textsuperscript{752} obliges its Members to recognize and enforce foreign arbitral awards and limits the grounds upon which a State may refuse to do so.\textsuperscript{753} The remedies scheme in international investment law is thus very investor-friendly and the enforcement of favorable awards against the host State is very investor-friendly.\textsuperscript{754} As a result, a State may be prevented from experimenting with regulatory measures. It is even possible that

\begin{itemize}
\item[746] Article 22 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).
\item[748] See Kurtz, 20 European Journal of International Law 749, 759 (2009).
\item[749] See Kurtz, 20 European Journal of International Law 749, 759 (2009).
\item[751] Article 54(1) ICSID Convention.
\item[753] See Newcombe/Paradell, Law and Practice of Investment Tribunals, p. 25 (2009).
\item[754] Van Aaken/Kurtz, 12 Journal of International Economic Law 859, 861 (2009) characterize this difference to the law of the WTO as “perhaps most crucially”.
\end{itemize}
certain chilling effects on State regulation, in particular for the economically inferior developing States, may arise.\textsuperscript{755}

4. Appraisal

The textual similarities between the WTO general exception clauses and IIA general exceptions modeled on them suggest that reference to WTO jurisprudence by investment tribunals is not only legally possibly but is also intended by the treaty parties. This applies all the more if the general exception clauses are incorporated into the IIA by reference to WTO agreements or if the State parties amended the text of the provision so as to codify the jurisprudence of the WTO AB, signifying their endorsement thereof. A comparison of the objectives and purposes of the two legal regimes or of the general exception clauses contained therein respectively shows that they are sufficiently comparable to allow cross-regime borrowing.

That being said, the existence of structural differences between the international investment world and the world trading regime cannot be denied. It is however important to note that most of the particularities relate to procedural aspects; for instance the particularities of the respective dispute settlement mechanisms or the available remedies. Their impact on substantive obligations remains limited. Generally, tribunals should however be mindful of the fact that international investment law, structurally, but also as regards its scope of application, is more intrusive on a State’s sovereignty than WTO law. This may require tribunals to take a more deferential approach in the interpretation of general exceptions than exists in the WTO realm.\textsuperscript{756}

\textsuperscript{755} See Kurtz, 20 European Journal of International Law 749, 759 (2009). See also Desierto, Public Policy in International Economic Law, pp. 317-320 (2015) for an account of how these differences impact upon the regulatory freedoms in WTO and investment law.

\textsuperscript{756} Alvarez/Brink, in: Sauvant (ed.), Yearbook on International Investment Law and Policy 2010-2011 319, 350 (2011) come to the opposite conclusion and argue that the WTO Appellate Body “might opt for a deferential view of what constitutes a legitimate governmental measure” because of the interstate structure and the limited remedies. Considering the above-demonstrated sovereignty-limiting impact of international investment law, this view is not persuasive.
B. The Case for a Cross-Regime Fertilization

Taking guidance from WTO jurisprudence, not in the sense of “binding precedents” but merely as “persuasive authority”, would also accelerate the development of a uniform case law, which in turn would add to legal certainty for both investors and host States. In fact, if some tribunals opted for an investment-specific approach, while others made reference to established WTO case law, the resulting legal uncertainty might be counterproductive to the goal of safeguarding the regulatory interests of host States and intensify the existing legitimacy crisis. Also, under this approach investment tribunals should feel encouraged to take guidance from WTO jurisprudence on general exceptions.

Proposals exist that the States could include in the IIA some form of interpretive guidance that refers investment tribunals to WTO jurisprudence in an additional subparagraph of the general exception provision, an annex to the IIA, or specific reference in the negotiation history. Until now, States have not chosen to go down that route. Considering that authoritative statements issued by State Parties to an IIA on the interpretation of substantive standards are rare in the investment treaty system, it is unlikely that such statements with regard to general exceptions will be witnessed in the future. Considering the above, they also do not appear necessary to draw the attention of investment tribunals to WTO jurisprudence.

In conclusion, cross-regime borrowing from WTO jurisprudence in the case of IIA general exception provisions that are textually sufficiently similar is legitimate and appropriate and will accelerate the emergence of a uniform jurisprudence. The latter will contribute to legal certainty and predictability and is thus to be encouraged.

758 The most prominent among the few examples is the statement of the NAFTA Free Trade Commission on the appropriate interpretation of Article 1105(1) NAFTA, see NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001 (available at: http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp, last visited 12 November 2017). The Commission’s interpretation statements are binding on a tribunal according to Article 1131(2) NAFTA.
III. The Possibility of Accounting for WTO Jurisprudence during Investment Treaty Interpretation

Having concluded that cross-regime borrowing in the interpretation of investment general exception clauses is legitimate, at least to the extent that the provisions are modeled on Article XX GATT or Article XIV GATS (and need to exercise more caution if the applicable IIA provides for a *sui generis* general exception provision), the following section gives brief guidance to investment tribunals on how to take into account external law in investor-State disputes.

Some commentators appear to suggest that the principle of systemic integration as codified in Article 31(3) lit. (c) VCLT would be useful as a doctrinal underpinning for the recourse to WTO jurisprudence by investment tribunals. Article 31(3) lit. (c) VCLT obliges a treaty interpreter to take into account together with the context “any relevant rules of international law applicable in the relations between the parties.” The provision recently gained considerable attention after the International Court of Justice utilized it in *Case concerning Oil Platforms*. It is considered by some to be the most promising remedy to ameliorate the risks associated with the phenomenon of the fragmentation into diverse international legal orders, serving “a function analogous to that of a master-key in a large

---

760 The customary international law character of Article 31(3) lit. (c) VCLT has been recognized by the International Court of Justice at the latest in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, 4 June 2008, I.C.J. Reports 2008, 177, 219, ¶112.


762 Note that this exercise forms a mandatory part of the interpretive process and not a merely subsidiary means of interpretation if the meaning is ambiguous, obscure or manifestly absurd or unreasonable (as contrasted with the use of *travaux préparatoires* according to Article 32 VCLT).


IIAs are not self-contained regimes. They do not exist in clinical isolation but are instruments of international law and as such governed by it. The principle of systemic integration thus seems to be an underestimated but suitable instrument to address conflicts between different sub-systems of international law.

Article 31(3) lit. (c) VCLT requires that the “rule” to be considered must be “relevant” and that it must be “applicable in the relations between the parties”. The fulfillment of the individual requirements is heavily contested in many cases, but not problematic for reference to WTO law by investment tribunals. The only other condition is that both parties to the IIA are also Member States of the WTO. That being said, the point in question here is not whether IIA tribunals are obliged to consider WTO norms in their interpretation but rather whether they can use Article 31(3) lit. (c) to rely on external WTO jurisprudence. Problematic is that Article 31(3) lit. (c) VCLT only applies to “rules”. The notion of “rules” corresponds to the notion of the sources of international law as laid down in Article 38(1) ICJ-Statute.

According thereto, the primary sources of international law are treaties (lit (a)), custom (lit. (b)) and general principles of law (lit. (c)). Judicial decisions and the teachings of the most highly qualified publicists are considered to be merely “subsidiary means for the determination of rules of

---

767 Cf. Article 2(1) lit. (a) VCLT, which designates that “1. For the purposes of the present Convention: (a) “treaty” means an international agreement concluded between States in written form and governed by international law [...]”.
768 Generally on the reconciliation of international investment law with other areas of international law see Van Aaken, 17 Finnish Yearbook of International Law 91 (2008); Hirsch, in: Muchlinski, et al. (eds.), The Oxford Handbook of International Investment Law 154 (2008).
law” (lit. (d)). At most, they therefore only qualify as “rules” under Article 31(3) lit. (c) VCLT to the extent that they lead to the identification of primary sources of international law. Whether investment tribunal can thus utilize Article 31(3) lit. (c) VCLT to justify their recourse to WTO jurisprudence seems at least doubtful.

But also apart from the principle of systemic integration, investment tribunals have little trouble in referring or considering WTO cases for the purpose of interpreting investment obligations. In fact, it is a common practice of international courts and tribunals to consider interpretations undertaken by other international bodies in their decisions. Most prominently, the International Court of Justice believed that it should consider the interpretations of the United Nations Human Rights Committee and reasoned in its judgment on the merits in Ahmadou Sadio Diallo that

"[t]he point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled”

Two paragraphs later, the ICJ also noted that its interpretation of a provision of the African (Banjul) Charter of Human and Peoples’ Rights was consistent with the interpretation accorded to the respective obligations in the European Convention for the Protection of Human Rights by the European Court of Human Rights and in the American Convention on Human Rights by the Inter-American Court of Human Rights, both of which would be “close in substance” to the obligation at issue.

Similarly, WTO general exception provisions are “close in substance” to IIA general exception provisions, at least to the extent the latter are modeled on the former. Reliance on WTO jurisprudence in their construc-

772 For extensive examples see supra Chapter Five, Part B, I.
773 See Gardiner Treaty Interpretation, p. 268 (2008) who notes that “courts and tribunals do make free use of such material without apparently seeing any need to find a specific justification in the Vienna rules.”.
tion as persuasive authority and in the interests of the consistency of international law and of legal certainty is thus possible for IIA tribunals.

C. The Interpretation of Key Terms in General Exception Clauses

Having established that recourse to WTO jurisprudence during the interpretation of IIA general exception clauses is appropriate and legitimate, the following section turns to the interpretation that should be accorded to key terms in IIA general exception provisions. In its course, it draws extensively on insights from WTO precedents.

According to established WTO practice, the interpretation and application of the two WTO general exception provisions follows a three-step procedure.\textsuperscript{776} First, the measure pursued by the State has to fall within the range of policies and objectives enumerated exhaustively in paragraphs (a) through (j) in the case of Article XX GATT, or (a) through (e) respectively in the case of Article XIV GATS. Second, the measure needs to be \textit{e.g.} “necessary” for, “relating to” or “directed to” the pursuit of the legitimate policy objective, depending on which nexus requirement the respective exception sub-paragraph specifies. Third, the measure must conform to the conditions stipulated in the introductory paragraph. The latter two requirements constitute checks on a State’s right to invoke that exception, firstly on the level of suitability of the means chosen to pursue a particular regulatory objective, and secondly on hidden or embedded discrimination in the application of the measure. As stressed by the Appellate Body, this sequence of steps does not reflect a random choice “but rather the fundamental structure and logic of Article XX.”\textsuperscript{777} It should therefore be observed to by investment tribunals.


I. Permissible Objectives

The enquiry as to whether a State measure may be defended under a general exception provision always begins with the question of whether it pursues a permissible objective recognized as such by the general exception provision. This list is exhaustive and cannot be unilaterally expanded after the treaty drafting process has been completed, even if so desired by the host State. Hence the range of permissible exceptions is restricted to those enumerated in the clause. While the regulatory power of host States is thus on the one hand expressly recognized and affirmed in the areas listed, it is, on the other hand, simultaneously limited to the exhaustive enumeration of policy objectives in the clause. Given the difficulties of treaty amendment, it is likely that the list will remain static for a considerable time.

Naturally, the larger the number of permissible objectives is, the more regulatory leeway is accorded to the host State and vice versa. Despite this, the fear of an overly broad regulatory power of the host State has been overstated. In fact, as will be elaborated in more detail below, some academics are even highly critical of this closed list approach for diametrically opposed reasons, arguing that it represents a major reason why the inclusion of exception clauses in IIAs might actually turn out to be more detrimental to the regulatory autonomy of host States than the provision of regulatory discretion already extant in the interpretation of certain substantive IIA disciplines, the latter being not confined to a limited set of public interests.778

1. Protection of Human, Animal or Plant Life or Health and Other Health-Related Objectives

The most frequently found permissible objectives in IIA general exception clauses are the “protection of human, animal or plant life or health” or

778 This line of argument suggests that, in the absence of a general exception provision, States are free to submit any kind and number of policy objectives the challenged measure is meant to implement to the tribunal which may take them into account in its interpretation of a number of substantive IIA disciplines. The presence of a general exception clause with an exhaustive list of permissible objectives would, it is asserted, preclude this option. For details, see infra Chapter Four, Part D, III.
varying other formulations that may be summarized under the heading of “health-related objectives”. In comparison with other permissible objectives, the exception probably offers the fewest interpretive ambiguities. What qualifies under human, animal or plant “life” or “health” is essentially uncontroversial. The difficulty lies in the assessment when human, animal or plant life or health is sufficiently threatened to trigger the exception. WTO jurisprudence suggests that for the risk to be identified, it needs to be based on objective scientific evidence. Secondly, there must be a rational or objective relationship between that evidence and the measure taken by the State. The risk evaluation and the measure taken on its basis do not need to be supported by a consensus or even a majority view among scientists. Rather, “qualified and respected sources”, even if they constitute a minority view, are considered sufficient in the WTO realm.

Importantly, environmental measures may fall under the exception as long as they relate to human, animal or plant life or health. However, to the extent that IIAs only incorporate or are modeled on Article XIV GATS, the absence of an exception “relating to the conservation of exhaustible natural resources” as entailed in Article XX lit. (g) GATT needs to be taken into account. Cases in which the challenged State measure purports to be aimed at the protection of natural resources such as air or water

---

785 This is expressly clarified by some IIA general exception clauses. Other provisions include the protection of the environment as self-standing objective. For an overview see supra Chapter Two, Part C, II, 1, e.
may be problematic. While environmental measures that protect living natural resources, for instance animal populations or trees, readily fall within the exception’s scope, measures concerning non-living natural resources are only covered if a connection to the life or health of humans, animals or plants can be established.

Some *sui generis* exception provisions only apply to measures protecting “human health” or “public health” and are thus narrower in scope than the above. Similarly, other provisions cover only the prevention of pests and diseases in animals or plants and unlike the above provision do not encompass, for instance, the diversity of the animal or plant population.

A straightforward example for the relevance of such a health-related exception in the investment context is the case of *Philip Morris Asia Ltd. v. Commonwealth of Australia*. 786

2. Securing Compliance with Laws and Regulations

Another permissible objective deals with the enforcement of laws and regulations not inconsistent with the underlying IIA. There seems to be some confusion among investment commentators as regards the scope of application of this exception. Some take it as “exclusionary wording […] that effectively emaciates ostensibly progressive provisions” and argue that the “final caveat severely undermines the whole concept of a regulatory exception by superimposing the terms of the BIT”. 787 In consequence, they submit that “[a]t the very best it is redundant, since laws and regulation not inconsistent with the BIT would appear to be permissible anyway.” 788 However, this argumentation is based on a flawed understanding of the text of the exception. A careful reading reveals that the exception does not

786 *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Notice of Arbitration, 21 November 2011. For a more detailed account see *supra* Chapter One, Part B, III. For a detailed study on the interplay between public health and international investment law see Vadi, Public Health in International Investment Law and Arbitration (2012).


apply to laws and regulations consistent with the IIA, which indeed would
be circular, but rather to IIA-inconsistent measures undertaken to secure
compliance with such IIA-consistent laws and regulations. In other words,
measures undertaken to secure compliance with IIA consistent laws and
regulations should not trigger compensatory duties even if the individual
measure in question would violate an IIA provision. 789

An example of a measure that is based upon laws that are \textit{per se} not
inconsistent with an IIA could be a government policy aimed at the cre-
ation and operation of national social benefits schemes. 790 For instance, a
State could adopt a law which introduces a nationwide public health
scheme. Such a law would not be inconsistent \textit{per se} with the BIT. How-
ever, measures taken to implement this law may have a negative impact on
the market share of foreign investors that are engaged in the sale of private
health insurance. These investors could then seek compensation for indi-
rect expropriation or for violations of the FET standard. 791

3. Conservation of Living or Non-Living Exhaustible Natural Resources

The conservation of exhaustible natural resources is another permissible
objective expressly recognized by Article XX lit. (g) GATT, but not by Ar-
ticle XIV GATS which is lacking a matching exception. This is important
and needs to be considered by States contemplating the inclusion of WTO-
based general exceptions since, together with the protection of human, an-
imal or plant life or health, the exception has been used as a gateway for
the introduction of environmental considerations into the WTO system de-
spite the fact that an explicit environmental exception is lacking. 792 States

789 See Meckenstock, Investment Protection and Human Rights Regulations, p. 132
(2010).
790 The following example is taken from Peterson, Bilateral Investment Treaties and
Development Policy-Making, IISD, pp. 30-31 (2004). It was also referenced in
Meckenstock, Investment Protection and Human Rights Regulations, pp. 107-108
(2010).
791 See Peterson, Bilateral Investment Treaties and Development Policy-Making,
IISD, pp. 30-31 (2004). With reference thereto also Meckenstock, Investment
792 See Matz-Lück/Wolfrum, in: Wolfrum, et al. (eds.), Max Planck Commentaries on
World Trade Law, Vol. 5, WTO – Trade in Goods, Article XX (g) GATT, ¶2
(2011).
that plan to incorporate by reference only Article XIV GATS without making amendments should be mindful that they cut themselves out of this opportunity.

It is further noteworthy that Article XX lit. (g) GATT only speaks of “exhaustible natural resources”, the conservation of which may be justifiable. The meaning of “exhaustible” is straightforward. It includes all resources that can be depleted. What may qualify as a “natural resource” is more intricate. To clarify their intentions, investment treaty drafters have added that such resources may be both “living and non-living”. This clarification is rooted in the jurisprudence of the WTO Appellate Body, which has also held that the exception applies not only to “mineral” or “non-living” resources but also to “living species which may be susceptible to depletion, such as sea turtles.” In doing so, the Appellate Body particularly highlighted the relevance attached to living resources as an environmental resource. Of significance in investment law may also be the interpretation undertaken by the Panel in US – Gasoline, which ruled that clean air may also qualify as exhaustible natural resources under the exception.

The significance of the exception lies in the range of environmental considerations that may be attached to it. A practical example is the case of Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica. The investor in this case had purchased a property of over thirty kilometers of Pacific coastline to develop it as a tourist resort and residential community. Subsequently, Costa Rica issued an expropriation decree for the property in order to add it to a national park and contribute to the preservation of rare species. Since the investor did not agree with the amount of compensation offered by Costa Rica, it brought an investment claim.

---

796 Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica, ICSID Case No. ARB/96/1, Award, 17 February 2000.
797 In the award, the tribunal made the infamous statement that “[e]xpropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a
4. Protection of Public Morals

IIA general exception clauses that incorporate Article XX GATT or Article XIV GATS fully or in relevant part entail an exception from investment rules for the “protection of public morals”.\(^{798}\) *Sui generis* exception clauses sometimes also use the essentially synonymous phrasing “public morality”.

In contrast to health-related objectives, public morals are a highly relational concept.\(^{799}\) They have been defined in WTO jurisprudence as “standards of right and wrong conduct maintained by or on behalf of a community or nation.”\(^{800}\) In other words, the content of “public morals” depends on the predominant moral values shared by a certain society at a certain point in time.\(^{801}\) Consequently, no international standard of what constitutes “public morals” exists and the standard differs from country to country. The term may also encompass human rights and social standards if they are part of the host State’s legal order.\(^{802}\) The concept’s inherent relativity requires tribunals to grant States a considerable margin of appreciation. While States that want to rely on the public morals exception are required to produce evidence that the adopted measures are taken in response to moral concerns that indeed exist in their society, tribunals...
should generally accept such domestic determinations and adopt a deferential standard of review.803

There are several ways that impairment of foreign investment could be introduced on the basis of public morals. As a practical example, in International Thunderbird Gaming Corporation v. The United Mexican States, a Canadian investor was engaged in the business of operating gaming facilities in Mexico.804 Although the investor had received governmental assurances to the contrary, these machines were later declared illegal gambling equipment and the facilities were closed down upon which the investor filed an investment claim against Mexico. Mexico defended its regulation as reflecting its national views on public morals. Other State measures that are conceivable and may involve questions of public morals include measures relating to alcoholic beverages, sex, slavery, torture of animals and drug abuse.805

5. Maintenance of Public Order

The maintenance of public order is a permissible objective mainly found in IIA general exceptions modeled on Article XIV GATS, but which also features in more common IIA security exception provisions and hybrid provisions incorporating both security and more limited public welfare objectives.806 In the WTO realm, the term has been defined as referring “to the preservation of the fundamental interests of a society, as reflected in


804 International Thunderbird Gaming Corporation v. The United Mexican States, Arbitral Award, 26 January 2006.


806 In particular for the latter two types of clauses, for which recourse to WTO jurisprudence may be of more limited value, the arbitrations involving the Argentine financial crisis and academic commentary dealing with security exception clauses may be illustrative for the meaning of public order, see supra Chapter Five, Part
public policy and law” that relate to “standards of law, security and morality”. In contrast to more serious threats of war or armed conflict, which may threaten a State’s existence, the security dimension of the public order exception only relates to law-enforcement related activities to maintain the rule of law within a State in peacetime.\textsuperscript{808} Clauses drafted on Article XIV GATS often also incorporate footnote 5, which limits the invocation of the public order exceptions to instances “where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.” An identical footnote was also part of the public order exception in the ultimately unsuccessful Multilateral Agreement on Investment,\textsuperscript{809} on which there appears to have been consensus that the application of a State’s criminal laws, anti-terrorist measures, and money laundering regulation qualify under the exception.\textsuperscript{810} In the context of security exception provisions, the tribunals have also ruled that an economic crisis may give rise to a threat to public order.\textsuperscript{811}

6. Protection of National Treasures of Artistic, Historic, or Archaeological Value

Article XX lit. (f) GATT covers measures that are “imposed for the protection of national treasures of artistic, historic or archaeological value”. In the investment context, it expresses the fundamental right of States to take measures to protect its national treasures, and ultimately to preserve its cultural identity, even if they conflict with their IIA obligations. The exception is best understood in a broad sense to encompass everything that is

\begin{itemize}
  \item A, II, 1. See also Burke-White/Von Staden, 48 Virginia Journal of International Law 307, 357-361 (2008).
  \item See VanDuzer/Simons/Mayeda, Integrating Sustainable Development into International Investment Agreements, p. 231 (2012).
  \item See supra Chapter Five, Part A, II, 1.
\end{itemize}
commonly referred to as “cultural property”. The only prerequisite seems to be that the cultural property to be protected must entail a temporal element. Contemporaneous cultural products such as films, music, or literature are probably not covered by the exception’s scope.

The exception’s utility in the investment context is demonstrated by the example of *Parkering-Compagniet AS v. Republic of Lithuania*. In this case, a Norwegian investor participated in a bid to build a parking area in the historical center of Vilnius, Lithuania, which is listed as cultural heritage site of outstanding universal value in the World Heritage List. The project was rejected on cultural heritage grounds and another project was selected that did not foresee excavations under the Cathedral. In reaction, the investor filed an investment claim against Lithuania, alleging discrimination. Although the investors’ claims were dismissed in their entirety by the tribunal, the existence of an exception provision might have deterred the investor from bringing a claim in the first place.

7. Protection of the Environment

Neither Article XX GATT nor Article XIV GATS contain an explicit commitment to the protection of the environment as one of their permissible objectives. This absence stands in marked contrast to the insistence of civil society on and the ensuing demand of States for appropriate regulatory discretion when it comes to the pursuance of environmental policies. To a certain degree, this shortcoming is remedied by the introduction of environmental considerations through Article XX lit. (b) and lit. (g) GATT. The options under Article XIV GATS are more limited since it only includes an exception for the protection of human, animal or plant life or

814 *Parkering-Compagniet AS v Republic of Lithuania*, ICSID Case No ARB/05/8, Award, 11 September 2007.
815 The list is available at http://whc.unesco.org/en/list (last visited 12 November 2017).
health to which environmental considerations may be attached, but no exception for the conservation of natural resources.

Some States therefore include an explicit exception for the protection of the environment in their *sui generis* clauses. This has the advantage that all measures taken for environmental purposes are justifiable and not only those that qualify as either protecting human, animal or plant life or health or that conserve natural resources.

8. Other Explicit Permissible Objectives

The remaining permissible objectives of Article XX GATT and Article XIV GATS that deal with trade in gold and silver (Article XX lit. (c) GATT), products of prison labor (Article XX lit. (e) GATT), obligations under international commodities agreements (Article XX lit. (h) GATT), efforts to ensure essential quantities of materials to a domestic processing industry (Article XX lit. (i) GATT), products in general or local short supply (Article XX lit. (j) GATT), the equitable or effective imposition or collection of direct taxes (Article XIV lit. (d) GATS), or double taxation agreements (Article XIV lit. (e) GATS) are not discussed in this section. They have been, and still are, of limited practical importance in international trade law and are similarly unlikely to yield much importance in international investment law.

II. The Nexus Requirements

If a measure is found to fall under the scope of the exception provision, a tribunal will have to examine whether it was also sufficiently linked to the pursued public interest. The necessary relationship between the State measure and the permissible objective sought by the former is indicated by the nexus requirement.

---

1. Necessary

The nexus requirement that a measure must be “necessary” for the achievement of the permissible objectives is overwhelmingly used in IIA general exception clauses. In part, other nexus requirements in WTO model clauses are even replaced with the necessity threshold during treaty negotiations. The WTO Appellate Body has developed a complex test to evaluate whether a measure is “necessary” to pursue a permissible objective, which may guide the interpretation of investment tribunals.

a. The WTO Approach to Necessity

The condition that the measure in question must be “necessary” to achieve the objective sought appears in Article XX lit. (a), (b) and (d) GATT and Article XIV lit. (a), (b) and (c) GATS and in IIA general exception clauses modeled on them.

Generally, the WTO Appellate Body has clarified that necessity forms an objective rather than a subjective standard. However, a State’s subjective characterization of the measure as evidenced for instance by statutory texts, legislative history or governmental pronouncements can also be relevant in the assessment. As to the meaning of “necessary”, the WTO Appellate Body found on numerous occasions the term is situated on a continuum which stretches between “indispensable” at the one end and “making a contribution to” at the other end. According to the Appellate Body, the meaning of “necessary” lies considerably closer to the pole of “indispensable” than to the opposite pole.

818 See supra Chapter Two, Part B, III.
The Appellate Body has developed a detailed two-step test to determine whether a measure is “necessary”. First, the Appellate Body embarks upon a weighing and balancing of the degree to which the measure achieves its objective against the trade restrictiveness of the measure in light of the importance of the objective sought. In order to do so, it first identifies the importance of the objective pursued by the challenged measure. This is probably the most controversial element of the test since it seems to accord a considerable amount of discretionary power on a WTO tribunal to second-guess the level of protection the responding State deemed appropriate for a given objective. However, the case practice of the WTO Panels and the Appellate Body suggest that an objective will be held to be of high importance once it falls within an explicit exception entailed in the clause.\footnote{822 See \textit{European Communities–Measures Affecting Asbestos and Asbestos-Containing Products}, Appellate Body Report, WT/DS135/AB/R, 5 April 2001, ¶172 (identifying that the protection of human life and health from carcinogenic asbestos products was “vital and important of the highest degree”). See also \textit{China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products}, Panel Report, WT/DS363/R, circulated 12 August 2009, ¶7.817 and \textit{United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services}, Panel Report, WT/DS285/R, circulated 10 November 2004, ¶6.492 (both Panels held that the protection of public morals should be regarded as very important).}

Secondly, the degree to which the challenged measure contributes to the achievement of the objective has to be established. A contribution to the achievement of the objective exists “when there is a genuine relationship of ends and means between the objective pursued and the measure at issue”\footnote{823 \textit{Brazil – Measures Affecting Imports of Retreated Tyres}, Appellate Body Report, WT/DS332/AB/R, adopted on 17 December 2007, ¶145. \textit{Brazil – Measures Affecting Imports of Retreated Tyres}, Appellate Body Report, WT/DS332/AB/R, adopted on 17 December 2007, ¶151 as reiterated in \textit{China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products}, Appellate Body Report, WT/DS363/AB/R, adopted 19 January 2010, ¶¶252-253. Here, the Appellate Body remarked that the effectiveness of an individual measure within a comprehensive policy framework may be hard to assess in the short term and that States are accorded the benefit of the doubt in the prediction of a measure’s effectiveness, cf. \textit{Mitchell/Henckels}, 14 Chicago Journal of International Law 93, 130-131 (2013).} or, if an actual contribution is not immediately observable in the short term, if the measure is “apt to produce a material contribution.”\footnote{824} This approach recognizes the uncertainty that may exist as regards the assessment of the effect of a public policy measure and affords considerable...
deference to the projections of the responding State. Moreover, the suitability of the measure to produce a contribution can be established by a quantitative or a qualitative test.\textsuperscript{825}

Thirdly, the degree to which the measure restricts international trade has to be assessed. \textsuperscript{826} This determination is not to be equated with the degree to which the measure is inconsistent with GATT/WTO obligations, but is to be assessed by considering the measure’s factual impact on imports.\textsuperscript{827}

The results of these enquiries are then weighed and balanced against each other in light of the importance of the objective. The more a measure contributes to its objectives and the less trade-restrictive it is, the likelier it qualifies as “necessary” under the weighing and balancing part of the test.\textsuperscript{828} Considering the competing objectives in light of the importance of the objective sought ensures that an appropriate margin of appreciation is applied in this analysis.\textsuperscript{829}

If a measure preliminarily qualifies as being “necessary”, in a second step an analysis as to whether alternatives to the challenged measure exist that are equally effective and reasonably available but less trade restrictive has to be undertaken.\textsuperscript{830} If an alternative WTO-consistent measure is reasonably available, the measure in question is not necessary. If no WTO-


\textsuperscript{829} See Mitchell/Henckels, 14 Chicago Journal of International Law 93, 130 (2013).

complaint is reasonably available, the measure among the reasonably available ones has to be picked that is the least inconsistent with WTO obligations.\footnote{European Communities – Measures Affect Asbestos and Asbestos-Containing Products, Appellate Body Report, WT/DS135/AB/R, adopted 5 April 2001, ¶171.} The complaining State has to identify less restrictive alternatives to which the responding State must show that the alternative is either not reasonably available or does not achieve the same level of protection.\footnote{Brazil – Measures Affecting Imports of Retreated Tyres, Appellate Body Report, WT/DS332/AB/R, adopted on 17 December 2007, ¶156.} An alternative will not be deemed reasonably available if it is merely theoretical in nature, the State is not capable of taking it, or the measure imposes an undue burden in the form of prohibitive costs or technical difficulties on the responding State.\footnote{China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, Appellate Body Report, WT/DS363/AB/R, adopted 19 January 2010, ¶318; Brazil – Measures Affecting Imports of Retreated Tyres, Appellate Body Report, WT/DS332/AB/R, adopted 17 December 2007, ¶156.} Importantly, the alternative measure proposed by the complaining State must meet the desired level of protection of the responding State.\footnote{Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef, Appellate Body Report, WT/DS161 and 169/AB/R, adopted 11 December 2000, ¶176; European Communities – Measures Affect Asbestos and Asbestos-Containing Products, Appellate Body Report, WT/DS135/AB/R, adopted 5 April 2001, ¶168; China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, Appellate Body Report, WT/DS363/AB/R, adopted 19 January 2010, ¶318.} As the Appellate Body put it “WTO Members have the right to determine the level of protection they consider appropriate” as regards the objectives set out in Article XX GATT (and Article XIV GATS).\footnote{European Communities – Measures Affect Asbestos and Asbestos-Containing Products, Appellate Body Report, WT/DS135/AB/R, adopted 5 April 2001, ¶168.}

b. The WTO Approach to Necessity in International Investment Law

In comparison to recourse to WTO jurisprudence on permissible objectives, the question whether surrounding investment tribunals should take guidance from WTO case law on the necessity nexus requirement is con-
siderably more controversial. In particular, the question concerning how much deference investment tribunals should grant to host States in their necessity enquiry is heavily contested. The problem is approached against the background of the above conclusions that WTO jurisprudence is generally appropriate to guide the interpretation of IIA general exception clauses and that international investment law, in general, is more intrusive on a host State’s regulatory sovereignty that international trade law.836

As outlined in the last section, the importance of a regulatory objective is considered relevant in the weighing and balancing test developed by the WTO Appellate Body to establish necessity. When taking guidance from this test, investment tribunals should be mindful of the Panel’s statement in United States – Gasoline that “it [is] not the necessity of the policy goal that [is] to be examined, but whether or not [the challenged measure] is necessary [...]” to achieve the host State’s objectives.837 In other words, what a tribunal should not do is conduct a de novo review of whether the arbitrators subjectively would have pursued the same objectives, thereby effectively second-guessing a host State’s decision under the pretext of assessing the measure’s objective’s importance.838 Only this way does the tribunal adequately preserve the host State’s sovereign right to decide which policy goals it wants to pursue. Therefore, investment tribunals should generally demonstrate a high degree of deference in their enquiry into the importance of a measure’s objective.839

As regards the question on whether alternative measures are reasonably available, tribunals should be mindful that not every alternative measure is to be considered, but indeed only those that meet the host State’s desired level of protection. Moreover, tribunals are also required to examine whether the pursuance of an alternative measure would lead to an “undue burden”, which may be assessed in – among others – financial terms. Here, tribunals need to take into account that the host State may be better placed to evaluate the efficacy and feasibility of a measure.840

836 For both conclusions see supra Chapter Five, Part B, II, 4.
2. Related to / Relating to

Sometimes, general exception clauses stipulate that the State measure needs to “relate to” or be “relating to” the permissible objective. In particular, the term “relating to” features prominently in Article XX lit. (g) GATT and investment exceptions modeled on or incorporating the clause. The GATT Panel in Canada – Herring and Salmon decided that the terminology “relating to” was not equivalent to the term “necessary” and therefore must mean something different. The Panel went on to interpret “relating to” as requiring that the contested measure must be “primarily aimed at” the permissible objective to be justifiable. The WTO Appellate Body upheld this reading in US – Gasoline, highlighting the “substantial” and not merely incidental or inadvertent relationship between means and ends pursued. In US – Shrimp, however, the Appellate Body avoided the “primarily aimed at” language and instead required a “reasonable” relationship between the measure and the pursued objective. In that case, a “close and real” relationship between the measure and the aim that was “every bit as substantial” as the one in US – Gasoline was deemed sufficient. Therefore, the two requirements under the “relating to” test seem to be, first, the existence of a causal relationship between the measure and the objective pursued and, second, the “substantial”, “close and real”, or “reasonable” nature of the relationship. Due to the split in the jurisprudence, it remains to be seen which approach will become the dominant one in the future. Compared to the “necessity” threshold, the “relating to” test is less demanding and therefore more deferential to a State’s sovereignty.

841 “Relating to” language can also be found in Article XX lit. (c) GATT and Article XX lit. (e) GATT. However, the respective exceptions for the imports and exports of gold and silver and products of prison labor have not attracted much attention and have not been the subject of trade dispute settlement thus far.


3. Imposed for

The requirement that a contested measure must be “imposed for” the permissible objective only appears in IIA general exceptions in connection with the “protection of treasures of artistic, historic or archaeological value”. To date, however, there exists no WTO case law interpreting this nexus requirement. Nevertheless, one may ascertain that “imposed for” probably constitutes a less onerous requirement than “necessary for”. According to its ordinary meaning, a measure that is “imposed for” an objective does not necessarily have to be “necessary” for its achievement. In other words, while “imposed for” seems to require that the measure must be aimed at the objective, the measure does not have to qualify as the least restrictive means available to the host State.\(^{847}\) The test for this nexus requirement hence comes close to the interpretation accorded to the wording “relating to” in early GATT cases.\(^{848}\)

4. Designed and Applied to / for

Other *sui generis* general exception provisions entail the requirement that the measure has to be “designed and applied” for the permissible objective. Again, this nexus requirement does not appear in Article XX GATT or Article XIV GATS so that the utility of WTO jurisprudence in its construction is limited. Starting again from the ordinary meaning of the terms, the use of “designed” suggests that the State must have specifically tailored the measure to achieve the sought objective. However, that alone is insufficient. The State must have also “applied” the measure to achieve the aim, which suggests that the measure must also have been implemented accordingly to qualify under the exception.

---


5. Directed to

A number of sui generis general exception provisions require that the measure must be “directed to” the permissible objective. This nexus requirement is not contained in the WTO model provisions, which means that investment tribunals will consequently not be able to rely on WTO jurisprudence in its construction. It is safe to assume that, in comparison to the more common necessity threshold requirement, the phrasing “directed to” constitutes a more lenient nexus standard. Its ordinary meaning suggests that a governmental measure is permissible as long as it is intended by the State to pursue the legitimate objective. Its interpretation thus resembles the possible interpretation of the “imposed for” nexus standard and the interpretation accorded to “relating to” in Canada – Herring and Salmon, where the WTO Appellate Body held that a measure must be “primarily aimed at” the achievement of the permissible objective to be justifiable.

6. Which it Considers Necessary

One IIA employs “which it considers necessary” language for the five permissible objectives of its general exception clause. This formulation’s significance lies in the fact that it makes the clause self-judging, making the State the sole arbiter of the question of whether the conditions for the invocation of the exception are fulfilled. Tribunal scrutiny is limited to a mere good faith review. The language is borrowed from and often used in security exception clauses, which allow the State to derogate from its investment obligations in case of a threat to public order, international peace and security, or to protect its own essential security interests. In instances such as these, which pose a threat to the very existence of the State itself, it may be understandable to provide the State with the opportunity to take the measures it considers necessary to end the peril without being second-guessed by a tribunal with the advantage of hindsight. Since the absence of an effective judicial review mechanism increases the danger of abusive

---

850 Article 5 of the Framework Investment Agreement in APTA Participating States (signed 15 December 2009).
invocations of the clause, however, the inclusion of such language calls for exceptional reasons. It is at least doubtful whether these reasons are present in the context of the pursuance of non-economic policy goals usually entailed in general exceptions, and most States – with the exception of the APTA members – do not seem to hold this view and thus refrain from using self-judging language.

7. No Nexus Requirement

On the rare occasion, IIA general exception clauses do not use any particular nexus requirements and employ the terms “to” or “for” to denote the required degree of connection between means and end. This signifies that a simple causal link between measure and objective suffices for successful reliance on the exception.

III. The Introductory Clause (“Chapeau”)

After having established that the proposed measure is aimed at achieving a permissible objective and is adequately connected to it as stipulated by the nexus requirement, a tribunal will have to assess the measure against the introductory paragraph (or “chapeau”) preceding the majority of general exception provisions drafted on the WTO model provisions.

The chapeau’s main purpose and function is to prevent the abusive invocation of the exception provision. Its current form originates in Article XX GATT, was later included in Article XIV GATS and is now regularly transplanted into IIA general exception clauses modeled on the WTO provisions. Its requirements, according to the WTO Appellate Body, emanate from the doctrine of good faith, recognized as general principle under public international law, which provides a safeguard against any misuse or abuse of the general exception provision. The WTO Appellate Body infers from this that there is a “need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the ex-

ceptions of Article XX, specified in paragraphs (a) to (j), on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand.\textsuperscript{852}

The task of interpreting the introductory clause has thus been characterized as “the delicate one of locating and marking out a line equilibrium between the rights of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions [...] of GATT 1994.”\textsuperscript{853} The WTO Appellate Body went on to explain that this “line of equilibrium” is meant to ensure that “neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement.”\textsuperscript{854}

Transported to the investment world, the difficulty in the interpretation of the introductory clause thus lies in the reconciliation of the stipulated conditions against abusive invocation with the rights of the host State to enjoy its regulatory flexibility in the policy areas covered by the general exception clause.

a. Application of the Measure

As emphasized by the WTO Appellate Body in \textit{United States – Gasoline}, under the \textit{chapeau} it is not the measure as such which is be assessed but rather the manner in which the measure was applied in the case at hand.\textsuperscript{855} This is important to note since it means that the assessment of the challenged measure is different under the introductory clause than the enquiry as to whether a State measures qualifies as furthering a permissible objective under the individual exception sub-paragraph. The different focus may, for instance, mean that a legislative measure that provides for ample flexibility in its application may pass scrutiny under the exception para-


graph, but that the actual implementation of the legislation does not meet the threshold of the introductory clause. As a result, the State measure would not be justifiable under the general exception clause.

b. Arbitrary or Unjustifiable Discrimination

After having established that there is a difference in treatment in the application of a measure, a tribunal will have to ascertain whether this discrimination was unjustifiable or arbitrary. What is considered to be “unjustifiable” or “arbitrary” in WTO jurisprudence is less clear. Academic commentary on the issue usually give an account of a number of cases and factual circumstances in which the Appellate Body found unjustifiable or arbitrary discrimination. These findings are highly fact-specific and therefore of limited probative value in investment law.

Picking out the more general points, discrimination will be deemed “arbitrary or unjustifiable” if it is not rationally connected to the objective that the challenged measure is intended to pursue. Therefore, the analysis focuses on the cause or rationale of the discrimination as opposed to its effect. Its rationale must be considered in light of the objectives listed in the exception sub-paragraphs of Article XX GATT or Article XIV GATS. This means that discriminatory treatment that bears no relationship to the objective pursued by the contested measure, but is based on different causes, cannot be justified under the chapeau. This is to ensure

859 Brazil – Measures Affecting Imports of Retreated Tyres, Appellate Body Report, WT/DS332/AB/R, adopted on 17 December 2007, ¶232. The discriminatory treatment in this case was motivated by Brazil’s desire to comply with a MERCOSUR ruling while the contested measure was intended to further the protection of public health and the environment.
that measures that derogate from WTO obligations are applied consistently.\textsuperscript{860}

For example, legislation that generally qualifies as being necessary for the protection of public health but differentiates in its individual application on two investors on the basis of non-health considerations would amount to unjustifiable or arbitrary discrimination and thus would fail the \textit{chapeau} test.

c. Between Investments or between Investors (Where Like Conditions Prevail)

Most IIA general exception clauses clarify that the discrimination needs to take place between investments or between investors, sometimes complemented with the words “where like conditions prevail”. This is a rather straightforward clarification that the relevant comparators in the discrimination enquiry are (like) investments or investors. More obscure are clauses stipulating that the relevant comparators are “countries”, “States”, or “Parties” “where like conditions prevail”. Considering that general exceptions are applied to measures enacted by a single State within its own borders, there is no apparent link to the connection of conditions in other countries.\textsuperscript{861} It is conceivable that the language relates to nationality-based discrimination of foreign investors. However, this would already be covered by the term “investors”, which encompasses discrimination between two foreign investors as well as between one foreign and one domestic investor. The meaning of the text thus remains obscure and should therefore be abandoned.

d. Disguised Restriction of International Trade (or Investment)

WTO case law on the interpretation of the notion of disguised restriction of international trade is rare. In \textit{US – Gasoline}, the Appellate Body held that concealed hindrances do not exhaust the term “disguised restric-

Rather, a disguised restriction exists if a measure that formally meets the requirements of the general exception clause in actual fact is discriminatory or designed to pursue a trade-restrictive objective. Accordingly, the three groups of measures which have been found to fall under this requirement in the jurisprudence of the WTO Appellate Body are the following:

- Measures that are not published or announced by the competent authorities;\textsuperscript{863}
- Measures that constitute disguised discrimination;\textsuperscript{864} and
- Measures whose “design, architecture and revealing structure” give away their protectionist character.\textsuperscript{865}

These principles are readily transportable to the interpretation of the \textit{chapeau} of investment general exception clauses, which use language such as a “disguised restriction on investors or investments”, a “disguised restriction on investment of investors of the other Party” or a “disguised restriction on investment flows”. It is noteworthy that some IIA general exceptions still employ the terminology “disguised restriction on international trade”.\textsuperscript{866} The same holds true for IIA general exceptions that merely incorporate the WTO provisions by reference. The purpose of this terminology is unclear. Considering that it may become a back door to investors raising trade law issues to confront a measure before an investment tribunal,\textsuperscript{867} which, it may safely be assumed, is not intended by the State Parties, it should be abandoned for more investment-specific language.

\begin{itemize}
  \item \textsuperscript{863} European Communities–Measures Affect Asbestos and Asbestos-Containing Products, Panel Report, WT/DS135/R, circulated 18 September 2000, ¶8.234.
  \item \textsuperscript{866} Particularly Canadian IIA.
\end{itemize}
3. The Relevance of the Chapeau to the Analysis of Nexus Requirements

José Alvarez and Tegan Brink point out that the existence of the chapeau may have an impact upon the interpretation accorded to the necessity requirement. The assumption seems to be that the necessity test does not need to be overly strict itself, for instance by requiring that a measure does not amount to discrimination to be necessary, since there is another safeguard against arbitrary or unjustifiable discrimination on the level of the chapeau. This argument is not necessarily restricted to the necessary nexus requirement but could be put forward for the interpretation of any other nexus requirements. In consequence, Alvarez and Brink caution that any comparative exercise needs to be mindful of this fact and must examine whether principles developed in the jurisprudence on Article XX GATT or Article XIV GATS can properly inform the interpretation of clauses that do not contain comparable chapeau requirements. This observation may be of relevance for sui generis and other IIA general exception clauses that omit a chapeau paragraph or stipulate other good faith or non-discrimination requirements.

The assumption that the chapeau may have an impact on the interpretation of the necessity requirement has a certain appeal. However, as demonstrated by Andrew Mitchell and Caroline Henckels, there is little evidence in WTO jurisprudence to support this claim. In fact, the WTO Appellate Body has used the general exceptions’ necessity test to inform its interpretive approach to other WTO provisions, for instance in the SPS and TBT Agreements, that feature a necessity requirement but no chapeau clause. They therefore come to the conclusion that “although sensitivity to context is required, the presence of the chapeau does not preclude the

---

868 See Alvarez/Brink, in: Sauvant (ed.), Yearbook on International Investment Law and Policy 2010-2011 319, 345 (2011). They submit this argument in the context of exploring whether the interpretation of necessity requirements in IIA security exception may be guided by WTO jurisprudence on general exceptions. However, the same question may appear in the context of IIA general exceptions that do not stipulate chapeau requirements.


871 See supra Chapter Two, Part C, II, 3, b.

WTO necessity test informing the approach taken by investment tribunals.” While one may agree with this conclusion, investment tribunals should nevertheless pay attention to the fact that an influence of the chapeau on the amount of deference accorded under the nexus requirement ultimately cannot be ruled out.

IV. Notification Requirements

Sometimes, States draft their general exception clauses with notification requirements as further safeguards against abusive invocation. One can distinguish between two different forms of notification requirement, which feature varying degrees of strictness. The simplest form can be found for instance in Article 15(3) of the Japan-Colombia BIT, which reads as follows:

**Article 15 General and Security Exceptions**
1. [General exception provision]
2. [Security exception provision]
3. In cases where a Contracting Party takes any measure, pursuant to paragraph 1, that does not conform with the obligations under this Agreement other than Article 12, that Contracting Party shall endeavor to, as soon as possible, notify the measure to the other Contracting Party.

While the paragraph stipulates the requirement that measures taken pursuant to the general exception clause need to be notified to the other State Party, its mandatory language “shall” is qualified by the verb “endeavor”, which does not place a definite legal obligation to inform the other State Party to the IIA on the State taking the measure. Rather, the State is only obliged to make an effort to inform the other State, which constitutes a

---

873 See Mitchell/Henckels, 14 Chicago Journal of International Law 93, 137 (2013). Their observations largely deal with IIA security exception clauses employing necessity requirements but not chapeau provision. However, they also apply to the case of IIA general exception clauses.

874 For details on this drafting practice, see supra Chapter Two, Part C, II, 3, c. See also Salacuse, The Law of Investment Treaties, p. 343 (2010) for a similar observation.

875 Article 15 of the Japan – Colombia BIT (signed 12 September 2011).
considerably weaker obligation to act as opposed to an obligation to achieve a certain result.

A more rigorous example of a notification requirement is found in Article 18(3) of the Japan-Laos BIT, which provides as follows:

**“Article 18 General and Security Exception Clauses**

3. In cases where a Contracting Party takes any measure, pursuant to paragraph 1 of this Article, that does not conform with the obligations of the provisions of this Agreement other than the provisions of Article 13, that Contracting Party shall, prior to the entry into force of the measure or as soon thereafter as possible, notify the other Contracting Party of the following elements of the measure: (a) sector and sub-sector or matter; (b) obligation or article in respect of the measure; (c) legal source of the measure; (d) succinct description of the measure; and (e) purpose of the measure.”

Notification requirements of this type of clause are much more sophisticated compared to the prior provision. They require the State Party that includes the clause to provide the other Contracting Party with details on a number of elements of the measure, including a succinct description of the measure, its purpose and legal source, the infringed obligations under the treaty, and the affected industrial sector or sub-sector. In light of the virtually limitless number of variations in which a regulatory State measure may interact or adversely affect foreign investment, the required richness of detail is indeed prudent to enhance transparency of the domestic legal framework and prevent abuses. The expedient nature (“shall”) of the notification, which has to take place either “prior to the entry into force of the measure or as soon thereafter as possible” adds an additional layer of protection against abuses.

**D. The Impact of Inconsistent Investment Treaty Practice**

A last general interpretive issue raised by the inclusion of general exception clauses is the impact of inconsistent investment treaty practice on the
interpretation process. As discussed above, States have only recently begun to incorporate such clauses into their IIA programs. It follows that several States have IIAs currently in force that contain similar or even identical treaty language in their substantive provisions but only sporadically subject their application to a general exception provision. Examples are the treaty programs of Canada and Mauritius. To date, 36 out of 38 Canadian FIPAs contain a general exception provision, which means that two FIPAs do not. Likewise, 28 out of 46 Mauritian BITs include general exceptions leaving 18 Mauritian BITs without a respective clause. At times, States also contemporaneously negotiate IIAs of which some include general exceptions while others do not. For instance, in 1997 Mauritius concluded four BITs, with Indonesia, Mozambique, Pakistan, and Portugal. The treaties with Indonesia, Mozambique, and Pakistan include a general exception provision for the protection of public health and the prevention of diseases and pests in animals or plants, while the contemporaneously concluded BIT with Portugal does not entail a respective provision. Save for the omission or inclusion respectively, the protection accorded by the four BITs is essentially identical.

Such inconsistent treaty practice may pose different interpretive difficulties. The first question relates to the possible influence of the inclusion or omission respectively of general exception clauses on the interpretation of other treaty disciplines in the same IIA. The second and related interpretive problem raised by inconsistent treaty practice appears in the interpretation of two contemporaneously concluded and largely identical IIAs by the same State, of which one includes a general exception provision

877 See supra Chapter Two, Part A.
878 As a side note, while the majority of Canadian FIPAs include general exception clauses modeled on Article XX GATT, the general exception provision of NAFTA (Article 2101), to which Canada is a party, does not apply to its investment Chapter 11.
883 Article II(3) of the Mauritius – Indonesia BIT.
884 Article 12 of the Mauritius – Mozambique BIT.
885 Article 12 of the Mauritius – Pakistan BIT.
while the other does not. This scenario begs the question whether the con-
scious or unconscious omission of general exception clauses in an IIA
demonstrates intent on part of the host State to eliminate its sovereign
right to regulate in the public interest by entering into the IIA to the extent
that such regulation violates investment obligations.

I. The Impact of the Inclusion or Omission of General Exception Clauses
in a Treaty on the Interpretation of Other Investment Disciplines in the
Same Treaty

The first scenario relates to the impact of the inclusion or omission respec-
tively of general exception clauses on the interpretation of other treaty dis-
ciplines contained in the same treaty. The underlying hypothesis is that tri-
bonals might be tempted to avoid considerations of the host State’s regula-
tory purpose on the level of the obligation, for instance in their expropria-
tion or national treatment inquiry, on the basis that such an assessment
would render an existing general exception provision effectively redundant. The argument thus suggests that the presence of a general excep-
tion clause might result in a narrow interpretation of substantive IIA obli-
gations discounting the public interest on the level of the obligation and
only taking it into account on the level of the exception. Cases of two
comparable treaties concluded by one State that contain practically identi-
cal treaty provisions, save for the inclusion or omission of the general ex-
ception clause may be particularly symptomatic.

According to Article 31(1) VCLT, the interpretation of a treaty must be
undertaken in good faith and guided by the ordinary meaning of its terms,
in their context, and in the light of the treaty’s object and purpose. The rel-
evant context in the interpretation of IIA obligations includes the remain-
ing text of the treaty, Article 31(2) VCLT. The rationale of the context’s
inclusion in the interpretive process is that one treaty clause shall not be
construed in a way that would contradict the meaning of another clause in
the same treaty. There have indeed been numerous occasions in which
investment tribunals have been influenced in their interpretation by the

887 See Orakhelashvili, The Interpretation of Acts and Rules in Public International
context provided by other provisions in the same treaty. 888 The context may thus serve as the basis for an argument that the presence of an exception clause in a treaty, compared to an identical treaty with no general exception provision, provides informative context to the interpretation of other treaty disciplines contained in the same treaty.

That being said, IIA tribunals have also disregarded the context on occasion and held that some treaty provisions are sufficiently independent to stand alone without influence from the context of other provisions in the treaty. 889 As regards general exceptions, it is equally doubtful whether tribunals should take the presence of an exception clause as an argument to lower the standard of review with regard to the assessment of treaty violations to the effect that the regulatory purpose is discounted in the tribunal’s first order inquiry. There are good arguments to suggest that the regulatory purpose needs to be considered – where possible – already on the level of the obligation and not only on the level of the exception. 890 The first ties in with the exhaustive list of public purposes contained in general exception clauses. What on the one hand acts as immanent safeguard against overly broad or abusive invocation, on the other hand limits State action justifiable under the clause to the values enumerated therein. Given the difficulty of pursuing treaty amendments, States would hence be locked into a closed list of policies for a considerable time without the possibility of legitimately pursuing public welfare measures not covered by the clause’s scope if the regulatory purpose was ignored on the level of the obligation. This arguably cannot be the intention of States in including general exceptions, which aim to enhance and not limit the States’ regulatory flexibility. Moreover, as a more symbolic reason, it would be a mistake to force a State to justify one of its non-discriminatory and non-arbitrary measures taken for a legitimate public purpose before an internation-

888 For a list of pertinent arbitrations refer to Weeramantry, Treaty Interpretation in Investment Arbitration, ¶3.54, fn. 108 (2012).
889 See Weeramantry, Treaty Interpretation in Investment Arbitration, ¶3.57 (2012) who refers to the example of the tribunal in Salini Construttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004, ¶¶128-130, which held that the meaning of the BIT’s umbrella clause is not affected by other provisions of the BIT.
890 Similar arguments may be advanced to rebut the allegation that general exception clauses limited the regulatory flexibility that exists within the interpretation of the national treatment standard, see supra Chapter Four, Part D, III.
al tribunal. Instead, there should not even be the finding of a treaty violation calling for a justification in the first place. Such an interpretive approach would also not make general exception clauses effectively redundant. Even if the public interest is considered in the interpretation of some treaty obligations, general exception clauses retain their place in cases involving the violation of other treaty standards where the regulatory purpose is less relevant or not relevant at all in the first order inquiry. In addition, they act as complementary backstop if, for whatever reason, the tribunal does not consider the regulatory purpose in its treaty violation inquiry and thus guarantee greater legal certainty and regulatory flexibility. Inconsistent treaty practice should therefore not tempt tribunals to take the presence of general exceptions as having a narrowing impact on the interpretation of other obligations contained in the treaty.

II. The Interpretive Impact of the Inclusion or Omission of General Exception Clauses Across Different Treaties in the Same Treaty Program

The second scenario deals with the impact of inconsistent treaty practice on the interpretation of contemporaneous treaties out of which one includes general exceptions while the other does not. The question here is what effect the presence of general exception clauses in other treaties concluded by one of the treaty Parties may or may not have on the interpretation of the applicable IIA that lacks a respective provision. In other words, does the omission of a general exception clause in an IIA by a host State, which habitually incorporates such clauses in its other IIAs, create a presumption in favor of a narrow construction of substantive treaty obligations, leaving no room for public interest considerations, with the argument that the host State intentionally omitted a general exception clause, which would have acted as a special provision to which public interest consideration could have been attached, in this specific treaty?

Again, the VCLT serves as starting point of the examination. In particular, Article 31(2) and (3) VCLT give some guidance on when to take recourse to other international agreements or instruments in the interpretation of a treaty. According to these rules, another international agreement, rule or subsequent practice is only relevant for the interpretation of a treaty if either the Parties to both international agreements are identical, the rule is applicable in the relations of both Parties, or the subsequent
practice establishes agreement among them. Since BITs and most PTIAs
are bilateral in nature, though, the treaty Parties of two or more IIAs nec-
essarily differ. For the same reason, the treaty practice of one Party to the
IIA at issue cannot usually be taken as to establish agreement between
both Parties. Because of this disparity in the treaty Parties, other IIAs do
not fall in any of the categories identified in Article 31(2) or (3) VCLT.

The lack of textual grounding in the VCLT notwithstanding, it is an em-
pirical fact that international courts and tribunals frequently look at third
treaties in order to ascertain the meaning of a term in the treaty in question
although the treaty Parties disagree. Richard Gardiner generally discusses
such comparative interpretive exercises under the heading of Article 31(3)
lit. (c) VCLT and observes that it constitutes “such an accepted and estab-
lished practice that it is hard to find any situation in which justification in
terms of the [VCLT rules] has been presented.” Correspondingly, invest-
ment tribunals have also used the antecedent or subsequent treaty practice
of one or more State Parties to assist in the interpretation of their treaty
without justifying this practice by recourse to the VCLT rules. For ex-
ample, the tribunal in CMS v. Argentina arrived at the conclusion that the
applicable security exception provision in the US –Argentina BIT was not
self-judging by comparing the clause’s wording to the provisions found in
the GATT and in other BITs. Reasons for tribunals possibly deeming
the comparison particularly fruitful probably include that IIAs largely con-

891 See Gardiner, Treaty Interpretation, p. 283 (2008). But see also Reinisch, in:
discusses the relevance of other international investment agreements under the
heading of “contextual interpretation” within the meaning of Article 31(1) VCLT.

892 See Reinisch, in: De Mestral/Lévesque (eds.), Improving International Invest-
ment Agreements 323, 332 (2013) and Reinisch, in: Bungenberg, et al. (eds.), In-
ternational Investment Law 372, 386 (2015), who cautions that whether reliance
on such third treaties is justified “raises complex legal questions”. See also
Schreuer, in: Fitzmaurice, et al. (eds.), Treaty Interpretation and the Vienna Con-
vention on the Law of Treaties 129, 135 (2010); Newcombe/Paradell, Law and
Practice of Investment Tribunals, pp. 112-113 (2009). For reasons and limitations
of such cross-fertilization see Brown, A Common Law of Adjudication, pp.

893 CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/
01/8, Award, 12 May 2005, ¶370. Other arbitrations in which the tribunal has ta-
taken recourse to third treaties include the following: Fedax N.V. v. The Republic of
Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to
Jurisdiction, 11 July 1997, ¶34 (taking recourse to “most contemporary bilateral
tain similar or identical provisions, apply to essentially the same type of subject matters and are often based on a model treaty which can be referenced.894 Other IIA tribunals have been more reluctant to compare IIAs, and, for instance, pointed to the difference in the treaty parties895 or opined that the remaining BIT practice of both parties to the BIT at issue was of “limited probative value”.896 As rightly pointed out by the tribunal in Siemens A.G. v. The Argentine Republic when comparing a model BIT with the textually different BIT at issue “it is not in [the tribunal’s] power to second-guess [the Argentina – Germany BIT drafters’] intentions by attributing special meaning to phrases based on whether they were or were not part of a model draft”.897 In particular, the conscious or unconscious omission of a treaty provision cannot be testament to the intention of the State to completely relinquish its sovereign right to regulate by concluding an IIA.898 Many reasons for the omission or inclusion of general exception clauses in only some treaties but not in others are conceivable, but not easily discernable from a comparison of the treaties’ texts. Influential for the decision

D. The Impact of Inconsistent Investment Treaty Practice

895 Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, 11 May 2005, ¶143.
896 Aguas del Tunari S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, 21 October 2005, ¶309-314. For more reasons of IIA tribunal to avoid reliance on other treaties as interpretive aid, see Weeramantry, Treaty Interpretation in Investment Arbitration, ¶5.37 (2012).
may be the negotiating power of the Parties as well as the circumstances surrounding the particular negotiations. The omission of a general exception provision may have been due to the objections of only one of the two treaty Parties to which the other Party reluctantly gave in. Such objections may have different reasons as well, including that the objecting State perceives its regulatory flexibility sufficiently safeguarded in the interpretation of treaty obligations. Andrew Newcombe suggests that another potential reason relates to the treaty making strategy of States. According to him, States may opt to include general exceptions when they expect to be the capital-importing country in relation to the other treaty Party in order to secure more regulatory flexibility for themselves as host countries. Conversely, States would be more likely to exclude such clauses in the negotiating process when they expect to be the capital-exporting country so as to not jeopardize the IIA protection of their nationals’ investments abroad.\textsuperscript{899} While this idea sounds plausible, this study’s statistical survey did not find evidence for such a negotiating strategy. In particular, the inclusion of a general exception provision does not seem to depend on the level of economic development of the treaty Parties or respective disparities between the Parties.\textsuperscript{900} Notwithstanding, whatever the reason of the omission of general exceptions in individual treaties may be, one cannot arrive at the conclusion that inconsistent treaty practice in a State’s BIT program is evidence of an intention of that State to eliminate its sovereign right to regulate by entering into an IIA without an exception clause.

The problem could also be framed as a matter of treaty silence on an issue that could have been included in the treaty. Dealing with the impact of such silence on the interpretation of a treaty, tribunals on occasion have had regard to similar treaties. In most instances, they dealt with the question under which circumstances terms may be implied that have not been explicitly included in the treaty.\textsuperscript{901} More insightful for the present purposes is the decision in \textit{Tokios Tokelés v. Ukraine} in which the tribunal

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{900} See supra Chapter Two, Part A, III.
\item \textsuperscript{901} See, e.g., recently Abaclat and Others v. The Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, ¶¶517-520; Siemens A.G. v. Argentine Republic. ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, ¶140; Salini Constructori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/1
\end{itemize}
\end{footnotesize}
looked to similar treaties in order to make sense of the absence of a qualification to a treaty provision in the treaty at issue. That such a qualification had been included in other IIAs was regarded “as a deliberate choice of the Contracting Parties” not to impose limits on the provision in the treaty at hand.\textsuperscript{902} Adopting this argumentation, one could thus reason that the presence of general exceptions in other IIAs concluded by one of the Contracting Parties was evidence of its intention not to include gateways for the considerations of the regulatory purpose in the IIA at issue. However, tribunal should generally be reluctant to easily read silence as implying a certain intention on part of the State Parties. As the tribunal in \textit{Salini Construttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan} pointed out “silence may mean agreement or disagreement. It also may happen that no conclusion should be drawn from silence.”\textsuperscript{903} Similarly, arbitrator Georges Abi-Saab noted in his dissenting opinion in \textit{Abaclat v. Argentine Republic} that silence needs to be qualified with surrounding circumstances to entail legal consequences.\textsuperscript{904} As elaborated in the preceding paragraph, the reasons for the inclusion or omission of general exceptions may be widespread. They thus cannot be inferred from an alleged silence in a treaty text.

For the above reasons, the influence of inconsistent treaty practice as regards the inclusion or omission of general exceptions on the interpretation of other IIAs remains an, albeit interesting, hypothesis but finds no basis in the rules of interpretation under the VCLT. Since it is furthermore impossible to deduce an intent on part of the treaty Parties, however framed, from the omission of general exceptions, inconsistent treaty practice should have no bearing on the interpretation of general exceptions at all.

\textsuperscript{902} Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, ¶36.
\textsuperscript{904} Abaclat v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, Dissenting Opinion of Abi-Saab, 28 October 2011, ¶168.
The plain fact that Chapter Five is the longest section of this study demonstrates that the inclusion of general exception clauses in IIAs poses a significant number of interpretation problems. Much of the uncertainty stems from the fact that tribunals have yet to address general exception clauses, but also from the lack of express stipulations on part of the State community as to how investment general exception clauses that are predominantly drafted on WTO model provisions should be interpreted.

As has been shown above, tribunals can be expected to approach general exceptions narrowly as derogations from the investment protection agenda once they are called to adjudicate upon them for the first time. This is regrettable and at odds with the intention of States that have included general exceptions in IIAs, which is to recalibrate the relationship between investment obligations and their right to regulate for the public interest that has been thrown out of balance in the eyes of many States. Ultimately, general exceptions are intended to enhance the host States’ regulatory flexibility.905 A better interpretive approach would hence be to steer a middle course and approach general exceptions without interpretive presumptions and only in accordance with the VCLT rules on interpretation.

In this respect, it seems advisable for investment tribunals to have regard to the wealth of WTO jurisprudence on the interpretation of general exception provision. Investment tribunals have frequently used WTO case law to inform their interpretation of treaty provisions that are shared across the two legal systems. They have taken particular care to examine the textual heterogeneity or homogeneity of the clauses, potentially differing objectives, and pertinent systematic differences across international trade and investment law to decide whether a cross-fertilization of the jurisprudence is in order. Applying these criteria to the case of general exceptions, one must come to the conclusion that, especially where comparable texts exist, recourse to WTO jurisprudence to guide the interpretation of investment general exception clauses is legitimate and appropriate. What is more, such recourse will also assist in fashioning a more uniform interpretive approach and hence mitigate fears of divergent rulings and growing legal uncertainty.

905 See supra Chapter Four, Part B, II.
The jurisprudence of WTO Panels and the Appellate Body as regards permissible objective, nexus requirements, and *chapeau* requirements may indeed provide helpful guidance in investment cases. Examples of conflicts between investment protection and the pursuance of the non-economic policy objectives that may be solved by general exceptions are readily apparent in past investment jurisprudence. Particular attention should be paid by tribunals to demonstrate the appropriate amount of deference when adopting the intricate necessity test of the WTO Appellate Body.
The last substantive Chapter of this study deals with the relevance of general exception provisions for selected individual standards of treatment, which appear with certain regularity and similarity in all or almost all IIAs. As a recurrent theme in this study, it is again recalled that the majority of general exception provisions are incorporated into IIAs by means of legal transplantation from or at least inspired by similar or identical clauses in the WTO realm.\footnote{See supra Chapter Two, Part B.} This practice needs to be mindful of the fact that rules imported from another legal system are not necessarily suited for this new legal context and may yield unforeseen or even perhaps undesirable results. Similar concerns appear in the (still sparse) literature on IIA general exception provisions. Most of these are articulated regarding the relationship between the new general exception provisions and three traditional investment obligations.

A. General Exception Clauses and the Prohibition of Uncompensated Expropriation

I. General Exception Clauses and the Obligation to Pay Compensation

The prohibition of uncompensated expropriation is at the core of treaty-based investment protection.\footnote{See Dolzer/Schreuer, Principles of International Investment Law, p. 98 (2012).} Virtually all modern IIAs contain specific provisions, stipulating preconditions for and consequences of expropriatory State action. These provisions purport to reflect customary international law and usually provide for a right to compensation for both direct and indirect takings of foreign property irrespective of the purpose of the governmental action. In other words, the norms do not prohibit expropriation, which is considered to be a fundamental right of the host State derived from the notion of territorial sovereignty.\footnote{See Dolzer/Schreuer, Principles of International Investment Law, p. 98 (2012).} In fact, they anticipate that...
States expropriate for public purposes and allow them to do so as long as they pay (adequate) compensation to the (former) owner.

The interaction between this traditional duty to compensate for expropriations and the new general exception provisions, which purport to exempt host States from liability for breaches of the underlying treaty, is unclear. Indeed, a lot of commentators seem to struggle with the idea that States might have intended IIAs with general exceptions to provide less protection to foreign investors with respect to expropriatory measures than pre- and coexisting customary international law does.\footnote{See Potestá, in: Treves, et al. (eds.), Foreign Investment, International Law and Common Concerns 193, 210 (2014); Legum/Petculescu, in Echandi/Sauvé (eds.), Prospects in International Investment Law and Policy 340, 362 (2013); Lévesque, in: Echandi/Sauvé (eds.), Prospects of International Investment Law and Policy 363, 368 (2013); Newcombe, in: De Mestral/Lévesque (eds.), Improving International Investment Agreements 267, 282 (2013); Newcombe, in: Cordonier Segger, et al. (eds.), Sustainable Development in World Investment Law 355, 369 (2011); Spears, 13 Journal of International Economic Law 1037, 1064 (2010). See also Alvarez/Brink, in: Sauvant (ed.), Yearbook on International Investment Law and Policy 2010-2011 319, 342 (2011) for similar concerns in the application of security exceptions.} While their concern may be appreciated from a policy perspective, the fact that general exception provisions clauses would deviate from customary international law if they were to apply to the expropriation provision does not constitute a legal problem per se. Not only is customary law evolutionary, meaning its content can change over the course of time if there is a mirroring shift of State practice and opinion juris to this effect, but it is also possible to contract out of custom, \textit{i.e.} to conclude a treaty in which the protection accorded in it differs from the protection under customary international law. The International Court of Justice acknowledged this possibility in the \textit{Case Concerning Elettronica Sicula S.p.A. (United States of America v. Italy)} requiring only that the intention of the treaty Parties to contract out of custom is clear.\footnote{See Case Concerning Elettronica Sicula S.p.A. \textit{(ELSI) (United State of America v. Italy)}, Judgment, 20 July 1989, I.C.J. Reports 1998, 15, 31, ¶50, in which the ICJ acknowledged that contracting out of custom was possible but that the intention to do so must be clear.} Since IIAs usually lack an insightful negotiating history or other pertinent statements by the treaty Parties,\footnote{See Newcombe/Paradell, Law and Practice of Investment Treaties, p. 113 (2009); Schreuer, in: Fitzmaurice, et al. (eds.), Treaty Interpretation and the Vienna Con-
it, applicable to the remainder of the treaty and categorically exempts host States from liability under the IIA for the pursuance of the enumerated policy objectives. Therefore, it gives at least a fair indication that States indeed intended to contract out of customary international law as regards the duty to compensate (non-discriminatory and non-arbitrary) expropriatory actions that were necessary to pursue (or relate to) one of the enumerated public policy objectives.912

In addition, this inference that general exceptions cannot have been meant to apply to the IIA expropriation standard because of a more extensive customary international law protection blurs the crucial difference between the two legal regimes. While customary international law may entail a right to compensation for expropriations, the IIA empowers foreign investors only the rights specifically granted by the IIA.913

Another argument explored by the critics surrounding the application of general exceptions to the expropriation standard ties in with the wording of the majority of general exception provisions, which, in relevant part, provides that “nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary for …” (or equivalent language). Some commentators argue that this language, while not “preventing” States from taking necessary measures, implies that States are still obliged to issue compensation for expropriatory actions.914 How-


912 This possibility is also recognized by Alvarez/Brink, in: Sauvant (ed.), Yearbook on International Investment Law and Policy 2010-2011 319, 344 (2011) who are generally reluctant to admit the usefulness of a general exception provision in IIAs but still acknowledge that “if BIT parties want to limit investor protections in this fashion, including those under customary international law, they can surely do so” (emphasis added).

913 See Titi, The Right to Regulate in International Investment Law, p. 181 (2014) who, however, wants to allow general exceptions to function only with respect to indirect (and not direct) expropriations. A proposition that finds no basis in the wording of existing general exception clauses.

ever, if general exceptions were only to allow States to take measures for the objectives identified by themselves but not exempt them from liability incurred by taking such measures, general exception would be merely declaratory and state the obvious, expressing that States can always decide to act in contravention of their treaty obligations if they are willing to encounter financial liability for doing so. Considering further that such a reading would not be confined to the effect of general exceptions in cases of direct or indirect takings of property but would apply identically to the effect of general exception clauses on all other treaty obligations, if adopted it would frustrate the very purpose of general exception provisions, which is to exempt the State from liability for violations of the IIA and thereby strengthen the host State’s regulatory flexibility.915 This cannot have been the intention of State in including general exception clauses in IIAs.

If, as suggested, States do not mean general exception provisions to apply to the expropriation standard, this also begs the question of why they have not added express language to this effect to their treaties. In fact, the possibility of circumventing this problem during the drafting process by exempting the expropriation provision from the ambit of the general exception clause has already been employed in investment treaty practice. A prominent example of this, admittedly still infrequent, practice is Article 24(1) Energy Charter Treaty, which provides that the general exceptions do not apply to the provision dealing with compensation for losses encountered during war or armed conflict (Article 12 ECT) or the expropriation provision (Article 13 ECT). The drafting thus explicitly excludes the expropriation provision from the application of the general exception clause. A similar exclusion can be found in Article VI(1) of the draft Multilateral Agreement on Investment, which provides that general exceptions916 do not apply to the expropriation and the compensation and protection from strife provisions, Article IV(2) and (3) MAI respectively.917

915 See supra Chapter Four, Part B, II.
916 Draft Article VI MAI is entitled “General Exceptions” but differs in coverage from Article XX GATT or Article XIV GATS in that it allows only measures necessary for the maintenance of public order, see Draft Article VI(3) MAI whose invocation is subjected to a chapeau paragraph.
The article was likely inspired by the above-mentioned Article 24(1) ECT and expressed “[t]he majority view that the MAI should provide an absolute guarantee that an investor will be compensated for expropriated investment.” Two further general exception clauses in bilateral treaties feature a similar exclusion. Given the prominence of both the Energy Charter Treaty and the draft Multilateral Agreement on Investment, the scope of membership to the former and the widespread participation in the latter’s negotiations respectively, their early conclusion in 1994 or discontinuation in 1998 respectively, and the occasional appearance of similar exclusions in bilateral treaties, one could expect States to having taken note of the problem and the appropriate drafting method to circumvent it. From that, one may conclude that States have meant the general exceptions to apply to the IIA as a whole, including the expropriation standard.

From a strictly legal perspective, one can conclude from the above that general exception clauses, in the absence of language to the opposite effect, also apply to the expropriation prohibition and exempt States from liability for violations thereof upon their successful invocation. Considering the importance of the expropriation standard for the international investment law regime and its historical development, and thus talking from a policy perspective, it goes without saying that this result may appear questionable to some States and commentators. States that feel uncomfortable with this scope of application of general exceptions should therefore opt to clarify the wording in their present and future treaties.


920 Article 95(3) of the Japan – Switzerland PTIA (signed 19 February 2009, entry into force 1 September 2009). See also Article 14 of the Moldova – Slovenia BIT, like Draft Article VI(3) MAI, which however only allows measures necessary for the maintenance of public order.

921 As Lévesque, in: Echandi/Sauvé (eds.), Prospects of International Investment Law and Policy 363, 369, fn. 31 (2013) points out, this raises the interpretation difficulty that a change in the language of subsequent treaties may lead tribunals to reason that different formulations must mean different intentions, although States only sought to clarify their previously undertaken obligations. Since an intention on part of the States to exclude the expropriation provision from the ambit
II. General Exception Clauses and Annexes on Indirect Expropriation

The second potential difficulty relates to the interaction between general exception clauses and annexes on indirect expropriation. These annexes stipulate what is arguably codification of the customary police powers exception, which gives interpretive guidance to tribunals assessing potential cases of indirect expropriations.\footnote{See Lévesque, in: Echandi/Sauvé (eds.), Prospects of International Investment Law and Policy 363, 369 (2013). Contrast this with Legum/Petculescu, in Echandi/Sauvé (eds.), Prospects in International Investment Law and Policy 340, 362 (2013), who assert that it is general exception provisions that codify the customary police powers doctrine.} Take, for example, the Canadian Model FIPA from 2004, which includes not only a general exception provision but also a pertinent annex to the expropriation provision. The annex reads as follows:

“Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety, and the environment, do not constitute indirect expropriations.”\footnote{Canada Model FIPA 2004, Annex B.13(1) lit. c.}

With sometimes slightly varying formulations, similar annexes on indirect expropriation also appear in other IIAs that include general exceptions.\footnote{See, e.g., Chapter 11, Annex on Expropriation and Compensation (4.) and Chapter 15, Article 1 (general exceptions) of the ASEAN – Australia – New Zealand FTA (signed 27 February 2009, entry into force 1 January 2010).} What they all have in common is that they apply to a non-exhaustive list of public welfare objectives, examples of which include “(public) health, safety and the environment”, require the measures to be “designed and applied to” as opposed to being “necessary” to achieve the permissible objective, and entail non-discrimination and sometimes good-faith requirements.\footnote{For another example see Annex B(4)(b) Expropriation in the U.S. model BIT 2012. Note though that the U.S. Model does not contain general exceptions.}
Some commentators conclude from the inclusion of general exceptions in addition to annexes on indirect expropriation that the former were not meant to apply to the expropriation standard. Suggesting that it is “not logical to have both provisions” if the general exception provision were applicable to expropriations, they reason that States consequently could not have meant IIA general exceptions to apply to expropriations.\textsuperscript{926} The reasoning implies that any other reading of the scope of general exceptions would render the annex redundant.

While this reasoning may seem superficially appealing, it does not withstand closer examination. Although annexes on expropriation may resemble general exception provisions to a certain degree, they feature some notable differences. First, unlike general exceptions, they do not purport to exempt States from liability for \textit{prima facie} violations of the expropriation provision, but rather define when governmental measures do not rise to the level of an indirect expropriation in the first place. Therefore, their legal effect differs decisively. This difference may well have an impact on the distribution of the evidentiary burden of production. What is more, the scope of application of an annex is both broader and narrower than the ambit of general exceptions. On the one hand, annexes only give guidance on how to approach cases of indirect expropriation, while direct takings of property are not covered by their scope. General exceptions, in contrast, purport to apply to all IIA obligations and thus to both direct and indirect forms of expropriation. In this sense, the scope of application of annexes is narrower than the one of general exceptions.\textsuperscript{927} At the same time, however, annexes encompass more regulatory measures compared to general exceptions, making their scope exceedingly broader. As mentioned above, annexes on indirect expropriation normally feature open-ended lists of permissible objectives and only enumerate specific welfare objectives by means of non-exhaustive examples. General exceptions, on the other hand, always contain closed lists of permissible objectives. In addition, annexes require only that the governmental measure must be “designed and applied” to protect the permissible objective, which is a distinct and arguably


\textsuperscript{927} Admittedly, it is only in rare instances that investors nowadays bring a claim against host States for an alleged direct expropriation and that indirect expropriations account for the bulk of expropriation claims.
much looser formulation than the necessity standard found in the large majority of general exception provisions.\textsuperscript{928} Moreover, while annexes usually entail some forms of non-discrimination and good faith requirements, these differ from the more elaborate requirements commonly found under the \textit{chapeau} provisions of most IIA general exceptions.

Considered together, the above differences between general exceptions and annexes on indirect expropriation indicate that States that have included both provisions intended to retain considerably more policy space when it comes to potentially indirectly expropriatory measures compared to public policy measures that might violate other IIA obligations, the latter being only covered by the general exceptions’ scope. The underlying reasons for this distinction are a matter of speculation. Obviously, what ultimately matters to the host State is whether or not its public policy measure will attract liability under the IIA and not whether it infringes one or the other IIA obligation. States that include both general exceptions and annexes on indirect expropriation in their IIAs might for example perceive that there are more unjustified claims brought under the premise of an indirect expropriation than under other IIA provisions or that public welfare measures are more likely to amount to an indirect expropriation rather than to a violation of other IIA obligations.

What is certain, though, is that the presence of a general exception clause does not necessarily render an annex on indirect expropriation redundant, or \textit{vice versa}. There is sufficient room for application of both provisions. Moreover, the presence of an annex does not necessarily mean that States did not intend the general exception provision to apply to expropriation. Specifically, the annex does not extend to cases of direct expropriation; the latter are therefore only covered by the general exception provision. On the other hand, it applies to considerably more public interest measures than general exceptions do, thus providing more regulatory flexibility in the context of indirect expropriation claims.

\textsuperscript{928} See \textit{supra} Chapter Five, Part C, II, 1 for details.
B. General Exception Clauses and the Fair and Equitable Treatment Standard

The obligation to accord foreign investors and investment fair and equitable treatment is another traditional IIA provision whose interaction with general exception provisions is unclear.

I. General Exception Clauses and the International Minimum Standard of Treatment

The precise content of the fair and equitable treatment standard is a matter of considerable controversy in international investment jurisprudence. That being said, there seems to be consensus that the standard, at a bare minimum, comprises the customary international law minimum standard of treatment as expressed in the decision in LFH Neer and Pauline Neer (United States v. Mexico). In this case, the Mexico-United States General Claims Commission held that

“the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.”

This expression of the minimum standard sets a very high threshold of what qualifies as a violation of it. At the other end of the spectrum lies the award in Waste Management, Inc. v. United Mexican States, which adopted a much broader definition of what infringes the minimum standard of treatment under the FET standard:

---

929 Today, the concept is actually the most frequently invoked standard in investor-State disputes; see Dolzer/Schreuer, Principles of International Investment Law, 2nd ed., p. 130 (2012).

930 LFH Neer and Pauline Neer (United States v. Mexico), Mexico-United States General Claims Commission, 4 Reports of International Arbitral Awards 60, 61-62 (1926). The tribunal in Glamis Gold, Ltd. v. United States of America, Award, 8 June 2009, ¶¶598-627 issued probably the most recent endorsement of the Neer decision as establishing the pertinent international minimum standard.
“[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety […]”

Under the latter definition, the FET minimum standard of treatment outlaws “arbitrary, grossly unfair, unjust or idiosyncratic” as well as discriminatory treatment of the foreign investor by the host State. This definition probably constitutes the prevailing approach to the FET standard. Other attempts at defining the content by other tribunals include similar terms such as “a willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith”, manifestly inconsistent, non-transparent, unreasonable or discriminatory conduct, or “improper and discreditable” conduct.

With this content of the fair and equitable treatment standard in mind, some commentators perceive a considerable overlap between general exception provisions and the FET standard to the extent that the latter codifies the customary international minimum standard of treatment. Some find it generally “unlikely” that the violation of the minimum standard may be justified by the stringent requirements of general exception clauses.

---

931 Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶98. The definition was taken up with approval in various subsequent awards, see, e.g., recently Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶609; Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1, Award, 7 December 2011, ¶314.


933 Saluka Investments B.V. v. The Czech Republic, Partial Award, 17 March 2006, ¶309.

934 Mondev International Ltd. v. United States of America, Award, 11 October 2002, ¶127.

without going into many details. Others link their argument to the *chapeau* requirements and argue that there is a substantial congruence between the prohibition of arbitrary treatment on the level of the FET obligation and arbitrariness on the level of the exception to the effect that general exception clauses cannot justify violations of the FET standard. This observation, however, holds true only as regards the minority of general exception clauses that prohibit the arbitrary application of a measure and possibly *sui generis* clauses that stipulate more general “good faith” requirements. General exception clauses that are modeled more faithfully on Article XX GATT and Article XIV GATS as well as clauses incorporating the WTO provisions by reference do not prohibit arbitrary treatment in general, but outlaw arbitrary or unjustifiable discrimination more specifically. Theoretically, cases are conceivable where the treatment may be considered arbitrary treatment under the above definition of the FET standard, but does not amount to an arbitrary discrimination under the *chapeau* paragraph. In these instances, the violation of the FET standard might be justifiable under the general exception clauses. Apart from that, several general exception clauses lack *chapeau* requirements or do not subject their invocation to good faith requirements. Also in these cases, no congruence between the FET obligation and general exceptions exists.

II. General Exception Clauses and the Protection of an Investor’s Legitimate Expectations

Another central feature of the contemporary understanding of the fair and equitable treatment standard is the protection of a foreign investor’s legitimate expectations as to the stability and predictability of the host State’s

938 Mostly early Canadian FIPAs concluded prior to the Canadian Model FIPA 2004, see supra Chapter Two, Part B, I, 1, a.
939 See supra Chapter Two, Part C, II, 3, b.
940 See supra Chapter Two, Part C, II, 3, d.
regulatory framework.\textsuperscript{941} The concept ensures consistency of treatment of an investor by the host State, but also presupposes that the investor takes the host State’s law as she finds it.\textsuperscript{942} The relevant regulatory framework, which may give rise to legitimate expectations, includes not only individual undertakings by the host State \textit{vis-à-vis} the investor, but also national legislation and international treaties as they stand at the time the investor made the investment.\textsuperscript{943} Changes to this regulatory environment that are unforeseen and which the investor did not have to foresee will violate the principle of fair and equitable treatment.\textsuperscript{944}

Some commentators remark that according to the dominant understanding of the notion of legitimate expectations “a change in a state’s policy can be both justifiable and non-discriminatory and yet breach past undertaking to a specific foreign investor.”\textsuperscript{945} In other words, they submit that non-discriminatory public interest measures adopted in good faith may still be considered to be inconsistent with past undertakings of the host State towards the foreign investor and hence amount to a compensable violation of the fair and equitable treatment standard. Here, they perceive a field of application for general exception clauses that derogate from such liability in relation to the FET standard.\textsuperscript{946}

It is however questionable whether this exhaustively characterizes the relationship between general exceptions and the notion of legitimate expectations. It appears more accurate to argue that legitimate expectations cannot arise in the first place if the applicable IIA contains a general exception clause permitting public interest regulation in the policy areas covered. As explained above, the relevant regulatory framework, which forms the basis of legitimate expectations, includes international treaties and thus the applicable IIA. If this IIA contains a general exception clause explicit-
ly stipulating conditions under which the host State may impair foreign investment to pursue non-discriminatory public policy measures in well-defined policy areas, it is hard to see how an investor could have legitimately fostered expectations that no such measure would ever be taken. To the contrary, a prudent investor must inform herself on the extent of protection accorded under an IIA and must have taken note of the general exception clauses that allow derogations from the accorded protection under specific circumstances. Although the ultimate outcome may be the same, general exception clauses hence do not justify a violation of legitimate expectations under the FET standard but rather prevent such legitimate expectations from arising in the first place.

In this regard, the inclusion of general exception clauses also adds legal certainty to the concept of legitimate expectations. In fact, the extent to which the protection of legitimate expectations clashes with the host States’ right to exercise its sovereign power to legislate in the public interest has recurrently been the subject of investment arbitrations.\textsuperscript{947} Tribunals draw the distinction between permissible and impermissible governmental conduct by evaluating whether the exercise of regulatory powers may be considered “reasonable”\textsuperscript{948} or whether it fundamentally modifies the underlying regulatory framework. This examination is not only case-sensitive but also depends on the subjective assessment of the respective arbitrators as to what can still be considered “reasonable”. It thus gives rise to legal uncertainty and risks giving too much weight to the investor’s expectations at the expense of the host State’s right to pursue public interest considerations.\textsuperscript{949} If however, by virtue of an explicit general exceptions provision in the IIA, the international legal framework applicable to the investment provides for the possibility of legitimate governmental regulation in certain policy areas at the time the investment was made, the investor must have expected such future regulation. Therefore, no legitimate expectations to the contrary could arise. This facilitates the arbitrators’ task of distinguishing between permissible and impermissible government-
tal conduct and thus makes the outcome of disputes involving the public interest more predictable.

C. General Exception Clauses and the National Treatment Standard

Finally, the interaction between the national treatment standard and general exception clauses is also a matter of some debate.

I. Non-Discrimination Elements in General Exception Clauses and the National Treatment Standard

Some commentators note that the prohibition of arbitrary or unjustifiable discrimination between investments or investors (where like conditions prevail) contained in chapeau paragraphs of WTO-like general exception clauses resembles the wording of the national treatment (and MFN treatment) obligations host States undertake as part of their substantive treaty obligations. From that, they conclude that general exception clauses cannot apply to violations of the national treatment standard.

Comparative recourse to WTO jurisprudence, where a similar overlap between general exceptions and WTO non-discrimination obligations exists, is of limited help. In solving this tension, the WTO Appellate Body held that the protection given by the substantive protections must necessarily differ from contents of the *chapeau* as otherwise the latter would be depleted of meaning. However, the WTO argumentation is not transportable to the investment realm. It is based on the argument that non-discrimination obligations and general exception clauses have been included in the GATT and GATS since the creation of the two treaties. Therefore, the treaty drafters must have had a different scope of application in mind. In contrast, national treatment obligations were included in IIAs since their inception, while general exception clauses are a comparatively recent addition to the investment realm. Hence, one cannot adopt the Appellate Body’s argumentation to conclude that the ambit of non-discrimination re-

quirements in IIA general exception must necessarily differ from the IIA national treatment standard.

Nonetheless, there are certain differences between the non-discrimination requirements on the level of the obligation and the non-discrimination requirements in the *chapeau*. First, the *chapeau* requires a discriminatory application of a measure rather than merely a discriminatory measure as such. Moreover, it allows for discriminatory applications, which are “reasonable” or “justifiable” as opposed to the national and MFN treatment standard, which outlaw any kind of differential treatment of like investments or investors. Therefore, there may be circumstances in which a differential treatment of like investments infringes the national treatment standard but is still justified under the exception’s *chapeau* clause. Again, general exceptions which do not stipulate any non-discrimination requirements also exist.

II. General Exception Clauses and the Flexibility Provided under the Prevailing Interpretation of the National Treatment Standard

As elaborated on in more detail above, some commentators are concerned about the interpretation of general exception clauses in relation to the national treatment standard. They submit that general exception clauses may limit a host State’s regulatory flexibility that exists within the jurisprudence on the national treatment standard, instead of enhancing it.

Note however that investment tribunals have attached public interest considerations to the likeness test and concluded that if there is a legitimate policy rationale justifying the differential treatment, two investments are not in like circumstances, see *supra* Chapter Four, Part C, III.


See *supra* Chapter Four, Part C, III.

In particular, they highlight the closed lists of permissible objectives, the strict nexus requirements and the *chapeau* requirements of general exceptions to conclude that the invocation of general exceptions is dependent on the fulfillment of comparatively stringent requirements. These are contrasted with the possibility of considering an unlimited number of objectives in the interpretation of the national treatment standard, less onerous nexus requirements as developed in the jurisprudence, and the absence of additional *chapeau* requirements.\(^{955}\)

However, the proponents of these arguments neglect that the inclusion of general exception clauses does not necessarily presuppose that public interest considerations must exhaustively be attached to them. Instead, States may choose to include general exceptions for other reasons; for instance, to subject the whole of the IIA to a limited number of permissible exceptions that they consider to be most important, and to simultaneously leave the question as to whether and under which circumstances other public interests may derogate from investment obligations to the arbitralists. General exception clauses thus do not have to be seen as replacements of public interest considerations on the level of the obligation, but can also be approached as complementary backstops. They thus do not limit the regulatory flexibility that may exist within the interpretation of the national treatment standard.\(^{956}\)


\(^{956}\) For a more detailed rebuttal of the arguments see *supra* Chapter Four, Part D, III.
Chapter Seven  Conclusion

For a better visualization to aid understanding of the results of this study, they will be applied to the case of Philip Morris Asia Ltd. v. Commonwealth of Australia here under the hypothesis that the applicable 1993 Hong Kong – Australia BIT included a general exception provision.

Applying the conclusions drawn in Chapter Three, it is not surprising that the 1993 Hong Kong – Australia BIT does not include general exception clauses since such clauses were largely unknown in IIAs at that point in time. One reason for their omission may have been that Australia did not expect to ever become the respondent in an investment claim brought by a Hong-Kong-based investor.

However, as Chapter Two has shown Australia has regularly incorporated IIA general exception provisions modeled on Article XX GATT and Article XIV GATS in its recently concluded PTIAs. For the purposes of the PM case study, it may thus be assumed that a hypothetically applicable general exception clause would also have been drafted on the WTO provisions.

As explained in Chapter Five, it would be legitimate and appropriate for investment tribunals to take guidance from WTO jurisprudence when interpreting investment general exception clauses. In the examination of the clause, the Australian plain packaging legislation would first have to fall within the range of policies and objectives enumerated in the clause. The applicable permissible objective in this case may be the protection of human, animal or plant life or health. The legislative history of the Plain Packaging Act reveals that it is intended by Australia to improve public health, including by discouraging taking up smoking, encouraging people to give up smoking, discouraging relapse and reducing exposure to second-hand smoke. Australia also submitted scientific evidence that plain packaging of tobacco products is likely to have these effects. Therefore, the Australian legislation would qualify as pursuing the protection of human life and health under the general exception clause.

In a second step, the Australian measures would also have to be “necessary” for the protection human life or health. To determine the necessity of the legislation, the tribunal would have to embark upon a weighing and balancing of the public health objective of the measure, the degree to
which the legislation contributes to the achievement of this goal, and the degree of impairment of foreign investment. These factors would need to be considered in light of the objective’s importance. The protection of human life and health can be considered of vital importance to a State. The prevailing scientific evidence and the fact that Australia adopted its plain packaging legislation in accordance with its international commitments under the WHO FCTC support the view that plain packaging contributes significantly to the protection of human health. The degree of impairment of foreign investment is negligible in this context.

Thereafter, the tribunal would also have to establish whether there were any less restrictive measures available to Australia that would have been equivalently effective. It should particularly emphasize that a host State cannot be forced to adopt less investment-restrictive measures that would result in a lower level of protection. In light of the paramount importance of the pursued public health objective, it is unlikely that the tribunal would find less investment-restrictive alternatives to plain packaging that would have an equal effect.

Since it is also not apparent that Australia applied the legislation in a manner that would amount to arbitrary or unjustifiable discrimination of foreign investors or investments, or to a disguised restriction of the flows of international investment, the plain packaging legislation would also withstand scrutiny under the chapeau provision. Therefore, Australia would be able to avail itself of an applicable general exception clause in defense of PM’s investment claims.

According to the conclusion in Chapter Six, had the Hong Kong – Australia BIT included a general exception provision, the clause would have also applied to PM’s indirect expropriation and fair and equitable treatment claims and would have relieved Australia from any duty to pay compensation.

For these reasons, and as explained in Chapter Four, the inclusion of a general exception provision would have provided Australia with greater regulatory flexibility to pursue public health regulations and would have shifted the economic risk of such action to PM. It would thus have preserved Australia’s sovereignty in this regard and would have provided Australia with an incentive to stay within the system of investor-State dispute settlement instead of abandoning it. Moreover, it would have vouched for much needed legal certainty as regards the outcome of the arbitral proceedings challenging a public interest regulation. In fact, it might have even prevented PM from bringing a futile claim in the first place.
In conclusion, Australia’s defense profile on the merits in the PM arbitration would have benefited greatly from an applicable general exception clause. States should therefore feel encouraged to start or continue including general exception provisions in their IIAs. Considering the recent developments, one may well expect that general exception will become an increasingly common sight in the investment treaty landscape.
## Model BITs

<table>
<thead>
<tr>
<th>Treaty</th>
<th>General Exception Clause</th>
</tr>
</thead>
</table>
| **Canada Model FI-PA (2004)** | **Article 10 – General Exceptions**  
1. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:  
(a) to protect human, animal or plant life or health;  
(b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or  
(c) for the conservation of living or non-living exhaustible natural resources. |
| **Colombian Model BIT (2007)** | **Article VIII**  
Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure that it considers appropriate to ensure that an investment activity in its territory is undertaken in accordance with the environmental law of the Party, provided that such measures are proportional to the objectives sought. |
### Article 24 General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international [trade or] investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:

1. to protect public morals or to maintain public order;
2. to protect human, animal or plant life or health;
3. to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
4. for the protection of national treasures of artistic, historic or archaeological value; or
5. for the protection of the environment

---

957 For greater certainty, the concept of "necessity" in this Article shall include measures taken by a Party as provided for by the precautionary principle, including the principle of precautionary action.

958 The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.
Canadian FIPA Program

Old Model (Pre-2004)

<table>
<thead>
<tr>
<th>Treaty</th>
<th>General Exception Clause</th>
</tr>
</thead>
</table>
| **Canada – Armenia FIPA**  
(Orta, signed 8 May 1997)  
Entry into force: 29 March 1999 | **Article XVII Application and General Exceptions**  
3. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:  
(a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;  
(b) necessary to protect human, animal or plant life or health; or  
(c) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. |
| **Canada – Barbados FIPA**  
1.(Bridge-town, signed 29 May 1996)  
Entry into force: 17 January 1997 | **Art. XVII Application and General Exceptions**  
3. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:  
(a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;  
(b) necessary to protect human, animal or plant life or health; or  
(c) relating to the conservation of living or non-living exhaustible natural resources. |
<table>
<thead>
<tr>
<th>Country 1 – Country 2</th>
<th>Annex I General and Specific Exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Special Provisions</strong></td>
<td><strong>III. General Exceptions and Exemptions</strong></td>
</tr>
<tr>
<td>2. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures:</td>
<td></td>
</tr>
<tr>
<td>(a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;</td>
<td></td>
</tr>
<tr>
<td>(b) necessary to protect human, animal or plant life or health; or</td>
<td></td>
</tr>
<tr>
<td>(c) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.</td>
<td></td>
</tr>
<tr>
<td>Country Pair</td>
<td>Agreement and Provisions</td>
</tr>
<tr>
<td>--------------</td>
<td>--------------------------</td>
</tr>
<tr>
<td>Canada – Ecuador FIPA</td>
<td>Article XVII Application and General Exceptions</td>
</tr>
<tr>
<td>(Quito, signed 29 April 1996)</td>
<td>3. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:</td>
</tr>
<tr>
<td></td>
<td>(a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;</td>
</tr>
<tr>
<td></td>
<td>(b) necessary to protect human, animal or plant life or health; or</td>
</tr>
<tr>
<td></td>
<td>(c) relating to the conservation of living or non-living exhaustible natural resources.</td>
</tr>
<tr>
<td>Canada – El Salvador FIPA</td>
<td>Annex I General and Specific Exceptions</td>
</tr>
<tr>
<td>(San Salvador, signed 31 May 1999)</td>
<td>Special Provisions</td>
</tr>
<tr>
<td></td>
<td>III. General Exceptions and Exemptions</td>
</tr>
<tr>
<td></td>
<td>2. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:</td>
</tr>
<tr>
<td></td>
<td>(a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;</td>
</tr>
<tr>
<td></td>
<td>(b) necessary to protect human, animal or plant life or health; or</td>
</tr>
<tr>
<td></td>
<td>(c) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.</td>
</tr>
<tr>
<td>Canada – Egypt FIPA</td>
<td>Article XVII Application and General Exceptions</td>
</tr>
<tr>
<td>---------------------</td>
<td>--------------------------------------------------</td>
</tr>
</tbody>
</table>
| 3. (Cairo, signed 13 November 1996) Entry into force: 3 November 1997 | 3. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:  
(a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;  
(b) necessary to protect human, animal or plant life or health; or  
(c) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. |

<table>
<thead>
<tr>
<th>Canada – Lebanon FIPA</th>
<th>Annex I General and Specific Exceptions</th>
</tr>
</thead>
</table>
| (Ottawa, signed 11 April 1997) Entry into force: 19 June 1999 | III. General Exceptions and Exemptions  
2. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:  
(a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;  
(b) necessary to protect human, animal or plant life or health; or  
(c) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. |
<table>
<thead>
<tr>
<th>Country A – Country B FIPA</th>
<th>Article XVII Application and General Exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Canada – Panama FIPA (Guatemala, signed 12 September 1996) Entry into force: 13 February 1998</td>
<td>3. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures: (a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; (b) necessary to protect human, animal or plant life or health; or (c) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.</td>
</tr>
<tr>
<td>Canada – Philippines FIPA (Manila, signed 9 November 1995) Entry into force: 13 November 1996</td>
<td>3. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures: (a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; (b) necessary to protect human, animal or plant life or health; or (c) relating to the conservation of living or non-living exhaustible natural resources.</td>
</tr>
</tbody>
</table>
| Canada – South Africa FIPA | **Art. XVII Application and General Exceptions**  
3. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:  
(a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;  
(b) necessary to protect human, animal or plant life or health; or  
(c) relating to the conservation of living or non-living exhaustible natural resources. |
|---|---|
| Canada – Thailand FIPA | **Article XVII Application and General Exceptions**  
3. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:  
(a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;  
(b) necessary to protect human, animal or plant life or health; or  
(c) relating to the conservation of living or non-living exhaustible natural resources.  
(d) imposed for the protection of national treasures of artistic, historic or archaeological value;  
(e) essential to the acquisition or distribution of products in general or local short supply, provided that any such measures shall be consistent with the principle that all investors are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of this Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. |
<table>
<thead>
<tr>
<th>Canada – Trinidad and Tobago FIPA</th>
<th>Article XVII Application and General Exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>6. (Toronto, signed 11 September 1995) Entry into force: 8 July 1996</td>
<td>3. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures: (a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; (b) necessary to protect human, animal or plant life or health; or (c) relating to the conservation of living or non-living exhaustible natural resources.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Canada – Ukraine FIPA</th>
<th>Art. XVII Application and General Exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>7. (Ottawa, signed 24 October 1994) Entry into force: 24 July 1995</td>
<td>3. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures: (a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; (b) necessary to protect human, animal or plant life or health; or (c) relating to the conservation of living or non-living exhaustible natural resources.</td>
</tr>
</tbody>
</table>
### Canada – Uruguay FIPA
(Ottawa, signed 29 October 1997)
Entry into force: 2 June 1999

**Annex I General and Specific Exceptions**

**Special Provisions**

**III. General Exceptions and Exemptions**

2. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:

   (a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;

   (b) necessary to protect human, animal or plant life or health; or

   (c) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

### Canada – Venezuela FIPA
(Caracas, signed 1 July 1996)
Entry into force: 28 January 1998

**Annex II. NAFTA, Group of Three and Exceptions**

10. **b.** Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:

   (i) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;

   (ii) necessary to protect human, animal or plant life or health; or

   (iii) relating to the conservation of living or non-living exhaustible natural resources
Canadian FIPA Program

New Model (since 2004)

<table>
<thead>
<tr>
<th>FIPA</th>
<th>Provision on general exceptions</th>
</tr>
</thead>
</table>
| **Canada – Bénin FIPA**     | **Article 20 General Exceptions**  
For the purpose of this Agreement:  
(a) a Contracting Party may adopt or enforce a measure necessary:  
   (i) to protect human, animal or plant life or health,  
   (ii) to ensure compliance with domestic law that is not inconsistent with this Agreement, or  
   (iii) for the conservation of living or non-living exhaustible natural resources;  
(b) provided that the measure referred to in subparagraph (a) is not:  
   (i) applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors, or  
   (ii) a disguised restriction on international trade or investment. |
| (signed 9 January 2013).    | Entry into force: 12 May 2014                                                                                                                                                                                                       |
| **Canada – Burkina Faso FIPA** | **Article 18 General Exceptions**  
1. For the purpose of this Agreement:  
a. a Party may adopt or enforce a measure necessary:  
to protect human, animal or plant life or health,  
to ensure compliance with domestic law that is not inconsistent with this Agreement, or  
to conserve living or non-living exhaustible natural resources;  
provided that the measure referred to in subparagraph (a) is not:  
   applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors, or  
a disguised restriction on investment or investment-related international trade. |
<p>| (Ottawa, 20 April 2015)    | Not yet entered into force.                                                                                                                                                                                                          |</p>
<table>
<thead>
<tr>
<th>Country 1 – Country 2 FIPA</th>
<th>Article 17 General Exceptions</th>
</tr>
</thead>
</table>
| **Canada – Cameroon FIPA**  
(signed 3 March 2014)  
Entry into force on 16 December 2016 | 1. For the purpose of this Agreement:  
a. each of the Parties may adopt or enforce a measure necessary:  
   to protect human, animal or plant life or health,  
   to ensure compliance with domestic law that is not inconsistent with this Agreement, or  
   for the conservation of living or non-living exhaustible natural resources;  
   provided that the measure referred to in subparagraph (a) is not:  
     applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors, or  
     a disguised restriction on international trade or investment. |

<table>
<thead>
<tr>
<th>Country 1 – Country 2 FIPA</th>
<th>Part D, Article 33 General Exceptions</th>
</tr>
</thead>
</table>
| **Canada – China FIPA**  
(Vladivostok, signed: 9 September 2012)  
Entry into force: 1 October 2014 | 2. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:  
   (a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;  
   (b) necessary to protect human, animal or plant life or health; or  
   (c) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. |
| Canada-Côte d’Ivoire FIPA | Article 17  
General Exceptions  
1. For the purpose of this Agreement:  
a. each of the Parties may adopt or enforce a measure necessary:  
to protect human, animal or plant life or health,  
to ensure compliance with domestic law that is not inconsistent with this Agreement, or  
for the conservation of living or non-living exhaustible natural resources;  
provided that the measure referred to in subparagraph (a) is not:  
applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors, or  
a disguised restriction on international trade or investment. |
|--------------------------|----------------------------------------------------------|
| Canada – Czech Republic FIPA (signed 6 May 2009) | Article IX General Exceptions  
1. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or enforcing measures necessary:  
(a) to protect human, animal or plant life or health;  
(b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement  
(c) for the conservation of living or non-living exhaustible natural resources. |

---

959 For greater certainty, the Contracting Parties confirm that insofar as this Agreement is concerned, any exceptions pertain to the investment obligations in this Agreement.
### Article 18
**General Exceptions**

1. For the purpose of this Agreement:
   a. a Party may adopt or enforce a measure necessary:
      i. to protect human, animal or plant life or health,
      ii. to ensure compliance with domestic law that is not inconsistent with this Agreement, or
      iii. to conserve living or non-living exhaustible natural resources;

   provided that the measure referred to in subparagraph (a) is not:
      i. applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors, or
      ii. a disguised restriction on investment or investment-related international trade.

### Article 17
**General Exceptions**

1. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining measures, including environmental measures:
   (a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
   (b) necessary to protect human, animal or plant life or health; or
   (c) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.
### Article 10 General Exceptions

1. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:
   - (a) to protect human, animal or plant life or health;
   - (b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or
   - (c) for the conservation of living or non-living exhaustible natural resources.

### Article 17 General Exceptions

1. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:
   - (a) to protect human, animal or plant life or health;
   - (b) to ensure compliance with laws and regulations that are not inconsistent with this Agreement; or
   - (c) for the conservation of living or non-living exhaustible natural resources.

### Article XVII Application and General Exceptions

3. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:
   - (a) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
   - (b) to protect human, animal or plant life or health; or
   - (c) for the conservation of living or non-living exhaustible natural resources.
**ANNEX I: General Exception Clauses in Current IIAs**

<table>
<thead>
<tr>
<th>Country Pair</th>
<th>Article 17 General Exceptions</th>
</tr>
</thead>
</table>
| **Canada – Mali FIPA** Entry into force: 8 June 2016 | 1. Subject to the requirement that measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, this Agreement does not prevent a Party from adopting or enforcing measures necessary:  
(a) to protect human, animal, or plant life or health;  
(b) to ensure compliance with domestic law that are not inconsistent with the provisions of this Agreement; or  
(c) to conserve living or non-living exhaustible natural resources. |
| **Canada – Mongolia FIPA** Entry into force: 24 February 2017 | 1. Subject to the requirement that measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, this Agreement does not prevent a Party from adopting or enforcing measures necessary:  
(a) to protect human, animal, or plant life or health;  
(b) to ensure compliance with domestic law that are not inconsistent with the provisions of this Agreement; or  
(c) to conserve living or non-living exhaustible natural resources. |
<table>
<thead>
<tr>
<th>Canada – Nigeria FIPA (signed 6 May 2014)</th>
<th>Article 18 General Exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1.</strong> For the purpose of this Agreement:</td>
<td><strong>Article 10 General Exceptions</strong></td>
</tr>
<tr>
<td><strong>a.</strong> a Party may adopt or enforce a measure necessary:</td>
<td><strong>1. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:</strong></td>
</tr>
<tr>
<td><strong>i.</strong> to protect human, animal or plant life or health,</td>
<td><strong>(a) to protect human, animal or plant life or health;</strong></td>
</tr>
<tr>
<td><strong>ii.</strong> to ensure compliance with domestic law that is not inconsistent with this Agreement, or</td>
<td><strong>(b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or</strong></td>
</tr>
<tr>
<td><strong>iii.</strong> to conserve living or non-living exhaustible natural resources;</td>
<td><strong>(c) for the conservation of living or non-living exhaustible natural resources.</strong></td>
</tr>
</tbody>
</table>

provided that the measure referred to in subparagraph (a) is not: |

<p>| <strong>i.</strong> applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors, or |
| <strong>ii.</strong> a disguised restriction on international trade or investment. | |</p>
<table>
<thead>
<tr>
<th>Country</th>
<th>Agreement</th>
<th>Entry into force</th>
<th>Article</th>
<th>General Exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Canada – Romania</td>
<td>FIPA</td>
<td>23 November 2011</td>
<td>XVII</td>
<td>Application and General Exceptions</td>
</tr>
<tr>
<td></td>
<td>(signed 8 May 2009)</td>
<td></td>
<td>3.</td>
<td>Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>(a) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>(b) to protect human, animal or plant life or health; or</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>(c) for the conservation of living or non-living exhaustible natural resources.</td>
</tr>
<tr>
<td>Canada – Senegal</td>
<td>FIPA</td>
<td>5 August 2016</td>
<td>18</td>
<td>General Exceptions</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>1.</td>
<td>For the purpose of this Agreement:</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>a.</td>
<td>a Party may adopt or enforce a measure necessary:</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>i.</td>
<td>to protect human, animal or plant life or health,</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>ii.</td>
<td>to ensure compliance with domestic law that is not inconsistent with this Agreement, or</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>iii.</td>
<td>to conserve living or non-living exhaustible natural resources;</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>provided that the measure referred to in subparagraph (a) is not:</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>i.</td>
<td>applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors, or</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>ii.</td>
<td>a disguised restriction on investment or investment-related international trade.</td>
</tr>
<tr>
<td>Country 1</td>
<td>Country 2</td>
<td>Agreement Details</td>
<td>Article</td>
<td>General Exceptions</td>
</tr>
<tr>
<td>----------</td>
<td>-----------</td>
<td>-------------------</td>
<td>---------</td>
<td>-------------------</td>
</tr>
</tbody>
</table>
| Canada – Serbia FIPA | Signing date: 1 September 2014, entry into force: 24 April 2015 | **Article 18**  
General Exceptions  
1. For the purpose of this Agreement:  
a. a Party may adopt or enforce a measure necessary:  
   i. to protect human, animal or plant life or health,  
   ii. to ensure compliance with domestic law that is not inconsistent with this Agreement, or  
   iii. to conserve living or non-living exhaustible natural resources;  
provided that the measure referred to in subparagraph (a) is not:  
   i. applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors, or  
   ii. a disguised restriction on investment or investment-related international trade. | **Article IX**  
General Exceptions  
1. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or enforcing measures necessary:  
   (a) to protect human, animal or plant life or health;  
   (b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement  
   (c) for the conservation of living or non-living exhaustible natural resources. |
**Article 17 General Exceptions**

1. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:
   
   (a) to protect human, animal or plant life or health;
   
   (b) to ensure compliance with laws and regulations that are not inconsistent with this Agreement; or
   
   (c) for the conservation of living or non-living exhaustible natural resources.

**Other BITs**

<table>
<thead>
<tr>
<th>Treaty</th>
<th>General Exception Clause</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Argentina – New Zealand BIT</strong></td>
<td><strong>Article 5 Exceptions</strong></td>
</tr>
<tr>
<td>(Buenos Aires, signed 27 August 1999)</td>
<td>3. The provisions of this Agreement shall in no way limit the right of either Contracting Party to take any measures (including the destruction of plants and animals, confiscation of property or the imposition of restrictions on stock movement) necessary for the protection of natural or physical resources or human health, provided such measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination.</td>
</tr>
</tbody>
</table>
| **China Mainland and Hong Kong Closer Economic Partnership Agreement**  
(Hong Kong, signed 28 June 2017) | **Article 22 Exceptions**  
1. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on trade or investment, nothing in this Agreement shall be construed to prevent one side from adopting or maintaining measures, including environmental measures:  
   (i) necessary to ensure compliance with laws that are not inconsistent with the provisions of this Agreement;  
   (ii) necessary to protect human, animal or plant life or health; or  
   (iii) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. |
| **Colombia – India BIT**  
(New Delhi, signed 10 November 2009)  
Not yet entered into force | **Article 13(5) General Exceptions**  
5. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the investor of the other Contracting Party or a disguised restriction on investment of investors of a Contracting Party in the territory of the other Contracting Party, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Contracting Party of measures:  
   a. necessary to maintain public order;  
   b. necessary to protect human, animal, plant life or health;  
   c. relating to the protection of the environment or the conservation of exhaustible natural resources, if such measures are made effective in conjunction with restrictions on domestic production or consumption; |
Colombia – Japan BIT  
(Tokyo, signed 12 September 2011) 
Not yet entered into force

<table>
<thead>
<tr>
<th>Colombia – Japan BIT</th>
<th>Article 15 General and Security Exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Tokyo, signed 12 September 2011)</td>
<td>1. Subject to the requirement that such measures are not applied by a Contracting Party in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Contracting Party, or a disguised restriction on investments of investors of that other Contracting Party in the Area of the former Contracting Party, nothing in this Agreement other than Article 12 shall be construed to prevent that former Contracting Party from adopting or enforcing measures, including those to protect the environment:</td>
</tr>
<tr>
<td></td>
<td>(a) necessary to protect human, animal or plant life or health;</td>
</tr>
<tr>
<td></td>
<td>(b) necessary to protect public morals or to maintain public order;</td>
</tr>
<tr>
<td></td>
<td>Note: The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.</td>
</tr>
<tr>
<td></td>
<td>(c) necessary to secure compliance with the laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:</td>
</tr>
<tr>
<td></td>
<td>(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contract;</td>
</tr>
<tr>
<td></td>
<td>(ii) the protection of the privacy of the individual in relation to the processing and dissemination of personal data and the protection of confidentiality of personal records and accounts; or</td>
</tr>
<tr>
<td></td>
<td>(iii) safety; or</td>
</tr>
<tr>
<td></td>
<td>(d) imposed for the protection of national treasures of artistic, historic, archaeological or cultural value.</td>
</tr>
<tr>
<td>2. (...)</td>
<td>3. In cases where a Contracting Party takes any measure, pursuant to paragraph 1, that does not conform with the obligations under this Agreement other than Article 12, that Contracting Party shall endeavor to, as soon as possible, notify the measure to the other Contracting Party.</td>
</tr>
<tr>
<td>Colombia – Peru BIT</td>
<td>Artículo 8(1): Excepciones Generales</td>
</tr>
<tr>
<td>------------------------------</td>
<td>-------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>(Lima, signed 11 December 2007) Not yet entered into force</td>
<td>1. Sujeto al requisito de que las siguientes medidas no se apliquen de una manera en que constituyan una discriminación arbitraria o injustificable entre las inversiones o entre los inversionistas, o una restricción encubierta al comercio internacional o a la inversión, nada en el presente Acuerdo se interpretará como una forma de evitar que una Parte adopte o haga cumplir las medidas necesarias:</td>
</tr>
<tr>
<td></td>
<td>a. para proteger la vida o salud de los seres humanos, los animales o las plantas;</td>
</tr>
<tr>
<td></td>
<td>b. para garantizar el cumplimiento de las leyes y normas que no sean incompatibles con las disposiciones del presente Acuerdo; o,</td>
</tr>
<tr>
<td></td>
<td>c. para conservar los recursos naturales vivos y no vivos no renovables.</td>
</tr>
<tr>
<td>Finland – Zambia BIT</td>
<td>Article 14 General Derogations</td>
</tr>
<tr>
<td>(Helsinki, signed 7 September 2005)</td>
<td>2. Provided that such measures are not applied in a discriminatory or arbitrary manner or do not constitute a disguised restriction on foreign investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting measures to maintain public order, or to protect public health and safety, including environmental measures necessary to protect human, animal or plant life.</td>
</tr>
<tr>
<td>Hong Kong, China – New Zealand BIT</td>
<td>Article 8 Exceptions</td>
</tr>
<tr>
<td>(Hong Kong, signed 6 July 1995)</td>
<td>3. The provisions of this Agreement shall not in any way limit the right of either Contracting Party to take measures directed to the protection of its essential interests, or to the protection of public health, or to the prevention of diseases and pests in animals and plants, provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination.</td>
</tr>
</tbody>
</table>

960 Article 12 bears the heading “Treatment in case of strife”.

https://doi.org/10.5771/9783845291932
Generiert durch IP '54.70.40.11', am 30.04.2019, 11:03:30.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.
<table>
<thead>
<tr>
<th>Country Pair</th>
<th>Article/Section</th>
<th>Description</th>
</tr>
</thead>
</table>
| Hong Kong – Chile BIT (Lima, signed 18 November 2016) | Article 18 Exceptions                               | 1. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining measures, including environmental measures:  
   (a) necessary to protect public morals or to maintain public order;  
   (b) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;  
   (c) necessary to protect human, animal or plant life or health; or  
   (d) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. |
| Hungary – Russian Federation BIT (Moscow, signed 6 March 1995) | Article 2 Promotion and Reciprocal Protection of Investment | 3. This Agreement shall not preclude the application of either Contracting Party of measures, necessary for the maintenance of defence, national security and public order, protection of the environment, morality and public health. |
| India – Australia BIT (signed 26 February 1999) | Article 15 Prohibitions and Restrictions | Nothing in this Agreement precludes the host Contracting Party from taking, in accordance with its laws applied reasonably and on a non-discriminatory basis, measures necessary for the protection of its own essential security interests or for the prevention of diseases or pests. |

961 The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.
<table>
<thead>
<tr>
<th>India – Bosnia &amp; Herzegovina BIT (New Delhi, signed 12 September 2006)</th>
<th>Article 12 Exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Entry into force: 14 February 2008</td>
<td>The provision of this Agreement shall not in any way limit the right of either Contracting Party in cases of extreme emergency to take action in accordance with its laws applied in good faith, on nondiscriminatory basis by giving the same treatment to all investors in the like situations, and only to the extent and duration necessary for the protection of its essential security interests, or for the prevention of diseases and pests in animals and plants.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>India – Czech Republic BIT (Prague, signed 11 October 1996)</th>
<th>Article 12 Exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Entry into force: 6 February 1998</td>
<td>2. The provision of this Agreement shall not in any way limit the right of either Contracting Party in cases of extreme emergency to take action in accordance with its laws applied in good faith, on a nondiscriminatory basis, and only to the extent and duration necessary for the protection of its essential security interests, or for the prevention of diseases and pests in animals or plants.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>India – France BIT (Paris, signed 2 September 1999)</th>
<th>Article 12 Exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Entry into force: 17 May 2000</td>
<td>The provision of this Agreement shall not in any way limit the right of either Contracting Party in cases of extreme emergency to take action in accordance with its laws applied in good faith, on a nondiscriminatory basis, and only to the extent and duration necessary for the protection of its essential security interests, or for the prevention of diseases and pests in animals or plants.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>India – Italy BIT (Rome, signed 23 November 1995)</th>
<th>Article 12 Exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Entry into force: 26 March 1998</td>
<td>The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions in circumstances of war or other forms of armed conflict, national emergency or civil disturbances or to prevent diseases of pests and animals or plants in accordance with its laws normally and reasonably applied on a non-discriminatory basis.</td>
</tr>
<tr>
<td>Country Combination</td>
<td>Article 11 Applicable Laws</td>
</tr>
<tr>
<td>---------------------</td>
<td>---------------------------</td>
</tr>
<tr>
<td>India – Mauritius BIT</td>
<td>3. The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases in pests and animals or plants.</td>
</tr>
<tr>
<td>India – Senegal BIT</td>
<td>2. Nothing in this Agreement precludes the host Contracting Party from taking necessary measures in accordance with its laws normally and reasonably applied on a non-discriminatory basis, in circumstances of extreme emergency posing a threat to the life or health of human beings, animals or plants.</td>
</tr>
<tr>
<td>India – Spain BIT</td>
<td>1. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, nothing in this Agreement shall be construed to prevent the Contracting Party from adopting or enforcing measures necessary:</td>
</tr>
<tr>
<td>Iran – Slovak Republic BIT</td>
<td>a) to protect public security or public morals or to maintain public order;</td>
</tr>
<tr>
<td></td>
<td>b) to protect human, animal or plant life or health;</td>
</tr>
<tr>
<td></td>
<td>c) to ensure compliance with laws and regulations; or</td>
</tr>
<tr>
<td></td>
<td>d) for the conservation of living or non-living exhaustible natural resources.</td>
</tr>
</tbody>
</table>

ANNEX I: General Exception Clauses in Current IIAs
| **Japan – Korea BIT**  
(Seoul, signed 22 May 2002)  
Entry into force: 1 January 2003 | **Article 16**  
1. Notwithstanding any other provisions in this Agreement other than the provisions of Article 11, each Contracting Party may  
(a) (...)  
(b) (...)  
(c) take any measure necessary to protect human, animal or plant life or health; or  
(d) take any measure necessary for the maintenance of public order. The public order exceptions may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.  
2. In cases where a Contracting Party takes any measure, pursuant to paragraph 1 above, that does not conform with the obligations of the provisions of this Agreement other than the provisions of Article 13, that Contracting Party shall not use such measure as a means of avoiding its obligations.  
3. In cases where a Contracting Party takes any measure, pursuant to paragraph 1 above, that does not conform with the obligations of the provisions of this Agreement other than the provisions of Article 11, that Contracting Party shall, prior to the entry into force of the measure or as soon thereafter as possible, notify the other Contracting Party of the following elements of the measure: (a) sector and sub-sector or matter; (b) obligation or article in respect of which the measure is taken; (c) legal source or authority of the measure; (d) succinct description of the measure; and (e) motivation or purpose of the measure. |
### Article 18 General and Security Exceptions

1. Notwithstanding any other provisions in this Agreement other than the provisions of Article 10, each Contracting Part may:
   
   (a) (…)
   
   (b) (…)
   
   (c) take any measure necessary to protect human, animal or plant life or health;
   
   (d) take any measure imposed for the maintenance of public order. The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society; or
   
   (e) take any measure imposed for the protection of national treasures of artistic, historic or archaeological value.

2. In cases where a Contracting Party takes any measure, pursuant to paragraph 1 above, that does not conform with the obligations of the provisions of this Agreement other than the provisions of Article 13, that Contracting Party shall not use such measure as a means of avoiding its obligations.

3. In cases where a Contracting Party takes any measure, pursuant to paragraph 1 of this Article, that does not conform with the obligations of the provisions of this Agreement other than the provisions of Article 13, that Contracting Party shall, prior to the entry into force of the measure or as soon thereafter as possible, notify the other Contracting Party of the following elements of the measure: (a) sector and sub-sector or matter; (b) obligation or article in respect of the measure; (c) legal source of the measure; (d) succinct description of the measure; and (e) purpose of the measure.

---

962 Article 10 bears the heading “Matters against Corruption”.

336
| **Japan – Iran BIT**  
| (Tokyo, 5 February 2016) |
| **Article 13 General and Security Exemptions** |
| 1. Subject to the requirement that such measures are not applied by a Contracting Party in a manner which would constitute a means of arbitrary or unjustifiable discrimination against, or a disguised restriction on investors of the other Contracting Party and their investments in the Territory of the former Contracting Party, nothing in this Agreement shall be construed so as to prevent the former Contracting Party from adopting or enforcing measures: |
| (a) necessary to protect human, animal or plant life or health; |
| (b) necessary to protect public morals or to maintain public order, provided that the public order exception may only be invoked where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society; |
| (c) necessary to secure compliance with the laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to: |
| (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contract; |
| (ii) the protection of the privacy of the individual in relation to the processing and dissemination of personal data and the protection of confidentiality of personal records and accounts; or |
| (iii) safety; |
| or (d) imposed for the protection of national treasures of artistic, historic or archaeological value. |
| Japan – Israel BIT  
(Tokyo, 1 February 2017) | **Article 15 General and Security Exceptions**  
1. Subject to the requirement that such measures are not applied by a Contracting Party in a manner which would constitute a means of arbitrary or unjustifiable discrimination against, or a disguised restriction on investors of the other Contracting Party and their investments in the Territory of the former Contracting Party, nothing in this Agreement shall be construed so as to prevent the former Contracting Party from adopting or enforcing measures:  
(a) necessary to protect human, animal or plant life or health; Note: This exception includes environmental measures necessary to protect human, animal or plant life or health.  
(b) necessary to protect public morals or to maintain public order, provided that the public order exception may only be invoked where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society;  
(c) necessary to secure compliance with the laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:  
   (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contract;  
   (ii) the protection of the privacy of the individual in relation to the processing and dissemination of personal data and the protection of confidentiality of personal records and accounts; or  
   (iii) safety;  
(d) imposed for the protection of national treasures of artistic, historic or archaeological value; or  
(e) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. |
<table>
<thead>
<tr>
<th>Japan – Mozambique BIT</th>
<th><strong>Article 18 General and Security Exceptions</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Subject to the requirement that such measures are not applied by a Contracting Party in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Contracting Party, or a disguised restriction on investments of investors of the other Contracting Party in the Area of the former Contracting Party, nothing in this Agreement other than Article 13 shall be construed so as to prevent the former Contracting Party from adopting or enforcing measures:</td>
<td></td>
</tr>
<tr>
<td>(a) necessary to protect human, animal or plant life or health;</td>
<td></td>
</tr>
<tr>
<td>(b) necessary to protect public morals or to maintain public order, provided that the public order exception may only be invoked where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society;</td>
<td></td>
</tr>
<tr>
<td>(c) necessary to secure compliance with the laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:</td>
<td></td>
</tr>
<tr>
<td>(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contract;</td>
<td></td>
</tr>
<tr>
<td>(ii) the protection of the privacy of the individual in relation to the processing and dissemination of personal data and the protection of confidentiality of personal records and accounts; or</td>
<td></td>
</tr>
<tr>
<td>(iii) safety;</td>
<td></td>
</tr>
<tr>
<td>(d) imposed for the protection of national treasures of artistic, historic or archaeological value;</td>
<td></td>
</tr>
</tbody>
</table>

---

963 Article 13 is entitled “Protection from Strife”. 

---

https://doi.org/10.5771/9783845291932
Generiert durch IP '54.70.40.11', am 30.04.2019, 11:03:30.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.
<table>
<thead>
<tr>
<th>Article 19 General and Security Exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Subject to the requirement that such measures are not applied by a Contracting Party in a manner which would constitute a means of arbitrary or unjustifiable discrimination against, or a disguised restriction on investors of the other Contracting Party and their investments in the Area of the former Contracting Party, nothing in this Agreement shall be construed so as to prevent the former Contracting Party from adopting or enforcing measures:</td>
</tr>
<tr>
<td>(a) necessary to protect human, animal or plant life or health;</td>
</tr>
<tr>
<td>(b) necessary to protect public morals or to maintain public order, provided that the public order exception may only be invoked where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society;</td>
</tr>
<tr>
<td>(c) necessary to secure compliance with the laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:</td>
</tr>
<tr>
<td>(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contract;</td>
</tr>
<tr>
<td>(ii) the protection of the privacy of the individual in relation to the processing and dissemination of personal data and the protection of confidentiality of personal records and accounts; or</td>
</tr>
<tr>
<td>(iii) safety; or</td>
</tr>
<tr>
<td>(d) imposed for the protection of national treasures of artistic, historic or archaeological value.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Japan – Myanmar BIT</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Tokyo, signed 15 December 2013)</td>
</tr>
<tr>
<td>Entry into force: 7 August 2014</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ANNEX I: General Exception Clauses in Current IIAs</th>
</tr>
</thead>
</table>

340
### Article 19 General and Security Exceptions

1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Contracting Party, or a disguised restriction on investments of investors of the other Contracting Party in the Area of a Contracting Party, nothing in this Agreement other than Article 14 shall be construed to prevent a Contracting Party from adopting or enforcing measures:

   (a) necessary to protect human, animal or plant life or health;

   (b) necessary to protect public morals or to maintain public order;

   Note: The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

   (c) necessary to secure compliance with the laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

      (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contract;

      (ii) the protection of the privacy of the individual in relation to the processing and dissemination of personal data and the protection of confidentiality of personal records and accounts; or

      (iii) safety;

   (d) which it considers necessary for the protection of its essential security interests:

      (i) taken in time of war, or armed conflict, or other emergency in that Contracting Party or in international relations; or

      (ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons;
(e) in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security; or
(f) imposed for the protection of national treasures of artistic, historic or archaeological value.

2. In cases where a Contracting Party takes any measure, pursuant to paragraph 1, that does not conform with the obligations under this Agreement other than Article 14, that Contracting Party shall, prior to the entry into force of the measure or as soon thereafter as possible, notify the other Contracting Party of the following elements of the measure: (a) sector and sub-sector or matter; (b) obligation or article in respect of the measure; (c) legal source of the measure; (d) succinct description of the measure; and (e) purpose of the measure.

964 Article 14 deals with the issue of compensation for damages suffered during armed conflict or a state of emergency.
| Japan – Uruguay BIT  
(signed 26 January 2015) | **Article 22 General and Security Exceptions**  
1. Subject to the requirement that such measures are not applied by a Contracting Party in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Contracting Party, or a disguised restriction on investments of investors of the other Contracting Party in the Area of the former Contracting Party, nothing in this Agreement shall be construed so as to prevent the former Contracting Party from adopting or enforcing measures:  
(a) necessary to protect human, animal or plant life or health;  
(b) necessary to protect public morals or to maintain public order, provided that the public order exception may only be invoked where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society;  
(c) necessary to secure compliance with the laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:  
(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contract;  
(ii) the protection of the privacy of the individual in relation to the processing and dissemination of personal data and the protection of confidentiality of personal records and accounts; or  
(iii) safety;  
(d) imposed for the protection of national treasures of artistic, historic or archaeological value; or  
(e) necessary for the conservation of living or nonliving exhaustible natural resources. |
<table>
<thead>
<tr>
<th>Article 17</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Contracting Party, or a disguised restriction on investments of investors of the other Contracting Party, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or enforcing measures:</td>
</tr>
<tr>
<td>(a) necessary to protect human, animal or plant life or health;</td>
</tr>
<tr>
<td>(b) necessary to protect public morals or to maintain public order;</td>
</tr>
<tr>
<td>Note: The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interest of society</td>
</tr>
<tr>
<td>(c) necessary to secure compliance with the laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:</td>
</tr>
<tr>
<td>(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contract;</td>
</tr>
<tr>
<td>(ii) the protection of the privacy of the individual in relation to the processing and dissemination of personal data and the protection of confidentiality of personal records and accounts; or</td>
</tr>
<tr>
<td>(iii) safety;</td>
</tr>
</tbody>
</table>
| (d) which it considers necessary for the protection of its essential security interests: (…)
| (e) in pursuance of its obligations under United Nations Charter for the maintenance of international peace and security; or |
| (f) imposed for the protection of national treasures of artistic, historic or archaeological value. |
2. In cases where a Contracting Party takes any measure, pursuant to paragraph 1 above, that does not conform with the obligations of the provisions of this Agreement other than the provisions of Article 12, that Contracting Party shall, prior to the entry into force of the measure or as soon thereafter as possible, notify the other Contracting Party of the following elements of the measure:
(a) sector and sub-sector or matter;
(b) obligation or article in respect of the measure;
(c) legal source of the measure;
(d) succinct description of the measure; and
(e) purpose of the measure.

965 Article 12 deals with the issue of compensation for damages suffered during armed conflict or a state of emergency.
| **Japan – Vietnam BIT**  
(Tokyo, signed 14 November 2003)  
Entry into force: 19 December 2004 | **Article 15**  
1. Notwithstanding any other provisions in this Agreement other than the provisions of Article 10, each Contracting Part may:  
(a) (…)  
(b) (…)  
(c) take any measure necessary to protect human, animal or plant life or health; or  
(d) take any measure necessary for the maintenance of public order. The public order exceptions may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.  
2. In cases where a Contracting Party takes any measure, pursuant to paragraph 1 above, that does not conform with the obligations of the provisions of this Agreement other than the provisions of Article 10, that Contracting Party shall not use such measure as a means of avoiding its obligations.  
3. In cases where a Contracting Party takes any measure, pursuant to paragraph 1 of this Article, that does not conform with the obligations of the provisions of this Agreement other than the provisions of Article 10, that Contracting Party shall, prior to the entry into force of the measure or as soon thereafter as possible, notify the other Contracting Party of the following elements of the measure: (a) sector and sub-sector or matter; (b) obligation or article in respect of the measure; (c) legal source of the measure; (d) succinct description of the measure; and (e) purpose of the measure.

---

966 Article 10 deals with the issue of compensation for damages suffered during armed conflict or a state of emergency.
<table>
<thead>
<tr>
<th>Country 1</th>
<th>Article 11 Application of Other Rules</th>
<th>Country 2</th>
<th>Article 14 Prohibitions and restrictions</th>
</tr>
</thead>
</table>
| Mauritius – Barbados BIT  
(St. Kitts, signed 28 September 2004)  
Entry into force: 18 June 2006 | 2. The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interest, or to the protection of public health or the prevention of diseases and pests in animals or plants. | Economic Union of Belgium and Luxembourg BIT  
(Brussels, signed 30 November 2005)  
Entry into force: 26 January 2010 | The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action, which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases and pests in animals or plants. |
| Mauritius – Benin BIT  
(Brussels, signed 18 May 2001)  
Not yet entered into force | Article 11 Interdictions et Restrictions  
Aucune disposition du présent Accord ne pourra être interprétée comme empêchant une Partie Contractante de prendre toute mesure nécessaire à la protection de ses intérêts essentiels en matière de sécurité, ou pour des motifs de santé publique ou de prévention des maladies affectant les animaux et les végétaux. | Botswana BIT  
(Gaberone, signed 17 August 2005)  
Not yet entered into force | Article 12 Prohibitions and Restrictions  
The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases and pests in animals or plants. |
| Mauritius – Burundi BIT  
(Brussels, signed 18 May 2001)  
Entry into force: 22 November 2009 | Article 12 Interdictions et Restrictions  
Aucune disposition du présent Accord ne pourra être interprétée comme empêchant une Partie Contractante de prendre toute mesure nécessaire à la protection de ses intérêts essentiels en matière de sécurité, ou pour des motifs de santé publique ou de prévention des maladies affectant les animaux et les végétaux. |

---

*ANNEX I: General Exception Clauses in Current IIAs*
## ANNEX I: General Exception Clauses in Current IIAs

<table>
<thead>
<tr>
<th>Country-Party</th>
<th>BIT Agreement</th>
<th>Entry into Force</th>
<th>Article 11 Interdictions et Restrictions</th>
<th>Article 12 Interdictions et Restrictions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mauritius – Cameroon BIT</td>
<td>(Brussels, signed 3 August 2001) Not yet entered into force</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mauritius – China BIT</td>
<td>(Port Louis, signed 4 May 1996) Entry into force: 8 June 1997</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mauritius – Chad BIT</td>
<td>(Brussels, signed 18 May 2001) Not yet entered into force</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mauritius – Comoros BIT</td>
<td>(Brussels, signed 18 May 2001) Not yet entered into force</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mauritius – Czech Republic BIT</td>
<td>(Port Luis, signed 5 April 1999) Entry into force: 6 May 2000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Country 1</td>
<td>Country 2</td>
<td>BIT Details</td>
<td>Article</td>
<td>Textual Content</td>
</tr>
<tr>
<td>----------</td>
<td>-----------</td>
<td>-------------</td>
<td>---------</td>
<td>----------------</td>
</tr>
<tr>
<td>Mauritius – Egypt BIT (Balaclava, signed 25 June 2014)</td>
<td>Article 13 Security Exceptions</td>
<td>Subject to the requirement that such measures are not applied in an arbitrary or discriminatory manner or constitute a disguised restriction on investors and investments, nothing in this Agreement shall be construed to prevent either Contracting Party from taking measures to fulfill its obligations with respect to the protection of its essential security interests, the protection of public health or the prevention of diseases and pests in animals or plants.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mauritius – Guinea Republic BIT (Brussels, signed 18 May 2001)</td>
<td>Article 12 Interdictions et Restrictions</td>
<td>Aucune disposition du présent Accord ne pourra être interprétée comme empêchant une Partie Contractante de prendre toute mesure nécessaire à la protection de ses intérêts essentiels en matière de sécurité, ou pour des motifs de santé publique ou de prévention des maladies affectant les animaux et les végétaux.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mauritius – Indonesia BIT (Port Louis, signed 3 March 1997)</td>
<td>Article II Scope of the Agreement</td>
<td>3. The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases and pests in animals or plants.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mauritius – Madagascar BIT (Antananarivo, signed 6 April 2004)</td>
<td>Article 3 Traitement juste et équitable</td>
<td>c. Aucune disposition du présent Accord ne pourra être interprétée comme empêchant une Partie Contractante de prendre toute mesure nécessaire à la protection de ses intérêts essentiels en matière de sécurité et d’ordre public, d’environnement, de santé publique et de prévention des maladies affectant les animaux et végétaux.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mauritius – Mauritania BIT (Brussels, signed 18 May 2001)</td>
<td>Article 11 Interdictions et Restrictions</td>
<td>Aucune disposition du présent Accord ne pourra être interprétée comme empêchant une Partie Contractante de prendre toute mesure nécessaire à la protection de ses intérêts essentiels en matière de sécurité, ou pour des motifs de santé publique ou de prévention des maladies affectant les animaux et les végétaux.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Country组合</td>
<td>BIT</td>
<td>Entry into force</td>
<td>Article 12 Prohibitions and Restrictions</td>
<td></td>
</tr>
<tr>
<td>------------</td>
<td>-----</td>
<td>-----------------</td>
<td>---------------------------------------</td>
<td></td>
</tr>
<tr>
<td>Mauritius – Mozambique BIT</td>
<td>(Maputo, signed 14 February 1997)</td>
<td>26 May 2003</td>
<td>The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases and pests in animals or plants.</td>
<td></td>
</tr>
<tr>
<td>Mauritius – Pakistan BIT</td>
<td>(Islamabad, signed 3 April 1997)</td>
<td>3 April 1997</td>
<td>The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests or to the protection of public health or the prevention of diseases and pests in animals or plants.</td>
<td></td>
</tr>
<tr>
<td>Mauritius – Republic of Congo</td>
<td>(Port Louis, signed 20 December 2010)</td>
<td>15 December 2013</td>
<td>Aucune disposition du présent Accord ne pourra être interprétée comme empêchant une Partie contractante de prendre toute mesure nécessaire à la protection de ses intérêts, essentiels en matière de sécurité, ou pour des motifs de santé publique ou de prévention des maladies affectant les animaux et les végétaux.</td>
<td></td>
</tr>
<tr>
<td>Mauritius – Romania BIT</td>
<td>(Bucharest, signed 20 January 2000)</td>
<td>20 December 2000</td>
<td>Article 2 Promotion and Admission 1. Each Contracting Party shall, in its State territory, promote as far as possible investments made by investors of the other Contracting Party and admit such investments in accordance with its national laws and regulations. However, this Agreement shall not prevent a Contracting Party from applying restrictions of any kind or taking any other action to protect its essential security interests or public health or to prevent diseases or pests in animals or plants.</td>
<td></td>
</tr>
<tr>
<td>Country</td>
<td>BIT Agreement Details</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>----------------</td>
<td>---------------------------------------------------------------------------------------</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
| Mauritius – Rwanda BIT | *Port Louis, signed 30 July 2001*  
Not yet entered into force  
**Article 12 Prohibitions and Restrictions**  
The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases and pests in animals or plants. |
| Mauritius – Senegal BIT | *Port Louis, signed 14 March 2002*  
Entry into force: 14 October 2009  
**Article 11 Interdictions et Restrictions**  
Aucune disposition du présent Accord ne pourra être interprétée comme empêchant une Partie Contractante de prendre toute mesure nécessaire à la protection de ses intérêts essentiels en matière de sécurité, ou pour des motifs de santé publique ou de prévention des maladies affectant les animaux et les végétaux. |
| Mauritius – Swaziland BIT | *Mauritius, signed 15 May 2000*  
Not yet entered into force  
**Article 12 Prohibitions and Restrictions**  
The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases and pests in animals or plants in conformity with the laws of each Contracting Party. |
| Mauritius – Turkey BIT | *Istanbul, signed 7 February 2013*  
Entry into force: 30 May 2016  
**ARTICLE 12 GENERAL EXCEPTIONS**  
1. Nothing in this Agreement shall be construed as preventing a Contracting Party from adopting, maintaining, or enforcing any non-discriminatory legal measures:  
   (a) designed and applied for the protection of human, animal or plant life or health, or the environment;  
   (b) related to the conservation of living or non-living exhaustible natural resources. |
| Mauritius – Zambia BIT | *Port Louis, 14 July 2015*  
Entry into force: 6 May 2016  
**Article 12 Prohibitions and Restrictions**  
The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases and pests in animals or plants. |
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Mauritius – Zimbabwe BIT</td>
<td></td>
<td>(Port Louis, signed 17 May 2000)</td>
<td>Not yet entered into force</td>
</tr>
<tr>
<td>Article 12 Prohibitions and Restrictions</td>
<td>The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests or to the protection of public health or the prevention of diseases and pests in animals or plants.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Moldova – Slovenia BIT</td>
<td></td>
<td>(Ljubljana, signed 10 April 2003)</td>
<td>Entry into force: 1 June 2004</td>
</tr>
<tr>
<td>Article 14 General Exceptions</td>
<td>2. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination by a Contracting Party, or a disguised investment restriction, nothing in this Agreement shall be construed to prevent a Contracting Party from taking any measure necessary for the maintenance of public order. 3. The provisions of this Article shall not apply to Article 5 (expropriation), 6 (compensation for losses), or 7 para 1(e) (free transfer of any compensation referred to in article 5 or 6).</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Article 27 General Exceptions[^967]</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>-----------------------------------</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Party or its investors where like conditions prevail, or a disguised restriction on investments of investors of the other Party in the territory of a Party, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) necessary to protect public morals or to maintain public order[^968];</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(b) necessary to protect human, animal or plant life or health;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on a contract;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; or</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(iii) safety;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(d) imposed for the protection of national treasures of artistic, historic or archaeological value; or</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(e) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

[^967]: For greater certainty, the application of the general exception to these provisions shall not be interpreted so as to diminish the ability of governments to take measures where investors are not in like circumstances due to the existence of legitimate regulatory objectives.

[^968]: The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.
### ANNEX I: General Exception Clauses in Current IIAs

<table>
<thead>
<tr>
<th>Singapore – Czech Republic BIT (Singapore, signed 8 April 1995)</th>
<th><strong>Article 11 Prohibitions and Restrictions</strong>&lt;br&gt;The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases and pests in animals or plants.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Singapore – China BIT (Beijing, signed 21 November 1985)</td>
<td><strong>Article 11 Prohibitions and Restrictions</strong>&lt;br&gt;The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases and pests in animals or plants.</td>
</tr>
</tbody>
</table>
### Article 18
Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination, between the Parties where like conditions prevail, or a disguised restriction on investments in the territory of a Party by investors of the other Party, nothing in this Chapter shall be construed to prevent the adoption or enforcement by a Party of measures:

(a) necessary to protect public morals or to maintain public order;\(^{969}\)

(b) necessary to protect human, animal or plant life or health;

(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter including those relating to:

(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on a contract;

(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;

(iii) safety;

(d) imposed for the protection of national treasures of artistic, historic or archaeological value;

(e) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

---

\(^{969}\) The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.
### Article 11 Prohibitions and Restrictions

The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases and pests in animals or plants.

<table>
<thead>
<tr>
<th>Country 1</th>
<th>Country 2</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Singapore – Mauritius BIT</strong>&lt;br&gt;(Singapore, signed 14 March 2000)&lt;br&gt;Entry into force: 19 April 2000</td>
<td><strong>Article 11 Prohibitions and Restrictions</strong>&lt;br&gt;The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases and pests in animals or plants.</td>
</tr>
<tr>
<td><strong>Singapore – Mongolia BIT</strong>&lt;br&gt;(Singapore, signed 24 July 1995)</td>
<td><strong>Article 11 Prohibitions and Restrictions</strong>&lt;br&gt;The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases and pests in animals or plants.</td>
</tr>
<tr>
<td>Article 28</td>
<td></td>
</tr>
<tr>
<td>--------------------------</td>
<td></td>
</tr>
<tr>
<td>Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination, between the Parties where like conditions prevail, or a disguised restriction on investments in the territory of a Party by investors of the other Party, nothing in this Chapter shall be construed to prevent the adoption or enforcement by a Party of measures:</td>
<td></td>
</tr>
<tr>
<td>(a) necessary to protect public morals or to maintain public order; 970</td>
<td></td>
</tr>
<tr>
<td>(b) necessary to protect human, animal or plant life or health;</td>
<td></td>
</tr>
<tr>
<td>(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter including those relating to:</td>
<td></td>
</tr>
<tr>
<td>(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on a contract;</td>
<td></td>
</tr>
<tr>
<td>(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;</td>
<td></td>
</tr>
<tr>
<td>(iii) safety;</td>
<td></td>
</tr>
<tr>
<td>(d) imposed for the protection of national treasures of artistic, historic or archaeological value;</td>
<td></td>
</tr>
<tr>
<td>(e) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.</td>
<td></td>
</tr>
</tbody>
</table>

970 The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

---

ANNEX I: General Exception Clauses in Current IIAs
### Article 11 Prohibitions and Restrictions

The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases and pests in animals or plants.

### Article 11 Prohibitions and Restrictions

The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action where such prohibitions, restrictions or actions are directed to:

1. the protection of its essential security interests;
2. the protection of public health; or
3. the prevention of diseases and pests in animals or plants.

### Article 11 Prohibitions and Restrictions

The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its national interests or to the protection of public health or the prevention of disease and pests in animals or plants.

### Article 20 Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between States where like conditions prevail, or a disguised restriction on investors and investments, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Party of measures:

1. necessary to protect public morals or to maintain public order;
2. necessary to protect human, animal or plant life or health; or the environment; or
3. necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement.
<table>
<thead>
<tr>
<th>Country 1</th>
<th>BIT Agreement</th>
<th>Country 2</th>
<th>BIT Agreement</th>
<th>Article 11 Other Rules and Specific Commitments</th>
<th>Article 5 General Exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Switzerland – Mauritius BIT</td>
<td>(Port Louis, signed 26 November 1998)</td>
<td>Switzerland – United Arab Emirates BIT</td>
<td>(Abu Dhabi, signed 3 November 1998)</td>
<td>3. Nothing in this Agreement shall be construed to prevent a Contracting Party from taking any action necessary for the protection of its essential security interests or for reasons of public health or the prevention of diseases in animals and plants.</td>
<td>1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any non-discriminatory legal measure:</td>
</tr>
<tr>
<td>Entry into force: 21 April 2000</td>
<td></td>
<td>Entry into force: 16 August 1999</td>
<td></td>
<td>a) designed and applied for the protection of human, animal or plant life or health, or the environment;</td>
<td>a) designed and applied for the protection of human, animal or plant life or health, or the environment;</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>b) related to the conservation of living or non-living exhaustible natural resources.</td>
<td>b) related to the conservation of living or non-living exhaustible natural resources.</td>
</tr>
<tr>
<td>Turkey – Azerbaijan BIT</td>
<td>(Izmir, signed 25 October 2011)</td>
<td>Turkey – Bangladesh BIT</td>
<td>(Ankara, signed 12 April 2012)</td>
<td></td>
<td>1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any non-discriminatory legal measure:</td>
</tr>
<tr>
<td>Entry into force: 2 May 2013</td>
<td></td>
<td></td>
<td></td>
<td>a) designed and applied for the protection of human, animal or plant life or health, or the environment;</td>
<td>a) designed and applied for the protection of human, animal or plant life or health, or the environment;</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>b) related to the conservation of living or non-living exhaustible natural resources.</td>
<td>b) related to the conservation of living or non-living exhaustible natural resources.</td>
</tr>
</tbody>
</table>
| Turkey – Cameroon BIT  
(Ankara, signed 24 April 2012) | **Article 5 General Exceptions**  
1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any non-discriminatory legal measure:  
   a) designed and applied for the protection of human, animal or plant life or health, or the environment;  
   b) related to the conservation of living or non-living exhaustible natural resources. |
|---|---|
| **Turkey – Colombia BIT**  
(Bogota, signed 28 July 2014) | **Article 6 General Exceptions**  
1. For the purposes of Agreement, subject to the requirement that such measures are not applied in a manner that constitute arbitrary or unjustifiable discrimination between investment or between investors, or a disguised restriction on investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or enforcing necessary legal measures:  
   a) designed and applied for the protection of human, animal or plant life or health, or the environment;  
   b) related to the conservation of living or non-living exhaustible natural resources. |
| **Turkey – Gabon BIT**  
(Ankara, signed 18 July 2012)  
Not yet entered into force | **Article 5 General Exceptions**  
1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any non-discriminatory legal measure:  
   a) designed and applied for the protection of human, animal or plant life or health, or the environment;  
   b) related to the conservation of living or non-living exhaustible natural resources. |
<table>
<thead>
<tr>
<th>Turkey – Gambia BIT</th>
<th>Article 5 General Exceptions</th>
</tr>
</thead>
</table>
| (Ankara, signed 12 March 2013) Not yet entered into force | 1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any non-discriminatory legal measure:  
   a) designed and applied for the protection of human, animal or plant life or health, or the environment;  
   b) related to the conservation of living or non-living exhaustible natural resources. |

<table>
<thead>
<tr>
<th>Turkey – Kenya BIT</th>
<th>Article 5 General Exceptions</th>
</tr>
</thead>
</table>
| (Ankara, signed 8 April 2014) | 1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any non-discriminatory legal measure:  
   a) designed and applied for the protection of human, animal or plant life or health, or the environment;  
   b) related to the conservation of exhaustible natural resources. |

<table>
<thead>
<tr>
<th>Turkey – Nigeria BIT</th>
<th>Article 6 General Exceptions</th>
</tr>
</thead>
</table>
| (Ankara, signed 2 February 2011) | 1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any non-discriminatory legal measure:  
   a) designed and applied for the protection of human, animal or plant life or health, or the environment;  
   b) related to the conservation of living or non-living exhaustible natural resources. |

<table>
<thead>
<tr>
<th>Turkey – Pakistan BIT</th>
<th>Article 5 General Exceptions</th>
</tr>
</thead>
</table>
| (Islamabad, signed 22 May 2012) | 1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any non-discriminatory legal measure:  
   a) designed and applied for the protection of human, animal or plant life or health, or the environment; and  
   b) related to the conservation of living or non-living exhaustible natural resources. |
Turkey – Rwanda BIT
(Istanbul, signed 3 November 2016)

Article 5 General Exceptions
1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any non-discriminatory legal measure:
   a) designed and applied for the protection of human, animal or plant life or health, or the environment;
   b) related to the conservation of living or non-living exhaustible natural resources.

Turkey – Tanzania BIT
(Daresselam, signed 11 March 2011)

Article 5 General Exceptions
1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any non-discriminatory legal measure:
   a) designed and applied for the protection of human, animal or plant life or health, or the environment;
   b) related to the conservation of living or non-living exhaustible natural resources.

Preferential Trade and Investment Agreements

<table>
<thead>
<tr>
<th>FTA</th>
<th>General Exception Provision</th>
</tr>
</thead>
<tbody>
<tr>
<td>ASEAN – Australia – New Zealand FTA (AANZFTA) (Hua Hin, signed 27 February 2009) Entry into force: 1 January 2010</td>
<td>Chapter 15 General Provisions and Exceptions Article 1 General Exceptions 2. For the purposes of Chapter 8 (Trade in Services), Chapter 9 (Movement of Natural Persons) and Chapter 11 (Investment), Article XIV of GATS including its footnotes shall be incorporated into and shall form part of this Agreement, mutatis mutandis.</td>
</tr>
</tbody>
</table>
### Article 16

1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties, their investors or their investments where like conditions prevail, or a disguised restriction on investors of any Party or their investments made by investors of any Party, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Party of measures:

   (a) necessary to protect public morals or to maintain public order\(^{971}\);

   (b) necessary to protect human, animal or plant life or health;

   (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

      (i) the prevention of deceptive and fraudulent practices to deal with the effects of a default on a contract;

      (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; and

      (iii) safety;

   (d) aimed at ensuring the equitable or effective\(^{972}\) imposition or collection of direct taxes in respect of investments or investors of any Party;

   (e) imposed for the protection of national treasures of artistic, historic or archaeological value; or

   (f) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

---

971 For the purpose of this Sub-paragraph, footnote 5 of Article XIV of the GATS is incorporated into and forms part of this Agreement, *mutatis mutandis*.

972 For the purpose of this Sub-paragraph, footnote 6 of Article XIV of the GATS is incorporated into and forms part of this Agreement, *mutatis mutandis*. 
| ASEAN – India Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation (signed 12 November 2014) | **Article 21 General Exceptions**  
Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against or amongst the Parties, their investors, or their investments where like conditions prevail, or a disguised restriction on investors of any Party or their investments, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Party of measures:  
(a) necessary to protect national security and public morals;  
(b) necessary to protect human, animal or plant life or health;  
(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter including those relating to:  
   (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on investment agreements;  
   (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and protection of confidentiality of individual records and accounts; or  
   (iii) safety;  
(d) imposed for the protection of national treasures of artistic, historic or archaeological value; or  
(e) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. |
ASEAN – Korea FTA Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation (AK-FTA) (Jeju-do, signed 2 June 2009) Entry into force: 1 January 2010

Article 20 General Exceptions

1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties or their investors where like conditions prevail, or a disguised restriction on investors or investments made by investors of any other Party, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Party of measures:

(a) necessary to protect public morals or to maintain public order973;
(b) necessary to protect human, animal or plant life or health;
(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
   (i) the prevention of deceptive and fraudulent practices to deal with the effects of a default on a contract;
   (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; and
   (iii) safety;
(d) inconsistent with Article 3 (National Treatment), provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of investments or investors of any other Party;
(e) imposed for the protection of national treasures of artistic, historic or archaeological value; or
(f) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

973 The public order exception may be invoked by a Party only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.
974 For the purpose of this subparagraph, footnote 6 of Article XIV of the GATS is incorporated into and forms an integral part of this Agreement, mutatis mutandis.
### Article 19 Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between covered investments or investors of the other Party and other investments or investors, where like conditions prevail, or a disguised restriction on investment, nothing in Articles 5 (National Treatment), 6 (Most Favoured Nation Treatment), 7 (Performance Requirements), or 8 (Senior Management and Boards of Directors) shall preclude the adoption or enforcement by either Party of measures:

(a) necessary to protect public morals or to maintain public order;
(b) necessary to protect human, animal or plant life or health;
(c) necessary to protect national works or specific sites of artistic, historic or archaeological value; or
(d) relating to the conservation of living or non-living exhaustible natural resources.

---

975 The Parties understand that this include environmental measures necessary to protect human, animal or plant life or health.
### Article 5 General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Participating States where like conditions prevail, or a disguised restriction on investment flows, nothing in this Agreement shall be construed to prevent an Participating State from adopting and implementing measures:

1. which it considers necessary for the protection of its national security, the protection of public morals and maintenance of public order, the protection of human, animal and plant life and health, and the protection of articles of artistic, historical and archaeological value;

2. which are aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of investments or investors of Participating States; or

3. which it considers necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement including those relating to:
   - the prevention of deceptive and fraudulent practices;
   - the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
   - safety.

---

976 The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interest of society.
### Article 17 General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Member States or their investors where like conditions prevail, or a disguised restriction on investors of any other Member State and their investments, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures:

(a) necessary to protect public morals or to maintain public order;\(^{977}\)

(b) necessary to protect human, animal or plant life or health;

(c) necessary to secure compliance with laws or regulations which are not inconsistent with this Agreement including those relating to:

(i) the prevention of deceptive and fraudulent practices to deal with the effects of a default on a contract

(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts

(d) aimed at ensuring the equitable or effective\(^{978}\) imposition or collection of direct taxes in respect of investments or investors of any Member State;

(e) imposed for the protection of national treasures of artistic, historic or archaeological value;

(f) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

---

\(^{977}\) The public order exception may be invoked by a Member State only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

\(^{978}\) For the purpose of this sub-paragraph, footnote 6 of Article XIV of the General Agreement on Trade in Services in Annex 1B to the WTO Agreement (GATS) is incorporated into and forms an integral part of this Agreement, *mutatis mutandis.*
<table>
<thead>
<tr>
<th><strong>Article 9.8 General Exceptions</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>For the purposes of this Chapter and subject to the requirement that such measures are not applied in a manner which would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures:</td>
</tr>
<tr>
<td>(a) necessary to protect human, animal or plant life or health;</td>
</tr>
<tr>
<td>(b) necessary to ensure compliance with laws and regulations that are not inconsistent with this Agreement;</td>
</tr>
<tr>
<td>(c) imposed for the protection of national treasures of artistic, historic or archaeological value; or</td>
</tr>
<tr>
<td>(d) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.</td>
</tr>
<tr>
<td>The Parties understand that the measures referred to subparagraph (a) include environmental measures to protect human, animal or plant life or health, and that the measures referred to in subparagraph (d) include environmental measures relating to the conservation of living and non-living exhaustible natural resources.</td>
</tr>
</tbody>
</table>
### Article 14.15 General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between covered investments or investors of the other Party and other investments or investors, where like conditions prevail, or a disguised restriction on investment, nothing in Articles 14.3, 14.4, and 14.9 shall prevent the adoption or enforcement by either Party of measures:

1. (a) necessary to protect public morals or to maintain public order;
   
   Note: The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

2. (b) necessary to protect human, animal or plant life or health;
   
   Note: This exception includes environmental measures necessary to protect human, animal or plant life or health.

3. (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter, including those relating to:
   
   1. (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on a contract;
   2. (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; or
   3. (iii) safety;

4. (d) imposed for the protection of national treasures of artistic, historic or archaeological value; or

5. (e) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.
### Article 22.1 General Exceptions

3. For the purposes of Chapter 11 (Investment), subject to the requirement that such measures are not applied in a manner which would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures:

- (a) necessary to protect human, animal or plant life or health;
- (b) necessary to ensure compliance with laws and regulations that are not inconsistent with this Agreement;
- (c) imposed for the protection of national treasures of artistic, historic or archaeological value; or
- (d) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

The Parties understand that the measures referred to subparagraph (a) include environmental measures to protect human, animal or plant life or health, and that the measures referred to in subparagraph (d) include environmental measures relating to the conservation of living and non-living exhaustible natural resources.

---

**Annex I: General Exception Clauses in Current IIAs**

<table>
<thead>
<tr>
<th>Country</th>
<th>FTA Details</th>
<th>Entry into Force</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia – Korea FTA (Seoul, signed 8 April 2014)</td>
<td>Article 22.1 General Exceptions</td>
<td>12 December 2014</td>
</tr>
</tbody>
</table>
Article 12.18 General Exceptions

1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Parties where like conditions prevail, or a disguised restriction on investment flows, nothing in this Chapter shall be construed to prevent the adoption or enforcement by any Party of measures:

(a) necessary to protect national security and public morals;
(b) necessary to protect human, animal or plant life or health;
(c) aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of investments or investors of the Parties; or
(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter including those relating to:
   (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on investment agreements;
   (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and protection of confidentiality of individual records and accounts; or
   (iii) safety;
(e) imposed for the protection of national treasures of artistic, historic or archaeological value; or
(f) to conserve exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

2. In cases where a Party takes any measures pursuant to paragraph 1 that do not conform to the obligations of the provisions of this Chapter other than the provisions of Article 12.10 (Treatment in the Case of Strife), that Party shall promptly notify the other Party on the measures.
### Article 19 Exceptions
Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between covered investments or investors of the other Party and other investments or investors, where like conditions prevail, or a disguised restriction on investment, nothing in Articles 5 (National Treatment), 6 (Most Favoured Nation Treatment), 7 (Performance Requirements), or 8 (Senior Management and Boards of Directors) shall preclude the adoption or enforcement by either Party of measures:

(a) necessary to protect public morals or to maintain public order;
(b) necessary to protect human, animal or plant life or health;  
(c) necessary to protect national works or specific sites of artistic, historic or archaeological value; or
(d) relating to the conservation of living or non-living exhaustible natural resources.

---

### Article 1601
2. For purposes of Chapters 8 — 10, Article XIV of GATS is incorporated into and made part of this Agreement, mutatis mutandis.
3. Article XX (e) – (g) of GATT 1994 is incorporated into and made part of Chapter 9, mutatis mutandis.

---

979 The Parties understand that this includes environmental measures necessary to protect human, animal or plant life or health.

980 Chapter 9 is the investment chapter.
<table>
<thead>
<tr>
<th>Country 1 – Country 2 FTA</th>
<th>Article 2201 General Exceptions</th>
<th>Article 28.3 – General exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Canada – Colombia FTA</strong>&lt;br&gt;(Signed 21 November 2008)&lt;br&gt;Entry into force: 15 August 2011</td>
<td>3. For the purposes of Chapter Eight (Investment), subject to the requirement that such measures are not applied in a manner that constitute arbitrary or unjustifiable discrimination between investment or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:&lt;br&gt;(a) to protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life and health;&lt;br&gt;(b) to ensure compliance with laws and regulations that are not inconsistent with this Agreement; or&lt;br&gt;(c) for the conservation of living or non-living exhaustible natural resources.</td>
<td>1. For the purposes of Article 30.8.5 (Termination, suspension or incorporation of other existing agreements), Chapters Two (National Treatment and Market Access for Goods), Five (Sanitary and Phytosanitary Measures), and Six (Customs and Trade Facilitation), the Protocol on rules of origin and origin procedures and Sections B (Establishment of investment) and C (Non-discriminatory treatment) of Chapter Eight (Investment), Article XX of the GATT 1994 is incorporated into and made part of this Agreement. The Parties understand that the measures referred to in Article XX (b) of the GATT 1994 include environmental measures necessary to protect human, animal or plant life or health. The Parties understand that Article XX(g) of the GATT 1994 applies to measures for the conservation of living and non-living exhaustible natural resources.</td>
</tr>
</tbody>
</table>

**Canada – European Union FTA**<br>(Signed October 2016)<br>Not yet entered into force. |
<table>
<thead>
<tr>
<th>Country Pair</th>
<th>Agreement</th>
<th>Entry into Force</th>
<th>Article 22.2 General Exceptions</th>
<th>Article 22.1 General Exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Canada – Honduras FTA</td>
<td>(Signed 5 November 2013)</td>
<td>1 October 2014</td>
<td>3. For the purposes of Chapter Ten (Investment): a. a Party may adopt or enforce a measure necessary: i. to protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life or health, ii. to ensure compliance with a laws or regulation that are not inconsistent with this Agreement, or iii. for the conservation of living or non-living exhaustible natural resources; b. provided that the measure referred to in sub paragraph (a) is not: i. applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors, or ii. a disguised restriction on international trade or investment.</td>
<td>3. For the purposes of Chapter Eight (Investment), subject to the requirement that those measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, this Agreement is not to be construed to prevent a Party from adopting or enforcing measures necessary: (a) to protect human, animal or plant life or health; (b) to ensure compliance with laws and regulations that are not inconsistent with this Agreement; or (c) for the conservation of living or non-living exhaustible natural resources.</td>
</tr>
</tbody>
</table>
### Canada – Panama FTA  
**Signed 14 May 2010**  
**Entry into force: 1 April 2013**

#### Article 23.02 General Exceptions
3. For the purposes of Chapter Nine (Investment):
   a. a Party may adopt or enforce a measure necessary:
      i. to protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life or health,
      ii. to ensure compliance with laws or regulations that are not inconsistent with this Agreement, or
      iii. for the conservation of living or non-living exhaustible natural resources;
   b. provided that the measure referred to in subparagraph (a) is not:
      i. applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors, or
      ii. a disguised restriction on international trade or investment.

### Canada – Peru FTA  
**Signed 28 May 2008**  
**Entry into force: 1 August 2009**

#### Article 2201 General Exceptions
3. For the purposes of Chapter Eight (Investment), subject to the requirement that such measures are not applied in a manner that constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:
   a. to protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life or health;
   b. to ensure compliance with laws and regulations that are not inconsistent with this Agreement; or
   c. for the conservation of living or non-living exhaustible natural resources.
<table>
<thead>
<tr>
<th>Costa Rica – China FTA (signed 8 April 2010) Entry into force: 1 August 2011</th>
<th>Article 159 General Exceptions 2. For purposes of Chapter 9 (Investment, Trade in Services and Temporary Entry of Business Persons), Article XIV of GATS (including its footnotes) is incorporated into and made part of this Agreement, <em>mutatis mutandis</em>. The Parties understand that the measures referred to in Article XIV (b) of GATS include environmental measures necessary to protect human, animal, or plant life or health, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in services and investment.</th>
</tr>
</thead>
<tbody>
<tr>
<td>EFTA – Colombia FTA (Geneva, signed 28 November 2008) Entry into force: 1 July 2011</td>
<td>Article 5.8 Exceptions The rights and obligations of the Parties in respect of general exceptions, including measures necessary to maintain public order, shall be governed by Article XIV of the GATS, which is hereby incorporated into and made part of this Chapter, <em>mutatis mutandis</em>. (footnotes omitted).</td>
</tr>
<tr>
<td>EFTA – Hong Kong FTA (Vaduz, 21 June 2011 signed) Entry into force: 1 October 2012 (1 November for Norway)</td>
<td>Article 4.9 Exceptions The rights and obligations of the Parties in respect of general exceptions and security exceptions shall be governed by Article XIV and paragraph 1 of Article XIV bis of the GATS, which are hereby incorporated into and made part of this Chapter, <em>mutatis mutandis</em>.</td>
</tr>
</tbody>
</table>
### EFTA – Korea FTA
(Hong Kong, signed 15 December 2005)
Entry into force: 1 September 2006

**Article 20 Exceptions**
Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between States where like conditions prevail, or a disguised restriction on investors and investments, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Party of measures:

- **(a)** necessary to protect public morals or to maintain public order;
- **(b)** necessary to protect human, animal or plant life or health; or the environment; or
- **(c)** necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement.

### EFTA – Costa Rica – Panama
(Trondheim, signed 24 June 2013)

**Article 5.9 General Exceptions**
With respect to the rights and obligations of the Parties concerning general exceptions, Article XIV of the GATS shall apply and is hereby incorporated into and made part of this Agreement, *mutatis mutandis*. 

---

**ANNEX I: General Exception Clauses in Current IIAs**
EFTA – Singapore FTA
(Egilsstadir, signed 26 June 2002)
Entry into force: 1 January 2003

Article 49 Exceptions
The following provisions shall apply, mutatis mutandis, to this Chapter: Articles 33, 34 and 35, as well as Article 19 (e), (f) and (g).

Article 33 General Exceptions
Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Chapter shall be construed to prevent the adoption or enforcement by any Party of measures:
(a) necessary to protect public morals or to maintain public order;981
(b) necessary to protect human, animal or plant life or health;
(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter including those relating to:
   (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
   (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
   (iii) safety;

Article 19 General Exception
Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Party of measures:
(a) necessary to protect public morals;
(b) necessary to protect human, animal or plant life or health;
(c) relating to the importations or exportations of gold and silver;

ANNEX I: General Exception Clauses in Current IIAs
(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII of the GATT 1994, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

(e) relating to the products of prison labour;

(f) imposed for the protection of national treasures of artistic, historic or archaeological value;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

<table>
<thead>
<tr>
<th>EFTA – Ukraine FTA</th>
<th>Article 4.14 Exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Reykjavik, signed 24 June 2010)</td>
<td>The rights and obligations of the Parties in respect of general exceptions shall be governed by Article XIV of the GATS, which is hereby incorporated into and made part of this Chapter, mutatis mutandis.</td>
</tr>
<tr>
<td>Entry into force: 1 June 2012</td>
<td></td>
</tr>
</tbody>
</table>

981 The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.
<table>
<thead>
<tr>
<th>India – Malaysia FTA Comprehensive Economic Cooperation Agreement (Kuala Lumpur, signed 18 February 2011)</th>
<th>Article 12.1 General Exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1. For the purposes of Chapters 2 through 10 (Trade in Goods, Rules of Origin, Customs Cooperation, Trade Remedies, Sanitary and Phytosanitary Measures, Technical Barriers to Trade, Trade in Services, Movement of Natural Persons, and Investment) of this Agreement, Article XX of GATT 1994 and its interpretive notes and Article XIV of GATS (including its footnotes) shall apply to this Agreement, <em>mutatis mutandis</em>.</td>
</tr>
<tr>
<td></td>
<td>2. For the purposes of Chapters 2 through 10 (Trade in Goods, Rules of Origin, Customs Cooperation, Trade Remedies, Sanitary and Phytosanitary Measures, Technical Barriers to Trade, Trade in Services, Movement of Natural Persons, and Investment) of this Agreement, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade in goods and services or investment, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures necessary to protect national treasures of artistic, historic or archaeological value.</td>
</tr>
</tbody>
</table>
### Article 6.11: general exceptions

1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Party or its investors where like conditions prevail, or a disguised restriction on investments of investors of a Party in the territory of the other Party, nothing in this Chapter shall be construed to prevent the adoption or enforcement by a Party of measures:

   (a) necessary to protect public morals or to maintain public order;

   (b) necessary to protect human, animal or plant life or health;

   (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter including those relating to:

   (i) the prevention of deceptive and fraudulent practices to deal with the effects of a default on a contract;

   (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;

   (iii) safety;

   (d) imposed for the protection of national treasures of artistic, historic or archaeological value;

   (e) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.
<table>
<thead>
<tr>
<th>Japan – Brunei FTA</th>
<th>Article 8 General and Security Exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Tokyo, signed 18 June 2007)</td>
<td>1. For the purposes of Chapters 2, 3, 4, 5(^{982}) other than Article 64, and 7, Article XX of the GATT 1994 is incorporated into and forms part of this Agreement, <em>mutatis mutandis</em>.</td>
</tr>
<tr>
<td>Entry into force: 31 July 2008</td>
<td>2. For the purposes of Chapter 5 other than Article 64(^{983}), and Chapter 6, Article XIV of the GATS is incorporated into and forms part of this Agreement, <em>mutatis mutandis</em>.</td>
</tr>
<tr>
<td></td>
<td>3. (...)</td>
</tr>
<tr>
<td></td>
<td>4. In cases where a Party takes any measure or action pursuant to this Article, the Party shall make reasonable effort to notify the other Party of the description of such measure or action either before the measure or action is taken or as soon as possible thereafter.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Japan – Chile FTA</th>
<th>Article 192 General Exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Tokyo, signed 27 March 2007)</td>
<td>1. For the purposes of Chapters 3, 4, 5, 6, 7 and 8(^{984}) other than Article 76, Article XX of the GATT 1994 is incorporated into and made part of this Agreement, <em>mutatis mutandis</em>.</td>
</tr>
<tr>
<td>Entry into force: 3 September 2007</td>
<td>2. For the purposes of Chapters 8 other than Article 76,(^{985}) 9, 10 and 11, Article XIV of the GATS, including its footnotes, is incorporated into and made part of this Agreement, <em>mutatis mutandis</em>.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Japan – India FTA</th>
<th>Article 11 Exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Tokyo, signed 16 February 2011)</td>
<td>2. For the purposes of Chapters 6 and 8(^{986}), Articles XIV and XIV bis of the GATS are incorporated into and form part of this Agreement, <em>mutatis mutandis</em>.</td>
</tr>
<tr>
<td>Entry into force: 1 August 2011</td>
<td></td>
</tr>
</tbody>
</table>

---

982 Chapter 5 is the investment chapter.

983 Article 64 deals with the issue of compensation for damages suffered during armed conflict or a state of emergency.

984 Chapter 8 is the investment chapter.

985 Article 76 deals with the issue of compensation for damages suffered during armed conflict or a state of emergency.

986 Chapter 8 is the investment chapter.
### Article 11 General and Security Exceptions

1. For the purposes of Chapters 2, 3, 4, 5\(^{987}\) other than Article 66, and 8 of this Agreement, Articles XX and XXI of the GATT 1994 are incorporated into and form part of this Agreement, *mutatis mutandis*.

2. For the purposes of Chapters 5 other than Article 66, 6 and 7 of this Agreement, Articles XIV and XIV bis of the GATS are incorporated into and form part of this Agreement, *mutatis mutandis*.

3. In cases where a Party takes any measure pursuant to paragraph 1 or 2, that does not conform with the obligations under Chapter 5 other than Article 66, the Party shall make reasonable effort to notify the other Party of the description of such measure either before the measure is taken or as soon as possible thereafter.

### Article 10 General and Security Exceptions

1. For the purposes of Chapters 2, 3, 4, 5, 6 and 7\(^{988}\) other than Article 82,\(^{989}\) Articles XX and XXI of the GATT 1994 are incorporated into and form part of this Agreement, *mutatis mutandis*.

2. For the purposes of Chapter 7 other than Article 82 and Chapter 8, Articles XIV and XIV bis of the GATS are incorporated into and form part of this Agreement, *mutatis mutandis*.

---

987 Chapter 5 is the investment chapter.

988 Chapter 7 is the investment chapter.

989 Article 82 deals with the issue of compensation for damages suffered during armed conflict or a state of emergency.
Article 99 General and Security Exceptions

1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Party, or a disguised restriction on investments of investors of the other Party in the Area of a Party, nothing in this Chapter other than Article 96 shall be construed to prevent a Party from adopting or enforcing measures:

(a) necessary to protect human, animal or plant life or health;

(b) necessary to protect public morals or to maintain public order;

Note: The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

2. In cases where a Party takes any measure, pursuant to paragraph 1 above, that does not conform with the obligations of the provisions of this Chapter other than Article 96, that Party shall, prior to the entry into force of the measure or as soon thereafter as possible, notify the other Party of the following elements:

(a) sector and subsector or activity;

(b) obligation or article in respect of the measure;

(c) legal source of the measure;

(d) succinct description of the measure; and

(e) purpose of the measure.

990 Article 96 deals with the issue of compensation for damages suffered during armed conflict or a state of emergency.
**Article 83 General Exceptions under Chapter 8**

1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Party, or a disguised restriction on investments of investors of a Party in the territory of the other Party, nothing in this Chapter shall be construed to prevent the adoption or enforcement by either Party of measures
   
   (a) necessary to protect public morals or to maintain public order
       Note: The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.
   
   (b) necessary to protect human, animal or plant life or health;
   
   (c) necessary to secure compliance with the laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
       (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contract
       (ii) the protection of the privacy of the individual in relation to the processing and dissemination of personal data and the protection of confidentiality of personal records and accounts;
       (iii) safety;
   
   (d) relating to prison labour;
   
   (e) imposed for the protection of national treasures of artistic, historic, or archaeological value;
   
   (f) to conserve exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

**ANNEX I: General Exception Clauses in Current IIAs**

---

**Japan – Singapore FTA**
(Singapore, signed 13 January 2002)
Entry into force: 30 November 2002

---

https://doi.org/10.5771/9783845291932

Generiert durch IP '54.70.40.11', am 30.04.2019, 11:03:30.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.
2. In cases where a Party takes any measure pursuant to paragraph 1 above or Article 4, which it implements after this Agreement comes into force, such Party shall make reasonable effort to notify the other Party of the description of the measure either before such measure is taken or as soon as possible thereafter, if such measure could affect investments or investors of the other Party in respect of obligations made under this Chapter.

Article 95 General and Security Exceptions

1. In respect of the making of investments, Articles XIV and XIVbis of the GATS, which are hereby incorporated into and made part of this Agreement, mutatis mutandis, shall apply.

2. Paragraph 1 of Article XIVbis of the GATS shall also apply, mutatis mutandis, to investments made.

3. This Article shall not apply to paragraph 1 of Article 86,\(^1\) and Articles 91\(^2\) and 92.\(^3\)

4. In exceptional circumstances, where a Party takes a measure pursuant to paragraphs 1 and 2, that Party shall, prior to the entry into force of the measure or as soon as possible thereafter, notify the other Party of the following:
   (a) the sector and sub-sector or activity affected by the measure;
   (b) the obligation or provisions of this Agreement affected by the measure;
   (c) the legal basis of the measure;
   (d) a succinct description of the measure; and
   (e) the purpose of the measure

---

\(^1\) Article 86(1) entails the fair and equitable treatment and the full protection and security obligations. Article 86 (2) is the observance of undertakings clause.

\(^2\) Article 91 is the expropriation provision.

\(^3\) Article 92 deals with the issue of compensation for damages suffered during armed conflict or a state of emergency.
### Japan – Thailand FTA
(Tokyo, signed 3 April 2007)
Entry into force: 1 November 2007

<table>
<thead>
<tr>
<th>Article 10 General and Security Exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. For the purposes of Chapters 2, 3, 4 and 8 other than Article 103, Articles XX and XXI of the GATT 1994 shall apply <em>mutatis mutandis</em>.</td>
</tr>
<tr>
<td>2. For the purposes of Chapters 7, 8 other than Article 103, and 9, Articles XIV and XIV bis of the GATS shall apply <em>mutatis mutandis</em>.</td>
</tr>
</tbody>
</table>

### Korea – Colombia FTA
(signed 21 February 2013)

<table>
<thead>
<tr>
<th>Article 21. Exception</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. For purposes of Chapters 8 (Investment), 9 (Cross border Trade in Services), 10 (Temporary Entry for Business Persons), 11 (Telecommunications), and 12(E-Commerce), Article XIV of the GATS (including its footnotes) is incorporated into and made part of this Agreement, <em>mutatis mutandis</em>. The Parties understand that the measures referred to in Article XIV(b) of the GATS include environmental measures necessary to protect human, animal, or plant life or health. The Parties understand that the measures referred to in Article XIV(a) of the GATS include measures aimed at preserving internal public order.</td>
</tr>
</tbody>
</table>

---

994 Chapter 8 is the investment chapter.
995 Article 103 deals with the issue of compensation for damages suffered during armed conflict or a state of emergency.
<table>
<thead>
<tr>
<th>Country 1</th>
<th>Article 10.18: Exceptions</th>
<th>Country 2</th>
<th>Chapter 20 General Provisions and Exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Korea – India FTA (Seoul, signed 7 August 2009) Entry into force: 1 January 2010</td>
<td>1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between States where like conditions prevail, or a disguised restriction on investors and investments, nothing in this Chapter shall be construed to prevent the adoption or enforcement by any Party of measures: (a) necessary to protect public morals or to maintain public order; (b) necessary to protect human, animal or plant life or health, or the environment; (c) necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Chapter; (d) necessary to protect national treasures of artistic, historic or archaeological value; or (e) necessary to conserve exhaustible, natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.</td>
<td>Korea – New Zealand FTA (signed 23 March 2015, entry into force 20 December 2015)</td>
<td>2. For the purposes of Chapters 8 (Cross-Border Trade in Services), 9 (Temporary Entry of Business Persons), and 10 (Investment), Article XIV of GATS, including its footnotes, is incorporated into and made part of this Agreement, mutatis mutandis. The Parties understand that the measures referred to in Article XIV(b) of GATS include environmental measures to protect human, animal or plant life or health.</td>
</tr>
<tr>
<td></td>
<td>2. (...)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>3. (...)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>4. A Party shall immediately inform the other Party to the fullest extent possible, of measures taken under paragraphs 1, 2(b) and (c) and of their termination, if such measures were taken.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Agreement</td>
<td>Article</td>
<td>Description</td>
<td></td>
</tr>
<tr>
<td>---------------------------------</td>
<td>---------</td>
<td>-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td><strong>Korea – Peru FTA</strong></td>
<td>Article 24.2</td>
<td>2. For purposes of Chapters Nine (Investment), Ten (Cross-border Trade in Services), Eleven (Temporary Entry for Business Persons), Thirteen (Telecommunications), and Fourteen (Electronic Commerce)1, Article XIV of GATS, including its footnotes, is incorporated into and made part of this Agreement, <em>mutatis mutandis</em>. The Parties understand that the measures referred to in Article XIV(b) of GATS include environmental measures necessary to protect human, animal, or plant life or health.</td>
<td></td>
</tr>
<tr>
<td><strong>Korea – Singapore FTA</strong></td>
<td>Article 21.2 General Exceptions</td>
<td>2. Subparagraphs (a), (b) and (c) of Article XIV of GATS are incorporated into and made part of this Agreement, for the purpose of (c) Chapter 10 (Investment)</td>
<td></td>
</tr>
</tbody>
</table>
| **Malaysia – Pakistan FTA**     | Article 126 General and Security Exceptions | 1. For the purposes of Chapters 2, 3, 4, 6, 7 and 9,996 Articles XX and XXI of the GATT 1994 shall, *mutatis mutandis*, be incorporated into and form part of this Agreement.  
2. For the purposes of Chapters 8 and 9, other than Article 95, Articles XIV and XIV bis of the GATS shall, *mutatis mutandis*, be incorporated into and form part of this Agreement. |

996 Chapter 9 is the investment chapter.
### Article 200 General Exceptions

1. For the purposes of this Agreement, Article XX of GATT 1994 and its interpretative notes and Article XIV of GATS (including its footnotes) are incorporated into and made part of this Agreement, *mutatis mutandis*.

2. The Parties understand that the measures referred to in Article XX(b) of GATT 1994 and Article XIV(b) of GATS, as incorporated into this Agreement, can include environmental measures necessary to protect human, animal or plant life or health, and Article XX(g) of GATT 1994, as incorporated into this Agreement, applies to measures relating to the conservation of living and non-living exhaustible natural resources, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in goods or services or investment.

3. For the purposes of this Agreement, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade in goods or services or investment, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures necessary to protect national works or specific sites of historical or archaeological value, or to support creative arts of national value.\(^\text{997}\)


---

\(^{997}\) "Creative arts" include: the performing arts – including theatre, dance and music – visual arts and craft, literature, film and video, language arts, creative online content, indigenous traditional practice and contemporary cultural expression,
### New Zealand – Malaysia FTA
(Kuala Lumpur, signed 26 October 2009)
Enter into force: 1 August 2010

<table>
<thead>
<tr>
<th>Article 17.1 General Exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. For the purposes of Chapters 2 through 10, (Trade in Goods, Rules of Origin, Customs Procedures and Co-operation, Trade Remedies, Sanitary and Phytosanitary Measures, Technical Barriers to Trade, Trade in Services, Movement of Natural Persons, and Investment) of this Agreement, Article XX of GATT 1994 and its interpretive notes and Article XIV of GATS (including its footnotes) are incorporated into and made part of this Agreement, <em>mutatis mutandis</em>.</td>
</tr>
<tr>
<td>2. The Parties understand that the measures referred to in Article XX(b) of GATT 1994 and Article XIV(b) of GATS include measures necessary to protect human, animal or plant life or health, and that Article XX(g) of GATT 1994 applies to measures relating to the conservation of living and non-living exhaustible natural resources.</td>
</tr>
<tr>
<td>3. For the purposes of Chapters 2 through 10, (Trade in Goods, Rules of Origin, Customs Procedures and Co-operation, Trade Remedies, Sanitary and Phytosanitary Measures, Technical Barriers to Trade, Trade in Services, Movement of Natural Persons, and Investment) of this Agreement, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade in goods and services or investment, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures necessary to protect national works or specific sites of historical or archaeological value, or to support creative arts of national value.</td>
</tr>
</tbody>
</table>

and digital interactive media and hybrid art work, including those that use new technologies to transcend discrete art form divisions. The term encompasses those activities involved in the presentation, execution and interpretation of the arts; and the study and technical development of these art forms and activities.

998 “Creative arts” include: the performing arts – including theatre, dance and music – visual arts and craft, literature, film and video, language arts, creative on-line content, indigenous traditional practice and contemporary cultural expression, and digital interactive media and hybrid art work, including those that use new technologies to transcend discrete art form divisions. The term encompasses tho-
New Zealand – Singapore FTA
(Singapore, signed 14 November 2000)
Entry into force: 1 January 2001

<table>
<thead>
<tr>
<th>Article 71 General Exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Party or as a disguised restriction on trade in goods and services or investment, nothing in this Agreement shall preclude the adoption by any Party of measures in the exercise of its legislative, rule-making and regulatory powers:</td>
</tr>
<tr>
<td>(a) necessary to protect public order or morality, public safety, peace and good order and to prevent crime;</td>
</tr>
<tr>
<td>(b) necessary to protect human, animal or plant life or health;</td>
</tr>
<tr>
<td>(c) necessary to prevent unfair, deceptive or misleading practices or to deal with the effects of defaults on services contracts;</td>
</tr>
<tr>
<td>(d) necessary to protect national works, items or specific sites of historical or archaeological value, or to support creative arts(^9) of national value;</td>
</tr>
<tr>
<td>(e) to conserve exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;</td>
</tr>
<tr>
<td>(f) necessary to secure compliance with laws and regulations relating to customs enforcement, tax avoidance or evasion;</td>
</tr>
<tr>
<td>(g) in connection with the products of prison labour.</td>
</tr>
</tbody>
</table>

\(^9\) Illustrative list of “creative arts”: the creative arts, including ngā toi Māori (Māori arts), comprise a range of art forms and disciplines including: dance, music, theatre, haka, waiata and other performing arts; visual arts, such as painting, sculpture, craft arts, whakairo (carving), raranga (weaving), tā moko; literature; film and video; language arts and new media. Cross-disciplinary arts activities that incorporate more than one art form are also included. The term encompasses those activities involved in the presentation, execution and interpretation of the arts; and the study and technical development of these art forms and activities.
Chapter 24 General Exceptions

Article 1 General Exceptions

1. For the purposes of this Agreement, Article XX of GATT 1994 and its interpretive notes and Article XIV of GATS (including its footnotes) are incorporated into and made part of this Agreement, mutatis mutandis.

2. The Parties understand that the measures referred to in Article XX(b) of GATT 1994 and Article XIV(b) of GATS include environmental measures necessary to protect human, animal or plant life or health, and that Article XX(g) of GATT 1994 applies to measures relating to the conservation of living and non-living exhaustible natural resources.

3. For the purposes of this Agreement, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade in goods or services and investment, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures necessary to protect that Party’s works or specific sites of historical or archaeological value, or to support creative arts\textsuperscript{1000} of significant value to that Party as a whole.

---

\textsuperscript{1000} “Creative arts” include: the performing arts – including theatre, dance and music – visual arts and craft, literature, film and video, language arts, creative on-line content, indigenous traditional practice and contemporary cultural expression, and digital interactive media and hybrid art work, including those that use new technologies to transcend discrete art form divisions. The term encompasses those activities involved in the presentation, execution and interpretation of the arts; and the study and technical development of these art forms and activities.
New Zealand – Thailand FTA (Bangkok, signed 19 April 2005) Entry into force: 1 July 2005

<table>
<thead>
<tr>
<th>Article 15.2 General Exceptions for Investment and Trade in Services</th>
</tr>
</thead>
<tbody>
<tr>
<td>For the purposes of Chapters 8 and 9, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures:</td>
</tr>
<tr>
<td>(a) necessary to protect public morals or to maintain public order;</td>
</tr>
<tr>
<td>(b) necessary to protect human, animal or plant life or health;</td>
</tr>
<tr>
<td>(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:</td>
</tr>
<tr>
<td>(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;</td>
</tr>
<tr>
<td>(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;</td>
</tr>
<tr>
<td>(iii) safety;</td>
</tr>
<tr>
<td>(d) relating to the products of prison labour;</td>
</tr>
<tr>
<td>(e) necessary to protect national treasures or specific sites of historical or archaeological value, or to support creative arts of national value;</td>
</tr>
<tr>
<td>(f) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;</td>
</tr>
<tr>
<td>(g) inconsistent with the requirement for national treatment provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of the other Party.</td>
</tr>
</tbody>
</table>

---

1001 Chapter 9 is the investment chapter.
1002 The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.
<table>
<thead>
<tr>
<th><strong>Pacific Agreement on Closer Economic Relations Plus</strong> (signed 16 June 2017)</th>
<th><strong>Chapter 11, Article 1 General Provisions and Exceptions</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>5. For the purposes of Chapter 9 (Investment), subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between investments and investors of the Parties or of a non-Party where like conditions prevail, or a disguised restriction on international trade or investment flows, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures:</td>
<td></td>
</tr>
<tr>
<td>(a) necessary to protect public morals or to maintain public order;(^\text{1003})</td>
<td></td>
</tr>
<tr>
<td>(b) necessary to protect human, animal or plant life or health;</td>
<td></td>
</tr>
<tr>
<td>(c) necessary to ensure compliance with laws and regulations that are not inconsistent with this Agreement, including those relating to:</td>
<td></td>
</tr>
<tr>
<td>(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on a contract;</td>
<td></td>
</tr>
<tr>
<td>(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; or</td>
<td></td>
</tr>
<tr>
<td>(iii) safety; or</td>
<td></td>
</tr>
<tr>
<td>(d) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption</td>
<td></td>
</tr>
</tbody>
</table>

---

\(^{1003}\) The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.
<table>
<thead>
<tr>
<th>Country pair</th>
<th>FTA</th>
<th>Entry into force</th>
<th>Article 21.02 Excepciones generales</th>
</tr>
</thead>
<tbody>
<tr>
<td>Panama – Costa Rica FTA</td>
<td>(Panama City, signed 7 August 2007)</td>
<td>23 November 2008</td>
<td>2. Se incorporan a este Tratado y forman parte integrante del mismo, los literales (a),(b) y (c) del Artículo XIV del AGCS, para efectos de: (c) el Capítulo 10 (Inversión);</td>
</tr>
<tr>
<td>Panama – El Salvador FTA</td>
<td>(Panama City, signed 6 March 2002)</td>
<td>11 April 2003</td>
<td>2. Se incorporan a este Tratado y forman parte integrante del mismo, los literales (a),(b) y (c) del Artículo XIV del AGCS, para efectos de: c) el Capítulo 10 (Inversión);</td>
</tr>
<tr>
<td>Panama – Honduras FTA</td>
<td>(Panama City, signed 15 June 2007)</td>
<td>9 January 2009</td>
<td>2. Se incorporan a este Tratado y forman parte integrante del mismo, los literales (a),(b) y (c) del Artículo XIV del AGCS, para efectos de: (c) el Capítulo 10 (Inversión);</td>
</tr>
<tr>
<td>Singapore – Australia FTA (Singapore, signed 17 February 2003) Entry into force: 28 July 2003</td>
<td>Chapter 8: Investment Article 21 General Exceptions</td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on investments in the territory of a Party by investors of the other Party, nothing in this Chapter shall be construed to prevent the adoption or enforcement by a Party of measures:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) necessary to protect public morals or to maintain public order;(^{1004})</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(b) necessary to protect human, animal or plant life or health;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter including those relating to:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on a contract;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(iii) safety;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(d) imposed for the protection of national treasures of artistic, historic or archaeological value;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(e) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\(^{1004}\) The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.
### Singapore – China FTA
(Beijing, signed 23 October 2008)
Entry into force: 1 January 2009

The provisions of the ASEAN-China Investment Agreement shall be incorporated and form an integral part of this Agreement unless the context otherwise requires. At any time after the entry into force of this Agreement, upon request by either Party, the Parties shall consult to further facilitating the flow of investments between the Parties.

### Singapore – Costa Rica FTA
(Singapore, signed 6 April 2010)
Entry into force: 1 July 2013

**Article 18.2**
2. For purposes of Chapter 10 (Trade in Services), Chapter 11 (Investment) and Chapter 12 (Electronic Commerce), Article XIV of GATS (including its footnotes) is incorporated into and made part of this Agreement, *mutatis mutandis*. The Parties understand that the measures referred to in Article XIV(b) of GATS include environmental measures necessary to protect human, animal, or plant life or health.

### Singapore – Panama FTA
(Singapore, signed 1 March 2006)
Entry into force: 24 July 2006

**Article 18.1 General Exceptions**
2. For purposes of Chapters 9 (Investment), 10 (Cross-Border Trade in Services), 12 (Telecommunications) and 13 (Electronic Commerce), Article XIV of GATS (including its footnotes) is incorporated into and made part of this Agreement, *mutatis mutandis*. The Parties understand that the measures referred to in Article XIV(b) of GATS include environmental measures necessary to protect human, animal, or plant life or health.

### Singapore – Peru FTA
(Lima, signed 28 May 2008)
Entry into force: 1 August 2009

**Article 18.1 General Exceptions**
2. For purposes of Chapter 10 (Investment), Chapter 11 (Cross Border Trade in Services), Chapter 12 (Temporary Entry for Business Persons) and Chapter 13 (Electronic Commerce), Article XIV of the GATS (including its footnotes) is incorporated into and made part of this Agreement, *mutatis mutandis*. The Parties understand that the measures referred to in Article XIV(b) of the GATS include environmental measures necessary to protect human, animal, or plant life or health.

---

*ANNEX I: General Exception Clauses in Current IIAs*
## Annex I: General Exception Clauses in Current IIAs

<table>
<thead>
<tr>
<th>Country Pair</th>
<th>Agreement Details</th>
<th>General Exceptions Clauses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Singapore – Taiwan FTA (signed 7 November 2013) Entry into force: 19 April 2014</td>
<td><strong>Article 16.2 General Exceptions</strong>&lt;br&gt;2. Subparagraphs (a), (b) and (c) of Article XIV of GATS (including its footnotes) are incorporated into and made part of this Agreement, mutatis mutandis, for the purposes of Chapters 8 (Cross-Border Trade in Services), 9 (Investment), 11 (Electronic Commerce) and 13 (Intellectual Property Cooperation). The Parties understand that the measures referred to in Article XIV(b) of GATS include environmental measures necessary to protect human, animal, or plant life or health.</td>
<td></td>
</tr>
<tr>
<td>Taiwan – El Salvador – Honduras FTA (San Salvador, signed 7 May 2007) Entry into force: 1 March 2008</td>
<td><strong>Article 16.02 General Exceptions</strong>&lt;br&gt;2. Subparagraphs (a), (b) and (c) of Article XIV of the GATS, are incorporated into and made an integral part of this Agreement, for purposes of:&lt;br&gt;c) Part Four (Investment, Services and Related Matters).</td>
<td></td>
</tr>
<tr>
<td>Taiwan – Guatemala FTA (Guatemala City, signed 22 September 2005) Entry into force: 1 July 2006</td>
<td><strong>Article 19.02 General Exceptions</strong>&lt;br&gt;2. Subparagraphs a), b) and c) of Article XIV of the GATS, are incorporated into and made an integral part of this Agreement, for purposes of:&lt;br&gt;c) Part Four (Investment, Services and Related Matters).</td>
<td></td>
</tr>
<tr>
<td>Taiwan – Panama FTA (Taipei, signed 21 August 2003) Entry into force: 1 January 2004</td>
<td><strong>Article 20.02 General Exceptions</strong>&lt;br&gt;2. Subparagraphs a), b) and c) of Article XIV of the GATS, are incorporated into and made an integral part of this Agreement, for purposes of:&lt;br&gt;c) Chapter 10 (Investment);</td>
<td></td>
</tr>
</tbody>
</table>
### Article 22 General Exceptions

1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between investors where like conditions prevail, or a disguised restriction on investment flows, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures:
   - (a) designed and applied to protect national security and public morals;
   - (b) designed and applied to protect human, animal or plant life or health;
   - (c) designed and applied to protect the environment; or
   - (d) any other measures as may from time to time be determined by a Member State, subject to approval by the CCIA Committee.

### Article 24

2. (1) This Article shall not apply to Articles 12, 13 and 29.

   (2) The provisions of this Treaty other than
   - a. those referred to in paragraph (1); and
   - b. with respect to subparagraph (i), Part III of the Treaty shall not preclude any Contracting Party from adopting or enforcing any measure
   - (i) necessary to protect human, animal or plant life or health;
   - (ii) essential to the acquisition or distribution of Energy Materials and Products in conditions of short supply arising from causes outside the control of that Contracting Party, provided that any such measure shall be consistent with the principles that
   - a. all other Contracting Parties are entitled to an equitable share of the international supply of such Energy Materials and Products; and
   - b. any such measure that is inconsistent with this Treaty shall be discontinued as soon as the conditions giving rise to it have ceased to exist; or

---

1005 Article 12 deals with compensation for losses, Article 13 is the expropriation provision and Article 29 deals with interim measures on trade-related matters.
(iii) designed to benefit Investors who are aboriginal people or socially or economically disadvantaged individuals or groups or their Investments and notified to the Secretariat as such, provided that such measure
a. has no significant impact on that Contracting Party’s economy; and
b. does not discriminate between Investors of any other Contracting Party and Investors of that Contracting Party not included among those for whom the measure is intended,

(iv) provided that no such measure shall constitute a disguised restriction on Economic Activity in the Energy Sector, or arbitrary or unjustifiable discrimination between Contracting Parties or between Investors or other interested persons of Contracting Parties. Such measures shall be duly motivated and shall not nullify or impair any benefit one or more other Contracting Parties may reasonably expect under this Treaty to an extent greater than is strictly necessary to the stated end.

Im Rahmen der Einleitung erfolgt zudem eine notwendige Begriffsbestimmung der untersuchten Ausnahmetatbestände sowie deren Abgrenzung von bereits vorhandenen beschränkteren Ausnahmeklauseln, anderen verwandten Vertragsbestimmungen und vertraglichen Vorbehalten. Darüber hinaus wird der Gang der Darstellung skizziert.


Sodann werden die individuellen Tatbestandsmerkmale der Klauseln ihrer Häufigkeit nach erfasst, um daraus Rückschlüsse zu ziehen, welche
nicht-wirtschaftlichen Interessen den Staaten im internationalen Investitionsrecht besonders schutzwürdig erscheinen, wie weit oder eng die kausale Beziehung zwischen beanstandeter Maßnahme und schutzwürdigem Interesse sein muss und ob und welche Mechanismen zum Schutz vor missbräuchlicher Anwendung der Ausnahmen existieren. Die Ergebnisse dieser Untersuchung stellen die Basis für den Fortgang des Promotionsvorhabens dar.

Das folgende dritte Kapitel ergründet, warum Ausnahmetatbestände für nicht-wirtschaftliche Rechtsgüter routinemäßig in internationalen Handelsabkommen vorkommen, aber erst in jüngerer Zeit in internationalen Investitionsabkommen inkorporiert werden. Als Begründung herangezogen werden sowohl die besondere historische Entwicklung der beiden Rechtssysteme wie auch die sich aus den historischen Umständen erklärenden unterschiedlichen liegenden ökonomischen Ideologien.


da sowohl Staaten wie auch ausländische Investoren nun mit Bestimmtheit wissen, dass Schiedsgerichte die legitime nicht-wirtschaftliche Zielsetzung einer angegriffenen staatlichen Maßnahme bei der Prüfung, ob eine Verletzung des Investitionsabkommen vorliegt, berücksichtigen müssen. Zuvor war dies der Interpretation des einzelnen Schiedsgerichts überlassen, was zu divergierenden Rechtsprechungslinien sowie wachsender Rechtsunsicherheit geführt hat.


**Kapitel 5** behandelt Probleme rund um die Auslegung der neuen Ausnahmeklauseln. Ausgehend von der Feststellung, dass bislang kein Schiedsverfahren öffentlich geworden ist, in dem Ausnahmeklauseln Teil des zugrunde liegenden Investitionsabkommens waren, wurde nicht nur
eine Prognose gewagt, welches die wahrscheinlichste zukünftige Auslegung solcher Klauseln ist, sondern es werden Schiedsgerichten auch dogmatische wie praxisrelevante Hilfestellungen für die Interpretation der einzelnen Tatbestandsmerkmale angeboten werden.


Auf dieser Basis werden im Folgenden Vorschläge für die Auslegung zentrale Tatbestandsmerkmale von investitionsrechtlichen Ausnahmetatbeständen für nicht-wirtschaftliche Rechtsgüter gegeben. Im Fokus steht dabei die Frage, wann eine staatliche Maßnahme „notwendige“ („necessary“) für die Erreichung des nicht-wirtschaftlichen Rechtsguts ist. Ziel der Untersuchung ist, eine Auslegung vorzuschlagen, die eine adäquate Balance zwischen staatlichem Ermessensspielraum und Einschränkungsprärogative auf der einen Seite und justizieller Überprüfbarkeit durch ein Schiedsgericht auf der anderen Seite findet.

ANNEX II: Zusammenfassung In Deutscher Sprache

 ANNEX II: Zusammenfassung In Deutscher Sprache

409
die Anwendung von Ausnahmetatbeständen auf die Verletzung des Gebots fairer und gerechter Behandlung ausschließt.

Ähnliche Fragen werden auch im Bereich des Zusammenspiels zwischen Ausnahmeklauseln und dem Gebot der Inländerbehandlung diskutiert. Vermag eine Ungleichbehandlung von inländischen und ausländischen Investoren auf Tatbestandsebene durch Ausnahmeklauseln, die in der Regel selbst Diskriminierungsverbote statuieren, gerechtfertigt werden oder ist jede tatbestandsmäßige Diskriminierung zugleich auch rechtswidrig mit der Folge, dass Ausnahmeklauseln hier leer laufen? Auch hier wird argumentiert, dass trotz einer gewissen Überschneidung eine Anwendung von Ausnahmetatbeständen auf Verletzungen des Inländerbehandlungsgebots nicht in jedem Fall ausgeschlossen ist.

Die Dissertation schließt in einem siebten Kapitel mit einer Zusammenfassung ihrer wesentlichen Ergebnisse.
Table Of Cases

International Arbitrations

Abaclat v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011
Dissenting Opinion of Abi-Saab, 28 October 2011
AES Summit Generation Limited and AES-Tőzsa Erőmű Kft v. Hungary, ICSID Case No. ARB/07/22, Award, 23 September 2010
Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2, Award, 25 June 2001
Alpha Projektholding v. Ukraine, ICSID Case No. ARB/07/16, Award, 8 November 2010
Amco Asia Corporation, Pan American Development Limited, PT Amco Indonesia v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 389
Aguas del Tunari S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, 21 October 2005
Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States, ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007
AWG Group Ltd. v. The Argentine Republic, Decision on Liability, 30 July 2010
Azurix Corp. v. Argentina, ICSID Case No. ARB/01/12, Award, 14 July 2006, 14 ICSID Reports 374
Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, 27 August 2009
Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008
The Canadian Cattlemen for Fair Trade v. United States of America, Award on Jurisdiction, 28 January 2008
Canfor Corporation and Terminal Forest Products Ltd. v. United States of America, Decision on Preliminary Question, 6 June 2006
CME Czech Republic C.V. v. The Czech Republic, Partial Award, 13 September 2001, 9 ICSID Reports 121
CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Award, 12 May 2005
– Decision of the Ad Hoc Committee on the Application for Annulment, 25 September 2007
Table Of Cases

Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICISD Case No. ARB/97/3, Award, 20 August 2007

Compañía del Desarrollo de Santa Elena S.A. v. The Republic of Costa Rica, ICSID Case No. ARB/96/1, Award, 17 February 2000

Continental Casualty Company v. Argentine Republic, ICSID Case No. ARB/03/9, Award, 5 September 2008
  – Decision on the Application for Partial Annulment of the Argentine Republic, 16 September 2011

Corn Products International, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, 15 January 2008


Enron Corporation Ponderosa Assets L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004
  – Award, 22 May 2007
  – Decision on the Application for Annulment of the Argentine Republic, 30 July 2010

EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award, 8 October 2009

El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award, 3 October 2011

Fedex N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997

Fireman’s Fund Insurance Company v. The United Mexican States, ICSID Case No. ARB(AF)/02/01, Award, 17 July 2006

GAMI Investments, Inc. v. The Government of the United Mexican States, Final Award, 15 November 2004

Glamis Gold Ltd. v. United States of America, Award, 8 June 2009

Grand River Enterprises Six Nations Ltd. v. United States of America, Award, 12 January 2011

Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, Award, 21 June 2011

International Thunderbird Gaming Corporation v. The United Mexican States, Arbitral Award, 26 January 2006
  – Separate Opinion (of Thomas Wälde), 31 December 2005

Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010


Marvin Roy Feldman Karpa v. The United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002
Merrill & Ring Forestry L.P. v. The Government of Canada, Award, 31 March 2010

Metalclad Corp. v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, 5 ICSID Reports 212

Methanex Corp. v. United States of America, Decision of the Tribunal on Petitions from Third Persons to Intervene as “Amici Curiae”, 15 January 2001

— Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, 44 ILM 1345 (2005)

Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002

MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004


Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, 12 October 2005

Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN 3467, Award, 1 July 2004

Parkerings-Compagniet A.S. v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007

Patrick Mitchell v. The Democratic Republic of Congo, ICSID Case No. ARB/99/7, Decision on Annulment, 1 November 2006

Philip Morris Brands Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, 8 July 2016

Concurring and Dissenting Opinion by Mr. Gary Born, 8 July 2016

Philip Morris Asia Ltd. v. The Commonwealth of Australia, PCA Case No. 2012-12

— Award on Jurisdiction and Admissibility, 17 December 2015

Piero Foresti, Laura de Carli & Others v. The Republic of South Africa, ICSID Case No. ARB(AF)/07/01, Award, 4 August 2010

Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction,

Pope & Talbot v. Canada, Interim Award, 26 June 2000, 7 ICSID Reports 69

— Award on the Merits of Phase 2, 10 April 2001, 122 ILR 352

PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award, 19 January 2007

Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, 29 July 2008


— Award, 31 January 2006

Saluka Investments v. The Czech Republic, Partial Award, 17 March 2006, 15 ICSID Reports 274
Table Of Cases

– Separate Opinion by Dr. Bryan Schwartz, concurring except with respect to performance requirements, in the partial award of the tribunal, 12 November 2000
Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, 11 May 2005
– Award, 28 September 2007
– Decision on the Argentine Republic’s Application for Annulment of the Award, 29 June 2010
Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia, Award on Jurisdiction and Liability, 28 April 2011
Siemens v. Argentina, ICSID Case No. ARB/02/8, Decision on Jurisdiction 3 August 2004
– Award, 6 February 2007, 14 ICSID Reports 518
SGS Société de Surveillance v. Republic of the Philippines, ICSID Case No. ARB/02/6. Decision on Jurisdiction, 29 January 2004
Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1, Award, 7 December 2011
Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. Argentina and AWG Group Ltd. V. Argentina, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010
Técnicas Medioambientales Tecmed v. Mexico, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, 10 ICSID Reports 134
Tokio Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004
Toto Costruzioni Generali v. Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009
United Parcel Services, Inc. v. Canada, Award on the Merits, 24 May 2007
Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12.
Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award 30 April 2004
Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award, 8 December 2008

PCIJ and ICJ

Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 22 July 2010, I.C.J. Reports 2010, 403
Case Concerning Ahmadou Sadio Diallo (Repiblic of Guinea v. Democratic Republic of the Congo), Judgment on the Merits, 30 November 2010, I.C.J. Reports 2010, 639

https://doi.org/10.5771/9783845291932
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.


The Case of the S.S. “Lotus” (France v. Turkey), Judgment, 7 September 1927, P.C.I.J. Reports Series A, No. 10

Mavrommatis Palestine Concessions (Greece v. United Kingdom), Judgment, 30 August 1924, P.C.I.J. Reports, Series A, No. 2


**WTO Dispute Settlement Body**

Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging
- Request for the Establishment of a Panel by Ukraine, WT/DS434/11, 17 August 2012;
- Request for the Establishment of a Panel by Honduras, WT/DS435/16, 17 October 2012;
- Request for Consultations by Dominican Republic, WT/DS441/15, 14 November 2012


Canada – Administration of Foreign Investment Review Act, Panel Report, BISD 30S/140, adopted on 7 February 1984


Table Of Cases

  European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, Appellate Body Report, WT/DS246/AB/R, adopted on 20 April 2004
  European Communities – Trade Descriptions of Sardines, Appellate Body Report, WT/DS231/AB/R, 26 September 2002
  European Economic Community – Restrictions on Imports of Apples – Complaint by the United States, L/6513, adopted on 22 June 1989
  United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany, Panel Report, WT/DS213/R, 3 July 2002

ITLOS


National Cases

Bibliography


Diehl, Alexandra N. Tracing a Success Story or “The Baby Boom of BITs” In: Reinisch/Knahr (eds), International Investment Law in Context pp. 7-25 (2008).


Bibliography


Feddersen, Christoph. Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT’s Article XX(a) and “Conventional” Rules of Interpretation In: 7 Minnesota Journal of Global Trade, pp. 75-121 (1998).


Jackson, John Howard. Sovereignty-Modern: A new approach to an outdated concept

Jackson, John Howard. Sovereignty: Outdated Concept or New Approaches In: Shan/
Simons/Singh (eds.), Redefining Sovereignty in International Economic Law, Ox-

Juillard, Patrick. The Law of International Investment – Can the Imbalance Be Redres-
sed? In: Sauvant (ed.), Yearbook on International Investment Law & Policy

Kalderimis, Daniel. Investment Treaties and Public Goods – Presentation to AIELN
Conference, Tokyo, 3 August 2009. In: 7 Transnational Dispute Management
(2010).

Karl, Joachim. International Investment Arbitration: A Threat to State Sovereignty? In:
Shan/Simons/Singh (eds.), Redefining Sovereignty in International Economic Law,

Kasenetz, Eric David. Desperate Times Call for Desperate Measures: The Aftermath of
Argentina’s State of Necessity and the Current Fight in the ICSID In: 41 George

Kaufmann-Kohler, Gabrielle. Arbitral Precedent: Dream, Necessity or Excuse? In: 23

Kennedy, Jesse. Protecting Regulatory Measures in Investment Treaty Law In: 4 Czech
Yearbook of International Law, pp. 3-25 (2013).

Kent, Avidan / Harrington, Alexandra R. The plea of necessity under customary inter-
national law: A critical review in light of the Argentine cases In: Brown/Miles

Kingsbury, Benedict / Schill, Stephan W. Public Law Concepts To Balance Investors’
Rights With State Regulatory Actions in the Public Interest – The Concept of Pro-
portionality In: Schill (ed.), International Investment Law and Comparative Public
Law pp. 75-103 (2010).

Klabbers, Jan. Jurisprudence in International Trade Law: Article XX GATT In: 26

Knox, John H. The Neglected Lessons of the NAFTA Environmental Regime In: 45

Kurtz, Jürgen. The Delicate Extension of Most-Favoured-Nation Treatment To Foreign
Investors: Maffezini v Kingdom of Spain In: Weiler (ed.), International Investment
Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties

Kurtz, Jürgen. The MFN Standard and Foreign Investment: An Uneasy Fit? In: 5 Jour-

Kurtz, Jürgen. National Treatment, Foreign Investment and Regulatory Autonomy:
The Search for Protectionism or Something More? In: Kahn/Wälde (eds.), New As-

Kurtz, Jürgen. The Use and Abuse of WTO Law in Investor-State Arbitration: Compe-
tition and its Discontents In: 20 European Journal of International Law pp. 749-771
(2009).


**Bibliography**


Potestà, Michele / Sobat, Marija. Frivolous claims in international adjudication: a study of ICSID Rule 41(5) and of procedures of other courts and tribunals to dismiss claims summarily In: 3 Journal of International Dispute Settlement pp. 137-168 (2012).


Bibliography


Bibliography


https://doi.org/10.5771/9783845291932

431
Bibliography


