



Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues

Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)

Managing Editor: Abigail Greene (avg2129@columbia.edu)

The Columbia FDI Perspectives are a forum for public debate. The views expressed by the authors do not reflect the opinions of CCSI or our partners and supporters.

No. 342 October 17, 2022

Why omitting general public policy exceptions from investment treaties is a setback for the right to regulate

by

Wolfgang Alschner*

In a recent [FDI Perspective](#), Charles-Emmanuel Côté reviewed the [2021 Canadian model investment treaty](#). The model breaks with a long-standing Canadian practice by omitting WTO-style general public policy exceptions. Côté noted little cause for concern, since general exceptions originally inspired by GATT Article XX “were never applied in an actual [investment arbitration] case. Their abandonment should not have serious consequences for the right to regulate.” This *Perspective* disagrees and provides three reasons why the omission of general public policy exceptions constitutes a serious setback in the quest to rebalance investment treaties.

- General exceptions in Canadian treaties have in fact been heavily litigated in the recent past and have emerged as a core defense for developing-country host states. In [Copper Mesa v Ecuador](#), [Bear Creek v Peru](#), [Infinito Gold v Costa Rica](#) and [Eco Oro v Colombia](#), the respondents (unsuccessfully) invoked general exceptions contained in Canadian investment treaties to justify the curtailment of mining concessions on environmental grounds. In at least three other cases involving Canadian treaties, the exception was applicable but not raised.¹ In short, while, for Canada as a respondent, general exceptions have not played a major role, Canada’s developing-country treaty partners have repeatedly relied on these clauses to defend their right to regulate. They will be hurt by the omission.
- General exceptions have [surged in popularity across the globe](#), and have been included in half of all newly signed investment treaties over the past five years. Their rising number demonstrate that states consider them to be vital tools for protecting the right to regulate. While many states are newcomers, several Asian and African countries have long traditions of inserting general exceptions protecting public health and the environment into [south-south bilateral investment treaties](#). Some capital exporters, like Turkey, Japan and, until now, Canada, also have a consistent practice of including general exceptions into their agreements. Canada’s decision to omit general exceptions in the 2021 model is thus oddly timed with these provisions becoming a mainstream treaty feature.

- Most importantly, Canada’s policy reversal signals defeat and retreat in the face of an emerging [backlash by investment tribunals against state-driven reform](#). In a [quest for policy space](#), states have inserted novel features—such as general public policy exceptions—into a new generation of investment treaties. A first set of arbitral awards rendered under these new-generation treaties paints a worrying picture: [new treaties have produced old outcomes](#), as controversial interpretations by investment tribunals have rolled back core innovations states adopted to safeguard the right to regulate.

Take the [2021 Eco Oro award](#), rendered under the 2008 Canada-Colombia Free Trade Agreement. The tribunal’s majority explained that the treaty’s general public policy exception would “not prevent an investor claiming ... payment of compensation” (para. 830). The tribunal thereby disregarded decades of caselaw on similarly worded exceptions in WTO law as well as the concordant submissions of the host and home state arguing that the successful invocation of an exception would shield a state from liability and, consequently, damages. In the words of one commentator, the interpretation rendered general exceptions “[effectively irrelevant in investment arbitration](#)”.

The Eco Oro award is part of an emerging pattern. By ignoring, downplaying or rolling back innovations through controversial interpretations, arbitral tribunals have read new treaties like old ones. This, in turn, deprives state-driven reform to better accommodate the right to regulate of its effectiveness and further undermines the investment regime’s legitimacy.

Against that backdrop, Canada’s omission of general public policy exceptions in its new model amounts to a capitulation. The phase out implicitly accepts that tribunals like in Eco Oro were right: these exceptions have no role to play in investment arbitration. Canada thereby inadvertently signals that states’ rebalancing efforts went too far and that it is time to pare back policy space. This, in turn, undermines general exceptions in existing treaties, including Canada’s, heightens litigation risks and calls into question the future direction of state-driven investment law reform.

It does not have to be this way. Canada has yet to negotiate an investment treaty using the new model. There is, thus, still time to change course. As an early adopter of general exceptions, Canada plays an important leadership role. Furthermore, in its [non-disputing party submission in Eco Oro](#), Canada eloquently and thoughtfully sketched out the role these provisions could play as a “final ‘safety net’ to protect the State’s exercise of regulatory powers” (para. 9). Canada should follow the nuanced path it itself set out in Eco Oro.

General exceptions are no panacea, nor do they necessarily open the door to abuse. They complement rather than substitute other treaty flexibilities such as clause-specific carveouts or clarifications.² Their chapeau and strict conditioning furthermore ensure that discriminatory measures are stripped of their public policy guise. Whereas their inclusion is thus a welcome, but modest, step toward more balanced investment treaties, their omission sends the wrong signal of states retreating, in the face of a backlash by arbitrators, from the treaty-design innovation they have championed for decades.

* Wolfgang Alschner (wolfgang.alschner@uottawa.ca) holds the Hyman Soloway Chair in Business and Trade Law at the Common Law Section of the University of Ottawa. This *Perspective* draws on Wolfgang Alschner, *Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes* (New York: OUP, 2022). The author wishes to thank Ben Heath, Caroline Henckels and Andrew Newcombe for their helpful peer reviews.

¹ [Gold Reserve v Venezuela](#), [Crystallex v Venezuela](#), [Rusoro v Venezuela](#).

² Some scholars fear that exceptions crowd out other flexibilities. See Caroline Henckels’ [recent work](#).

The material in this Perspective may be reprinted if accompanied by the following acknowledgment: “Wolfgang Alschner, ‘Why omitting general public policy exceptions from investment treaties is a setback for the right to regulate,’ Columbia FDI Perspectives No. 342, October 17, 2022. Reprinted with permission from the Columbia Center on Sustainable Investment (<http://ccsi.columbia.edu>).” A copy should kindly be sent to the Columbia Center on Sustainable Investment at ccsi@law.columbia.edu.

For further information, including information regarding submission to the *Perspectives*, please contact: Columbia Center on Sustainable Investment, Abigail Greene, at avg2129@columbia.edu.

The Columbia Center on Sustainable Investment (CCSI), a joint center of Columbia Law School and the Earth Institute at Columbia University, is a leading applied research center and forum dedicated to the study, practice and discussion of sustainable international investment. Our mission is to develop and disseminate practical approaches and solutions, as well as to analyze topical policy-oriented issues, in order to maximize the impact of international investment for sustainable development. The Center undertakes its mission through interdisciplinary research, advisory projects, multi-stakeholder dialogue, educational programs, and the development of resources and tools. For more information, visit us at <http://ccsi.columbia.edu>.

Most recent Columbia FDI Perspectives

- No. 341, Vanessa Tsang, “Strengthening international negotiation assistance for developing host countries,” *Columbia FDI Perspectives*, October 3, 2022
- No. 340, Brian Chang and Daniel Kang, “Advancing alternatives: Promoting mediation and conciliation in investor-state dispute settlement,” *Columbia FDI Perspectives*, September 20, 2022
- No. 339, Christian Pitschas, “Defining investment in a future WTO agreement on investment facilitation for development,” *Columbia FDI Perspectives*, September 5, 2022
- No. 338, Louis T. Wells, “Got ‘critical minerals’? Hooray! But be careful!,” *Columbia FDI Perspectives*, August 22, 2022
- No. 337, Charles-Emmanuel Côté, “The new Canadian Model investment treaty: A quiet evolution,” *Columbia FDI Perspectives*, August 8, 2022

All previous *FDI Perspectives* are available at <https://ccsi.columbia.edu/content/columbia-fdi-perspectives>.