GENERAL PUBLIC POLICY EXCEPTIONS IN INTERNATIONAL INVESTMENT AGREEMENTS (IIAS): OPPORTUNITIES AND CHALLENGES IN TIMES OF GLOBAL HEALTH CRISIS

Yi TANG*

ABSTRACT

This article delves into the efficacy of general public policy exceptions within International Investment Agreements (hereinafter "IIAs") against the backdrop of the unprecedented global health crisis precipitated by the COVID-19 pandemic. By empirically surveying the use of general public policy exceptions in IIAs, the research highlights a discernible trend towards the incorporation of such exceptions in new-generation IIAs, aimed at reconciling investment protection with the host state's regulatory autonomy for public welfare. However, the examination of arbitral jurisprudence reveals the tribunals' challenges in coherently and effectively applying these exceptions, often resulting in outcomes that diverge from the contracting states' expectations and the objectives underlying these treaty innovations. This analysis is particularly

* PhD Candidate, Faculty of Law, University of Hong Kong. An earlier draft of this article was presented at the 8th Asian International Economic Law Network (AIELN) Conference, titled "The New Generation of Economic Agreements in the Asia-Pacific," held on December 1-2, 2023, at the National Taiwan University College of Law, as well as at the Young Scholars Workshop of the 2023 CIBEL Global Network Conference, themed "Reshaping the Global Economic Governance: Opportunities and Challenges for the Asia-Pacific Region," held on November 23, 2023. The author expresses deep gratitude to the organizers, commentators and participants for their valuable feedback and insightful suggestions during these conferences. Special thanks are due to Dr. Ying Zhu for her enriching discussions on this paper and to Dr. Weixia Gu for her helpful supervision and guidance. The author also extends sincere appreciation to the anonymous reviewers for their constructive comments, and to the AJWH editorial team for their meticulous efforts. Any errors or omissions are the author's own. The author can be reached at tangyihku@connect.hku.hk.

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important and timely in the context of the COVID-19 crisis, where the potential surge in investor-state disputes arising from pandemic-related regulatory measures poses pressing questions about the efficacy and scope of general public policy exceptions. However, the prevailing uncertainties in arbitral interpretations may cast a significant shadow on the prospective utility of these exceptions. In light of these challenges, this article calls for a holistic reform of IIAs and a recalibration of arbitral practice, advocating for enhanced engagement with World Trade Organization jurisprudence and the provision of explicit clarifications within IIAs to ensure that general public policy exceptions fulfil their intended purpose.

KEYWORDS: *international investment agreements, general public policy exceptions, WTO-style general exceptions, COVID-19 pandemic, investor-state arbitration, treaty-based defense*

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Table of Contents

I. Introduction 129
II. Conceptual Clarification: Defining General Public Policy Exceptions 131
A. Typology of Exception Clauses 131
B. Anatomy of GATT Article XX and GATS Article XIV 132
III. Empirical Investigation: Mapping the Use of General Public Policy Exceptions in IIAs Treaty Practice 138
A. Stocktaking: Overall Results of General Public Policy Exceptions in IIAs 138
B. Recent Trend: Proliferation of General Public Policy Exceptions in New-Generation IIAs 141
C. Review of State Practice 142
IV. Arbitral Case Law: Applying and Interpreting General Public Policy Exceptions 146
A. Arbitral Awards that Dealt with General Public Policy Exceptions 147
B. Analytical Summary: Interpretative Challenges Encountered by the Tribunals 153
V. COVID-19 Crisis and General Public Policy Exceptions 155
VI. Bridging the Divide: Reconciling Treaty Intentions and Arbitral Practices in General Public Policy Exceptions 160
A. Unravelling the Dynamics: Tensions Between New Treaty Designs and Old Arbitral Interpretations 160
B. Charting the Path Forward: Suggestions for Future Reform 164
VII. Conclusion 165

I. INTRODUCTION

As states strive to reconcile investment protection with broader public policy concerns, a growing trend towards incorporating general public policy exceptions into International Investment Agreements (hereinafter "IIAs")[1] has become increasingly prominent. This trend gains significant relevance in the aftermath of the COVID-19 pandemic, wherein host states may face an upsurge in investment arbitration claims due to extraordinary regulatory measures implemented during the public health crisis. General public policy exceptions clause in IIAs emerges as a vital defense for host states under

[1] In this article, the term "International Investment Agreements [hereinafter IIAs]" is used to collectively describe investment provisions or chapters found in both free trade agreements and regional trade agreements, as well as traditional bilateral investment treaties [hereinafter BITs].

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such circumstances. This article attempts to explore whether the general public policy exceptions in existing IIAs are well-equipped to handle Investor-State Dispute Settlement (hereinafter "ISDS") cases in times of public health crisis.

This study presents an overview of the general public policy exceptions clause in IIAs, evaluating its efficacy in preserving states' regulatory space. The analysis unfolds along two primary dimensions. First, it conducts an empirical investigation into the inclusion of general public policy exceptions in the existing IIAs, identifying a growing trend towards incorporating such provisions. Despite this trend, a substantial portion of current IIAs, mainly those old-generation IIAs that generally lack these exceptions, still dominate the landscape. This may pose challenges for host states in leveraging general public policy exceptions clause as a defense in potential ISDS cases triggered by the COVID-19 crisis. Second, the article delves into arbitral case law, examining the awards where the general public policy exceptions are interpreted and applied. This analysis uncovers considerable uncertainty regarding the investment tribunals' approach to these exceptions, highlighting unresolved complex interpretative challenges.

Furthermore, it is important to acknowledge the limitations of the existing jurisprudence surrounding general public policy exceptions. Given the paucity of investment arbitration cases directly addressing the general public policy exceptions clause in IIAs, drawing definitive conclusions regarding its efficacy in preserving states' regulatory space becomes inherently challenging. Recognizing this constraint upfront is necessary, as it underscores the nascent stage of current case law development and sets realistic expectations for this analysis. Therefore, while this study aims to shed light on the potential role of the general public policy exceptions clause in ISDS cases, it does so with an awareness of the evolving nature of international investment law and the need for further jurisprudential development in this area.

This article is structured as follows: Part II conceptually clarifies "general public policy exceptions". Part III empirically investigates the inclusion of these exceptions in IIAs and reviews the treaty practices of representative states. Part IV delves into the application and interpretation of general public policy exception clauses in existing arbitral case law. Part V specifically addresses the implications and significance of these exceptions in light of the COVID-19 crisis. Part VI provides analysis regarding the tensions between treaty intentions and arbitral practices in general public policy exceptions, and proposes suggestions for future reform. Finally, Part VII presents the conclusion.

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II. CONCEPTUAL CLARIFICATION: DEFINING GENERAL PUBLIC POLICY EXCEPTIONS

General public policy exceptions clause usually aims to exempt host states from treaty obligations when they enact measures in good faith to promote public welfare goals.[2] The allure of such clause lies in its capacity to provide host states with a safeguarded regulatory space, which allows states to implement various measures to tackle potential future threats to public welfare, as well as to justify existing regulatory actions.[3]

To provide a conceptual clarification, this part first outlines a typology of exception clauses in IIAs, as discussed in existing literature, and specifically defines the general public policy exceptions clause under consideration here. Furthermore, it delineates the general exceptions within World Trade Organization (hereinafter "WTO") law, setting the stage for a deeper exploration of WTO-inspired general public policy exceptions in IIAs, detailed in Part III.

A. Typology of Exception Clauses

Exception clauses in IIAs vary, and scholars have proposed different ways of categorizing these exceptions. For instance, Spears identifies three principal types of general exceptions clauses found in new-generation IIAs: (1) exceptions based on Article XX of the General Agreement on Tariffs and Trade (hereinafter "GATT") or Article XIV of the General Agreement on Trade in Services (hereinafter "GATS"); (2) conditional exceptions subject to fewer substantive and more procedural requirements than the general exceptions in the GATT and GATS; and (3) highly conditional exceptions with an even more limited range of requirements designed to prevent abuse.[4] After acknowledging the terminological ambiguities in terms like "exception," "exemption," and "carve-outs," Wagner suggests that various exception clauses in IIAs can be classified into three main groups: (1) general exceptions; (2) security exceptions; and (3) hybrid provisions.[5]

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[2] Levent Sabanogullari, *The Merits and Limitations of General Exception Clauses in Contemporary Investment Treaty Practice*, INT'L INST. FOR SUSTAINABLE DEV. [hereinafter IISD] (May 21, 2015), https://www.iisd.org/itn/en/2015/05/21/the-merits-and-limitations-of-general-exception-clauses-in-contemporary-investment-treaty-practice/.

[3] Andrew Newcombe, *The Use of General Exceptions in IIAs: Increasing Legitimacy or Uncertainty?*, *in* IMPROVING INTERNATIONAL INVESTMENT AGREEMENTS 267, 268 (Armand De Mestral & Céline Lévesque eds., 2012).

[4] Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13(4) J. INT'L ECON. L. 1037, 1060-62 (2010).

[5] Kilian Wagner, *Regulation by Exception – The Emergence of (General) Exception Clauses in International Investment Law?*, 26 AUSTRIAN REV. INT'L EUR. L. ONLINE 77, 83 (2024).

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Instead of exploring the various types of exceptions clauses in IIAs, this article focuses exclusively on one particular type—the general public policy exceptions clause.[6] Drawing upon the conceptual groundwork laid by Andrew Newcombe[7] and Amelia Keene,[8] it defines general public policy exceptions as those provisions modelled on Article XX of the GATT or Article XIV of the GATS, generally applicable to the whole IIA. Hence, the general public policy exceptions discussed in this article refer to those WTO-style or WTO-like general exceptions incorporated into IIAs.

B. Anatomy of GATT Article XX and GATS Article XIV

1. The General Exceptions of the GATT and the GATS — The general public policy exceptions clause incorporated into IIAs draws significant inspiration from WTO law, particularly the general exceptions clause enshrined in Article XX of the GATT[9] and Article XIV of the GATS.[10] This part aims to dissect these foundational WTO general exceptions to lay a more robust groundwork for subsequent discussions on general public policy exceptions in IIAs.

Article XX of the GATT provides, in part, as follows[11]:

> 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; . . .

[6] The term "general public policy exceptions" adopted in this article refers specifically to the "WTO-style general exceptions", which may also be termed as "GATT/GATS-style general exceptions".

[7] Andrew Newcombe, *General Exceptions in International Investment Agreements*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 355, 357 (Marie-Claire Cordonier Segger et al. eds., 2011).

[8] Amelia Keene, *The Incorporation and Interpretation of WTO-Style Environmental Exceptions in International Investment Agreements*, 18(1) J. WORLD INV. & TRADE 62, 63 (2017).

[9] General Agreement on Tariffs and Trade, art. XX, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT].

[10] General Agreement on Trade in Services, art. XIV, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].

[11] GATT, art. XX.

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> (d) necessary to secure compliance with laws or regulations which are not inconsistent with provisions of this Agreement . . .
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; . . .

To elaborate, Article XX of the GATT comprises two pivotal components: (1) ten enumerated exceptions, listed in subparagraphs (a) through (j); and (2) an introductory provision, known as the *chapeau*.[12] The enumerated exceptions provide an exhaustive list of permissible policy objectives, such as the protection of human, animal or plant life or health.[13] The *chapeau*, on the other hand, governs the application of the measures in question or controls the enumerated exceptions, which is generally understood to prevent the misuse or abuse of a Member state's right to invoke the general exceptions.[14]

A similarly worded clause can be found in Article XIV of the GATS,[15] which provides for general exceptions in trade services. Compared with Article XX of the GATT, Article XIV of the GATS adopts the same structure, containing both a *chapeau* and a list of enumerated exceptions, albeit with slight variations in wording.[16]

2. The Two-Tiered Review or Three-Step Analysis Established by the WTO Appellate Body — A critical inquiry arises concerning the practical interpretation and application of WTO general exceptions: What is the legal test for justifying a measure under such exceptions? The WTO system establishes a two-tiered review process for examining the general exceptions clause: initially assessing whether the measure falls under one of the enumerated exceptions, and subsequently determining if the measure's application satisfies the requirements set forth in the introductory paragraph, i.e., the *chapeau*.[17] This two-tiered approach effectively entails a dual-focus

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[12] Julien Chaisse, *Exploring the Confines of International Investment and Domestic Health Protections—Is a General Exceptions Clause a Forced Perspective?*, 39(2-3) AM. J.L. MED. 332, 345 (2013).

[13] Sabanogullari, *supra* note 2.

[14] David Collins, *The Line of Equilibrium: Improving the Legitimacy of Investment Treaty Arbitration Through the Application of the WTO's General Exceptions*, 32(4) ARB. INT'L 575, 579 (2016).

[15] GATS, art. XIV.

[16] For example, Article XIV(a) of the GATS includes measures necessary to "maintain public order" in addition to measures "necessary to protect public morals". And the *chapeau* of GATS Article XIV uses the term "like conditions" rather than "the same conditions" (as adopted in the *chapeau* of GATT Article XX). It is also noted that subparagraph(g) under Article XX of the GATT is not available under Article XIV of the GATS.

[17] *WTO Rules and Environmental Policies: GATT Exceptions*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm (last visited Aug. 15, 2024).

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analysis, concentrating first on the measure itself and then on the application of that measure.[18]

The first tier of this analysis further subdivides into two steps: (1) ascertaining whether the measure aligns with the policy objectives listed in subparagraphs (a) through (j); and (2) assessing if the measure satisfies the nexus requirement of it being "necessary" or "relating to" the pursuit of the policy objective in question.[19] Thus, what appears as a two-tiered review is effectively a more detailed three-step analysis. Such an approach has been confirmed by the WTO Appellate Body in various cases. For instance, in cases such as *US — Gasoline*[20] and *US — Shrimp*[21], the Appellate Body clarifies that this two-tiered legal test must be applied in a specific order[22]— first, the measure must be "provisionally justified"[23] under one of the subparagraphs of GATT Article XX; and second, if the measure is provisionally justified, it must then be tested for conformity with the *chapeau*.[24] Furthermore, the Appellate Body emphasized that "a sufficient nexus" must exist between the measure and the protected interest in the first tier.[25]

With particular respect to health-related measures, the most pertinent subparagraph is GATT Article XX(b), which permits measures "necessary to protect human, animal, or plant life or health." This specific exception is pivotal, especially in the context of global health crises such as the COVID-19 pandemic. A deeper understanding of how this provision has been interpreted and applied in the WTO jurisprudence could provide valuable insights for interpreting general public policy exceptions in IIAs similarly.

As a more detailed elaboration on the above-mentioned two-tiered review or three-step analysis, it is important to note that a successful invocation of general exceptions under GATT Article XX or GATS Article

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[18] Collins, *supra* note 14, at 577.
[19] Newcombe, *supra* note 3, at 271.
[20] Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996) [hereinafter *US — Gasoline* Appellate Body Report].
[21] Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products,* WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998) [hereinafter *US — Shrimp* Appellate Body Report].
[22] Andrew Mitchell et al., *Importing WTO General Exceptions into International Investment Agreements: Proportionality, Myths and Risks*, *in* Y.B. ON INT'L INV. L. & POL'Y 2016-2017 305, 322 (Lisa Sachs et al. eds., 2019).
[23] *US — Shrimp* Appellate Body Report, *supra* note 21, ¶ 125.
[24] *Id.* at ¶¶ 119-20; *US — Gasoline* Appellate Body Report, *supra* note 20, at 22.
[25] Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 292, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005) [hereinafter *US — Gambling* Appellate Boy Report], quoted in Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.169, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (adopted June 18, 2014) [hereinafter *EC — Seal Products* Appellate Body Report]. *See also US — Shrimp* Appellate Body Report, *supra* note 21, ¶ 133.

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XIV requires satisfying three successive legal thresholds.[26] All three thresholds must be met for the defense to succeed. WTO panels and the Appellate Body typically consider these thresholds in the specific order listed below, proceeding to the next threshold only if the current one is satisfied. These three thresholds are identified as follows: (1) the subject matter/scope threshold; (2) the qualifier threshold of "necessary" or "relating to"; and (3) the *chapeau* threshold.[27]

To elaborate and apply these three thresholds to GATT Article XX(b) specifically, they are as follows. The first threshold is the subject matter/scope threshold, requiring that the policy measure in question be designed for the protection of human, animal, or plant life or health.[28] The second threshold is the qualifier threshold, also known as the nexus requirement. Generally, the qualifier threshold is indicated by the terms "necessary" or "relating to" in the subparagraphs under GATT Article XX. For most cases invoking GATT Article XX, this threshold requires that the measure be "necessary" for the subparagraph's specified policy objective (e.g., a measure for which GATT Article XX(a) is invoked must be "necessary to protect public morals"), or that the measure be "relating to" the objective (e.g., measures under GATT Article XX(g) must be "relating to the conservation of exhaustible natural resources"). Specifically, regarding GATT Article XX(b), health-related measures must satisfy the "necessary" qualifier, as it is provided that a measure for which GATT Article XX(b) is invoked must be "necessary to protect human, animal or plant life or health." Notably, it is found that "while respondents under the 'relating to' qualifier have a failure rate of 37.5%, the failure rate for the necessity test is 61%".[29] Therefore, it is much harder for health-related measures to satisfy this qualifier threshold. The third threshold is the *chapeau* threshold. As the name indicates, this threshold is contained in the introductory clause or *chapeau* of the general exceptions. Specifically, it requires that the policy measure must not be applied "in a manner which constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade". This final *chapeau* threshold has proven very difficult to satisfy. It is observed that respondents who have reached this threshold have had a terribly low success rate,[30] as evidenced in the *Brazil — Tyres* case discussed below.

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[26] DANIEL RANGEL, *WTO General Exceptions: Trade Law's Faulty Ivory Tower*, PUB. CITIZEN'S GLOB. TRADE WATCH 1, 4 (Feb. 2022), https://www.citizen.org/wp-content/uploads/WTO-General-Exceptions-Paper_-1.pdf.
[27] *Id.* at 11-12.
[28] *Id.* at 11.
[29] *Id.* at 6.
[30] *Id.*

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A landmark case that elucidates the application of GATT Article XX(b) is *Brazil — Retreaded Tyres*.[31] In this case, the European Communities challenged Brazil's import ban on retreaded tyres. Brazil invoked GATT Article XX(b), arguing that the import ban was necessary to protect human health and the environment from the risks posed by waste tyres.[32] Applying the three thresholds elaborated above to this case, it is found that the first two thresholds were both satisfied. First, regarding the subject matter/scope threshold, the import ban implemented by Brazil was recognized as being designed to protect human health. Second, the qualifier threshold of "necessary" of the necessity test was also met, meaning that the import ban was found to be necessary to protect "human, animal, or plant life or health." Importantly, the WTO Appellate Body in its report has provided a crucial analysis of the necessity test under GATT Article XX(b), stating that, "Another key element of the analysis of the necessity of a measure under Article XX(b) is the contribution it brings to the achievement of its objective. A contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue. To be characterized as necessary, a measure does not have to be indispensable. However, its contribution to the achievement of the objective must be material, not merely marginal or insignificant, especially if the measure at issue is as trade-restrictive as an import ban".[33] The real problem arose when proceeding to the third threshold concerning the requirements of the *chapeau*. The Appellate Body concluded that while the import ban satisfied the necessity test, it was applied in a manner that constituted arbitrary or unjustifiable discrimination and a disguised restriction on international trade within the meaning of the *chapeau*, due to certain exemptions. Consequently, the import ban was not justified under GATT Article XX(b).[34]

In conclusion, the interpretation and application of general exceptions by WTO jurisprudence, particularly GATT Article XX(b) in the *Brazil — Retreaded* Tyres case, provide valuable insights into how health-related measures can be justified under general exception clauses. For the purpose of drawing comparative lessons from WTO law to investment law, there are two crucial takeaways.

On the one hand, the two-tiered review or three-step analysis established by WTO jurisprudence offers a structured approach that could be informative for interpreting similar clauses in IIAs. The principles derived from the WTO's interpretation of general exceptions may serve as a guideline for

[31] Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/AB/R (adopted Dec. 3, 2007) [hereinafter *Brazil — Retreaded Tyres* Appellate Body Report].
[32] Panel Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, ¶ 4.9, WTO Doc. WT/DS332/R (adopted June 12, 2007) [hereinafter *Brazil — Retreaded Tyres* Panel Report].
[33] *Brazil — Retreaded Tyres* Appellate Body Report, *supra* note 31, ¶ 210.
[34] *Id.* ¶ 258.

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investment arbitral tribunals. Arguably, the most important lesson that investment arbitral tribunals can draw from WTO jurisprudence is the clearly structured analytical framework for interpreting general exceptions, namely the successive three-step analysis. This structured analysis contrasts with the often inconsistent interpretative approaches observed in ISDS case law, which will be further discussed in Part IV below. Drawing on the WTO's structured approach can help investment arbitral tribunals develop a more coherent framework for evaluating general public policy exceptions in investment disputes, thereby enhancing consistency, certainty, and predictability.

On the other hand, caution must be exercised regarding the WTO's review standards and requirements for assessing general exceptions. Criticisms have been levelled against the WTO's practice, particularly the overly stringent requirements imposed by WTO jurisprudence. A recent report found that, among all the relevant WTO cases dealing with general exceptions under GATT Article XX or GATS Article XIV, only two out of forty-eight attempts to use the general exceptions have ever succeeded,[35] indicating an extremely high failure rate of around 96%.[36] Notably, the only two successful cases both relate to the exception for the conservation of exhaustible natural resources. The attempts to use the particular policy objective defence related to the protection of human health under subparagraph(b) of GATT Article XX have entirely failed. Such an outcome has led to criticisms about the practical "uselessness" of the current WTO general exceptions clauses, and this is argued to be largely attributed to the stringent tests and inflexible analytical framework developed by the WTO Appellate Body and panels.[37]

Therefore, for drawing comparative insights from WTO jurisprudence on general exceptions, two essential takeaways could be summarized here. First, investment arbitral tribunals should consider learning from the structured analytical framework established by WTO jurisprudence. Employing such a structured framework—the two-tiered review or three-step analysis—may contribute significantly to increasing consistency and predictability of ISDS case law. Second, investment tribunals should also be cautious about the overly stringent requirements of WTO jurisprudence. Host states intending to invoke the general public policy exceptions clause as a defense should be aware of these requirements and exercise caution when implementing their regulatory measures accordingly.

[35] RANGEL, *supra* note 26, at 9.
[36] *Id.* at 13.
[37] *Id.* at 4.

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III. EMPIRICAL INVESTIGATION: MAPPING THE USE OF GENERAL PUBLIC POLICY EXCEPTIONS IN IIAS TREATY PRACTICE

This part undertakes an empirical analysis to chart the incorporation of general public policy exceptions in the existing landscape of IIAs. The investigation yields three primary findings: First, within the expansive network of IIAs, the inclusion of WTO-style general public policy exceptions remains relatively uncommon. The current landscape is predominantly shaped by old-generation IIAs, [38] indicating that such exceptions are not widely incorporated across the board. Second, a discernible shift is observed in the new-generation IIAs, particularly those signed in the past five years, where the inclusion of such exceptions is becoming a common and popular practice. This trend signifies a growing recognition of the importance of general public policy exceptions, marking a progressive evolution in treaty drafting. Lastly, from the perspective of regional and state practices, this investigation identifies certain states and regions as pioneers in the adoption of general public policy exceptions in their IIAs, showcasing leadership and potentially setting trends for others to follow. Additionally, it is important to note that this exploration into the use of general public policy exceptions in the existing IIAs relies on the comprehensive data provided by the Electronic Database of Investment Treaties (hereinafter "EDIT")—the most comprehensive collection of IIA full texts available to date.[39]

A. Stocktaking: Overall Results of General Public Policy Exceptions in IIAs

To gauge the prevalence and distribution of general public policy exceptions within IIAs, an initial overview is essential. According to the latest statistics released by the United Nations Conference on Trade and Development (hereinafter "UNCTAD"),[40] as of 2022, the total IIA landscape comprises 3,265 agreements, with 2,584 of these agreements currently in force (See Figure 1 below). As Figure 1 shows, a massive proliferation of IIAs occurred during the 1990s, followed by a gradual decline due to the termination of treaties by some states.

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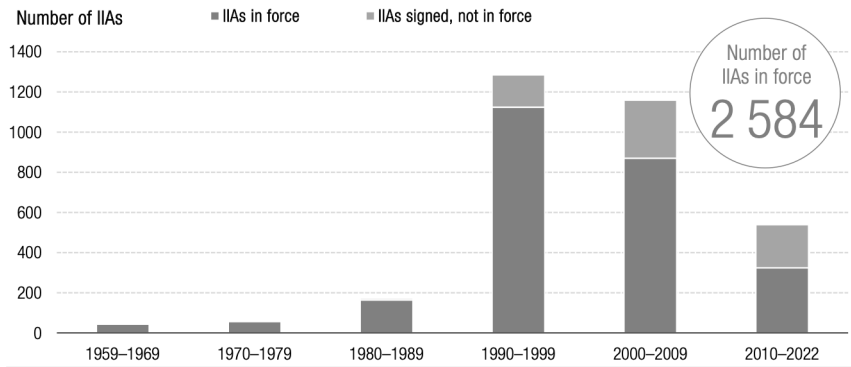
[38] *Trends in the Investment Treaty Regime and a Reform Toolbox for the Energy Transition*, U.N. TRADE & DEV. [hereinafter UNCTAD] (Aug. 2023), https://unctad.org/system/files/official-document/diaepcbinf2023d4_en.pdf. Based on the explanation offered by the UNCTAD, all the IIAs could be divided into two generations: (1) for the IIAs signed before the year of 2011, these are categorized as "old-generation"; (2) and for the IIAs signed after the year of 2012, these are the so-called "new generation".

[39] *See generally* Wolfgang Alschner et al., *Introducing the Electronic Database of Investment Treaties (EDIT): The Genesis of a New Database and Its Use*, 20(1) WORLD TRADE REV. 73 (2021).

[40] UNCTAD, *supra* note 38.

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FIGURE 1: Stock of IIAs Signed and in Force, 1959-2022 (By Date of Signature)



With particular regard to the inclusion of general public policy exceptions, it is found that only a minority of the over 3,000 IIAs feature such provisions, though their presence is on an upward trajectory. EDIT's statistics[41] reveal that only about 15% of all IIAs feature these general public policy exception clauses (see Figure 2). However, the data also highlights a growing trend in their inclusion, as illustrated by Figure 3, which summarizes the changes in the count of general public policy exception clauses in IIAs over the years. These figures provide a visual representation of the evolution of these exceptions over time, underscoring a rising trend to include general public policy exceptions modelled on Article XX of GATT or Article XIV of GATS within IIAs, despite their historically limited use.

[41] ELECTRONIC DATABASE OF INVESTMENT TREATIES (EDIT), https://edit.wti.org/document/investment-treaty/search (last visited Aug. 15, 2024).

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FIGURE 2: Shares of Features in All Treaties

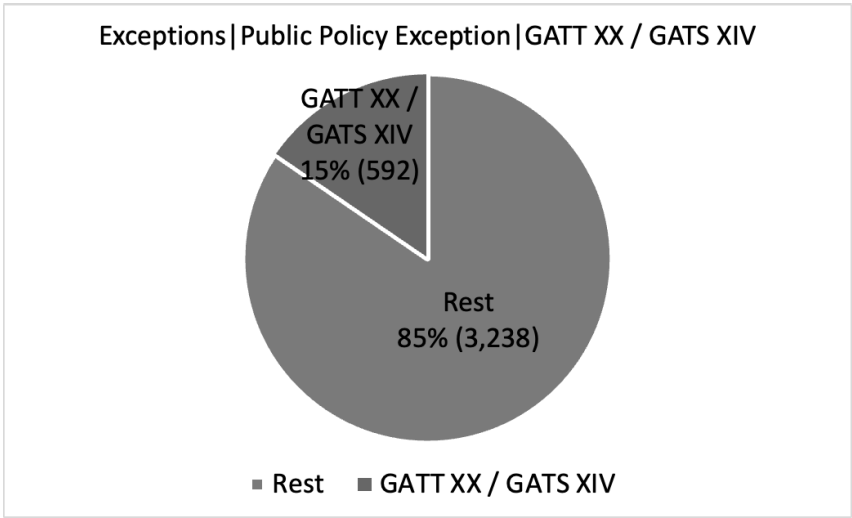
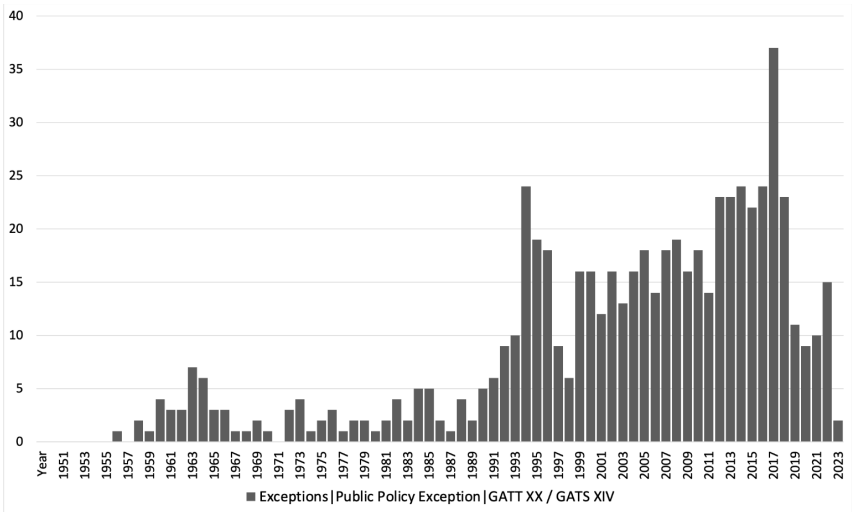


FIGURE 3: Count of Features Per Year



Further differentiation between old-generation and new-generation IIAs accentuates this trend. According to UNCTAD, general public policy exceptions are seldom found in old-generation IIAs, appearing in less than

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7% of these agreements.[42] Conversely, their inclusion is becoming markedly more frequent in newly concluded IIAs,[43] reflecting a paradigm shift in treaty drafting towards greater flexibility and autonomy for states in addressing public policy objectives.

B. Recent Trend: Proliferation of General Public Policy Exceptions in New-Generation IIAs

Despite their relative scarcity within the extensive network of over 3,000 IIAs, the inclusion of the general public policy exceptions clause has witnessed a notable increase in recent years. This upward trend is particularly evident in the analysis of IIAs concluded in the past few years. For example, in the IIAs concluded in 2020, an overwhelming majority—eight out of nine reviewed agreements—contained general public policy exceptions.[44] Similarly, in 2019, nine out of fifteen IIAs reviewed included such exceptions.[45] Going further back to 2018, nineteen out of twenty-nine reviewed IIAs were found to include these exceptions.[46]

A comparative study conducted by the UNCTAD[47] further underscores this trend. When comparing the thirteen IIAs concluded in 2017 with those concluded in 2000, the difference is stark: only one of the thirteen IIAs from 2000 contained general exceptions, whereas, in 2017, twelve out of thirteen IIAs featured these exceptions. This contrast highlights the growing prevalence and popularity of general public policy exceptions in modern IIAs.

Additional research reinforces this observation. Ackermann's survey of 107 IIAs signed between 2013 and 2017 found that 68.2% contained exception clauses.[48] Keene's examination of 113 IIAs concluded between 2010 and 2015 reported that 45% of these agreements included WTO-style

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[42] UNCTAD, *International Investment Policies and Public Health*, 2021(2) IIA ISSUE NOTE (2021), https://unctad.org /system/files/official-document/diaepcbinf2021d5_en.pdf.

[43] *World Investment Report 2023: Investing in Sustainable Energy for All*, UNCTAD 89 (2023), https://unctad.org/system/files/official-document/wir2023_en.pdf.

[44] *Recent Developments in the IIA Regime: Accelerating IIA Reform*, UNCTAD 8 (Aug. 2021), https://unctad.org/system/files/official-document/diaepcbinf2021d6_en.pdf.

[45] *The Changing IIA Landscape: New Treaties and Recent Policy Developments*, UNCTAD, 6 (July 2020), https://unctad.org/system/files/official-document/diaepcbinf2020d4.pdf.

[46] *Taking Stock of IIA Reform: Recent Developments*, UNCTAD 2 (June 2019), https://unctad.org/system/files/official-document/diaepcbinf2019d5_en.pdf.

[47] *Recent Developments in the International Investment Regime*, UNCTAD 3-5 (May 2018), https://unctad.org/system/files/official-document/diaepcbinf2018d1_en.pdf.

[48] Tobias Ackermann, *Exception Clauses in International Investment Agreements: A Case for Systemic Integration?*, *in* INTERNATIONAL CHALLENGES IN INVESTMENT ARBITRATION 37, 39 (Mesut Akbaba & Giancalo Capurro eds., 2018). It should be noted that in this research, the exceptions clauses capture both security exceptions and general exceptions, which are different from the general public policy exceptions clauses examined in this article.

臺灣大學學術期刊資料庫

general exceptions.[49] These findings collectively affirm the rising inclusion of general public policy exceptions in recent IIAs, marking a significant shift in treaty practice towards accommodating broader public policy objectives within the framework of IIAs.

C. Review of State Practice

The proponents of adopting general public policy exceptions in IIAs are quite diverse,[50] making it challenging to identify a clear geographical pattern. Nonetheless, Canada stands out as a notable example among states, and Asia emerges as a significant region in this regard.

1. Salient Example: Canada — When it comes to state's treaty practice of including general public policy exceptions clause in IIAs, the most salient example is Canada.[51] Canada's practice in integrating WTO-style general exceptions into its Bilateral Investment Treaties (hereinafter "BITs")—referred to as Foreign Investment Protection Agreements (hereinafter "FIPAs") within Canada—is unique and unparalleled among Organisation for Economic Co-operation and Development (OECD) nations.[52] The majority of Canada's FIPAs include such exceptions,[53] showcasing the country's pioneering role in this aspect of treaty practice.

Initiating in the 1990s, Canada has systematically incorporated such clauses into its IIAs,[54] a practice exemplified in its 2004 Model FIPA. Article 10 of this model agreement articulates:

> 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

[49] Keene, *supra* note 8, at 69.
[50] Sabanogullari, *supra* note 2.
[51] Wagner, *supra* note 5, at 85.
[52] Chaisse, *supra* note 12, at 340.
[53] Newcombe, *supra* note 7, at 358.
[54] *See, e.g.*, Agreement Between the Government of Canada and the Government of the Republic of Armenia for the Promotion and Protection of Investments, Arm.-Can., art. XVII, May 8, 1997, https://edit.wti.org/document/show/fb290e4d-551b-4946-98d6-dc4f06b2dd3d; Agreement Between the Government of Canada and the Government of Ukraine for the Promotion and Protection of Investments, Can.-Ukr., art. XVII(3), Oct. 24, 1994, https://edit.wti.org/document/show/041ce2c3-27e7-4b7b-9646-ba97c6430b07.

臺灣大學學術期刊資料庫

(c) for the conservation of living or non-living exhaustible natural resources.[55]

This WTO-style general exceptions clause, mirroring the structure and intent of Article XX of GATT, was also adopted in subsequent agreements, such as the 2007 Canada–Peru BIT.[56] It features an exhaustive list of permissible objectives alongside a *chapeau* that emphasizes the non-arbitrary and justifiable application of such measures, preventing them from being used as a disguised restriction on investment or trade.[57]

Despite Canada's pioneering role as the first country that has started systematically integrating WTO-style general exceptions into its IIAs,[58] a noteworthy shift occurred with its 2021 Model FIPA.[59] This latest Model FIPA marks a departure from Canada's long-standing practice by omitting the WTO-style general exceptions clause, a move that has been criticized as a serious setback in efforts to rebalance IIAs.[60] The timing of Canada's decision is particularly striking, given that these exceptions are increasingly recognized and integrated into IIAs globally as a mainstream reformed feature in contemporary treaty practice.[61]

2. Regional Focus: Asian Countries — Apart from Canada, a number of other states, particularly in Asia, have begun including general public policy

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[55] Agreement Between Canada and ---------- for the Promotion and Protection of Investments, art. 10, 2004, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2820/download [hereinafter Canada Model BIT 2004]. *See also* Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments, Can.-Peru, art. 10(c), Nov. 14, 2006, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/626/download; Peru-Singapore Free Trade Agreement, Peru-Sing., ch. 10, art. 10.7, para. 3(c), May 29, 2008, https://edit.wti.org/document/show/70f229b0-717e-4b42-ba9f-557d5fbdd802; Free Trade Agreement Between Canada and the Republic of Peru, Can.-Peru, art. 2201, para. 3(c), May 29, 2008, https://edit.wti.org/document/show/5110a77d-e03a-4235-94ab-8f178d8376af; Free Trade Agreement Between Canada and the Republic of Colombia, Can.-Colom., art. 2201, para. 3(c), Nov. 21, 2008, https://edit.wti.org/document/show/866df0be-415b-42d6-9fc9-1e21a03bfaa6; Agreement Between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments, Can.-Jordan, art. 10(1), June 28, 2009, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/617/download.

[56] Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments, Can.-Peru, art. 10, Nov. 14, 2006, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/626/download.

[57] Wolfgang Alschner & Kun Hui, *Missing in Action: General Public Policy Exceptions in Investment Treaties*, *in* 2018 Y.B. ON INT'L INV. L. & POL'Y 363, 369 (Lisa Sachs et al. eds., 2019).

[58] *Id.* at 368.

[59] Agreement Between Canada and ---------- for the Promotion and Protection of Investments, art. 22, May 11, 2021, https://edit.wti.org/document/show/df095419-503c-4721-81aa-a244792816c5 [hereinafter Canada Model FIPA (or BIT) 2021]. In this 2021 Model FIPA, Article 22 "General Exceptions" still includes specialized exceptions and a security exception but not the previous WTO-style general exception.

[60] Wolfgang Alschner, *Why Omitting General Public Policy Exceptions from Investment Treaties Is a Setback for the Right to Regulate* (Colum. Ctr. Sustainable Inv. (CCSI), Columbia FDI Perspectives No. 342, 2022).

[61] *Id.*

臺灣大學學術期刊資料庫

exception clauses in their IIAs since the late 1990s.[62] A notable distinction emerges between BITs and Free Trade Agreements (hereinafter "FTAs") in this context. While the incorporation of general public policy exceptions into BITs remains relatively rare, these provisions are increasingly found in comprehensive bilateral FTAs between Asian nations.[63]

To be more specific, these Asian states have adopted three different approaches for designing their WTO-style general public policy exceptions provisions[64]: (1) Adopting clauses that draw either entirely or partially on Article XX of the GATT;[65] (2) Incorporating provisions based on Article XIV of the GATS;[66] and (3) Combining both Article XX of the GATT and Article XIV of the GATS within a single clause.[67] An exemplar of the third comprehensive integration approach is the China–New Zealand FTA, signed in April 2008, which embodies both Article XX of the GATT and Article XIV of the GATS. Article 200 of the FTA stipulates[68]:

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[62] Spears, *supra* note 4, at 1061.
[63] Newcombe, *supra* note 7, at 359.
[64] Spears, *supra* note 4, at 1061.
[65] *See, e.g.*, Agreement Between Japan and the Republic of Singapore for a New-Age Economic Partnership, Japan-Sing., art. 83, Jan. 13, 2002, https://edit.wti.org/document/show/96886f0d-ca27-4a33-82f4-ae8deac602a4; Singapore-Australia Free Trade Agreement, Austl.-Sing., art. 19, Feb. 17, 2003, https://edit.wti.org/document/show/ed6efe25-3bc8-4b3b-86fc-776ff662016c; Bilateral Investment Treaty Between the Government of the Hashemite Kingdom of Jordan and the Government of the Republic of Singapore, Jordan-Sing., art. 18, May 16, 2004, https://edit.wti.org/document/show/1d7d8884-b675-4e01-99dd-37e97fc40fdf; Comprehensive Economic Cooperation Agreement Between the Republic of India and the Republic of Singapore, India-Sing., art. 6.11, June 29, 2005, https://edit.wti.org/document/show/d03a9413-226b-4e23-a4c8-badbf46549f5; Agreement Between the Government of Japan and the Government of Malaysia for an Economic Partnership, Japan-Malay., art. 10, Dec. 13, 2005, https://edit.wti.org/document/ show/d67f24ba-d839-4b7d-8588-17abd53b500c; ASEAN Comprehensive Investment Agreement art. 17, Feb. 26, 2009, https://edit.wti.org/document/show/82356d54-796a-4b1e-b35d-8737408d65fd; Agreement on Investment of the Framework on Comprehensive Economic Cooperation Between the People's Republic of China and the Association of Southeast Asian Nations art. 16, Aug. 15, 2009, https://edit.wti.org/document/show/7f0d5a37-899b-47d4-bba4-7620d7feb9a3; Comprehensive Economic Partnership Agreement Between the Republic of Korea and the Republic of India, India-S. Kor., art. 10.18, Aug. 7, 2009, https://edit.wti.org/document/show/ e235aef4-cd0a-4205-9abf-082987e4c125.
[66] *See, e.g.*, Free Trade Agreement Between the Republic of Korea and Singapore, S. Kor.-Sing., art. 21.2, Aug. 4, 2005, https://edit.wti.org/document/show/e5646779-2a58-4b7d-9ab5-890398f01c2f (last visited Aug. 19, 2024); Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area ch. 15, arts. 1-5, Feb. 28, 2009, https://edit.wti.org/document/show/0c43ae63-ccd6-4009-94cc-cbb711db3939 (last visited Aug. 19, 2024).
[67] *See, e.g.*, Australia–Thailand Free Trade Agreement, Austl.-Thai., art. 1601, July 5, 2004, https://edit.wti.org/document/show/dd3be13b-1eca-4060-8de6-9748c0fd7c24; Agreement Between the Government of Japan and the Government of Malaysia for an Economic Partnership, Japan-Malay., art. 10, Dec. 13, 2005, https://edit.wti.org/document/show/ d67f24ba-d839-4b7d-8588-17abd53b500c; China–New Zealand Free Trade Agreement, China-N.Z., art. 200, Apr. 7, 2008, https://edit.wti.org/document/show/9e0c31e0-db36-453c-8674-cafda1efade3.
[68] China–New Zealand Free Trade Agreement, *supra* note 67, art. 200.

臺灣大學學術期刊資料庫

> 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 as 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.
>
> 4. Nothing in this Agreement shall prevent the Parties from taking any necessary measures to restrict the illicit import of cultural property from the other Party under the framework of the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, done at Paris on 14 November 1970.

In sum, Part III's empirical investigation into the inclusion of general public policy exceptions in IIAs has illuminated a complex yet evolving landscape. Despite their scarcity in the extensive network of over 3,000 IIAs, a discernible shift towards the inclusion of these exceptions is evident, particularly in the new-generation IIAs concluded in recent years. This trend reflects a growing recognition among treaty parties of the importance of these exceptions for balancing investment protection with broader public policy objectives. Notably, Canada emerges as a pioneering example, systematically integrating WTO-style general exceptions across its IIAs, although a recent deviation from this practice in its 2021 Model FIPA signals

臺灣大學學術期刊資料庫

a noteworthy shift in its treaty strategy. Meanwhile, Asian countries have demonstrated a regional inclination towards incorporating general public policy exceptions into their FTAs, employing a variety of approaches to design such exceptions. These developments signal a potential paradigm shift in states' treaty-making, where IIAs serve not only the interests of investors but also the wider public good. As the article progresses, these empirical insights will serve as a backdrop for a deeper exploration into how general public policy exceptions are interpreted and applied in the realm of ISDS, highlighting their practical implications and challenges that lie ahead.

IV. ARBITRAL CASE LAW: APPLYING AND INTERPRETING GENERAL PUBLIC POLICY EXCEPTIONS

Following an empirical survey of general public policy exceptions within IIAs—often referred to as the "law on paper"—this section delves into their interpretation and application as manifested in arbitral case law, thus shedding light on the "law in practice".

To date, arbitral jurisprudence directly engaging with general public policy exceptions remains notably limited. All the cases under scrutiny revolve around Canadian IIAs, with disputes invariably arising from the mining sector, due to regulatory measures aimed at environmental protection or addressing protests against specific projects.[69]

This analysis examines the only four cases that have directly addressed general public policy exceptions: (1) *Copper Mesa Mining Corporation v. Republic of Ecuador*;[70] (2) *Bear Creek Mining Corporation v. Republic of Peru*;[71] and (3) *Eco Oro Minerals Corp. v. Republic of Colombia*,[72] and (4) *Red Eagle Exploration Limited v. Republic of Colombia*.[73] The very recent award in the *Red Eagle* case, rendered earlier this year, places this discussion at the cutting edge of academic inquiry, potentially marking the first comprehensive examination of all four cases concerning the pivotal issue of general public policy exceptions.

These case studies expose a landscape rife with controversy and uncertainty, underscoring the challenges arbitral tribunals face in

[69] Wagner, *supra* note 5, at 103.
[70] Copper Mesa Mining Corporation (Can.) v. Republic of Ecuador, PCA Case No. 2012-2, Award (Mar. 15, 2016), https://pcacases.com/web/sendAttach/1957. [hereinafter Copper Mesa v. Ecuador]
[71] Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Award (Nov. 30, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw9381.pdf [hereinafter Bear Creek v. Peru].
[72] Eco Oro Minerals Corp. v. Republic of Colom., ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (Sept. 9, 2021), https://www.italaw.com/sites/default/files/case-documents/italaw16212.pdf. [hereinafter Eco Oro v. Colombia].
[73] Red Eagle Exploration Limited v. Republic of Colom., ICSID Case No. ARB/18/12, Award (Feb. 28, 2024), https://www.italaw.com/sites/default/files/case-documents/180718.pdf. [hereinafter Red Eagle v. Columbia]

臺灣大學學術期刊資料庫

interpreting and applying general public policy exceptions. The reasoning in these disputes casts a significant shadow over the efficacy of these exceptions in navigating the tension between investors' rights and host states' regulatory autonomy.

A. Arbitral Awards that Dealt with General Public Policy Exceptions

1. The Trailblazer: Copper Mesa v. Ecuador — The first known investment arbitration case dealing with general public policy exceptions is *Copper Mesa v. Ecuador*.[74] In this case, Ecuador had rescinded the mining concessions of the investor due to intense protests between proponents and opponents, sparked by the project's proximity to ecologically sensitive zones. In 2011, the investor, Copper Mesa commenced arbitration proceedings against Ecuador under the Canada–Ecuador BIT (1996).[75] Copper Mesa claimed that Ecuador's nullification and termination of its mining concessions amounted to an unlawful expropriation, and breaches of national treatment (NT), fair and equitable treatment (hereinafter "FET"), and full protection and security (hereinafter "FPS"). In its defense, Ecuador raised the general public policy exceptions clauses, referring to Article XVII(3) of the Canada–Ecuador BIT entitled "Application and General Exceptions", which states that[76]:

> 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.

[74] Copper Mesa v. Ecuador, *supra* note 70.

[75] Agreement Between the Government of Canada and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments, Can.-Ecuador, Apr. 29, 1996, https://edit.wti.org/document/show/ef3dc9d4-bf88-4073-8fb3-60fef085b834 (entered into force June 6, 1997) [hereinafter Canada–Ecuador BIT]. The general exceptions clause, stipulated in Article XVII(3) of the Canada–Ecuador BIT indeed resembles WTO-style general exceptions clause.

[76] *Id.* art. XVII(3).

臺灣大學學術期刊資料庫

Ecuador defended its actions by stating that the revocation and cessation of the concessions were aimed at addressing environmental and public health concerns, thus falling within its legitimate police powers.[77] It further asserted that even if the tribunal deemed its measures as expropriatory, these measures would not constitute a treaty breach due to the general exceptions as provided by Article XVII(3).[78] Although the tribunal treated the police powers and the exception clause as distinct defenses, it decided to analyse them jointly, as both defenses turned on "the same factors".[79] The tribunal finally determined that Ecuador's measures "were made in an arbitrary manner and without due process".[80] This led to the conclusion that these actions neither qualified under the police power exception nor satisfied the criteria of Article XVII(3)'s *chapeau*, thereby rendering the exception clause inapplicable. Consequently, the tribunal decided that Ecuador's actions constituted a breach of the treaty's expropriation, FET, and FPS clauses, despite the inclusion of a general public policy exception in the treaty.[81]

2. Confusing General Exceptions with Police Powers: Bear Creek v. Peru — The second invocation of the general exceptions came in the case of *Bear Creek v. Peru*.[82] This case revolved around the revocation of a mining license by the government of Peru. Bear Creek, a Canadian mining company, initially received a constitutional exemption in 2007 to operate in Peru's border region, which requires proof of public necessity for foreign entities. However, due to local protests, the Peruvian government rescinded this exemption in 2011, leading Bear Creek to lose its mining concession. After inconclusive local court proceedings, Bear Creek initiated an ICSID arbitration claim against Peru in 2014, alleging that the revocation was inconsistent with the terms of the investment chapter of the Canada–Peru FTA (2009).[83] In response, the Peruvian government argued that its measures were within the scope of its police powers and conformed to the general exceptions clause stipulated in the FTA,[84] under Article 2201.1(3) of the Canada–Peru FTA.[85]

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[77] Copper Mesa v. Ecuador, *supra* note 70, ¶ 6.11.
[78] *Id.* ¶ 6.14.
[79] *Id.* ¶ 6.58.
[80] *Id.* ¶ 6.66.
[81] *Id.* ¶¶ 10.5-.6.
[82] Bear Creek v. Peru, *supra* note 71.
[83] Free Trade Agreement Between Canada and the Republic of Peru, Can.-Peru, May 29, 2008, https://edit.wti.org/document/show/5110a77d-e03a-4235-94ab-8f178d8376af [hereinafter Canada–Peru FTA].
[84] Bear Creek v. Peru, *supra* note 71, ¶¶ 337, 458-70.
[85] Canada–Peru FTA, *supra* note 83, art. 2201.1(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

臺灣大學學術期刊資料庫

Echoing the challenges faced by the *Copper Mesa* tribunal, the tribunal here also had to address the interplay between the defenses of police powers and the general exceptions. In their cursory examination, the majority of the tribunal determined that Article 2201.1(3)'s exhaustive listing of policy justifications, along with its detailed and precise wording, rendered it as *lex specialis*, thereby overriding any other international law defenses, including police powers. The tribunal reasoned that "no other exceptions from general international law or otherwise can be considered applicable in this case."[86]

After dismissing the police powers argument, the tribunal majority then considered the applicability of the general exceptions clause. The tribunal noted that the decree revoking the mining license failed to explicitly mention the protection of human life or health.[87] Further, the tribunal inferred that the decree fell short of meeting the requirements set by the general exception's *chapeau*, as the claimant was not heard before the license was revoked, amounting to a lack of due process.[88] Even if the exception did apply, the tribunal expressed the view that it "does not offer any waiver" from the obligation for compensation.[89] The tribunal finally concluded that the revocation decree constituted an unlawful indirect expropriation, and did not delve into other claims or their possible connections with the general exception.[90]

3. Rendering General Exceptions Ineffectual: Eco Oro v. Colombia — The more recent *Eco Oro v. Colombia* decision issued in September 2021[91] was argued to represent "the preliminary climax" of the worrying trend in interpreting and applying general public policy exceptions.[92] In this case, the Canadian mining company Eco Oro had a concession contract with Colombia for mining rights in an area partially overlapping with the environmentally sensitive Páramo de Santurbán, a crucial wetland region. As Eco Oro's operations were gearing up, Colombian authorities were

> 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.

[86] Bear Creek v. Peru, *supra* note 71, ¶ 473.
[87] *Id.* ¶ 475.
[88] *Id.* ¶ 477.
[89] *Id.*
[90] *Id.* ¶¶ 533, 544, 553.
[91] Eco Oro v. Colombia, *supra* note 72.
[92] Wolfgang Alschner, *From a Backlash Against Investment Arbitration to a Backlash by Investment Arbitrators?*, KLUWER ARB. BLOG (July 4, 2022), https://arbitrationblog.kluwerarbitration.com/2022/07/04/from-a-backlash-against-investment-arbitration-to-a-backlash-by-investment-arbitrators/.

臺灣大學學術期刊資料庫

embroiled in an ongoing political struggle over how to balance between environmental protection and mining investment promotion. In 2014, Colombian authorities declared a 55% overlap between Eco Oro's concession area and the Páramo.[93] This triggered a sequence of events, culminating in Eco Oro commencing arbitration proceedings against Colombia under the 2008 Canada–Colombia FTA,[94] claiming that Colombia, by its actions and inactions, had breached its treaty obligations. In response, Colombia refuted these claims, arguing that its actions were in compliance with the FTA's provisions and were justifiable under the general exceptions clause,[95] stipulated in Article 2201(3) of the FTA.[96]

The tribunal majority held that Colombia's measures did not constitute unlawful expropriation but did breach the minimum standard treatment (hereinafter "MST"). After having found an MST breach, the tribunal turned to the general exceptions of Article 2201(3). When examining the general exceptions of Article 2201(3), the tribunal diverged from the positions of both Colombia and Canada. In their submissions, Colombia asserted that Article 2201(3) would justify a possible violation of the FTA given that its measures were necessary to preserve the Páramo de Santurbán wetland conservation area and that no compensation would therefore be due,[97] and Canada also expressed in its non-disputing submission that the general public policy exception clause serves as a "final 'safety net' to protect the state's exercise of regulatory powers".[98] However, the tribunal viewed the general public policy exception as merely "permissive",[99] providing permission for states to adopt protective measures rather than exempting

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[93] J. Benton Heath, *Eco Oro and the Twilight of Policy Exceptionalism*, INT'L INST. SUSTAINABLE DEV. (Dec. 20, 2021), https://www.iisd.org/itn/en/2021/12/20/eco-oro-and-the-twilight-of-policy-exceptionalism/.

[94] Free Trade Agreement Between Canada and the Republic of Colombia, Can.-Colom., Nov. 21, 2008, U.N.T.S. 3242 [hereinafter Canada–Colombia FTA].

[95] Eco Oro v. Colombia, *supra* note 72, ¶ 366.

[96] Canada–Colombia FTA, *supra* note 94, art. 2201(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: (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; (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.

[97] Eco Oro v. Colombia, *supra* note 72, ¶ 362.

[98] Eco Oro Minerals Corp. v. Republic of Colom., ICSID Case No. ARB/16/41, Non-Disputing Party Submission of Canada, ¶ 20 (Feb. 27, 2020), https://www.italaw.com/sites/default/files/case-documents/italaw11532.pdf.

[99] Eco Oro v. Colombia, *supra* note 72, ¶ 829.

臺灣大學學術期刊資料庫

them from liability for such actions. According to the tribunal, even if the general exceptions clause applies to a state measure, "this does not prevent an investor claiming . . . that such a measure entitles it to the payment of compensation."[100] In other words, even if the conditions of the exceptions provision are met, such clause does not exempt the contracting states from the liability of compensating investors for any losses incurred from the public interest-related measures such as environmental measures.[101]

This tribunal majority's unconventional take has raised significant concerns and controversies,[102] especially as it contrasts sharply with the concordant and express statements of both the host state (Colombia) and home state (Canada),[103] and departs starkly from decades of caselaw on similarly worded general exceptions in neighbouring WTO trade law.[104] Critics argue that the *Eco Oro* tribunal's interpretation on the general public policy exceptions has rendered the provision "effectively irrelevant in investment arbitration",[105] casting doubt on the ability of states to rely on these exceptions to defend public-interest-driven regulatory measures within the IIA framework. This outcome not only undermines the clause's intended function as a safeguard for states' regulatory autonomy but also reflects a broader concern that despite states' efforts to exclude specific regulatory measures driven by public interest from the protective ambit of some recent IIAs, arbitral tribunals persist in overlooking these considerations.[106]

4. Bypassing General Exceptions: Red Eagle v. Colombia — Similar to the *Eco Oro* case, *Red Eagle v. Colombia* [107] also revolved around Colombia's mining ban in the environmentally sensitive Páramos region. Red Eagle, a Canadian company, acquired mining titles in the Páramos area between 2010 and 2013. Despite initial exceptions allowing some mining activities, subsequent legal and constitutional rulings issued by Colombia progressively tightened restrictions, finally leading to a comprehensive ban in 2016. Red Eagle lodged the ICSID claim in 2018, alleging that Colombia had violated the Canada–Colombia FTA's prohibition on expropriation and breached the MST.

As in *Eco Oro*, Columbia invoked the general exceptions clause in Article 2201(3) of the FTA as a defense. However, having found that

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[100] *Id.* ¶ 830.
[101] Claudia Annacker, *Fragmentation and Integration in International Investment Law: Plus Ça Change*, 38(3) ICSID REV. - FOREIGN INV. L. J. 501, 507 (2023).
[102] Güneş Ünüvar, *A Tale of Policy Carve-Outs and General Exceptions: Eco Oro v Colombia as a Case Study*, 14(4) J. INT'L DISP. SETTLEMENT 517, 517 (2023).
[103] Robert Garden, *Eco Oro v Colombia: The Brave New World of Environmental Exceptions*, 38(1) ICSID REV. - FOREIGN INV. L.J. 17, 22 (2023).
[104] Alschner, *supra* note 60.
[105] Heath, *supra* note 93.
[106] Ünüvar, *supra* note 102, at 517.
[107] Red Eagle v. Columbia, *supra* note 73.

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Colombia had not breached either the MST or the FTA's protections against expropriation, the tribunal majority deemed it unnecessary to consider the scope or effect of the general exceptions clause.[108] This stance effectively circumvented a detailed examination of the clause since, in their view, the exception only applied after establishing a breach of the treaty's primary obligations—a scenario not applicable in the *Red Eagle* dispute. The tribunal finally ruled in favor of Colombia, contrasting sharply with the *Eco Oro* decision where Colombia was held liable under the same FTA provisions.

It is important to note that there exists a trilogy of disputes arising from Colombia's Páramo mining ban—*Eco Oro v. Colombia*, *Red Eagle v. Colombia*, and the suspended *Galway Gold v. Colombia.*[109] This article has already discussed the former two cases and identified a stark contrast in decisions—where *Eco Oro* tribunal found in favor of the investor while *Red Eagle* tribunal ruled in favor of Colombia. This divergence in tribunal decisions—despite similar factual scenarios and legal arguments under the identical FTA—highlights a critical point for analysis. Regrettably, the *Red Eagle* tribunal refrained from engaging with the general exceptions clause or offering a comparative analysis vis-à-vis the *Eco Oro* tribunal's findings. Its decision to bypass this exception, without providing a rationale or contrasting its approach with the *Eco Oro* decision, represents a missed opportunity for deeper jurisprudential discourse. Such a comparative analysis could have contributed valuable insights into the application of general public policy exceptions.

Moreover, the suspended case of *Galway Gold v. Colombia* adds another layer to this complex narrative, holding the potential to further dissect and clarify the application of general public policy exceptions in international investment arbitration. It remains to be seen whether forthcoming decisions will bring the needed clarity or not. But it is predicted that the evolving landscape of investment disputes, particularly those triggered by public-interest measures and brought under new-generation IIAs, will continue to be characterized by uncertainty.[110]

B. Analytical Summary: Interpretative Challenges Encountered by the Tribunals

From the foregoing case analysis, it can be concluded that the number of arbitral awards involving WTO-style general public policy exceptions is considerably limited. To date, there have been four existing disputes, all of

[108] *Id.* ¶ 428.
[109] Montauk Metals Inc. (formerly known as Galway Gold Inc.) v. Republic of Colombia, ICSID Case No. ARB/18/13, Procedural Order No. 2 - Annex B (Feb. 12, 2021), https://www.italaw.com/sites/default/files/case-documents/italaw16156.pdf.
[110] Garden, *supra* note 103, at 24.

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which are related to the mining industry. The measures in dispute all involve the revocation or termination of mining concessions granted to investors, and the legal bases for bringing the ISDS claims all lie in the IIAs signed by Canada, exhibiting a high degree of homogeneity. The four pivotal arbitration cases examined herein uncover a deeply troubling interpretative approach adopted by tribunals. The investment tribunals have consistently failed to conduct a thorough analysis of the general public policy exceptions clause, either by sidestepping the necessary criteria, misconstruing the clause's meaning, or confusing its application with other types of defenses, thus unduly restricting the scope and legal effect of these exceptions.

The application of general public policy exceptions by current arbitral tribunals is marred by two significant shortcomings: (1) insufficient analysis, and (2) erroneous and controversial interpretations.

On the one hand, the arbitral practice to date has shown a reluctance to engage deeply with the general public policy exceptions. None of the existing arbitral awards has provided a thorough and comprehensive analysis of these exceptions. Despite the tribunals' extensive exploration into various aspects of the cases—such as the concept of indirect expropriation or the MST—the scrutiny of general public policy exceptions has been markedly limited.[111] Alschner and Hui have previously concluded in their article that general public policy exceptions are largely "missing in action".[112] They observed that in many investment arbitration cases, these exceptions are either misinterpreted by tribunals or not consistently invoked by respondent states.[113] Moreover, the recent decision in *Eco Oro* seems to exacerbate these concerns, with general public policy exceptions not merely "missing in action" but "simply obliterated".[114]

On the other hand, arbitral tribunals seem to be "well capable of creating interpretative deadlocks by convenient or erroneous readings of relevant provisions".[115] A recent UNCTAD report has criticized that ISDS tribunals in these cases have applied and interpreted general exception clauses "in narrow and unexpected ways",[116] and thus may create regulatory chill. It is also noted that in most cases, the respondent states' efforts to invoke the WTO-style general exceptions contained in the IIAs have failed, which may leave the host states frustrated and disappointed. As will be discussed in detail in the analysis of Part VI, such a disappointed hope could be explained

[111] Wagner, *supra* note 5, at 111.
[112] Alschner & Hui, *supra* note 57, at 392.
[113] *Id.*
[114] Heath, *supra* note 93.
[115] Ünüvar, *supra* note 102, at 533.
[116] *The International Investment Treaty Regime and Climate Action*, UNCTAD (Sept. 2022), https://investmentpolicy.unctad.org/publications/1269/the-international-investment-treaty-regime-and-climate-action.

臺灣大學學術期刊資料庫

by the conflict between host states' treaty innovation and arbitral tribunals' path dependency.

To elaborate, such erroneous and controversial interpretation of general public policy exceptions has been particularly evident in the tribunals' handling of two key issues: (1) the relationship between general exceptions and police powers, and (2) the exemption of compensation.

First, tribunals have struggled to delineate the relationship between general public policy exceptions and the doctrine of police powers. This confusion is manifest in inconsistent tribunal practices. For instance, the *Copper Mesa* tribunal treated these two as distinct yet factually related defenses, whereas the *Bear Creek* tribunal adopted an approach where the general exceptions applied to the exclusion of police powers. However, neither tribunal thoroughly elucidated the rationale behind their interpretive decisions. Additionally, both tribunals swiftly concluded that procedural deficiencies in the states' interactions with foreign investors violated the primary obligations and the requirements set out in the *chapeau* of the exceptions, without carefully or clearly delineating the normative boundaries of each.[117]

Regarding the relationship between general exceptions and police powers, we suggest that general exceptions and police powers should be viewed as two independent and different defenses. As it has been made clear by Canada in its non-disputing party submission in the case of *Eco Oro*, the general exceptions, by nature, should be viewed as "an additional tool or a final safety net",[118] and whether a measure is justified under such a general exceptions clause "is a distinct enquiry that must be viewed through a different lens."[119] From the intentions of treaty parties, general public policy exceptions should supplement rather than limit or exclude the operation of police powers. Differentiating between these two defenses is beneficial to maximizing the treaty's flexibility.

The second interpretative difficulty arises from the question of whether general exceptions could exempt host states from paying compensations. Tribunals in both *Bear Creek* and *Eco Oro* controversially concluded that the application of general exceptions does not absolve the states from compensatory duties. In the case of *Bear Creek*, the tribunal held that the general exceptions clause "does not offer any waiver from the obligation . . . to compensate for the expropriation".[120] In the case of *Eco Oro*, while both Colombia and Canada had argued that the general exceptions permitted the

[117] Alschner & Hui, *supra* note 57, at 383.
[118] Eco Oro Minerals Corp. v. Republic of Colom., ICSID Case No. ARB/16/41, Non-Disputing Party Submission of Canada, ¶ 20 (Feb. 27, 2020), https://www.italaw.com/sites/default/files/case-documents/italaw11532.pdf.
[119] *Id.* ¶ 21.
[120] Bear Creek v. Peru, *supra* note 71, ¶ 477.

臺灣大學學術期刊資料庫

justified action to be taken without the payment of compensation, the tribunal ruled to the contrary, holding that general exceptions do not preclude host state's duty to pay compensation.[121] Disagreeing with these tribunals' conclusions, we argue that their interpretations place significant limits on the utility of general exceptions clause,[122] and obviously deviate from the state parties' intention behind incorporating these exceptions into their IIAs. It is implausible to presume that states would incorporate general public policy exceptions into their IIAs without intending to avoid potential compensation obligations imposed by arbitral awards.[123] If the general public policy exceptions clause fails to exempt the host state from compensation duties under any circumstances, its practical utility appears significantly diminished.[124]

V. COVID-19 CRISIS AND GENERAL PUBLIC POLICY EXCEPTIONS

The COVID-19 pandemic has caused severe disruptions not only to public health but also to the global economy.[125] In response, states worldwide have implemented a wide array of regulatory measures aimed at both containing the spread of the virus and cushioning economic shocks. These measures, while necessary, have raised concerns about potential adverse effects on foreign investments and the likelihood of an increase in ISDS claims against host states.[126] Given the breadth, scope and intensity of the COVID-19-related measures, many have predicted that in the post-COVID-19 era, the world is highly likely to face a deluge of investor-state disputes stemming from the states' regulatory responses to the pandemic, and the investment arbitration risks will loom large for the host states in the coming years.[127]

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[121] Eco Oro v. Colombia, *supra* note 72, ¶ 830.

[122] Jarrod Hepburn, *Analysis: Bear Creek Tribunal Declines to Infer Legality Requirement, Considers Interpretive Annex on Indirect Expropriation, and Views Treaty's General Exceptions Clause as Ruling out Other Exceptions*, INV. ARB. REP. (Dec. 4, 2017), https://www.iareporter.com/articles/analysis-bear-creek-tribunal-declines-to-imply-legality-requirement-considers-interpretive-annex-on-indirect-expropriation-and-views-treatys-general-exceptions-clause-as-ruling-out-other-exceptio/.

[123] Yue Zhao, *Revisiting Chinese International Investment Treaties During the COVID-19 Pandemic: Are Public Interest Clauses a Sufficient Defence for Emergency Measures?*, *in* COVID-19 AND INTERNATIONAL BUSINESS AND ECONOMIC LAW: CHINA AND A CHANGING WORLD 140, 156 (Kun Fan & Xiao-chun Charlie Weng eds., 2023).

[124] *Id.*

[125] Janice Lee, *Note on COVID-19 and the Police Powers Doctrine: Assessing the Allowable Scope of Regulatory Measures During a Pandemic*, 13(1) CONTEMP. ASIA ARB. J. 229, 229 (2020).

[126] Dimitrios Katsikis, *'Necessity' Due to COVID-19 as a Defence to International Investment Claims*, 36(1) ICSID REV. - FOREIGN INV. L.J. 46, 46 (2021).

[127] *See, e.g.*, Oliver Hailes, *Epidemic Sovereignty? Contesting Investment Treaty Claims Arising from Coronavirus Measures*, EJIL: TALK! (Mar. 27, 2020), https://www.ejiltalk.org/epidemic-

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Indeed, this risk is not unfounded. Numerous potential investor-state arbitration cases are currently under consideration. Several countries, including Peru, Chile, Mexico, Italy, Spain, and India are reportedly facing heightened investment arbitration risks due to their COVID-19-related emergency measures.[128] These measures include but are not limited to the suspension of collection of toll fees on highways, the closure of flight routes, additional sanitary measures, the constraints on renewable energy projects, and nationalization of private hospitals, etc. In short, it is evident that many states have been warned of potential ISDS claims arising from their COVID-19 related regulatory measures. These concerns are substantiated.

Particularly, the first ISDS claim related to a host state's response to the COVID-19 pandemic has already been filed, marking a pivotal moment in the interaction between public health crises and investment arbitration.

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sovereignty--investment-treaty-claims-arising-from-coronavirus-measures/; Dilini Pathirana, *COVID-19, Preventative Measures and the Investment Treaty Regime*, AFRONOMICSLAW (Apr. 13, 2020), https://www.afronomicslaw.org/2020/04/13/covid-19-preventative-measures-and-the-investment-treaty-regime; *see generally* Julien Chaisse, *Both Possible and Improbable - Could COVID-19 Measures Give Rise to Investor-State Disputes?*, 13(1) CONTEMP. ASIA ARB. J. 99 (2020); Federica Paddeu & Kate Parlett, *COVID-19 and Investment Treaty Claims*, KLUWER ARB. BLOG (Mar. 30, 2020), http://arbitrationblog.kluwerarbitration.com/2020/03/30/covid-19-and-investment-treaty-cla ims/; Nicholas J. Diamond, *Pandemics, Emergency Measures, and ISDS*, KLUWER ARB. BLOG (Apr. 13, 2020), http://arbitrationblog.kluwerarbitration.com/2020/04/13/pandemics-emergency-measur es-and-isds/; Ahmed Bakry, *The COVID-19 Crisis and Investment Arbitration: A Reflection from the Developing Countries*, KLUWER ARB. BLOG (Apr. 21, 2020), http://arbitrationblog.kluwerarbitration.com/2020/04/21/the-covid-19-crisis-and-investment-arbitration-a-reflection-from-the-developing-countries/.

[128] Adam Payne, *Spain Has Nationalised All of Its Private Hospitals as the Country Goes into Coronavirus Lockdown*, BUS. INSIDER (Mar. 16, 2020, 10:53 PM), https://www. businessinsider.in/politics/news/spain-has-nationalised-all-of-its-private-hospitals-as-the-country-goes-into-coronavirus-lockdown/articleshow/74658200.cms; Massimo Benedetteli et al., *Could Covid-19 Emergency Measures Give Rise to Investment Claims? First Reflections from Italy*, GLOB. ARB. REV. (Mar. 26, 2020), https://globalarbitrationreview.com/coronavirus/could-covid-19-emergency-measures-give-rise-investment-claims-first-reflections-italy; Cosmo Sanderson, *Peru Warned of Potential ICSID Claims over Covid-19 Measures*, GLOB. ARB. REV. (Apr. 9, 2020), https://globalarbitrationreview.com/coronavirus/peru-warned-of-potential-icsid-claims-over-covid-19-measures; Cosmo Sanderson, *Mexico Faces Potential Claims over Pandemic Response*, GLOB. ARB. REV. (May 22, 2020), https://globalarbitrationreview.com/coronavirus/mexico-faces-potential-claims-over-pandemic-response; *Mexican COVID-19 Measures Imperil Foreign Investments in Renewable Energy Projects – Are International Arbitration Claims Imminent?*, CROWELL & MORING LLP (May 19, 2020), https://www.crowell.com/NewsEvents/AlertsNewsletters/all/Mexican-COVID-19-Measures-Imperil-Foreign-Investments-in-Renewable-Energy-Projects-Are-International-Arbitration-Claims-Imminent (last visited Mar. 16, 2022); Cosmo Sanderson, *Peru Threatened over Coronavirus Emergency Measure*, GLOB. ARB. REV. (Jan. 5, 2020), https://globalarbitrationreview.com/coronavirus/peru-threatened-over-coronavirus-emergency-measure; Jack Ballantyne, *Chile Threatened over Airport Pandemic Disruption*, GLOB. ARB. REV. (Jan. 20, 2021), https://globalarbitrationreview.com/chile-threatened-over-airport-pandemic-disruption; *French Consortium Kicks Off an ICSID Claim Against Chile After USD 37 Million Loss due to COVID-19 Pandemic*, INV. TREATY NEWS (Mar. 23, 2021), https://www.iisd.org/itn/en/2021/03/23/french-consortium-kicks-off-an-icsid-claim-against-chile-after-usd-37-million-loss-due-to-covid-19-pandemic/; Toby Fisher, *Chile Hit with Claim over Airport Pandemic Disruption*, GLOB. ARB. REV. (Aug. 16, 2021), https://globalarbitrationreview.com/chile-hit-claim-over-airport-pan demic-disruption.

臺灣大學學術期刊資料庫

Registered before the ICSID on August 13, 2021, the case of *ADP International S.A. and Vinci Airports S.A.S. v. Republic of Chile*[129] involves two French airport companies challenging regulatory measures implemented by Chile in response to the pandemic. The claimants, ADP and Vinci Airports, initiated treaty-based arbitration proceedings against Chile, invoking protections under the Chile–France BIT of 1992. In this case, both two French companies hold interests in the Chilean company Nuevo Pudahuel, which was granted a concession for the operation of Santiago's Arturo Merino Benítez airport in 2015. However, due to the COVID-19 pandemic, the airport's passenger traffic drastically decreased, causing financial problems for Nuevo Pudahuel.[130] Reportedly, the company requested concession renegotiation, but Chile's Ministry of Public Works rejected the request, leading to the investment dispute.[131] Although Chilean authorities maintained that the measures taken were necessary for protecting their citizens and the public health system,[132] the claimants alleged that Chile's refusal to renegotiate the concession terms and compensate for pandemic-related economic losses constituted a breach of the BIT. As of now, the case is still pending, with the latest development being a pre-hearing organization meeting held on April 10, 2024.[133] While the tribunal's approach to deal with ADP and Vinci's investment claims remains to be seen, this case exemplifies the real-world impact and practical implications of the COVID-19 pandemic on investment arbitration, highlighting the intricate interplay between COVID-19 measures, regulatory autonomy, and investor rights. As this case unfolds, it may offer a critical lens through which to assess the role of general public policy exceptions in safeguarding regulatory autonomy amidst global emergencies and crises.

Against this backdrop, the role of general public policy exceptions in IIAs gains renewed importance. The empirical analysis presented in Part III

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[129] ADP International S.A. and Vinci Airports S.A.S. v. Republic of Chile, ICSID Case No. ARB/21/40, Respondent's Press Release on the Notice of Arbitration, https://www.italaw.com/sites/default/files/case-documents/italaw180893.pdf.

[130] Lisa Bohmer, *Chile Is Put on Notice of Treaty-Based Airport Concession Dispute*, INV. ARB. REP. (Jan. 20, 2021), https://www.iareporter.com/articles/chile-is-put-on-notice-of-treaty-based-airport-concession-dispute/.

[131] Lisa Bohmer, *French Airport Investors Make Good on Earlier Threat to Bring Treaty-Based Claims Against Chile in Relation to Reduced Air Traffic During the COVID Pandemic*, INV. ARB. REP. (Aug. 13, 2021), https://www.iareporter.com/articles/french-airport-investors-make-good-on-earlier-threat-to-bring-treaty-based-claims-against-chile-in-relation-to-reduced-air-traffic-during-the-covid-pandemic/.

[132] Bettina Müller, *Before the Flood? The Looming Risk of Corporations Suing States for Covid-Related Measures*, BUS. & HUM. RTS. RES. CTR. (Sept. 8, 2022), https://www.business-humanrights.org/en/blog/before-the-flood-the-looming-risk-of-corporations-suing-states-for-covid-related-measures/.

[133] ADP International S.A. and Vinci Airports S.A.S. v. Republic of Chile, ICSID Case No. ARB/21/40, Respondent's Press Release on the Notice of Arbitration (Aug. 13, 2021), https://icsid.worldbank.org/cases/case-database/case-detail?CaseN o=ARB/21/40.

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demonstrates that these exceptions typically list the protection of human or health as a permissible policy objective. This implies that regulatory measures genuinely taken for the purpose of combating COVID-19 could fall within the scope of these general public policy exceptions. Consequently, the general public policy exceptions clause emerges as a crucial treaty-based defense mechanism for host states against ISDS claims arising from pandemic-related regulatory actions. And it is anticipated that such a clause will be invoked more actively and robustly than before. The global health crisis, therefore, serves to highlight, perhaps even elevate the significance of these general public policy exceptions in IIAs.

However, the effectiveness of these exceptions as a treaty defense in the context of the COVID-19 crisis is under challenge by several factors. Despite the growing inclusion of general public policy exceptions in new-generation IIAs, the majority of existing investment agreements—predominantly old-generation IIAs—generally lack such provisions. This absence of general public policy exceptions in most IIAs signifies that many states may not have a clear treaty basis to justify their pandemic-related measures. Such a gap in treaty coverage may limit the applicability of these exceptions in defending against potential ISDS claims.

Furthermore, as observed in Part IV, the application of general public policy exceptions by arbitral tribunals has been fraught with problems, including insufficient analysis and controversial interpretations. The existing arbitral jurisprudence reveals a high level of uncertainty and inconsistency in how these exceptions are treated, potentially complicating their invocation as a robust defense in the face of pandemic-related disputes.

Therefore, the dilemma or difficulty of invoking the general public policy exceptions clause in IIAs to defend the host state's regulatory measures taken in response to the COVID-19 pandemic could be summarized as twofold. First, from the perspective of treaty practice, a majority of the existing IIAs do not contain the general public policy exceptions clause. Consequently, the absence of such exceptions may significantly limit host states' ability to invoke this particular defense in the event of ISDS claims arising from the COVID-19 pandemic. However, it is important to note that the absence of general public policy exceptions does not preclude host states from considering and relying on other possible defenses. Nonetheless, the absence of this specific general public policy exceptions clause does restrict the range of defenses available to host states. Second, from the perspective of arbitral jurisprudence, there exists a considerable degree of uncertainty as to how investment arbitral tribunals will interpret and apply the general public policy exceptions in the context of the COVID-19 crisis.

Apart from the general public policy exceptions clause in IIAs, host states also have access to a range of alternative defenses. These defenses

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could be broadly classified into two categories: treaty-based defenses and defenses under customary international law. Regarding treaty-based defenses, it is important to note that the focus of this article—the general public policy exceptions clause within IIAs—represents just one type of such treaty-based defenses. Beyond this provision, host states may also avail themselves of other clauses contained in IIAs, such as national security exceptions. With respect to defenses under customary international law, host states have various options, including police powers and necessity. Notably, previous case law, particularly cases arising from the Argentine economic crisis, has detailedly discussed some of these state defenses.[134] While a detailed exploration of these possible defenses falls beyond the scope of this article, it is pertinent to briefly acknowledge their existence here. Host states facing COVID-19-related ISDS claims may have multiple avenues for defending themselves. This broader perspective helps us gain a comprehensive understanding of the array of defenses available to host states.

In conclusion, the unprecedented COVID-19 global health crisis has introduced new challenges and considerations for both investors and host states, which may exacerbate the existing tension between protecting foreign investments and safeguarding host states' regulatory autonomy. While it is premature to draw definitive conclusions regarding the COVID-19 pandemic's impact on this tension, it is worthwhile to contemplate its potential implications, particularly in light of recent developments. Notably, an ongoing ICSID case, *ADP and Vinci Airports v. Chile*,[135] concerning a dispute stemming from measures taken by a host state in response to the COVID-19 pandemic has emerged, thereby shedding light on the practical implications of the pandemic on ISDS. However, caution must be exercised in extrapolating broader conclusions, as this case represents just one example of the potential implications of the pandemic on ISDS, and the current

[134] For more detailed discussions on these other possible defenses, such as security exceptions in IIAs, police powers, and necessity, etc., see generally Freya Baetens, *Protecting Foreign Investment and Public Health Through Arbitral Balancing and Treaty Design*, 71(1) INT. COMP. L.Q. 139 (2022); Jaemin Lee, *The Coronavirus Pandemic and International Investment Arbitration Application of "Security Exceptions" Clauses in Investment Agreements*, 13(1) CONTEMP. ASIA ARB. J. 185 (2020); Oliver Hailes, *Police Powers in a Pandemic: Investment Treaty Interpretation and the Customary Presumption of Reasonable Regulation*, *in* CUSTOM AND ITS INTERPRETATION IN INTERNATIONAL INVESTMENT LAW 233 (Andreas Kulick et al. eds., 2024); Lee, *supra* note 125; *See generally* Prabhash Ranjan, *COVID-19, India and Indirect Expropriation: Is the Police Powers Doctrine a Reliable Defence?*, 13(1) CONTEMP. ASIA ARB. J. 205 (2020); Federica Cristani, *Chapter 4: How Pandemics (May) Affect State Defences: Invoking Necessity in COVID-19-Related International Investment Arbitration Cases*, *in* BALANCING THE PROTECTION OF FOREIGN INVESTORS AND STATES RESPONSES IN THE POST-PANDEMIC WORLD 61 (Yulia Levashova & Pascale Accaoui Lorfing eds., 2022); Katsikis, *supra* note 126. Lu Wang & Wenhua Shan, *Force Majeure and Investment Arbitration*, 37(1-2) ICSID REV. - FOREIGN INVEST. L.J. 138, 149-52 (2022).

[135] ADP International S.A. and Vinci Airports S.A.S. v. Republic of Chile, ICSID Case No. ARB/21/40, Respondent's Press Release on the Notice of Arbitration (August 13. 2021), https://www.italaw.com/sites/defa ult/files/case-documents/italaw180893.pdf.

臺灣大學學術期刊資料庫

jurisprudence surrounding COVID-19 regulatory measures is extremely limited and still evolving. Further research and more empirical evidence are needed to fully understand the implications of the COVID-19 pandemic on ISDS and the tension between investment protection and regulatory autonomy.

As the world grapples with the aftermath of the pandemic and anticipates future public interest challenges, the role of general public policy exceptions in IIAs will evolve and gain increased significance.[136] Despite their potential as a crucial tool for reconciling different interests, the effectiveness of such exceptions in the current international investment law regime is hampered by insufficient treaty coverage and unclear arbitral interpretations. Therefore, there exists a pressing need for greater clarity and enhanced consistency in arbitral practice, ensuring that the investment law regime remains responsive to global challenges of this magnitude.

VI. BRIDGING THE DIVIDE: RECONCILING TREATY INTENTIONS AND ARBITRAL PRACTICES IN GENERAL PUBLIC POLICY EXCEPTIONS

A. Unravelling the Dynamics: Tensions Between New Treaty Designs and Old Arbitral Interpretations

Over the last decade and a half, states have embarked on a journey of rebalancing their IIAs,[137] introducing novel features in new-generation IIAs with the aim of achieving a better balance between protecting foreign investments and preserving sovereign regulatory space. A hallmark of this state-driven treaty reform has been the incorporation of general public policy exceptions. These exceptions are expected to equip investment arbitral tribunals with "new analytical devices for adjudicating disputes involving competing policy objectives",[138] thereby alleviating concerns over the undue restraints imposed by old-generation IIAs on states' right to regulate.[139]

However, the interpretation and application of these general public policy exceptions by arbitral tribunals, as evidenced in the case studies discussed in Part IV, appear to deviate from the intentions and expectations of the contracting States. Despite the reformative aspirations of new-generation IIAs, featuring general public policy exceptions, the arbitral outcomes have often paralleled those adjudicated under old-generation IIAs

[136] *Investment Policy Monitor: Special Issue - Investment Policy Responses to the COVID-19 Pandemic*, UNCTAD INVS. POL'Y HUB 1, 11 (2020), https://investmentpolicy.unctad.org /publications/1225/investment-policy-monitor-special-issue---investment-policy-res ponses-to-the-covid-19-pandemic.
[137] Alschner, *supra* note 92.
[138] Spears, *supra* note 4.
[139] Alschner, *supra* note 92.

臺灣大學學術期刊資料庫

devoid of such provisions. In other words, investment arbitral tribunals have interpreted these new treaties with general public policy exceptions just like those old ones that lacked these exceptions.[140] This is a phenomenon, as highlighted by Professor Wolfgang Alschner, where "new treaties produce old outcomes".[141] The arbitral jurisprudence on the general public policy exceptions to date has been discouraging and disappointing. In various cases, tribunals have confused, misconstrued, or ignored these exceptions,[142] thereby downplaying or rolling back the treaty design innovations.[143] Such interpretative practices not only dull the effect of the treaty reforms but also cast doubt on the potential of general public policy exceptions to serve as effective instruments for rebalancing investment protection and regulatory autonomy.

As a result, these well-intentioned treaty innovations, though promising on paper, have fallen short in practice.[144] Contrary to the expectations set by state-driven reforms, the incorporation of general public policy exceptions into IIAs has not yielded the desired clarity or arbitral outcomes. The prevailing arbitral approach has left the potential of the general public policy exceptions largely unfulfilled, rendering these treaty innovations less impactful than anticipated. This conflict between the new treaty design and the old arbitral decision necessitates a deeper examination of the underlying dynamics at play. Accordingly, this part of the analysis presents two primary explanations: firstly, the tension between treaty-makers and treaty interpreters; and second, the challenges associated with transplanting concepts from international trade law to investment law. The following discussion elucidates these perspectives.

First and foremost, this conflict between new treaties and old outcomes, at its core, can be seen as a tension between the contracting states, as treaty makers or drafters, and investment arbitral tribunals, as treaty interpreters. Some argue that this tension stems from "a disconnection between state parties' shift towards a new rule-making paradigm and arbitral tribunals' path dependency".[145] The evolution of IIAs reflects a deliberate shift by States towards a new rule-making paradigm, addressing previous gaps and ambiguities with more precise language and explicit provisions. This shift,

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[140] WOLFGANG ALSCHNER, INVESTMENT ARBITRATION AND STATE-DRIVEN REFORM: NEW TREATIES, OLD OUTCOMES 7 (2021).
[141] *Id.* at xviii.
[142] *Id.* at 7.
[143] Alschner, *supra* note 60.
[144] ALSCHNER, *supra* note 140, at 6.
[145] Jiang Chaoyi (蒋超翊) & Li Ruoqing (李若晴), *Shutu Heyi Tonggui- Lun Guoji Touzifa Yizhi WTO Yiban Liwai Tiaokuan de Shijian Kunnan yu Tupo (殊途何以同归——论国际投资法移植 WTO 一般例外条款的实践困难与突破) [Different Routes to the Same End: Unravelling the Paradox of Interpreting WTO-Style General Exceptions in International Investment Law]*, 1(11) CHINESE REV. INT'L L. 99, 120 (2024).

臺灣大學學術期刊資料庫

however, clashes with the established practice of arbitral tribunals. In other words, the path dependency among tribunals, where arbitrators continue to rely on interpretative practices developed under the old treaty regime, creates friction with the new treaty designs.

Beyond mere path dependency, others argue that the root of this tension lies in a "competition over norm-development"[146], or a competition for treaty-interpreting power. For many years, investment arbitral tribunals, tasked with interpreting the vague and open-textured language found in old-generation IIAs, have been delegated a "quasi-legislative power", allowing them to formulate specific rules to fill the gaps left by the incomplete IIAs.[147] As these tribunals assumed this quasi-legislative role, they became the primary drivers of normative development in investment law, growing accustomed to this significant gap-filling authority.

However, with the emergence of new-generation IIAs, states have taken it upon themselves to address the gaps left by earlier treaties. At times, they have adhered to previous arbitral interpretations, but more frequently, contracting states have intentionally deviated from judicial precedents, rectified perceived misinterpretations by arbitral tribunals, and introduced new clauses or omitted old ones.[148] These innovations in treaty design have led to conflicts between states and tribunals. States advocate for change, while tribunals favor continuity. It is argued that the drive behind the state-driven treaty reform is fundamentally aimed at "curtailing the quasi-legislative power of arbitrators" and redirecting the authority for legal gap-filling from tribunals to states.[149] Central to this conflict is the question of who holds the gap-filling power.

This tug-of-war over interpretative authority and normative control has manifested in recent arbitral awards, where tribunals have opted to adhere to their interpretative preferences over those explicitly articulated by state parties. For example, in the previously discussed *Eco Oro* award, the tribunal openly disagreed with the united positions of the contracting state parties, Canada and Colombia, regarding the interpretation of the general public policy exception. Such resistance not only undermines the state-driven IIA reforms but also raises serious questions about the reallocation of gap-filling authority in the evolving landscape of international investment law.

A second lens through which this conflict can be analyzed highlights the specific challenges arising from the transplantation of general public policy exceptions from international trade law to international investment law. The clause of general public policy exceptions is deeply rooted in international trade law, prominently established through Article XX of the GATT and

[146] Alschner, *supra* note 92.
[147] ALSCHNER, *supra* note 140, at 14.
[148] Alschner, *supra* note 92.
[149] ALSCHNER, *supra* note 140, at 14.

臺灣大學學術期刊資料庫

Article XIV of the GATS. While a well-established mechanism in international trade law, the general public policy exceptions clause's introduction into international investment law represents a novel development, which is manifested in the growing trend of IIAs incorporating WTO-style general exceptions in recent years. Therefore, the incorporation of WTO-style general public policy exceptions into IIAs marks a significant cross-fertilization between international trade and investment law.

As international investment law and international trade law have traditionally developed in separate and independent trajectories, with different objectives and dynamics,[150] a direct transplantation or importation of WTO-style general exceptions into investment law could lead to interpretative difficulties and adaptability issues in the practice of investment arbitration. Arbitral tribunals, accustomed to a certain orthodoxy, may struggle with appropriately interpreting and applying these "imported" general public policy exceptions, which requires not only an understanding of the original context within which these exceptions operate in trade law but also an appreciation of how they should be adapted to fit the framework of investment law. Misinterpretation of general public policy exceptions risks defeating the intended purpose of incorporating such exceptions into IIAs—to afford States the leeway to regulate in areas of critical public interest without fear of contravening treaty obligations. The challenges observed in existing arbitral practice, where general public policy exceptions are either overlooked or misunderstood, underscore the complexity of integrating WTO-style exceptions into investment law. To ensure that these exceptions can be successfully or seamlessly integrated into the context of investment law and function as intended, a thoughtful and informed approach to their interpretation and application is essential. Investment arbitral tribunals play a crucial role in this process. To some extent, the future efficacy of general public policy exceptions hinges on the tribunals' ability to adapt, interpret, and apply these exceptions in a manner that respects their origins in trade law while acknowledging the distinctive character and objectives of investment law.

B. Charting the Path Forward: Suggestions for Future Reform

After unravelling the tensions between progressive aspirations of new IIAs and conservative tendencies of arbitral jurisprudence regarding the incorporation and interpretation of general public policy exceptions in IIAs, it becomes imperative to consider future directions. What steps should be

[150] For a detailed analysis of the different goals and dynamics of the international trade and investment law, see Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102(1) AM. J. INT'L L. 48, 53-58 (2008).

臺灣大學學術期刊資料庫

undertaken next? The following discussion proposes a series of solutions and suggestions aimed at addressing the challenges highlighted previously.

While the incorporation of general public policy exceptions into IIAs represents a novel and laudable step forward, it alone does not guarantee the achievement of the desired outcomes. To fully realize the potential of these treaty innovations, a comprehensive or holistic reform of IIAs, covering both substantive and procedural aspects, is needed.[151] It is insufficient to merely reform the clauses within IIAs; these innovative clauses must also be effectively and accurately invoked and adjudicated within arbitral practices. Thus, beyond the textual reform of treaties, there is a pressing need to enhance the interpretative approaches adopted by tribunals. It is only through consistent engagement by both states and tribunals that novel elements like general public policy exceptions can progressively reshape investment law jurisprudence and guide the evolution of investment law in alignment with the goals envisioned by treaty drafters who initially incorporated these new clauses into their IIAs.[152]

Given the roots of general public policy exceptions in WTO law, it is suggested that future ISDS tribunals should consider drawing comparative lessons from WTO jurisprudence. The established legal frameworks and interpretative approaches employed by the WTO in applying general exceptions could serve as a guidance for investment tribunals, thus improving the clarity, consistency and predictability of arbitral decisions related to general public policy exceptions. Moreover, ISDS tribunals have previously benefited from learning lessons from WTO jurisprudence in various aspects, including national treatment, amicus curiae submissions, and the necessity test.[153] These instances exemplify the "reflexivity"[154] of investment arbitration practices, illustrating a successful precedent for leveraging WTO legal insights. This precedent has created favorable conditions for ISDS tribunals to draw upon the rich experience of WTO case law in applying general public policy exceptions, thereby enhancing the clarity of such interpretations.

Furthermore, to avoid the interpretative problems posed by the investment arbitral tribunals, contracting states could imbue their IIAs with more certain and concrete guidelines. For example, the UNCTAD has suggested that given the recent ISDS tribunals have applied the general

[151] Alschner, *supra* note 92.
[152] Alschner & Hui, *supra* note 57, at 393.
[153] Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107(1) AM. J. INT'L L. 45, 52 (2013).
[154] David Schneiderman, *Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?*, 2(2) J. INT'L DISP. SETTLEMENT 471, 487-91 (2011).

臺灣大學學術期刊資料庫

public policy exception clauses "in narrow and unexpected ways",[155] the contracting states should consider providing clarifications and additional guidance for interpreting these exceptions through the treaty texts themselves, amendments protocols, or declarations.[156] In a more targeted approach, states could consider incorporating stipulations within their IIAs that explicitly exempt the state from compensation obligations when an exception clause is deemed applicable, evidenced by the Morocco Model BIT.[157]

VII. CONCLUSION

In conclusion, this article has elucidated the evolving landscape of general public policy exceptions within IIAs and critically examined the efficacy of such exceptions against the backdrop of a global health crisis. Through conceptual clarification, empirical investigation, analysis of arbitral jurisprudence, and consideration of the implications of the COVID-19 pandemic, this research has shed light on significant challenges and opportunities for general public policy exceptions to play a crucial role in times of crisis and in the context of ongoing reform.

Despite the growing trend towards incorporating general public policy exceptions in new-generation IIAs, this analysis reveals inconsistencies in their interpretation and application by investment arbitral tribunals, often resulting in outcomes that diverge from the intentions of contracting states. It should be acknowledged that general public policy exceptions are no panacea,[158] nor do they inherently invite misuse or abuse.[159] Instead, they work alongside, rather than replacing, other treaty flexibilities.[160] When employed appropriately, these exceptions hold the potential to markedly advance a more balanced international investment legal regime. While these

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[155] *Review of 2021 Investor–State Arbitration Decisions: Insights for IIA Reform*, UNCTAD (July 2023), https://investmentpolicy.unctad.org/publications/1284/review-of-2021-investor-state-arbitration-decisions-insights-for-iia-reform.

[156] *Id.*

[157] *See* Agreement Between the Kingdom of Morocco and ---------- for the Reciprocal Promotion and Protection of Investments, art. 10.8(c), June 1, 2019, https://edit.wti.org/document/show/b5908c50-ef94-4902-b71d-12024f285ef8 [hereinafter Morocco Model BIT 2019]. In this Morocco Model BIT 2019, Article 10.8(c) provides that "Consistent with the right of States to regulate and the principles of customary international law relating to State police powers, bona fide and non-discriminatory legislative and regulatory measures taken by a Party to protect or enhance legitimate public welfare objectives such as public health, safety, environment and labor, or which result in legitimate general taxation or alteration of the value of the national currency or any type of action commonly accepted as falling within the police power of the States, do not constitute an indirect expropriation under this Article and therefore would not be subject to any requirement of compensation."

[158] Annacker, *supra* note 101, at 506.

[159] Alschner, *supra* note 60.

[160] *Id.*

臺灣大學學術期刊資料庫

exceptions could play a pivotal role in addressing public health crises and achieving sustainable development goals, they require further refinement, clarification, and reform in a holistic manner. Unlocking the full potential of general public policy exceptions requires joint and concerted efforts from various stakeholders, including both states and tribunals. Shifting the interpretative mindset from viewing new treaties through the lens of old ones to a more forward-looking approach that respects the innovations and intentions behind new-generation IIAs is critical.[161] Only if the interpretive centre of gravity shifts from old to new treaties will new treaties yield new outcomes.[162] The reform of general public policy exceptions in IIAs to better respond to global health crisis, represents merely one aspect of the broader IIA and ISDS reform efforts currently in progress. In the post-crisis policy agenda, it is crucial to consider holistically reforming existing IIAs together with the current ISDS system to ensure they are fully equipped to navigate crises of global magnitude affecting public health, economic stability, the environment, and beyond.

[161] ALSCHNER, *supra* note 140, at 14-17.
[162] Wolfgang Alschner & Florencia Sarmiento, *An Interview with Wolfgang Alschner on Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes*, INV. TREATY NEWS (July 4, 2022), https://www.iisd.org/itn/en/2022/07/04/an-interview-with-wolfgang-alschner-on-investment-arbitration-and-state-driven-reform-new-treaties-old-outcomes-wolfgang-alschner-florencia-sarmiento/.

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