Much Ado About Nothing: The Case Against Replicating Article XX(g), GATT 1994 In International Investment Agreements

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A. Introduction

In 2019, the UN General Assembly President reminded the world of the uphill battle we face against climate change and the 11 short years available to us to prevent its

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irreversible effects.[1] The visible costs of human endeavours, especially economic activities, have spurred international, regional, and national regimes into action – all of which are experiencing an era of regulatory overhaul in a scramble to secure sustainable development. In this process, no discipline has escaped scrutiny. Of late, international investment law has also been confronted with the challenge to strike a balance between economic interests and environmentally sustainable growth. Reports suggest that over sixty disputes concerning environmental protection were brought before various investor-state tribunals between 2012 and 2017 alone[2] – as opposed to a mere four up until 2000 and 24 between 2000 and 2011.[3]

Presently, tribunals apply varied means and methods of treaty interpretation to balance concerns of investment protection against environmental interests.[4] However, the aforesaid proliferation of environmental issues in investment law, together with the heightened criticism against the lack of consistency in their interpretation,[5] compels more lasting change at a policy level. It is argued that arbitral tribunals show much more deference to a state's powers and the exercise thereof for regulatory purposes when presented with explicit treaty provisions.[6] Conversely, there has traditionally been a relative reluctance to balance the host states' *implicit or customary* right to regulate in the public interest against the rights of investors.[7] Accordingly, it is best to introduce reforms in the agreements that govern investment promotion and protection – that is, International Investment Agreements ("IIAs"). This exercise may also tempt more states to participate in the network of IIAs, by guaranteeing them the available policy space they need.

A popular suggestion in the legal literature to this end is the introduction of a 'General Exceptions Clause' ("GEC") in IIAs that mirrors the typology and structure of the WTO's General Agreement on Tariffs and Trade, 1994 ("GATT").[8] This suggestion is motivated by investment law's arguably close relationship with international trade law.[9] The present inquiry aims to assess the viability of this suggestion in the context of the salient features of international law on investment protection. To this end, **Section [B]** begins by exploring the WTO's jurisprudence on the conservation of exhaustible natural resources ("ENRs") and sustainable development. **Section [C]** considers the pros and cons of introducing a WTO-like ENR exception in IIAs. **Section [D]** offers concluding remarks on the way forward in this regard.

1 https://www.un.org/press/en/2019/ga12131.doc.htm (09/01/2020).
2 *Parlett/Ewad*, Protection of the Environment in Investment Arbitration – A Double Edged Sword, 22 August 2017, available at: http://arbitrationblog.kluwerarbitration.com/2017/08/22/protection-environment-investment-arbitration-double-edged-sword/ (11/01/2020).
3 *Luke*, in: Miles (ed.), p. 155.
4 *Newcombe*, General Exceptions in International Investment Agreements, 14 May 2008, available at: https://www.biicl.org/files/3866_andrew_newcombe.pdf (09/01/2020); *Hai Yen*, p. 227; *Moloo/Chao*, in: Bjorklund (ed.), p. 302.
5 *Gattini/Tanzi/Fontanelli*, p. 153; *Douglas/Pauwelyn/Viñuales*, p. 297.
6 *Burke-White/von Staden*, VJIL 2008/48, pp. 372–3; *Vandevelde*, LCR 2013/17, p. 457.
7 *Sweet*, LEHR 2010/4, pp. 63-64; *McLachlan/Shore/Weiniger*, pp. 22-23.
8 *Vandevelde*, LCR 2013/17, p. 455; *Lester/Mercurio*, IIELIB 2017/12, p. 3.
9 *Taniguchi/Ishikawa*, in: Julien Chaisse et al. (eds.), p. 73; *Vadi*, in: Radi (ed.), pp. 170-171.

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B. Environmental Protection in the WTO: An Overview

The Conservation of natural resources and the protection of the environment are significant prerogatives of the state. Environmental concerns ancillary to multilateral trade have been a subject of discussion since the GATT 1947 era.[10] During the genesis of the multilateral trading system, these were largely considered subsidiary to the interests of the trading community.[11] Conversely, with the focus on sustainable development in the new Preamble of the Agreement establishing the World Trade Organization ("WTO Agreement") and the consequent 'greening' of the GATT,[12] the cause of resource conservation has been substantially boosted. It has since been recognised that this cause cannot be compromised in the quest for trade liberalisation.[13] In this light, the WTO agreements introduce exceptions into their texts, aimed at the conservation of natural resources.[14] The present paper considers the most relevant of these exceptions – Article XX(g) GATT.

Notably, the WTO's General Agreement on Trade in Services ("GATS") does not contain an identical exception.[15] This exclusion has not proved material so far, since no environment-related service measure has been challenged for its inconsistency with the GATS yet.[16]

I. Preamble of the WTO Agreement

The most prominent acknowledgement of the importance of coordinating trade and environment policies can be found in the Preamble of the WTO Agreement. By "allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment",[17] the WTO Agreement's Preamble confirms the broad autonomy available to member states in determining their environmental policies, circumscribed only by

10 *Gómez*, EECCRDE 2009, p. 76; *Neuling*, LLAICLR 1999/22, p. 32.
11 *Condon*, p. 24.
12 *Charnovitz*, JIEL 2007/3, p. 687; *Dunkley*, p. 193.
13 *Wallach/Sforza*, p. 27; Agenda 21, § 2.19, UN Doc. A/CONF. 151/4 (1992), reprinted in 31 I.L.M. 881.
14 *Adinolfi/Baetens et al.*, p. 4; *Bernasconi-Osterwalder et al.*, p. 76.
15 *Moore*, p. 84.
16 *Charnovitz*, in: Lukauskas et al. (eds.), p. 904.
17 WTO Agreement, Preamble, Recital 1: "The Parties to this Agreement... Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.".

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their obligation to respect the GATT and other WTO agreements as much as possible.[18]

While this Preamble is not binding in the same way as the substantive standards contained in WTO agreements,[19] it "adds colour, texture, and shading" to the contents of the substantive standards.[20] Pertinently, the Preamble has often contributed to the understanding of the provision under discussion here, Article XX(g) GATT.

II. Structure and Function of Article XX GATT

Through the various covered agreements annexed to it, the WTO Agreement imposes obligations on Contracting Parties to ensure free and liberalised trade. Simultaneously, to secure the Contracting Parties' right to uphold their legitimate regulatory interests, it strives to achieve its primary objective without sacrificing such interests – including but not limited to environmental protection and preservation, optimal use of world resources, and sustainable development. The Preamble of the WTO Agreement,[21] and Article XX GATT[22] operate together to further this agenda.

Article XX provides for limited and conditional exceptions from GATT obligations[23] – it can only be invoked should the measures at issue prove to be inconsistent with other GATT obligations.[24] Measures satisfying the conditions in this Article may be maintained even if they run afoul of other GATT commitments. Article XX stipulates a two-tiered test before a measure can be justified for inconsistency with GATT obligations: first, it must qualify for one of the enumerated, exhaustive lists of exceptions in Article XX (i.e., paragraphs (a) to (j)); and second, it must satisfy the conditions of the opening clause.[25] This opening clause or the chapeau denies the protection of the exceptions to measures that constitute 'an arbitrary or justifiable discrimination

18 WTO Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R (29/04/1996) ("AB, US – Gasoline"), p. 30; *Bernasconi-Osterwalder/Mageaw et al.*, p. 110.

19 WTO Panel Reports, *China—Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/R, WT/DS432/R, WT/DS433/R (26/03/2014) ("Panel, China – Rare Earths"), para. 7.261.

20 WTO Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (12/10/1998) ("AB, US – Shrimp"), paras 152-155.

21 WTO Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (07/04/2004) ("AB, EC – Tariff Preferences"), para. 94.

22 *Matsushita/Shoenbaum, et al.*, p. 717; *Voigt*, p. 136; AB, US – Shrimp, (fn. 20), paras 129-131.

23 *Van den Bossche/Zdouc*, p. 547; GATT Panel Report, *United States –Section 337 of the Tariff Act of 1930*, L/6439-36S/345 (16/01/ 1989), para. 5.9.

24 WTO Appellate Body Reports, *European Communities— Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/ DS401/AB/R (22/05/ 2014) ("AB, EC – Seal Products"), para. 5.185.

25 WTO Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R (12/06/2007) ("Panel, Brazil – Retreaded Tyres"), para. 7.107; WTO Appellate Body Report, *Colombia — Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/AB/R (07/06/2016), para. 6.20; AB, *EC – Seal Products*, (fn. 24), para. 5.169.

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between countries where the same conditions prevail' or that are tantamount to 'a disguised restriction on trade'.[26]

It is important to note that as opposed to the usual practice in international law,[27] the WTO Appellate Body ("AB") does not interpret Article XX narrowly by virtue of its classification as a GEC.[28] Instead, it balances affirmative commitments against general exceptions,[29] eliminating the need to opt for a narrow or broad interpretation. As the AB explained:

"[A] balance must be struck between the right of a Member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other Members... The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ."[30]

III. The Contours of Article XX(g) GATT

With respect to conservation of exhaustible natural resources, subparagraph (g) of Article XX provides as follows:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

.... (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;"

The text of Article XX(g) clearly identifies its three requirements: (a) the measure should envisage conservation of exhaustible natural resources [**Aim**]; (b) the measure should be 'related to' the conservation of exhaustible natural resources [**Nexus**]; (c) the measure should be taken in conjugation with analogous restrictions on domestic consumption or production [**Safeguard**].[31] In order to successfully avail the benefit

26 *Trebilcock/Howse*, p. 531.
27 *Zleptnig*, p. 108; *Eriksen/Emerland*, p. 265.
28 *Fitzmauric/Elias et al*., p. 127.
29 *Reid*, p. 225; *Marceau/Trachtman*, in: Bethelehem/McRae et al. (eds.), p. 227.
30 AB, *US – Shrimp*, (fn. 20), paras 156 and 159.
31 *Koul*, p. 346; *Desierto*, p. 201.

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of Article XX(g), the responding party bears the burden of demonstrating that each of these three requirements is met.[32]

With respect to the **aim** of the measure**,** the AB applies a test of finity to suggest that insofar as a resource is capable of depletion and extinction, it ought to be considered an ENR.[33] This shows the inclination of WTO dispute settlement bodies to afford a dynamic interpretation of the 'aim' element of Article XX(g).[34] By taking account of the evolving nature of sustainable development goals as recognised in the Preamble of the WTO Agreement,[35] the AB has classified both living and non-living resources as 'exhaustible', capable of being protected under this exception.[36] Based on the WTO's jurisprudence so far, this even includes shrimp[37] and clean air.[38]

Further, the term 'conservation' in the aim element of Article XX(g) is not just restricted to measures limiting or halting the activities leading to a danger of extinction, but includes those facilitating the replenishment of endangered resources.[39] If this interpretation and the test of 'finity' are considered dispositive, measures taken to secure protection for clean water, fertile soil, and biodiversity would also fall under the scope of this exception. Consequently, most environmental protection measures are squarely within the gamut of Article XX(g) GATT.

In contemplating the **nexus** of a measure to its aim, the term 'relating to' is interpreted to mean a close relationship of means and ends,[40] such that the measure in dispute is 'primarily' aimed at the conservation of natural resources.[41] It implies a reasonable relationship – if not an explicitly direct one[42] – between the measure and its aim (here, resource conservation).[43] The measure must not be disproportionately broad in its reach and scope,[44] but instead narrowly focused upon its aim stipulated in Article XX(g).[45] Thus, the element of proportionality is a characteristic feature of Article XX(g).

Finally, the **safeguard** element in Article XX(g) checks if a state is attempting to abuse the protection under the Article. It essentially compels that the measures concerned with the conservation of exhaustible natural resources impose restrictions, not just in respect of imported goods threatening such conservation but also with respect

32 AB, *EC – Tariff Preferences*, (fn. 21), para. 95; Panel, *China – Rare Earths*, (fn. 19), para. 7.261; WTO Appellate Body Report, *China—Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (07/082014) ("AB, China – Rare Earths"), para. 5.94.
33 AB, *US – Shrimp*, (fn. 20), para. 128.
34 *Trebilcock/Howse*, p. 456.
35 AB, *US – Shrimp*, (fn. 20), paras 128-131.
36 Ibid.
37 AB, *US – Shrimp*, (fn. 20), para. 132.
38 AB, *US – Gasoline*, (fn. 18), p. 16.
39 AB, *China – Rare Earths*, (fn. 19), para. 5.89.
40 AB, *US – Shrimp*, (fn. 20), paras. 135-6; AB, *China – Rare Earths*, (fn. 19), para. 5.90.
41 AB, *US – Gasoline*, (fn. 18), p. 18.
42 AB, *China – Rare Earths*, (fn. 19), para. 5.94.
43 AB, *US – Shrimp*, (fn. 20), para. 141.
44 Ibid., paras 137-42.
45 Ibid.

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to the relevant domestic goods.[46] While domestic and imported products do not need to be treated identically by a state claiming the exemption under Article XX(g),[47] its measure must be 'even-handed'.[48] This implies similarity in the nature and effect of restrictions against both domestic and imported goods.[49]

IV. The Chapeau of Article XX and its Impact on Clause (G)

The chapeau of Article XX addresses the manner in which the state applies measures that it claims qualify for exemptions under the GATT's GEC.[50] Its purpose is to ensure that "while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the [GATT]."[51] The two-tiered test and order of analysis under Article XX follows from this relationship between its chapeau and enumerated subparagraphs.[52]

The interpretation of this chapeau depends on the justification being invoked: thus, when invoked with respect to conservation of natural resources, the chapeau's interpretation is informed by the text and interpretation of Article XX(g).[53]

1. Arbitrary or Unjustifiable Discrimination

Discrimination here differs from discrimination under Article I or III GATT: the chapeau does not seek to prevent discrimination *per se*, but rather arbitrary and unjustifiable discrimination.[54] Such discrimination occurs when countries in which the same conditions prevail are treated differently ('arbitrary'),[55] or without any consideration for the propriety of the measure in the conditions prevailing in those countries ('unjustifiable').[56] The AB in US – Shrimp, for instance, found the US measure to constitute unjustifiable discrimination, since the US had imposed a single, unbending

46 AB, *US – Gasoline*, (fn. 18), p. 19.
47 Ibid., p. 21.
48 AB, *US – Shrimp*, (fn. 20), paras 144-5.
49 Ibid., para. 143.
50 Panel, *Brazil – Retreaded Tyres*, (fn .25), para. 7.107.
51 AB, *US – Gasoline*, (fn. 18), p. 22.
52 WTO Appellate Body Report, *Indonesia – Importation of Horticultural Products, Animals and Animal Products*, WT/DS477/AB/R (09/11/2017), para. 5.96.
53 *Bhala*, p. 533; *Sacredoti/Yanovich/Bohanes*, p. 321.
54 AB, *US – Gasoline*, (fn. 18), p. 23; AB, *EC – Seal Products*, (fn. 24), para. 5.298; *Lester/Mercurio/Davies*, p. 385.
55 WTO Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (17/12/2007), paras 229-230.
56 WTO Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R (13/06/2012), para. 7.316; WTO Panel Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R (01/12/2003), paras 7.228-7.229, 7.232 and 7.234.

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requirement for turtle conservation without considering the appropriateness of that requirement for different exporting countries.[57]

2. Disguised Restriction on Trade

The term of import here is 'disguised': the second part of Article XX's chapeau seeks to prevent Contracting Parties from masquerading their trade restrictive measures as legitimate policy actions.[58] Accordingly, the purpose and object of the measure are checked to see if its true aim is perpetrating protectionist actions.[59] This is indicated by the design, architecture, and revealing structure of the measure at issue.[60]

C. Natural Resource Conservation in Investment Law: Past, Present, and Future

Due to the broad *ratione materiae* scope of modern day IIAs, traditional investments pertaining to the natural resources sector invariably qualify for protection under these agreements. Several IIAs explicitly protect 'concessions' granted to investors with respect to natural resources.[61] In fact, concessions to investors are considered the 'paradigmatic example of a foreign investment transaction'.[62] For this reason, IIAs

57 AB, *US – Shrimp*, (fn. 20), para. 177.
58 AB, *US – Gasoline*, (fn. 18), p. 25; WTO Panel Report, *Colombia — Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461 /R (27/11/2015), para. 7.549.
59 AB, *US – Gasoline*, (fn. 18), para. 25.
60 WTO Appellate Body Report, *Japan — Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (04/10/1996), para. 199; AB, *EC – Seal Products*, (fn. 24), para. 5.298.
61 Ethiopia–Sudan BIT, Art. 1(a)(v): "investment... includes business concessions conferred by Law or under contract, including concessions to search for, cultivate, extract or exploit natural resource"; UK–Ecuador BIT, Art. 1(a)(v); *Alam/Bhuiyan/Razzaque*, p. 254; *Shan/Gallagher*, in: Brown (ed.), p. 150.
62 *Morgera/Kulovesi*, p. 30.

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expressly[63] or implicitly[64] recognise the importance of the conservation of natural resources, as well as environmental protection.[65]

In jurisprudence, utilisation of land-based resources by investors and the competing interests of the host state have often clashed before arbitration tribunals.[66] For example, the environmental impact of Pacific Rim Cayman's mining activities on the exhaustible water resources in El Salvador invited arbitral scrutiny.[67] Unfortunately, each of these cases faltered on jurisdictional or procedural grounds before a robust discussion on resource conservation could take place before the concerned tribunals. Nonetheless, investment arbitration has seen several prominent disputes, which may be assessed under the lens of 'conservation of natural resources' as defined in the jurisprudence of the WTO – such as a denial to issue waste disposal permits and an order establishing an ecological park,[68] and a ban on hazardous waste exports.[69]

Similarly, tribunals have also addressed questions over a host state's policy space to safeguard 'clean drinking water' (albeit, largely from a human rights perspective and not based on environmental concerns) through their right to regulate.[70] Consider the

63 . Thailand–Myanmar BIT, Art. 12: "State Parties shall promote the use of their natural resources in a sustainable and an environmentally friendly manner"; SADC Protocol on Finance and Investment, Art. 2, Annexes A and B, Art. 12; Columbia-Peru-Ecuador-EU FTA, Arts. 272, 273, 275.

64 Energy Charter Treaty, Preamble: "Recognising the necessity for the most efficient exploration, production, conversion, storage, transport, distribution and use of energy"; EU-Georgia Association Agreement, Art. 231.

65 ECOWAS Energy Protocol, Art. 19.1; "In pursuit of sustainable development and taking into account its obligations under those international agreements concerning the environment to which it is party, each Contracting Party shall strive to minimize in an economically efficient manner harmful Environmental Impacts occurring either within or outside its Area from all operations within the Energy Cycle in its Area, taking proper account of safety. In doing so each Contracting Party shall act in a Cost-Effective manner. In its policies and actions each Contracting Party shall strive to take precautionary measures to prevent or minimize environmental degradation. The Contracting Parties agree that the polluter in the Areas of Contracting Parties, shall bear the cost of the avoidance, elimination, and clean-up of any pollution, as well as the cost of any other consequences of such pollution, including trans-boundary pollution, with due regard to the public interest and without distorting Investment in the Energy Cycle or international trade"; Belgium Luxembourg Economic Union-Columbia BIT, Art. VII(1); United States Model BIT 2012, Art. 2(2).

66 UNCITRAL, *Glamis Gold Ltd. v. USA*, Award (08/06/2009); ICSID, *Bernhard von Pezold and Others v. Republic of Zimbabwe*, Case No. ARB/10/15, Award (28/07/2015); ICSID, *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, Case No. ARB(AF)/07/01, Award (04/08/ 2010).

67 ICSID, *Pac Rim Cayman LLC v. Republic of El Salvador*, Case No. ARB/09/12, Award (14/10/2016).

68 ICSID, *Metalclad Corp. v. The United Mexican States*, Case No. ARB(AF)97/1, Award (30/08/2000).

69 UNCITRAL, *S.D. Myers Inc. v. Government of Canada*, Second Partial Award (13/11/2000).

70 ICSID, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. Argentine Republic*, Case No. ARB/03/17, Decision on Liability (30/07/2010), para. 240; ICSID, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, Case No. ARB/07/26, Award (08/12/2016), para. 720.

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Methanex v. USA dispute: the investor was a manufacturer of a gasoline-based additive, whose ban resulted in the loss of its investment in the United States of America. This ban was justified on the basis of the need to secure clean drinking water in California.[71] In assessing whether the host state's measure amounted to expropriation, the Tribunal declared this "non-discriminatory regulation for a public purpose" beyond reproach.[72] In the absence of specific commitments or representations to the contrary, the measure was found neither expropriatory nor compensable.[73]

Given the frequency with which natural resources have featured in investment arbitration, the tussle between the state's right to regulate for resource conservation and investment protection is a tumultuous, ongoing affair. In this light, it is essential to examine the typology of GECs and the merits and demerits of including them in IIAs to bolster resource conservation efforts.

I. The Context, Typology, and Merits of General Exceptions in IIAs

The dilemma of attracting beneficial investment and simultaneously safeguarding non-economic interests plagues nations today.[74] They view these as competing interests, sceptical that onerous investment protection obligations will induce a 'regulatory chill' domestically by preventing governments from adopting laws and regulations designed to promote policies in public interest.[75] While this concern is not novel, it has magnified with the expansion of the network of IIAs as states are now susceptible to more and more challenges for their alleged failure to uphold their obligations. Admittedly, states have secured more victories in investor-state dispute settlement ("ISDS") than investors.[76] However, the costs associated with the process of the arbitration itself are worrisome.

Moreover, international investment law faces a legitimacy crisis emanating from questions over its consistency, transparency, and its efficiency in securing a host state's right to regulate its interests.[77] This is exacerbated by increasingly broad interpretations of substantive IIA standards that allow arbitration of measures rooted in public interest.[78] For example, consider the disputes faced by Uruguay and Australia pur-

71 UNCITRAL, *Methanex Corp. v. United States of America*, NAFTA, Final Award of the Tribunal on Jurisdiction and Merits, (03/08/2005) ("Methanex"), Part IV – Chapter A.
72 Methanex, Part IV – Chapter D, paras 7-18.
73 Ibid.
74 *Lo*, AJWIHLP 2012/7, p. 41; *Voon/Mitchell/Munro*, JIDS 2014/5, p. 42.
75 *Lester/Mercurio*, IIELIB 2017/12, p. 1; *Kanisthasen*, TRESP 2015/1, p. 28; *Waincymer*, in: Dupuy/Francioni/Petersmann (eds.), pp. 275, 306–7; *Miles*, 2008/27, pp. 22–26.
76 *Franck*, NCLR 2007/86, p. 48.
77 *Waincymer*, in: Dupuy/Francioni/Petersmann (eds.), p. 275; *Franck*, FLR 2005/73, p. 1547; *Kaufmann-Kohler*, AI 2007/23, p. 357.
78 PCA, *Bilcon of Delaware et al v. The Government of Canada*, Case No. 2009–04, Award on Jurisdiction and Liability (17/03/ 2015), para. 49; UNCITRAL, *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013–22, Award (27/09/ 2016), para. 7.

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suant to their plain packaging policy in this regard – a measure seemingly intended to secure public health their repective territories.[79]

Finally, the choice of arbitral tribunals to ignore policy considerations in favour of granting compensation to investors – despite a measure being motivated by a legitimate public interest – has hit the critical nail in this coffin. Several measures have been proposed in response to this conundrum, such as procedural reforms to investment arbitration[80] and precision in treaty drafting.[81] Significantly, it has led to the emergence of a new trend of including general exception clauses in IIAs.[82]

1. A Classification of General Exception Clauses found in IIAs

A recent study found regulatory exceptions in 45% of its treaty study sample,[83] demonstrating the extent of the pervasive practice of securing policy space vide IIAs. [84] Broadly, there are five types of exceptions that states use for this purpose:

Category [**I**]: Some IIAs expressly incorporate the GATT/GATS in their text, in an attempt to replicate the success of Article XX of the GATT/Article XIV of the GATS.[85]

Category [**II**]: This includes IIAs that contain GECs analogous to the GATT/GATS regime, with minor amendments to address the peculiarities of investment protection or the specific concerns of the contracting parties.[86]

Category [**III**]: Contracting parties may also stipulate a restricted exception clause, which only safeguards specific interests of the host state – public health and safety,[87] cultural and linguistic diversity,[88] labour standards,[89] *et al.*

79 ICSID, *Philip Morris Brands Sàrl v. Uruguay*, Case No. ARB/10/7, Award (08/07/2016); UNCITRAL, *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (17/12/2015).

80 http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.pdf (30/04/2019); http://europa.eu/rapid/press-release_IP-15-6059_en.html (30/04/2019); http://europa.eu/rapid/press-release_IP-16-4349_en.htm (30/04/2019).

81 *Ortino*, OGFOII 2005/7, pp. 243-244; Comprehensive Economic and Trade Agreement, Art. 8.10.

82 *Chaisse*, AJLM 2013/39, p. 344; *Legum/Petculescu*, in: Enchandi/Sauvé (eds.), p. 343; *Spears*, JIEL 2010/13, p. 1071.

83 *Keene*, JWIT 2017/18, pp. 62, 65, 69.

84 *Lester/Mercurio*, IIELIB 2017/12, p. 2.

85 China–New Zealand BIT, Art. 200; European Union-Hong Kong FTA, Art. 4.9; Japan-Switzerland EPA, Art. 9.5; Australia-Thailand FTA, Art. 1601.

86 Australia-Korea FTA, Art. 22.1; Indian Model BIT 2016, Art. 32.1; Energy Charter Treaty (ECT), Art. 24(2)(b); Canada-Peru BIT, Art. 10.

87 French Model BIT (2006), Art. 1(6).

88 United States Model BIT 2004, Preamble.

89 USA – Turkey BIT, Art. 12.

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Category [**IV**]: IIAs may limit the invocation of exceptions to certain investment protection standard(s).[90] For this, an exclusionary or exhaustive list may be indicated.[91]

Category [**V**]: The least common and most nascent practice is to introduce industry carve-outs.[92] These guarantee the states' unrestricted right to regulate a concerned industry.[93]

Treaties that do not contain any exception clauses do not foreclose a host state's autonomy to take measures in pursuit of legitimate policy objectives. Starting from early instruments such as the 1961 Draft Convention on the International Responsibility of States for Injuries to Aliens and the Second Restatement of the Foreign Relations Law of the United States adopted by the American Law Institute in 1965, states have been allowed room to take measures reasonably necessary in the public interest.[94] Customary international law posits that if an economic injury to non-nationals results from a non-discriminatory measure in good faith in the exercise of the police powers of the state, no remedy is required – this is referred to as the police powers doctrine.[95] While traditional codifications of this customary doctrine were restricted to a few chosen exceptions – public order, safety, health, and morality – there is no such restriction on its scope today.[96]

The following section concerns itself with the merits and demerits of Category [I] and [II] clauses – that is, clauses that expressly incorporate Article XX(g) GATT or an analogous provision to secure the conservation of ENRs in investor-state relations.

2. The Case against a GATT-Style GEC for Resource Conservation in IIAs

Broadly, the case for replicating GECs like Article XX(g) in IIAs is premised on the success and stability of the multilateral trading framework.[97] The arguments in favour of an ENR conservation exception in an IIA can be summarised as follows: In addition to affording the host state an increased autonomy in its sovereign conduct, the regulatory space contained in a 'conservation of ENRs' exception might impel more states

90 Switzerland–Japan FTA, Art. 95; KORUS FTA, Annex 11-B(3)(b); Turkish Model BIT, Art. 3(4)(a); Ghanaian Model BIT, Art. 5(1)(b).
91 *Mercurio*, JIDS 2015/7, p. 252.
92 *Sy*, GWILR 43/2011, p. 656.
93 Trans-Pacific Partnership Art. 29.5; Agreement to Amend the Singapore–Australia Free Trade Agreement Art. 22.
94 1961 Draft Convention on the International Responsibility of States for Injuries to Aliens, Art. 4(2); Convention Establishing the Multilateral Investment Guarantee Agency, Washington (11/10/1985) 24 ILM 1605 (1985), Art. 11(a)(ii); *American Law Institute*, para. 712.
95 UNCITRAL, Invesmart, *B.V. v. Czech Republic*, Award (26/06/2009), paras 497-500; ICSID, *SAUR International v. Argentine Republic*, Case No. ARB/04/4, Decision on Jurisdiction and Liability (06/06/2012), paras 396-405; ICSID, *Generation Ukraine Inc. v. Ukraine*, Case No. ARB/00/9, Final Award (16/09/2003), para. 11.3; PCA, *Saluka Investments BV (The Netherlands) v. Czech Republic*, Partial Award (17/03/2006), paras 254-261.
96 Methanex, Part IV, Chapter D, para. 7; ICSID, *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, Case No. ARB/17/27, Award (13/11/2019), paras 364-367.
97 *Kurtz*, p. 172.

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to negotiate stronger investment protections for their own nationals investing abroad.[98] Further, it may prevent states from giving unduly constrained interpretations to substantive standards.[99] At the interpretation front, it is suggested that borrowing the interpretation of GECs from WTO jurisprudence may rein in the variability in investment arbitration awards.[100] Finally, it is believed that GEC clauses will prevent tribunals from introducing extrinsic tests of proportionality and police powers into the substantive standards of the treaty at their discretion.[101]

Two concerns arise vis-à-vis inclusion of an Article XX(g)-like exception in investment treaties. These are over the redundancy of such an inclusion [**a**] and, alternatively, its effectiveness in an investment protection regime [**b**].

a. Is a GATT-style Article XX(g) exception necessary for IIAs?

It is safe to presume that a defence of resource conservation will always be raised in response to an assertion of breach of a substantive standard of protection. Here, it is essential to evaluate the operation of relevant investment standards and the impact of introducing an ENR-related exception modelled on Article XX(g) GATT for the same. For measures aimed at environmental protection, the IIA standards most likely to be relevant are the protection against unlawful expropriation, the guarantee of fair and equitable treatment to investors and their investments, and the protection against discriminatory treatment (including both national treatment and most-favoured nations clause).

i. Expropriation

Consider the Copper Mesa Mining Corp. v. Ecuador dispute. In this case concerning mining reforms, the Tribunal found Ecuador's revocation and termination of concession contracts to constitute unlawful expropriation,[102] since they were made arbitrarily and without regard to due process. In light of this finding, the Tribunal noted that the measure could not be justified under the GEC in the IIA, since it would incontrovertibly fail to meet the chapeau standard – that is, "measures not applied in an arbitrary or unjustifiable manner" – thereto.[103] This case effectively illustrates the extensive discretion that tribunals may exercise over public policy issues, even in the presence of an explicit GEC, to make determinations on the application of the GEC itself. The case also highlights the redundancy of a GATT-like Article XX(g) exception in IIAs:

98 *Vandevelde*, LCR 2013/17, pp. 449, 456.
99 Ibid.
100 *Kurtz*, pp. 168–171, 228.
101 *Mitchell/Munro/Voon*, in: Sachs/Johnson et al., p. 352.
102 PCA, *Copper Mesa Mining Corporation v. Republic of Ecuador*, Case No. 2012-2, Award (15/03/2016), para. 6.56.
103 Ibid., at para. 6.67.

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First, if the measure in question does not meet the criteria of lawful expropriation (due process, public purpose, non-discriminatory measure),[104] it is unlikely to be able to satisfy the chapeau of a XX(g)-like exception.[105]

Second, the scope of "public interest" in a clause allowing lawful expropriation is incontrovertibly broader than the very narrow scope of a GEC focused on "conservation of exhaustible natural resources". While WTO dispute settlement bodies may have interpreted Article XX(g) broadly, it is uncertain if arbitral tribunals will apply this interpretation *mutatis mutandis*. Therefore, a measure that is deemed to be an unlawful expropriation by virtue of its failure to correspond to "genuine public interest" will, in all likelihood, be unable to fulfil the 'aim' element of an Article XX(g)-like general exception clause – further rendering the inclusion of such a clause meaningless.

Third, it is also important to consider the proportionality test, which is becoming increasingly relevant in the context of the expropriation standard to distinguish non-compensable regulatory measures from compensable expropriation.[106] As explained by the tribunal in Tecmed v. Mexico, "there must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure."[107] The effect of the application of this test is the same as the 'nexus' element of Article XX(g) – to prevent states from taking disproportionately broad measures to meet policy objectives and instead compel them to take measures 'reasonably relating to' the aim of conservation of exhaustible natural resources. A state's failure to meet the proportionality requirement under the conditions for lawful expropriation will surely result in its failure to comply with the nexus element of a proposed GEC.

Cumulatively, these overlaps between the existing scope of an expropriation standard and an Article XX(g) GATT-like GEC raise a more important concern. There is no easy way for a tribunal to give effect to the entirety of either clause when they are substantially overlapping. Much of the policy space that is secured by Article XX(g)-like exceptions can already be secured by the conditions for legality in an expropriation standard. What role would the *effet utile* principle (principle of effective treaty interpretation) play in a situation such as this – will the tribunal narrow the scope of lawful expropriation? Will it constrain the policy space available under the GEC? An *ad hoc* tribunal's choice to go one way or another could not just be in

104 ICSID, *Philip Morris Brands Sàrl v. Uruguay*, Case No. ARB/10/7, Award (08/06/2016), paras 298-305.

105 *Martini*, BCLR 2008/59, p. 2883.

106 *Marjosola/Pellet*, in: Kinnear et al. (eds.), p. 458; ICSID, *Total S.A. v. Argentine Republic*, Case No. ARB/04/01, Decision on Liability (27/12/ 2010), p. 197; ICSID, *El Paso Energy International Company v. Argentine Republic*, Case No. ARB/03/15, Award (31/10/2011), paras 236-243; ICSID, *Philip Morris Brands Sàrl v. Uruguay*, Case No. ARB/10/7, Award (8 July 2016), para. 305; UNCITRAL, *Les Laboratoires Servier, S.A.S., Biofarma, S.A.S. and Arts et Techniques du Progres S.A.S. v. Republic of Poland*, Award (14/02/2012), para. 569.

107 ICSID, *Técnicas Medioambientales Tecmed v. Mexico*, Case No. ARB(AF)/00/2, Award (29/05/2003), para. 122.

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contradiction of what was envisaged by the treaty parties but also lead to varied interpretations of the same treaty.

Finally, it is uncertain whether tribunals in interpreting a GEC-like Article XX(g), invoked to justify a taking of property, will consider the measure in question as a regulatory measure requiring no payment of compensation,[108] a lawful expropriation compelling compensation according to the standards prescribed in the treaty, [109] or an unlawful expropriation compelling payment of 'full reparation' as defined under customary international law.[110] Hence, the inclusion of an Article XX(g)-like GEC does not assuage states' fears of inconsistent interpretations and outcomes arising from similarly worded treaties. In this sense, the inclusion of such a clause might prove fundamentally detrimental to the investor's cause – if a tribunal reads such a clause as a modification or variation from the general rule on lawful expropriation (and as an expression of the state parties' intent to contract out of a customary norm), the host state could invariably be excused from the (customary) need to tender compensation even for lawful expropriations.[111]

The foregoing confirms 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. Even such drafting exercises may prove to be cumbersome and ineffective. Given that select investment tribunals have chosen to recognise a broader, more malleable police powers doctrine, the inclusion of a GEC to justify conservation-based expropriation seems unnecessary.[112] On the contrary, directly or indirectly excluding 'environmental action' from the scope of expropriation would provide more useful guidance to tribunals.[113] This is not beyond the realm of possibility. An expropriation provision's scope is no different than that of the Taking Clause in the Constitution of the United States of America and yet, the presence of such a constitutional provision has not hindered the United States' efforts to put a functional body of environmental law in place.[114]

Admittedly, despite the recognition of the customary right to regulate, several tribunals have decided against excluding regulatory actions from the scope of expropriation – the Occidental v. Ecuador tribunal found regulatory measures affecting an investment's value tantamount to expropriation;[115] the Pope & Talbot v. Canada tribunal refused to carve out all regulatory measures from the ambit of the expropriation

108 ICSID, *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, Case No. ARB/17/27, Award (13/11/2019), paras 364-367.
109 ICSID, *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, Case No. ARB/06/2, Dissenting Opinion of Brigitte Stern (16/09/2015), para. 9.
110 ICSID, *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, Case No. ARB/10/5, Award (13/03/2015), para. 132.
111 *Keene*, JWIT 2017/18, p. 86; *Alvarez/Brink*, in: Sauvant (ed.), p. 342; *Marboe*, pp. 78-79.
112 *Legum/Petculescu*, in: Enchandi/Sauvé (eds.), p. 350.
113 *Newcombe*, in: de Maestral/Lévesque (eds.), pp. 267, 268; *Yannaca-Small*, in: OECD (ed.), pp. 43, 54.
114 *Vandevelde*, p. 459.
115 ICSID, *Occidental Petroleum Corporation v. Ecuador*, Case No. ARB/06/11, Award (5 October, 2012), para. 455.

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standard;[116] the SD Myers v. Canada tribunal even went so far as to suggest that legitimate regulatory actions are hardly ever challenged in investment arbitration proceedings.[117] On the other hand, there are also awards that ignore the economic impacts on an investment if the measure in question is a non-discriminatory regulation for a public purpose, taken in accordance with due process.[118] This indicates that the jurisprudence necessary to guide the process of drafting suitable substantive standards of protection and the necessary explanations thereto already exists. In comparison, the inclusion of an Article XX(g)-style GEC – a largely untested type of clause – will only throw open more questions than it will answer.

ii. Fair and Equitable Treatment (FET)

The obligation to grant fair and equitable treatment to investors is not one with any uniform interpretation – while some consider it analogous to the minimum standard of treatment under customary international law,[119] others accord it a more expansive scope.[120] However, it is certain that the appropriate interpretation of this standard depends on its wording, context, and negotiating history of the provision it is contained in.[121] Largely, the contents of the FET standard include protection against discrimination, arbitrariness, breach of legitimate expectations, and disregard of the due process of law.[122] The invocation of an Article XX(g)-like GEC to excuse the breach of the FET standard raises the following concerns:

The chapeau of GATT Article XX(g) GATT 1994 – which is crucial for the effective operation of the exception itself – precludes member states from claiming the general exception if a measure is arbitrary or a disguised restriction on international trade. This indicates that all in all, the scope of an ENR-related exception clause read with its chapeau is essentially the same as the existing scope of the FET standard as described above. The exception would only prove material in allowing states to bypass the le-

116 UNCITRAL, *Pope & Talbot v. The Government of Canada*, Interim Award (26 June, 2000), para. 99.

117 UNCITRAL, *SD Myers, Inc. v. Government of Canada,* First Partial Award (13/11/2000), para. 281.

118 UNCITRAl, *Chemtura Corp. v. Government of Canada*, Award (02/08/2010), para. 266; PCA, *Saluka Investments BV (The Netherlands) v. Czech Republic*, Partial Award (17/03/2006), paras 253-265.

119 UNCITRAL, *Ronald S. Lauder v. Czech Republic*, Final Award (03/09/2001), para. 292; ICSID, *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, Case No. ARB/04/19, Award (18/08/2008), paras 335-337.

120 ICSID, *Tecnicas Medioambientales Tecmed S.A. (TECMED) v. Mexico*, Case No. ARB/AF/00/2, Award (29/05/2003), para. 154; ICSID, *OKO Pankki Oyj and o thers v. Republic of Estonia*, Case No. ARB/04/6, Award (19/11/ 2007), paras 230-238; ICSID, *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, Case No. ARB/08/8, Excerpts of Award (01/03/2012), para. 265; ICSID, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, Case No. ARB/09/01 Award, (21/07/2017), para. 666.

121 PCA, *Deutsche Telekom v. India*, Case No. 2014-10, Interim Award (13/12/ 2017), para. 331.

122 ICSID, *Anglo American PLC v. Bolivarian Republic of Venezuela*, Case No. ARB(AF)/14/1, paras 442-443.

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gitimate expectations of investors in their attempts to prioritize environmental protection. The inclusion of an additional clause simply to allow derogation from the protection of legitimate expectations is both unnecessary and confusing.

In the presence of a clause like Article XX(g), a tribunal could be dissuaded from giving the FET clause its intended effect by construing it too narrowly.[123] For example, it could read the protection against 'discrimination' and 'arbitrariness' out of the FET standard to 'give effect' to both clauses adequately. This is an unwelcome solution: the FET standard is a primary norm in international law. In other words, investor A investing in host state B is entitled to compensation for a breach of FET in light of discriminatory treatment. On the other hand, an Article XX(g)-like GEC is a secondary norm. It will only allow tribunals to disregard the state's invocation of an exception on the grounds of discrimination or arbitrariness. Effectively, this might lead to an inequitable reduction in A's rights and protection, since A would no longer be able to claim an independent violation of the discrimination or arbitrariness standard.

Moreover, there is a recurring trend of applying a 'proportionality'[124] test to FET measures. As noted by the tribunal in Philip Morris v. Uruguay in excluding Uruguay's responsibility, the measure in question "was an attempt to address a real public health concern, that the measure taken was not disproportionate to that concern and that it was adopted in good faith".[125] This test is the same as the **nexus** element included in Article XX(g) (that is, a reasonable relationship between the measure and its aim). Hence, if a state fails the proportionality test under the FET standard, it is also likely to fail the nexus test under an Article XX(g)-like exception.

For all these reasons, a XX(g)-like GEC is incapable of excusing a state's responsibility for breaches of a FET clause, thereby rendering its inclusion pointless. In fact, judicial review of invocation of a GEC might endanger the margin of appreciation afforded by FET clause,[126] which allows tribunals to defer to the judgement of the host state insofar as regulatory actions are concerned, and subject sovereign actions to scrutiny under an 'objective' yardstick. Finally, given that good faith forms the cornerstone of FET,[127] the chapeau accompanying a GEC would make no significant improvement over the current structure or function of a FET clause.

123 *Collins*, AI 2015/32, p. 582.

124 ICSID, *EDF (Services) Ltd v. Romania*, Case No. ARB/05/13, Award (08/10/ 2009), para. 293; ICSID, *Occidental Petroleum Corporation v. Ecuador*, Case No. ARB/06/11, Award (05/10/ 2012), paras 402 ff.

125 ICSID, *Philip Morris Brands Sàrl v. Uruguay*, Case No. ARB/10/7, Award (08/07/2016), para. 409.

126 ICSID, *Philip Morris Brands Sàrl v. Uruguay*, Case No. ARB/10/7, Award (08/07/2016), para. 399.

127 ICSID, *UAB E Energija (Lithuania) v. Republic of Latvia*, Case No. ARB/12/33, Award (22/12/2017), para. 839.

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The FET obligation is also understood to afford substantial regulatory scope to host states,[128] allowing them to pursue public welfare objectives according to their chosen level of protection ('the margin of appreciation').[129] For this reason, tribunals refuse to read the 'police powers' exception into FET, since the latter already envisages the state's right to regulate.[130] The more prudent way forward in light of this line of case laws is to imbibe language and reasoning from these decisions into the text of the FET standard and provide clarifications as necessary in the first-order standard itself.

iii. Non-Discrimination

This standard protects investors from less favourable treatment as compared to the treatment meted out to the nationals of the host state as well as third-country nationals.[131] For example, if state X is a large consumer of artificial soil – produced in its territory by both domestic companies and companies from countries Y and Z – it may neither treat companies from either Y or Z more favourably than the other nor treat one or both of them less favourably than its own domestic company.

However, the standard operates differently in trade and investment regimes: while WTO law foresees assessment of 'equal opportunities' amongst like products, investment tribunals are reluctant to apply the same test.[132] Conversely, the tests applied by investment tribunals oscillate between the comparison of all foreign and domestic exporters at one end,[133] and comparison of only identical foreign and domestic exporters at the other.[134] In practice, most tribunals compare investments from the same business or economic sector (also referred to as investments in like circumstances)[135] based upon the presumption that such investments raise similar public policy concerns.[136] In S.D. Myers v. Canada, the concurring opinion notes:

"Article 1102 (National Treatment) of NAFTA is not made subject to an equivalent of Article XX (General Exceptions) of GATT. Read in its proper context, however,

128 UNCITRAL, *Frontier Petroleum v. Czech Republic*, Award (12/11/2010), para. 527; UNCITRAL, *International Thunderbird Gaming Corporation v. Mexico*, Award (26/01/2006), para. 127.

129 ICSID, *Bernhard von Pezold and Others v. Republic of Zimbabwe*, Case No. ARB/10/15, Award (28/01/2015), paras 465-466; ICSID, *Parkerings-Compagniet v. Lithuania*, Case No. ARB/05/8, Award (11/09/2007), para. 332; ICSID, *Electrabel v. Hungary*, Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30/11/2012), para. 8.35.

130 ICSID, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. Argentina*, Case No. ARB/03/17, Decision on Liability (30/07/2010), para. 148.

131 *Mitchell/Heaton/Henckels*, p. 34.

132 ICSID, *Cargill, Incorporated v. United Mexican States*, Case No. ARB(AF)/05/2, Award (18/09/2009), para. 193; ICSID, *Merrill & Ring Forestry L.P. v. Government of Canada*, Case No. UNCT/07/1, Award (31/03/2010), para. 86.

133 ICSID, *Occidental Petroleum Corporation v. Ecuador*, Case No. ARB/06/11, Award (05/10/2012).

134 Methanex, Part IV, Chapter B, para. 9.

135 PCA, *Windstream Energy LLC v. Government of Canada*, Case No. 2013–22, Award (27/09/2016), paras 413-414.

136 *DiMascio/Pauwelyn*, AJIL 2008/102, pp. 75-76.

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the phrase 'like circumstances' in Article 1102 in many cases does require the same kind of analysis as is required in Article XX cases under the GATT. The determination of whether there is a denial of national treatment to investors or investments 'in like circumstances' under Article 1102 of NAFTA may require an examination of whether a government treated non-nationals differently in order to achieve a legitimate policy objective that could not reasonably be accomplished by other means that are less restrictive to open trade."[137]

These differences lead to a curious outcome when an Article XX(g)-like exception is invoked in relation to discriminatory treatment under international trade and investment law: under WTO law, a discriminatory action such as one in breach of the most-favoured nations (Article I GATT) or national treatment (Article III GATT) clauses may be justified if the discrimination is motivated by a state's attempt to conserve natural resources. Conversely, once discrimination is established in investment law, it is not conceivable that the derogation would be considered justifiable for reasons of environmental protection because the comparators would meet the broader test of 'investors in like circumstances'.

Take the example of country X, whose rivers and soil face a threat of irreversible contamination owing to a chemical ABC contained in artificial soil. X may be permitted to stop imports from Y under international trade law if Y's manufacturers are the only ones known to export artificial soil to X. However, X would have no reasonable justification to treat companies engaged in manufacturing or selling artificial soil within its territory differently solely on the basis of their nationality, as long as these enterprises were found to be placed in like circumstances. An Article XX(g)-like exception would play little role here.

In any case, in order to identify the appropriate comparable variable here, investment tribunals are known to take regulatory considerations into account.[138] This guides their decision as to whether the discriminatory treatment was justifiable. For example, the Tribunal in Pope & Talbot noted that where differential treatment was rooted in legitimate policy concerns, the measure in question would not be characterised as discriminatory.[139] Similarly, the discriminatory treatment of a foreign car parking in Parkerings v. Lithuania was justified despite a more favourable treatment granted to a domestic car parking since the former was in a part of Vilnius designated by the UNESCO as a protected cultural heritage site.[140] NAFTA tribunals in interpreting 'discrimination' also do not apply the General Exceptions contained in the treaty to excuse sovereign conduct, but instead distinguish between regulatory and

137 UNCITRAL, *SD Myers, Inc. v. Government of Canada*, First Partial Award (13/11/2000), para. 298.

138 UNCITRAL, *SD Myers, Inc. v. Government of Canada*, First Partial Award (13/11/2000), para. 246; ICSID, *Marvin Feldman v. Mexico*, Case No. ARB(AF)/99/1, Award (16/12/2002), paras 170-182; PCA, *Bilcon of Delaware et al v. The Government of Canada*, Case No. 2009–04, Award on Jurisdiction and Liability (17/2015), para. 723.

139 UNCITRAL, *Pope & Talbot v. The Government of Canada*, Award on the Merits of Phase 2 (10/04/2001), para. 81.

140 ICSID, *Parkerings-Compagniet AS v. Republic of Lithuania*, Case No. ARB/05/8, Award (11/09/2007), Section 8.3.

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discriminatory actions based on the text of the standard itself.[141] Through uniform purposive interpretation, they have made room for state parties to the NAFTA to subject investors to different treatments based on legitimate regulatory distinctions.[142] Hence, the regulatory space secured by an Article XX(g)-like GEC can be inherently found in the non-discrimination standard itself.

Clarifying the scope of this regulatory power is undeniably a simpler, more efficient method than the introduction of a GEC, which might be interpreted variably by different tribunals. The only improvement required is to clarify the scope of a 'legitimate' regulatory distinction. This may be done by introducing language in an IIA to the effect that a legitimate distinction is one that 'bears a reasonable nexus to rational government policies';[143] constitutes 'legitimate public policy measures that are pursued in a reasonable manner';[144] or bears 'a plausible connection with a legitimate goal of policy'.[145] The outcome of the introduction of such language is foreseeable, given that these thresholds have already been applied in the past by arbitral tribunals. This will also help a state *ex ante* assess the propriety of its measures and reduce the 'regulatory chill' that they often experience.

b. Will a GATT-style Article XX(g) be effective in IIAs?

It is essential to recall that unlike the origins of WTO law, international investment law emerged from customary principles of diplomatic protection of aliens.[146] Instruments such as the 1961 Draft Convention for Protection of Aliens,[147] the Convention establishing the MIGA,[148] and the United States' Second Restatement of the Foreign Relations Law[149] confirm this. While an exception for resource conservation cannot be directly observed from these instruments,[150] they confirm that a wide set of police powers is available to a host state, which might be narrowed down if restrictive treaty wording such as a narrowly defined GEC is introduced.

141 *DiMascio/Pauwelyn*, AJIL 2008/102, p. 77.
142 UNCITRAL, *GAMI Investments, Inc. v. Government of the United Mexican States*, NAFTA, Award (15/11/2004), para. 114; ICSID, *Marvin Feldman v. Mexico*, Award (16/12/2002) paras 170 – 182.
143 UNCITRAL, *Pope & Talbot v. The Government of Canada*, Award on the Merits of Phase 2 (10/04/2001), para. 78.
144 UNCITRAL, *SD Myers, Inc. v. Government of Canada*, First Partial Award (13/11/2000), para. 246.
145 UNCITRAL, *GAMI Investments, Inc. v. Government of the United Mexican States*, NAFTA, Award (15/11/2004), para. 114.
146 ICSID, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, Case No. ARB/87/3, Final Award (27/06/1990), para. 67; ICSID, *MTD Equity Sdn Bhd v. Chile*, Case No. ARB/01/1, Decision on Annulment (21/03/2007).
147 1961 Draft Convention on the International Responsibility of States for Injuries to Aliens, Art. 4(2).
148 Convention Establishing the Multilateral Investment Guarantee Agency, Washington (11/10/1985) 24 ILM 1605 (1985), Art. 11(a)(ii).
149 American Law Institute, para. 712.
150 *Legum/Petculescu*, in: Enchandi/Sauvé (eds.), p. 351.

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Moreover, the provisions of the Vienna Convention on the Law of Treaties apply to IIAs: in accordance with Article 31 thereof, directly importing exceptions like Article XX(g) would also subsume its context into the treaty.[151] This may occasion contradiction with or disregard of the context of an IIA itself, which is substantially different from the GATT. The differing goals of the trade and investment regimes must be considered here – while the GATT concerns protection of states' interests, IIAs contemplate individual interests. In light of fundamental rules of treaty interpretation, this would make a concordant purposive interpretation perverse.[152]

It is also helpful to understand that the interpretation of GECs in WTO is an anomaly. As mentioned in Section [B][II] above, these are not interpreted narrowly, as is the practice in public international law, but instead subjected to a weighing and balancing exercise. This practice is unknown to investment tribunals. For example, the tribunals in the Argentinian crisis disputes did not balance the exceptions clause and the standard of necessity therein against the rights and obligations of Argentina, since there was no guidance to do so in the underlying treaty.[153] There is no certainty if investment tribunals interpreting an Article XX(g)-like exception would undertake the kind of balancing exercise that has made Article XX(g) effective in multilateral trading relations. Thus, it might be advisable to instead clarify the scope of the substantive standards of protection to secure a host state's interests, since the regulatory powers of the state and the rights of the investor are often balanced therein.

With respect to the chapeau, consider the two following terms: 'discrimination' and 'restriction'. Here, one should note that IIAs do not confer collective rights for trading partners – only investors from a certain state. Thus, to see whether a measure constitutes a 'restriction' within the meaning of the chapeau would mean the assessment of restrictiveness from the purview of each individual.[154] This poses a number of concerns:[155] First, the state is unable to envisage which investor might institute a proceeding; second, this can set off a Pandora's box of investment claims against the state, all of which view 'restrictions' differently; and finally, assessing whether differential treatment against a specific investor is justified or reasonable *ex ante* would be difficult since the number of claimants aggrieved by an action and the nature of their claims is unknown.

A more detailed assessment of the two regimes also reveals the following:

There are structural differences in the settlement of international trade and investment disputes. The lack of any appellate review in investment arbitration amplifies concerns over inappropriate treaty interpretation, given that the ultimate outcome is final and binding. This danger is mitigated by the availability of appellate review in WTO law.

151 *Mitchell/Munro/Voon*, in: Sachs/Johnson et al., p. 356.
152 *DiMascio/Pauwelyn*, AJIL 2008/102, pp. 54, 56.
153 *Alvarez/Khamsi*, in: Sauvant (ed.), p. 441.
154 *Raju*, JGLR 2016/7, p. 233.
155 Ibid.

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The nature of standards involved in the two regimes in distinct. Hence, transposing WTO law into investment law requires arbitrators to be well versed in WTO law and to understand the workability of its interpretation in the context of investment law.

There are different remedies at stake under the two legal regimes.[156] A state in breach of WTO law must tender prospective remedies (that is, bring its laws in compliance with its WTO obligations). In investor-state relations, host states need to provide retrospective remedies to investors whose rights they have abrogated. The obligation to tender retrospective remedies induces a regulatory chill in host states that are concerned about the implications of their actions. Using narrow, unworkable environmental-GECs that, by and large, mirror the contents of the existing standards of investment would further amplify this regulatory chill.

State parties would also need to account for the concern that, should the practice of including GECs in IIAs become common, arbitral tribunals might interpret the absence of a GEC negatively to the prejudice of the host state of an investment.[157]

II. Charting a Course for the Future: Suggested Approach for the next generation of IIAs

For all the foregoing reasons, the application of a GATT-style Article XX(g) exception in investor-state relations is inadvisable. If such an exception in an IIA were to be made effective, it would have to be accompanied by several explanations and clarifications of how the exception operates. This is simply a more tedious way of arriving at the same result that provisions clarifying the scope of the first-order obligations itself could yield.

Introducing interpretative language in IIAs to elaborate on the scope of standards of protection is not a novel practice.[158] As seen from the above discussion, this would be a far more meaningful exercise than the introduction of an Article XX(g)-style exception, as well as a less cumbersome one in light of the jurisprudence available to guide treaty-making. Joint interpretative statements by IIA parties will also be helpful. In this regard, the following clarifications can be made to existing substantive standards to address regulatory concerns over the conservation of exhaustible natural resources:

The treaty parties can introduce annexes clarifying the meaning and scope of substantive standards, as well as their interaction with established rules of customary international law. This will allow *ex ante* certainty to a state about the measures that it can take in the legitimate exercise of its regulatory powers and add *ex post* certainty in the awards rendered by investment arbitration tribunals.

The treaty parties can expressly extend the scope of 'public purpose' in expropriation clauses to include 'conservation of exhaustible natural resources'. An inclusive, illustrative list of public purposes could be provided in this regard, so as to prevent

156 *Kurtz*, p. 230.
157 *Miles*, p. 309.
158 *Spears*, JIEL 2010/13, p. 1044.

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the unnecessary restriction of the scope of lawful expropriation under the treaty. Similar stipulations concerning the 'legitimate right to regulate' towards 'conservation of exhaustible natural resources' can also be incorporated in FET and non-discrimination standards. The relation of such exclusion to the substantive standard can be expressly explained (i.e., measures covered by these exclusions do not amount to a breach of any obligation in the first place).

In addition, the treaty parties can clarify the meaning of the terms 'conservation' (measures both to limit the depletion and to enable the restoration of exhaustible natural resources) and 'exhaustible natural resources' (to be contemporarily interpreted to include all living and non-living natural resources capable of severe depletion or extinction).

IIAs should also state the threshold of the deference afforded to host states taking regulatory actions in the Expropriation, FET, and Non-discrimination clause – that is, an explicit reference to one of many available thresholds such as 'the least restrictive alternative', 'margin of appreciation', or 'reasonable nexus' tests.[159]

The treaty should lay down the 'nexus' element between the substantive standard and the 'right to regulate' clearly, depending on how narrowly or broadly the contracting parties wish to define their right ('primarily aimed at', 'directly related to', 'relating to', 'necessary for', 'aimed at').

Under Article 31(3)(c) of the Vienna Convention on the Law of Treaties, IIAs must be interpreted in accordance with the relevant rules of international law applicable between parties.[160] State parties to IIAs should explicitly set out the Multilateral Environmental Agreements or similar bilateral agreements in operation between them in order to clarify what such relevant rules might be. They should also direct what level of consideration a tribunal adjudicating investor-state disputes should give to state's obligations under these relevant rules. This will go a long way in boosting the cause of environmental protection and balancing it appropriately against economic interests.

In SGS v. Philippines, in the course of interpreting the BIT's observance of undertakings clause, the tribunal stated that since the purpose of the BIT is to create and maintain favourable conditions for investments, "[i]t is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments."[161] To avoid an outcome like this, states may benefit from referencing their right to regulate environmental sustainability explicitly in the Preamble.

Any concerns over the restrictive language of these clarifications[162] may simply be alleviated by insertion of an inclusive or illustrative list, followed by a generic category

159 *Burke-White/von Staden*, 2008/48, p. 308; *Muchlinski*, in: Sauvant (ed.), pp. 48, 76.
160 *McLachlan/Shore/Weiniger*, p. 67.
161 ICSID, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29/01/2004), para. 116.
162 *Kurtz*, p. 177.

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("comparable public interest", "similar circumstances"). This is identical to what the TBT in Article 2.2 provides in order to secure the state's regulatory rights. [163]

The only instance that the insertion of GECs is effective is when the purpose of the first order standard is not clear.[164] Conversely, in cases of ENR conservation, such a situation is highly unlikely to arise since the objectives of the first order standards that are relevant in cases concerning environmental sustainability (expropriation, fair and equitable treatment, and non-discrimination) are clear and known and the deficiency in their consistent and equitable interpretation is curable.

D. Conclusion

While admittedly, the relationship between economic and environmental objectives was discussed heavily in the negotiations of a multilateral trading system,[165] their replication "as is" in the context of investment protection is undesirable. Given the inherent flexibilities of investment protection standards[166] and the influence of customary international law in their interpretation,[167] Article XX(g)-like GECs do not expand the regulatory powers of a host state in any way. Instead, they may curtail such policy space by unduly limiting the rights of the host state's expansive police powers.[168] Further, the difficulties in translating WTO jurisprudence into investment law jurisprudence might aggravate the inconsistencies in the latter.[169]

Not only are the benefits of GEC codification in IIAs few, but its perils are also many. To undertake such a drafting exercise would severely undermine the foundations of the 'right to regulate' in international investment law – rendering it a counterintuitive exercise. In this light, the energies of policy-makers are better employed in providing clarificatory language for the substantive standards of investment protection.

163 WTO Agreement on Technical Barriers to Trade, Art. 2.2: "Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.".

164 *Kurtz*, p. 179.

165 *Raju*, JGLR 2016/7, p. 229.

166 UNCITRAL, *Saluka Investments BV (The Netherlands) v. Czech Republic*, Partial Award (17/03/2006), para. 300.

167 *Chaisse*, AJLM 39/2013, pp. 354-359; *Legum/Petculescu*, in: Enchandi/ Sauvé (eds.), p. 344.

168 *Newcombe*, in: de Maestral/Lévesque (eds.), pp. 267, 268; *de Mestral, Armand/Lukas Vanhonnaeker*, in: Rensmann (ed.), pp. 75, 114–115; *Lévesque*, in: Echandi/Sauvé, pp. 363, 364, 366–367; *DiMascio/Pauwelyn*, AJIL 2008/102, pp. 82-83; *Spears*, JIEL 2010/13, p. 1063.

169 *Mann*, IISDBP 2007/12.

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