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LEGAL OPINION ON GENERAL EXCEPTIONS AND SECURITY EXCEPTIONS IN INVESTMENT AGREEMENTS

Canada, European Union, Japan, Netherlands, and United States of America

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EXECUTIVE SUMMARY

The use of general exceptions provisions in international investment agreements is a relatively recent development in the treaty-based system. Among the agreements examined in this study, the adoption of GATT Article XX and GATS Article XIV language is the most frequent manner of elaborating on the exceptions. The EU investment agreements mostly adopt the wording of the GATS Article XIV (a)-(c), but include particular understandings on the terms. Canada is also a frequent user of general exceptions, although they add policy grounds to those set out in GATT/GATS. The United States and the Netherlands rarely use general exceptions. Japan's practice is variable and rather unique. The Japanese practice often (but not always) uses a combined general exceptions and national security provision, sometimes based on GATT/GATS language, sometimes incorporating it directly. It also includes a notification requirement, obliging the State Parties to inform each other should they invoke an exception.

Security exception provisions have a longer history, although those, too, were not common outside of the United States' investment protection agreements. While sometimes appearing together with general exceptions, security exceptions more often apply to a wider scope of provisions. Such is the case in particular where investment protection obligations are contained in a broader free trade agreement. In those cases, the security exceptions are generally found in a chapter of the agreement that applies to all provisions. The EU investment agreements tend to stick closely to the terms of the GATS Article XIV*bis*, including with self-judging wording, without, however, incorporating those provisions as such. The US has its own long tradition of self-judging "Measures not Precluded" clauses that it continues. Canada also regularly uses self-judging security exceptions and language heavily reliant on, but not exactly the same as, GATS Article XIV*bis*. The Netherlands rarely uses a national security exception. Japan, as stated above, often uses a security exception that is combined with general exceptions and a notification provision.

Investor-State Dispute Settlement jurisprudence on the general exceptions is very thin. The majority of cases arise from complaints brought by Canadian investors in Latin American mining sectors. The decisions demonstrate an attention to the terms of the exceptions provisions that require any host regulations to have been taken in a manner that conforms with the requirements of non-arbitrary or discriminatory treatment. There is one case that found the general exception to apply but nevertheless did not relieve the host of its obligation to compensate the investor. Reasoned on the specific wording of the IIA provision, it is not clear whether this controversial decision is more generally applicable.

There is more jurisprudence on national security exceptions, but with the majority of cases arising under the same Argentina-United States BIT, the findings are relatively narrow. The tribunals tend to find that "national security" is not solely related to military capabilities, and would include economic crisis and that such provisions must be textually explicit if they are to be considered self-judging. The majority of awards would not hold the host liable for the investor's costs if the national security exception were successfully invoked.

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I. QUESTIONS

The State Secretariat for Economic Affairs (SECO) has requested a report concerning general exceptions in international investment agreements (IIAs), looking at different types of treaties, including bilateral investment treaties (BITs), treaties with investment provisions (TIPs), mainly investment chapters of preferential trade agreements (PTAs), as well as model agreements.

For the purpose of this report, SECO has defined certain treaties and model instruments as priorities, namely, the 2016 Comprehensive Economic and Trade Agreement (CETA); the 2016 United States – Mexico – Canada Agreement (USMCA); the 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP); Canada's Foreign Investment Promotion and Protection Agreement (FIPA) Model (2021); the US Model Bilateral Investment Treaty (2012); and the Netherlands Model Investment Agreement (2019). Japanese treaty practice is also to be surveyed. References to other agreements concluded by the European Union (EU) are also welcomed.

A detailed list of the agreements examined in this legal opinion is found in Annex 1. To avoid repetition, for an analysis of CETA and the EU – Japan Economic Partnership (2018), see the EU section. Likewise, for an analysis of the CPTPP, see the Canada section, and for the analysis of the USMCA, see the US section.

II. ANALYSIS

1. The Notion of General Exceptions

Exceptions – defined as "situations in which a rule is applicable to a case, but is nevertheless not applied to this case" [1] - are common features in a myriad of international treaties.[2] Made mainly to ensure that a state has policy flexibility to pursue interests it considers more important than those of the treaty obligations in certain contexts, they can create a clear answer to potential rule conflicts (by stating that where two rules might collide, the one will make the other inapplicable). They may also exist to ensure that the application of a rule in a particular case does not undermine the underlying value of the rule or the values contained in another rule.[3] While scholars have indicated that careful drafting and interpretive practices could achieve the same results as many exceptions, the use of exception clauses is a simple way for treaty parties to safeguard their policy flexibility.

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1 Jaap Hage, Antonia Waltermann, and Gustavo Arosemena (2020) "Exceptions in International Law". In *Exceptions in International Law*, edited by Lorand Bartels and Federica Paddeu, Oxford University Press, p. 19, https://doi.org/10.1093/oso/9780198789321.003.0002.

2 SECO mentioned as a background document the OECD Working Paper "The Future of Investment Treaties – Track 1 sustainability cluster. Illustrative case study on goals and challenges in treaty policy – exceptions clauses. Note by the Secretariat" (2021). David Gaukrodger (2021), "The Future of Investment Treaties – Track 1 sustainability cluster. Illustrative case study on goals and challenges in treaty policy – exceptions clauses", OECD Note by the Secretariat, No. DAF/INV/TR1/WD (2021)1, OECD Publishing, Paris, https://doi.org/10.1787/4a6f4f17-en. For that reason, we will refrain from an in-depth discussion about that paper here. However, we mention the provisions cited in that report when they incorporate general exception provisions.

3 Jaap Hage, Antonia Waltermann, and Gustavo Arosemena (2020) "Exceptions in International Law". In *Exceptions in International Law*, edited by Lorand Bartels and Federica Paddeu, Oxford University Press, p. 19, https://doi.org/10.1093/oso/9780198789321.003.0002.

Despite being found in almost all international trade agreements, in international investment law, the use of exceptions has been less common than the use of carve-outs (provisions that limit the scope of obligations such that the rule is not applicable at all).

In the current stock of bilateral investment treaties in effect, general exceptions have been placed in a limited, but growing, number of IIAs in order to establish a balance between the protection of foreign investors and the State's regulatory purposes. Treaties including such exceptions, usually establish an exhaustive list of legitimate objectives and the nexus between a measure and the said objectives. [4] According to Vandevelde, such a list reflects four basic concerns: the preservation and protection of life (including the environment that makes it possible), the economy's regulation, and the preservation of diverse cultures form the first three, with the security of the state against external threats or internal disorder the fourth. The latter is the most common general exception and is usually included in a dedicated provision.[5]

Some scholars have warned that the effectiveness of general exceptions could be affected by the tribunal's strict interpretation of them, leaving a limited policy space for States to excuse a treaty breach due to legitimate regulatory purposes.[6] Newcombe's argument is that while general exceptions are intended to ensure policy space for states, their presentation in a closed list might have the unintended consequence of being a limitation of the range of legitimate objectives available to states as compared to the space provided by IIAs which do not contain similar exception clauses.[7] This approach also questions the logic behind exceptions clauses for standards such as fair and equitable treatment, asking, "If a measure can be justified under the stringent requirements of a general exception provision, including the chapeau analysis it is difficult to envisage a situation where it would have violated fair and equitable treatment in the first place."[8] An envisaged solution would be to include public concerns in the text of agreements and within their standards of protection.[9] Others have suggested a new model of IIAs exceptions where States may define their policy objectives and preclude tribunals from subjectively assessing them.[10] Subject to full tribunal review, this clause would permit States to contradict their substantive IIA obligations while pursuing a particular objective to the desired extent, provided that they act in the manner that is least inconsistent with these obligations.[11]

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4 Louis-Marie Chauvel (2017) "The Influence of General Exceptions on the Interpretation of National Treatment in International Investment Law", *Brazilian Journal of International Law* 14, no. 2 (2017), p. 156.

5 Vandevelde, op. cit, p. 450.

6 Andrew Newcombe (2008), "General Exceptions in International Investment Agreements" BIICL Eighth Annual WTO Conference, 13th and 14th May 2008, London, http://www.biicl.org/files/3866_andrew_newcombe.pdf at p. 3. See also Gabriele Gagliani (2015), "'The Interpretation of General Exceptions in International Trade and Investment Law: Is a Sustainable Development Interpretive Approach Possible'. *Denver Journal of International Law & Policy* 43, no. 4; Chauvel, op. cit.; Camille Martini (2018), "Avoiding the Planned Obsolescence of Modern International Investment Agreements: Can General Exception Mechanisms Be Improved, and How", *Boston College Law Review* 59, no. 8, pp. 2877–98; and Andrew D. Mitchell, James Munro, and Tania Voon (2019), "Importing WTO General Exceptions into International Investment Agreements". In *Yearbook on International Investment Law & Policy 2017*, pp. 305–55. Oxford University Press.

7 Newcombe, supra n 9.

8 Newcombe at p. 11.

9 Newcombe; Martini, supra n. 9.

10 Robert Brew (2019), "Exception Clauses in International Investment Agreements as a Tool for Appropriately Balancing the Right to Regulate with Investment Protection". *Canterbury Law Review* 25, pp. 205–42.

11 Id.

To avoid restrictive interpretations of exceptions, Henckels has advanced the idea that general and security exceptions should be seen as permissions rather than defenses.[12] Characterizing exceptions in this way would be both compatible with investment liberalization and promotion, as well as lessen the burden on responding governments that mounting a defense is more onerous than making an argument that measures at issue are outside the scope of the treaty.[13] If we understand exceptions as limiting the scope of the substantive investment obligations, those obligations do not apply to measures that come within the exception. Then, such provisions would not be affirmative defenses to justify what would otherwise be prohibited by the treaty. [14]

Many IIAs also include special exceptions, for example, concerning national treatment (NT) or most-favored nation (MFN) treatment with respect to customs unions, free trade areas (and often double taxation agreements), which seemingly started with the Egypt – United Kingdom BIT (1975). In fact, according to EDIT these are the most common type of exceptions found in IIAs, with 2029 BITs and 104 TIPs with such provisions. [15] Likewise, several IIAs have exceptions to the requirement of free transfers of payments related to an investment, allowing exchange controls when foreign exchange reserves fall to very low levels,[16] or to comply with the application of certain laws and regulations (e.g. concerning taxation, bankruptcy, labor).

Other types of special exceptions include those related to balance of payments or external financial difficulties, as well as non-conforming measures (NCMs), which are usually considered for existing or future measures in annexes with schedules of specific commitments, in treaties that have pre-establishment NT, MFN or market access obligations. A distinct but related type of clause are "carve-outs" or exclusions that leave certain policies outside of the scope of application of the treaty (e.g., tobacco measures).

As required by SECO, this report will only focus on general exceptions, and we will consider, as such, those that are explicitly labeled as "general exceptions", as well as national security exceptions, even though they are usually treated in separate provisions.

2. Overview of General Exceptions in IIAs

2.1. Origin of General Exceptions in Investment Treaties

Unlike trade agreements, the majority of IIAs currently in force do not include general exception clauses or provisions explicitly excepting measures taken in the interest of national security. From a total of 3324 IIAs concluded at the end of 2016, Sabanogullari identified only a small minority of 178 agreements with general exceptions provisions. Notwithstanding this, there is a discernable trend

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12 Caroline Henckels (2020), "Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law", *International & Comparative Law Quarterly* 69, no. 3, pp. 557–84. https://doi.org/10.1017/S0020589320000135.

13 Id.

14 Caroline Henckels (2020), "Scope Limitation or Affirmative Defence? The Purpose and Role of Investment Treaty Exception Clauses". In *Exceptions in International Law*, edited by Lorand Bartels and Federica Paddeu, 0. Oxford University Press, https://doi.org/10.1093/oso/9780198789321.003.0020.

15 Wolfgang Alschner, Manfred Elsig, and Rodrigo Polanco (2021), "Introducing the Electronic Database of Investment Treaties (EDIT): The Genesis of a New Database and Its Use," World Trade Review, Cambridge University Press, vol. 20(1), pp. 73-94. Unless otherwise mentioned, all BITs, PTAs, and model IIAs are available at the Electronic Database of Investment Treaties (EDIT), https://edit.wti.org/app.php/document/investment-treaty/search (21.07.2023).

16 Vandevelde, op. cit. p. 450.

toward the growing inclusion of general exceptions and national security exceptions in recently concluded IIAs.[17]

In the case of the earliest BITs, exception clauses were limited to particular provisions. The very first such agreement, the Germany – Pakistan BIT (1959), included a combined security, health, and morality exception for the non-discrimination obligations, stating that "measures taken for reasons of public security and order, public health or morality shall not be deemed as discrimination". Subsequent German BITs include similar clauses, applicable only to the non-discrimination obligation[18] or to commitments to grant necessary authorizations[19]. Generalized clauses, either for security or other policies, remained rare in the BIT practice of European states until recently.

Seemingly, the first BIT including a general exception provision, is Article XVII of the Canada – Ukraine BIT (1994). That agreement uses language similar to the GATT Article XX Chapeau to except Parties' measures taken for environmental purposes from the BIT obligations:

> *Article XVII. Application and General Exceptions*
> *[…]*
> *(2) Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.*
> *(3) Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:*
> *(a) Necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;*
> *(b) Necessary to protect human, animal or plant life or health; or*
> *(c) Relating to the conservation of living or non-living exhaustible natural resources.*

Although the United States was an early proponent of security exceptions (see below), its practice with general exception provisions in investment treaties is more restrained. This includes the NAFTA - the very first PTA with an investment chapter (Chapter 11). While the NAFTA does have a Chapter 21 setting out general exceptions, Article 2101 does not apply to Chapter 11. Seemingly the first PTA with an investment chapter that included a general exceptions clause explicitly applicable to the investment chapter[20] is the New Zealand – Singapore CEPA (2000), Article 71 of which largely follows the GATT/GATS model, but without including public morals or public order exceptions:

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17 Levent Sabanogullari, General Exception Clauses in International Investment Law. The Recalibration of Investment Agreements via WTO-Based Flexibilities. Nomos Verlagsgesellschaft, Successful Dispute Resolution vol 7, 2018, p. 64.

18 See also the German BITs with Malaysia (1960), Morocco (1961), Liberia (1961), Thailand (1961), Guinea (1962), Turkey (1962), Cameroon (1962), Sudan (1963), Sri Lanka (1963), South Korea (1964), Philippines (1964), among others.

19 Germany – Senegal BIT (1964).

20 Even though Central America - Dominican Republic FTA (1998), Art. 17.01, incorporates GATT Article XX as a whole into the agreement, it is debatable whether that applies to the investment chapter, as the provision stipulates that "Article XX of the GATT 1994 and its interpretative notes are incorporated into and form an integral part of this Agreement". As GATT Article XX is applicable to trade in goods only, it is not clear that its incorporation should extend its scope to investment.
The first TIP that included general exceptions for public order and public health was seemingly the Germany – Spain Treaty of Establishment (1970), which included the right to establish, acquire or manage companies in another Contracting Party. Some years later, the 1973 Treaty establishing the

Article 71. General Exceptions

Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Party or as a disguised restriction on trade in goods and services or investment, nothing in this Agreement shall preclude the adoption by any Party of measures in the exercise of its legislative, rule-making and regulatory powers:
a) necessary to protect public order or morality, public safety, peace and good order and to prevent crime;

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

c) necessary to prevent unfair, deceptive or misleading practices or to deal with the effects of defaults on services contracts;

d) necessary to protect national works, items or specific sites of historical or archaeological value, or to support creative arts […] of national value;

e) to conserve exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

f) necessary to secure compliance with laws and regulations relating to customs enforcement, tax avoidance or evasion;

g) in connection with the products of prison labour.

Security Exception

The use of security exceptions has a longer history than the use of general exceptions, although exceptions for national security today generally accompany provisions on general exceptions and, thus, are still not frequent in the overall IIA landscape.

It was the United States that first began using security exceptions. The United States' practice of including security exceptions began already in its Friendship, Navigation and Commerce (FCN) agreements. As FCNs were the forerunners to BITs, it is not particularly surprising that the first US BIT retained this practice. The 1982 Agreement with Panama includes a "not precluded" provision near the end of the treaty (Article X) that notes that the obligations contained in the treaty "shall not preclude" the signatory states from taking

> *"any and all measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace and security, or the production of its own essential security interests".*

This or similar wording is found in the other bilateral agreements the United States concluded with partners until 2001. The two subsequent BITs (with Uruguay in 2006 and Rwanda in 2012) contain a specific "Essential Security" exception clause as well as separate provisions on "investment and environment" and "investment and labor".

The NAFTA's Chapter 11, the first PTA with an investment chapter, does not have a chapter-specific exceptions clause, but the national security exception found in the Agreement's Article 2102 is fully applicable to Chapter 11:

Article 2102. National Security

Caribbean Community (CARICOM), included a general exceptions clause following for the first time a wording similar to the GATT Articles XX and XXI. However, as neither have fully-fledged investment protection obligations, we do not consider them further.

> *1. Subject to Articles 607 (Energy – National Security Measures) and 1018 (Government Procurement Exceptions), nothing in this Agreement shall be construed:*
>
> *(a) to require any Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests;*
>
> *(b) to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests*
>
> *(i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,*
>
> *(ii) taken in time of war or other emergency in international relations, or*
>
> *(iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices; or*
>
> *(c) to prevent any Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.*

The OECD's draft Multilateral Agreement on Investment also had text labeled "General Exceptions" that excepted measures taken in the interest of national security and international peace and security based on the GATT Article XXI text. There was also an exception for measures "necessary for the maintenance of public order", as long as they were not arbitrary or disguised restrictions, as GATT Article XX's chapeau would require.

Interestingly, the New Zealand - Singapore CEPA, which was a forerunner in general exceptions, did not include national security exceptions.

2.2. Typology of General Exceptions in Investment Treaties

a) In relation to GATT and GATS

The majority of general exception clauses in IIAs follow the basic characteristics and structure of GATT Article XX and GATS Article XIV. An introductory clause containing prohibitions of arbitrary or discriminatory treatment and disguised restrictions on investment is followed by a catalog of policy concerns that are deemed legitimate grounds for overriding the treaty's obligations.[21] These grounds commonly include human life and health, animal and plant life and health (or environmental protection), the protection of culture, the conservation of natural resources, and the need to secure compliance with laws. Some also extend to the protection of culture and/or indigenous peoples' rights.

National security exceptions often follow the model of GATT Article XXI and GATS Article XIVbis. The provisions usually stipulate that States are not required to disclose any information contrary to public order or essential security interests and are not prevented from taking actions necessary to protect them, followed by a list of measures that are considered necessary for the protection of their essential security interests. Note that the United States' provisions on national security until the mid-2000s are somewhat different from the average IIA provision.

Authors have considered different typologies of these exceptions. Legum and Petculescu identified four categories of approaches to general exceptions:

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[21] Sabanogullari, op. cit., p. 67.

a) Instruments expressly incorporating GATT Article XX and/or GATS) Article XIV;
b) agreements that, without making express reference to GATT Article XX, were clearly inspired by it and included a similar, general list of exceptions;
c) instruments that contain additional specific clauses or provisions that are generally aimed at promoting a specific legitimate interest, such as the environment or labor rights or cultural and linguistic diversity; and
d) a limited form of general exception, including only some public order exception clauses.[22]

Chaisse, Sabanogullari, and Kurtz have a similar view of the above, identifying three types of exceptions:

a. Instruments incorporating WTO "General exceptions" clause;
b. Inspiration from WTO "General exceptions" clause"; and
c. Specific provisions aimed at protecting a specific legitimate interest[23] (Chaisse, Sabanogullari) or a more constrained clause, as found in older BITs (Kurtz)[24].

Pathirana and McLaughlin, categorize general (and national security) exceptions as "non-precluded measures" (NPMs) and categorize them into two types: a) WTO-Model NPM clauses, based on GATT Article XX or GATS Article XIV, which using a list of permissible objectives, affirm the State's right to adopt measures which would otherwise constitute violations of standards set out in other IIAs provisions; and b) "Prohibition and Restriction" Model NPMs clauses, which typically reference both essential security considerations and public policy concerns together, and do not contain the separate chapeau or "necessary" test to prevent their misuse. This formulation requires that impugned measures must be "directed to" one of the public policy goals, with a lower nexus requirement to clear, as it needs only that the disputed measure has a close and genuine relationship between ends trying to be achieved.[25]

Looking solely at national security exceptions, Mantilla Blanco and Pehl have classified such provisions into three generations: a) a first generation that follows GATT Article XXI; b) a second generation that departs from the GATT tradition but is still grounded in it; and c) a third generation with broadly worded security exceptions.[26]

With some minor variations, in the agreements analyzed in this report, we too have found three varieties of general and national security exceptions provisions in IIAs:

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22 Barton Legum and Ioana Petculescu (2013), "GATT Article XX and International Investment Law", in *Prospects in International Investment Law and Policy*: World Trade Forum, Roberto Echandi and Pierre Sauvé eds., Cambridge University Press, pp. 340–362.

23 Julien Chaisse (2013), "Exploring the Confines of International Investment and Domestic Health Protections—Is a General Exceptions Clause a Forced Perspective?" *American Journal of Law & Medicine* 39, no. 2–3, pp. 332–60. https://doi.org/10.1177/009885881303900208; Sabanogullari, op. cit, pp. 67-97 (Sabanogullari's analysis adds a fourth category of clauses as *suis generis*, containing fewer or different permissible objectives, distinct nexus requirements, and fewer, different or no safeguard against abusive invocations).

24 Jürgen Kurtz (2016) *The WTO and International Investment Law: Converging Systems*, Cambridge International Trade and Economic Law, Cambridge University Press, pp. 168-228.

25 Dilini Pathirana and Mark McLaughlin (2021), "Non-Precluded Measures Clauses: Regime, Trends, and Practice". In *Handbook of International Investment Law and Policy*, edited by Julien Chaisse, Leïla Choukroune, and Sufian Jusoh, pp. 483–505. Singapore: Springer.

26 Sebastián Mantilla Blanco, and Alexander Pehl (2020), *National Security Exceptions in International Trade and Investment Agreements: Justiciability and Standards of Review*. Springer, Cham.

i. **Explicit incorporation of GATT/GATS** concerning general exceptions (GATT Article XX, GATS Article XIV), or national security (GATT Article XXI, GATS Article XIV bis), usually using the *mutatis mutandis* principle.

ii. **Same or similar content to GATT/GATS** on general or national security exceptions without explicitly referring to them. Beyond the resemblance, countries often choose to include some selected policy objectives found in GATT and GATS. Some agreements use a language mixing the wording of GATT and GATS (e.g., including both the supply of military services and traffic in arms as part of the same national security exception).

iii. **Additional content to GATT/GATS** on general or national security exceptions, adding measures that qualify in each category, e.g., measures concerning cultural industries (to general exceptions), or measures to protect critical public infrastructure (to national security exceptions). Some IIAs clarify some elements found in GATT/GATS (e.g., what is a measure necessary to maintain public order).

b) "Self-judging" and "not Self-Judging" provisions

Of particular relevance to the security exceptions is the question of whether the host state's invocation of a national/essential security interest can be scrutinized by an arbitral tribunal. Some authors draw a distinction between the "traditional" model of exceptions, where the state that wants to avoid being held responsible has the burden of proof for the exception,[27] and so-called "self-judging" exceptions, which in theory gives States a broader discretion to limit or derogate from obligations which arise under the treaty. This type of exception has become a distinctive trend in several IIAs, particularly concerning national security exceptions.

"Self-judging" language typically provides that nothing in the treaty "shall be construed to preclude a party from taking measures that it considers necessary to protect its essential security interests". A plain reading of the words "it considers" has spurred States to argue that it is the prerogative of the State invoking the exception, to determine if the measures protect essential security interests. The effect of this language is, therefore, to require the tribunal to give great – if not total - deference to the party's invocation of exception. The invocation, that is, becomes nearly non-justiciable. According to Vandevelde, "where a party pleads an exception as a defense to a claim that a treaty obligation has been violated, the only benefit that a foreign investor may receive from that obligation is the right to have an arbitral tribunal determine whether the exception does, in fact, apply. Where the exception is self-judging, then the treaty may not provide even that benefit". [28]

Mantilla Blanco and Pehl have pointed out that no published ISDS decision has yet applied provisions using the phrase "it considers", which is one of the main arguments to consider that an exception would be "self-judging". Both authors have advanced a presumption against the self-judging character of national security exceptions, based on the rule excluding the extensive interpretations of exceptions, and the need to have unequivocal language indicating the parties' intention to introduce a "self-judging" exception. [29]

Bahmaei and Sabzevari held that such a clause should not affect the jurisdiction of the tribunal but requires the tribunal to apply the principle of good faith as the proper standard of review to interpret

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27 Hage, Waltermann, and Arosemena, op. cit., p. 19.

28 Vandevelde, op. cit, p. 455.

29 Mantilla Blanco and Pehl, op. cit, pp. 40-47.

the elements of the clause, preventing States' abuse of self-judging exceptions provisions.[30] This is the approach the WTO tribunal took in the *Russia – Transit* case, looking at the parallel wording of GATT Article XXI.

2.3. Where General Exceptions Provisions are Found

a) Within the Treaty

The placement of general or national security exceptions provisions within the text of IIAs varies. The majority of provisions labeled as such (or with similar wording) are placed in dedicated exceptions chapters, usually at the end of the main text of the agreement. However, some treaties include such exceptions as part of the general provisions found at the beginning of the main text of the agreement. Fewer include such exceptions as provisions within the investment chapter.

b) Geographically

Canada and Japan are one of the main drivers of the inclusion of general and national security exceptions in IIAs. Canada is the first OECD member that began the practice of incorporating general exception clauses in IIAs, and one of the few to do so.[31]

The United States has consistently included national security exceptions in its IIAs, but has not been an avid user of general exceptions. The EU has an inconsistent practice concerning general exceptions, sometimes including them, and sometimes not, while national security exceptions are generally considered. Netherlands investment treaty-making practice does not consider either general or national security exceptions.

Outside these countries, exceptions are regularly found in agreements concluded by Germany, Turkey, China, Finland, and Denmark.

2.4. General Exceptions in Selected IIAs

Several IIAs include explicit general exceptions and national security provisions. The following analysis of the defined priority agreements and countries looks at both types of clauses in this regard.

2.4.1. European Union's Treaty Practice

Until the 2009 Lisbon Treaty gave the European Union exclusive competences over foreign direct investment, investment protection[32] – and hence IIAs – was a matter of Member State competence. Since gaining the competence to conclude IIAs, the European Union has regularly included general exception provisions in dedicated clauses in the main text of the agreements.

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30 Mohammad-Ali Bahmaei, and Habib Sabzevari (2023), "Self-Judging Security Exception Clause as a Kind of Carte Blanche in Investment Treaties: Nature, Effect and Proper Standard of Review". *Asian Journal of International Law* 13, no. 1, pp. 97–123. https://doi.org/10.1017/S2044251322000273.

31 Sabanogullari, op. cit, p. 70.

32 See generally Joachim Karl, The Competence for Foreign Direct Investment: New Powers for the European Union, 5 J. World Investment & Trade 413 (2004) (setting out the development of the foreign investment competences in the European Union prior to the Lisbon Treaty).

i. CETA (2016)

CETA is the first EU agreement with extensive investment commitments and investor-state dispute settlement. The investment chapter (Chapter 8) contains neither a general exceptions provision nor a security exception provision. Still, the CETA's chapter on exceptions (Chapter 28) extends the general exceptions (Article 28.3) to Chapter 8's provisions on non-discriminatory treatment of investments[33] and the national security exception (Article 28.6) to all provisions of the Agreement.

CETA Article 28.3 is a general exceptions provision, explicitly incorporating GATT Article XX in Article 28.3.1, adding additional clarifications on GATT Article XX(b) and (g). The second paragraph, Article 28.3.2, is based on (rather than incorporating directly) GATS Article XIV. Also extending to investment establishment and non-discrimination, it uses chapeau-like language and sets out the GATS Article XIV (a), (b), and (c) grounds as exceptions, adding "public security":

> *Article 28.3. General Exceptions*
>
> *1. For the purposes of Article 30.8.5 (Termination, suspension or incorporation of other existing agreements), (…) and Sections B (Establishment of investment) and C (Non-discriminatory treatment) of Chapter Eight (Investment), Article XX of the GATT 1994 is incorporated into and made part of this Agreement. The Parties understand that the measures referred to in Article XX (b) of the GATT 1994 include environmental measures necessary to protect human, animal or plant life or health. The Parties understand that Article XX(g) of the GATT 1994 applies to measures for the conservation of living and non-living exhaustible natural resources.*
>
> *2. For the purposes of Chapters Nine (Cross-Border Trade in Services), Ten (Temporary Entry and Stay of Natural Persons for Business Purposes), (…) and Sections B (Establishment of investments) and C (Non-discriminatory treatment) of Chapter Eight (Investment), subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures necessary:*
>
> *(a) to protect public security or public morals or to maintain public order (1);*[34]
>
> *(b) to protect human, animal or plant life or health (2);*[35] *or*
>
> *(c) to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:*
>
> > *(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts;*
> >
> > *(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; or*
> >
> > *(iii) safety.*

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33 It also extends to the establishment provisions.

34 The public security and public order exceptions may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

35 The Parties understand that the measures referred to in subparagraph (b) include environmental measures necessary to protect human, animal or plant life or health.

The national security exception applies to all of the CETA provisions and, therefore, to all investment protection obligations of Chapter 8. CETA Article 28.6 closely follows the text of GATT Article XXI and GATS Article XIV bis without incorporating those provisions:

> *Article 28.6. National Security*
>
> *Nothing in this Agreement shall be construed:*
>
> *(a) to require a Party to furnish or allow access to information if that Party determines that the disclosure of this information would be contrary to its essential security interests; or*
>
> *(b) to prevent a Party from taking an action that it considers necessary to protect its essential security interests:*
>
> *(i) connected to the production of or traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods and materials, services and technology undertaken, and to economic activities, carried out directly or indirectly for the purpose of supplying a military or other security establishment (1);*[36]
>
> *(i) taken in time of war or other emergency in international relations; or*
>
> *(iii) relating to fissionable and fusionable materials or the materials from which they are derived; or*
>
> *(c) prevent a Party from taking any action in order to carry out its international obligations for the purpose of maintaining international peace and security.*

Of note is the lack of explicit position on the self-judging/justiciability issue. The text itself suggests a self-judging character. The failure to incorporate the GATS provision per se, however, may indicate that WTO jurisprudence is not to be determinative as to the interpretation of CETA Article 28.6.[37]

ii. Other EU IIAs

a) Prior to CETA

Before CETA, the earliest EU agreement with investment commitments that included general exceptions was the EU – South Korea FTA (2010). That treaty contains a Section C on "establishment" that has obligations on market access and non-discriminatory treatment of the establishment of investments. The remaining parts of the Chapter cover trade in services and electronic commerce. Dispute settlement is only state-to-state (not ISDS).

The general exceptions largely follow GATS Article XIV, and apply to all provisions of Chapter 7:

> *Article 7.50. Exceptions*
>
> *Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on establishment or cross-border supply of services, nothing in this Chapter shall be construed to prevent the adoption or enforcement by either Party of measures:*
>
> *(a) necessary to protect public security or public morals or to maintain public order [footnote referring to an explanation the term "public order" stating that the "public order exception*

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36 The expression "traffic in arms, ammunition and implements of war" in this Article is equivalent to the expression "trade in arms, munitions and war material".

37 Note that CETA was concluded before the WTO's *Russia-Transit* case. This may have had an impact on the negotiators' silence on the value of WTO jurisprudence.

may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society."];

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

(c) relating to the conservation of exhaustible natural resources if such measures are applied in conjunction with restrictions on domestic investors or on the domestic supply or consumption of services;

(d) necessary for the protection of national treasures of artistic, historic or archaeological value;

(e) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter including those relating to:

(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts;

(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;

(ii) safety;

(f) inconsistent with Articles 7.6 [national treatment] *and 7.12* [national treatment], *provided that the difference in treatment is aimed at ensuring the equitable or effective [footnote omitted] imposition or collection of direct taxes in respect of economic activities, investors or service suppliers of the other Party.*

The national security exception is found in the Agreement's "Institutional, General, and Final Provisions" Chapter (15). Article 15.9 sets out the security exceptions using a text modeled after GATT Article XXI and GATS Article XIV bis:

Article 15.9. Security Exceptions

Nothing in this Agreement shall be construed:

(a) to require any Party to furnish any information, the disclosure of which it considers contrary to its essential security interests;

(b) to prevent any Party from taking any action which it considers necessary for the protection of its essential security interests:

(i) connected with the production of or trade in arms, munitions or war material or relating to economic activities carried out directly or indirectly for the purpose of provisioning a military establishment;

(ii) relating to fissionable and fusionable materials or the materials from which they are derived; or

ii) taken in time of war or other emergency in international relations; or

(c) to prevent any Party from taking any action in order to carry out its international obligations for the purpose of maintaining international peace and security.

A similar pattern is followed by subsequent EU agreements. The EU-Georgia Association Agreement (2014), considers general exceptions (Article 134, very similar to EU – South Korea FTA, Article 7.50) and security exceptions (Article 136, also quite similar to EU – South Korea FTA, Article 15.9) applicable to the establishment, trade in services and electronic commerce chapter (Chapter 6). That Agreement is interesting for its additional security exception (Article 415), applicable to the whole agreement, which qualifies the exception concerning the trade in arms to provide that it does not impair the conditions of competition in respect of products not intended for specifically military purposes.

Additionally, it explicitly connects internal security to national security, excepting measures which the Party takes "*in the event of **serious internal disturbances** affecting the maintenance of law and order*".

> *Article 415. Security Exceptions*
>
> *Nothing in this Agreement shall prevent a Party from taking any measures:*
>
> *(a) which it considers necessary to prevent the disclosure of information contrary to its essential security interests;*
>
> *(b) which relate to the production of, or trade in, arms, munitions or war materiel or to research, development or production indispensable for defence purposes, provided that such measures do not impair the conditions of competition in respect of products not intended for specifically military purposes;*
>
> *(c) which it considers essential to its own security, in the event of serious internal disturbances affecting the maintenance of law and order, in time of war or serious international tension constituting threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.*

Likewise, the 2015 EU – Kazakhstan Enhanced Partnership and Cooperation Agreement (EPCA), also considers general exceptions applicable to the establishment of investments (Article 55) and national security exceptions (Article 274). It follows the EU – South Korea FTA in this regard and in its lack of an ISDS mechanism.

b) Post-CETA

Few EU international investment agreements concluded after CETA consider both general exceptions and national security exceptions. These agreements only partially follow CETA's approach of incorporating GATT Article XX concerning general exceptions, and following GATT Article XXI and GATS Article XIV bis, regarding national security exceptions.

Some agreements with limited investment commitments and no ISDS include general exceptions and national security exceptions, following the GATS model, like in most EU agreements concluded prior to CETA. For example, the 2017 Armenia - EU Comprehensive and Enhanced Partnership Agreement (CEPA), which includes only NT and MFN commitments concerning the establishment of investments (Article 144), has general exceptions applicable to the establishment of investments (Article 200) and security exceptions (Article 202). Both provisions are very similar to the EU – South Korea FTA described above.

The EU – Singapore FTA (2018), with only limited investment provisions – market access, non-discriminatory (NT and MFN) treatment on establishment, and restrictions on performance requirements (Arts. 8.4, 8.5, 8.6 and 8.8), also has general exceptions (Article 8.62), which closely follow the EU – South Korea FTA. Such general exceptions are also applicable to non-tariff barriers to investment in renewable energy generation (Article 7.6). This treaty also has security exceptions following the GATT/GATS model, with the addition of measures taken "to protect critical public infrastructure (this relates to communications, power or water infrastructure providing essential goods or services to the general public) from deliberate attempts to disable or disrupt it" (Article 16.11).

In contrast, the 2018 EU – Singapore Investment Protection Agreement (IPA), which has extensive investment commitments and ICS, does not include general exceptions. It does, however, have a provision on security exceptions (Article 4.5) following the GATT/GATS model:

> *Article 4.5. Security Exceptions*
>
> *Nothing in this Agreement shall be construed to:*

(a) require either Party to furnish any information, the disclosure of which it considers contrary to its essential security interests;

(b) prevent either Party from taking any action which it considers necessary for the protection of its essential security interests:

(i) connected with the production of or trade in arms, munitions and war materials and related to traffic in other goods and materials and to economic activities carried out directly or indirectly for the purpose of provisioning a military establishment;

(ii) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment;

(iii) relating to fissionable and fusionable materials or the materials from which they are derived; or

(iv) taken in time of war or other emergency in international relations, or to protect critical public infrastructure (this relates to communications, power or water infrastructure providing essential goods or services to the general public) from deliberate attempts to disable or disrupt it;

(c) prevent either Party from taking any action for the purpose of maintaining international peace and security.

The EU - Japan Economic Partnership (2018 the EU - Vietnam FTA (2019), and the parallel EU - Vietnam IPA (2019) follow the EU – South Korea template. In contrast, the most recent Chile – EU Advanced Framework Agreement (AFA), only explicitly considers the use of general and security exceptions, regarding the implementation of national treatment commitments with respect to investment in public procurement goods or services (Article 10.8).

Article 10.8

Public Procurement

1. Each Party shall ensure that enterprises of the other Party established in its territory are accorded treatment no less favourable than that accorded, in like situations, to its own enterprises with respect to any measure regarding the purchase of goods or services by a procuring entity for governmental purposes.

2. The application of the national treatment obligation provided for in this Article remains subject to security and general exceptions as defined in Article X of the GP Chapter of this Agreement.

The same provision is included in the 2022 Chile – EU Interim Agreement (Article 10.7), also concerning investment in public procurement. However, the Chile – EU Interim Agreement also includes general exceptions (Article 32.1) and security exceptions (Article 32.2) following the CETA model.

Finally, the EU's most recent agreement, the 2022 EU - Angola Sustainable Investment Facilitation Agreement (IFA), with its several investment commitments (e.g., on predictability and transparency, measures against corruption, streamlining of authorization procedures) and no ISDS, includes both general exceptions (Article 8.1) and security exceptions (Article 8.2). The IFA returns to the GATS approach of the EU-South Korea Agreement:

Article 8.1. General Exception

Nothing in this Agreement shall be construed to prevent the adoption or enforcement by either Party of measures:

(a) necessary to protect public security or public morals or to maintain public order (12);[38]

[38] The public security and public order exceptions may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

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

(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts;

(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;

(iii) safety.

Article 8.2. Security Exceptions

Nothing in this Agreement shall be construed to:

(a) require a Party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) prevent a Party from taking any action which it considers necessary for the protection of its essential security interests:

(i) connected to the production of or traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods and materials, services and technology, and to economic activities, carried out directly or indirectly for the purpose of supplying a military establishment;

(ii) relating to fissionable and fusionable materials or the materials from which they are derived; or

(iii) taken in time of war or other emergency in international relations; or

(c) prevent a Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

2.4.2. United States Treaty Practice

The United States was a latecomer to the international investment agreement negotiating world, remaining committed to its FCN practices until the 1980s. Those FCNs had always included national security exceptions – labeled "Measures not Precluded" - so it is not surprising that the provisions were retained when the country started entering investment protection agreements. While the early United States national security exceptions used language that was ambiguous about the justiciability of the decision to invoke the exception, starting in 2000, the provisions' text is more clearly self-judging.

The earliest United States BITs included a provision considering a few general exceptions and national security exceptions. The first one was the BIT with Egypt (1982), which combined the general exceptions to the maintenance of public order or morals and to measures necessary to fulfill existing or future international obligations, with a national security exception. This provision offered a blanket exception, without any chapeau-like requirement that such measures not be arbitrary or unjustifiable discriminations or disguised restrictions. Following the US labeling practice, the US-Egypt BIT's provision was titled "Measures Not Precluded by Treaty":

Article X. Measures Not Precluded by Treaty

1. This Treaty shall not preclude the application by either Party or any subdivision thereof of any and all measures necessary for the ***maintenance of public order and morals****, the* ***fulfillment of its existing international obligations****, the* ***protection of its own security interests****, or such measures deemed appropriate by the Parties to fulfill* ***future international obligations****.*

A similar provision was found the same year in the BIT with Panama (1982), restricting the general exceptions only to the maintenance of public order and expanding the national security exception to the fulfillment of its obligations with respect to the maintenance or restoration of international peace and security. The provision, however, was slightly limited by the qualifier of "essential" security interests (and not merely security interests like in the BIT with Egypt).

> *Article 10.*
>
> *1. This treaty shall not preclude the application by either Party of any and all measures necessary for the **maintenance of public order**, the fulfillment of its obligations with respect to the **maintenance or restoration of international peace and security**, or the production [sic] of its own **essential security interests**.*

An almost identical provision is found in the subsequent BITs with Haiti (1983), Democratic Republic of Congo (1984), Morocco (1985), Turkey (1985), Bangladesh (1986), Grenada (1986), Congo (1990), Poland (1990), Tunisia (1990), Sri Lanka (1991), Czech Republic (1991), Slovakia (1991), Argentina (1991), Kazakhstan (1992), Romania (1992), Russia (1992), Bulgaria (1992), Armenia (1992). The BITs with Senegal (1983) and Cameroon (1986) also include the protection of public morals among the general exceptions.

As mentioned, NAFTA (1992) did not consider the application of the general exceptions (Article 2101) to the investment chapter (Chapter 11), although national security exceptions (Article 2102) were fully applicable.[39] NAFTA's Chapter 11 had its own exception for "environmental measures" in Article 1114:

> *Article 1114: Environmental Measures*
> *1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.*

Many of the US BITs concluded after NAFTA continued with the wording similar to that of the Panama – United States BIT. This includes the agreements with Kyrgyzstan (1993), Moldova (1993), Ecuador (1993), Belarus (1994), Jamaica (1994), Ukraine (1994), Estonia (1994), Mongolia (1994), Uzbekistan (1994), Latvia (1995), and Lithuania (1998).

The BITs with Georgia (1994), Trinidad and Tobago (1994), Albania (1995), Nicaragua (1995), Honduras (1995), Croatia (1996), Jordan (1997), Azerbaijan (1997), Bolivia (1998), Mozambique (1998), El Salvador (1999), and Bahrain (1999) only include a national security exception ("*measures necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests*").

Along the same line, the US-Vietnam Trade Relation Agreement (2000), which has an investment chapter, includes no general exceptions provision, but does include a national security exception. Significantly, the language of this provision is more clearly self-judging:

> *Chapter VII, Article 2. National Security*
>
> *This Agreement shall not preclude a Party from applying measures that **it considers to be necessary** for the protection of its own essential security interests. Nothing in this Agreement shall be construed to require either Party to furnish any information, the disclosure of which it considers contrary to its essential security interests.*

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[39] Article 1106.6 contains language similar to GATT Article XX's environmentally related exceptions for certain performance requirement obligations.

The US Free Trade Agreements with Singapore (2003), Chile (2003), Australia (20004), Bahrain (2004), Peru (2006), Panama (2007), and South Korea (2007), follow the same template, with a similar national security exception and no general exceptions clause applicable to their investment chapters. The same happens in the 2004 US Model BIT, and the BITs with Uruguay (2005) and Rwanda (2008).

i. US Model BIT (2012)

The 2012 US Model BIT follows the recent historical trend described above and only includes a national security exception, following the "self-judging" wording described above:

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

There is no provision on "general exceptions" in the 2012 Model BIT.[40] However, this model agreement includes a provision that could be considered a general exception for environmental concerns. Article 12(5) states:

> *Article 12. Investment and Environment*
> *(…)*
> *5. Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.*

ii. USMCA (2020)

The USMCA has a Chapter 14 dedicated to investment protection and a Chapter 32 dedicated to exceptions (and general provisions). Following the trend found in all prior US preferential trade agreements, USMCA Chapter 32 does not include treaty-wide general exceptions that apply to Chapter

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[40] Note that the US Model BIT 2012, similar to NAFTA, does include a provision similar to GATT Article XX/GATS Article XIV applicable to the prohibition of certain performance requirements in Article 8, establishing that:

> *(c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), (c), (f), and (h), and 2(a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:*
>
> > *(i) necessary to secure compliance with laws and regulations that are not inconsistent with this Treaty;*
> > *(ii) necessary to protect human, animal, or plant life or health; or*
> > *(iii) related to the conservation of living or non-living exhaustible natural resources.*
>
> *[…]*

14[41] but does include a national security exception that extends to investment. The relevant provision follows the explicitly "self-judging" wording described before:

> *Article 32.2. Essential Security*
>
> *1. Nothing in this Agreement shall be construed to:*
>
> *(a) require a Party to furnish or allow access to information the disclosure of which it determines to be contrary to its essential security interests; or*
>
> *(b) preclude a Party from applying measures that **it considers necessary** for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.*

There are no general exceptions in Article 14.[42]

2.4.3. Canada's Treaty Practice

Canadian treaty practice has a long-standing recognition of general and national security exceptions. The first agreement that includes general exceptions is the 1994 BIT with Ukraine, which partially follows the GATT/GATS model, with some variations. Paragraph (3) does not talk about discrimination and instead prohibits the application of measures in an "arbitrary or unjustifiable manner". The list of policy objectives does not include public morals or public order, but it clarifies that the conservation of exhaustible natural resources includes both living and non-living resources, something that is not explicitly recognized in GATT Article XX(g):[43]

> *Article XVII. Application and General Exceptions*
>
> *(…)*
>
> *(2) Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing **any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns**.*
>
> *(3) Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:*
>
> *(a) Necessary to **ensure compliance with laws and regulations** that are not inconsistent with the provisions of this Agreement;*
>
> *(b) Necessary **to protect human, animal or plant life or health**; or*
>
> *(c) Relating to the **conservation of living or non-living exhaustible natural resources**.*

Article VI of the same agreement also includes miscellaneous exceptions, some of which could be qualified as general exceptions, like those dealing with the aboriginal peoples of Canada or foreign aid programs to promote economic development. The treaty also has additional exemptions concerning

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41 Article 32.1 (General Exceptions) only makes applicable Article XIV of GATS to Chapter 15 (Cross-Border Trade in Services), Chapter 16 (Temporary Entry for Business Persons), Chapter 18 (Telecommunications), Chapter 19 (Digital Trade), (2) and Chapter 22 (State-Owned Enterprises and Designated Monopolies), mutatis mutandis.

42 Like the US Model BIT (2012), USMCA Chapter 14 a GATT/GATS-like environmental exception reference when dealing with the prohibition of performance requirements in Article 14.10.

43 Sabanogullari, op. cit. pp. 71-72.

cultural industries, which do not qualify as exceptions, as they completely exclude that sector from the scope of the agreement.

> *Article VI. Miscellaneous Exceptions*
>
> *(…)*
>
> *(2) The provisions of Articles II, III, IV and V of this Agreement do not apply to:*
>
> *(a) Procurement by a government or state enterprise;*
>
> *(b) Subsidies or grants provided by a government or a state enterprise, including government-supported loans, guarantees and insurance;*
>
> *(c) Any measure denying investors of the other Contracting Party and their investments any rights or preferences provided to the aboriginal peoples of Canada; or*
>
> *(d) Any current or future foreign aid program to promote economic development, whether under a bilateral agreement, or pursuant to a multilateral arrangement or agreement, such as the OECD Agreement on Export Credits.*
>
> *(3) Investments in cultural industries in Canada are exempt from the provisions of this Agreement. "Cultural industries" means natural persons or enterprises engaged in any of the following activities:*
>
> *(a) The publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing;*
>
> *(b) The production, distribution, sale or exhibition of film or video recordings;*
>
> *(c) The production, distribution, sale or exhibition of audio or video music recordings;*
>
> *(d) The publication, distribution, sale or exhibition of music in print or machine readable form; or*
>
> *(e) Radio communications in which the transmissions are intended for direct reception by the general public, and all radio, television or cable broadcasting undertakings and all satellite programming and broadcast network services.*

The same provisions are also found in the BITs with Latvia (1995 and 2009), Trinidad and Tobago (1995), Philippines (1995), South Africa (1995), Romania (1996), Ecuador (1996), Barbados (1996), Panama (1996), Egypt (1996), Thailand (1997) and Armenia (1997). [44]

An important change took place in 2004 with the publication of the Canadian Model Foreign Investment Promotion Agreement (FIPA). FIPA included a provision that is both a general exception (Article 10.1) and a national security exception clause (Article 10.4).

Article 10.1 largely follows the GATT Article XX/GATS Article XIV model, using a chapeau but without including public order or morals:

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

[44] However, the BITs with Romania, Panama, Egypt, Thailand, and Armenia, consider exceptions relating to the conservation of living or non-living exhaustible natural resources, if such measures are made effective in conjunction with restrictions on domestic production or consumption.

> *(b) to **ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement**; or*
>
> *(c) for the **conservation of living or non-living exhaustible natural resources**.*
>
> *(…)*

FIPA's Article 10.4 follows GATT Article XXI and GATS Article XIV bis without integrating them per se:

> *4. Nothing in this Agreement shall be construed:*
>
> *(a) to require any Party to furnish or allow access to any information the disclosure of which **it determines** to be contrary to its **essential security interests**;*
>
> *(b) to prevent any Party from taking any actions that **it considers necessary** for the protection of its essential security interests*
>
> > *(i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,*
> >
> > *(ii) taken in time of war or other emergency in international relations, or*
> >
> > *(iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices; or*
>
> *(c) to prevent any Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.*
>
> *5. Nothing in this Agreement shall be construed to require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting Cabinet confidences, personal privacy or the confidentiality of the financial affairs and accounts of individual customers of financial institutions.*
>
> *6. The provisions of this Agreement shall not apply to investments in cultural industries. (…)*

Note that the security provision is limited to "essential" security interests but is also explicitly self-judging.

The practice of including both general and national security exceptions was included in subsequent Canadian BITs with Peru (2006), Czech Republic (2009), Romania (2009),[45] Jordan (2009), Slovakia (2010), Kuwait (2011), China (2012), Benin (2013), Tanzania (2013), Cameroon (2014), Nigeria (2014), Serbia (2014), Senegal (2014), Mali (2014), Côte d'Ivoire BIT (2014), Burkina Faso (2014), Guinea (2015), Hong Kong (2016), Mongolia (2016), Kosovo (2018), and Moldova (2018).

When it comes to Canadian PTAs with investment chapters, the trend has been varied. Following NAFTA (1992), the FTA with Chile (1996) resembled the United States practice of providing only for agreement-wide national security exceptions and no general exceptions applicable to the investment chapter.

Subsequent Canadian PTAs with investment chapters were more consistent with the 2004 Model FIPA. Their content concerning exceptions remained essentially the same, but the provisions are located in a different chapter of the treaty. For example, the FTA with Peru (2008) has a Chapter on Exceptions (Chapter 22) that contains both a general exception clause that does not include public order or public

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[45] This agreement also includes a provision on "miscellaneous exceptions" (Article VI) with basically the same wording as the Canada-Ukraine BIT (1994) described above.

morals (Article 2201) and a national security clause (Article 2202). These explicitly apply to the investment chapter (Chapter Eight). The general exceptions clause applying to investment is truncated:

> *Article 2201. General Exceptions*
> *[…]*
> ***3. For the purposes of Chapter Eight (Investment), subject to the requirement that such measures are not applied in a manner that constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:***
>
> ***(a) to protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life or health;***
>
> ***(b) to ensure compliance with laws and regulations that are not inconsistent with this Agreement; or***
>
> ***(c) for the conservation of living or non-living exhaustible natural resources.***

The content of Article 2202 is nearly identical to GATS Article XIV*bis*, but the terms are slightly different:

> *Article 2202. National Security*
>
> *Nothing in this Agreement shall be construed:*
>
> *(a) to require either Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests;*
>
> *(b) to prevent either Party from taking any actions that it considers necessary for the protection of its essential security interests:*
>
> > *(i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,*
> >
> > *(ii) taken in time of war or other emergency in international relations, or*
> >
> > *(iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices; or*
>
> *(c) to prevent either Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.*

The FTAs with Colombia (2008), Panama (2010), Honduras (2013), and South Korea (2014), basically replicate such provisions. Notably, the treaty with Colombia includes a public order exception, but it is not intended to infringe on the rights of investors.[46]

As mentioned above, CETA (2016) closely follows this template, clarifying that: (a) the public security and public order exceptions may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society; (b) the measures to protect human, animal or plant life or health include necessary environmental measures; and (c) the compliance with laws or regulations which are not inconsistent with the provisions of the Agreement include those relating to:

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[46] Article 2201(4): *Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining measures relating to nationals of the other Party aimed at* ***preserving public order****, […]. Without prejudice to the foregoing, the Parties understand that […] in particular the rights of investors under Chapter Eight (Investment), remain applicable to such measures.*

(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts; (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; or (iii) safety.

i. CPTPP

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018) only considers national security exceptions applicable to the investment chapter (Chapter 9):

> *Article 29.2. Security Exceptions*
>
> *Nothing in this Agreement shall be construed to:*
>
> *(a) require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or*
>
> *(b) preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.*

The agreement includes general exceptions (Article 29.1) following the GATT/GATS model, but they are not applicable to the investment chapter.

ii. Canada Model FIPA (2021)

The most recent Canadian Model IIA (FIPA 2021) explicitly includes a provision with both general exceptions and national security exceptions.

The FIPA 2021 general exceptions differ substantially in form and content from the GATT/GATS Model. There is no chapeau or listing of legitimate policy grounds; instead, each policy reason is taken separately. The policies permitting exceptions do not include public order or public morals, protection of human, animal, or plant life or health, compliance with laws and regulations, or the conservation of living or non-living exhaustible natural resources. Instead, the model treaty provides for exceptions concerning aboriginal peoples' rights (Article 22.1), prudential reasons (Article 22.2), monetary and related credit or exchange rate policies (Article 22.3), to secure compliance with laws (Article 22.5), and cultural industries (Article 22.6).

> *Article 22. General Exceptions*
>
> *1. This Agreement does not prevent Canada from adopting or maintaining a measure necessary **to fulfill Aboriginal** or treaty **rights** as recognized and affirmed by section 35 of the Constitution Act, 1982, including land claims agreements, and those rights set out in self-government agreements between the central government or a regional level of government and Aboriginal peoples.*
>
> *2. Notwithstanding the other provisions of this Agreement, a Party is not prevented from adopting or maintaining a measure for prudential reasons, including for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial institution, or to ensure the integrity and stability of the financial system. If the measure does not conform with the provisions of this Agreement to which this exception applies, the measure must not be used as a means of avoiding the Party's commitments or obligations under those provisions.*
>
> *3. This Agreement does not apply to non-discriminatory measures of general application taken by a central bank or monetary authority of a Party, or a financial institution that is owned or controlled by a Party, in pursuit of monetary and related credit or exchange rate policies. This paragraph shall not affect a Party's obligations under Article 10 (Transfers of Funds) or Article 12 (Performance Requirements).*

> *(…)*
>
> *5. This Agreement does not require a Party to furnish or allow access to information, the disclosure of which would be contrary to its law or would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private.*
>
> *6. This Agreement does not apply to a measure adopted or maintained by a Party with respect to a person engaged in a cultural industry. […]*

Concerning national security exceptions, the model agreement resembles that of the Canada-Peru (2008) agreement discussed above.

2.4.4. Netherland's Model BIT (2019)

Dutch investment treaty-making does not generally consider general or national security exceptions, although some agreements do include them.

The Protocol of the Netherlands – Uganda BIT (1970) includes an exception concerning its Article VI (fair and equitable treatment), stipulating that "*Measures taken in the national interest or for reasons of **public order and security, public health or morality** shall not be considered "unjustified or discriminatory" within the meaning of Article VI*".

In more general terms, Article 12 of the India – Netherlands BIT (1995), provided that the provisions of the Agreement "*shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions or take action in accordance with its laws applied in good faith, on a non discriminatory basis, and to the extent **necessary for the protection of its essential security interests, or for the prevention of diseases and pests in animals or plants***".

The Mexico – Netherlands BIT (1998) Schedule excludes "*the resolutions adopted by a Contracting Party for **national security reasons***" from investor-state arbitration.

Surprisingly, the latest Dutch Model BIT of 2019 does not include either a general exceptions provision or a generally applicable national security exception provision.[47]

2.4.5. Japan's Treaty Practice

With different variations across time, Japanese investment treaty practice includes both general and national security exceptions in a single article. The wording of the provisions differs, sometimes modeled loosely on GATT or GATS, but departing from them in the structure (not using a *chapeau*, but incorporating a reference to the use of the exception within a separate paragraph) and the exact choice of words. Moreover, in what Sabanogullari has identified as a "sui generis" peculiarity, most Japanese IIAs incorporate a requirement to notify the other treaty party if either State takes a measure pursuant to the general exception that would otherwise not conform to the IIA.[48]

The first Japanese IIA including general and national security exceptions is the Japan – South Korea BIT (2002).[49] Such agreement only partially follows the GATT/GATS model, including measures concerning

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47 Article 11 contains an exception concerning "the international obligations for the purpose of maintaining international peace and security", but it is only limited to the treatment related to the free transfer.

48 Sabanogullari, op. cit, pp. 85-87.

49 Exceptions for the national treatment obligation were included in two 1998 Protocols to BITs.
The Protocol of the China – Japan BIT (1998) includes a provision limiting national treatment "in case it is really necessary for the reason of public order, national security or sound development of national

the protection of human, animal or plant life or health (Article 16.1(c)), and those necessary for the maintenance of public order, only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society (Article 16.1(d)). Regarding national security exceptions, the treaty is much in line with the intention of GATT and GATS (Article 16.1(a)(b)) but uses slightly different wording:

> *Article 16.*
>
> *1. Notwithstanding any other provisions in this Agreement other than the provisions of Article 11, each Contracting Party may:*
>
> *(a) Take any measure which it considers necessary for the protection of its **essential security interests**;*
>
> *(i) Taken in time of war, or armed conflict, or other emergency in that Contracting Party or in international relations; or*
>
> *(ii) Relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons;*
>
> *(b) Take any measure in pursuance of its obligations under the United Nations Charter for the **maintenance of international peace and security**;*
>
> *(c) Take any measure necessary to protect **human, animal or plant life or health**; or*
>
> *(d) Take any measure necessary for the **maintenance of public order**. The public order exceptions may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.*
>
> *2. In cases where a Contracting Party takes any measure, pursuant to paragraph 1 above, that does not conform with the obligations of the provisions of this Agreement other than the provisions of Article 11, that Contracting Party **shall not use such measure as a means of avoiding its obligations**.*
>
> *3. In cases where a Contracting Party takes any measure, pursuant to paragraph 1 above, that does not conform with the obligations of the provisions of this Agreement other than the provisions of Article 11, that **Contracting Party shall, prior to the entry into force of the measure or as soon thereafter as possible, notify the other Contracting Party** of the following elements of the measure: (a) sector and sub-sector or matter; (b) obligation or article in respect of which the measure is taken; (c) legal source or authority of the measure; (d) succinct description of the measure; and (e) motivation or purpose of the measure. (…)*

With some variations, similar provisions are included in the subsequent BITs with Vietnam (2003) and Laos (2008). Several later agreements expanded the scope of general exceptions in alignment with the GATT/GATS model. The agreements with Uzbekistan (2008) and Taiwan (2011), added language reflective of GATS Article XIV.

The BIT with Peru expanded the general exceptions to include measures imposed for the protection of national treasures of artistic, historic or archaeological value.

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economy". Likewise, the Protocol of the Japan – Russia BIT (1998) also considers as an exception to national treatment "the right to determine economic fields and areas of activities where activities of foreign investors shall be excluded or restricted, in accordance with its applicable laws and regulations, in case it is really necessary for the reason of national security". The most interesting part of these is the use of the term "in case it is really necessary", which suggests it is justiciable.

A similar provision was included in the subsequent BITs with Colombia (2011), Kuwait (2012), Mozambique (2013), Myanmar (2013), Iran (2016), Armenia (2018), Jordan (2018), Morocco (2020), Georgia (2021), and Bahrain (2022). In addition to those exceptions, the BIT with Uruguay (2015) adds the measures "necessary for the conservation of living or nonliving exhaustible natural resources".[50]

Exceptionally, the BIT with Cambodia (2007) explicitly incorporates GATT Articles XX and XXI as well as GATS Articles XIV and XIV bis in a single provision:

> *Article 18.*
>
> *1. For the purposes of this Agreement other than Article 13, Articles XX and XXI of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and Articles XIV and XIV bis of the General Agreement on Trade in Services in Annex 1B to the WTO Agreement ("the GATS") are incorporated into and form part of this Agreement, mutatis mutandis.*
>
> *2. In cases where a Contracting Party takes any measure, pursuant to paragraph 1, that does not conform with the obligations under this Agreement other than Article 13, which it implements after this Agreement enters into force, the Contracting Party shall make reasonable effort to notify the other Contracting Party of the description of such measure either before the measure is taken or as soon as possible thereafter.*

The BIT with Argentina (2018) also incorporates GATT Article XX and GATS Article XIV on general exceptions, *mutatis mutandis*. Still, it separates the provision on national security exceptions and only uses the language of GATT and GATS without incorporating them:

> *Article 15. General Exceptions*
>
> *For the purposes of this Agreement, Article XX of the GATT 1994 and Article XIV of the GATS are incorporated into and form part of this Agreement, mutatis mutandis.*
>
> *Article 16. Security Measures*
>
> *Subject to Article 12, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or enforcing measures:*
>
> *(a) Which it considers necessary for the protection of its essential security interests:*
>
> *(i) Taken in time of war, armed conflict, or other emergency situations in that Contracting Party or in international relations; or*
>
> *(ii) Relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons; or*
>
> *(b) In pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.*

Some Japanese BITs do not include general exceptions and only consider national security exceptions. That is the case of the Japanese BITs with Kazakhstan (2014), Ukraine (2015), Oman (2015), Kenya (2016), and United Arab Emirates (2018).

Concerning PTAs with investment chapters, following the trend found in other countries examined before, some early agreements do not apply general exceptions to the investment chapter, but they do apply national security exceptions to the investment chapter. That is the case of the first Japanese PTA including such exceptions, the Economic Partnership Agreement (EPA) with Mexico (2004), and the subsequent agreements with Australia (2014), the United Kingdom (2020), the Regional Comprehensive Economic Partnership (RCEP) Agreement (2020), and the Indo-Pacific Economic Framework (IPEF) Agreement (2023). The RCEP's security exception stands out as it includes a

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[50] Japan – Uruguay BIT, Art. 20.1(c)(d)(e).

reference to the protection of critical public infrastructures (including communications, power, and water infrastructure).

A different approach was taken in the Japan – Malaysia EPA (2005). That agreement simply incorporates GATT Articles XX and XXI as well as GATS Articles XIV and XIV bis into the treaty, making them explicitly applicable to its investment chapter (Chapter 7), mutatis mutandis:

> *Article 10. General and Security Exceptions*
>
> *1. For the purposes of Chapters 2, 3, 4, 5, 6 and 7 other than Article 82, Articles XX and XXI of the GATT 1994 are incorporated into and form part of this Agreement, mutatis mutandis.*
>
> *2. For the purposes of Chapter 7 other than Article 82 and Chapter 8, Articles XIV and XIV bis of the GATS are incorporated into and form part of this Agreement, mutatis mutandis.*

This approach became majoritarian in Japanese PTAs, and a similar provision is included in the EPAs with Chile (2007), Thailand (2007), Brunei Darussalam (2007), Indonesia (2007), Switzerland (2009), and Mongolia (2015).

The Comprehensive Economic Partnership Agreement (CEPA) with India (2011) only incorporates GATS Articles XIV and XIV bis to the investment Chapter (Chapter 8). It does, however, include the critical infrastructure expansion of what is security-relevant in the security exception of Article 11.3.

A different take is found in the EPA with the Philippines (2006), which includes general and security exceptions as a single provision within the investment chapter. The grounds for the general exceptions only partially follow the GATT/GATS model, while the national security exceptions follow the GATT/GATS model closely:

> *Article 99. General and Security Exceptions*
>
> *1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Party, or a disguised restriction on investments of investors of the other Party in the Area of a Party, nothing in this Chapter other than Article 96 shall be construed to prevent a Party from adopting or enforcing measures:*
>
> *(a) necessary to protect human, animal or plant life or health;*
>
> *(b) necessary to protect public morals or to maintain public order; Note: The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.*
>
> *(c) which it considers necessary for protection of its essential security interests;*
>
> *(i) taken in time of war, or armed conflict, or other emergency in that Party or in international relations; or*
>
> *(ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons; or*
>
> *(d) in pursuance of its obligations under United Nations Charter for the maintenance of international peace and security.*
>
> *2. [notification requirement]*
>
> *3. […]*

2.5. Exceptions in International Investment Law Jurisprudence

The invocation of general exceptions or national security exceptions has been dealt with in only a few ISDS decisions. Even where there are decisions on such provisions, tribunals have done little to elucidate the role of the clauses.[51]

2.5.1 Case law on general exceptions

Case law concerning general exception clauses, so far is scarce. This is not surprising, given the paucity and the relative novelty of such clauses. The decisions that have been issued so far have not revealed a deep analysis of the texts of the exception clauses at issue or of the role of exceptions in investment treaties.

Interestingly, recent empirical research (admittedly based on a few cases brought under post-2010 IIAs) has found that investors seem no less likely to bring claims against hosts when the IIA has a higher degree of policy flexibility for the host than traditional IIAs.[52] Another study suggests that ISDS tribunals are interpreting new IIAs like they did the agreements' older counterparts, failing to adjust the balancing of investment protection with the host's regulatory autonomy.[53] Indeed, the existing awards seem to manifest one of the anticipated critiques in the literature: arbitral tribunals appear to understand even successful invocations of general exceptions as not relieving a state from the obligation to pay compensation to the investor.[54]

Most known cases concern Canadian IIAs and relate to disputes about the mining sector. As we have seen, Canada has pioneered the inclusion of general exceptions in investment treaties following WTO-style clauses requiring a measure to be non-arbitrary and non-discriminatory. The complaints targeted regulatory measures of environmental protection surrounding mining or government opposition to a mining project. The analysis of the general exception provisions has been largely connected with other regulatory defenses like the "police powers" doctrine or its codification in provisions on indirect expropriations.[55]

i. Copper Mesa v Ecuador[56]

This case was triggered after Ecuador revoked the investor's mining concessions following violence between proponents and opponents of the project and protests due to its vicinity to ecologically sensitive areas and a lack of prior consultation with the local residents.[57] Ecuador asserted that even if the tribunal found expropriatory effects, the general exceptions clause would justify the lack of

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51 Wolfgang Alschner, and Kun Hui (2019), "Missing in Action: General Public Policy Exceptions in Investment Treaties". In *Yearbook on International Investment Law & Policy 2018*, edited by Lisa Sachs, Lise Johnson, and Jesse Coleman, Oxford University Press, pp. 363–93.

52 Tarald Laudal Berge (2020), "Dispute by Design? Legalization, Backlash, and the Drafting of Investment Agreements". *International Studies Quarterly* 64, no. 4, pp. 919–28. https://doi.org/10.1093/isq/sqaa053.

53 Wolfgang Alschner (2022), Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes, Oxford University Press, 2022.

54 Kilian Wagner (2024), "Regulation by Exception – The Emergence of (General) Exception Clauses in International Investment Law?" *Austrian Review of International and European Law Online* 26, no. 1, pp. 77–117. https://doi.org/10.1163/15736512-02601004.

55 Wagner, op. cit., p. 103.

56 *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, 15 March 2016.

57 Copper Mesa v Ecuador, Award, §1.05, 1.86.

compensation for the revocation of the rights. The claimant disagreed and submitted that even legitimate policy measures require compensation.[58]

Article XVII(3) of the Canada – Ecuador BIT (1996) provides:

> *Article XVII. Application and General Exceptions*
>
> *3. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:*
>
> *(a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;*
>
> *(b) necessary to protect human, animal or plant life or health; or*
>
> *(c) relating to the conservation of living or non-living exhaustible natural resources.*

As regards a measure amounting to a direct expropriation, the Tribunal required that the measure deprive the investor of its investment permanently, that the resulting deprivation was not justifiable because of it being a legitimate exercise of the Respondent's police powers, and not fall within the scope of an exception.[59] On the facts, the tribunal concluded that the revocation of the first concession was not a legitimately exercised regulatory measure because it was made in an arbitrary manner and without due process. For the same reason, the tribunal found that the exception clause was inapplicable. The measure, therefore, constituted an illegal expropriation.[60]

Critical here was the tribunal's attention to the "chapeau" of the exceptions clause. The arbitrariness of the government's prior behavior meant that the violation could not be justified by an exception, even as the violation itself was based on the arbitrariness of the behavior.

ii. Bear Creek v Peru[61]

Bear Creek's intended mining project had a fate similar to Copper Mesa's project. Again, it was the investor's alleged failure to consult with affected communities and its attempts to circumvent domestic regulation that created the conditions for violent protests against the mining concession. Therefore, Peru revoked Bear Creek's concession, basing the decision on the investor's breach of domestic law, failure to obtain a social license, and a governmental need to end the social unrest.

Despite the contextual similarities of the dispute with those of Copper Mesa, the Bear Creek tribunal took a different approach toward the interpretation of the general exception.[62] First, the tribunal looked at the revocation of the concession as an indirect (rather than direct) expropriation. While the FTA contained an Annex 812.1(c) of the Canada-Peru FTA (2008) that provides for limiting the characterization of a regulatory measure as an expropriation if the measure is a good faith, non-discriminatory regulation taken under the state's police powers, there is also a general exceptions

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58 Id. §6.14-6.19.

59 Id. §6.58.

60 Id. 6.66-6.67.

61 Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Award, 30 November 2017.

62 Wagner, op. cit. pp. 104-105.

clause in Article 2201.1 of the Canada - Peru FTA (2008).[63] Article 2201.1 provides for the following exceptions:

> *3. For the purposes of Chapter Eight (Investment), subject to the requirement that such measures are not applied in a manner that constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:*
>
> *(a) to protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life or health;*
>
> *(b) to ensure compliance with laws and regulations that are not inconsistent with this Agreement; or*
>
> *(c) the conservation of living or non-living exhaustible natural resources.*

The tribunal found that there was a conflict of norms between the "police powers" doctrine and the existence of a general exceptions clause and determined that only the general exceptions clause could be applied in this case.[64] Examining the facts of the case according to the text of the general exceptions, the tribunal determined that the exceptions did not justify the government's revocation because the decree revoking the concession had not explicitly stated the legitimate objectives listed in the exception clause.[65] Concerning the obligation to compensate for an expropriation, the tribunal concluded that since the exception in Article 2201 does not offer any waiver from the obligation in Article 812 to compensate for the expropriation, and since Peru had failed to explain why it was necessary for the protection of human life not to offer compensation to Claimant, compensation was due, mainly on the lack of explicit language stating that the invocation of an exception would relieve the host of the duty to compensate the investor.

iii. Infinito Gold v Costa Rica[66]

In this case, the tribunal had to examine a breach of the fair and equitable treatment (FET) standard by a mining ban for reasons of environmental protection. However, the exception that the Respondent relied on in this case was a *sui generis* provision[67]:

> *Annex I - Canada-Costa Rica BIT*
>
> *III. General Exceptions and Exemptions*
>
> *(1) Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.*

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63 Id. §473.

64 Id.

65 Id. §477. According to Wagner, by this interpretation, the tribunal failed to give effect to the exception clause as a stand-alone provision and rather treated it as a mere appendage to the expropriation clause. Wagner, op. cit., p. 106.

66 *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 03 June 2021.

67 It is unclear why Costa Rica chose not to rely on the subsequent clause of the same Annex that includes a WTO-style general exception for environmental values. Wagner has pointed out that although Costa Rica did not explicitly invoke the general exception provision in Article III(2) of the treaty's Annex, the principle of iura novit arbiter would have allowed the arbitrators to engage in such deliberations. Wagner, op. cit., p. 109.

Following the Claimant's interpretation, the tribunal's analysis centered on the wording "any measure otherwise consistent with this Agreement", and that wording's uniqueness in terms of the other exceptions contained in Section III.[68] The tribunal inferred that the provision is a reaffirmation of the State's right to regulate rather than an exception (or carveout) to the substantive provisions of the BIT.[69] Accordingly, it holds the Respondent liable for its breaches of the FET obligation.

iv. Eco Oro v Colombia[70]

Yet another Canadian mining company, *Eco Oro*, was the claimant in another exceptions case. *Eco Oro* held mining exploration and exploitation rights in an area of Colombia that overlapped with the Santurbán "páramo", an ecosystem that plays a central role in maintaining biodiversity due to its capacity to absorb and restore water. At the time of *Eco Oro*'s initial investments, there were no restrictions on mining activities in those areas, nor were the páramos delimited or protected by law.

In 2012, Colombia adopted several measures to delimit the Santurbán páramo and suspended mining activities there. It granted some exceptions for companies that held mining rights in the area, including *Eco Oro*. However, in February 2016, the Colombian Constitutional Court struck down the legal provision that would have permitted *Eco Oro* to continue its operations. In August 2016, the National Mining Agency issued a resolution withdrawing *Eco Oro*'s permits in areas coinciding with the páramo.[71]

In its Decision on Jurisdiction, Liability and Directions on Quantum, the *Eco Oro v Colombia* tribunal interpreted the general exceptions clause of the 2008 Canada-Colombia FTA. Article 2201(3) general exceptions clause of the Canada – Colombia FTA (2008) states:

> *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.

For the expropriation claim, the tribunal had to apply Annex 811 of the treaty on indirect expropriations, which includes a "regulatory exception" paragraph (Annex 811.2(b)) that specifically excludes the need to compensate the investor for such measures. On this claim, the tribunal determined that the mining ban was a good faith, non-discriminatory measure designed and applied

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68 *Infinito Gold v. Costa Rica*, Award §780-781.

69 Id. §776-777.

70 *Eco Oro Minerals Corp. v. Republic of Colombia* (ICSID Case No. ARB/16/41), Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021.

71 Roopa Mathews and Dilber Devitre, New Generation Investment Treaties and Environmental Exceptions: A Case Study of Treaty Interpretation in *Eco Oro Minerals Corp. v. Colombia*, 11 April 2022, https://arbitrationblog.kluwerarbitration.com/2022/04/11/new-generation-investment-treaties-and-environmental-exceptions-a-case-study-of-treaty-interpretation-in-eco-oro-minerals-corp-v-colombia/

to protect the environment, and as such, it was a legitimate exercise of Colombia's police powers and does not constitute indirect expropriation.[72]

However, the award found that the administrative back and forth of the state authorities was arbitrary and in breach of the international minimum standard of treatment (recognized in Article 805).[73] Therefore, the exception clause needs to be applied to the breach of the minimum standard of treatment.

In the context of the FTA's object and purpose, the majority of the Tribunal construes Article 2201(3) as being permissive, ensuring a Party is not prohibited from adopting or enforcing a measure to protect human, animal, or plant life and health, provided that such measures are not arbitrary or unjustifiably discriminatory between investment or between investors or a disguised restriction on international trade or investment. However, the tribunal holds that the same interpretation does not prevent an investor from claiming the payment of compensation for such measures. According to the tribunal, given that the FTA is equally supportive of investment protection, had it been the intention of the Contracting Parties that a measure could be taken pursuant to Article 2201(3) without any liability for compensation, the Article would have been explicit in this regard, and drafted in similar terms as Annex 811(2)(b), making explicit that the taking of such a measure would not give rise to any right to seek compensation.[74]

The decision has generated immense controversy, due to the arbitral tribunal's unconventional approach to the consequences of a general exceptions provision. [75] Much of the criticism rests with the notion that under the accepted rules on state responsibility, a state is only liable for compensation if there has been a breach of a legal obligation. The *Eco Oro* tribunal does not explain why it finds otherwise, besides pointing to the absence of language to the contrary in the text of the exception.[76] Other commentators criticize that the Tribunal did not accept Canada's non-disputing party submission that payment of compensation is not required in such circumstances.[77]

2.5.2 Case law on security exception clauses

Having existed for much longer, the security exception has also had more prominence in ISDS contexts. The first several investment disputes on exceptions clauses examined the security exception of the Argentina-United States BIT (1991) against the background of the Argentine financial crisis of 2001/2002.

The relevant provision, Article XI, of the BIT states:

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

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72 *Eco Oro v Colombia*, Decision on Jurisdiction, Liability and Directions on Quantum, §698-699.

73 Id. §820.

74 Id. §829-830.

75 Güneş Ünüvar, A tale of policy carve-outs and general exceptions: *Eco Oro v Colombia* as a case study, Journal of International Dispute Settlement, 9 July 2023; https://doi.org/10.1093/jnlids/idad017

76 J. Benton Heath, *Eco Oro* and the twilight of policy exceptionalism, IISD, Investment Treaty News, 20 December 2021, https://www.iisd.org/itn/en/2021/12/20/eco-oro-and-the-twilight-of-policy-exceptionalism/.

77 Mathews and Devitre, op. cit.

Although those cases concerned similar factual situations relating to Argentina's measures to cope with the crisis, the tribunals' findings differ significantly[78], including on the question of whether Article XI of the BIT was "self-judging" or not. There appears to be a trend, however, that a successful invocation of the provision precludes compensation.

Two more recent decisions on the security exception concern India's decision to cancel an agreement over the lease of space segment capacity. These decisions interpreted India's hybrid exception clauses that contain policy objectives such as public health as well as security interests.

i. CMS v Argentina[79]

CMS Gas was a United States company operating in Argentina in the years preceding the financial crisis of 2001 on the basis of a license to transport and distribute gas at a dollar-denominated tariff. When the host changed and "pesofied" the tariffs, the claimant alleged that the manner in which the measures were taken and their impacts on the investment were violations of the BIT.

Finding a violation of fair and equitable treatment, the tribunal addressed whether the host could avoid liability by relying on the security exception of Article XI. [80]

The tribunal first noted that the text of Article XI does not refer to economic difficulties, but that there is nothing in either customary international law or the Treaty that would exclude major economic crises from the scope of Article XI. It then considered that "major economic emergencies" need to be included in "essential security interests" to ensure that the treaty parties' interests are fully upheld.[81]

The question of Article XI's self-judging (or not) nature was taken up next. Here, the tribunal compared the text to that of GATT Article XXI. The arbitrators distinguished the BIT's wording from the GATT's in terms of Article XI's lack of explicit reference to the invoking state's decision relating to the need for the measure. They thus determined that whereas GATT Article XXI is clearly self-judging, Article XI of the BIT is not. [82]

Argentina applied for annulment of the tribunal's award. Relating to national security, the annulment committee looked at the difference between the security exception of Article XI BIT and the necessity defense under international law. The security exception, said the committee, is a "threshold requirement": if it applies, the substantive obligations under the Treaty do not apply. By contrast, the necessity defense of Article 25 of the norms of state responsibility excuses wrongful acts, meaning that there must first be a wrongful act. Thus, for the annulment committee Article XI and Article 25 are substantively different. The security exception does not qualify measures that are taken to protect the essential security interests, whereas an invocation of necessity (as outlined in Article 25 ARSIWA) requires, for instance, that the action taken "does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole". Such a condition is foreign to Article XI. By not distinguishing the two, the Tribunal made a manifest error of law.[83] However, the committee did not see a manifest excess of powers and refrained from annulment.

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78 Wagner, op. cit., pp. 96-98.

79 *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005.

80 The tribunal also examined the applicability of a plea of necessity under international law, but rejected this on the grounds of IIAs being agreements specifically aimed to regulate governmental conduct in times of crisis. CMS v. Argentina, Award, §353-358.

81 Id. §359-360.

82 Id. §366-377.

83 *CMS v Argentina*, ICSID Case No ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, §129-130.

ii. Enron v Argentina[84]

The *Enron* tribunal also examined Article XI of the Argentina-United States BIT. That tribunal approached the interpretation of the security exception from a different perspective as the *CMS* case did, but ultimately determined similarly that the term "essential security interests" covers economic difficulties and that the particular provision is not self-judging, given the lack of explicit words to indicate otherwise[85].

In contrast to the *CMS* annulment committee, the *Enron* tribunal looked at the text of Article XI and determined that without a definition of "essential security interest", it would draw a parallel with the international law on states of necessity.[86] (This finding was later criticized by the annulment committee.) Further, in contrast to the *CMS* tribunal, the Enron arbitrators conclude that a restrictive interpretation should be applied to Article XI. This was based on reasoning that is similar to the *CMS* tribunal's reasoning on necessity claims. Since the object and purpose of the treaty are to apply in situations of economic difficulty and hardship, it would not make sense to allow for a broad "escape route" from the obligations.[87]

Having determined that the security exception of Article XI is not self-judging, the tribunal then holds that judicial review in its respect is not limited to an examination of whether its invocation or the measures adopted were taken in good faith. Rather, the judicial control must examine whether the requirements of the Treaty have been met and can thereby preclude wrongfulness. In this case, it said that the Argentine crisis did not meet the customary law requirements of Article 25 ARSIWA, so they concluded that necessity or emergency are not conducive to the preclusion of wrongfulness.[88]

While annulment was requested, the ad hoc annulment committee in *Enron v Argentina* held – as did the *CMS* committee - that the requirements under Article XI of the BIT are not the same as those under customary international law as codified by Article 25 of the ILC Articles, and that the tribunal in the award had erred on this point.[89]

iii. Sempra v Argentina[90]

The tribunal in Sempra takes the same approach as in *Enron v Argentina*. The award notes that the object and purpose of the Treaty are, as a general proposition, to be applicable in situations of economic difficulty and hardship that require the protection of the internationally guaranteed rights of its beneficiaries. To this extent, any interpretation resulting in an escape route from the defined obligations cannot be easily reconciled with that object and purpose. Accordingly, a restrictive interpretation of any such alternative is mandatory.[91]

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84 Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, *L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007.

85 Id. §335.

86 Id. §333.

87 *Enron v. Argentina*, Award, §331-332. Likewise, to interpret that such a determination is self-judging would be definitely inconsistent with the object and purpose of the treaty, depriving it of any substantive meaning. Id.

88 Id. §339.

89 Enron v Argentina, ICSID Case No ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, §404-405.

90 *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007.

91 *Sempra v. Argentina*, Award §373.

Likewise, the Tribunal considers that there is nothing that would prevent an interpretation allowing for the inclusion of economic emergency in the context of Article XI, as ”essential security interests” can encompass situations other than traditional military threats.

On the issue of self-judging, *Sempra's* tribunal found, like the tribunals in *CMS* and *Enron*, that a self-judging provision must be expressly drafted to reflect that intent, as otherwise, the object and purpose of the treaty would lead to a presumption that an exception would not have such meaning.[92] The Sempra tribunal, like the tribunal in *Enron*, also considers that the Tribunal concludes that Article XI is not self-judging and that judicial review is not limited in its respect to an examination of whether its invocation, or the measures adopted, were taken in good faith.

The ad hoc annulment committee in *Sempra v Argentina*, like in *CMS* and *Enron*, sought to clarify the effect of the exception clause to untangle the improper relation made in the award between Article XI and necessity under customary international law, holding again that Article 25 ARSIWA and a BIT security exception are different, the former presupposing a finding of a wrongful act, the latter holding the state to have not acted wrongly in the first place.[93]

iv. LG&E v Argentina[94]

Along the same line as the preceding cases, the tribunal in *LG&E v Argentina* held that analysis under Article XI is twofold: first, the tribunal must decide whether the conditions that existed entitled the State to invoke the protections included in Article XI and second, whether the measures implemented by the State were necessary to maintain public order or to protect its essential security interest. To carry out such a two-fold analysis, it shall apply first, the Treaty, second, the general international law to the extent required, and third, the Argentine domestic law.[95]

Concerning the question of whether Article XI is self-judging, the tribunal pointed out that the language of the BIT does not specify who should decide what constitutes essential security measures (either any of the Parties, or the Tribunal). Based on the evidence before the Tribunal regarding the understanding of the Parties in 1991 at the time the Treaty was signed, the Tribunal concluded that the provision was not self-judging. According to the arbitrators, were the Tribunal to conclude that the provision is self-judging, Argentina's determination would be subject to a good faith review anyway, which does not significantly differ from the substantive analysis presented in the award.[96]

Determining that a severe economic crisis can constitute an essential security interest for the purposes of Article XI, the *LG&E* tribunal held that Argentina had experienced sufficiently “serious public disorders”[97] from December 2001 until April 2003 to meet the threshold of constituting a threat to an essential security interest.[98][99]

Having found that there was, indeed, a justified reliance on Article XI, the tribunal then decided that Argentina was not liable to the investor for the damages suffered during the crisis. It reasoned that,

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92 Id. §379.

93 *Sempra v Argentina*, ICSID Case No ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010, §175.

94 *LG&E Energy Corp.*, LG&E Capital Corp. and *LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006.

95 *LG&E v Argentina*, Decision on Liability, §205-206.

96 Id. §207-214.

97 Id. §228.

98 The tribunal also states that the same situation fulfills the requirements of a necessity defense under international law. Id. §245.

99 Id. §228.

even though Article XI of the BIT did not specify whether compensation is owed or not, it found that the investor must bear the costs of the effect of the host's actions for the period of emergency.[100]

v. Continental Casualty v. Argentina[101]

The *Continental Casualty v. Argentina* case takes up the same issues as the previously discussed disputes but addresses them somewhat differently. Here, the tribunal first distinguishes between the security exception and the invocation of the state of necessity, noting, as the *CMS* and *Enron* ad hoc annulment committees did, that the result of a successful invocation of a security exception justifies the state's act, leaving no wrongfulness to need to overcome. In other words, the Continental Casualty tribunal says that Article XI derogates from the BIT's other obligations and, as a consequence, need not be narrowly interpreted. This is unlike the state of necessity, which is strictly conditioned on the existence of an "exceptional" circumstance.[102]

Like other prior tribunals, the tribunal in *Continental Casualty* concluded that a severe economic crisis may qualify as affecting an essential security interest. It, however, uses a lower standard of severity than the others did, speaking of a "grave crisis".[103]

That the host must be allowed discretion in estimating the situation it faces at the moment leads the tribunal to note that even with a provision such as Article XI, whose text does not explicitly afford a self-judging character, a margin of appreciation must be afforded to the host when determining if there are essential security interests at stake.[104] The result of the tribunal's analysis of Article XI led it to declare that no liability could be attached to the host for taking actions covered by the security exception.[105]

vi. El Paso v Argentina[106]

The *El Paso v. Argentina* case does not add anything new to the analysis. It also found that Article XI of the BIT is a threshold requirement, such that if it applies, the substantive obligations under the Treaty do not apply.[107]

It then noted that in order to analyze the consequences of Article XI, the first question to answer is whether there was a situation of emergency necessary "for the maintenance of the public order" or for "the protection of essential security interests". If the answer is in the affirmative, all the acts considered necessary by the Tribunal to cope with this situation are excluded from the scope of the BIT. If the answer is negative, the Tribunal has to examine the different measures taken in order to

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100 Id. §264. The tribunal's words are interesting, writing that there is no language on liability in Article XI, but they are "nevertheless" finding that the investor needs to bear the costs. Id.

101 *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008.

102 Id. §§164-167.

103 The award finds that protection of essential security interests does not require "total collapse" of the country or that a "catastrophic situation" has already occurred before responsible national authorities may have recourse to its protection. *Continental Casualty v. Argentina*, Award, §178-181.

104 Id. §231-266. The tribunal particularly noted the term "*its* essential security interest" (emphasis supplied) in underlining the margin of appreciation.

105 Id. §164.

106 *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011.

107 *El Paso v. Argentina*, Award §553.

determine whether or not they are in violation of one of the BIT standards of treatment of foreign investments.[108]

The award emphasizes that a state of emergency can be of an economic nature[109] and that the host State is generally not responsible for the consequences of a state of emergency unless it has significantly contributed to that situation.[110]

vii. Mobil v Argentina[111]

The *Mobil v Argentina* award also presents little new analysis relating to the security exception. It distinguishes the BIT security exception from the necessity defense[112] and notes that even though they differ, they are both aimed at ensuring flexibility in the application of international obligations, and their practical result may be the same: removing the responsibility of the State.[113] The Mobil tribunal also looks at the text of Article XI of the BIT to find it not self-judging.[114] However, it goes beyond the other tribunals by extending the idea also discussed in *El Paso* about the need for the State invoking necessity not to have created the situation of necessity.[115] Yet, the majority of the tribunal noted that the claimants bear the burden of proof regarding the host country's contribution to the alleged necessity (in this case, the economic crisis beginning in late 2001).[116]

viii. CC/Devas v India[117]

The *CC/Devas* case was one brought on the basis of the India-Mauritius BIT. That Agreement's Article 11(3) is an interesting exception provision that combines health and essential security:

> *India – Mauritius BIT, Art. 11(3)*
>
> *The provisions of this Agreement shall not in any way limit the right or either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is* ***directed to*** *the protection of its essential security interests, or to the protection of public health or the prevention of diseases in pets and animals or plants.*

The tribunal concluded that Article 11(3) of the India-Mauritius BIT (1998) is not self-judging, as it plainly does not contain any explicit language that the Tribunal would regard as granting discretion of that nature to the State. [118]

Given the unusual wording of this BIT's provision, the first condition that the tribunal had to consider was the nexus that must exist between the State measures at stake and the essential security interests of the State for the exception to be triggered. Here, the term "directed to" is used rather than the

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108 Id. §554. To analyze the consequences of Article 25 ARSIWA, the reverse approach is required.

109 Id. §611.

110 Id. §615,618,624. As a rule of international law, such a contribution must be sufficiently substantial and not merely incidental or peripheral.

111 *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013.

112 *Mobil v Argentina*, Award §1024.

113 Id. §1028.

114 Id. §1039, 1056.

115 Id. §1063.

116 Id. §1106.

117 *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telcom Devas Mauritius Limited v. Republic of India*, PCA Case No. 2013-09, Award on Jurisdiction and Merits, 25 July 2016.

118 *CC/Devas v India*, Award on Jurisdiction, §219.

more usual "necessity".[119] The tribunal sticks to the plain language to conclude that the State does not have to demonstrate necessity in the sense that the measure adopted was the only one it could resort to in the circumstances, but it still has to establish that the measure related to its essential security interest.[120]

The tribunal recognizes that national security issues relate to the existential core of a State. By majority, the tribunal has no difficulty concluding that the reservation of spectrum for the needs of defense and para-military forces can be classified as "directed to the protection of its essential security interests,". However, the same cannot be said when it comes to taking over the spectrum allocated to the claimants for "railways and other public utility services as well as for societal needs, and having regard to the needs of the country's strategic requirements".[121] An investor who wishes to challenge a State decision in that respect faces a heavy burden of proof, such as bad faith, absence of authority, or application to measures that do not relate to essential security interests.[122] Following by the tribunal in *Continental* and the annulment committee in *CMS*, the award held that if a State properly invokes a national security exception under an investment treaty, it cannot be liable for compensation of damages.[123]

ix. Deutsche Telekom v India[124]

The tribunal in *Deutsche Telekom v. India* had to apply another health-and-essential security exceptions clause, but this time one without the "directed to" language. Article 12 of the applicable Germany-India BIT (1995) states:

> *Germany – India BIT*
>
> *Article 12. Prohibitions and Restrictions*
>
> *Nothing in this Agreement shall prevent either Contracting Party from applying prohibitions or restrictions to the extent necessary for the protection of* ***its essential security interests****, or for the prevention of diseases and pests in animals or plants.*

In this case, the tribunal distinguished the BIT's Article 12 from the international law defense of state of necessity, holding that the BIT provision has no additional conditions than are set forth in the text.[125]

The award observes that the essential security interest treaty provision is not a self-judging clause, given a lack of clear indications in the text to the contrary.[126] That said, the award accepts a degree of deference to the host State's assessment of the existence of essential security interests[127], neither reviewing the determination *de novo* nor requiring proof the measure has been the only way to achieve the stated purpose.[128] However, it also observes that the notion of national security cannot be stretched beyond its natural meaning, and should include the presence of interests that are concerned

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119 Id. §233.

120 Id. §235-244.

121 Id. §354-358; 361-373.

122 Id. §245.

123 Id. §293-294.

124 *Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award, 13 December 2017.

125 *Deutsche Telekom v. India*, Award, §225-229.

126 Id. §231.

127 Id. §235.

128 Id. §238.

with security (as opposed to other public interests), and are essential (i.e., go to the core of State security).[129]

However, after taking into account the decision's background and subsequent facts shedding light on the purported necessity of the measure, the award found that India failed to establish that its decision had been necessary to protect its essential security interests. The tribunal observed there was a mix of reasons for the decision, only some of which can objectively be said to relate to essential security interests.[130]

129 Id. §236.

130 Id. §284-288.

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Annex A: Treaties analyzed in this legal report

A. Comprehensive Economic and Trade Agreement (CETA)

B. Other agreements concluded by the European Union (EU). We have considered as relevant EU investment treaty practice, all IIAs signed or concluded by the EU after CETA with investment chapters or sections, namely:
   - EU-Angola Sustainable Investment Facilitation Agreement (2022)[131]
   - EU-Organisation of African, Caribbean, and Pacific States Partnership (OACPS) Agreement (2021)[132]
   - China-EU Comprehensive Agreement on Investment (2021)[133]
   - EU-United Kingdom Trade and Cooperation Agreement (2020)
   - EU-Vietnam FTA and Investment Protection Agreement (2019)
   - EU-Singapore FTA and Investment Protection Agreement (2018)
   - EU-Japan Economic Partnership (2018)
   - Interim Trade Agreement Between the European Union and the Republic of Chile (2022) [134]
   - EU-Chile Advanced Framework Agreement (2022)[135]
   - Free Trade Agreement Between the European Union and New Zealand (2023)[136]

C. United States–Mexico–Canada Agreement (USMCA)

D. Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)

E. Canada's Foreign Investment Promotion and Protection Agreement (FIPA) Model (2021)

F. U.S. Model Bilateral Investment Treaty (2012)

G. Netherlands Model Investment Agreement (2019),

H. Japanese treaty practice. We have considered as relevant Japanese investment treaty practice, all IIAs signed or concluded by Japan in the past ten years, namely:
   - Bahrain-Japan BIT (2022)
   - Georgia-Japan BIT (2021)
   - Regional Comprehensive Economic Partnership Agreement-RCEP (2020)
   - Japan-United Kingdom CEPA (2020)
   - Japan-Morocco BIT (2020)

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131 Draft text made public on 18.11.2022, available at: https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/a17ccfe1-ce36-428f-bc7f-76bcb902c36a/details?download=true (10.07.2023)

132 Negotiated Agreement text initialled by EU OACPS chief negotiators (15.04.2021), made public on 15.04.2022, available at: https://international-partnerships.ec.europa.eu/system/files/2021-04/negotiated-agreement-text-initialled-by-eu-oacps-chief-negotiators-20210415_en.pdf (10.07.2023)

133 EU-China Agreement in principle, made public on 30 December 2020, available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/china/eu-china-agreement/eu-china-agreement-principle_en (10.07.2023).

134 EU-Chile Interim Trade Agreement, concluded on 9 December 2022 (not signed yet), available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/text-agreement_en (10.07.2023).

135 EU-Chile Advanced Framework Agreement, partially concluded on 9 December 2022 (not signed yet), available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/text-agreement_en (10.07.2023).

136 EU-New Zealand: Text of the agreement, signed on 9 July 2023, available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/new-zealand/eu-new-zealand-agreement/text-agreement_en (10.07.2023).

- Argentina-Japan BIT (2018)
- Japan-Jordan BIT (2018)
- Japan-United Arab Emirates BIT (2018)
- Armenia-Japan BIT (2018)
- Israel-Japan BIT (2017)
- Japan-Kenya BIT (2016)
- Iran, Islamic Republic of-Japan BIT (2016)
- Trans-Pacific Partnership (TPP) (2016)
- Japan-Oman BIT (2015)
- Japan-Mongolia EPA (2015)
- Japan-Ukraine BIT (2015)
- Japan-Uruguay BIT (2015)
- Japan-Kazakhstan BIT (2014)
- Australia-Japan EPA (2014)
- Japan-Myanmar BIT (2013)
- Japan-Mozambique BIT (2013)
- Japan-Saudi Arabia BIT (2013)