sciendo
Vietnamese Journal of Legal Sciences, Vol. 14, No. 2, 2025 , pp. 18-38 DOI: 10.2478/vjls-2025-0009

PRESERVING STATE REGULATORY AUTONOMY THROUGH GENERAL EXCEPTION CLAUSES IN INTERNATIONAL INVESTMENT AGREEMENTS: INSIGHTS FROM VIETNAM

DAO KIM ANH, DANG PHUONG NHI, PHAM HAI QUYEN
Foreign Trade University, Vietnam
Email: anhdk@ftu.edu.vn; dangphuongnhi260403@gmail.com; qp301103@gmail.com

Abstract

International investment law has long been criticized for favoring investor protections over States' regulatory autonomy. This imbalance may create a "chilling effect", where governments hesitate to enact public interest regulations due to their fear of facing claims from foreign investors. To address this, States are increasingly incorporating general exception clauses in international investment agreements (IIAs) to safeguard their regulatory autonomy. However, the effectiveness of these clauses remains contentious, with concerns over narrow interpretations by arbitral tribunals and limited case law on their application. This article examines the use of general exception clauses in treaty practices and their interpretation in recent investor-State disputes. It further evaluates the relevance of these clauses for Vietnam, offering recommendations for drafting effective clauses to protect the regulatory sovereignty of host States.

Keywords: *general exception clauses, international investment agreements, international investment law, investor-state dispute settlement*

Received: 23 October 2024 Revised: 9 December 2024 Accepted: 15 February 2025

International investment law has long been criticized for having an asymmetrical structure, offering protections primarily to investors while placing excessive limitations on States' rights to regulate domestic issues.[1] As a result, host States may face significant hurdles when their regulatory measures – designed to protect the environment, public health, and other essential public interests – are challenged by investors as violations of fair and equitable treatment (FET),[2] expropriation,[3] or national treatment.[4] This dynamic has led to a "chilling effect", discouraging States from implementing necessary regulations due to the fear of costly investment disputes.[5]

1 Martini, C. (2018). Avoiding the planned obsolescence of modern international investment agreements: Can general exception mechanisms be improved, and how?. *Boston College Law Review*, *59*(8), 2877 - 2897, p. 2878. https://lira.bc.edu/work/sc/296df3f6-eeb5-419c-859a-8ee7dec1ee30

2 *Técnicas Medioambientales Tecmed v. United Mexican States*, ICSID Case No. ARB(AF)/00/2), Award (May 29, 2003).

3 Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award (Aug. 27, 2008).

4 *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (Sep. 18, 2009).

5 Berge, T. L., & Berger, A. (2021). Do investor-State dispute settlement cases influence domestic environmental regulation? The role of respondent state bureaucratic capacity. *Journal of International Dispute Settlement*, *12*(1), 1–41, p. 25. https://doi.org/10.1093/jnlids/idaa027

The need to preserve their domestic regulatory autonomy has prompted many States to seek ways to retain a reasonable degree of power to govern within their territories.[6] One strategy to achieve this objective is the inclusion of general exception clauses in international investment agreements (IIAs). These clauses aim to carve out specific regulatory measures, particularly those related to public welfare, that States can adopt without breaching their obligations under investment treaties. By incorporating such provisions, States seek to reconcile their international commitments with their sovereign right to regulate in the public interest.[7]

However, the inclusion of general exception clauses remains an emerging trend, and significant challenges persist regarding the drafting and interpretation of these provisions by arbitral tribunals. Scholars are deeply divided on the effectiveness of general exceptions. Some argue that these provisions are often interpreted too narrowly and may fail to offer meaningful protection to States.[8] They suggest that the rigid interpretation of such clauses could undermine the policy space that IIAs are meant to preserve. Others contend that by listing a finite set of exceptions, general clauses might unintentionally restrict the regulatory space available to States even further, especially if arbitral tribunals adopt a restrictive interpretation of these lists.[9] Conversely, some scholars believe that general exceptions can be effective in preventing tribunals from interpreting applicable standards too broadly.[10]

The debate over the applicability of general exception clauses is further complicated by the scarcity of case law on this issue in the context of investor-State dispute settlement. To date, jurisprudence on general exceptions in investor-State disputes remains limited, and earlier academic analyses have been largely speculative, relying on World Trade Organization (WTO) case law to predict how these provisions might be

6 Spears, S. A. (2010). The quest for policy space in a new generation of international investment agreements. *Journal of International Economic Law, 13*(4), 1037–1075, pp. 1037–1044. https://doi.org/10.1093/jiel/jgq048

7 Martini (2018), *supra* note 1, p. 2879.

8 Newcombe, A. (2008, May 13 & 14). *General exceptions in international investment agreements* [Draft Discussion Paper]. British Institute of International and Comparative Law (BIICL) Eighth Annual WTO Conference, London, England, p. 11. https://www.biicl.org/files/3866_andrew_newcombe.pdf

9 Viñuales, J. E. (2019). Foreign investment and the environment in international law: Current trend. In K. Miles (Ed.). *Research handbook on environment and investment law* (pp. 12-37). Edward Elgar Publishing, p. 32.

10 Keene, A. (2017). The incorporation and interpretation of WTO-style environmental exceptions in international investment agreements. *Journal of World Investment & Trade, 18*(1), 62-99, p. 89. https://doi.org/10.1163/22119000-12340031

applied.[11] To address this gap, this article will analyse how tribunals have interpreted and applied general exception clauses in recent cases, thereby providing a clearer understanding of their impact in foreign investor–state disputes.

In the context of Vietnam, the inclusion of general exception clauses in IIAs has become progressively relevant. Vietnam has participated in numerous IIAs in recent years,[12] and an increasing number of these agreements include general exception clauses, as discussed in part 2 of this article. As Vietnam continues to negotiate new investment treaties, the inclusion of effective and well-drafted general exception clauses will be crucial in ensuring that the country can meet its development goals without compromising its sovereignty.

This article aims to evaluate the effectiveness of general exception clauses in IIAs as a tool for preserving regulatory autonomy while protecting investment interests. It examines how these clauses have been incorporated, interpreted, and applied in investor-State disputes, and their relevance to Vietnam's investment policy. To achieve this, the research analyzes a selection of investment treaties and relevant case law. Treaties were selected based on their inclusion of general exception clauses, their geographical relevance to Vietnam, or their alignment with emerging international trends. Representative examples were drawn from a diverse range of IIAs, including treaties concluded by countries across different continents and by both developed and developing nations, ensuring broad representativeness. These treaties were then categorized using two main criteria: the method of incorporation of general exceptions (e.g., WTO-style verbatim, *mutatis mutandis*, or with revisions) and the treaty's structural approach to balancing investor protection with state sovereignty. This categorization provides a framework for analyzing drafting practices, assessing patterns in treaty design, and identifying lessons for Vietnam's future negotiations.

The article is structured as follows: Part 1 reviews treaty practice regarding general exception clauses, highlighting different drafting approaches with key examples. Part 2 examines how arbitral tribunals have interpreted these provisions in recent investor-State disputes. Part 3 analyses the inclusion of general exceptions in Vietnam's IIAs, including

11 Newcombe (2008), *supra* note 8; Keene (2017), *supra* note 10; Mitchell, A. D., Munro, J., & Voon, T. (2019). Importing WTO general exceptions into international investment agreements: Proportionality, myths and risks. In L. E. Sachs, L. Johnson & J. Coleman (Eds.). *Yearbook on international investment law & policy*. Oxford University Press, p. 349.

12 Tran, V. D. (2021). Vietnam's experiences with international investment agreements governance: Issues and solutions. *Asian Yearbook of International Law, 25*(2019), 84-104, pp. 85–86. https://ssrn.com/abstract=3890580

an empirical study of all IIAs concluded by Vietnam, mapping their general exception provisions to ensure a comprehensive examination of Vietnam's treaty practices. Based on this analysis, the article concludes with several recommendations for Vietnam's future treaty negotiations on drafting effective general exception clauses.

1. General exception clauses in investment treaty practices

Investment treaties are primarily designed to protect foreign investors and their investments in host countries.[13] Under these treaties, contracting States commit to treating investors from other States in accordance with specific standards, such as national treatment and FET. However, exception clauses in investment treaties allow States to lawfully implement measures that might otherwise violate their treaty obligations, provided that these measures serve certain policy objectives.[14] These clauses can take the form of general exceptions, which apply broadly to various obligations, or specific exceptions, which are limited to particular provisions.[15]

States typically take one of two approaches to drafting general exception clauses.[16] The first involves directly incorporating Article XX of the General Agreement on Tariffs and Trade (GATT) and/or Article XIV of the General Agreement on Trade in Services (GATS) into the investment treaty, thereby making these provisions part of the IIA. This is intended to transplant well-established WTO language and jurisprudence, thereby enhancing legal predictability and interpretive clarity. However, this approach remains contested, as investment tribunals are not bound by WTO decisions, which limits the actual legal effect of such references.[17] The second approach involves modelling general exception clauses on these WTO provisions, often with minor modifications to suit the specific context of investment protection.

---

13 Gaukrodger, D. (2017). The balance between investor protection and the right to regulate in investment treaties: A scoping paper. *OECD Working Papers on International Investment*, No. 2017/02. OECD Publishing, Paris, p. 3. https://doi.org/10.1787/82786801-en

14 Henckels, C. (2020). Scope limitation or affirmative defence? The purpose and role of investment treaty exception clauses. In L. Bartels & F. Paddeu (Eds.), *Exceptions in international law*. Oxford University Press, p. 363.

15 Specific exceptions are purported to relieve the host state from particular obligations only. For instance, Article 2(5) of the Morocco–Serbia Bilateral Investment Treaty (2015) contains a specific exception, which exclusively applies to the host State's non-discriminatory obligations under Article 2, therefore, not extending to other provisions such as those on expropriation.

16 Newcombe (2008), *supra* note 8, p. 2.

17 Martini, C. (2017). Balancing investors' rights with environment protection in international investment arbitration: An assessment of recent trends in investment treaty drafting. *International Lawyer, 50*(3), 529 - 582. https://scholar.smu.edu/til/vol50/iss3/8/

These modifications may include changes in terminology, adjustments in scope, or the inclusion of policy objectives that are not explicitly addressed in the WTO provisions.

This research focuses on general exception clauses that are comprehensive, "catch-all" provisions within IIAs. Several States have adopted such comprehensive provisions in their recent treaty practice. For example, Canada has been a pioneer in incorporating such clauses, notably including GATT-like general exceptions in 18 of its 24 bilateral investment treaties (BITs) with other countries.[18] An example can be found in Canada's 2004 Model BIT, which includes the following:

"Article 10. General Exceptions

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

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

(b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or

(c) for the conservation of living or non-living exhaustible natural resources."

This provision comprises two key parts: the *chapeau* (introductory clause), which imposes conditions to prevent misuse of the exceptions, and the specific categories listed in paragraphs (a) to (c), outlining the types of policy objectives that justify state intervention. Together, these elements ensure that host States retain the flexibility to pursue public policy goals, particularly in areas such as health, safety, and environmental protection, without breaching their treaty obligations under IIAs.

1.1. Inspiration from the WTO Agreements

The inclusion of general exception clauses in IIAs draws heavily on the model established by WTO agreements, particularly Article XX of the GATT and Article XIV of the GATS. The widespread adoption of these clauses into IIAs is driven by two primary factors. First, there is an increasing convergence between investment and trade law, particularly in new-generation IIAs, which are often integrated into broader free trade agreements (FTAs).[19] This convergence is evident in agreements such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), where Chapter 9 integrates investment protection

18 Newcombe (2008), *supra* note 8, p. 3.
19 Keene (2017), *supra* note 10, p. 72.

provisions within a broader trade framework. Second, general exception clauses offer predictability, as they rely on a well-established body of WTO jurisprudence that interprets these provisions in the context of GATT and GATS agreements.[20]

However, despite their conceptual alignment with WTO provisions, the application of general exception clauses in the context of investment presents significant challenges. Unlike the WTO dispute settlement mechanism, which involves State-State relations and trade measures, the investment dispute settlement mechanism focuses on investor-State conflicts arising from regulatory measures that directly impact individual investors.[21] This distinction creates unique interpretive issues, particularly when tribunals assess whether a State's measure satisfies the safeguards outlined in the *chapeau*. For example, the emphasis on preventing "arbitrary or unjustifiable discrimination" can inadvertently limit a State's ability to rely on general exceptions, even when the measure in question serves legitimate public welfare objectives.[22] This tension was evident in *Glamis Gold Ltd. v. United States*, where California's mining regulations – intended to protect the environment and indigenous cultural sites – were nonetheless deemed to constitute manifest arbitrariness and discrimination and therefore, a violation of the applicable investment treaty.[23] Since exceptions typically require that measures be non-arbitrary and non-discriminatory, it is unlikely that a state can successfully rely on such exceptions to justify their measures once a breach has been established.

In practice, IIAs generally follow two approaches when incorporating WTO-style general exceptions, either replicating the clause verbatim or adapting them *mutatis mutandis* to fit the treaty's context. In cases of direct incorporation, the IIA might explicitly state that the general exceptions from the GATT or GATS are "incorporated into and made part of this Agreement." For instance, Article 28.3.1 of the Comprehensive Economic and Trade Agreement (CETA) states that: "Article XX of the GATT 1994 is incorporated into and made part of this Agreement."[24] In comparison, in cases where general exceptions are incorporated into

20 *Ibid*.

21 Latek, M. and Puccio, L. (2015, January). Investor-State dispute settlement (ISDS) State of play and prospects for reform. *European Parliamentary Research Service,* European Parliament. https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/545736/EPRS_BRI%282015%29545736_EN.pdf

22 Martini (2018), *supra* note 1, p. 2885.

23 *Glamis Gold, Ltd. v. United States of America*, UNCITRAL (NAFTA Ch. 11 Arb. Trib.), Award (June 8, 2009), para. 616.

24 Article 28.3 of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union (signed on 30 October 2016, in force since 21 September 2017).

mutatis mutandis, the provisions are adapted to suit the specific context of the treaty. For example, the Colombia–Korea FTA provides that for its chapter on investment, "Article XIV of the GATS (including its footnotes) is incorporated into and made part of this Agreement, *mutatis mutandis*."[25] This approach is also common in FTAs between Asian States. For instance, the China–New Zealand FTA incorporates both Article XX of the GATT and Article XIV of the GATS *mutatis mutandis*.[26]

The incorporation of WTO-style general exceptions in IIAs offers States flexibility in implementing public policy measures, such as environmental and health regulations, without violating their obligations to protect foreign investments. The dual incorporation of GATT and GATS exceptions can provide comprehensive protection, especially for environmental concerns. Article XIV of the GATS lacks an exception for the conservation of natural resources, whereas Article XX(g) of the GATT specifically addresses this issue, ensuring more robust protection for environmental measures.[27]

However, WTO-style exceptions may also lead to inconsistencies when applied in the investment context, for example, the *chapeau* of Article XX of the GATT, which is intended to prevent "disguised restrictions on international trade." This issue is evident in treaties like CETA, where the *chapeau* is designed to control trade-related measures but does not adequately address "disguised restrictions on international investment." As a result, the *chapeau*'s original focus on trade may render it less effective in an IIA context.[28]

1.2. Tailoring general exception clauses for investment treaties

In response to these challenges, some States have opted to draft their own general exception clauses modeled on Article XX of the GATT or Article XIV of the GATS, but with specific modifications to reflect the investment focus. For example, Article 16.1 of the 2023 Japan–Angola BIT adjusts the *chapeau* to focus explicitly on investment and imposes stricter conditions for invoking public order exceptions:

"Article 16. General and Security Exceptions

1. Subject to the requirement that such measures are not applied by a Contracting Party in a manner which would constitute a means of arbitrary or unjustifiable discrimination against, or a disguised restriction

25 Article 21.1(2) of the Free Trade Agreement between the Republic of Colombia and the Republic of Korea (signed on 21 February 2013, in force since 15 July 2016).

26 Article 200 of the Free Trade Agreement between the Government of New Zealand and the Government of the People's Republic of China (signed on 07 April 2008, in force since 01 October 2008).

27 Mitchell et al. (2019), *supra* note 11, p. 42.

28 *Ibid*.

on investors of the other Contracting Party and their investments in the Area of the former Contracting Party, nothing in this Agreement shall be construed to prevent the former Contracting Party from adopting or enforcing measures:

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

(b) necessary to protect public morals or to maintain public order, provided that the public order exception may only be invoked where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society;

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

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

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

(iii) safety; or

(d) imposed for the protection of national treasures of artistic, historic or archaeological value."

As can be seen, this clause selectively incorporates provisions from both GATT and GATS but adjusts them to align with the investment context. For example, the *chapeau* replaces "a disguised restriction on trade in services" with "a disguised restriction on investors and their investments" to reflect the treaty's focus on investment. Additionally, Article 16.1(b) imposes a stricter condition than the GATS, allowing the public order exception only when there is a "genuine and sufficiently serious threat" to fundamental societal interests. This heightened standard illustrates how investment treaties may impose more stringent requirements than trade agreements.

In short, the use of general exception clauses in IIAs is a growing trend, aimed at striking a balance between investor protection and state regulatory autonomy. While some scholars are optimistic about their ability to rebalance international investment law and address criticisms related to the "chilling effect" of investment arbitration,[29] others remain skeptical.[30] Critics argue that the standards embedded in these clauses often favour investors, limiting their ability to effectively protect state sovereignty. This concern arises from the typically narrow drafting of

29 Keene (2017), *supra* note 10.

30 Newcombe (2008), *supra* note 8; Keene (2017), *supra* note 10; Mitchell et al. (2019), *supra* note 11.

such clauses and the inclusion of conditions, such as the requirement that measures not be arbitrary or discriminatory, which are frequently interpreted in ways that prioritize investor rights over public policy objectives. Moreover, the absence of explicit provisions precluding compensation further undermines the utility of these clauses, as States may still face significant financial liability for justified public welfare measures.[31] To provide a deeper examination of the effectiveness of general exception cases, the following section will explore how investment tribunals have interpreted and applied these general exception clauses in practice, with a focus on assessing their effectiveness in maintaining the balance between investor protection and state regulatory autonomy.

2. Interpretation of general exception clauses by investment tribunals

As the incorporation of general exception clauses is a relatively recent development in IIAs, there have been few cases that directly address their application. Thus, arbitral tribunals have yet to provide comprehensive interpretations of these clauses or clearly define their role within investment treaties.[32] A notable trend, however, is that tribunals typically interpret general exception clauses in a manner that does not entirely absolve States of their obligations toward investors. This section explores this trend through two landmark cases - *Copper Mesa v. Ecuador* and *Eco Oro v. Columbia*, which highlight contrasting approaches to general exception clauses. These cases were selected for the clarity with which they frame the legal issues and for the different ways in which they balance investor protection with regulatory autonomy. Therefore, they provide particularly illustrative examples of how tribunals have begun to interpret and apply general exception clauses in practice, making them representative of broader interpretive trends.

2.1. Copper Mesa v. Ecuador

The case of *Copper Mesa v. Ecuador*[33] arose under the Canada–Ecuador BIT (1996). Copper Mesa, a Canadian company, invested in three mining concessions in Ecuador, which were subsequently revoked by the Ecuadorian government due to environmental and social conflicts, including violent incidents involving Copper Mesa's agents and local communities. Copper Mesa claimed that these actions by Ecuador amounted to unlawful expropriation and a failure to provide FET, alleging violations of Articles II, IV, and VIII of the BIT.[34]

31 *Ibid*.

32 Nadakavukaren, K. & Lazo, R. P. (2023). Legal opinion on right to regulate on investment treaties. *E-Avis ISDC*, p. 29. https://www.isdc.ch/media/2375/23-016-e-avis.pdf

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

34 *Ibid*, paras. 1.05, 1.86 and 7.1.

In its defense, Ecuador invoked the general exception clause under Article XVII(3) of the BIT, arguing that the revocation of the concessions was necessary to protect public welfare, particularly in light of environmental and social concerns. The relevant clause provides:

"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."[35]

The Article allows measures aimed at compliance with domestic laws, protection of life and health, and conservation of natural resources, provided that they are not applied arbitrarily or unjustifiably, nor serve as disguised restrictions on trade or investment.[36] It is modeled after WTO-like general exceptions, similar to Article XX of the GATT, but differs in several respects: it explicitly applies to investment (unlike GATT, which focuses on trade), omits "public morals" as a justification, and narrows the language regarding compliance with laws and regulations.

Despite Ecuador's attempt to rely on the general exception clause, the tribunal ruled in favor of the investor, concluding that Ecuador's actions amounted to unlawful expropriation. The tribunal found that Ecuador's conduct did not satisfy the conditions for a lawful expropriation under the BIT, as it was arbitrary, lacked due process, deprived the investor of its rights, and was carried out without compensation. Ecuador's invocation of the general exception clause was rejected because its actions failed to meet the requirements outlined in the *chapeau* of the clause, which stipulates that any measures must not be arbitrary, unjustifiable, or a disguised restriction on investment.[37]

The tribunal emphasized the importance of the *chapeau* as a safeguard, ensuring that States cannot invoke general exceptions without adhering to principles of fairness, transparency, and non-discrimination. As the Ecuador's arbitrary revocation of concessions which contravened the *chapeau*'s requirements and had not provided Copper Mesa with a fair

35 Article XVII(3) of the Agreement between the Government of Canada and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments (signed 29 December 1996, entered into force 6 May 1997).

36 *Ibid*, para. 6.14.

37 *Ibid*, para. 6.56.

opportunity to address or remedy alleged violations, nor did it implement its measures in a consistent or transparent manner, therefore, Ecuador's conduct was considered a failure to meet both procedural and substantive standards. This meant that that the general exception clause could not be used to defend the State's actions. By focusing on the *chapeau*, the tribunal reinforced the view that compliance with procedural fairness is essential for a successful invocation of the general exception clause. This approach seems to mirror the jurisprudence of WTO dispute settlement, where the *chapeau* of GATT Article XX has long been interpreted as a critical safeguard against the misuse of exceptions as disguised restrictions on trade. At the same time, it departs from some arbitral practice where tribunals have been more willing to defer to States' regulatory discretion. The Copper Mesa tribunal's strict reading underscores that the threshold for States is high: exceptions cannot excuse arbitrary or unjustifiable measures, and procedural safeguards must be respected.

This case illustrates how tribunals scrutinize both the procedural and substantive elements of state actions when evaluating claims based on general exception clauses. The ruling highlights that general exception clauses are not a blanket defense for States, as they require strict adherence to the procedural and fairness requirements outlined in the *chapeau* of the clause.

2.2. Eco Oro v. Columbia

The *Eco Oro v. Colombia*[38] case arose under the 2008 Canada-Colombia FTA, concerning a mining project in Colombia's sensitive Santurbán páramo ecosystem, crucial for water supply. Eco Oro, a Canadian company, had been developing the Angostura gold-silver project since 1994, but in 2010, Colombia introduced new environmental regulations to protect the páramo, prohibiting mining activities in large areas of Eco Oro's concession. Colombia's Ministry of Environment, however, failed to clearly delineate the protected areas, causing uncertainty and preventing Eco Oro from progressing with its project. After Colombia's Ministry of Mining consistently denied Eco Oro's requests to either suspend its contractual obligations or extend the performance period until the boundaries were clarified, Eco Oro claimed that these actions breached the FET standard under the Canada-Colombia FTA.[39]

The tribunal found that Colombia violated the FET standard, as Eco Oro had been given assurances that it could continue its mining activities, which were later frustrated by Colombia's delays in finalizing the boundaries

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

39 *Ibid,* paras. 80-100, 700-728.

of the protected area.[40] After establishing the breach, the tribunal turned to the applicability of the general exception clause in Article 2201 of the Canada-Colombia FTA, which permits States to adopt necessary measures to protect public welfare, including environmental measures.[41] The relevant portion of Article 2201, which applies to Chapter Eight (Investment), allows States to adopt measures necessary for protecting human, animal, or plant life or health; ensuring compliance with laws; or conserving natural resources, provided that such measures are not arbitrary, discriminatory, or a disguised restriction on trade or investment.

Colombia argued that Article 2201 precluded any obligation to compensate Eco Oro, as the measures were necessary to protect the environment and public health. The state interpreted the word "prevent" in the article as shielding it from any responsibility to provide compensation for its environmental regulations. However, Eco Oro contended that while Article 2201 could prevent restitution, it did not preclude compensation, meaning Colombia could enact environmental protections while still compensating the affected investor. The tribunal agreed with Eco Oro's interpretation, concluding that Article 2201 did not absolve Colombia from compensating Eco Oro for its losses, as the clause did not explicitly state that compensation was excluded.[42] In justifying its decision, the tribunal compared Article 2201 with Annex 811(2)(b) of the same Canada-Colombia FTA, which explicitly states that certain measures do not constitute indirect expropriation and therefore do not trigger compensation.[43] The tribunal noted that if Article 2201 had similarly clear language exempting the state from compensating investors for measures falling under the general exception, Colombia would not have been liable to pay compensation in this case.

This case highlights several important aspects of how arbitral tribunals interpret general exception clauses. Firstly, tribunals approach these clauses inconsistently, sometimes focusing on whether a breach has occurred before examining the applicability of the exception, as seen in *Copper Mesa v. Ecuador*[44] and *Bear Creek v. Peru*,[45] and other times bypassing this analysis, as in this case, where the tribunal directly addressed the compensation issue. Secondly, while some scholars have argued that WTO jurisprudence should inform the interpretation of

40 *Ibid,* paras. 743-821.
41 *Ibid,* paras. 826-837.
42 *Ibid*.
43 *Ibid,* para. 829.
44 *Copper Mesa v. Ecuador*, *supra* note 33.
45 Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Award, (Nov. 30, 2017), para. 416.

general exceptions in investment disputes, arbitral tribunals have largely ignored WTO case law, focusing instead on the specific language of the investment treaties. Finally, tribunals tend to place little emphasis on the intentions of treaty drafters, even when non-disputing parties, such as Canada – the home State of the investor, provide certain input. In this case, Canada argued that the general exception clause was intended to act as a carve-out for environmental measures, but the tribunal rejected this view, emphasizing that the treaty aimed to balance investment protection with environmental regulations.[46] This ruling demonstrates the considerable discretion arbitral tribunals have in interpreting general exception clauses, leading to unpredictable outcomes that may diverge from what treaty drafters initially intended. As noted by Güneş Ünüvar (2023), "arbitral tribunals are well capable of creating interpretative deadlocks by convenient or erroneous readings of relevant clauses."[47] While these clauses are designed to offer States flexibility in regulating public welfare, their effectiveness depends heavily on how tribunals interpret the scope and application of the exceptions.

2.3. Challenges in applying general exception clauses: Strict arbitration approaches

The two cases analyzed reveal important patterns and trends in how tribunals interpret and apply general exception clauses. One recurring theme is the strong emphasis tribunals place on procedural safeguards, such as those outlined in the *chapeau* of general exception clauses. These safeguards, which require measures to be non-arbitrary, non-discriminatory, and not disguised restrictions on investment, are intended to prevent misuse of exceptions. However, this procedural focus often comes at the expense of substantive policy objectives, such as environmental protection or social welfare. In the case of *Copper Mesa*, for example, the tribunal concentrated on procedural flaws in Ecuador's actions, effectively sidelining the country's justification of its measures as necessary for public welfare. This prioritization of procedural compliance over the underlying intent of the measures limits the utility of general exceptions as a tool for safeguarding regulatory autonomy.

Another significant trend is the difficulty States face in avoiding compensation obligations even when their measures fall within the scope of general exceptions. The *Eco Oro* case highlights this challenge, as the tribunal determined that while Colombia's environmental regulations

46 *Eco Oro v. Colombia*, *supra* note 38, paras. 374, 471-477.

47 Ünüvar, G. (2023, December). A tale of policy carve-outs and general exceptions: Eco Oro v Colombia as a case study. *Journal of International Dispute Settlement, 14*(4), 517–533, p. 533. https://doi.org/10.1093/jnlids/idad017

were justified under the general exception clause, the absence of explicit language exempting the state from compensation rendered the exception ineffective in shielding Colombia from financial liability. This distinction between regulatory legitimacy and compensation has emerged as a persistent tension in the practical application of general exceptions, undermining their ability to address "regulatory chill" effectively. For States, the financial risk of compensation claims may deter them from enacting necessary public interest regulations, thereby reducing the impact of general exceptions on preserving policy space.

Tribunal interpretations of general exceptions also reveal inconsistencies in their methodological approaches. In some cases, such as the *Copper Mesa* case, tribunals first determine whether a breach of treaty obligations has occurred before examining the applicability of the exception. In others, like the case of *Eco Oro*, the tribunal bypassed this initial analysis and focused instead on the implications of the exception for compensation. This lack of uniformity creates uncertainty for both States and investors, complicating efforts to predict how general exception clauses will be applied in practice. Such inconsistencies weaken the effectiveness of these clauses in achieving their dual objectives of regulatory flexibility and investment protection.

Finally, although many general exception clauses are modelled on WTO provisions, tribunals have largely avoided relying on WTO jurisprudence to inform their interpretations. Instead, they have focused on the specific language and context of the investment treaties at issue, limiting the relevance of WTO case law. This divergence underscores the need for clearer, investment-specific drafting of general exception clauses to ensure that their application aligns with the unique dynamics of investor-State disputes.

Collectively, these cases highlight significant shortcomings in the practical application of general exception clauses. While their increasing inclusion in modern treaties reflects a growing recognition of the need to address "regulatory chill", tribunals' narrow focus on the threshold for application, their reluctance to exclude compensation obligations, and their inconsistent interpretive approaches undermine the effectiveness of these clauses as tools for balancing regulatory autonomy and investor protections. For general exceptions to become a more viable mechanism, future treaty negotiations must address these limitations by clarifying the standards of application, explicitly excluding compensation for justified measures, and tailoring exceptions to the specific context of investment disputes rather than relying solely on WTO-inspired models.

3. General exceptions in Vietnam's investment treaties

Since opening its economy to foreign investment nearly four decades ago, Vietnam has made significant progress in attracting foreign direct investment (FDI), becoming one of the top 20 global FDI destinations.[48] To support and manage these inflows, Vietnam has continually enhanced its legal framework and financial incentive policies, including proactive participation in international treaties since the 1980s. These efforts have contributed to a favorable investment climate, fueling economic growth and industrialization.[49]

Despite these achievements, challenges associated with FDI have emerged. Issues such as the influx of outdated technology in FDI projects, labor conflicts, and environmental degradation from irresponsible investments have raised concerns. The Formosa environmental disaster is a particularly striking example, highlighting the urgent need for stricter enforcement of regulations and more sustainable investment practices.[50] These problems underscore the importance of reassessing Vietnam's investment agreements to better protect the host State's policy space, including the integration of general exception clauses.

The inclusion of general exception clauses in international treaties, especially in IIAs, is a growing trend worldwide. As a developing nation deeply involved in global economic integration, Vietnam has also adopted this practice. According to the United Nations Trade and Development (UNCTAD) data, Vietnam has signed a total of 98 investment treaties.[51] This section examines these treaties to assess Vietnam's approach to incorporating general exception clauses.

Vietnam has actively participated in IIAs since the 1990s. However, in the early stages, most of these agreements were "first-generation" treaties that lacked general exception clauses or provisions aimed at balancing investor protection with the state's right to regulate in the public interest. It was only after the 2000s that Vietnam began to systematically

48 Tran, V. (2024). Chính sách thu hút nguồn vốn đầu tư trực tiếp nước ngoài thời gian qua và một số gợi ý cho Hà Nội [trans: Policies to attract foreign direct capital in recent times and recommendations for Hanoi]. *Communist Review*. https://www.tapchicongsan.org.vn/web/guest/trang-thong-tin-dia-phuong/-/2018/966502/chinh-sach-thu-hut-nguon-von-dau-tu-truc-tiep-nuoc-ngoai-thoi-gian-qua-va-mot-so-goi-y-cho-ha-noi.aspx

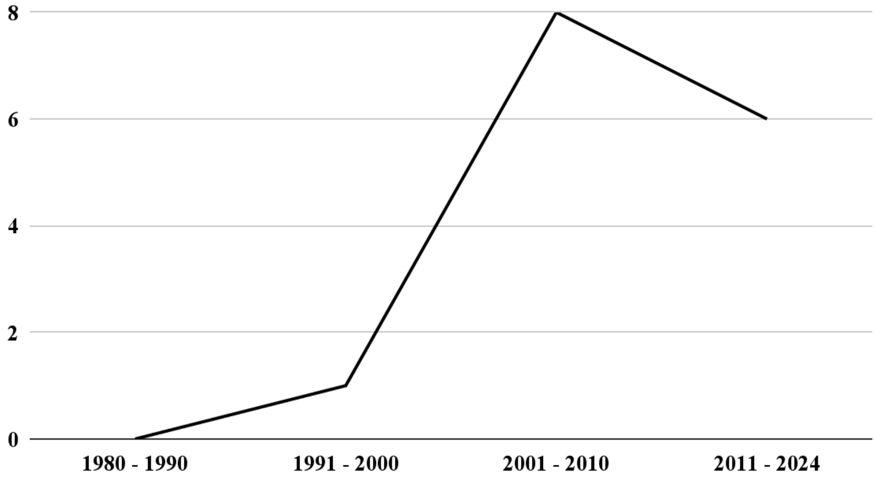
49 Nguyen, T. V. N. (2019). Bàn về chính sách ưu đãi đầu tư của Việt Nam đối với doanh nghiệp FDI [trans: Discussing Vietnam's preferential investment policies for FDI enterprises]. *Finance Review,* (10). https://tapchitaichinh.vn/ban-ve-chinh-sach-uu-dai-dau-tu-cua-viet-nam-doi-voi-doanh-nghiep-fdi.html

50 Nguyen, T. M. H. (2018). Tính hai mặt của đầu tư trực tiếp nước ngoài (FDI) ở Việt Nam [trans: The duality of foreign direct investment (FDI) in Vietnam]. *Institute of Statistical Science,* (03). https://vienthongke.vn/tinh-hai-mat-cua-dau-tu-truc-tiep-nuoc-ngoai-fdi-o-viet-nam/

51 UN Trade and Development [UNCTAD] (n.d.). *International investment agreements navigator.* https://investmentpolicy.unctad.org/international-investment-agreements/advanced-search

include general exception clauses in its treaty practice. The trend of incorporating such provisions has grown over time. Before 2000, none of Vietnam's investment treaties contained general exception clauses. The US-Vietnam Trade Relations Agreement (2000)[52] was the first international treaty to integrate WTO-like general exceptions into its text. After that, Vietnam increasingly signed IIAs that included general exception clauses. By the time of writing, 15 of Vietnam's investment treaties feature general exception clauses (see Figure 1).[53]

Figure 1: Number of general exceptions in Vietnam's IIAs



Source: Compiled by the authors based on IIAs[54]

This trend reflects Vietnam's evolving approach to balancing investment protection with regulatory sovereignty, particularly in sectors such as environmental protection, public health, and social welfare. The inclusion of these provisions is especially evident in recent comprehensive agreements like the Regional Comprehensive Economic Partnership (RCEP) signed in 2020 and the EU-Vietnam Investment Protection Agreement signed in 2019. Both of which demonstrate Vietnam's strategic shift toward safeguarding its right to regulate. It is also noteworthy that a significant proportion of these agreements fall under the Association of Southeast Asian Nations (ASEAN) framework, further highlighting Vietnam's engagement in multilateral and regional treaties where the

52 Agreement between the United States of America and the Socialist Republic of Vietnam on Trade Relations (signed on and in force since 13 July 2000).

53 See Figure 1 for more details.

54 The UNCTAD. Investment Policy Hub. *International Investment Agreements Navigator*. https://investmentpolicy.unctad.org/international-investment-agreements

inclusion of general exceptions has become more prevalent. For example, agreements such as the ASEAN-Hong Kong Investment Agreement (2017), the ASEAN-China Investment Agreement (2009), and the ASEAN Comprehensive Investment Agreement (2009) reflect Vietnam's increasing reliance on regional frameworks to structure its investment policies.[55]

The research also reveals that Vietnam's approach to including general exception clauses in its treaties generally follows two primary methods. The first involves incorporating exceptions *mutatis mutandis* from existing frameworks, seen in six treaties. For example, Article 17.12 of RCEP (2020) provides:

"For the purposes of Chapter 8 (Trade in Services), Chapter 9 (Temporary Movement of Natural Persons), Chapter 10 (Investment), and Chapter 12 (Electronic Commerce), Article XIV of GATS including its footnotes is incorporated into and made part of this Agreement, *mutatis mutandis*."

The second method is modeling exceptions on WTO-style language from GATT Article XX and GATS Article XIV. Six treaties incorporate exceptions based on both articles, while two treaties are modeled solely on Article XX of GATT. For example, Article 10 of ASEAN–India Framework Agreement (2003) states:

"Article 10: General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination [...] nothing in this Agreement shall prevent any Party from taking action and adopting measures for the protection of its national security or the protection of articles of artistic, historic and archaeological value, or such other measures which it deems necessary for the protection of public morals, or for the protection of human, animal or plant life, health and conservation of exhaustible natural resources."

Globally, Vietnam's treaty practice aligns with international trends in incorporating general exception clauses as a safeguard to balance investor protection with the host State's right to regulate in the public interest. Vietnam has adopted both the "incorporate" and "modeled on" approaches to general exceptions, learning from international practices and integrating WTO-style clauses into its investment treaties. However, as case law demonstrates, WTO-style general exceptions may not be well-suited to the investment context, revealing loopholes that reduce their effectiveness in investor-State disputes. Investment tribunals tend to adopt a narrow approach in interpreting general exception clauses,

55 See Annex 1 for more details.

making it difficult for States to successfully invoke these provisions in practice. If not carefully drafted, general exceptions may fail to provide States with the regulatory flexibility they intend.

For Vietnam to effectively use general exception clauses in future IIAs, two revisions are recommended. *First*, the *chapeau* requirements of general exceptions, which stem from trade law, should be adapted to fit investment law. WTO-style exceptions generally require that State measures must not be applied in an arbitrary or unjustifiable discriminatory manner. However, these conditions, which stem from trade law, are not well-suited to the investment context, making it difficult to apply general exceptions in practice. For example, in cases involving breaches of the FET standard, a State's measure that is found to be arbitrary or discriminatory would automatically fail the *chapeau*'s requirements, preventing the general exception from being invoked.[56] A similar issue arises in cases of expropriation. A measure will constitute unlawful expropriation if it is either discriminatory or not for a public purpose. If it is discriminatory, it fails the *chapeau*'s conditions, and if it is not for a public purpose, it would not fall within the public policy objectives listed in the general exception clause.[57] In both scenarios, the general exception clause becomes unenforceable once a breach is established, rendering it ineffective in practice.

Second, general exception clauses should explicitly preclude compensation. One of the main reasons States incorporate general exceptions into IIAs is to avoid liability for compensating investors when implementing measures in the public interest. States seek to maintain the ability to pursue sustainable policy goals without facing the financial burden of compensating investors for regulations that affect their investments. However, tribunal decisions in recent case law reveal a distinction between the legitimacy of a State's regulatory measure and its obligation to compensate. A State may be permitted to maintain a measure for public purposes, but the obligation to compensate the investor often remains. Although this distinction exists in principle, the potential for large compensation awards may deter States from enacting necessary regulatory changes.[58] It is crucial, therefore, that future treaties explicitly state that if a measure is justified by the general exceptions, no compensation will be owed to the investor.[59] This clarification

56 Martini (2018), *supra* note 1, p. 2887.
57 *Ibid*, p. 2889.
58 Berge & Berger (2021), *supra* note 5.
59 Garden, R. (2022). Eco Oro v Colombia: The brave new world of environmental exceptions. *ICSID Review - Foreign Investment Law Journal, 38*(1), 17 - 24, p. 23. https://doi.org/10.1093/icsidreview/siac020

should be embedded directly within the general exception clause to prevent tribunals from circumventing it, as was seen in the *Bear Creek v. Peru* case. By addressing these two key areas, Vietnam can enhance the effectiveness of general exception clauses, protecting its regulatory autonomy while mitigating the risks of investor-State claims.

Conclusion

The inclusion of general exceptions in IIAs has recently emerged as an important mechanism for addressing the often-competing interests of foreign investors and host States. However, the effectiveness of these exceptions remains controversial due to inconsistent drafting, legal limitations, and varying interpretations by arbitral tribunals. Noting that the most common types of general exceptions in treaties are those that "incorporate" or are "modelled on" WTO-style general exceptions, a review of landmark investor-State disputes also reveals that arbitral tribunals have adopted a strict and narrow interpretive approach towards these exceptions. Even in cases where general exception clauses justify public welfare measures, host States are not exempt from the obligation to compensate investors. This risk of compensation may deter States from pursuing necessary regulatory changes, thereby limiting the effectiveness of the general exceptions in safeguarding public interests. In Vietnam's investment treaties, the inclusion of general exception clauses has also become more prevalent. However, Vietnamese negotiators must ensure that these clauses are carefully crafted, particularly focusing on the wording of the *chapeau* and resolving compensation issues to retain crucial regulatory autonomy in the context of IIAs. ●

References

[1] Berge, T. L., & Berger, A. (2021). Do investor-State dispute settlement cases influence domestic environmental regulation? The role of respondent state bureaucratic capacity. *Journal of International Dispute Settlement*, *12*(1), 1–41. https://doi.org/10.1093/jnlids/idaa027

[2] Garden, R. (2022). Eco Oro v Colombia: The brave new world of environmental exceptions. *ICSID Review - Foreign Investment Law Journal, 38*(1), 17 - 24. https://doi.org/10.1093/icsidreview/siac020

[3] Henckels, C. (2020). Scope limitation or affirmative defence? The purpose and role of investment treaty exception clauses. In L. Bartels & F. Paddeu (Eds.), *Exceptions in international law*. Oxford University Press.

[4] Keene, A. (2017). The incorporation and interpretation of WTO-style environmental exceptions in international investment agreements. *Journal of World Investment & Trade, 18*(1), 62-99. https://doi.org/10.1163/22119000-12340031

[5] Martini, C. (2018). Avoiding the planned obsolescence of modern international investment agreements: Can general exception mechanisms be improved, and how?. *Boston College Law Review*, *59*(8), 2877 - 2897. https://lira.bc.edu/work/sc/296df3f6-eeb5-419c-859a-8ee7dec1ee30

[6] Mitchell, A. D., Munro, J., & Voon, T. (2019). Importing WTO general exceptions into international investment agreements: Proportionality, myths and risks. In L. E. Sachs, L. Johnson & J. Coleman (Eds.). *Yearbook on International Investment Law & policy*. Oxford University Press

[8] Newcombe, A. (2008, May 13 & 14). *General exceptions in international investment agreements* [Draft Discussion Paper]. British Institute of International and Comparative Law (BIICL) Eighth Annual WTO Conference, London, England. https://www.biicl.org/files/3866_andrew_newcombe.pdf

[10] Spears, S. A. (2010). The quest for policy space in a new generation of international investment agreements. *Journal of International Economic Law*, *13*(4), 1037–1075, pp. 1037–1044. https://doi.org/10.1093/jiel/jgq048

[11] Tran, V. (2024). Chính sách thu hút nguồn vốn đầu tư trực tiếp nước ngoài thời gian qua và một số gợi ý cho Hà Nội [trans: Policies to attract foreign direct capital in recent times and recommendations for Hanoi]. *Communist Review*. https://www.tapchicongsan.org.vn/web/guest/trang-thong-tin-dia-phuong/-/2018/966502/chinh-sach-thu-hut-nguon-von-dau-tu-truc-tiep-nuoc-ngoai-thoi-gian-qua-va-mot-so-goi-y-cho-ha-noi.aspx

[12] Tran, V. D. (2021). Vietnam's experiences with international investment agreements governance: Issues and solutions. *Asian Yearbook of International Law*, *25*(2019), 84-104. https://ssrn.com/abstract=3890580

[13] Ünüvar, G. (2023, December). A tale of policy carve-outs and general exceptions: Eco Oro v Colombia as a case study. *Journal of International Dispute Settlement, 14*(4), 517–533. https://doi.org/10.1093/jnlids/idad017

[14] Viñuales, J. E. (2019). Foreign investment and the environment in international law: Current trend. In K. Miles (Ed.). *Research handbook on environment and investment law* (pp. 12-37). Edward Elgar Publishing

Author Contribution

All authors contributed to the study conception and design. All authors read and approved the final manuscript.

Declarations

Conflict of Interest: The authors declare no competing interests.

Disclaimer: All claims expressed in this article are solely those of the authors and do not necessarily represent those of their affiliated organizations, or those of the publisher, the editors and the reviewers. Any product that may be evaluated in this article or claim that may be made by its manufacturer is not guaranteed or endorsed by the publisher.

Annex 1: General exception clauses in Vietnam's IIAs

No.	International Investment Agreements	Type of general exception clauses			
		Directly incorporate		Modeled on WTO-style	
		Verbatim	*Mutatis mutandis*	Article XX GATT	Both Article XX GATT and Article XIV GATS
1	RCEP (2020)		Article 17.12		
2	EU-Vietnam Investment Protection Agreement (2019)				Article 4.6
3	ASEAN-Hong Kong, China SAR Investment Agreement (2017)				Article 9
4	Eurasian Economic Union-Vietnam FTA (2015)		Article 1.9		
5	Korea-Vietnam FTA (2015)		Article 16.1		
6	ASEAN-India Investment Agreement (2014)				Article 21
7	ASEAN-China Investment Agreement (2009)				Article 16
8	ASEAN – Korea Investment Agreement (2009)				Article 20
9	AANZFTA (2009)		Chapter 15, Article 1		
10	ASEAN Comprehensive Investment Agreement (2009)				Article 17
11	Japan-Vietnam EPA (2008)		Article 8		
12	ASEAN-Japan EPA (2008)		Article 7		
13	ASEAN-India Framework Agreement (2003)			Article 10	
14	ASEAN-China Framework Agreement (2002)			Article 10	
15	US-Vietnam Trade Relations Agreement (2000)	Chapter VII, Article 3			

Source: Compiled by the authors