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**Return of the Inconsistent Application of the 'Essential Security Interest' Clause in Investment Treaty Arbitration:
CC/Devas v India and Deutsche Telekom v India**

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Return of the Inconsistent Application of the ‘Essential Security Interest’ Clause in Investment Treaty Arbitration: CC/Devas v India and Deutsche Telekom v India

Abstract

Investment treaty arbitration is currently undergoing a backlash, precipitated in large measure by the problem of inconsistency in investment awards. Inconsistent reasoning and decisions have proved particularly problematic when different shareholders of an affected company pursue claims for reflective loss before different tribunals concerning the same dispute. This article examines two recent investment treaty cases – *CC/Devas v India* (*CC/Devas*) and *Deutsche Telekom v India* (*DT*) – that are a critical example of this very real problem.

The first part of this article assesses the inconsistent interpretation and application of ‘essential security interest’ (ESI) clauses in *CC/Devas* and *DT*. As this article shows, the disagreement between the tribunals is explained by contradictory assessments of the same facts.

The second part critically evaluates the impact of these cases on the development of the precise criteria for successfully invoking an ESI clause. ESI clauses comprise two elements – (i) existence of an ESI; and (ii) nexus between the ESI and the measure adopted. These elements have hitherto been subject to inconsistent interpretations, leaving the exact contours of such clauses unclear. This article uncovers which security interests can qualify as ‘essential’ interests, focusing particularly on the question whether ESI encompasses protection of strategic resources for military and non-military use. It also examines the meaning of the nexus requirement of ‘necessary’, and explores the difference(s) between the nexus requirements of ‘directed to’ and ‘necessary’.

I. INTRODUCTION

The last two decades have witnessed an unprecedented growth – a ‘baby boom’ – in the number of investment treaty arbitrations (ITA) between a foreign investor and a host State.¹ In the increased academic and public scrutiny that has followed this rapid rise, many have repeatedly questioned the legitimacy of the investment treaty regime, arguing that the regime is undergoing a ‘legitimacy crisis’.²

¹ Stanimir A. Alexandrov, ‘The “Baby Boom” of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as “Investors” and Jurisdiction Ratione Temporis’ (2005) 4 LPICT 19. According to the most recent statistics, the investment treaty regime currently comprises 2,946 BITs and 376 treaties with investment chapters. The cumulative number of known investment cases, as of 1 January 2018, stood at 855: United Nations Conference on Trade and Development. (UNCTAD), ‘World Investment Report 2018: Investment and New Industrial Policies’ (2018), at 19, <https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf> accessed 28 November 2018.

² See example: David Schneiderman, ‘International Investment Law’s Unending Legitimation Project’ (2017) 49 Loyola Univ Chicago LJ 232; William W. Burke-White, ‘The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System’ in Michael Waibel and others (eds), *The Backlash against Investment Arbitration* (Alphen aan den Rijn: Kluwer Law International 2010) 408ff; Susan D. Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent

Various factors have precipitated this ‘backlash against investment arbitration’.³ They range from procedural issues such as lack of transparency,⁴ double hatting by lawyers acting as counsel and arbitrator,⁵ absence of an appeals mechanism,⁶ to substantive issues such as expansive interpretations of investment protection standards by investment tribunals.⁷ Additionally, a central concern relates to inconsistency of decisions by tribunals.⁸ Even the staunchest defenders of ITA concede that ‘the current system of investment arbitration has not been designed...to promote uniformity and consistency’.⁹

As Susan Franck describes, inconsistent decisions can result when tribunals reach different conclusions regarding the meaning of the same treaty provision, or when tribunals diverge in their assessment of cases involving similar commercial situations and similar investment rights.¹⁰ Significant concerns also arise when tribunals reach divergent conclusions in situations wherein the same dispute is litigated before separate tribunals by different shareholders of an affected company. The inconsistent outcomes in the *Lauder* and *CME* saga is well-known.¹¹ Dutch company, CME, and its ultimate shareholder, Lauder, commenced parallel arbitration against the Czech Republic for revoking TV licences granted to local company, TV Nova. Both arbitrations concerned the same facts, the same host State action and the same dispute. The *Lauder* tribunal decided in the Czech Republic’s favour but the *CME* tribunal – within two weeks of the *Lauder* decision – held that the Czech Republic had breached its treaty obligations.

Decisions’ (2005) 73 Fordham LR 1521; M. Sornarajah, ‘A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration’ in Karl P. Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (Oxford: Oxford University Press 2008) 39; Charles N. Brower and Stephan W. Schill, ‘Is Arbitration a Threat or Boon to the Legitimacy of International Investment Law?’ (2009) 9(2) Chicago J Int’l L 471; Stephan W. Schill, ‘Enhancing International Investment Law’s Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach’ (2011) 52(1) Va J Int’l L 57.

³ See generally: Michael Waibel and others (eds), *The Backlash against Investment Arbitration* (Alphen aan den Rijn: Kluwer Law International 2010).

⁴ See example: N. Jansen Calamita, ‘Dispute Settlement Transparency in Europe’s Evolving Investment Treaty Policy’ (2014) 15 JWIT 645.

⁵ See example: Malcolm Langford, Daniel Behn and Runar Hilleren Lie, ‘The Revolving Door in International Investment Arbitration’ (2017) 20(2) JIDS 301.

⁶ See example: Gabriel Bottini, ‘Reform of the Investment Arbitration Regime: The Appeals Proposal’ in Jean E. Kalicki and Anna Jouben-Bret (eds), *Reshaping the Investor-State Dispute Settlement System* (Leiden: Brill, 2015) 455.

⁷ See example: Malcolm Langford and Daniel Behn, ‘Managing Backlash: The Evolving Investment Treaty Arbitrator?’ (2018) 29(2) EJIL 551, 554-57.

⁸ See example: Franck (n 2); Brower and Schill (n 2) 473-74; United Nations Commission on International Trade Law (UNCITRAL), ‘Report of the Working Group III (Investor-State Dispute Settlement Reform)’, UN Doc A/CN.9/935 (14 May 2018) paras 20-38.

⁹ Rudolf Dolzer, ‘Fair and Equitable Treatment: Today’s Contours’ (2014) 12 Santa Clara J Int’l L 7, 15.

¹⁰ Franck (n 2) 1545-46. See also: August Reinisch, ‘The Issues Raised by Parallel Proceedings and Possible Solutions’, in Waibel and others (n 3) at 115-17.

¹¹ *CME Czech Republic BV v Czech Republic*, UNCITRAL, Partial Award (13 September 2001); *Ronald S Lauder v Czech Republic*, UNCITRAL, Final Award (3 September 2011).

Against this backdrop, two awards against India – *CC/Devas v India (CC/Devas)* and *Deutsche Telekom v India (DT)* – made public recently, take particular significance.¹² Underlying both cases are the same facts and the same dispute. Indian state-owned company, Antrix, cancelled an agreement (Agreement) by which it leased electromagnetic spectrum (Spectrum) on two satellites to Indian commercial enterprise, Devas. The Indian government ordered the cancellation, citing increased demands for allocating the Spectrum to meet national needs of military and para-military forces and public utility services. Alleging expropriation and breach of fair and equitable treatment, three Mauritian shareholders of Devas initiated the first case, *CC/Devas*, under the India-Mauritius BIT. The second case, *DT*, was commenced by German shareholder Deutsche Telekom under the Germany-India BIT. Both BITs include an ‘essential security interest’ clause, which limits the availability of investment protections when a State adopts a measure to protect its ‘essential security interest’ (ESI). The fundamental question before the tribunals, thus, was whether India cancelled the Agreement to protect an ESI. While the *CC/Devas* tribunal found in India’s favour (by majority), the *DT* tribunal reached the opposite result 5 months later, concluding that there was no nexus between India’s ESI, i.e. the needs of the military and para-military forces, and the decision to cancel the Agreement.

This article critically analyses the divergent interpretation and application of the ESI clause in *CC/Devas* and *DT*. As this article shows, the *DT* tribunal explained the divergent conclusions by relying, partly, on the different legal thresholds for establishing a nexus between the decision and the ESI in the India-Mauritius and Germany-India BITs. Under the India-Mauritius BIT, India’s decision needed to be ‘directed to the protection of’ its ESI. By contrast, the Germany-India BIT covered only those decisions that were ‘necessary’ to protect an ESI. The *DT* tribunal suggested that the ‘necessary’ standard requires a ‘more stringent nexus’ between the measure and the ESI than the ‘directed to’ standard.¹³ However, as this article argues, it was not the difference in treaty standards that led to the split in opinion between the tribunals. Rather, the disagreement is explained by different, and contradictory, assessments of the same facts – the *DT* tribunal undertook a cumulative assessment of facts preceding and following India’s decision to cancel the Agreement, whereas the *CC/Devas* tribunal based its finding solely on the ultimate decision.¹⁴

A second purpose of this article is to revisit the debate on the precise legal criteria for successfully invoking an ESI clause. ESI clauses are pervasive in investment treaties, and have been subject to extensive academic scrutiny.¹⁵ Yet, until *CC/Devas* and *DT*, such clauses were

¹² *CC/Devas (Mauritius) Ltd, Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v India*, PCA Case No. 2013-09, Award on Jurisdiction and Merits (25 July 2016); *Deutsche Telekom AG v India*, PCA Case No. 2014-10, Interim Award (13 December 2017).

¹³ *DT* (n 12) para 288.

¹⁴ See further: Section III.C.

¹⁵ William W. Burke-White and Andreas von Staden, ‘Investment Protection and Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties’ (2008) 48(2) *Va J Int’l L* 307; José E. Alvarez & Kathryn Khamisi, ‘The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime’ (2009) *I Yearbook of Investment Law and Policy* 379; Jürgen Kurtz, ‘Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis’ (2010) 59 *ICLQ* 325; Prabhash Ranjan, ‘Non-Precluded Measures in Indian International Investment Agreements and India’s Regulatory Power as a Host Nation’ (2012) 2 *Asian J Int’l L* 21; Amit Kumar Sinha, ‘Non-Precluded Measures Provisions in Bilateral Investment Treaties of South Asian Countries’ (2017) 7 *Asian J Int’l L* 227;

only invoked in a series of five cases assessing the necessity of measures adopted by Argentina in the wake of its 2001-2002 economic crisis.¹⁶ In those cases too, the tribunals diverged in their factual and legal assessments, leaving much to be desired in terms of guidance on the precise contours of such clauses. Through an analysis of the awards in *CC/Devas* and *DT*, this article will examine which security interests can qualify as ‘essential’ interests, what is meant by ‘necessary’, and explore the difference(s) between the nexus requirements of ‘directed to’ and ‘necessary’.

Section II recaps the conflicting jurisprudence on ESI clauses developed in decisions against Argentina. Section III demonstrates the contradictory elements of the ruling in *CC/Devas* and *DT*. Section IV re-evaluates the legal elements of ESI clauses and examines the implications of these developments. Section V concludes.

II. ESI CLAUSES – A BREEDING GROUND FOR INCONSISTENCY: REVISITING THE CASES ON THE ARGENTINIAN ECONOMIC CRISIS

ESI clauses owe their origin to friendship, commerce and navigation treaties (FCN treaties) concluded by the US in the post-Second World War era.¹⁷ They enlist the ‘exceptions’ to a State’s substantive obligations under a treaty.¹⁸ Although a significant proportion of investment treaties include ESI clauses, their formulation differs.¹⁹ Broadly speaking, ESI clauses comprise two elements – *first*, the ‘permissible objective’ in relation to which host States can take measures that would otherwise breach their investment obligations. ESI clauses are a sub-type of a ‘non-precluded measure’ clause, in which the permissible objective is the protection of an ‘essential security interest’. A non-precluded measure clause is wider in scope, and covers also objectives such as ‘public order’, ‘public health’, ‘public morality’, and situations of ‘extreme emergencies’.²⁰ The *second* element requires proof of a causal link between the measure and the objective (the ‘nexus’ requirement). The nexus requirement varies widely – both within and across the practice of States.²¹ Surveys demonstrate that the required nexus varies from measures ‘necessary’ to protect the permissible objective, to measures ‘required’, ‘related to’, ‘directed to’, or ‘for’ the protection of the stated objective.²²

Tobias Ackermann, ‘Exception Clauses in International Investment Agreements – A Case for Systematic Integration?’ in Mesut Akbaba and Giancarlo Capurro (eds), *International Challenges in Investment Arbitration* (New York: Routledge 2019).

¹⁶ *CMS Gas Transmission Co. v Argentina*, ICSID Case No. ARB/01/8, Award (12 May 2005); *LG&E Energy Corporation v Argentina*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006); *Enron Corporation v Argentina*, ICSID Case No. ARB/01/3, Award (22 May 2007); *Sempra Energy International v Argentina*, ICSID Case No. ARB/02/16, Award (28 September 2007), *Continental Casualty Company v Argentina*, ICSID Case No. ARB/03/9, Award (5 September 2008).

¹⁷ Burke-White and von Staden (n 15) 312.

¹⁸ *Oil Platforms Case (Iran v USA)* (Merits) [2003] ICJ Rep 161 at para 35.

¹⁹ Burke-White and von Staden (n 15) 324ff; Ranjan (n 15) 32ff.

²⁰ Burke-White and von Staden (n 15) 332-35; Ranjan (n 15) 35-47; Sinha (n 15) 246-58.

²¹ Burke-White and von Staden (n 15) 330.

²² Burke-White and von Staden (n 15) 330; Ranjan (n 15) 47; Sinha (n 15) 241.

Despite their prevalence, ESI clauses have remained largely dormant in ITA. Prior to *CC/Devas* and *DT*, only Argentina invoked them in five cases in which investors challenged measures that Argentina had adopted to address its economic crisis in 2001-2002: *CMS* (2005); *LG&E* (2006); *Sempra* (2007); *Enron* (2007); and *Continental* (2008) (collectively, the *Argentinian cases*).²³

These disputes arose from near identical facts. The five investors acquired shareholdings in companies that Argentina privatised in the late 1980s and early 1990s. The privatisation programme was backed by guarantees, which included the pegging of the Argentinian peso to the US dollar, and the calculation of tariffs in US dollars. By 2001, Argentina was in the grips of a severe economic crisis. In response, Argentina adopted a series of measures to stabilise its economy. The measures included devaluing the peso by abolishing the currency board that pegged the Argentinian peso to the US dollar, pesifying all dollar-denominated contractual and financial obligations, and freezing bank deposits.²⁴ These measures, the investors alleged, violated Argentina's investment obligations.

Not just the factual background, but the investment treaty invoked was also identical. Being US nationals, the investors in all five cases relied upon the Argentina-US BIT. Article XI of that BIT exempts a State from its investment obligations if the measures adopted were 'necessary' to protect its ESI. Argentina relied upon this ESI clause to plead exemption from its obligations, arguing that its measures were necessary to protect against the social, political and economic challenges presented by the economic crisis.

Despite these similarities, the tribunals split in their *legal* assessments of what could constitute an ESI and what was the required nexus between the measure and the ESI under the 'necessary' standard. They also diverged in their *factual* assessment as to whether Argentina's measure met the stated legal standards. The *LG&E* and *Continental* tribunals concluded in Argentina's favour, but the remaining three tribunals – *CMS*, *Enron* and *Sempra* – held that the economic crisis did not threaten Argentina's ESI nor were the measures a necessary response. Within each group too, there were significant differences in reasoning.

A. On ESI

A primary point of disagreement between the tribunals concerned the relationship between an ESI clause and the customary international law (CIL) defence of 'necessity'. The ESI clause itself provided little guidance on the meaning and scope of the terms 'necessary' and ESI. The tribunals had to thus decide whether the standards for applying the necessity defence under CIL applied also to the treaty's ESI clause. Under CIL, 'necessity' precludes wrongfulness only if a State acts to safeguard an 'essential interest' against a 'grave and imminent peril'.²⁵

²³ Argentina invoked the ESI clause in a sixth case, *El Paso v Argentina*, but that case is not included in this discussion, because the tribunal's assessment in that case was limited to whether Argentina contributed to the economic crisis: *El Paso Energy International Company v Argentina*, ICSID Case No. ARB/03/15, Award (13 October 2011) paras 649-670.

²⁴ Alvarez and Khamsi (n 15) 388-90.

²⁵ International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, UN Doc A/56/10 (2001), art 25(1)(a).

The *CMS*, *Enron* and *Sempra* tribunals pegged the ESI clause to the CIL defence of necessity. The *CMS* tribunal did not clarify its basis for doing so, stating simply that the existence of a state of necessity under CIL and the treaty's ESI clause raised 'one fundamental issue'.²⁶ The *Enron* and *Sempra* tribunals explicitly clarified that reference to the CIL standard of necessity was made necessary because the BIT provision did not provide a definition of ESI.²⁷ Having pegged the ESI clause to necessity under CIL, the three tribunals agreed that whether Argentina's ESI was at stake would depend on the gravity and imminence of the crisis.²⁸ For *CMS*, this standard of gravity could only be met if Argentina's crisis resulted in 'total economic and social collapse'.²⁹ For *Enron* and *Sempra*, only if the very existence of the State and its independence was compromised, could the crisis qualify as involving an ESI.³⁰

The *LG&E* and *Continental* tribunals, by contrast, distinguished the ESI clause from necessity under CIL. As the *Continental* tribunal explained, necessity and ESI clauses have different objectives. Necessity under CIL only precludes the wrongfulness of an act. An ESI clause is a 'safeguard clause'; a measure covered by the clause lies outside the scope of the investment treaty in so far as a State would not be held to have breached its obligations under the treaty.³¹ The *LG&E* and *Continental* tribunals disagreed that the ESI clause could only apply in situations of 'total collapse' or when a State's existence was compromised.³² For these tribunals, a 'threat' of total collapse,³³ a danger that the State's 'economic foundation is under siege' suffices to prove the existence of an ESI.³⁴

On either account, all tribunals agreed on facts that Argentina faced a 'severe' crisis.³⁵ However, the *CMS*, *Enron*, and *Sempra* tribunals were not convinced that the crisis was severe enough to compromise Argentina's existence and independence.³⁶ For the *LG&E* and *Continental* tribunals, the facts proved that Argentina was in the midst of a severe economic crisis that could not be addressed by ordinary measures and called for 'immediate, decisive action'.³⁷ As the *LG&E* tribunal noted, '[t]o conclude that such a severe economic crisis could not constitute an essential security interest is to diminish the havoc that the economy can wreak on the lives of an entire population and the ability of the Government to lead'.³⁸

Academics commonly explain these divergent conclusions by pointing to the different viewpoints of the tribunals on the interpretive relevance of the CIL standard of necessity.³⁹

²⁶ *CMS* (n 16) para 308.

²⁷ *Enron* (n 16) para 333; *Sempra* (n 16) para 375.

²⁸ *CMS* (n 16) para 319; *Enron* (n 16) para 307; *Sempra* (n 16) para 349.

²⁹ *CMS* (n 16) para 355.

³⁰ *Enron* (n 16) para 306; *Sempra* (n 16) para 348.

³¹ *Continental* (n 16) paras 163-66.

³² *LG&E* (n 16) para 251; *Continental* (n 16) paras 180-81.

³³ *LG&E* (n 16) para 231.

³⁴ *LG&E* (n 16) paras 231, 238; *Continental* (n 16) paras 175, 178, 180-81.

³⁵ *CMS* (n 16) para 320; *Enron* (n 16) para 306; *Sempra* (n 16) para 348; *LG&E* (n 16) para 231; *Continental* (n 16) para 180.

³⁶ *CMS* (n 16) para 354; *Enron* (n 16) para 306; *Sempra* (n 16) para 348.

³⁷ *LG&E* (n 16) paras 226-38; *Continental* (n 16) paras 178-81.

³⁸ *LG&E* (n 16) para 238.

³⁹ Peter Tomka, 'Defenses Based on Necessity Under Customary International Law and on Emergency Clauses in Bilateral Investment Treaties' in Meg Kinnear and others (eds), *Building International Investment Law: The*

This provides only a partial explanation, as the starting point of the tribunals' reasoning also varied. The *CMS*, *Enron* and *Sempra* tribunals began their reasoning from the point that the object and purpose of investment treaties is to protect foreign investments, including in situations of economic difficulties.⁴⁰ As the *Enron* and *Sempra* tribunals articulated, 'any interpretation resulting in an escape route from the obligations defined cannot be easily reconciled with that object and purpose'.⁴¹ The *LG&E* and *Continental* tribunals placed no such premium on the investment protection objectives of an investment treaty. Consequently, these tribunals found it imprudent to limit the application of ESI clauses to measures taken *after* a State's collapse.⁴² Additionally, the *Continental* tribunal called for a 'margin of appreciation' in favour of States.⁴³

B. On the Standard of 'Necessary'

The *CMS*, *Enron* and *Sempra* tribunals were also unconvinced that Argentina's measures were 'necessary' to address the situation. Turning again to necessity under CIL for guidance, these tribunals declared that a measure could be necessary if it was the 'only way' to protect against a crisis.⁴⁴ The *LG&E* and *Continental* tribunals rejected this approach but failed to provide a consistent standard for determining the necessity of adopting a measure. The *LG&E* tribunal stated that a measure is necessary if 'a State has no choice but to act'.⁴⁵ Equally, the *LG&E* tribunal declared that a finding of necessity would not be affected by the fact that a State could avail of alternative responses.⁴⁶ The *Continental* tribunal, borrowing from the necessity standard adopted by the WTO, articulated a two-fold test.⁴⁷ *First*, a measure should 'contribute materially' to the protection of a State's ESI.⁴⁸ *Secondly*, a State must not have 'reasonably available alternatives, less in conflict or more compliant with its international obligations'.⁴⁹

The disagreement extended to the case facts. The *LG&E* tribunal considered the measures a necessary and legitimate response, given the crisis at play.⁵⁰ According to *CMS*, *Enron* and *Sempra*, however, the measures that Argentina adopted were not the 'only way' to respond to the crisis.⁵¹ None of these tribunals identified the alternatives, stating that it was not for the

First 50 Years of ICSID (The Hague: Kluwer Law International 2015) 485; Alvarez and Khamisi (n 15) 380-81; Irene M. Ten Cate, 'The Costs of Consistency: Precedent in Investment Treaty Arbitration' (2012-13) 51 *Colum J Transnat'l L* 418, 429.

⁴⁰ *CMS* (n 16) para 354; *Enron* (n 16) para 331; *Sempra* (n 16) para 373.

⁴¹ *Enron* (n 16) para 331; *Sempra* (n 16) para 373.

⁴² *Continental* (n 16) para 180 (stating that '[the invocation of the clause does not require that the situation has already degenerated into one that calls for the suspension of constitutional guarantees and fundamental liberties. There is no point in having such protection if there is nothing left to protect]').

⁴³ *Continental* (n 16) para 181.

⁴⁴ *CMS* (n 16) para 323; *Enron* (n 16) para 308; *Sempra* (n 16) para 350.

⁴⁵ *LG&E* (n 16) para 239.

⁴⁶ *ibid.*

⁴⁷ *Continental* (n 16) paras 192-95.

⁴⁸ *ibid.*, para 196.

⁴⁹ *ibid.*, para 198.

⁵⁰ *LG&E* (n 16) paras 240-42.

⁵¹ *CMS* (n 16) para 323; *Enron* (n 16) para 308; *Sempra* (n 16) para 350.

tribunal to conduct such an assessment.⁵² The *Continental* tribunal concluded, first, that there was a ‘genuine relationship of end and means’ as the measures were ‘inevitable, or unavoidable, in part indispensable, and in any case material’ to prevent a breakdown of the Argentinian economy.⁵³ Secondly, unlike *CMS*, *Enron* and *Sempra*, the tribunal conducted an in-depth review of the proposed alternatives and found them unsuitable to address the crisis.⁵⁴

C. Summary

The divergent outcomes in the *Argentinian cases* are repeatedly cited as examples to highlight concerns of inconsistency and unpredictability in ITA.⁵⁵ Academics occasionally rationalised the initial divergence in views of the first two cases – *CMS* and *LG&E* – as teething problems of a system in its infancy, and it was hoped that a ‘common legal opinion or jurisprudence constante’ on the requirements for invoking ESI clauses would develop as the system evolves.⁵⁶ Quite to the contrary, the cases following *CMS* and *LG&E* have left us none the wiser regarding the precise legal contours of ESI clauses, nor has the application of ESI clauses to the same facts been consistent. The tribunals agreed on two issues, namely that ESI clauses are not self-judging,⁵⁷ and that non-military, economic crises can, in principle, qualify as an ESI.⁵⁸ Furthermore, the clarifications issued by the annulment committee decisions in *CMS*, *Enron* and *Sempra* make clear that ESI clauses are distinct from necessity under CIL.⁵⁹ These elementary issues aside, the *Argentinian cases* offered little clarity on the two key elements for invoking the ESI clause – what constitutes an ESI, and when is the nexus between a measure and an ESI established under the ‘necessary’ standard.

⁵² *CMS* (n 16) para 323; *Enron* (n 16) para 309; *Sempra* (n 16) para 351.

⁵³ *Continental* (n 16) para 197.

⁵⁴ *ibid*, para 198-214.

⁵⁵ Christina Binder, ‘Necessity Exceptions, the Argentina Crisis and Legitimacy Concerns’ in Tullio Treves, Francesco Seatzu and Seline Trevisanut (eds), *Foreign Investment, International Law and Common Concerns* (Abingdon: Routledge 2014) 79-81; August Reinisch, ‘Necessity in International Investment Arbitration: An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on *CMS v Argentina* and *LG&E v Argentina*’ (2007) 8(2) JWIT 191.

⁵⁶ Franck (n 2) 1610; Reinisch (n 55) 214. See generally: Anthea Roberts, ‘Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System’ (2013) 107(1) AJIL 45, 75-7.

⁵⁷ *CMS* (n 16) para 373; *LG&E* (n 16) para 212; *Enron* (n 16) para 332; *Sempra* (n 16) para 385; *Continental* (n 16) para 187. Declaring that an ESI clause is not self-judging means that a tribunal will subject a State’s subjective assessment of whether an ESI exists, and whether the measure it has adopted concerns the protection of that ESI, to full judicial review.

⁵⁸ *CMS* (n 16) para 359; *LG&E* (n 16) para 238; *Enron* (n 16) para 332; *Sempra* (n 16) para 374; *Continental* (n 16) para 178.

⁵⁹ *CMS Gas Transmission Company v Argentina*, ICSID Case No. ARB/01/8, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic (25 September 2007) paras 129-30; *Enron Corporation v Argentina*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic (30 July 2010) para 405; *Sempra Energy International v Argentina*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic’s Application for Annulment of the Award (29 June 2010) paras 198-200.

III. CC/DEVAS AND DT: SAME FACTS, DIFFERENT RESULTS

ESI clauses reappeared in *CC/Devas* and *DT* against the backdrop of the inconsistent and inconclusive legacy of the *Argentinian cases*. As the introduction foreshadowed, both cases concerned the same dispute, namely the cancellation of the Agreement by which Indian state-owned company, Antrix, leased the Spectrum to Devas. In both cases, India argued that it was protected by the ESI clauses in the India-Mauritius and Germany-India BITs, as the Agreement was cancelled to make the Spectrum available for military and other strategic needs. Both tribunals spent substantial effort in interpreting and applying the respective ESI clauses, and ultimately reached divergent conclusions – *CC/Devas* agreed with India, while *DT* found in favour of the claimant. The inconsistent interpretation and application of ESI clauses that explain these divergent outcomes are described below.

A. Facts Leading to the Cancellation of the Agreement

Antrix and Devas concluded the Agreement in 2005. Beginning 2005, the Indian military made repeated demands for the Spectrum. In 2009, in response to a call for a ‘consolidated proposal’ by the Indian space agency, ISRO, the military presented a detailed projection of its Spectrum requirements. At the time, ISRO expressed its ‘inability’ to meet the military’s demands and encouraged the military to ‘explore new avenues’.⁶⁰

From 2009, several governmental departments scrutinized the Agreement. Not just the military’s needs, but several other reasons, brought about this scrutiny. The Indian Department of Space (DoS) learned of possible irregularities in the Agreement and set up a committee through the Department of Telecommunications (DoT) to review the Agreement. The committee found that the Agreement imposed onerous penalties upon Antrix for delays in satellite delivery and noted that the Agreement did not include a clause that would allow the government to prioritise ‘strategic and other essential’ needs. Accordingly, the committee recommended that the Agreement be revisited.⁶¹

Parallely, the Indian media’s scrutiny over the Antrix-Devas Agreement led to ISRO admitting in a memorandum that the Agreement did not allow ISRO to accommodate ‘strategic needs’ for the Spectrum and denied other commercial enterprises a level playing field. Consequently, ISRO queried, for the first time, whether the Agreement should be annulled.⁶²

These multiple reasons continued to inform calls for annulling the Agreement within governmental departments. In 2010, the DoS recommended annulling the Agreement, identifying three reasons in support – (i) the need to preserve the Spectrum for military and societal needs; (ii) concerns regarding certain provisions of the Agreement; and (iii) denial of a level playing field to other commercial enterprises.⁶³

Pursuant to the DoS’s recommendation, ISRO sought a legal opinion from India’s Additional Solicitor-General (ASG) on terminating the Agreement. The ASG opined that the

⁶⁰ *CC/Devas* (n 12) paras 337-49; *DT* (n 12) paras 242-45.

⁶¹ *CC/Devas* (n 12) paras 120-25; *DT* (n 12) paras 247-48.

⁶² *CC/Devas* (n 12) paras 127-28; *DT* (n 12) paras 75, 79.

⁶³ *CC/Devas* (n 12) paras 133-34; *DT* (n 12) para 82.

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decision to terminate the Agreement should come from the government, as that would constitute a *force majeure* event under the Agreement.⁶⁴ ISRO then asked the government's approval to cancel the Agreement. In its request, ISRO shed its other concerns and cited only India's military and strategic needs for the Spectrum as the reason for cancelling the Agreement.⁶⁵

Ultimately, in 2011, the government approved ISRO's request and ordered the cancellation of the Agreement. The government's decision too did not enlist other concerns that had cumulatively led to a review of the Agreement. Instead, it based the decision solely on the increased demand for allocating the Spectrum for 'national needs, including for the needs of defence, para-military forces, railways and other public utility services as well as for societal needs'.⁶⁶ Yet, the government did not allocate the Spectrum to the military until 2015. For several years after the decision, the military and the DoT made competing demands for the Spectrum.⁶⁷

B. Did the Dispute Involve an 'Essential Security Interest'?

The claimants in both *CC/Devas* and *DT* argued that a threat or a risk to a security interest was necessary for the security interest to qualify as an ESI. In *CC/Devas*, the claimants contended that a security interest could only be 'essential' if the interest was – (i) 'vital...absolutely necessary; extremely important'; and (ii) under a threat.⁶⁸ Likewise, the *DT* claimants stressed an ESI could exist only if the interest was under an 'imminent threat of severe consequences'.⁶⁹

From a legal standpoint, the *CC/Devas* tribunal initially agreed with the claimants that 'essential' entails 'important', 'absolutely necessary', 'indispensably requisite', or 'unavoidable' security interests.⁷⁰

At a later stage, the tribunal diluted this standard and queried instead whether the Indian military was in 'genuine need' of the Spectrum.⁷¹ Consequently, in its assessment of the facts, the tribunal did not examine whether the military's spectrum needs constituted indispensable or unavoidable security interests, nor did it inquire whether the military's needs had become absolutely necessary in 2011 when the government annulled the Agreement. Acknowledging that it must give a 'wide measure of deference' to India's assessment of its ESI,⁷² the tribunal noted simply that:

Even though there is nowhere in the CCS decision any specific reference to the Respondent's 'essential security interests,' the Tribunal, by majority, has no difficulty concluding that the reservation of spectrum for the needs of defence

⁶⁴ *CC/Devas* (n 12) paras 135-37; *DT* (n 12) para 83.

⁶⁵ *CC/Devas* (n 12) paras 143-44; *DT* (n 12) para 89.

⁶⁶ *CC/Devas* (n 12) para 146; *DT* (n 12) paras 91, 272.

⁶⁷ *CC/Devas* (n 12) para 335; *DT* (n 12) paras 273-79.

⁶⁸ *CC/Devas* (n 12) para 225.

⁶⁹ *DT* (n 12) para 209.

⁷⁰ *CC/Devas* (n 12) para 243.

⁷¹ *ibid*, para 315.

⁷² *ibid*, para 244.

and para-military forces can be classified as ‘directed to the protection of its essential security interests’.⁷³

The *DT* tribunal, by contrast, articulated a lower standard for establishing the existence of an ESI. Unlike *CC/Devas*, the *DT* tribunal did not compare ‘essential’ interests to ‘absolutely necessary’ or ‘unavoidable’ interests,⁷⁴ stating instead that ‘essential’ security interests are those that go to the ‘core (the “essence”) of state security’.⁷⁵

On facts, however, it is unclear whether the tribunal applied this lower standard or effectively endorsed a standard of absolute necessity (as initially adopted by the *CC/Devas* tribunal). On the one hand, unlike *CC/Devas*, the *DT* tribunal did not assess whether the military’s Spectrum needs were genuine. Instead, the tribunal summarily concluded that it would ‘of course accept that the so-called strategic needs’ of India’s military and para-military forces constituted ESI.⁷⁶ On the other hand, the tribunal doubted that the case involved a ‘true instance’ of ESI.⁷⁷ *First*, the tribunal noted that in 2009, ISRO asked the military to ‘explore new avenues’ and ‘best utilise’ the available Spectrum, suggesting that military needs were not irreconcilable with the Agreement.⁷⁸ *Secondly*, the tribunal reasoned that if an ESI did exist, the government would not engage in protracted debates about who the Spectrum should be allotted to, after cancelling the Agreement.⁷⁹ *Finally*, the tribunal found it hard to reconcile the fact that part of the Spectrum was allotted to government-owned companies for commercial purposes in 2009 when the military had already stated its need for the Spectrum, again suggesting the ‘absence’ of an ESI.⁸⁰ This oscillation between the presence or absence of an ESI ultimately proved inconsequential, as the *DT* tribunal found that there was no nexus between India’s military needs and the decision to cancel the Agreement.

C. Was There a Nexus Between the Measure and the ESI?

The nexus requirement differed in the applicable BITs. The *CC/Devas* tribunal, constituted under the India-Mauritius BIT, had to determine whether India’s decision was ‘directed to’ the protection of its ESI.⁸¹ The *DT* tribunal, applying the Germany-India BIT, had to assess whether the decision was ‘necessary’ for protecting the ESI.⁸²

Both tribunals acknowledged the difference in the applicable nexus requirements. The *CC/Devas* tribunal distinguished the two standards, but failed to articulate clearly what

⁷³ *ibid*, para 354.

⁷⁴ *DT* (n 12) para 229.

⁷⁵ *ibid*, para 236.

⁷⁶ *ibid*, paras 281, 284.

⁷⁷ *ibid*, para 290.

⁷⁸ *ibid*, paras 244-45.

⁷⁹ *ibid*, para 287.

⁸⁰ *ibid*, para 290.

⁸¹ *Agreement between The Government of the Republic of Mauritius and The Government of the Republic of India for the Promotion and Protection of Investments*, signed on 4 September 1998, entered into force on 20 June 2000, art. 11(3) (India-Mauritius BIT).

⁸² *Agreement between the Federal Republic of Germany and the Republic of India for the Promotion and Protection of Investments* (signed 10 July 1995, entered into force 13 July 1995) (‘Germany-India BIT’) art 12.

‘directed to’ implied.⁸³ The tribunal declined that ‘directed to’ required a State to demonstrate ‘necessity in the sense that the measure adopted was the only one it could resort to in the circumstances’.⁸⁴ Neither was it convinced of the other extreme, that the standard had the practical effect of turning the ESI clause into a self-judging clause.⁸⁵ Ultimately, the *CC/Devas* tribunal appeared to suggest that a measure would be ‘directed to’ the protection of an ESI if it ‘related to’ that objective.⁸⁶

The *DT* tribunal held, conversely, that ‘necessary’ implied that a measure must not simply be ‘related to’ an ESI.⁸⁷ In *DT*’s view, a measure would be necessary if – (i) it was ‘principally targeted’ to protect the ESI and was ‘objectively required’ to achieve that protection; and (ii) the State could not avail of other reasonable alternatives that were less in conflict with its international obligations.⁸⁸

Prima facie, these differences in the nexus requirements explain the divergent outcomes in the two cases. As the *DT* tribunal emphasised:

[T]he BIT applicable in this case requires it to find that a measure was “necessary”...and not merely “directed at the protection” of such interests as was required under the treaty at issue in the Mauritius BIT Arbitration. In the Tribunal’s view, the phrase “to the extent necessary” implies a *more stringent* nexus between the measure at issue and the interests pursued.⁸⁹

A deeper analysis of the tribunals’ reasoning reveals, however, that the divergences are attributable not to these legal distinctions but to different perceptions regarding the import of India’s decision to cancel the Agreement, and the relevance of the facts preceding and following that ultimate decision.

Both tribunals were privy to the same three key facts. *First*, in the years leading to the government’s decision to cancel the Agreement, several factors (including military and strategic needs, fears of a political scandal, onerous contractual clauses, and the lack of a level playing field for other commercial enterprises) were at play. *Secondly*, the 2011 decision to cancel the Agreement was based only on military and other strategic needs. While the decision ordered the cancellation of the Agreement, it did not simultaneously direct that the Spectrum be allocated to the military. *Finally*, following the Agreement’s cancellation, protracted debates regarding the Spectrum’s allocation continued for several years between various governmental branches.

The majority in *CC/Devas* admitted that a ‘mix of factors’ led to calls for annulling the Agreement,⁹⁰ and conceded that these events could help understand the ‘context’ in which the decision was reached.⁹¹ Yet, in its eventual analysis, the tribunal majority considered only the

⁸³ See further: Section IV.C.2.

⁸⁴ *CC/Devas* (n 12) para 243.

⁸⁵ *ibid*, paras 241-42.

⁸⁶ *ibid*, para 243.

⁸⁷ *DT* (n 12) para 238.

⁸⁸ *ibid*, para 239.

⁸⁹ *ibid*, para 288.

⁹⁰ *CC/Devas* (n 12) para 321.

⁹¹ *ibid*, para 331.

‘actual decision’ to be the ‘determinant factor’,⁹² explaining its reluctance to engage with facts other than the decision itself, partly, in political terms:

it is a regular phenomenon in public administration that decisions are influenced by a number of factors including, sometimes, purely political ones.⁹³

Be that as it may, the tribunal’s approach of placing selective emphasis on the content of the decision creates the risk of States being able to escape their investment obligations by couching the actual measure in objective terms as one directed to the protection of an ESI, even when the actual object of the adopting the measure might well be different.⁹⁴ In a case such as *CC/Devas*, it is unsurprising that the majority reasoning was met with a strong dissent, in which the majority was chided for restricting itself to the ‘formulaic’ decision of the Indian government, which did not accurately reflect the whole ‘substance’ or ‘purpose’ of the decision.⁹⁵

Even just on the terms of the decision, the *CC/Devas* majority and dissent disagreed on the indicia for determining the purpose of the decision. For the majority, it was sufficient that India took the Spectrum from Devas to meet, at least partly, its military needs.⁹⁶ For the dissent, the taking of the Spectrum from Devas needed to be matched by a giving of the Spectrum to the military. The potential uses for the Spectrum remained open for governmental deliberation at the time of the decision and several years after, indicating to the dissent that the decision was not contemporaneously ‘directed’ towards the protection of the military’s needs.⁹⁷

This factual disagreement between the majority and dissent in *CC/Devas* regarding the ‘import and intended effect’ of the decision to cancel the Agreement,⁹⁸ formed also the basis for the divergent outcomes in *CC/Devas* and *DT*. Like the *CC/Devas* dissent, the *DT* tribunal concluded that ‘as long as the choice among these potential usages...remained open’, India’s decision could not be held to be targeted towards protecting the military’s needs.⁹⁹

Thus, the *DT* tribunal’s attempt to explain the divergent outcomes on the differing treaty standards of ‘directed’ and ‘necessary’ was simply a subterfuge for what was essentially its disagreement with *CC/Devas* regarding the factual existence of a causal link between the decision and the ESI. It wasn’t a stricter nexus requirement that defeated India’s claim in *DT*. The history behind the decision, and the indeterminate status of Spectrum allocation, were irrelevant facts for the *CC/Devas* majority. These exact facts proved to the *DT* tribunal that the decision was not targeted at – or, synonymously, directed towards – addressing the military’s needs.

⁹² *ibid*, paras 331, 351.

⁹³ *ibid*, para 330.

⁹⁴ *CC/Devas (Mauritius) Ltd, Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India*, PCA Case No 2013-09, Dissenting Opinion of David R. Haigh Q.C., para 3.

⁹⁵ *ibid*, para 85.

⁹⁶ Add the quantification argument.

⁹⁷ *CC/Devas* (n 12) paras 96-9.

⁹⁸ *DT* (n 12) para 285.

⁹⁹ *ibid*, paras 286-87.

Having demonstrated the inconsistent approaches of the *CC/Devas* and *DT* tribunals, the next section critically evaluates the contribution of these cases to the development of our understanding of the interpretation and application of ESI clauses.

IV. RE-EVALUATING THE INTERPRETATION AND APPLICATION OF ESI CLAUSES

Combined, the *Argentinian cases*, *CC/Devas* and *DT* have left concrete, consistent, guidance on two threshold issues. *First*, it is now settled that ESI clauses and CIL on necessity achieve different objectives and operate exclusively of each other. *Secondly*, unless expressly articulated, ESI clauses are not self-judging.¹⁰⁰ Beyond these, a *jurisprudence constante* on the meaning of ESI and the nexus requirement remains elusive. The positive and negative implications of the developments generated by these decisions are discussed below.

A. Essential Security Interest, Military Needs and Protection of Strategic Resources

The term ‘essential security interests’, and its variations such as ‘national security’ and ‘public security’, appear in a wide range of investment and other treaties, but the term remains notoriously undefined.¹⁰¹ Conventional discussions on what constitutes an ESI have been limited to whether the term covers only military threats (such as war, armed attack or terrorism) or extends also to economic and other non-military crises.¹⁰² Article XXI(b) of the General Agreement on Tariffs and Trade (GATT) is a typical illustration of an ESI clause that confines ESI to actions taken for specific military or defence-related concerns.¹⁰³ Outside of the WTO context, there is increased judicial and academic acceptance that ESI can encompass non-military crises, including economic and environmental crises.¹⁰⁴ As existing jurisprudence

¹⁰⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, [1986] ICJ Rep 14, para 282; *Oil Platforms case* (n 18) para 43.

¹⁰¹ See example: Treaty of Amity, Economic Relations, and Consular Rights (Iran–USA) (adopted 15 August 1955, entered into force 16 June 1957) 284 UNTS 93, art XX(1)(d); General Agreement on Tariffs and Trade (adopted 15 April 1994, entered into force 1 January 1995), 1867 UNTS 187, art XXI; Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 (ECHR) arts 6(1), 8(2), 11(2); Treaty on the Functioning of the European Union (signed 13 December 2007) [2010] OJ C83/47 (TFEU) arts 36, 45, 52, 65, 202.

¹⁰² David A Baldwin, ‘The Concept of Security’ (1997) 23 Rev Int’l Studies 5; Burke-White and von Staden (n 15) 349; Ranjan (n 15) 37-9; Sinha (n 15) 247-48; Kurtz (n 15) 361-64; Michal J Hahn, ‘Vital Interests and the Law of GATT: An Analysis of GATT’s Security Exception’ (1991) 12 Mich J Int’l L 558, 580-82; Iain Cameron, *National Security and the European Convention on Human Rights* (The Hague: Kluwer Law International 2000) 40-8.

¹⁰³ GATT (n 101) art XXI defines ESI as: actions (i) relating to fissionable 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 as is carried on directly or indirectly for the purpose of supplying a military establishment; and (iii) taken in time of war or other emergency in international relations. See also: Kurtz (n 15) 362; Dapo Akande and Sope Williams, ‘International Adjudication on National Security Issues: What Role for the WTO?’ (2003) Va J Int’l L 365, 398; Hahn (n 102) 580.

¹⁰⁴ *Military and Paramilitary Activities in and against Nicaragua* (n 100) para 224; *CMS* (n 16) para 359; *Continental* (n 16) para 178; Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties* (The Hague: Kluwer Law International 2009) 497-98; Tarcisio Gazzini, ‘Necessity in International Investment

continues to tether ESI to notions of ‘crisis’,¹⁰⁵ the central point of contention in non-military contexts concerns the level of intensity that a situation must reach to qualify as an ESI. In the *Argentinian cases*, this translated into disagreements regarding whether a State’s total collapse was necessary to prove the existence of an ESI, or whether a threat of collapse would suffice.

The factual matrix in *CC/Devas* and *DT* concerned neither of these scenarios. The dispute concerned the reacquisition of a strategic, limited, resource. The interpretive challenge for the tribunals was, thus, whether the definition of an ESI could be further broadened to cover not just crisis situations emerging from military or non-military threats, but also situations of protecting a strategic resource when no foreseeable crisis exists. This analysis entailed two questions – *first*, can protection of a strategic resource constitute an ESI? If so, must the need for the resource relate only to military purposes, or can ESI protect resources necessary to meet other needs? *Secondly*, must there be an existing crisis in relation to the strategic resource to trigger ESI? The tribunals’ perfunctory analyses – accepting military, but not other needs, for the Spectrum as ESI – do no justice to the importance of clearly answering these questions.

1. Strategic resources and military needs

Since it first materialised in treaty texts, drafters have been careful to emphasise the exceptional nature of ESI clauses. It has repeatedly been iterated that ESI clauses are to be used for ‘serious reasons’, that they are ‘not intended to be a loophole through which arbitrary actions would or could be taken so as to defeat the purpose of the Treaty’, and that their purpose is not to ‘create a basis for unduly prolonged departures from any provision of the Treaty’.¹⁰⁶ The qualifier ‘essential’ was included to ensure that ESI clauses were not invoked in a ‘frivolous manner’, and to emphasise that only the ‘most important’, ‘serious’ or ‘vital’ security interests would be protected by the clause.¹⁰⁷ Measures associated with the military, even when undertaken during a war, were not intended to automatically constitute ESI.¹⁰⁸ During negotiations with the US on an FCN treaty, Dutch negotiators queried whether ESI would cover a Dutch law that permitted military authorities to seize property during a war and defer payment of compensation until after the war. The US negotiators responded that while an ESI clause ‘would undoubtedly allow a certain amount of flexibility in the modalities of payment, in a war

Law: Some Critical Remarks on *CMS v. Argentina*’ (2008) 26 J Energy & Natural Resources L 463; Kurtz (n 15) 362-63.

¹⁰⁵ Alvarez and Khamsi (n 15) 451-55; Newcombe and Paradell (n 104) 497-98; UNCTAD, ‘The Protection of National Security in IIAs’ (2009), at 26 < https://unctad.org/en/Docs/diaeia20085_en.pdf > accessed 1 December 2018.

¹⁰⁶ Kenneth J Vandeveld, *U.S. International Investment Agreements* (Oxford: Oxford University Press 2009) 199 (citing excerpts of discussions regarding the scope of ESI clauses in FCN treaties between the US and its treaty partners). See also: GATT, Analytical Index, ‘Article XXI: Security Exceptions’ < https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art21_jur.pdf > accessed 1 December 2018 (citing drafting history of the ESI clause in GATT article XXI).

¹⁰⁷ Vandeveld (n 106) 198-99; Alvarez and Khamsi (n 15) 452-53; Ranjan (n 15) 37. See also: *Oil Platforms case* (n 18) Separate Opinion of Judge Simma, para 11.

¹⁰⁸ Hahn (n 102); Akande and Williams (n 103) 398.

or emergency', the clause 'would not be regarded as derogating from the basic principle that compensation would be due and payable'.¹⁰⁹

Ensuring that the military has the resources to defend a State's sovereignty and territorial integrity against internal and external threats qualifies, undeniably, as a 'security interest'.¹¹⁰ However, whether the availability of a resource constitutes an 'essential' security interest, should depend on whether the resource is strategic, i.e. integral or necessary, for the military to perform its function of national defence.¹¹¹ If resources integral to defence and warfare are not distinguished from non-integral resources, any measure undertaken for military supply could be justified on grounds of ESI. Such an expansive interpretation would threaten the balance that ESI clauses seek to achieve between upholding an investment treaty's investment protection objectives and ensuring a State's freedom to protect against security concerns.¹¹² It would also conflict with the basic international legal principle that compensation must accompany expropriation.¹¹³ A comparative assessment of jurisprudence on ESI under GATT Article XXI is instructive on this distinction.¹¹⁴ In 1975, Sweden introduced an import quota for certain varieties of shoes, arguing that the decrease in domestic shoe production risked the non-availability of shoes for military use in case of war, and thus threatened its ESI.¹¹⁵ Sweden revoked the quota, but not before many Contracting States raised doubts regarding whether the justification was covered by GATT Article XXI.¹¹⁶ Commenting upon the case, Hahn, similarly argues for a distinction between 'key' and other military goods.¹¹⁷ In Hahn's view, ensuring the availability of shoes cannot be an ESI because 'shoes are not likely to be a key

¹⁰⁹ Kenneth J Vandeveld, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties* (Oxford: Oxford University Press 2017) 525-26.

¹¹⁰ Baldwin (n 102) 9, 15; Hahn (n 102) 580-82. An example of a domestic legislation is the U.S. Trade Expansion Act, 1964, sec 232(c).

¹¹¹ In a recent report, the International Centre for Trade and Sustainable Development have noted that a policy aimed at 'securing a reliable supply of an important input for military products' would constitute a national security measure: see, Mark Feldman, 'International Investment Obligations and Industrial Policy: Evolution in Treaty Practice' (September 2018), at 3

<https://www.ictsd.org/sites/default/files/research/rta_exchange_-_international_investment_obligations_and_industrial_policy_-_feldman.pdf> accessed 15 December 2018.

¹¹² CMS (n 16) para 360; Burke-White and von Staden (n 15) 378; Diane Desierto, 'Protean 'National Security' in Global Trade Wars, Investment Walls, and Regulatory Controls: Can "National Security" Ever be Unreviewable in International Economic Law?', *EJILTalk* (2 April 2018) < <https://www.ejiltalk.org/national-security-defenses-in-trade-wars-and-investment-walls-us-v-china-and-eu-v-us/>> accessed 15 December 2018.

¹¹³ Oscar Schachter, 'Compensation for Expropriation' (1984) 78(1) AJIL 121, 127.

¹¹⁴ The framework for undertaking such a comparative analysis is provided by Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which articulates the principle of systematic integration and obliges interpreters to take account of 'relevant rules of international law applicable in the relations between the parties': see, Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT). See also: Kurtz (n 15) 362-64; Akande and Williams (n 103) 370-73.

¹¹⁵ GATT, *Sweden—Import Restrictions on Certain Footwear*, 'Notification by the Swedish Delegation', GATT Doc L/4250 (17 November 1975) para 4 (noting that 'the maintenance of a minimum domestic production capacity in vital industries... is indispensable to secure the provision of essential products necessary to meet basic needs in case of war or other conflict in international relations'); Hahn (n 102) 580-81.

¹¹⁶ GATT, 'Minutes of Meeting of 31 October 1975', GATT Doc C/M/109 (10 November 1975), at 9.

¹¹⁷ Hahn (n 102) 580-81.

factor in battlefields'.¹¹⁸ Likewise, Schloemann and Ohloff suggest that a resource must serve a defence purpose to qualify as 'security-sensitive'.¹¹⁹

Secondly, whether the existence of a crisis is necessary for security interests to become essential is open to debate. An armed conflict inevitably evokes notions of crisis. In situations of non-military threats, proof of a crisis may be necessary to distinguish ordinary adversities from ones that have the potential to affect the very security of a State. Thus, in situations of economic adversity – as in the *Argentinian cases* – the existence and severity of an economic crisis becomes integral to prove an ESI to ensure that economic downturns that can be reversed by ordinary measures are kept outside the scope of an ESI clause.¹²⁰ In other, wholly different situations, such as the availability of a limited, strategic resource, the existence of a crisis provides an improper constraint on the definition of the ESI. In such situations, it should suffice that the threat or risk associated with the failure to protect the resource is *tangible and not speculative* at the time of adopting the measure.¹²¹ Support for this view is found in the ICJ's ruling in *Nicaragua*. Whilst defining ESI, the ICJ held that 'the risk run by these "essential security interests" [must be] *reasonable*'.¹²² One of the measures challenged in *Nicaragua* concerned the US's imposition of trade embargoes upon Nicaragua in response to Nicaragua's support of armed groups in its neighbouring countries. In holding that the embargo was not protected by the ESI clause in the US-Nicaragua FCN treaty, the ICJ appeared to emphasise the speculative nature of threat to the US's ESI at the time the embargo was imposed. The ICJ reasoned that 'no evidence at all is available to show how Nicaraguan policies had in fact become a threat to "essential security interests" in May 1985', especially because 'those policies had been consistent, and consistently criticized by the United States, for four years previously'.¹²³ Interpretive explanations of ESI provided by some States similarly articulate the need for a tangible risk. The US, for instance, has repeatedly emphasised, albeit tautologically, that ESI includes 'actions not arising from a state of war or national emergency', if such actions 'have a *clear and direct relationship* to the essential security interest of the Party involved'.¹²⁴

As Section III.B demonstrated, it is this last factor that both the *CC/Devas* and *DT* tribunals endorsed to different degrees. Despite emphasising the unavoidable and indispensable nature of an 'essential' security interest (*CC/Devas*) and holding that ESI are those that go to the core of the security interest (*DT*), neither tribunal examined whether ensuring effective communication is integral to the military's operations. The 'essential' nature of the 'security interest' was presumed on that count as they were needs of the military. However, at least the *CC/Devas* tribunal enquired whether the military's needs were tangible, by assessing whether

¹¹⁸ *ibid.*

¹¹⁹ Hanne L Schloemann and Stefan Ohlloff, "Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence' (1993) 93 AJIL 424, 445.

¹²⁰ See example: *Continental* (n 16) para 180; *Enron* (n 16) para 305.

¹²¹ See also: Lise Johnson, 'International Investment Agreements and Climate Change: The Potential for Investor-State Conflicts and Possible Strategies for Minimizing It' (2009) 29 Environmental LR 1147, 1159.

¹²² *Military and Paramilitary Activities in and against Nicaragua* (n 100) para 224. See also: *Oil Platforms case* (n 18) Separate Opinion of Judge Buergethal, para 37.

¹²³ *Military and Paramilitary Activities in and against Nicaragua* (n 100) para 282.

¹²⁴ Vandevelde (n 106) 201.

the military had a ‘genuine need’ for the Spectrum.¹²⁵ The *DT* tribunal flagged concerns about the tangible nature of the military’s Spectrum needs, suggesting the ‘absence’ of ESI in the case, but ultimately left unclear whether such an inquiry is material to proving the existence of an ESI.¹²⁶

Should the government attest to the tangibility of the risk to the ESI at the time of adopting a measure? *CC/Devas* espoused a laxer approach. Approaching this issue from the military’s point of view, *CC/Devas* found the military’s consistent and repeated demands for the Spectrum as concrete proof of a tangible need to protect military communications. By contrast, *DT* viewed the issue from the government’s lens. According to *DT*, India’s ESI appeared to be speculative, because despite the military’s sustained demands over a prolonged period, the government had not definitively agreed to allocate the Spectrum to the military before, at the time, or immediately after it annulled *Devas*’s contract. Which of the two approaches is preferable depends not just on the facts of the case, but on more systemic concerns such as the extent to which a State’s assessment of its ESI should be subject to judicial review,¹²⁷ and what the adequate balance between investment protection and State sovereignty ought to be. At the ICJ, there is a degree of agreement that the plausibility of a risk to an ESI is to be judged against the standard of reasonableness.¹²⁸ Although reasonableness is a ‘notoriously ubiquitous and imprecise concept’ that is applied differently in different contexts and encompasses several distinct elements,¹²⁹ it requires, first and foremost, that the ‘State’ must recognise the purpose behind enacting a measure.¹³⁰ To that extent, the stricter scrutiny preferred by *DT* – examining whether the government considered military communications to be under a tangible threat without the Spectrum – appears more suited to establish whether there is a genuine ESI that needs protection.

2. Strategic resources and non-military needs

A more difficult interpretive question concerns the reach of ESI when a strategic resource is reacquired for non-military purposes. As previously described, India reacquired the Spectrum to meet, not just its military’s needs, but also needs of public utility services such as the railways and other societal needs such as tele-education, tele-health and rural communications.¹³¹ In a rare display of agreement, the *CC/Devas* and *DT* tribunals held that

¹²⁵ *CC/Devas* (n 12) para 315.

¹²⁶ See further: Section III.B above.

¹²⁷ See further: Section IV.B below.

¹²⁸ *Military and Paramilitary Activities in and against Nicaragua* (n 100) para 224; *Oil Platforms case* (n 18) Separate Opinion of Judge Kooijmans, paras 44, 52(b) (noting that ‘the Court must first apply the test of reasonableness with regard to the question whether there existed a plausible threat to these interests justifying certain protective measures’).

¹²⁹ Federico Ortino, ‘Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing’ (2017) *LJIL* 71, 72, 87.

¹³⁰ Olivier Corten, ‘The Notion of “reasonable” in International Law: Legal Discourse, Reason and Contradictions’ (1999) 48 *ICLQ* 613, 623.

¹³¹ *CC/Devas* (n 12) paras 146, 360; *DT* (n 12) paras 256, 272.

these non-military interests were issues of ‘public interest’ and could not constitute ESI ‘without distorting the natural meaning of such term’.¹³²

Whether or not ESI can encapsulate the protection of strategic resources for non-military needs relates back to the charged issue of whether ‘security’ is a limited concept covering military concerns with the primary focus on protection of the state. Increasingly, ‘security’ discourse has been criticising attempts to understand security as a fixed concept, arguing instead that security is a multi-faceted and evolving concept that encompasses issues of human, political, military, socio-economic, environmental and energy security.¹³³ Kurtz argues, for instance, that ‘challenges to security are now multi-faceted and encompass events often far beyond State control, including risks of external pollution, terrorist attacks and water shortages. These changing risks require a new paradigm of “human security”’.¹³⁴ States too recognise that ‘security’ has a broad reach.¹³⁵ The UK, for instance, has noted that ‘[o]ver recent decades, our view of national security has broadened to include threats to individual citizens and to our way of life’.¹³⁶

Under this broader outlook, protection of strategic or critical industries and infrastructure increasingly constitutes an important element of national security.¹³⁷ Critical industries and infrastructure are variously defined by national governments, but include, in essence, industries and infrastructure that are essential for the economic and social well-being of a country and its citizens.¹³⁸ Public utilities, such as energy, water, transport and communications are recognised, near universally, as critical industries and infrastructure.¹³⁹ Already, countries place *ex ante* restrictions on foreign investment in critical industries on grounds of national security.¹⁴⁰

This evolving and dynamic understanding of security suggests that policies aimed at ensuring critical infrastructure security can be covered by a broad interpretation of ESI.

¹³² *CC/Devas* (n 12) paras 354-61; *DT* (n 12) paras 236, 281.

¹³³ See example: the book-length treatment of the topic in Mary E Footer and others (eds), *Security and International Law* (Oxford: Hart Publishing 2016).

¹³⁴ Kurtz (n 15) 362-63.

¹³⁵ Organisation for Economic Co-operation and Development (OECD), ‘Security-Related Terms in International Investment Law and in National Security Strategies’ (May 2009), at 11-4 <<https://www.oecd.org/daf/inv/investment-policy/42701587.pdf>> accessed 18 December 2018.

¹³⁶ UK Cabinet Office, ‘The National Security Strategy of the United Kingdom: Security in an Interdependent World’ (March 2008), para 1.5, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228539/7291.pdf> accessed 18 December 2018.

¹³⁷ Philip Auerswald and others, ‘The Challenge of Protecting Critical Infrastructure’ (October 2005), at 5 <<http://opim.wharton.upenn.edu/risk/downloads/05-11-EMK.pdf>> accessed 18 December 2018; Frédéric Wehrlé and Joachim Pohl, ‘Investment Policies Related to National Security – A Survey of Country Practices’, OECD Working Papers on International Investment 2016/02, at 22; UNCTAD (n 105) 10-17, 26; UNCTAD, ‘World Investment Report 2016: Investor Nationality – Policy Challenges’ (2016), at 94-5 <https://unctad.org/en/PublicationsLibrary/wir2016_en.pdf> accessed 18 December 2018.

¹³⁸ OECD, ‘Protection of “Critical Infrastructure” and the Role of Investment Policies Relating to National Security’ (May 2008), at 3, 4, <<https://www.oecd.org/daf/inv/investment-policy/40700392.pdf>> accessed 18 December 2018.

¹³⁹ *ibid.*, at 5.

¹⁴⁰ The UNCTAD’s survey reveals that these restrictions include prohibiting (fully or partially) foreign investment in certain sensitive sectors, maintaining State monopoly in sensitive sectors, and maintaining a foreign investment review mechanism for scrutinising proposed and implemented investments. See: UNCTAD (n 137) 97.

Measures adopted to protect a resource vital to infrastructure security could, by extension, constitute an ESI under this analytical framework. Such measures could include forced reacquisition of resources, in case a host State concludes that a resource not previously considered security-sensitive, has acquired such a characteristic after an investment has been made.¹⁴¹ Needless to say, the threshold for such an interest to qualify as a ‘security interest’ and, more importantly, an ‘essential’ security interest remains high. On this important point, decisions of the European Court of Justice (ECJ, now Court of Justice of the European Union (CJEU)) might provide a lodestar for investment tribunals. The Treaty Establishing the European Community (EC Treaty) enlists ‘public security’ as a ground for deviating from treaty obligations relating to freedom of establishment and free movement of persons, services and capital.¹⁴² The ECJ has repeatedly held that ‘public security’ includes the protection of critical resources. In *Campus Oil v Minister for Industry and Energy*, the ECJ was asked to decide whether an Irish rule that required importers of petroleum products to purchase a proportion of their requirement from a State-owned refinery was justified on grounds of public security. The ECJ held that:

petroleum products, because of their *exceptional importance as an energy source* in the modern economy, are of fundamental importance for a country’s existence since not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend upon them. An interruption of supplies of petroleum products, with the resultant dangers for the country’s existence, could therefore seriously affect the public security.¹⁴³

Particularly in relation to sectors of public utility, the ECJ has maintained the view that the aim of safeguarding supply of public utilities is covered by the concept of public security.¹⁴⁴ What emerges from the ECJ’s jurisprudence is that *first*, public security can include measures taken to protect critical infrastructure such as public utilities. *Secondly*, only those resources that are vital or of ‘exceptional importance’ for uninterrupted supply of public utilities can constitute public security. *Finally*, on whether public security covers only measures taken in the face of a crisis, the ECJ’s decisions make clear that an impending crisis is not a prerequisite to adopt measures to protect critical infrastructure and resources. As the decisions suggest, the intention behind adopting a measure to protect a resource/infrastructure must not be purely economic.¹⁴⁵ Whilst identifying whether the protection of a resource/infrastructure is a matter of public

¹⁴¹ UNCTAD (n 105) 31-2.

¹⁴² Treaty Establishing the European Community (signed 25 March 1957, entered into force 1 January 1958) 298 UNTS 3 (EC Treaty) arts 30, 46, 58(b), 186.

¹⁴³ *Campus Oil v Minister for Industry and Energy* [1984] 3 CMLR 544, para 34. See also: *Commission v Greece* [2001] ECR I-7915, par. 29.

¹⁴⁴ *Commission v Spain* [2003] ECR I-4581, para 71 (holding that: ‘As regards the three other undertakings concerned, which are active in the petroleum, telecommunications and electricity sectors, it is undeniable that the objective of safeguarding supplies of such products or the provision of such services within the Member State concerned in the event of a crisis may constitute a public-security reason...and therefore may justify an obstacle to the free movement of capital’. See also: *Commission v France* [2002] ECR I-4781, paras 47-8; *Commission v Belgium* [2002] ECR-I 4809, para 46; Henrik Bjørnebye, *Investing in EU Energy Security: Exploring the Regulatory Approach to Tomorrow’s Electricity Production* (Alphen aan den Rijn: Kluwer Law International 2010) 92.

¹⁴⁵ *Campus Oil* (n 143) para 35.

security, regard must be had to the effect that the non-availability of that resource or infrastructure would have on the country's existence or to a 'fundamental interest of society'.¹⁴⁶ A measure is justified by public security if it is intended to ensure that there would be a minimum supply of a resource or a utility 'in the event of a genuine or sufficiently serious threat'.¹⁴⁷ To this extent, the precautionary character of protecting critical resources/infrastructure diverges from the reactive nature of measures taken to combat military or non-military crises.¹⁴⁸

A caveat should be entered at this point. The EC Treaty refers to 'public security' and not to ESI. The 'public security' formulation might suggest that the term covers a broader range of scenarios.¹⁴⁹ As discussed in this section, the different formulations should not exclude critical infrastructure and resource security from the scope of ESI in principle, but can have an impact on the situations in which a threat to a critical resource/infrastructure become an ESI. In that regard, guidance is available from recent investment treaties concluded by some South Asian States. The ESI clauses in these treaties specifically identify the protection of 'critical public infrastructure, including communication, power and water infrastructures' as an ESI, but limit its scope to protection from 'deliberate attempts intended to disable or degrade such infrastructure'.¹⁵⁰ A precautionary measure intended to prevent the consequences of a future threat (as in the ECJ's case) or measures taken to develop a critical infrastructure, might be viewed as a regulatory or a strategic measure but would not constitute ESI under the stricter standard articulated in these treaties.¹⁵¹

The foregoing shows that protection of critical or strategic resources/infrastructure can constitute ESI. Which kinds of threat to a critical resource/infrastructure can qualify as ESI is a subject of ongoing debate. In *CC/Devas* and *DT*, the tribunals are right to suggest that societal needs, such as tele-education and tele-health, are matters of public interest – taking of property for such reasons should be regulated by rules on expropriation. However, needs of the railways and other public utility services – which India had itself identified as 'national' and not 'societal' needs – invited discussion on the scope of ESI clauses in relation to protection of critical infrastructure/resources.¹⁵² The case, on facts, may not have met the strict threshold for classifying the protection of critical infrastructure/resources as ESI. However, the tribunals'

¹⁴⁶ *ibid.*, para 35; *Commission v Spain* (n 144) para 72.

¹⁴⁷ *Commission v Spain* (n 144) para 73.

¹⁴⁸ UNCTAD (n 105) xvi.

¹⁴⁹ *ibid.*, 98. The EC Treaty and the TFEU themselves use the different formulation 'essential interests of its security' in the provision recording security exceptions to the treaty: see EC Treaty (n 142) art 296(1)(b); TFEU (n 101) art 346(1)(b).

¹⁵⁰ See example: ASEAN Comprehensive Investment Agreement (signed 26 August 2014, entered into force 12 September 2016) art 18(b)(iv); Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore (signed 29 June 2005, entered into force 1 August 2005) art 6.12(b)(iv); Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India (signed 12 November 2014) art 22(b)(iv); Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the People's Republic of China and the Association of Southeast Asian Nations (signed 15 September 2009, entered into force 1 January 2010) art 17(b)(iv); Model Text for the Indian Bilateral Investment Treaty (2016) art 33.1(ii)(d).

¹⁵¹ Feldman (n 111) 6.

¹⁵² *CC/Devas* (n 12) para 146; *DT* (n 12) para 272.

dismissal of measures taken for non-military needs as ones taken in the ‘public interest’ deviates not only from now established jurisprudence that non-military concerns are covered by ESI, but also presents a missed opportunity for analysing the breadth of ESI clauses in relation to protection of critical resources/infrastructure.

B. Existence of an ESI and Deferential Standard of Review

As previously adumbrated, investment tribunals agree that, absent clear language, ESI-based exceptions are justiciable. Whether an ESI exists is not left exclusively to a State’s subjective judgment. Quite apart from the question of State discretion and non-justiciability, is the issue of deference in judicial review of the existence of an ESI.¹⁵³

A deferential standard of judicial review, or the granting of a ‘margin of appreciation’ to a State’s assessment of its position,¹⁵⁴ is widely recognised as a product of the European Court of Human Rights (ECtHR).¹⁵⁵ The ECtHR routinely deploys the margin of appreciation doctrine in assessing justifications based on ‘national security’ and other objectives such as ‘public emergency’ and ‘protection of health or morals’.¹⁵⁶ As the ECtHR held in *CG and others v Bulgaria*, States enjoy a ‘large margin of appreciation’ in defining ‘what is in the interests of that [national] security’.¹⁵⁷ The rationale for according such deference, as the ECtHR famously explained in *Ireland v UK*, is that:

by reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide...on the presence of such an emergency...¹⁵⁸

Investment tribunals have been slow to acknowledge a State’s definitional prerogative on matters of ESI. The early tribunals of *CMS*, *LG&E*, *Sempra* and *Enron* did not pronounce on the appropriate standard of review, and proceeded to conduct a full-scale ‘substantive’ review of whether Argentina’s economic crisis constituted an ESI.¹⁵⁹ Support for deference came first

¹⁵³ Note: At this stage, this questions relates only to the existence of an ESI and not to the separate question of whether there was a nexus between the measure and the ESI.

¹⁵⁴ Stephan Schill and Robyn Briese, “‘If the State Considers’: Self-Judging Clauses in International Dispute Settlement” (2009) 13 Max Planck UNYB 61, 74; Yuval Shany, ‘Toward a General Margin of Appreciation Doctrine in International Law’ (2006) 16(5) EJIL 907, 909-10.

¹⁵⁵ See example: Julian Arato, ‘The Margin of Appreciation in International Investment Law’ (2013-14) 54 Va J Int’l L 545, 547; Pär Hallström, ‘Margin of Appreciation and National Security’ in Jonas Ebbeson and others (eds), *International Law and Changing Perceptions of Security: Liber Amicorum Said Mahmoudi* (Leiden: Brill 2014) 116; Andrew Legg, *Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford: Oxford University Press 2012) 3. While some, such as Eirik Bjorge, suggest that the margin of appreciation doctrine was created by inter-State arbitration in the 1920s, it is nevertheless agreed that the doctrine finds most widespread application at the ECtHR: Eirik Bjorge, ‘Been There, Done That: The Margin of Appreciation and International Law’ (2015) 4 CJICL 181, 185-86; Eyal Benvenisti, ‘Margin of Appreciation, Consensus, and Universal Standards’ (1999) 31 Int’l L & Pol 843; Shany (n 154) 909.

¹⁵⁶ Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Council of Europe Publishing 2000); Akande and Williams (n 103) 382.

¹⁵⁷ *CG and others v Bulgaria*, App no 1365/07 (ECHR, 24 April 2008) paras 40, 43.

¹⁵⁸ *Ireland v UK* [1978] EHRR 25, para 207. See also: *Handyside v UK* [1976] 1 EHRR 737, para 48; *Smith and Grady v UK* [1999] 29 EHRR 493, para 89.

¹⁵⁹ See further: Section II. *CMS* (n 16) para 374; *Enron* (n 16) para 332; *Sempra* (n 16) para 388.

from Burke-White and von Staden who relied on the ECtHR's jurisprudence to propose a similar margin of appreciation to States in identifying their ESI.¹⁶⁰ In the same year that Burke-White and von Staden published their work, margin of appreciation finally found its way into investment treaty jurisprudence when the *Continental* tribunal similarly drew from the ECtHR's template to declare that 'this objective assessment [of what is an ESI] must contain a significant margin of appreciation for the State'.¹⁶¹

The *CC/Devas* and *DT* decisions have further entrenched margin of appreciation into investment treaty jurisprudence on ESI. Both tribunals concurred that States are owed a degree of deference on the question of the existence of an ESI.¹⁶²

Investment law's evolution towards deferring to a State's identification of its ESI is a step in the right direction from a historical, comparative and practical perspective. Historically, negotiations of FCN treaties between the US and its treaty partners indicates that although ESI clauses were meant to be justiciable, States shared a belief that tribunals would accord weight to a State's assessment on matters of security.¹⁶³ Notably, in negotiations between Germany and the US, when German negotiators queried whether ESI clauses are justiciable, the US responded by clarifying that such clauses were in fact justiciable but speculated that 'international tribunals would probably give very heavy weight to arguments presented by the government invoking the reservation'.¹⁶⁴

From a comparative perspective, other international tribunals have come down in favour of a deferential review of security-based and other objectives. The ECJ has towed a line similar to that of the ECtHR. While holding that States cannot unilaterally determine the scope of public security,¹⁶⁵ the ECJ has nonetheless recognised that States enjoy 'a certain degree of discretion' on such matters.¹⁶⁶ As Advocate Jacobs has explained, the importance of security as a legitimate aim, and a diversified understanding of what might constitute a security interest for a particular State, are important reasons for deferring to a State's appraisal on issues of national security.¹⁶⁷

The ICJ has not displayed the same degree of enthusiasm towards adopting a deferential standard of review on other matters, but on the interpretation of ESI the ICJ too has preferred

¹⁶⁰ Burke-White and von Staden (n 15) 370-75.

¹⁶¹ *Continental* (n 16) para 181.

¹⁶² *CC/Devas* (n 12) paras 244-45; *DT* (n 12) para 235.

¹⁶³ Vandevelde (n 109) 511-14.

¹⁶⁴ *ibid* 514. The US was similarly emphatic in other negotiations that States would have a degree of latitude in determining what constituted their 'essential' security interests, see: Vandevelde (n 109) 523.

¹⁶⁵ *Commission v Spain* (n 104) para 72.

¹⁶⁶ *Germany v Leifer* [1995] ECR I-3231, para 35; *Sirdar v The Army Board* [1999] ECR I-7403, para 27; *Tanja Kreil v Bundesrepublik Deutschland* [2000] ECR I-69, para 24; *Case C-544/15, Sahar Fahimian v Bundesrepublik Deutschland* (2016), para 50.

¹⁶⁷ *Commission v Greece* [1996] ECR I-1513, I-1526, Opinion of Advocate General Jacobs, paras 54-5 (stating that: 'Because of differences of geography and history each of the Member States has its own specific problems and preoccupations in the field of foreign and security policy. Each Member State is better placed than the Community institutions or the other Member States when it is a question of weighing up the dangers posed for it by the conduct of a third State. Security is, moreover, a matter of perception rather than hard fact. What one Member State perceives as an immediate threat to its external security may strike another Member State as relatively harmless... issues of national security are primarily a matter for the appraisal of the authorities of the State concerned').

a deferential approach. In the *Oil Platforms* case, the ICJ rejected a deferential approach on questions of self-defence, holding instead that ‘the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is *strict and objective*, leaving no room for any “measure of discretion”’.¹⁶⁸ In the *Gabčíkovo-Nagymaros Project* case, whilst assessing the necessity of Hungary’s suspension of works on the project under CIL, the ICJ similarly held that it must establish ‘the *objective* existence of a “peril”’.¹⁶⁹ Bjorge, relying upon the ICJ’s preference for an objective analysis, has contended that the ‘margin of appreciation is decidedly old hat’ and has been ‘reduced to a vanishing point’ in international law.¹⁷⁰

The ICJ’s inclination towards an objective standard of review in these cases is distinguishable, and in no way suggests a blanket rejection of deferential review by the Court. In *Gabčíkovo-Nagymaros Project*, the ICJ’s choice of objective review can be explained by the fact that the CIL defence of necessity applies only ‘on an exceptional basis’.¹⁷¹ More importantly, in *Oil Platforms*, the ICJ addressed only the narrow question of the standard of review applicable to the law of self-defence. It decidedly refrained from commenting upon the standard for examining whether a State measure was exempted under an ESI clause. In that case, the US had contended that its military attacks on Iranian offshore oil installations were necessary to protect its ESI. In support of its contention, the US asserted that ‘[a] measure of discretion should be afforded to a party’s good faith application of measures to protect its essential security interests’.¹⁷² As the ICJ had already decided to examine the issue under the law on self-defence, it chose against providing its opinion on the standard of review applicable to ESI clauses by stating that ‘[t]he Court does not have to decide whether the United States interpretation...on this point is correct’.¹⁷³

The ICJ’s approach towards reviewing the existence of an ESI is more accurately found in the *Nicaragua* case. In that case, as previously stated, the ICJ adopted a standard of reasonableness to assess the risk run by ESIs.¹⁷⁴ This language, as Judge Koojimans notes in his separate opinion in *Oil Platforms*, suggests an espousal of deferential review:

With regard to the assessment of the risk run by the essential security interests, the term “reasonableness” is used; with regard to the “measures taken”, the Court states that it is not sufficient that they may be deemed “useful” but that they must be necessary. This seems to indicate that with regard to the measures taken a stricter test must be used than with regard to the assessment that essential security interests are at risk. *There seem to be good reasons for such a distinction with regard to the margin of discretion to be left to governmental authorities.* The evaluation of what essential security interests are and whether they are in jeopardy is first and foremost a political question and can hardly be

¹⁶⁸ *Oil Platforms* case (n 18) para 73.

¹⁶⁹ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, para 54.

¹⁷⁰ Bjorge (n 155) 190. See also: Schill and Briese (n 154) 78-80.

¹⁷¹ *Gabčíkovo-Nagymaros Project* (n 169) para 51; Articles on States Responsibility (n 25) 83 (para 13).

¹⁷² *Oil Platforms* case (n 18) para 73.

¹⁷³ *ibid.*

¹⁷⁴ *Military and Paramilitary Activities in and against Nicaragua* (n 100) para 224.

replaced by a judicial assessment. Only when the political evaluation is patently unreasonable... is a judicial ban appropriate.¹⁷⁵

Practically too, a deferential review is a sound way to avoid adding fuel to the fire that is the legitimacy crisis of investment law. Concepts such as ESI, as Schloemann and Ohlhoff explain, are a function of ‘contemporary sovereignty’ and demand ‘individualization, or individual definition, by the State concerned’.¹⁷⁶ The impossibility of developing a shared understanding of what constitutes an ESI for a State attests to a challenge that a judicial tribunal might face in undertaking a full-fledged review of this question. Certainly, doing so runs the risk of an investment tribunal being perceived as ‘substituting the functions of a sovereign State’ and sitting in appeal over a State’s policy decisions – matters that go to the heart of investment law’s legitimacy crisis. Deference thus strikes an appropriate balance between judicial review and a State’s prerogative to define its security concerns.

A side consequence of affording deference to States on matters of ESI is that tribunals will be less likely to base their findings that an ESI clause is non-applicable on the question of whether an ESI exists or not, if they can reach that same conclusion by establishing the lack of a nexus between a State measure and the ESI. As Akande and Williams explain, international tribunals consider the issue of the existence of an ESI a mere ‘formality’, as it would be ‘exceedingly rare for an international tribunal to find that a particular interest considered by a State to be a national or essential security interest may not actually be classified as such’.¹⁷⁷ Certainly, the *DT* tribunal’s reluctance to declare the absence of an ESI validates this observation. As previously described, the significant time lag between the Indian military’s demands for the Spectrum and the Indian government’s ultimate allocation of that Spectrum to the military, raised justifiable concerns regarding the existence of an ESI for the *DT* tribunal. Ultimately, however, the *DT* tribunal shied away from pronouncing upon this more political matter, as it could base its decision on India’s failure to establish that it was necessary to cancel Devas’s Agreement.

C. ESI Clauses and the Nexus Requirement

1. ‘Necessary’

Prior to the *DT* case, investment tribunals had adopted three different interpretations of the necessity requirement in ESI clauses – (i) the *CME*, *Enron* and *Sempra* tribunals applied the framework of necessity under CIL to suggest that a measure is ‘necessary’ under an ESI clause if it is the ‘only way’ for the State to protect its ESI; (ii) the *LG&E* tribunal proposed that a necessary measure is one that is ‘legitimate’ and undertaken in a situation when a State has no choice but to act; and (iii) the *Continental* tribunal borrowed from WTO jurisprudence a two-step test of examining whether the measure ‘contributed materially’ to the protection of the ESI and whether the State could deploy a less restrictive alternative.

¹⁷⁵ *Oil Platforms case* (n 18), Separate Opinion of Judge Kooijmans, para 44.

¹⁷⁶ Schloemann and Ohlhoff (n 119) 450.

¹⁷⁷ Akande and Williams (n 103) 398.

The latter approach of *Continental* requires further examination to assess the developments generated by the *DT* ruling. WTO jurisprudence on necessity is derived from interpretations of the standard in the general exception clause in GATT Article XX and GATS Article XIV. WTO law adopts a proportionality-based test comprising two stages. The first stage entails a holistic ‘weighing and balancing’ exercise of several factors, such as the importance of the interest at stake, the measure’s contribution to the interest, and the restrictive impact of the measure on international trade.¹⁷⁸ If this analysis yields a preliminary conclusion that the measure is necessary, the second stage confirms the necessity of the measure by comparing it to other less trade-restrictive measures which a State can reasonably adopt to achieve the same goal (LRM test).¹⁷⁹

Contrary to certain academic opinion,¹⁸⁰ *Continental*’s two-step test does not fully mirror that of the WTO. Unlike WTO law, *Continental* did not propagate a proportionality-based ‘weighing or balance’ exercise. Furthermore, *Continental*’s assessment of material contribution requires proof that the measure was ‘apt to and did make... a material or a decisive contribution’ towards the achievement of the objective.¹⁸¹ The WTO does not require this stricter proof of *actual* contribution. Under WTO jurisprudence, a measure can be necessary even if its benefits are not ‘immediately observable’ so long as the measure is likely or ‘apt to produce a material contribution’.¹⁸² Ultimately then, *Continental* cherry-picked the LRM test from WTO law and incorporated it into investment jurisprudence.

The chequered development of necessity in investment law placed the *DT* tribunal in the unique position of charting the future path. Yet, without engaging with previous investment jurisprudence or with WTO law, the *DT* tribunal proposed a two-pronged test involving an analysis of whether the measure was ‘principally targeted’ to protect the ESI and whether the State could achieve the same outcome through less restrictive reasonable alternatives. The similarity in the tests adopted by *Continental* and *DT* are immediately apparent. However, *DT* does not tow entirely the same line as *Continental*. Linguistic and standard of review-related variations are discernible.

Linguistically, the *DT* tribunal has discarded *Continental*’s analysis of material contribution in favour of examining whether the measure was principally targeted at the ESI. While the tribunal did not clarify what it meant by ‘principally targeted’, one senses a similarity with the

¹⁷⁸ WTO, *Korea: Measures Affecting Imports of Fresh, Chilled and Frozen Beef—Report of the Appellate Body* (11 December 2000) WT/DS161/AB/R, WT/DS169/AB/R, para 164 (*Korea—Various Measures on Beef*); WTO, *Colombia: Measures Relating to the Importation of Textiles, Apparel and Footwear—Report of the Appellate Body* (7 June 2016) WT/DS461/AB/R, para 5.70; WTO, *India: Certain Measures Relating to Solar Cells and Solar Modules—Report of the Appellate Body* (16 September 2016) WT/DS456/AB/R, para 5.63.

¹⁷⁹ WTO, *Brazil: Measures Affecting Imports of Retreaded Tyres—Report of the Appellate Body* (3 December 2007) WT/DS332/AB/R, para 156 (*Brazil—Retreaded Tyres*).

¹⁸⁰ See example: Jose E. Alvarez and Tegan Brink, ‘Revisiting the Necessity Defence: Continental Casualty v. Argentina’ (2012) 3 TDM 1; Diane A Desierto, ‘Necessity and “Supplementary Means of Interpretation” for Non-Precluded Measures in Bilateral Investment Treaties’ (2010) 31(3) U Pa J Int’l L 827.

¹⁸¹ *Continental* (n 16) para 196. One can query whether, on facts, *Continental* subscribed to this higher threshold of actual contribution: Andrew Mitchell and Caroline Henckels, ‘Variations on a Theme: Comparing the Concept of “Necessity” in International Investment Law and WTO Law’, (2013) 14(1) Chi J Int’l L 93, 152-53.

¹⁸² *Brazil—Retreaded Tyres* (n 179) para 151; WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products—Report of the Appellate Body* (22 May 2014) WT/DS401/AB/R, para 5.213.

WTO standard of aptness under which a measure’s *potential* to contribute to the objective, and not its *actual* contribution is put to objective scrutiny. If *DT* has indeed favoured this laxer standard of assessment, it is a welcome refinement of *Continental*’s material contribution test. It acknowledges the temporal gap that might exist between the adoption of a measure and the manifestation of its results. As the WTO Appellate Body has explained, the results of certain measures ‘can only be evaluated with the benefit of time’.¹⁸³

Shunning evidence of actual contribution also pays heed to the fact that certain government measures may be just one part of a ‘multiplicity of interacting measures’ that are designed to collectively achieve a policy objective.¹⁸⁴ The State or the government is not a single entity. The execution of a measure or policy might require the involvement or participation of various government departments each with their own mandate. In such situations, the isolated contribution of one government measure may be difficult to establish without accounting for the network of other contributing measures. Shaping necessity examination in terms of the principal target of the measure can allow tribunals to assess the likely contribution of a distinct measure in light of the suite of interrelated measures. The measure, by itself, might not contribute towards the objective, but it can still be necessary if it can be proved that the measure forms part of a broader initiative such that there exists a genuine relationship of ends and means between the stated objective and the impugned measure. This analytical framework can explain *DT*’s factual analysis. To conclude that it was not necessary for India to cancel the Agreement with Devas, the *DT* tribunal drew primarily upon the fact that there was no comprehensive policy in place to allocate the Spectrum to the military at the time the Agreement was cancelled. The government department responsible for terminating the Agreement had done so when other ‘organs of the Government’ responsible for spectrum allocation had not agreed to allocate the Spectrum to the military.¹⁸⁵ India’s claim that there was a genuine relationship of ends and means between the military’s need for the Spectrum and the standalone decision to cancel the Agreement would have likely passed muster, were the government departments in agreement regarding the proper use of the Spectrum. The taking of the Spectrum from Devas, in that case, would form part of a broader established policy to make the Spectrum available to the military.

From a standard of review perspective, *Continental* and *DT* differ in the rigour with which to scrutinise the availability of other reasonable less-restrictive alternatives. Having drawn from WTO law, the *Continental* tribunal implemented the LRM test by engaging in an extensive review of whether the suggested less-restrictive alternatives could achieve the same level of benefit as Argentina sought to achieve through the imposed measure.¹⁸⁶ By contrast, the *DT* tribunal did not articulate the relevant standard for assessing when it would be reasonable to conclude that States could avail of alternative measures. In *DT*, the claimants proposed that India could have alternatively satisfied the military’s needs by acquiring spectrum previously allocated to other governmental departments.¹⁸⁷ India argued in response that the alternative quantity of Spectrum in the hands of other governmental departments would

¹⁸³ *Brazil—Retreaded Tyres* (n 179) para 151.

¹⁸⁴ *ibid.*

¹⁸⁵ *DT* (n 12) para 287.

¹⁸⁶ *Continental* (n 16) paras 198-230.

¹⁸⁷ *DT* (n 12) para 219.

not be sufficient to meet the military's needs.¹⁸⁸ The tribunal did not examine whether this proposed alternative would achieve India's stated objective to the same level, concluding summarily that India had not considered 'these reasonable, least restrictive alternative measures, although they were clearly available'.¹⁸⁹

ESI clauses being exceptions to investment obligations, the burden of demonstrating the necessity of a measure falls upon the respondent State. However, the State need only show that the alternatives suggested by the claimant would not be equally effective in addressing the objective.¹⁹⁰ This is not peculiar to assessments of necessity under ESI clauses. The relative effectiveness of alternative measures is also integral to establish whether a measure was the 'only way' to safeguard against an essential interest under the CIL defence of necessity.¹⁹¹ The *DT* tribunal's failure to engage with India's argument that the proposed alternative was ineffective, insofar as it would not provide the same level of benefit (as the impugned measure), sets a dangerous precedent for future tribunals. This view is best treated as *obiter dictum*, as the *DT* tribunal had already determined that the measure failed to satisfy the first-prong of the necessity test, namely whether the measure was principally targeted at the ESI.

Two broader points remain to be made. *First*, incorporation of the WTO's LRM test into investment law has faced academic criticism.¹⁹² The different textual make-ups of ESI clauses in investment law and the general exceptions clauses in the GATT and GATS is key to this objection against convergence with WTO law. Notably, the general exception clauses in GATT and GATS include a protective *chapeau* that excludes measures which are applied in a manner constituting 'arbitrary or unjustifiable discrimination'. Critics have argued that the additional checks offered by the *chapeau* allow the WTO to adopt a more flexible interpretation of the necessity standard.¹⁹³ Others have convincingly refuted this criticism as being overstated. Distinguishing 'regulatory design' from 'regulatory application', Kurtz helpfully explains that the *chapeau* performs the different function of testing the application of the measure, whereas necessity tests the design of a measure under WTO and investment law.¹⁹⁴ Elsewhere, Mitchell and Henckels demonstrate that the same LRM test applies to necessity even under WTO agreements that do not contain a *chapeau* similar to that of the GATT and GATS.¹⁹⁵ More significantly, a cross-regime comparison demonstrates that the LRM test is not unique to the

¹⁸⁸ *ibid*, para 192.

¹⁸⁹ *ibid*, para 290.

¹⁹⁰ Benedict Kingsbury and Stephan Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law', New York University School of Law, Public Law & Legal Theory Research Paper Series Working Paper No 09-46 (September 2009), at 29.

¹⁹¹ *Enron annulment* (n 59) para 371; Jorge E Viñuales, 'Sovereignty in Foreign Investment Law' in Zachary Douglas, Joost Pauwelyn and Jorge E. Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford: Oxford University Press 2014) 355-56; Sahib Singh, 'The Enron Annulment Decision's exposure of Necessity's Endemic Uncertainty: A Welcome Critique', *EJIL:Talk!* (25 October 2010) <<https://www.ejiltalk.org/the-enron-annulment-decision%E2%80%99s-exposure-of-necessity%E2%80%99s-endemic-uncertainty-a-welcome-critique/>> accessed 22 December 2018.

¹⁹² See example: Alvarez and Brink (n 180); Desierto (n 180); Andrea K. Bjorklund and Sophie Nappert, 'Beyond Fragmentation' in Todd Weiler and Freya Baetens (eds), *New Directions in International Economic Law: In Memoriam Thomas Wälde* (Leiden: Martinus Nijhoff 2011) 474-78.

¹⁹³ Alvarez and Brink (n 185); Bjorklund and Nappert (n 197).

¹⁹⁴ Kurtz (n 15) 224-25.

¹⁹⁵ Mitchell and Henckels (n 181) 159-60.

WTO. Other international courts including the CJEU and the ECtHR similarly apply the LRM test as a second-level analysis to determine the necessity of a measure.¹⁹⁶

Second, the attempt to harmonise the standard of necessity under investment law with that of other areas of international law is writ large in the recent formulations of *Continental* and *DT*. Yet, the tribunals have treaded cautiously, transplanting selectively the LRM test while discarding any relevance of a full-fledged proportionality analysis.¹⁹⁷ This cherry-picking exercise is not without merit.¹⁹⁸ It signals institutional awareness of the constraints within which investment tribunals operate. Proportionality analysis demands significant intrusion into a State’s policy determinations and requires ‘judges to behave as legislators do, or to sit in judgment on a prior act of balancing performed by elected officials’.¹⁹⁹ Being far-removed from the socio-political context in which governments make such determinations, investment tribunals lack the familiarity or the expertise to make the value-judgments required under proportionality analysis.²⁰⁰ Indeed, this constraint has not prevented other international tribunals from engaging in a proportionality review. However, institutional specificities explain why proportionality has stronger footing in those other tribunals. The CJEU, for instance, is embedded in the European regional setting. Its judicial authority to apply proportionality analysis derives from the constitutional functions it performs and the goal of economic integration that it pursues.²⁰¹ Investment tribunals, by contrast, do not operate in a particular supra-national constitutional order; their environment consists of a highly fragmented network of investment treaties. At the WTO, proportionality weighing, although the subject of criticism,²⁰² is still less problematic because panel decisions are subject to appellate review. No such appellate check is available to curb unduly activist applications of proportionality analysis by investment tribunals.

¹⁹⁶ Janneke Gerards, ‘How to improve the necessity test of the European Court of Human Rights’ (2013) 11(2) *ICON* 466, 481-84; Lukasz Gruszczynski and Wouter Werner, *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (Oxford: Oxford University Press 2014) 212; Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration* (Cambridge: Cambridge University Press 2015) 57-62.

¹⁹⁷ In *Oil Platforms*, Judge Higgins suggested that “‘necessary” is understood...as incorporating a need for “proportionality” in “general international law””, see: *Oil Platforms case* (n 18) Separate Opinion of Judge Higgins, para 48. Proportionality here refers to proportionality *stricto sensu* under which courts and tribunals engage in a weighing and balancing exercise to examine whether the measure is disproportionate or excessive in relation to the interests affected. See: Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press 2012) 340-70; Henckels (n 196) 25-6, 62-7.

¹⁹⁸ For proponents of a proportionality analysis in investment law, see: Gebhard Bücheler, *Proportionality in Investor-State Arbitration* (Oxford: Oxford University Press 2015) 238-43; Reinisch (n 55) 201; Alec Stone Sweet, ‘Investor State Arbitration: Proportionality’s New Frontier’ (2010) 4 *L & Legal Ethics Human Rights* 48, 76.

¹⁹⁹ Alec Stone Sweet and Jud Matthews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 47 *Colum J Transnat’l L* 72, 88.

²⁰⁰ Henckels (n 196) 164; William W Burke-White and Andreas von Staden, ‘Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations’ (2010) 35 *Yale J Int’l L* 283, 335-36; Kurtz (n 15) 367.

²⁰¹ Bo Vesterdorf, ‘A Constitutional Court for the EU?’ (2006) 4(4) *ICON* 607, 607-11; Stone Sweet and Matthews (n 199) 139-44; Kurtz (n 15) 367; Henckels (n 196) 164.

²⁰² See example: Gisele Kaptein, ‘A Critique of the WTO Jurisprudence on “Necessity”’ (2010) 59(1) *ICLQ* 89.

2. 'Directed to' v. 'necessary'

Until *CC/Devas* and *DT*, there was little academic or judicial clarity on the difference between the nexus requirements of 'directed to' and 'necessary'. Broad agreement existed that necessity imposes a more stringent nexus requirement.²⁰³ The ICJ had emphatically stated in its ruling in *Nicaragua* that measures had to be more than 'merely useful' to qualify as necessary.²⁰⁴ The precise boundaries of distinction however remained unclear. Some academics adopted an intention-based test, arguing that 'directed to' requires proof that the State adopted the impugned measure with the intention to further the stated objective.²⁰⁵ Others proposed that any tenuous link between the measure and the objective would suffice. Only 'extreme cases' would fail to meet the 'directed to' requirement, as the test brings ESI clauses 'very close to a self-judging clause'.²⁰⁶

CC/Devas has dismissed this latter proposal, and confirmed that tribunals must objectively assess the nexus between the measure and the objective even under the 'directed to' standard.²⁰⁷ In the remainder of its analysis, however, the tribunal appears to have adopted two divergent views of the test. On the one hand, the tribunal indicated that necessity's stringency lay in the second-level analysis of less restrictive alternatives:

[Under the "directed to" standard], the Respondent does not have to demonstrate necessity in the sense that the measure adopted was the only one it could resort to in the circumstances.²⁰⁸

This (first) outlook suggests that difference between 'directed to' and 'necessary' lies in the fact that 'directed to' requires only a first-level necessity analysis of whether the measure is 'principally targeted' at the objective, or has the potential to contribute materially to the objective. If this analysis yields a positive result, the measure will be found 'directed to' the objective even if the State has other alternatives at its disposal.

On the other hand, the tribunal subjected the facts to a significantly laxer scrutiny. As previously recalled, India's decision to cancel Devas's Agreement only tangentially contributed to the fulfilment of its military's Spectrum needs because, at the time of the decision, the various government departments had not reached agreement on transferring the Spectrum to the military. Despite the fact that the taking of the Spectrum would not be matched by a giving of the Spectrum to the military, the tenuous link was sufficient for the tribunal to conclude that the measure was directed to the protection of India's ESI. This (second) outlook places 'directed to' and 'necessary' at two ends of the nexus spectrum. It suggests that a measure need only be capable of providing the most incidental bare-minimum contribution to meet the 'directed to' standard. It further suggests that time is of no relevance in examining the 'directed to' nexus. Measures that have no immediate potential to contribute to the objective

²⁰³ See example: Ranjan (n 15) 51-2.

²⁰⁴ *Military and Paramilitary Activities in and against Nicaragua* (n 100) para 224.

²⁰⁵ Burke-White and von Staden (n 200) 342; Sinha (n 15) 261.

²⁰⁶ UNCTAD (n 105) 95.

²⁰⁷ *CC/Devas* (n 12) para 242.

²⁰⁸ *ibid*, para 243.

would nevertheless pass the ‘directed to’ test, so long as they are undertaken with the intention to contribute to that objective.

Between the two, it is suggested that the first outlook is preferable. The deference afforded to States under the second outlook would bring such ESI clauses dangerously close to being self-judging clauses, even though that was rightly not the (initial) intention of the *CC/Devas* tribunal.²⁰⁹ Admittedly, differences in nexus requirements under ESI clauses reflect differences in risk allocation between foreign investors and States.²¹⁰ However, the second outlook gives significantly greater protection to a State’s regulatory freedom to adopt measures at a time when they have no potential to protect the ESI, skewing the balance unfavourably against foreign investment protection. Such an overly permissive approach could pave the way for opportunistic abuse of ESI clauses by host States.

The first outlook, by contrast, allows investment protection to be balanced with State sovereignty, whilst giving States greater regulatory freedom to invoke ESI clauses than available under the ‘necessary’ standard, thereby preserving the latitude States intended to offer themselves by framing the nexus requirement in linguistically different terms. More importantly, it better delineates the boundaries between the nexus requirements in ESI clauses. ‘Necessary’ and ‘for’ form the two ends of the nexus spectrum. Necessary requires the measure’s potential for contribution to be additionally tested against the benchmark of the LRM test. ‘For’, as some academics have argued, requires a ‘relatively thin nexus’ under which measures need ‘merely further a permissible objective’.²¹¹ ‘Directed to’ lies between these extremes, but the second outlook risks conflating the standards of ‘directed to’ and ‘for’. Furthermore, the first outlook also keeps in check the risks inherent in a broad intention-based analysis. The facts of *CC/Devas* and *DT* have made it amply clear that in certain situations, despite a State’s intention to use a measure to further a stated objective, the measure may not have the ability to contribute to that objective. These are situations wherein a measure is designed to further an objective, but the probability of its success is contingent on subsequent governmental initiatives. Given that the measure’s success is being stalled by a wing of the government, the genuineness of the relationship of means and ends between the measure and the objective is suspect until such time as there is a meeting-of-minds between the government departments. Seeking evidence of potential contribution akin to the first-test under the necessity analysis reduces the risk of governmental overreach.

V. CONCLUSION

Criticism of the investment treaty regime continues to rise. Significant reforms of the regime are already underway. Inconsistent decisions on the same or similar disputes provide important fuel to these calls for recalibration, and the need for appellate review. While consistency in case-law is not a virtue in itself and can impede the development of the law, the reasons for contradictory reasons and outcomes need to be adequately articulated to allow for a coherent

²⁰⁹ ESI clauses are only ‘self-judging’ if they include the phrase ‘if [the State] considers necessary’ that GATT Article XXI includes. See: *Military and Paramilitary Activities in and against Nicaragua* (n 100) para 222.

²¹⁰ Burke-White and von Staden (n 15) 330.

²¹¹ Burke-White and von Staden (n 15) 342; Ranjan (n 15) 51.

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3 legal system to develop. The recent decisions against India in the *CC/Devas* and *DT* cases are
4 but another example of the very real problem of inconsistent reasoning and outcomes in
5 investment treaty arbitration. Both tribunals were asked to resolve the same dispute, albeit
6 under different investment treaties. As this article has demonstrated, the ultimate divergence in
7 outcomes on whether India's actions were exempt under the ESI clauses of the respective
8 treaties, had little to do with the differences in the formulation of those clauses. The tribunals
9 had markedly different takes on the same facts. This was the case not only in relation to the
10 import of India's decision to cancel Devas's Agreement. Even on the existence of an ESI, the
11 tribunals did not see eye to eye. This article has not taken issue with the outcome of the later
12 decision in *DT*. Rather, it is the process of reasoning that raises concerns of inconsistency.²¹²
13 The later tribunal, *DT*, had the award of the previous tribunal, *CC/Devas*, on record. Yet, the
14 *DT* tribunal made little attempt to engage with the reasons presented in that previous award,
15 citing to the *CC/Devas* award only once in its examination of the applicability of the ESI clause.
16 Better engagement with the previous decision could have explained the need for the
17 contradictory outlook, thereby moulding the law in a more coherent fashion.

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19 Paucity of engagement with previous jurisprudence on ESI clauses, especially the
20 *Argentinian cases*, is a broader problem that plagues the *CC/Devas* and *DT* decisions. Indeed,
21 investment tribunals are not bound by the doctrine of precedent. Nevertheless, tribunals
22 themselves have frequently subscribed to the virtues of developing a *jurisprudence constante*.
23 In line with this view, tribunals have opined that they 'may pay due consideration to earlier
24 decisions' and have even suggested that they have not just 'a duty to adopt solutions established
25 in a consistent line of cases', but also a 'duty to seek to contribute to the harmonious
26 development of investment law'.²¹³ The inclusion of exception clauses, such as ESI clauses, in
27 investment treaties are important tools to create a sustainable investment law regime. They
28 make it possible to reconcile private objectives of investment protection with a State's public
29 non-investment regulatory objectives. But the continued emergence of conflicting
30 jurisprudence on ESI clauses, and the failure to engage with previous cases, impede
31 significantly the ability of such clauses to fulfil their intended objective.

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33 As this article has shown, there are few aspects relating to ESI clauses on which tribunals
34 concur. A significant – and commendable – recent development on this front is a shared belief
35 that tribunals must show a degree of deference to a State's assessment of its ESI. However, a
36 shared understanding of key elements of ESI clauses continues to elude the international
37 investment community.

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39 On the existence of ESI, a methodological flaw was evident in the reasoning of the
40 *CC/Devas* and the *DT* tribunals. Both tribunals presumed, without explanation, that protection
41 of critical infrastructure cannot constitute an ESI. More importantly, neither tribunal queried
42 whether the military's need for resources automatically constitutes 'essential' security
43 interests. This missed opportunity is all the more significant in the current global environment.
44 The WTO is soon to grapple with a similar dilemma in the context of tariffs that the US has
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57 ²¹² On reasoning-related problems in investment treaty arbitration, see: Federico Ortino, 'Legal Reasoning of
58 International Investment Tribunals: A Typology of Egregious Failures' (2012) 3 JIDS 31.

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60 ²¹³ See example: *Saipem v Bangladesh*, ICSID Case No ARB/05/7, Award (30 June 2009) para 90; *Churchill
Mining and Planet Mining v Indonesia*, ICSID Case No ARB/12/14 and ARB/12/40, Award (6 December 2016)
para 253.

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imposed on aluminium imports. As justification, President Trump has invoked the ESI clause in GATT Article XXI, arguing that the tariffs are necessary to ensure the sustainability of domestic aluminium industries and to alleviate the ‘risk of becoming completely reliant on foreign producers of high-purity aluminium that is essential for key military...systems’.²¹⁴

Equally disturbing is the continued lack of clarity on the required nexus between a State measure and its ESI. When elucidating the ‘necessary’ standard, for instance, the *DT* tribunal espoused a two-step test without citing *Continental* at all. Important differences are visible, as a result, in the content of the two-step test adopted by *Continental* and *DT*.

Not just the backlash against the investment treaty regime, but also the increased inclination among States to retreat towards nationalism, has created a pressing need to identify clearly the extent of a State’s regulatory space. Quality reasoning and a robust interpretation of ESI clauses can go a long way in providing that desired clarity. Given the challenges that tribunals have faced in interpreting and applying ESI clauses, future tribunals might benefit from requesting *amicus curiae* observations on the scope of ESI clauses from other (non-disputing) States parties to the investment treaty.²¹⁵ To spur clarity in the interpretation of ESI clauses, States should also be exhorted to provide interpretive guidance, such as by way of interpretive notes, on what they intended the scope of ESI clauses to be.

²¹⁴ White House, ‘Presidential Proclamation on Adjusting Imports of Aluminium into the United States’ (8 March 2018) <<https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-aluminum-united-states/>> accessed 20 December 2018.

²¹⁵ Tribunals have previously sought such interpretive guidance *proprio motu*. See: *Eureko v Slovak Republic*, PCA Case No 2008-13, Award on Jurisdiction, Arbitrability and Suspension (26 October 2010) paras 30, 32; *B-Mex and others v Mexico*, ICSID Case No ARB(AF)/16/3, Procedural Order No 7 (23 November 2018).