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Investment protection and the safeguard of the essential interests of the State: Drawing lessons from the Pacific Alliance's investment treaty framework

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The Additional Protocol to the Framework Agreement of the Pacific Alliance (PA Additional Protocol) sets forth an additional layer for the protection of foreign investment to the pre-existing International Investment Agreements (IIAs) between the PA Member States, posing a number of systemic questions regarding the application and interpretation of different treaty provisions and the way how they interplay. Against this background, the chief purpose of this article is to ascertain the extent to which the PA Member States have preserved a regulatory space for the protection of their essential interests in the PA Additional Protocol and the pre-existing IIAs between them. Particular emphasis is given to variations in the scope of national security and public order exceptions vis-à-vis other investment treaty provisions, taking into account potential situations of overlapping and conflict of norms between the PA Additional Protocol and the pre-existing IIAs in place.

The article concludes that the narrower scope of the national security and public order exceptions in the PA Additional Protocol is outweighed by other provisions in the treaty that carefully balance the protection of investments vis-à-vis the right to regulate in the public interest. As highlighted by the UNCTAD, the PA Additional Protocol has all the elements suggested to preserve a regulatory space for public policies of host countries and to minimize the exposure to investment arbitration in this ground; this encompasses sensitives issues that would be otherwise governed by national security and public order exceptions in pre-existing IIAs between the PA Member States.

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I. Introduction

The Additional Protocol to the Framework Agreement of the Pacific Alliance (PA Additional Protocol)[1] sets forth an additional layer for the promotion and protection of foreign investment to the pre-existing International Investment Agreements (IIAs) between the Pacific Alliance Member States (PA Member States), posing important questions regarding the application and systemic interpretation of different treaty provisions and the way how they interplay.

Envisaged as an area of deep integration, the stepping stone of the Pacific Alliance draws on the fact that the four PA Member States have already in force free trade and investment agreements between each other, a condition that is also required for States who want to become Members of this regional economic integration organization.[2] This set of treaties is divided into five Free Trade Agreements (FTAs) containing investment chapters and one Bilateral Investment Treaty (BIT).[3] Importantly, none of these treaties corresponds to the traditional IIAs based on a first generation of European Model BITs, which were mainstream before the advent of FTAs with investment chapters similar to Chapter Eleven of the North American Free Trade Agreement.[4] As such, most of the existing IIAs between

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[1] The PA Additional Protocol was signed in 10 February 2014 by Colombia, Chile, Mexico and Peru, currently the four members of the Pacific Alliance. It draws on the Pacific Alliance Framework Agreement, signed in 6 June 2012, and in force since 20 July 2015. See Organization of American States (OAS), SICE-Foreign Trade Information System, Trade Policy Developments – Pacific Alliance, <http://www.sice.oas.org/TPD/Pacific_Alliance/Pacific_Alliance_e.asp> accessed 30 November 2015.

[2] See Article 11 of the Pacific Alliance Framework Agreement.

[3] The IIAs in force between the PA Member States are the Free Trade Agreement between Chile and Colombia, signed in 27 November 2006; the Free Trade Agreement between Chile and Mexico, signed in 17 April 1998; the Free Trade Agreement between Chile and Peru, signed in 22 August 2006; the Free Trade Agreement between Colombia and Mexico, signed in 13 June 1994 ; the Free Trade Agreement between Mexico and Peru, signed in 6 April 2011; and the Bilateral Investment Treaties between Colombian and Peru, signed in 11 December 2007.

[4] The obligations under the North American Free Trade Agreement (NAFTA) involve liberalization commitments including the right to establishment of foreign investors on the basis of non-discriminatory standards of treatment as well as prohibitions on the use of certain performance requirements by the NAFTA Contracting parties. For a further account on this issue, see Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff Publishers 1995) 53-85; Jürgen Kurtz, 'A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment' (2002) 23 (4) *University of Pennsylvania Journal of International Economic Law*, 736; Roberto Echandi, 'Bilateral Investment Treaties and Investment Provisions in

the PA Member States reflect both the aim of protection of investment already in place in host States as well as of liberalization regarding the admission and establishment of foreign investment.[5] They also contain important references that circumscribe the meaning and scope of IIA provisions with a view to strike a balance between investment protection and the right to regulate in the public interest.

It is noteworthy, however, that the coexistence of different treaties addressing the same subject-matter between the same State parties does not necessarily amount to potential conflicts of norms. As a matter of general international law, it is presupposed that successive treaties are not incompatible with each other and may coexist in light of a harmonizing and systemic interpretation which avoids conflicts in the first place.[6] This approach to the application of successive treaties is also embedded in Article 1.2 of the PA Additional Protocol which sets out, as a general rule, that the Parties confirm their rights and obligations stemming from other international agreements between them, and states that, in case of an alleged inconsistency with other international agreements, the concerned Parties shall initiate consultations in order to reach a mutually satisfactory solution. A footnote to this provision complements and orients the mutually supportive relationship sought vis-à-vis other international agreements between the Parties, by clarifying that the sole fact that another treaty grants a more favourable treatment to goods, services, investments or people will not be deemed as incompatible with the provisions of the PA Additional Protocol.[7] It may be noted, therefore, that the PA Member States have pursued to articulate the different IIAs applicable *inter se* by suggesting that concurring provisions among different treaties shall be interpreted in the most favourable terms for the protection of foreign investment.[8]

Regional Trade Agreements: Recent Developments in Investment Rulemaking', in Katia Yannaca-Small (ed.), *Arbitration under International Investment Agreements – A Guide to the Key Issues* (Oxford University Press 2010) 4-5.

[5] Except for the FTA between Colombia and Mexico, all the IIAs in force between the PA Member States contain standards of most favourable nation treatment and national treatment which apply to the pre-establishment phase of an investment.

[6] The application of successive treaties relating to the same subject-matter is addressed in Article 30 of the Vienna Convention on the Law of Treaties (VCLT) which content is also considered to be part of customary international law. Paragraph 3 of the said Article states that when all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty. As noted by Mark Villiger, Article 30 (3) does not contain a conflict clause, since it presupposes successive treaties which are not incompatible with each other. Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009) 402, 406.

[7] The footnote in Article 1.2 is relevant in light of Article 30 (3) of the VCLT, in what it clarifies the extent to which the earlier treaties are compatible with the PA Additional Protocol and, therefore, remain applicable in the relationship between the PA Member States.

[8] Noticeably, the application of Article 1.2 is confirmed by Article 10.3, which states that in case of incompatibility between the Investment Chapter and other Chapter, the latter shall prevail to the extent of the incompatibility.

Against this backdrop, this article explores whether this most favourable approach towards investment protection among different IIAs between the PA Member States reduces their regulatory space for the safeguard of their essential interests, namely the maintenance of public order and the protection of their essential security interests. In order to address this question, this article analyses first the coverage and scope of the treaty exceptions agreed by the PA Member States related to the safeguard of their essential interests (Part II). More concretely, this Part will assess the limited scope of the public order exception contained in the PA Additional Protocol as well as the variety of national security exceptions applicable between the PA Member States. Part III will turn then into the analysis of whether, and to what extent, the standards of investment treatment in the PA Additional Protocol and in the previous IIAs between the PA Member States are drafted in a way that their meaning and scope are in line with the preservation of a regulatory space for the protection of the State's essential security interests and the maintenance of public order. Part IV provides the main conclusions regarding the potential coexistence of IIAs between the PA Member States outlining the overall balance between protection of foreign investment, on the one hand, and the safeguard of public order and the essential security interests of the State, on the other hand.

II. Safeguarding the essential interests of the PA Member States in IIAs through public order and essential security general exceptions

The inclusion of general exceptions in IIAs is ultimately aimed at preserving a regulatory space for the protection of public interests, and it is envisaged as a means to justify the adoption or maintenance of measures that otherwise would be precluded in light of the rights and obligations contained in an IIA. In the particular case of public order and essential security general exceptions, the fact that they involve the essential interests of the State is a powerful reason for relying on a wording that accords greater flexibility for the adoption of measures with a negative impact on investment protection. Indeed, this is arguably the rationale underlying the inclusion of general exceptions with a "self-judging" character. At the same time, however, the most recent investment treaty practice, including that of the PA Member States, also reflects a greater concern for preserving investment protection from abusive interpretations of public order and essential security exceptions. Some of these treaty exceptions are modelled on similar provisions under the WTO law and reflect a more stringent approach as compared with a first generation of IIAs.[9]

[9] With respect to the protection of public order, a small but increasing number of IIAs include general exceptions modelled on GATT Article XX and/or GATS Article XIV. The majority of these IIAs are Canadian Foreign Investment Promotion and Protection Agreements. See Andrew Newcombe, 'The use of general

A. Public order and investment protection: drawing the line between treaty exception and treaty interpretation.

Article 18.2 of the PA Additional Framework contains a "non-precluded measure" provision aimed at preserving public order. Remarkably, however, this provision seems to deviate from the way in which a treaty exception operates, in what it is not addressed to delimit the scope of the provisions to which it applies (the Investment Chapter) but it confirms ultimately the application thereof. Article 18.2 reads as follows:

> *Article 18.2: Public Order*
>
> *The Parties understand that nothing in Chapter 10 (Investment) shall be construed to prevent a Party from adopting or maintaining measures relating to natural persons of the other Party necessary to preserve public order [1], subject to the requirement that such measures are not applied in a manner that constitutes arbitrary or unjustifiable discrimination.*
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> *[1] Notwithstanding the foregoing, the Parties understand that the rights and obligations under Chapter 10 (Investment) shall remain applicable*.

From the outset, this provision exclusively applies to the Investment Chapter with the aim of not precluding the right of the Parties to adopt or maintain measures for the safeguard of public order. More concretely, however, the text contains important references that circumscribe the coverage and scope of Article 18.2. First, it limits its coverage to measures adopted or maintained by a Party relating to "natural persons" of the other Party necessary to preserve public order. The exclusion of "legal persons" is not a common trait in the wording of public order exceptions in IIAs. Indeed, the investment arbitration cases where it was raised a defence based on a public order exception involved measures in the context of an economic crisis that were not circumscribed to "natural persons".[10] Second, the adoption or maintenance of measures must be "necessary" to preserve public

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exceptions in IIAs: increasing legitimacy or uncertainty?' in Armand de Mestral and Céline Levésque, *Improving International Investment Agreements* (Routledge Research in International Economic Law 2013) 273. As regard to the protection of the essential security interests of the State, various multilateral and bilateral investment treaties and free trade agreements contain self-judging clauses that are similar to GATT Article XXI or GATS Article XIV *bis*. See Stephan Schill and Robyn Briese, '"If the State Consider": Self-Judging Clauses in International Dispute Settlement' in A. von Bogdandy and R. Wolfrum (eds.) *Max Planck Yearbook of United Nations Law* (2009) 13, 110.

[10] All the cases in investment treaty arbitration where a public order exception was invoked are related to the Argentine economic crisis that took place at the beginning of the century and to the application of a sole IIA provision, namely Article XI of the Argentina-US BIT. See *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No ARB/01/08); *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v. Argentine Republic* (ICSID Case No ARB/02/1); *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, LP v. Argentine Republic* (ICSID Case No ARB/01/3); *Sempra Energy International v Argentine Republic* (ICSID ARB/02/16); *Continental Casualty Company v. Argentine Republic* (ICSID Case No ARB/03/09); and *El Paso Energy International Company v. Argentine Republic* (ICSID Case No ARB/03/15).

order and they cannot be applied in a manner that constitutes "arbitrary or unjustifiable discrimination". Whereas a "necessity" nexus requirement to adopt restrictive measures is in line with the mainstream pattern of public order exceptions in IIAs, the condition that such measures are not applied in a manner that constitutes arbitrary or unjustifiable discrimination is only reflected in most recent IIAs that draw on the wording of GATT Article XX and GATS Article XIV.[11] Third, and more significantly, the scope of Article 18.2 is substantially limited as compared to other similar provisions in IIAs in what its sole footnote clarifies that the rights and obligations under the Investment Chapter shall remain applicable.[12] As such, this provision arguably operates in a different fashion than an investment treaty exception by which it would be limited the scope of the investment provisions to which the exception applies.

The confirmation of the rights and obligations under the Investment Chapter is problematic because it seems to jeopardise the "effect utile" of the non-precluded measure clause. It arguably implies that Article 18.2 does not operate as a genuine treaty exception by which the scope of primary norms in the treaty is delimited vis-à-vis the scope of the treaty exception, but it leads to assume instead that its purpose is only to shed light on the interpretation of the provisions to which it applies, without delimiting the scope thereof, so as they are not read in a way that prevent the Parties from adopting measures for the safeguard of public order.

From the six IIAs in force between the PA Member States, three include public order exceptions. As compared to the non-precluded measure clause contained in Article 18.2 of the PA Additional Protocol, the exceptions set forth in the previous IIAs have a broader scope or contain less stringent conditions to adopt or maintain measures for the safeguard of public order. With respect to their coverage, only the public order exception in the FTA between Chile and Colombia is similar to Article 18.2 in what it is limited to the adoption or maintenance of measures related to "natural persons". Furthermore, regarding the conditions required to adopt or maintain restrictive measures, the Chile-Colombia FTA is the only one that requires that those measures are not applied in a manner that constitutes an arbitrary or unjustifiable discrimination.[13] The other IIAs that include a public order exception, namely the Colombia-Mexico FTA and the Colombia-Peru FTA, are

[11] Both GATT Article XX and GATS Article XIV require that a policy measure is not applied in a manner that constitutes arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

[12] A similar wording can be found in the public order general exception set forth in Article 2201 (4) of the Colombia-Canada FTA, signed in 21 November 2008. This provision relates to the adoption or maintenance of measures for preserving public order, but states at the same time that the rights and obligations under the Agreement, in particular the rights of investors under the Investment Chapter, "remain applicable to such measures".

[13] See Article 21.3 of the FTA between Chile and Colombia, signed in 27 November 2006.

not modelled on GATT Article XX or GATS Article XIV general exceptions, nor they contain conditions aside from a "necessity" nexus for limiting the adoption or maintenance of restrictive measures based on the protection of public order.

The discussion of which norm would apply in case of two concurrent non-precluded measure provisions set forth in different IIAs between the same PA Member States is grounded both on the general rules on successive treaties under public international law and on Article 1.2 of the PA Additional Protocol. The latter differs with the former in what it does not reflect the principle *lex posterior derogat legi priori*, but involves instead the application of the most favourable norm for protection of investments in case of two concurring provisions under different IIAs. Against this background, it may be assumed that Article 18.2 of the PA Additional Protocol, either as the *lex posterior* or as the non-precluded measure provision which involves a better treatment for protection of investment, would prevail over the other public order exceptions under previous IIAs between the PA Member States to the extent of the inconsistency.

B. Essential security exceptions: the general rule and the Peruvian approach

Article 18.3 of the PA Additional Protocol contains an essential security exception with a general scope of application vis-à-vis the other provisions of the treaty. Following the pattern of most recent FTAs, this provision is modelled on the wording of the essential security exceptions contained in GATT Article XXI and GATs Article XIV *bis*. Accordingly, it is divided into three parts. First, paragraph (a) of Article 18.3 states that nothing in the PA Additional Protocol shall be construed to require a Party to furnish any information the disclosure of which it determines to be contrary to its essential security interests. Second, Article 18.3 paragraph (b) refers to three categories or situations with respect to which the State parties may adopt restrictive measures "deemed necessary" for the protection of their essential security interests.[14] Although these categories are mainly limited to military issues, one of them relates to measures taken in time of war or "*other emergency in international relations*", leaving certain leeway for a broader interpretation regarding the situations covered under the treaty exception. Finally, Article 18.3 paragraph (c) applies to any action that a Contracting Party takes in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

[14] Paragraph (b) of Article 18.3 refers to measures: (i) relating to fissionable or fusionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials, or related to the supply of services, for the purpose of supplying a military establishment; and (iii) taken in time of war or other emergency in international relations.

For the purposes of the current analysis, it is relevant to outline the scope and coverage of Article 18.3 (b) of the PA Additional Protocol as compared to similar provisions in previous IIAs between the PA Member States. The particular trait of this exception relies on the fact that its general scope of application vis-à-vis the other provisions of the treaty as well as its potential self-judging character are offset by its limited coverage, which is mainly related to military issues and measures adopted in time of war.

Two caveats must however be expressed. First, it is questionable to assert that the entire treaty exception has a self-judging character. The real implication of the reference "measures deemed necessary" is that the appraisal of the necessity to adopt restrictive measures for protecting the essential security interests of the State is mainly an exclusive prerogative of the State who invokes the exception. This circumstance clearly relies on deference as the standard of review to be applied in investment arbitration, but it does not exempt the application of the treaty exception from judicial review. Indeed, it is argued that even the measures deemed necessary to protect the essential interests of the State remain subject to judicial review under the general principle of good faith.[15] At the same time, the assessment of whether the particular facts in a case relate to one of the three situations set forth in Article 18.3 (b) is still subject to judicial review by investment tribunals. Second, it may be discussed whether the reference to "other emergency in international relations" is stringent enough to exclude the protection of security interests no related to military issues or no adopted in time of war. Whereas it certainly leaves out the protection of national security interests to the extent that they are not part of an emergency in international relations, it does not clarify whether situations such as international economic crises or critical situations relating to cross-border energy supply, to name two controversial cases, may be under the coverage of the exception to the extent that they indirectly have an impact in international relations.

Importantly, all the IIAs between the PA Member States contain essential security exceptions. Aside from the FTA between Chile and Peru concluded in 2006, all the exceptions in previous IIAs are modelled on the wording of GATT Article XXI and GATS Article XIV *bis*. However, the possibility of potential conflicts of norms between Article 18.3 of the PA Additional Protocol and the essential security exception set forth in the Chile-Peru FTA is set aside by the fact that, pursuant Annex 18-A of the PA Additional Protocol, the essential security exceptions contained in IIAs between Peru and the other PA Member States remain applicable notwithstanding the application of Article 18.3 between the other Contracting States. Annex 18-A more concretely refers to the application of Article 17.2 of the Chile-Peru FTA, Article 8.4 (b) of the BIT between Peru

[15] See United Nations Conference on Trade and Development (UNCTAD), 'The Protection of National Security in IIAs' (2009 UNCTAD Series on International Investment Policies for Development) 91-2.

and Colombia, and Article 18.2 of the Peru-Mexico FTA. It also clarifies that the Annex will be updated in order to incorporate the essential security exceptions applicable between Peru and the acceding States to the PA Additional Protocol.

As compared to Article 18.3 (b) of the PA Additional Protocol, Article 17.2 of the Chile-Peru FTA is modelled on the essential security exception set forth in the 2004 and the 2012 US BIT Models rather than on GATT Article XXI or GATS Article XIV *bis*.[16] In this regard, it applies to measures that a State party considers necessary for the protection of its own essential security interests without relating the application of the exception to military issues or limiting the coverage thereof to an exhaustive list of situations. Noticeably, however, it is similar to Article 18.3 (b) in what it relies on a nexus requirement based on "necessity" the appraisal of which has a self-judging character.

The broad coverage and scope along with the self-judging character of the assessment of necessity under the essential security exception contained in the Chile-Peru FTA reflect a more restrictive approach towards protection of foreign investment than Article 18.3 (b) of the PA Additional Protocol. It arguably encloses the potential risk of overextended and arbitrary interpretations regarding the categories of situations deemed to be covered under the treaty exception as well as the justification of restrictive measures and policies related to national security issues. It is relevant to note that the only national security exception that has been so far analysed in investment arbitration, namely Article XI of the Argentina-US BIT, has a broad coverage and scope but does not has a self-judging character regarding the assessment of "necessary measures" to protect the essential security interests of the State. Yet, Article XI of the Argentina-US BIT has been subject to different and contradictory interpretations by arbitral tribunals and is still deemed controversial by scholars and practitioners in the field.

III. Moving aside from general exceptions: the safeguard of the essential interests of the State within the realm of substantive IIA provisions.

A coherent design of IIAs implies, among other elements, the adequacy of the provisions of the treaty to the object and purpose thereof, as well as the compatibility between standards of investment treatment and exceptions in order to avoid overlapping and potential conflicts of norms. Against this backdrop, a coherent approach in the drafting of public order and essential security general exceptions in IIAs would require not to overlook the fact that the essential interests of the State may be also protected to some

[16] Article 18 of the 2004 US Model BIT and Article 18 of the 2012 US Model BIT have identical wording and state that nothing in an IIA shall be construed to preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

extent through the right to regulate in the public interest embedded in the interpretation of some important IIA provisions.

This is particularly relevant in the case of IIAs which contain carefully-crafted investment provisions with the purpose to strike a fair balance between investment protection and the State's right to regulate in the public interest. The PA Additional Protocol responds precisely to this category of investment agreements. As highlighted by the UNCTAD, this treaty contains substantive and procedural investment provisions reflecting policy objectives that stimulate responsible business practices, avoid over-exposure to litigation, preserve the right to regulate in the public interest, prompt investments conducive to development, and promote sustainable development-oriented policies.[17] Interestingly, from a review of the IIAs concluded in 2014, the PA Additional Protocol is the only one that includes all the relevant aspects associated with the aforementioned policy objectives suggested by the UNCTAD.[18]

In light of the foregoing, the role of the public order and essential security general exceptions in the PA Additional Protocol is deemed complementary to the meaning and scope of the primary norms in the treaty in what the latter already enclose a regulatory space for the protection of the essential interests of the State. Given that reasons of space permit only a cursory discussion of the interlinkage between standards of investment treatment and the general exceptions on public order and security, this analysis focuses on three categories of IIA provisions, namely indirect expropriation, fair and equitable treatment (FET) and the standards on non-discrimination[19].

[17] See United Nations Conference on Trade and Development (UNCTAD), 'Recent Trends in IIAs and ISDS' [2015] (1) IIA Issues Note, 4.

[18] The IIA aspects associated with the policy objectives recommended by the UNCTAD consist on: (i) references to the protection of health and safety, labor rights, environment or sustainable development in the treaty preamble; (ii) a refined definition of investment (reference to characteristics of investment, exclusion of portfolio investment, sovereign debts obligations or claims of money arising solely from commercial contracts); (iii) a carve-out for prudential measures in the financial services sector; (iv) a fair and equitable standard equated to the minimum standard of treatment of aliens under customary international law; (v) clarification of what does and does not constitute an indirect expropriation; (vi) detailed exceptions from the free-transfer-of-funds obligation, including balance-of-payments difficulties and/or enforcement of national laws; (vii) the omission of the so-called "umbrella" clause; (viii) general exceptions, e.g. for the protection of human, animal or plant life or health; or the conservation of exhaustible natural resources; (ix) explicit recognition that parties should not relax health, safety or environmental standards to attract investment; (x) promotion of Corporate and Social Responsibility standards by incorporating a separate provision into the IIA or as a general reference in the treaty preamble; and (xi) limiting access to investor-State dispute settlement (ISDS) (e.g., limiting treaty provisions subject to ISDS, excluding policy areas from ISDS, limiting time period to submit claims, no ISDS mechanism). Ibid.

[19] These standards are among the most common IIA provisions challenged in investment treaty arbitration and have occasionally trigger inconsistent and controversial interpretations by which regulatory actions based on public welfare objectives have been related to a breach of the IIA and led to the obligation to compensate foreign investors.

A. Indirect Expropriation

The provisions on expropriation set forth in Article 10.12 and Annex 10.12 of the PA Additional Protocol draw on the US and Canadian Model BITs.[20] An important feature thereof for the purpose of our analysis is the distinction between legitimate governmental regulations and indirect expropriation. Annex 10.12 outlines that, except in rare circumstances, non-discriminatory regulatory actions by a Party designed and applied to protect legitimate public welfare objectives do not constitute indirect expropriation.

The foregoing distinction draws on the so-called police powers doctrine, which origin may be traced back to the 1961 Draft Convention on the International Responsibility of States for Injuries to Aliens prepared under the auspices of Harvard Law School.[21] Although some investment tribunals and scholars have argued that the police powers doctrine has become a rule of general international law applicable to indirect expropriation,[22] its legal nature is still under debate. Indeed, investment treaty arbitration continues reflecting inconsistent interpretations regarding the meaning and scope of regulatory takings. In this context, it seems to be relevant for States to incorporate and make explicit in IIAs the difference between indirect expropriation and legitimate governmental regulations. By clarifying what is not deemed to be an indirect expropriation, States may preserve a regulatory space deemed necessary for the public interest, including the maintenance of public order and the protection of their essential security interests.

Some of the previous IIAs between the PA Member States also include a precision in similar terms. This is the case of the Chile-Colombia FTA, the Chile-Peru FTA, the Mexico-Peru FTA and the BIT between Colombia and Peru. The Chile-Mexico FTA and the Colombia-Mexico FTA, on the contrary, do not contain a reference that explicitly distinguishes between indirect expropriation and legitimate governmental regulations. In these cases, there is a greater margin of uncertainty as to the particular stance that an investment tribunal would adopt when deciding upon the meaning and scope of indirect expropriation. A vaguely worded provision on indirect expropriation could indeed lead to

[20] See Article 6 and Annex B of the 2012 US BIT Model, as well as Article 13 and Annex B.13 (1) of the 2004 Canada BIT Model. Noticeably, the provisions on expropriation under the 2012 US BIT Model have not varied from their previous versions under the 2004 US BIT Model.

[21] The 1961 Harvard Draft was conceived as a revision of the 1929 draft Convention on the Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, which had also been prepared under the auspices of Harvard Law School. See Jürgen Kurtz, 'Building Legitimacy Through Interpretation in Investor-State Arbitration: On Consistency, Coherence, and the Identification of Applicable Law', in Zachary Douglas, Joost Pauwelyn, an Jorge E. Viñuales, *The Foundations of International Investment Law* (Oxford University Press 2014) 294.

[22] Two investment tribunals have explicitly catalogued the police powers doctrine as a rule of general international law. See *Methanex Corp. v United States of America* (Award, 3 August 2005) NAFTA/UNCITRAL Arbitration, 7; and *Saluka Investments BV v. Czech Republic* (Partial Award, 17 March 2006) UNCITRAL Rules, 262.

a more restrictive interpretation of that standard which would benefit investment protection to the detriment of the right to regulate in the public interest.

Moreover, the different wording on indirect expropriation in IIAs between the same PA Member States could trigger conflicting interpretations as to the meaning and scope of the standard of expropriation. On the one hand, it could be argued that the standard on indirect expropriation as drafted under the Chile-Mexico FTA and the Colombia-Mexico FTA would remain applicable despite the eventual entry into force of the PA Additional Protocol, since Article 1.2 of the latter not only confirm the rights and obligations under previous IIAs between the Parties but also excludes a case of inconsistency if the previous IIAs contain a more favourable treatment for investment. As such, an investment tribunal could decide that the more stringent criteria on indirect expropriation under Annex 10.12 of the PA Additional Protocol would not necessarily be bound in the interpretation of that standard if there are IIAs between the same PA Member States with a broader wording thereof. On the other hand, it could be rather argued that the criteria on indirect expropriation under Annex 10.12 of the PA Additional Protocol is applicable in any case as a norm of general international law, and that as such it governs the interpretation of such standard despite the lack of a similar language in previous IIAs between the same PA Member States.

Another relevant issue is the relation between the standard of expropriation and public order or essential security general exceptions. It is important to note that the criteria set out in Annex 10.12 of the PA Additional Protocol for distinguishing legitimate governmental regulations from indirect expropriation do not require a State to prove the "necessity" of such regulations for protecting a legitimate public welfare objective. The meaning and scope of the standard of indirect expropriation is in this respect less stringent for protecting the essential interests of the State as compared to the general exceptions on public order and essential security set forth in the IIAs between the PA Member States, the application of which is based on a nexus of "necessity". However, a general exception may have an "*effet utile*" with respect to the standard of indirect expropriation in what a governmental regulation aimed at protecting the essential interests of the State would be considered an indirect expropriation if it is discriminatory but still could be justified under the general exception on the basis that the latter does not include a condition on non-discrimination.

B. Standards on non-discrimination

All the IIAs between the PA Member States include obligations on non-discrimination through the standards of National Treatment (NT) and Most-favored Nation Treatment

(MFN). As an important common feature to all these IIAs, it is observed that the NT and MFN standards always require comparison of investors/investments that are "in like circumstances". Such a provision, as noted by the UNCTAD, can go some way in safeguarding the State's right to regulate in the public interest.[23] Some investment tribunals have found that two investments are not in "like circumstances" where there is a legitimate policy rationale for differentiating between them, not motivated by protectionism.[24] Moreover, the majority of investment tribunals have taken a softer approach than "necessity" under general exceptions looking only for a "reasonable" or "rational" nexus between the measure and the policy pursued.[25]

In the context of the IIAs between the PA Member States, the foregoing construction of IIA obligations on non-discrimination may affect an "*effet utile*" interpretation of general exceptions modelled on GATT Article XX and GATS Article XIV. This is arguably the case of the public order "exception" set forth in Article 18.2 of the PA Additional Protocol, in what its nexus requirement is based on "necessity" and its application is subject to the condition that the State's measure is not applied in a manner that constitutes an arbitrary or unjustifiable discrimination. General exceptions of this type might be interpreted restrictively and may provide even less regulatory flexibility for host States than the IIA standards on non-discrimination based on the criterion of investors/investments that are in "similar circumstances".[26]

C. Fair and Equitable Treatment Standard

The FET standard, especially as it has been drafted in traditional IIAs, is oftentimes catalogued as an all-encompassing provision, and it is deemed controversial due to its open-ended and largely undefined nature used by investors to challenge any type of governmental conduct considered inequitable or unfair.[27]

Most of the IIAs between the PA Member States contain, however, FET standards which scope is circumscribed to the minimum standard of treatment governed by customary international law. As mentioned by the UNCTAD, this approach to the standard may raise the threshold of State liability by requiring that the challenged conduct be found to

[23] See United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2015. Reforming International Investment Governance* (United Nations 2015) 137.

[24] See *Pope & Talbot Inc. v. The Government of Canada* (Award, 10 April 2001) at paras. 78 and 79, and *GAMI Investments, Inc. v. The Government of the United Mexican States* (Final Award, 15 November 2004) at para. 114. See also Andrew Newcombe, 'General Exceptions in International Investment Agreements', in Marie-Claire Cordonier Segger, Markus W. Gehring and Andrew Newcombe (eds.), *Sustainable Development in World Investment Law* (Kluwer Law International 2011) 366.

[25] Nicholas DiMascio and Joost Pauwelyn, 'Non-discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' (2008) 102 American Journal of International Law 48, 76.

[26] See Andrew Newcombe, (n 9) 279.

[27] United Nations Conference on Trade and Development (UNCTAD) (n 23) 137.

amount to egregious or outrageous mistreatment of foreign investors, helping to preserve the State's ability to adapt their policies in light of changing objectives.[28]

The IIAs that refer to the FET standard as part of a minimum standard of treatment within customary international law draw on the US and Canadian Model BITs.[29] The standard under both Models is also drafted in a way that prevents an overextended interpretation thereof by stating that a determination that there has been a breach of another provision of the IIA, or of a separate international agreement, does not establish that there has been a breach of the minimum standard of treatment. The PA Additional Protocol as well as four out of the six previous IIAs between the PA Member States contain provisions with such characteristics.[30]

Other IIAs go further in circumscribing the definition of the FET standard, by stating that, as part of the minimum standard of treatment, it includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world, and by including a definition of customary international law related to the minimum standard of treatment. This approach, modelled on the US BIT Model but not in the Canadian BIT Model, is followed in the PA Additional Protocol as well as in three out of the six previous IIAs between the PA Member States.[31]

From the overall set of previous IIAs between the PA Member States, only the Colombia-Mexico FTA does not contain a FET standard. Other two IIAs, namely the Mexico-Peru FTA and the Chile-Mexico FTA, differ in the wording of this standard as compared with the PA Additional Protocol in what they do not precise the meaning of the FET standard, nor they contain a definition of customary international law in this field.[32] However, it is assumed that a narrower definition of the minimum standard of treatment under the PA Additional Protocol would supersede a broader definition thereof under previous IIAs. This may be arguably so not much because of the principle of *lex posterior derogat legi priori*, but rather in light of the legal nature of the minimum standard of treatment which is deemed to be part of customary international law. As such, it would be difficult to argue that a broader definition of such standard in previous IIAs amounts to a more favourable

[28] However, even if the scope of the FET standard may be reduced by linking it to the minimum standard of treatment, the contours of the latter are still far from clear. Ibid., 137-8.

[29] See Article 5 of the 2004 Canada Model BIT, Article 5 of the 2004 US Model BIT, and Article 5 of the 2012 US Model BIT.

[30] These treaties are the Chile-Colombia FTA, the Chile-Peru FTA, the Mexico-Peru FTA and the Colombia-Peru BIT.

[31] These treaties are the Chile-Colombia FTA, the Chile-Peru FTA, and the Colombia-Peru BIT.

[32] Additionally, the regulation of the minimum standard of treatment under the Chile-Mexico FTA is different to the PA Additional Protocol in what it does not state that a determination that there has been a breach of another provision of the IIA, or of a separate international agreement, does not establish that there has been a breach of the minimum standard of treatment.

treatment for protection of investment as compared with the narrower definition thereof under the PA Additional Protocol, and that as such the broader definition in previous IIAs would prevail pursuant Article 1.2 of the PA Additional Protocol.

IV. Overall Balance and Conclusions

From an overall perspective, most of the general exceptions on essential security and public order under the IIAs in force between the PA Member States are drafted in a way that preserve to a great extent a regulatory space for the safeguard of the essential interests of the State. As compared with some of these provisions, the general exceptions under Articles 18.2 and 18.3 of the PA Additional Protocol have a narrower coverage and scope. This is of paramount importance since, except for the essential security exceptions in the IIAs between Peru and other PA Member States, the aforementioned provisions of the PA Additional Protocol would supersede the general exceptions set forth in previous IIAs.

In consolidating a common investment legal framework between the PA Member States, the PA Additional Protocol reflects all the investment treaty policies suggested by the UNCTAD for an IIA reform aimed at striking a fair balance between investment protection and the right to regulate in the public interest.[33] More importantly, it does so in procuring a coherent and systemic approach between: (i) the PA Additional Protocol and the other IIAs between the PA Member States (ii) the standards of investment treatment and the general exceptions on national security and public order, and (iii) the different provisions in IIAs and the object and purpose thereof.

As regards to the first scenario, the PA Additional Protocol prevents potential conflicts of norms by clarifying that investment provisions under other IIAs between the PA Member States are not deemed incompatible if they turn out to be more favourable for the protection of investments. This approach may occasionally entail the prevailing application of standards of investment protection under previous IIAs over equivalent provisions in the PA Additional Protocol. However, a broader or narrower definition of a standard of investment protection in previous IIAs does not imply *per se* a more favourable treatment for protection of investments. Such an assessment is rather to be undertaken on a case-by-case basis and in light with the intention of the Parties to allow the coexistence of IIAs between the PA Member States to the extent possible.

[33] The UNCTAD identifies two reform areas related to the objective of safeguarding the right to regulate in IIAs. On the one hand, it posits to draft clearly defined IIA standards of protection, namely FET, indirect expropriation and MFN. On the other hand, it is suggested to incorporate "safety valves" in IIAs, e.g. exceptions for public policies, national security and balance-of-payment crises. See United Nations Conference on Trade and Development (UNCTAD) (n 23) Table IV.3 "Objectives and areas for IIA reform", 133.

Whit respect to coherence in the relation between standards of investment protection and general exceptions on national security and public order, what is important to assess is the extent to which the construction of the former is consistent with an "*effet utile*" interpretation of the latter. Whereas the provision on public order under the PA Additional Protocol seems in this regard problematic and redundant, since it relates to the adoption or maintenance of measures that in either case must be necessarily consistent with the rights and obligations under the Investment Chapter; the essential security exception is rather applicable to measures that otherwise would amount to a breach of the IIA, and is less stringent than the definition of NT, MFN and the police powers doctrine applicable to indirect expropriation in what it does not require a measure to be non-discriminatory.

In general terms, the relevance and effectiveness of general exceptions in IIAs is conditioned by the extent to which the standards of investment protection in the treaty already enclose a regulatory space for the protection of the State's interests at stake. The limitations in the scope and coverage of Articles 18.2 and 18.3 of the PA Additional Protocol are in this regard consistent with the inclusion of more detailed and carefully-crafted standards of investment treatment in the treaty which already enclose a regulatory space for the safeguard of the essential interests of the State.

Finally, it is important to evaluate the adequacy of the overall set of investment provisions to the object and purpose of the IIAs to which they belong. Vaguely worded exceptions with a self-judging character, for example, could be at odds with the aim of promoting and protecting foreign investment insofar as they may potentially trigger abusive interpretations. Essential security exceptions modelled on GATT Article XXI or GATS Article XIV *bis* seem to follow a more balanced approach in this respect, since they circumscribe their coverage to a limited set of situations but have at the same time a self-judging character in the evaluation of the necessity to adopt restrictive measures. This model is reflected in the PA Additional Protocol as well as in most of the IIAs between the PA Member States.

The PA Additional Protocol is called to consolidate an investment legal framework within the Pacific Alliance with a systemic approach for balancing investment protection and the State's right to regulate in the public interest, which includes the safeguard of the essential interests of the State. In the overall balance, the design of the PA Additional Protocol is coherent in light of the relation between the standards of investment treatment and the general exceptions contained therein (coherence within the IIA) as well as regarding the relation of the provisions thereof with equivalent norms under other IIAs between the PA Member States (coherence between IIAs).