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## Avoiding the Planned Obsolescence of Modern International Investment Agreements: Can General Exception Mechanisms Be Improved, and How?

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# AVOIDING THE PLANNED OBSOLESCENCE OF MODERN INTERNATIONAL INVESTMENT AGREEMENTS: CAN GENERAL EXCEPTION MECHANISMS BE IMPROVED, AND HOW?

CAMILLE MARTINI\*

**Abstract:** In light of the increase in investor-state disputes brought by foreign investors under the arbitration clauses contained in international investment agreements (“IIAs”), treaty negotiators have started to develop safeguards in recent IIAs in an attempt to mitigate the impact of these agreements on their regulatory powers. General exception clauses modeled on Article XX of the General Agreement on Tariffs and Trade are part of these new treaty provisions. General exceptions clauses are, in their current form, a source of uncertainty rather than coherence. Recent arbitration cases have shed light on the unworkable enforceability requirements contained in general exceptions clauses, preventing, in most cases, these clauses from being successfully implemented. While narrowing the scope of the standards of protection contained in IIAs may be a more effective path to improve the balance between protection of foreign investors’ rights and outcomes that promote good governance and sustainable development, general exception clauses may nonetheless justify in very specific circumstances conduct that would otherwise represent a violation of the applicable IIA, in spite of the many interpretive issues contained therein.

## INTRODUCTION

Although international investment agreements (“IIAs”) represent an effective mechanism to further the liberalization of regulatory frameworks and harmonize standards of protection for investors,<sup>1</sup> they can also limit

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The views expressed in this Essay are those of the author and do not necessarily reflect the views of the author’s firm or any of its clients.

<sup>1</sup> See, e.g., UNCTAD, INVESTMENT POLICY FRAMEWORK FOR SUSTAINABLE DEVELOPMENT 31, 76, 79–80, 83 (2015), [http://unctad.org/en/PublicationsLibrary/diaepcb2015d5\\_en.pdf](http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf) [<https://perma.cc/3MCS-2Z9H>].

IIAs are the primary public international law instruments governing the promotion and protection of foreign investments. . . . [M]ost IIAs combine similar (sometimes identical) treaty-based standards of promotion and protection for foreign investment

host countries' policy space, or "right to regulate." This is true especially in the fields of environmental protection, national security, public health, human rights, and energy transition.<sup>2</sup> In anticipation of lengthy and costly investor-state dispute settlement ("ISDS") proceedings, host countries could be deterred from implementing legitimate public policies when such policies could potentially impact foreign investors' economic interests.<sup>3</sup>

IAs, by their very nature, contain a certain degree of asymmetry, given that only foreign investors may bring claims under them and thus only foreign investors benefit from the protection that they provide.<sup>4</sup> Highly unbalanced agreements, however, can undermine the current model of international economic governance.<sup>5</sup> On the one hand, IAs have become powerful tools for foreign investors to challenge host governments' regulations that conflict with their economic interests.<sup>6</sup> On the other hand, one can seriously doubt whether traditional IAs have succeeded in engaging with the social dimension of international investment flows.<sup>7</sup>

Has the liberalization of foreign investment gone too far? Policymakers, when implementing either general or targeted regulatory changes, face

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with an investor-state arbitration mechanism that allows foreign investors to enforce these standards against host states.

ANDREW NEWCOMBE & LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 1–2* (2009).

<sup>2</sup> See S.A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. INT'L ECON. L. 1037, 1039 (2010).

<sup>3</sup> This phenomenon has been described as a "regulatory chill." See *id.* at 1039–40.

<sup>4</sup> The fact that only foreign investors may bring a claim under the investor-state dispute resolution provisions of an IA should not impair a key purpose of IAs that is "wider than just investor protection but covers attraction of and benefiting from foreign investment, which in turn connotes investment that is good for sustainable development." Peter Muchlinski, *General Exceptions in International Investment, Preface*, in *SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW* 351, 353 (Marie-Claire Cordonier Segger et al. eds., 2011) [hereinafter *SUSTAINABLE DEVELOPMENT*]. Moreover, there is a possibility for host states, in specific circumstances, to bring counter-claims before investment tribunals. See, e.g., Stefan Dudas, *Treaty Counterclaims Under the ICSID Convention*, in *ICSID CONVENTION AFTER 50 YEARS: UNSETTLED ISSUES* 385, 385–406 (Crina Baltag ed., 2016) (discussing examples of states bringing counterclaims against foreign investors in IA disputes).

<sup>5</sup> See Frank J. Garcia, *Investment Treaties Are About Justice*, COLUM. FDI PERSPECTIVES, No. 185 (2016), <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2034&context=lsfp> [https://perma.cc/SD7P-5CTK] (emphasizing the broader role of IAs as "instruments of economic governance" rather than as merely existing to protect "private actor rights").

<sup>6</sup> See M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 254–55 (4th ed. 2017).

<sup>7</sup> See Frank J. Garcia et al., *Reforming the International Investment Regime: Lessons from International Trade Law*, 18 J. INT'L TRADE L. 861, 862, 867–69 (2015); Federico Ortino, *The Social Dimension of International Investment Agreements: Drafting a New BIT/MIT Model?*, 2008 OECD GLOBAL F. ON INT'L INV. 243, 243–44, <http://www.oecd.org/investment/globalforum/40311350.pdf> [https://perma.cc/X3JG-6YAF].

a growing tension between their country's domestic legal frameworks and international commitments under IIAs.<sup>8</sup> Policymakers must determine how they can achieve a balanced integration between investment and non-investment objectives and what substantive IIA reforms they could implement to achieve not only the protection of foreign investors' rights, but also outcomes that promote good governance and sustainable development.<sup>9</sup> The increasing insertion of general exception clauses ("GECs") in IIAs—*i.e.* treaty provisions seeking to justify a host state's conduct that would otherwise qualify as a violation of the applicable IIA—are merely a result of these concerns.<sup>10</sup>

Part I of this Essay will describe how the use of GECs, as part of a broader set of innovative investment treaty provisions, has increased in recent years.<sup>11</sup> Part II of this Essay will explain GECs' unworkable enforceability requirements and argue that they are ill-adapted to justify violations of the fair and equitable treatment and expropriation standards.<sup>12</sup> Finally, Part III of this Essay will explore other potential issues facing GECs and suggest some solutions to enable policymakers to better take into consideration these challenges in drafting the next generation of IIAs.<sup>13</sup>

## I. GENERAL EXCEPTION CLAUSES IN INTERNATIONAL INVESTMENT AGREEMENTS

Reconciling the objectives of GECs with the current development of ISDS is a complex undertaking. In light of the increase in investor-state disputes brought by foreign investors under the arbitration clauses contained in IIAs, treaty negotiators have started to develop safeguards in recent IIAs in an attempt to mitigate the impact of these agreements on their regulatory powers.<sup>14</sup> The inclusion of new treaty provisions in IIAs also

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<sup>8</sup> See SORNARAJAH, *supra* note 6, at 219.

<sup>9</sup> See Frank J. Garcia & Sebastián López Escarcena, *Investment Law for the Twenty-First Century*, 59 B.C. L. REV. 2595, 2603–04 Annex I (2018) (listing policy proposals for the reform of international investment law); see also Frank J. Garcia, *21st Century Investment Agreements: Justice, Governance and the Rule of Law*, 12 PONTES 5 (2016), <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2033&context=lsfp> [<https://perma.cc/M9J4-ZYD2>].

<sup>10</sup> See *infra* notes 14–90 and accompanying text.

<sup>11</sup> See *infra* notes 14–35 and accompanying text.

<sup>12</sup> See *infra* notes 36–78 and accompanying text.

<sup>13</sup> See *infra* notes 79–89 and accompanying text.

<sup>14</sup> See Spears, *supra* note 2, at 1048–64 (describing new analytical devices included by states in recent IIAs). One reform action UNCTAD was to provide was for the “amend[ment of] treaty provisions,” which involves the “modifi[ca]tion of] an existing treaty’s content by introducing new provisions or altering or removing existing ones.” U.N. CONF. ON TRADE & DEV., WORLD INVESTMENT REPORT, at 131, U.N. Doc. UNCTAD/WIR/2017, U.N. Sales No. E. 17. II. D. 3 (2017) [hereinafter WORLD INVESTMENT REPORT 2017].

seeks to improve the interactions between domestic regulatory measures and international law. Although domestic legal frameworks may be part of the applicable law in a given investment case, the regulatory actions of a host state may be perceived, subject to the wording of the applicable IIA, as not being part of the applicable law, but as factual considerations reviewed by the arbitral tribunal in assessing the lawfulness of a host country's measures under international law—most often in investment arbitration the treaty upon which the claim is based.

This reasoning partly explains why IIAs are deemed to limit host countries' right to regulate. Legitimate public policies, such as environmental or health measures, are implemented through domestic regulations either of a general nature (such as the decision to prohibit certain products deemed dangerous for human health) or targeted to a single investor or situation (such as the withdrawal of a license). This in turn will be assessed against the standards of treatment contained in the applicable IIA, such as the standards of Fair and Equitable Treatment ("FET"),<sup>15</sup> Most-Favored Nation ("MFN"),<sup>16</sup> National Treatment ("NT"),<sup>17</sup> or the protection against unlawful expropriation. By inserting clauses seeking to safeguard some level of regulatory space, host states not only aim to decrease the likelihood that challenges will be brought against legitimate public interest measures, but also seek to improve the interplay between domestic regulatory measures and their respective commitments under international law.

As noted by UNCTAD, although "old treaties" still represent the majority of IIAs in force today,<sup>18</sup> many new IIAs contain sustainable development

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<sup>15</sup> The FET standard is one of the most important standards of treatment in IIAs. See NEWCOMBE & PARADELL, *supra* note 1, at 255 ("IIA tribunals have interpreted fair and equitable treatment as providing a wide range of procedural and substantive protections, including the protection of legitimate expectations.").

<sup>16</sup> MFN treatment obligations in international investment law "require[s] that state conduct does not discriminate between similarly situated persons, entities, goods, services or investments of different foreign nationalities." NEWCOMBE & PARADELL, *supra* note 1, at 193.

<sup>17</sup> A NT clause is defined as "[a] provision contained in some treaties . . . according foreigners the same rights . . . as those accorded to nationals." *National-Treatment Clause*, BLACK'S LAW DICTIONARY (10th ed. 2014). "The purpose of the national treatment obligation in IIAs is to prohibit nationality-based discrimination by the host state between the host states' investors and investments and those of another IIA party." NEWCOMBE & PARADELL, *supra* note 1, at 150–51.

<sup>18</sup> WORLD INVESTMENT REPORT 2017, *supra* note 14, at xii. According to UNCTAD's World Investment Report 2017, "old" investment treaties (signed before 2010) represent 95% of the IIAs in force today." *Id.* These treaties "bite," according to UNCTAD, given that by the end of 2016, "virtually all of the known treaty-based ISDS cases had been filed pursuant to treaties concluded before 2010, which typically feature broad and vague formulations and include few exceptions or safeguards." *Id.* This prompted the launch of phase two of UNCTAD's *Roadmap for IIA Reform*, aimed at "modernizing the existing stock of old-generation treaties." UNCTAD, *Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties*, IIA ISSUES NOTE, June 2017, at 1. UNCTAD presented and analyzed several options for Phase 2 of IIA reform:

mind elements.<sup>19</sup> Provisions inserted in IIAs to safeguard host countries' regulatory space include: (i) references in the preamble to provide guidance to tribunals when interpreting treaty provisions;<sup>20</sup> (ii) clauses explicitly referring to a host state's right to regulate; (iii) exclusions and language clarifications;<sup>21</sup> and (iv) GECs, often modeled on the General Agreement on Tariffs and Trade ("GATT") Article XX and, more generally, any mechanism used to justify a conduct that would otherwise qualify as a violation of the IIA.<sup>22</sup> In

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(1) jointly interpreting treaty provisions; (2) amending treaty provisions; (3) replacing "outdated" treaties; (4) consolidating the IIA network; (5) managing relationships between coexisting treaties; (6) referencing global standards; (7) engaging multilaterally; (8) abandoning unratified old treaties; (9) terminating existing old treaties; and (10) withdrawing from multilateral treaties. Countries can adapt and adopt these options to pursue the reforms set out in the Road Map in line with their policy priorities.

WORLD INVESTMENT REPORT 2017, *supra* note 14, at xii.

<sup>19</sup> WORLD INVESTMENT REPORT 2017, *supra* note 14, at 119.

<sup>20</sup> *Id.* at 122. According to UNCTAD, although only 8% of earlier IIAs (1959–2010) contained references to health and safety, labor rights, environment or sustainable development in their preambles, this ratio has increased to 56% in most recent BITs (2011–2016). *See id.*

<sup>21</sup> See Camille Martini, *Balancing Investors' Rights with Environmental Protection in International Investment Arbitration: An Assessment of Recent Trends in Investment Treaty Drafting*, 50 INT'L LAW. 529, 574–76 (2017) (discussing language clarifications and exclusions in recent IIAs). These exclusions do not include certain measures from the scope of a given provision or from the entire scope of the treaty, thereby limiting the extent to which regulatory measures can result in a violation of the standards of protection. Relevant examples of exclusions include the Essential Security Exception clause contained in the North American Free Trade Agreement as well as the taxation carve-out contained in Article 21(1) of the Energy Charter Treaty. *See* North American Free Trade Agreement, art. 2102, Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 [hereinafter NAFTA]; Energy Charter Treaty, art. 21(1), Dec. 17, 1994, 34 I.L.M. 360 [hereinafter ECT]. For an example of a language clarification, in the context of an indirect expropriation clause, see Agreement Between Japan and the Republic of Peru for the Promotion, Protection, and Liberalisation of Investment, Annex IV, Japan-Peru, Nov. 21, 2008, <https://www.mofa.go.jp/region/latin/peru/agree0811.pdf> [<https://perma.cc/W3EF-WKW5>]. Language clarifications can also take the form of more carefully drafted definitions of covered investment or investor. *See* WORLD INVESTMENT REPORT 2017, *supra* note 14, at 122.

<sup>22</sup> Mark Wu, *The Scope and Limits of Trade's Influence in Shaping the Evolving International Investment Regime*, in THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 169, 198 (Zachary Douglas et al. eds., 2014). Some provisions, although labeled as general exceptions, do not seek to justify conduct that would otherwise qualify as a violation of the IIA, but merely reaffirm the host state's ability to implement measures that are consistent with the treaty. Given their limited impact in practice, these provisions may be assimilated to those reaffirming the host state's right to regulate. *See*, for instance, Annex I, Section III(1) of the Canada-Peru BIT. Agreement Between the Government of Canada and the Government of Peru for the Promotion and Protection of Investments, Annex 1, Can.-Peru, Mar. 18, 1998, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/626> [<https://perma.cc/RUE2-LX8Z>] ("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."). The International Centre for the Settlement of Investment

addition, there is a theory that host states could introduce their legitimate expectations in IIAs to balance the interests of both host states and investors.<sup>23</sup> To illustrate these new trends, recent model bilateral investment treaties (“BITs”) published in 2015 by Brazil,<sup>24</sup> Norway,<sup>25</sup> and India,<sup>26</sup> contain innovative features that will be used as the basis for upcoming treaty negotiations, possibly shaping the practice of tomorrow’s international investment law.<sup>27</sup>

A recent increase in the occurrence of GECS poses many interpretive and theoretical challenges.<sup>28</sup> As such, for the sake of concision, this Essay

Disputes had an opportunity to clarify the meaning of this provision in *Infinito Gold Ltd. v. Republic of Costa Rica*. See ICSID Case No. ARB/14/5, Decision on Jurisdiction, ¶ 358 (Dec. 4, 2017) (“As is obvious from its plain language quoted above, this provision sets out guidelines regarding the content of measures that may be adopted, maintained or enforced by the host state. It does not relate to the State’s consent to arbitrate, nor to whether a claim can be heard or not; it relates to whether a particular measure has or has not breached the BIT. Accordingly, it cannot be deemed a matter of jurisdiction or admissibility; it must properly be regarded as a matter for the merits.”). A tribunal has nonetheless given a greater interpretive weight to a similar clause, noting:

[The] principle [of a state’s police powers to enforce existing laws] is given even greater force in the present context by Article 10.10 of the US–Oman FTA, which, it will be recalled, provides specifically that neither party shall be constrained from “enforcing any measure . . . it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.”

Adel A Hamadi Al Tamimi v. Sultanate of Oman, ICSID Case No. ARB/11/33, Award, ¶ 445 (Nov. 3, 2015).

<sup>23</sup> See Karl P. Sauvant & Güneş Ünüvar, *Can Host Countries Have Legitimate Expectations?*, COLUM. FDI PERSPECTIVES, No. 183, at 2 (2016). This theory could help mitigate the asymmetry in IIAs standards of protections, but it needs to be further explored as it has only been discussed by two scholars. See *id.* (discussing the theory of using states’ legitimate expectations in balancing IIAs).

<sup>24</sup> See Cooperation and Facilitation Investment Agreement Between the Federative Republic of Brazil and [Country] (2015), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/4786> [<https://perma.cc/9WR6-Q6JK>] (Brazil Model BIT).

<sup>25</sup> See Agreement Between the Kingdom of Norway and [Country] for the Promotion and Protection of Investments (2015), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3350> [<https://perma.cc/PH2A-CD7X>] (Norway Model BIT).

<sup>26</sup> See Bilateral Investment Treaty Between the Government of the Republic of India and [Country] (2015), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3560> [<https://perma.cc/CCA7-S845>] (India Model BIT).

<sup>27</sup> In fact, Brazil’s Model BIT has led to the incorporation of similar provisions in subsequent investment treaties. See, e.g., Agreement for Cooperation and Facilitation of the Investments Between the Federative Republic of Brazil and the United States of Mexico, Braz.-Mex., May 26, 2015, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/4718> [<https://perma.cc/6PP6-WD68>]; Investment and Cooperation and Facilitation Agreement Between the Federative Republic of Brazil and the Republic of Chile, Braz.-Chile, Nov. 24, 2015, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/4712> [<https://perma.cc/B2AU-6PCZ>].

<sup>28</sup> See WORLD INVESTMENT REPORT 2017, *supra* note 14, at 119 (“A review of 18 IIAs concluded in 2016 for which texts are available . . . shows that most of them include provisions safeguarding the right to regulate for sustainable development objectives . . . . *Of these 18 agreements, 9 have general exception—for example, for the protection of human, animal or plant life or health,*

will focus on the implementation of GECs modeled on Article XX of the GATT,<sup>29</sup> which raise many interpretive issues not yet analyzed by arbitral case law.<sup>30</sup> Other mechanisms, such as exclusions, or “carve-out” provisions,<sup>31</sup> will be evoked for comparison purposes.

International law practitioners have increasingly acknowledged the benefit of GECs in IIAs.<sup>32</sup> Nevertheless, doubts regarding the actual added value of these provisions in practice remain. These critiques include: (i) the risk that extensive phrasing could enable host states to implement protectionist measures; (ii) the risk that GECs fall short of providing additional regulatory flexibility to implement public policy measures; (iii) the fact that arbitral tribunals have to some extent already incorporated host states’ right to regulate in the interpretation of traditional standards of protection;<sup>33</sup> in sum, that GECs are redundant,<sup>34</sup> create uncertainty in investment disputes, and may even render inoperative existing safeguards as construed by the arbitral practice.<sup>35</sup>

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*or the conservation of exhaustible natural resources.* Another 11 explicitly recognize that the parties should not relax health, safety or environmental standards to attract investment; and 12 refer to the protection of health and safety, labour rights, the environment or sustainable development in their preambles.” (emphasis added)).

<sup>29</sup> See General Agreement on Tariffs and Trade, art. 20, Oct. 30, 1947, 61 Stat. pt. 5, 55 U.N.T.S. 194 (“Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health. . . .”).

<sup>30</sup> See NEWCOMBE & PARADELL, *supra* note 1, at 503.

<sup>31</sup> See generally Caroline Henckels, *Scope Limitations or Affirmative Defenses: The Purpose and Role of Investment Treaty Exception Clauses*, in EXCEPTIONS IN INTERNATIONAL LAW (Federica Paddeu & Lorand Bartels eds.) (forthcoming 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2801950](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2801950) (discussing the purpose and use of exemption clauses and carve-outs).

<sup>32</sup> See *supra* note 18 and accompanying text. *But see* SORNARAJAH, *supra* note 6, at 262–63.

<sup>33</sup> See, e.g., *Técnicas Medioambientales Tecmed SA v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 122 (May 29, 2003) (recalling the “due deference [owed] to the State when defining the issues that affect its public policy or the interests of society as a whole,” and determining of whether such measures were “reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation”); see also *Martini*, *supra* note 21, at 581–82. New provisions inserted in IIAs and the solutions developed by several tribunals have common features, such as the implementation of a proportionality test to balance host states’ public interest and the assessment of the impact on the investor’s interests. See ARNAUD DE NANTEUIL, *L’EXPROPRIATION INDIRECTE EN DROIT INTERNATIONAL DE L’INVESTISSEMENT* 482–89 (2014).

<sup>34</sup> See, e.g., *Copper Mesa Mining Corp. v. Republic of Ecuador*, PCA No. 2012-2, Award, ¶ 6.67 (Mar. 15, 2016) (noting the inapplicability of a GEC in the Canada-Ecuador BIT that had been modeled on Article XX of the GATT).

<sup>35</sup> See *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/2, Award, ¶¶ 473–474 (Nov. 30, 2017). In *Bear Creek Mining Corp.*, the tribunal stated:

Despite the scarcity of arbitral cases applying GECs, some recent cases have shed light on how tribunals would interpret the clauses, and what hurdles these provisions may face before being successfully implemented. This article will discuss practical aspects of the implementation of general exceptions in the context of an alleged violation of the standard of fair and equitable treatment and the protection against expropriation. It will seek to demonstrate that, although general exceptions often require the host country to refrain from any discriminatory or arbitrary behavior in order to be applicable, this requirement is ill-adapted to violations of the FET and expropriation standards, rendering the provision inoperative in most cases. The extent to which GECs can successfully be applied will also be analyzed. By identifying the potential implementation challenges that face GECs, this article aims to enable policymakers to better take into consideration these challenges in order to negotiate more effective general exception mechanisms, avoiding the anticipated obsolescence of modern IIAs.

## II. THE NON-ARBITRARY AND NON-DISCRIMINATORY CONDUCT REQUIREMENT OF GENERAL EXCEPTION CLAUSES IS ILL-ADAPTED TO THE FAIR AND EQUITABLE TREATMENT AND EXPROPRIATION STANDARDS

General exceptions modeled on Article XX of the GATT usually allow a host state to justify, in limited subject areas, conduct that would otherwise represent a violation of the treaty as long as said conduct is non-discriminatory, and not a disguised restriction on investment or trade.<sup>36</sup> Similarly to what has been developed in the World Trade Organization (“WTO”) frame-

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[T]he list [contained in the general exception clause of the applicable FTA] is not introduced by any wording (e.g. “*such as*”) that could be understood that it is only exemplary. It must therefore be understood to be an exclusive list . . . [T]he interpretation of the FTA must lead to the conclusion that no other exceptions from general international law or otherwise can be considered applicable in this case.

*Id.* ¶ 473. On this basis the tribunal found that the police powers exception was not applicable: “There is, thus, no need to enter into the discussion between the Parties regarding the jurisprudence concerning any police power exception for measures addressed to investments.” *Id.* ¶ 474.

<sup>36</sup> See, e.g., Model Bilateral Investment Treaty, Can., art. 10., <https://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf> [<https://perma.cc/ZQ6H-CQC6>] (“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.”).

work,<sup>37</sup> arbitral tribunals must follow a two-step analysis to determine the applicability of similar general exceptions. First, the measure must fulfill the requirements contained in the article’s “chapeau” (for example, not representing an “arbitrary or unjustifiable discrimination” between investors or investments,<sup>38</sup> or not being applied in an “arbitrary or unjustifiable manner”).<sup>39</sup> Second, the measure must be necessary to meet one of the enumerated exceptions, meaning that there would be no other alternative to fulfill the policy objective.<sup>40</sup> The requirement that a measure is non-arbitrary and non-discriminatory represents in the international investment law framework an important hurdle that prevents, in most cases, the GECs from being successfully implemented by arbitral tribunals, thus limiting the potential impact of these clauses in practice.

### *A. General Exception Clauses and the Fair and Equitable Treatment Standard*

The first limitation of GECs in the context of the FET standard is that the requirement of non-discrimination and non-arbitrariness prevents exceptions from being applied to justify a measure that would fall below the minimum standard of treatment prescribed under customary international law.<sup>41</sup>

In 2009, in *Glamis Gold Ltd. v. United States of America*, the tribunal defined the content of the minimum standard of treatment with reference to the 1926 case of *L.F.H. Near v. United Mexican States*.<sup>42</sup> It is quite easy to

<sup>37</sup> See World Trade Organization Secretariat, *WTO Rules and Environmental Policies: GATT Exceptions*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/envir\\_e/envnt\\_rules\\_exceptions\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/envnt_rules_exceptions_e.htm) [<https://perma.cc/W3Y6-K8J7>] (emphasizing the two-step process required under Article XX of the GATT); see also Spears, *supra* note 2, at 1062–63 (summarizing the WTO Appellate Body’s approach to interpreting GECs).

<sup>38</sup> See, e.g., Free Trade Agreement Between the European Union and the Socialist Republic of Vietnam, ch. VII, E.U.-Viet., Sept. 24, 2018, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> [<https://perma.cc/X92L-J82J>].

<sup>39</sup> Agreement Between the Government of Canada and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments, art. XVII, Can.-Ecuador, Apr. 29, 1996, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/609> [<https://perma.cc/82Z3-D9KY>] [hereinafter Canada-Ecuador BIT].

<sup>40</sup> See NEWCOMBE & PARADELL, *supra* note 1, at 505; NAFTA, *supra* note 21, art. 1102.

<sup>41</sup> Andrew Newcombe, *General Exceptions in International Investment, in SUSTAINABLE DEVELOPMENT*, *supra* note 4, at 351, 369.

<sup>42</sup> See *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, ¶ 616 (June 8, 2009) (referencing *L.F.H. Near v. United Mexican States*, 4 R.I.A.A. 60 (U.S.-Mex. Gen. Claims Comm’n 1926) (stating “the fundamentals of the *Neer* standard thus still apply today: to violate the customary international law minimum standard of treatment codified in Article 1105 of the [NAFTA], an act must be sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a mani-

understand, in light of this definition of the minimum standard of treatment, why GECs could not be successfully applied in cases where this minimum standard is breached. As general exceptions only come into play after a finding that a measure is contrary to the treaty standard (here, the FET standard construed as the minimum standard of treatment), the finding of a violation would automatically preclude the application of an exception clause. In other words, if an exception may produce effects only if a state's behavior is non-arbitrary and non-discriminatory, one may hardly see how the exception could apply to justify a behavior with the *precise* attribute of, in the words of the *Glamis Gold Ltd.* tribunal, being a "manifest arbitrariness, blatant unfairness, complete lack of due process or evident discrimination."<sup>43</sup> In any case, it may not be desirable (or achievable) for a host country to justify resorting to a general exception mechanism to permit conduct that would otherwise be a violation of the minimum standard of treatment to foreigners under customary international law.

Upon a finding that the FET standard is equivalent to the minimum standard of treatment,<sup>44</sup> a GEC found in the applicable IIA cannot be invoked to justify a violation of the FET standard. Where the tribunal holds otherwise, *i.e.* that under the applicable IIA, the FET standard is broader than the minimum standard of treatment,<sup>45</sup> or that the standard itself has evolved,<sup>46</sup> there is a possibility that a GEC could permit conduct that would otherwise be prohibited by treaty. The exception clause would not impact the tribunal's interpretation of the FET standard as such, but would rather prevent the tribunal from applying a broad interpretation of this standard to the particular public policy measure at stake. In this situation, an exception clause could well be applied to justify a measure that would otherwise constitute a violation of the FET standard when the arbitral tribunal would give the

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fest lack of reasons—so as to fall below accepted international standards and constitute a breach of Article 1105(1)").

<sup>43</sup> *Id.*

<sup>44</sup> *See, e.g.,* El Paso Energy Int'l Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Award, ¶ 337 (Oct. 31, 2011); *Glamis Gold, Ltd.*, ¶ 616; Cargill, Inc. v. United Mexican States, ICSID Case No. ARB(AF)05/02 (NAFTA), Award, ¶¶ 284, 286 (Sept. 18, 2009); Rumeli Telekom A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, ¶ 611 (July 29, 2008); Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, ¶ 592 (July 24, 2008).

<sup>45</sup> *See, e.g.,* Compañía de Aguas del Aconquija S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award, ¶ 7.4.7 (Aug. 20, 2007); Enron Creditors Recovery Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, ¶ 258 (May 22, 2007); Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶ 368 (July 24, 2006); Int'l Thunderbird Gaming Corp. v. United Mexican States, UNCITRAL, Award, ¶ 194 (Jan. 26, 2006).

<sup>46</sup> *See, e.g.,* Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Award, ¶ 299 (Feb. 6, 2007).

standard a broader acceptance, for instance encompassing the protection of the investor's legitimate expectations<sup>47</sup> or the requirements of transparency or proportionality.<sup>48</sup> In any event, the tribunal's finding that the measures at issue are discriminatory or arbitrary would prevent the successful implementation of the exception.<sup>49</sup>

Paradoxically, the effective implementation of GECs in the context of FET violations would require a tribunal, after adopting a broad interpretation of this standard, to then refrain from implementing a restrictive approach in the assessment of the GEC.

### B. General Exception Clauses in Expropriation Cases

The high threshold GECs impose may present difficulties regarding (i) their application in cases of unlawful expropriations for lack of due process, lack of public interest or discriminatory treatment, even where one of the enumerated exceptions (e.g., the protection of human, animal, or plant life) is present; and (ii) their effect, on the amount to be paid in case of unlawful expropriations for lack of compensation only.

First, as illustrated by the 2016 Permanent Court of Arbitration ("PCA") case *Copper Mesa Mining Corp. v. Ecuador*, brought pursuant to the Canada-Ecuador BIT of 1996,<sup>50</sup> the requirement of a non-discriminatory and non-arbitrary measure contained in the "chapeau" of the article may preclude the

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<sup>47</sup> See *Suez, Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 222 (July 30, 2010) (defining legitimate expectations as "certain expectations about the nature of the treatment that [the investor] may anticipate from the host State"); *MTD Equity Sdn. Bhd. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, ¶ 69 (Mar. 21, 2007) (evoking the "legitimate expectations generated as a result of the investor's dealings with the competent authorities of the host State . . ."); *Técnicas Medioambientales Tecmed, S.A.*, ¶ 154 (May 29, 2003) (referring to the "basic expectations that were taken into account by the foreign investor to make the investment"); *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, ¶ 611 (Sept. 13, 2001) (holding that changes to the [television industry's] regulatory framework of the host state constituted an "evisceration of the arrangements in reliance upon [which] the foreign investor was induced to invest").

<sup>48</sup> See, e.g., *Occidental Petroleum Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, ¶¶ 402–404 (Oct. 5, 2012); *Cargill, Inc.*, ¶ 511.

<sup>49</sup> In addition, a GEC would arguably fall short of justifying a violation of the FET standard for breach of good faith. See, e.g., *UAB E Energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award, ¶ 839 (Dec. 22, 2017) (holding that good faith is generally regarded as a fundamental part of the FET standard of protection).

<sup>50</sup> See *Copper Mesa Mining Corp. v. Republic of Ecuador*, PCA Case No. 2012-2, Award (Mar. 15 2016). After Ecuador had initiated annulment proceedings before the District Court of The Hague and Copper Mesa Mining Corp. had filed a petition to confirm the award in the U.S. District Court for the District of Columbia, the two parties entered into a settlement agreement on July 19, 2018, pursuant to a joint motion dated July 25, 2018. See generally *Copper Mesa Mining Corp. v. Republic of Ecuador*, No. 1:17-cv-0394 (TNM) (D.D.C. July 25, 2018).

application of the exception clause in cases of expropriation where the requirements of due process and/or of a non-discriminatory measure have not been met.<sup>51</sup>

The *Copper Mesa Mining Corp.* case arose from the Republic of Ecuador's termination of three concession contracts (respectively situated at Junín, Chaucha and Telimbela, in Ecuador).<sup>52</sup> The claimant in the case argued that the Republic of Ecuador had unlawfully revoked or terminated the contracts, thereby violating its international obligations under the FET, full protection and security, NT, and expropriation standards contained in the BIT.<sup>53</sup> The Republic of Ecuador specifically argued that the contested measures (the 2008 Mining Mandate, the 2009 Mining Law, and the Termination Resolutions) were a justified exercise of its police powers and part of a legitimate reform of its mining legal framework.<sup>54</sup> The measures, according to the tribunal, did not constitute an expropriation.<sup>55</sup> Ecuador argued that, even if these measures were, in effect, expropriation, they did not qualify as breaches of the IIA because they fell under the general exception provided by Article XVII(3) of the BIT.<sup>56</sup> *Copper Mesa Mining Corp.* is the first reported investment case in which the host state articulated a defense based on a GEC inserted in the applicable IIA.<sup>57</sup> The claimant answered that the host state's measures were applied "in an arbitrary and unjustifiable man-

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<sup>51</sup> Canada-Ecuador BIT, *supra* note 39, art. XVII ("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." (emphasis added)). A similar conclusion would most likely be reached in case of a violation of the MFN and NT standards, as such violation would imply a finding of a discriminatory action.

<sup>52</sup> *Copper Mesa Mining Corp.*, ¶ 1.8.

<sup>53</sup> *Id.* ¶ 1.71.

<sup>54</sup> *Id.* ¶ 6.2.

<sup>55</sup> *Id.* ¶ 6.9 (holding "it is well established under international law that a non-discriminatory regulation, adopted for a public purpose and enacted in accordance with due process, does not amount to expropriation, and even less, to unfair and inequitable treatment").

<sup>56</sup> *Id.* ¶ 6.14.

<sup>57</sup> Jarrod Hepburn, *In-Depth: In Copper Mesa Case, Jurisdictional Objections Were Waved Away; Ecuador Breaches BIT Due to Failure to Protect Investor from Protesters*, IA REPORTER (June 5, 2016), <https://www.iareporter.com/articles/in-depth-in-copper-mesa-case-jurisdictional-objections-were-waved-away-ecuador-breaches-bit-due-to-failure-to-protect-investor-from-protesters/> [<https://perma.cc/GS94-RU4V>] ("Notably, the *Copper Mesa* case appears to be the first in which a state has sought to rely on a general exceptions clause, which—although relatively often found in Canada's BITs—remain otherwise rare.").

ner” and that, as a consequence, the GEC was inapplicable to its claims for expropriation.<sup>58</sup>

The *Copper Mesa Mining Corp.* tribunal, reaching the assessment of the lawfulness of the measure at hand, found that the expropriation was unlawful given that it: (i) amounted to substantial deprivation;<sup>59</sup> (ii) was “made in an arbitrary manner and without due process”;<sup>60</sup> and (iii) was effectuated without providing compensation to the investor.<sup>61</sup> Following the finding that the expropriation was unlawful, the tribunal turned to the GEC’s application, the Republic of Ecuador’s subsidiary argument. After characterizing the state’s measures as “made in an arbitrary manner and without due process,” the Tribunal concluded that the GEC contained in Article XVII(3) of the Canada-Ecuador BIT was inapplicable “given its introductory proviso,”<sup>62</sup> provided that only measures not “applied in an arbitrary or unjustifiable manner”<sup>63</sup> could fall within the scope of the exception.

*Copper Mesa Mining Corp.* illustrates that GECs are ill-adapted to provide a carve-out in case of expropriation measures that violate the due process requirement of a lawful expropriation. The case also provides support to a similar conclusion in situations where the expropriation measure is discriminatory or not taken in the public interest. It seems doubtful that a tribunal could hold that an expropriation measure, deemed unlawful because it discriminated against a foreign investor, could still fulfill the requirements of the exception clause and thus be considered as not applied in an arbitrary or unjustifiable manner. Moreover, if the expropriation measure was not taken in the public interest, it is not the “chapeau” itself that would prevent the GEC’s application, but the second requirement contained in the exception clause—that the unlawful measure be necessary to meet one of the enumerated public policy concerns.<sup>64</sup> The “public interest” condition of a lawful expropriation is arguably broader than the closed list of public policy concerns contained in the exception clause; therefore it is again doubtful that an expropriation measure deemed unlawful could ever fulfill the public policy requirement of the exception clause.

In the context of an unlawful expropriation, the absence of one of three conditions of a lawful expropriation (*i.e.*, public interest, due process and

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<sup>58</sup> *Copper Mesa Mining Corp.*, ¶ 6.17.

<sup>59</sup> *Id.* ¶ 6.59.

<sup>60</sup> *Id.* ¶ 6.56 (“[T]he Termination Resolutions were implemented . . . without any effective opportunity for the Claimant to appeal . . . before any administrative or judicial organ competent to hear and decide such an appeal on its merits within the Ecuadorian legal system.”).

<sup>61</sup> *Id.* ¶ 6.67.

<sup>62</sup> *Id.*

<sup>63</sup> Canada-Ecuador BIT, *supra* note 39, art. XVII.

<sup>64</sup> See *supra* notes 42–47 and accompanying text.

non-discrimination) almost automatically precludes the application of a GEC.<sup>65</sup> On the one hand, it seems legitimate that exception mechanisms could not act to justify an otherwise discriminatory or arbitrary behavior by the host state. On the other hand, the *Copper Mesa Mining Corp.* case illustrates that an arbitral tribunal could easily find a GEC inapplicable based on the threshold contained in its “chapeau”.<sup>66</sup> The *Copper Mesa Mining Corp.* tribunal, indeed, found a violation of due process; the explanations provided by the tribunal, however, were rather succinct.<sup>67</sup> What meaning should be given to the non-discriminatory and non-arbitrary behavior contained in the exception, and is it necessarily the same meaning as the due process requirement of an expropriation? The tribunal provided no explanation whatsoever, did not draw any parallel with WTO case law, and did not even interpret the exception clause before qualifying it as “inapplicable.”<sup>68</sup> In this respect, the case illustrates that tribunals have extensive discretion to make determinations on the application of the GECs. For instance, in cases of targeted measures (such as the withdrawal of a license or a concession) for motives peculiar to a given investor, it is uncertain how tribunals would assess whether such behavior is discriminatory, arbitrary, or unjustifiable. This reinforces the idea that general exception mechanisms contained in future investment treaties need to be carefully drafted and tailored to the specificities of investment law, instead of being imported “as is” from trade law.

Another difficulty GECs caused in cases of unlawful expropriations concerns the scope of their application. More specifically, the concern was whether these provisions could provide a basis to exclude the qualification of an act as expropriatory altogether or, at most, render an otherwise unlawful expropriation lawful.<sup>69</sup>

One practical consequence of this uncertainty surrounding the scope of exception clauses relates to the question of compensation in unlawful expropriations. It seems doubtful that a GEC could completely relieve a state of any obligation to pay an investor compensation in case of expropriation.<sup>70</sup> As explained below, however, these clauses could play a key role in

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<sup>65</sup> The fourth condition traditionally contained in IIAs, the payment of compensation, is discussed below. See *infra* 74–82 and accompanying text.

<sup>66</sup> See *Copper Mesa Mining Corp.*, ¶ 6.67.

<sup>67</sup> See *id.*

<sup>68</sup> See *id.*

<sup>69</sup> See Martini, *supra* note 21, at 580.

<sup>70</sup> See NEWCOMBE & PARADELL, *supra* note 1, at 505–06 (stating “[i]t would be surprising if, by effect of general exceptions, parties to IIAs intended to provide less protection to foreign investors that that accorded under customary international law; thus if the exception does not prevent a finding of expropriation (because the measure is a direct expropriation) presumably it cannot exclude payment for compensation”).

reducing the amount paid by excluding the possibility that the host state must provide for reparation under customary international law.

There is a growing trend in investment cases to grant full reparation under customary international law upon a finding of unlawful expropriation, instead of “compensation” as required in the applicable IIA.<sup>71</sup> The common rationale is that treaty provisions on compensation only describe the standard of compensation in case of lawful expropriation and do not define the standard in case of unlawful expropriation.<sup>72</sup> Several tribunals and scholars have expressed a contrary view: that the treaty standard for compensation should be applied in any circumstances, regardless of whether the expropriation was found lawful or not by the tribunal.<sup>73</sup> According to this view, the treaty standard is construed as *lex specialis*, applicable in all cases of expropriation, and therefore preempts the application of international custom-

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<sup>71</sup> See IRMGARD MARBOE, *CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW* 78–79 (2d ed., 2017) (“Recent practice of international investment tribunals has also come to the same conclusion [including an increase in value of unlawfully expropriated property]. It appears that the distinction between ‘compensation’ for lawful expropriation and ‘damages’ for unlawful expropriations becomes increasingly more accepted. The ICSID Tribunal in *ADC v. Hungary*, for instance, . . . pointed out that, in cases of unlawful expropriations, the standard of compensation contained in the applicable investment protection treaty [was] not decisive but, instead, customary international law should be applied . . . . Similarly, the ICSID Tribunal in *Siemens v. Argentina* emphasized the difference between compensation and damages in expropriation cases and clarified its importance . . . . The idea that compensation is due in case of lawful expropriations and damages in case of unlawful expropriations, thus seems to gain ground in recent investment arbitration practice.”); see also Meg Kinnear, *Damages in Investment Treaty Arbitration*, in *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* 551, 557–60 (Katia Yannaca-Small ed., 2010).

<sup>72</sup> See, e.g., *Burlington Res. Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, ¶ 160 (Feb. 7, 2017) (“The appropriate standard of compensation in this case [of unlawful expropriation] is the customary international law standard of full reparation. Article III(1) only describes the conditions under which an expropriation is considered lawful; [and] it does not set out the standard of compensation for expropriations resulting from breaches of the Treaty.”); *Quiborax S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, ¶ 326 (Sept. 16, 2015); *Yukos Universal Ltd. (Isle of Man) v. Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award, ¶¶ 1758–1759, 1826 (July 18, 2014); *ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits, ¶¶ 342–343 (Sept. 3, 2013); *ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, ¶ 481 (Oct. 6, 2006).

<sup>73</sup> See, e.g., *Sistem Mühendislik Inaat Sanayi ve Ticaret A. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, ¶¶ 121, 156 (Sept. 9, 2009); *Técnicas Medioambientales Tecmed, S.A.*, ¶¶ 187, 189; *Middle East Cement Shipping & Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, ¶ 107 (Apr. 12, 2002); *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, ¶ 118 (Dec. 8, 2000); Audley Sheppard, *The Distinction Between Lawful and Unlawful Expropriation*, in *INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY* 169, 196–97 (Clarisse Ribeiro ed., 2006); see also Christina L. Beharry, *Lawful Versus Unlawful Expropriation: Heads I Win, Tails You Lose*, in *9 INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW* 185, 192 (Ian A. Laird et al. eds., 2016) (“[A]ccording to another view, . . . BITs contain *lex specialis* that is applicable to all cases of expropriation.”).

ary law as *lex generalis*, which would allow for full reparation in the place of compensation.<sup>74</sup>

The finding that the customary international law standard of full reparation applies instead of the treaty standard of compensation in cases of unlawful expropriations may have important consequences on the amount of damages awarded. In recent cases, arbitral tribunals did not hesitate, upon a finding that the reparation standard should apply, to award damages based on the valuation at the date of the award instead of fair market value at the date of the expropriation, thus awarding more in damages.<sup>75</sup> This trend is not the majority approach in light of the many other ISDS cases where the tribunal chose to conduct the valuation at the date of the expropriation.<sup>76</sup> This trend, is notable, however, because of its upward effect on the total damages awarded.<sup>77</sup>

GECs may play a key role in the future to prevent such an upward effect on total damages awarded. GECs, where found applicable, could prevent ar-

<sup>74</sup> See *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, ¶¶ 189–190 (June 29, 2010) (“In the present case, where the BIT provides the relevant treaty language, it is necessary first and foremost to apply the provisions of the BIT. Indeed, the Parties are in agreement that the BIT constitutes the applicable law. . . . Article 38 of the Statute of the ICJ lists ‘international conventions’ as a primary source of international law. It is not, however, primarily for this reason that the BIT has pre-eminence in the investor-state context of arbitration, but because the consent to submit to international dispute resolution is predicated on the very terms of the BIT.”).

<sup>75</sup> See, e.g., *Burlington Res. Inc.*, ¶ 326; *Quiborax S.A.*, ¶¶ 370–371; *ConocoPhillips Petrozuata B.V.*, ¶ 401 (in which the tribunal accepted the principle that the award should be valued at the time of the tribunal's decision but did not reach decision on quantum); *ADC Affiliate Ltd.* ¶¶ 496–497, 499; *Yukos Universal Ltd.*, ¶¶ 1763, 1766–1767. In *Siemens A.G.*, although the tribunal decided that *ex post* information could be used in the valuation, it eventually proceeded to a damage calculation based on the information available at date of expropriation. See *Siemens A.G.*, ¶¶ 377, 379, 385.

<sup>76</sup> See *Quiborax S.A.*, Partially Dissenting Opinion of Arbitrator Stern, ¶¶ 43–44; see also MARK KANTOR, VALUATION FOR ARBITRATION 60, 65–66 (2008) (“By far, the common legal approach to calculating compensation values the impact of the injury as of the date of the harm. That approach, therefore, disregards events subsequent to the injury, whether positive or negative.”).

<sup>77</sup> This Essay does not seek to assess the legal merit of the different valuation approaches. For arguments in favor of a valuation at date of award using hindsight, see Manuel A. Abdala, Chorzów's *Standard Rejuvenated—Assessing Damages in Investment Treaty Arbitrations*, 25 J. INT'L ARB. 103, 111 (“In indirect expropriation and unjust treatment cases . . . it is often highly difficult for a panel to assess the precise measure . . . that triggered relevant loss in value. It is equally difficult to determine the expectations of the relevant players concerning the evolution of key variables at the time(s) the investment was affected . . . . In those cases, using *ex post* information on the evolution of these key variables may turn out to be the most reasonable assumption about the parties' *ex ante* information. The passage of time permits a direct insight and a more accurate representation as to the extent of the harm, and thus of the quantum of the damage.”). *Contra* Beharry, *supra* note 73, at 215 (“[T]here are legal and economic reasons to doubt the soundness of valuations based on the date of the award. The use of hindsight can create unbalanced and arbitrary outcomes and distorted incentives.”).

bitral tribunals from applying the full reparation standard in cases of unlawful expropriation. It is doubtful that an exception clause would permit host states to completely avoid payment of compensation. In cases where expropriation is deemed unlawful because no compensation is paid, or because the expropriation is not in the public interest,<sup>78</sup> however, the exception clause could lead tribunals to reduce the damages awarded, applying as a ceiling the fair market value of the investment at the date of the expropriation.

### III. LESSONS LEARNED FROM THE ARBITRAL PRACTICE AND A PATH FORWARD

The hurdles GECs faced as well as the scarcity of investment tribunals that have had the opportunity to apply them show the need to design more effective mechanisms.

GECs provide very limited room for host states to implement measures in the public interest. Namely, GECs may play a role in preventing: (i) the implementation of a broad interpretation of the FET standard including the protection of the legitimate expectations of the investor; and (ii) the award by tribunals of full reparations under customary international law, thereby inflating the amount paid to the investor. Although these two outcomes may prove non-negligible in the future, relying on general exceptions to achieve these results might not be the most effective path, for several reasons.

First, general exceptions are difficult to implement. Not only does the arbitral case law suggest that tribunals tend to apply exceptions narrowly,<sup>79</sup> but the two-pronged test GECs contain creates an additional hurdle for investment tribunals.<sup>80</sup> In this regard, the tribunal's reluctance in the 2016 PCA case, *Copper Mesa Mining Corp. v. Ecuador*, to provide an interpretation of the applicable GEC, is telling.<sup>81</sup> Although it might seem evident that arbitrary measures of a host state—qualified by the *Copper Mesa Mining Corp.* tribunal as “unreasonable” and “disproportionate” conduct—fall into the category of “arbitrary or unjustifiable” measures under the “chapeau,”

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<sup>78</sup> As previously explained, the “chapeau” of GECs is likely to prevent such finding in expropriation cases where the measure is either discriminatory or constituting a violation of due process principles. See *supra* note 51 and accompanying text.

<sup>79</sup> Newcombe, *supra* note 41, at 361–62. Even when tribunals interpret specific clauses in light of the treaty's object and purpose, this object and purpose is often limited to investment protection and promotion, and thus narrowly construed as well. See *id.*

<sup>80</sup> See NEWCOMBE & PARADELL, *supra* note 1, at 504 (discussing the two-pronged test for GECs).

<sup>81</sup> See *Copper Mesa Mining Corp.*, ¶ 6.84.

one would have expected the tribunal to at least elaborate on the threshold or definition of these terms.<sup>82</sup>

Second, the closed list of general exceptions that could excuse an otherwise unlawful behavior is generally construed narrowly and imported—often only in part—from trade law, with limited relevance to the issues raised in ISDS proceedings dealing with the movement of capital and investment activities. Such a list drastically reduces the scope and potential impact of the general exceptions given that the measure at issue needs to fit in one of the specific categories listed.

Third, GECs create uncertainty. The determination of what constitutes an “arbitrary” or “unjustified” behavior is not only uncertain, but it also rests fully in tribunals’ hands. The interpretation by arbitral tribunals of such broad notions remains unpredictable, which is not the result sought by implementing such a provision. The finding of the *Bear Creek Mining Corp. v. Republic of Peru* tribunal, which inferred from the applicable GEC that no other exceptions from general international law or otherwise—including the police powers theory—could be considered applicable,<sup>83</sup> is revealing in that respect.

Finally, GECs face additional hurdles applied by investment tribunals to limit the implementation of other types of exceptions and carve-out mechanisms. For instance, the implementation of GECs could be prevented through the application of a MFN clause, if the claimant seeks the application of a more favorable IIA signed by the host state (*i.e.* not containing such an exception).<sup>84</sup> Moreover, tribunals have applied a good faith requirement to deny the application of a treaty carve-out in certain circumstances, even if such requirement was not expressly construed by the applicable IIA. For instance, in the context of the taxation carve-out of the Ener-

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<sup>82</sup> *See id.*

<sup>83</sup> *Bear Creek Mining Corp.*, ¶¶ 473–474. The tribunal inferred from the applicable GEC that:

[T]he list [contained in the GEC] is not introduced by any wording (e.g. “*such as*”) which could be understood that it is only exemplary. It must therefore be understood to be an exclusive list. Also in substance, in view of the very detailed provisions of the FTA regarding expropriation . . . and regarding exceptions in Article 2201 expressly designated to ‘Chapter Eight (Investment),’ the interpretation of the FTA must lead to the conclusion that no other exceptions from general international law or otherwise can be considered applicable in this case . . . . There is, thus, no need to enter into the discussion between the Parties regarding the jurisprudence concerning any police power exception for measures addressed to investments.

*Id.*

<sup>84</sup> As pointed by the Working Group on Trade and Investment Law Reform, treaty negotiators will need to consider whether to “limit[] the potential effects of Most Favored Nation clauses to eviscerate more modern IIAs . . .” in the future. *See Garcia & Escarcena, supra* note 9.

gy Charter Treaty,<sup>85</sup> the *Yukos Universal Limited (Isle of Man) v. The Russian Federation* tribunal found that the carve-out could only apply to “*bona fide* taxation measures,” thereby upholding jurisdiction over the challenged measures, in light of the “extraordinary circumstances of th[e] case.”<sup>86</sup> Although the *Yukos* award was eventually set aside,<sup>87</sup> subsequent tribunals did not take long to follow the same approach.<sup>88</sup>

In light of the obstacles facing GECs, a more effective way to achieve the results explained above could be to narrow the scope of the standards of protection themselves, either by narrowing the scope of a given provision, such as the FET standard,<sup>89</sup> or by altering certain of their components, such as establishing the fair market value at the date of expropriation as a ceiling for recovery in cases of unlawful expropriations. This targeted approach provides, *ex ante*, more predictability to host states and foreign investors in the evaluation of their policies or investment decisions and, *ex post*, less uncertainty for investment tribunals assessing the lawfulness of a specific state conduct. Altering the scope of the standards themselves, instead of using general exceptions as a way to get around them, bears another important consequence. With altered standards, state conduct that would otherwise have been found unlawful under an IIA would not be merely justi-

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<sup>85</sup> ECT, *supra* note 21, art. 21(1) (“Except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties. In the event of any inconsistency between this Article and any other provision of the Treaty, this Article shall prevail to the extent of the inconsistency.”).

<sup>86</sup> *Yukos Universal Ltd.*, ¶ 1407 (“Secondly, the Tribunal finds that, in any event, the carve-out of Article 21(1) can apply only to *bona fide* taxation actions, *i.e.*, actions that are motivated by the purpose of raising general revenue for the State. By contrast, actions that are taken only under the guise of taxation, but in reality, aim to achieve an entirely unrelated purpose (such as the destruction of a company or the elimination of a political opponent) cannot qualify for exemption from the protection standards of the ECT under the taxation carve-out in Article 21(1). As a consequence, the Tribunal finds that it does indeed have ‘direct’ jurisdiction over claims under Article 13 (as well as Article 10) in the extraordinary circumstances of this case.”).

<sup>87</sup> Hague District Court, Judgment of 20 April 2016, ¶¶ 5.96–5.97.

<sup>88</sup> *See, e.g.*, *Novenergia II–Energy & Env’t (SCA), SICAR v. Kingdom of Spain*, SCC Case No. V2015/063, Final Award, ¶ 521–522 (Feb. 15, 2018); *Isolux Infrastructure Netherlands, BV v. Kingdom of Spain*, SCC Case No. V2013/153, Award, ¶ 729 (July 12, 2016) (both finding the carve-out applicable only to the extent the measure was issued in good faith, noting, however, that the burden of proving bad faith was on claimant); *see also Eiser Infrastructure Ltd. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, ¶ 268 (May 4, 2017).

<sup>89</sup> In fact, more recent IIAs tend to contain more detailed FET provisions. *See, e.g.*, The Comprehensive Economic and Trade Agreement (CETA), Can-E.U., art. 8.10(2), Oct. 30, 2016, [http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc\\_154329.pdf](http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf) [<https://perma.cc/CEB7-CXWP>] (containing a closed list of the measures that can constitute a breach of the obligation of fair and equitable treatment, thereby limiting the need to invoke to general exceptions). For an analysis of the opportunity of inserting exceptions in IIAs, as opposed to framing the relevant substantive obligations in a more precise manner, *see generally* Caroline Henckels, *Should Investment Treaties Contain Public Policy Exceptions?*, 59 B.C. L. REV. 2825 (2018).

fied by an exception clause, but instead perfectly lawful under the standard's altered scope, without shifting the burden of proof to the respondent with respect to the exception relied upon for its defense. This is a more efficient result for host states seeking to implement public policies, provided that those policies do not amount to an abuse of rights.

### CONCLUSION

In conclusion, there is a risk that GECs undermine the objectives of IIAs, without solving the underlying tension between the host states' domestic regulatory framework and traditional standards of protection subscribed by host states under international law. The inclusion of more balanced treaty provisions, however, provides more coherence to the international investment legal framework. They promote coherence by incorporating public concerns directly in the text of agreements and mitigating the asymmetry of IIAs,<sup>90</sup> without drastically impacting the structure and implementation of these agreements.

The development of these new provisions raises interpretation challenges, as it may be the case with any innovative mechanism. Policymakers have not yet successfully designed treaty mechanisms enabling host states to foster legitimate environmental and social policies without the fear of future ISDS challenges, and that would prevent abusive challenges against measures promoting public policy and sustainable development objectives, and limit the opportunities for protectionist or abusive measures by host states. GECs are, in their current form, a source of uncertainty rather than coherence and their impact on tribunals in their implementation of the traditional standards of protection is limited. The ongoing development of more

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<sup>90</sup> See, e.g., *Adel A Hamadi Al Tamimi*, ¶¶ 387, 440, 445–446, 458. The tribunal noted that:

[T]he US-Oman FTA places a high premium on environmental protection. It is uncontroversial that general principles of customary international law must be applied in the context of the express provisions of the Treaty. In the present case, *Article 10.10* [the applicable GEC] *expressly qualifies the construction of the other provisions of Chapter 10*, including *Article 10.5* [on the minimum standard of treatment]. *The wording of Article 10.10 provides a forceful protection of the right of either State Party to adopt, maintain or enforce any measure to ensure that investment is "undertaken in a manner sensitive to environmental concerns,"* provided it is not otherwise inconsistent with the express provisions of Chapter 10.

(emphasis added). *Id.* ¶ 387. It also held that "[i]t bears repeating that Article 10.10 and Chapter 17 of the US-Oman FTA [entitled 'Environment'], establish that a high threshold must be breached in the enforcement of a State's environmental laws and regulations before it can be considered a violation of Chapter 10 [on investment protection]." *Id.* ¶ 458. See Camille Martini, *supra* note 21, at 557–82 (discussing the trend among treaty negotiators towards more balanced IIAs).

detailed standards of protection as well as other types of provisions, such as references in the treaty's preamble to the sustainable development objectives of IIAs, does nonetheless represent a necessary step in the quest for a more transparent and sustainable model for investor-state dispute resolution.

