NECESSITY IN INVESTMENT ARBITRATION: ESSENTIAL SECURITY INTERESTS IN THE DEVAS ERA

—*Sujaya Sanjay*[*]

ABSTRACT

Treaty-based investment arbitration has yielded a number of awards that have recognised various principles of international law that apply to investment treaty disputes. However, despite the multitude of awards, it has been observed that there has been little consistency in the application of these principles, and that achieving a 'jurisprudence constante' remains a distant dream as of today. One such example is the interpretation of essential security interests clauses that exist in differentiated languages across various international investment agreements. This paper aims to analyse the various turns that jurisprudence on this aspect has taken, ranging from emphasis upon customary international law as contained in the work product of the International Law Commission, to reliance on the case law of other dispute settlement bodies such as the WTO system. In this milieu, this article demonstrates that in a pair of arbitrations against the Republic of India, the respective tribunals created coherence, despite sophisticated variations in the terms employed in the relevant treaties. What is apparent is a return to the basic rules of treaty interpretation and ascertaining the host State's responsibility using the principles found in the Vienna Convention on the Law of Treaties, rather than relying upon circumstances precluding wrongfulness in customary international law.

1. INTRODUCTION

The principle of necessity in International law is viewed by States as a "safety valve" that allows them to adjust compliance with their international

* The author is a BA-LLB (Hons) graduate from Gujarat National Law University, Gandhinagar and holds an LLM (Investment Treaty Arbitration) from Uppsala University, Sweden. The author is grateful to Professors Kaj Hobér and Joel Dahlquist, and to Mr. Shujoy Mazumdar for their insight on the subject, and their support and encouragement.

obligations under extraordinary circumstances.[1] In treaty form, necessity manifests itself as an essential security interests ("**ESI**") clause, which allows the State to take measures that would otherwise be inconsistent with its obligations under the treaty. ESI clauses are found in many bilateral investment treaties ("**BITs**") and are said to be a form of risk allocation between states and investors.[2] The general defence of necessity is also recognised as a part of customary international law,[3] and is considered an "external application" of the principle of self-preservation in international law.[4] The doctrine finds application in many areas of international law, such as military action, naval warfare, high seas, neutrality and so on.[5]

The existing jurisprudence on necessity in investment law is fragmented and incoherent.[6] To start with, there have been very few cases in which respondent States have relied on ESI clauses to defend their actions before investment tribunals. A coherent discussion on ESI clauses can be done by focussing on two specific events – one being the Argentine financial crisis of 2001, and the other being the annulment of the Devas agreement by India. As will be demonstrated below, there is no consistent jurisprudence concerning the application of ESI clauses – even between tribunals adjudicating on the same issue.

Part I of the article covers the existing jurisprudence on necessity as developed by the International Court of Justice ("**ICJ**") and the ILC's Articles on Responsibility of States for Internationally Wrongful Acts ("**ILC Articles**"), with a brief analysis of their assessment and application by the investment tribunals in the Argentine claims. Part II comprises a detailed discussion of the Antrix-Devas saga and the awards rendered in the

1. Diane A. Desierto, *Necessity and National Emergency Clauses – Sovereignty and Modern Treaty Interpretation* (2012) Brill- Nijhoff, 3.
2. William W. Burke-White and Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties* (2008) 48 Va. J Int'l L 307, 324.
3. Case Concerning the Gabčikovo-Nagymaros Project, (Hungary/Slovakia) (Judgment) (Gabčikovo-Nagymaros Project) [1997] ICJ Rep 7, para 51.
4. Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1987) Grotius Ltd., 69-77.
5. Burleigh Cushing Rodick, *The Doctrine of Necessity in International Law* (Columbia University Press 1928) 119, 120.
6. For a more detailed review on the complex nature of necessity in investment treaty arbitration, see G. Sacerdoti, "The Application of BITs in the Time of Economic Crisis: Limits to their Coverage, Necessity and the Relevance of WTO Law" in G. Sacerdoti, and others, *General Interests of Host States in International Investment Law*, 1.

investment claims brought against India. This section analyses both awards in detail to the extent of the two tribunals' analyses of the relevant ESI clauses relied on by India in these arbitrations. It also notes the implications of the two tribunals' decisions, together with a brief understanding of the change in approach by India and other States to ESI clauses. Finally, Part III summarises the author's concluding remarks.

2. EXISTING JURISPRUDENCE ON NECESSITY IN INTERNATIONAL INVESTMENT LAW

A. ESI clauses and the necessity defence in customary international law

In many ways, the ICJ's decision in *Hungary v. Slovakia* (known famously as the "***Gabčikovo-Nagymaros Project***" case) could be the starting point for modern jurisprudence on the doctrine of necessity.

In this case, the ICJ recognised the defence of necessity as a firmly established principle in customary international law.[7] It observed that the relevant criteria for the defence of necessity could be found in Article 33 of the Draft Articles on the International Responsibility of States,[8] which had been pleaded by both parties: (a) that the State's actions arose out of concern for an essential interest; (b) that the interest was threatened by "grave and imminent peril"; (c) that the State's actions were the only way to safeguard the said interest; (d) that they did not impair the essential interest

7. Gabčikovo-Nagymaros Project (n 3) para 51.
8. Article 33 of the Draft Articles closely mirrors ILC Article 25. It reads as follows:
   "Article 33. State of necessity
   1. *A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:*
      a. *the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and*
      b. *the act did not seriously impair an essential interest of the State towards which an obligation exists.*
   2. *In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:*
      a. *if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or*
      b. *if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or*
      c. *if the State in question has contributed to the occurrence of the state of necessity."*

of any other State towards which such obligation existed; and (e) that the acting State did not contribute to the state of necessity.[9]

These criteria, which were identified by the ICJ, made their way into the finished ILC Articles that were published in 2001.

The ILC Articles have generated considerable controversy with respect to their scope and application.[10] Matthew Parish notes that the ILC Articles are not law, but rather the ILC's "opinion about what the law should be."[11] It is generally accepted amongst international law scholars that they were drafted keeping in mind the obligations between States inter-se, and not necessarily concerning State obligations towards non-State actors such as (in the case of investment arbitration) private entities.[12] James Crawford has described investment tribunals' reliance on the ILC Articles as how "a drowning man might grab a stick at sea in the hope of having certainty".[13] This could not be more apparent than when looking at the awards in the Argentine cases, where tribunals have grappled with the interpretation of necessity under ILC Article 25 and the ESI clause. Further, the body of arbitral awards on this issue has been far from consistent.[14]

Between 2001 and 2002, in response to a financial crisis that had taken over the country, Argentina enacted a series of emergency measures including currency devaluation, nationwide freezing of bank accounts, and suspension of tariff adjustments in the gas sector. These measures opened the floodgates to a barrage of claims by foreign investors.

---

9. Gabčikovo-Nagymaros Project (n 3) para 52.
10. ILC Article 33 states:
    1. *"The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.*
    2. *This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State."* [emphasis supplied].
11. Matthew Parish, *On Necessity* (2010) 11 JWIT, 169.
12. See Martins Paparinskis, *Circumstances Precluding Wrongfulness in International Investment Law* (2016) 31 ICSID Rev 484, 487; see also James Crawford, *State Responsibility: The General Part* (CUP, 2013) 74-5, 460, 587-92.
13. James Crawford, *Investment Arbitration and the ILC Articles on State Responsibility* (2010) 25 ICSID Rev, 127.
14. UNCTAD, "The Protection of National Security in IIAs" [2009] UNCTAD Series on International Investment Policies for Development, 42.

Several arbitrations were commenced under the ICSID Convention and the US-Argentina BIT. They include the likes of CMS v. Argentina ("**CMS**"),[15] Enron v. Argentina ("**Enron**"),[16] Sempra v. Argentina, ("**Sempra**")[17] LG&E v. Argentina ("**LG&E**")[18] and Continental Casualty v. Argentina ("**Continental Casualty**").[19] All five of these claims arose out of the measures invoked by Argentina in response to its brewing economic crisis, and in all cases, Argentina invoked the "necessity" clause in Article XI of the BIT[20] to defend its actions.

The tribunals in *CMS*, *Enron* and *Sempra* concluded that the necessity defence was inapplicable, whereas the tribunals in *LG&E* and *Continental Casualty* concluded the opposite. For the sake of brevity and keeping in mind that the *Enron* and *Sempra* awards largely follow the reasoning in *CMS* regarding interpretation of necessity, this part shall confine its analysis to *CMS* and *LG&E* awards, where both tribunals reached diametrically opposite conclusions on the interpretation of necessity and its impact on Argentina's liability as a result. The *Continental* decision has been briefly discussed in Part II in the author's analysis of the Devas awards.

B. Rules of interpretation

It is universally accepted that treaties are to be interpreted in accordance with the fundamental customary international law rules of interpretation, which have been codified under Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("**VCLT**").[21] ILC Article 25, while also codifying

15. CMS Gas Transmission Co. v. Argentine Republic, Award (2005) 44 ILM 1205, para 359 (CMS).
16. Enron Corpn. and Ponderosa Assets, LP v. Argentine Republic, ICSID Case No. ARB/01/3, Award (22 May 2007) (Enron).
17. Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Award (28 September 2007) (Sempra).
18. LG&E Energy Corpn. v. Argentine Republic, Award (25 July 2007) ICSID Case No. ARB/04/4 (LG&E Energy).
19. Continental Casualty Co. v. Argentine Republic, Award (5 September 2008) ICSID Case No. ARB/03/9 (Continental).
20. Article XI of the US-Argentina BIT reads as follows: "*This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace and security, or the protection of its own essential security interests.*"
21. Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, 2009) 439. Article 31 embodies the textual approach to treaty interpretation, recognizing that the best guide to the common intention of the States' parties to a treaty may be found in the text of the treaty itself. Article

customary international law on necessity, is still a secondary source of interpretation which covers circumstances precluding wrongfulness.[22] It follows that the effect of the ESI clause differs from that of ILC Article 25, and this difference has an impact on State liability in investment treaty arbitration. This difference became apparent in the Argentine cases, as illustrated below in the conflicting decisions in CMS and LG&E.

As discussed above, the ESI clause protects measures that a State may take in order to secure its security interests against obligations it may have undertaken under the BIT. The ESI clause in a BIT and the necessity defence in customary international law present a good example of "opposable norms" in international law.[23] The ICJ has observed that although such norms may overlap in their content and are both binding on the States, they each retain their separate existence.[24]

Both tribunals had no difficulty in confirming that Article XI was broadly worded and encompassed economic crises.[25] Both tribunals also found that Article XI was not self-judging in nature. However, they starkly differed on the interpretation of Article XI itself. The *CMS* tribunal read the clause as a restatement of the defence under customary international law and interpreted it in accordance with the criteria under ILC Article 25.[26]

The *CMS* tribunal's conflation of the meaning of Article XI of the BIT with ILC Article 25 without an independent examination of Article XI was

---

32 provides recourse to supplementary sources of interpretation under certain circumstances where the textual interpretation under Article 31 does not suffice. See, James Crawford, *Brownlie's Principles of Public International Law* (OUP, 2012) 379-384.

22. ILC, "Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001 with Commentaries" in Report of the International Law Commission on the work of its fifty-third session (23 April – 1 June and 2 July – 10 August 2001) 59 UN Doc. A/56/10 (2001) 139.
23. See J.G. Starke, *The Concept of Opposability in International Law*, (1969) 2 AYBIL 1. See also Sujaya Sanjay, *Essential Security Interests in Investment Arbitration: Should ESI Clauses in BITs Be Interpreted As Per Customary International Law*, (2020) Uppsala University Publications, available at http://uu.diva-portal.org/smash/record.jsf?pid=diva2%3A1436408&dswid=-3106, 10.
24. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) ICJ 14 (Merits) [1986] ICJ Rep 14, 95 (Nicaragua case).
25. CMS (n 15) para 359; LG&E Energy (n 18) para 238.
26. CMS (n 15) paras 315-317.

erroneous. This was pointed out by the ICSID Annulment Committee, to which Argentina had made an application.[27]

The *CMS* Annulment Committee found that Article XI of the BIT was more of a threshold requirement which, if met, would exclude the applicability of the substantive obligations under the BIT. Article 25, on the other hand, was considered an "excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations."[28] The requirements under the treaty are not the same as those in customary international law.[29]

The *LG&E* tribunal, which analysed the situation in the context of Article XI, appears to have thought along the same lines as the *CMS* Annulment Committee.[30] The tribunal found that "Article XI refers to situations in which a State has no choice but to act",[31] and went on to find that Argentina was not liable for breaches of the BIT during the period of necessity, based on Article XI and the submissions made by Argentina. The tribunal also considered the requirements under customary international law (analysed below), but only as a side note and only after concluding its separate analysis of Article XI.[32]

It may be noted that Argentina had also made applications to the ICSID Annulment Committee for annulment of the awards in *Enron* and *Sempra*. In their respective decisions on annulment, both Annulment Committees agreed with the CMS Tribunal in rejecting the respective tribunals' reasoning in conflating Article XI of the BIT with the customary international law definition of necessity. Although the *CMS* Annulment Committee did not find this sufficient to warrant annulment, the other two Annulment Committees saw fit to annul the awards in *Enron* and *Sempra*

---

27. CMS Gas Transmission Co. v. Argentine Republic, Annulment (25 September 2007) ICSID Case No. ARB/01/8, paras 130-136. The Committee found that the tribunal had committed a "manifest error of law" by failing to recognize that Article XI of the BIT and ILC Article 25 substantively differ in their requirements and application, and that the BIT provision ought to have taken precedence over the customary international law standard. The Committee even observed that if it were a court of appeal, it would be obliged to review the award on the basis of this error, but that it could not do so on account having "limited jurisdiction under Article 52 of the ICSID Convention."
28. CMS Gas Transmission Co. v. Argentine Republic, Annulment (25 September 2007) ICSID Case No. ARB/01/8, para 129.
29. *Id*., para 130.
30. LG&E Energy (n 18) para 229. See also UNCTAD Study, 48.
31. LG&E Energy (n 18) para 239.
32. LG&E Energy (n 18) para 245.

respectively, on the ground that the tribunals did not apply the correct law – namely, the ESI clause – to assess Argentina's assertion of necessity.[33]

The distinction between the two clauses is crucial. This is because the ESI clause, if successfully invoked, extinguishes the liability of the State, as if there was no treaty violation in the first place. The customary international law defence, on the other hand, merely excludes international responsibility for a wrongful act.[34] Moreover, under customary international law, the exclusion of State responsibility under necessity does not absolve the State of its obligation to pay compensation.[35]

In investment treaty arbitration, where compensation for treaty violations are the focus of the disputes between the investor and the State, the customary law defence would render the ESI clause meaningless, because then the State would be required to compensate the investor regardless of whether or not it was able to successfully plead necessity.[36] The CMS Annulment Committee recognised the distinct effect that these two opposable norms had on Argentina's liability, and found that the Tribunal's decision amounted to a "manifest error of law". The Committee further pointed out that for as long as Article XI of the BIT applied to the circumstances, it "excluded the operation of the substantive provisions of the BIT", and that there was "no possibility of compensation being payable during that period."[37]

---

33. Enron Creditors Recovery Corpn. Ponderosa Assets, LP v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic (30 July 2010), para 405. See also Sempra Energy International v. Argentina Republic, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award (29 June 2010), paras 160-165.
34. August Reinisch, *Necessity in Investment Arbitration* (2010) 41 Netherlands Yearbook of International Law 137, 149.
35. ILC Article 27 provides that compensation may be payable, notwithstanding successful invocation of the necessity plea by a State. It reads as follows:
    "Article 27. Consequences of invoking a circumstance precluding wrongfulness
    The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:
    (a) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;
    (b) The question of compensation for any material loss caused by the act in question." [emphasis supplied]
    It may be noted that the CMS tribunal also refused to absolve Argentina of its liability to pay compensation based on ILC art. 27. See CMS (n 15) paras 383-394.
36. See Gabčikovo-Nagymaros Project (n 3) paras 152-153. See also CMS, *supra* note 15, para 388.
37. CMS Gas Transmission Co. v. Republic of Argentina, ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine

The above jurisprudential background sets the framework in which the awards in the two Devas arbitrations will be analysed. As is clear from above, it would be a mistake to restate the ESI clause in a BIT as equal to the necessity defence in customary international law, because it would result in a violation of '*ut res magis valeat quampereat*', or the rule of effectiveness in treaty interpretation.[38]

3. THE DEVAS ARBITRATIONS – A SHIFT IN THE APPROACH TO INTERPRETING ESI CLAUSES

A. Different clauses, different interpretations

In the aftermath of the Argentine claims, it became clear that a blind application of ILC Article 25 to an ESI clause would not yield satisfactory results in accordance with the fundamental rules of treaty interpretation under the VCLT. The Devas arbitrations, which were recently concluded, indicate a shift from the Argentine awards in the rules of interpretation and the standards of review followed whilst interpreting ESI clauses. Unlike in the Argentine awards, the Devas claims arose under two different BITs, although they arose out of the same measures adopted by the Republic of India.

In 2004, Antrix Corporation Limited (Antrix), a government company and the commercial arm of the Indian Space Research Organisation (ISRO), was approached by Forge Advisors, a US-based consultancy firm, for commercialisation of the S-band electromagnetic spectrum which was owned by the Indian Government's Department of Space (DOS).[39] Following negotiations, the Antrix board of directors approved the partnership and prepared the agreement for the lease of the spectrum (the Devas Agreement). Thereafter, Devas Multimedia Private Limited (Devas) was incorporated in India to enter into the Devas Agreement.[40]

The Devas Agreement provided for the lease of the S-band spectrum on two satellites which were to be launched by ISRO, for 12 years subject to renewal. The parties formally entered into the agreement in 2005, which came into effect about a year later, after Antrix obtained the necessary

Republic (25 September 2007), para 146.

38. William W. Burke-White and Andreas von Staden (n 2) 323.
39. Deutsche Telekom AG v. Republic of India, PCA Case No. 2014-10, Award (13 December 2017), para 54 (DT).
40. *Id*., para 58.

approvals and clearances from various governmental departments.[41] It should also be noted that, around this time, several officers of the Indian defence forces had made requisitions for the S-band spectrum for "military and strategic purposes".[42]

Shortly after the Devas Agreement was concluded, Devas secured equity investments from Columbia Capital LLC and Telecom Ventures LLC, through their subsidiaries in Mauritius (collectively, "**CC/Devas**"). Subsequently, Deutsche Telekom (Germany) ("**DT**") also made investments into Devas through its subsidiary in Singapore.[43]

In 2009, news of the 2G telecommunications scandal broke out in the media. Although this scandal was wholly unrelated to the Devas Agreement, there was some media coverage suggesting that the spectrum had been leased to Devas at a throwaway price, implying corruption in the deal.[44] In June 2010, following the media furore and having received advice from the Ministry of Law and Justice to prioritise the spectrum for strategic needs, DOS officials wrote to the Space Commission, recommending annulment of the Devas Agreement.[45] Shortly thereafter, the DOS received recommendations from the Space Commission as well as the Additional Solicitor General of India to instruct Antrix to annul the Devas Agreement.[46]

In February 2011, following some arrests in the 2G scandal and renewed media interest in the Devas agreement, DOS officials held a press conference announcing their decision to terminate the Agreement, which was the first time this was brought to the notice of Devas.[47] The DOS officials then briefed the Cabinet Committee on Security ("**CCS**"), which was the highest authority and which would take the final decision on the issue.[48] Ultimately, based on the DOS's note, the CCS in sovereign capacity decided that the Devas Agreement "shall be annulled forthwith".[49]

The cancellation of the Devas agreement prompted its investors CC/Devas and DT (claimants), to file investment claims against India for unlawful

41. *Id*., para 63.
42. *Id*., para 72.
43. DT (n 39) para 69.
44. *Id*., para 78.
45. *Id*., paras 79-81.
46. *Id*., paras 82-83.
47. *Id*., paras 85-86.
48. *Id*., para 87.
49. *Id*., para 91.

expropriation of their investment and breach of its obligation to accord fair and equitable treatment to the Claimants. The claimants initiated *ad hoc* UNCITRAL arbitration under the Mauritius-India and Germany-India BITs, respectively. In both cases, India relied on the ESI clause in the respective BIT, arguing that the cancellation of the spectrum lease agreement was in furtherance of protecting its essential security interests.

Although both tribunals reached opposite conclusions on India's ESI defence (explained below), they agreed that the ESI clause could not be equated with the customary international law standard of necessity, and that a "degree of deference" should be accorded to the host State on the question of the existence of ESI.[50] Even so, the DT Tribunal went a step further and cautioned that the State cannot enjoy an unlimited degree of deference, otherwise it would render useless the protections accorded to the investor under the BIT.[51]

On the face of it, the reasoning behind the difference in outcomes in the two Devas awards might be attributed to the difference in wording of the respective ESI clauses in the Mauritius-India and Germany-India BITs. In CC Devas, India relied on Article 11(3) of the Mauritius-India BIT[52] to preclude liability towards the investor under the treaty. CC/Devas relying on *CMS* and other like awards issued against Argentina, argued that for invoking Article 11(3), India would have to meet the requirements for necessity under customary international law. The tribunal found that Article 11(3) is a specific provision for protection of essential security interests and that it is not tantamount to invoking the necessity defence under customary international law.[53] The tribunal noted that the word "necessary" was absent from Article 11(3), and that the claimant's reliance on the jurisprudence in the Argentine awards was not relevant to this case. The tribunal went on to interpret Article 11(3) in accordance with Articles 31 and 32 of the VCLT,[54]

50. CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Ltd. v. Republic of India, Award (25 July 2016) PCA Case No. 2013-09, paras 244-5; DT (n 39) para 235.
51. DT (n 39) para 238.
52. Article 11 of the Mauritius-India BIT reads: "The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests […]" [emphasis supplied].
53. CC/Devas (n 50) para 255.
54. *Id*., para 230.

and interpreted 'essential' as per its dictionary meaning, according a "wide measure of deference" to India.[55]

The DT Tribunal, on the other hand, took a slightly different approach. The tribunal recognised that Article 12 of the Germany-India BIT[56] was to be interpreted independently, "without incorporating requirements from the customary international law state of necessity defence which are not present in the text of the [BIT]."[57] However, it did identify the requirements of Article 12: that (a) the State relying on Article 12 apply a prohibition or restriction; (b) for the protection of its essential security interests; (c) to the extent necessary for such protection.[58] Of these requirements, the DT Tribunal's analysis of the third one is most relevant. It identifies a twofold test for necessity: (a) whether the measure was "principally targeted" and "objectively required" for the protection of ESI, and (b) whether the State had any reasonable alternatives, "less in conflict or more compliant with its international obligations."[59]

The Tribunal went on to examine the circumstances surrounding the decision taken by the CCS to annul the Devas Agreement. This, it noted, were relevant to determine whether India's measures were necessary for the protection of its essential security interests.[60] The tribunal concluded, based on the notes and minutes of the CCS meeting and other documentary evidence provided by the parties, that the military needs as argued by India were not the sole purpose for diversion of the spectrum that had been leased to Devas. Rather, it was one of the several strategic and social interests (including railways and other public utility services) that the CCS had sought to protect by annulling the agreement.[61]

The Tribunal also took note of the media scrutiny of the Devas Agreement and the concerns raised within the government about the alleged lack of transparency concerning acquisition of the spectrum lease by Devas, as well as concerns over the commercial terms of the Agreement itself.[62] The

---

55. *Id*., paras 243-244.
56. Article 12 of the Germany-India BIT reads: "*Nothing in this Agreement shall prevent either Contracting Party from applying prohibitions or restrictions* to the extent necessary *for the protection of its essential security interests*." [emphasis supplied].
57. DT (n 39) para 229.
58. *Id*., para 230.
59. *Id*., para 239.
60. *Id*., para 240.
61. *Id*., para 281.
62. *Id*., para 282.

Tribunal rightly found that none of these concerns could be considered as "essential security interests" within the meaning of Article 12 of the BIT.[63] On this basis, the tribunal rejected India's ESI argument on the basis that the first of the two requirements for necessity had not been fulfilled by India.[64] The Tribunal did not venture into detail on the second requirement, simply stating that India did not avail of other "least restrictive alternative" measures although they were available.[65]

Interestingly, the tribunal in *Continental Casualty v. Argentina* had adopted a similar approach based on the dispute settlement regime of the World Trade Organisation ("**WTO**") under the General Agreement on Tariffs and Trade ("**GATT**"). The tribunal had identified a similar twofold requirement: (a) whether the State's measures contributed materially to the realisation of their legitimate aims under Article XI of the BIT; and (b) whether Argentina had reasonably available alternatives, less in conflict or more compliant with its international obligations.[66] However, *Continental Casualty* was not discussed by the DT Tribunal.

That differently worded ESI clauses might be subjected to different standards of interpretation is not a novel idea. The United Nations Commission on Trade and Development ("**UNCTAD**"), in its study of ESI clauses, has also remarked that ESI clauses which contain necessity as a precondition greatly reduce the discretionary power of the host State, and rely on a proportionality test when adjudicating a measure taken by the host State.[67] Likewise, ESI clauses that do not refer to necessity confers greater regulatory power on the Contracting States parties – to the extent that "their practical effect comes very close to a self-judging clause."[68] Thus, it is fairly clear that the differences in the language of the two ESI clauses are central to the opposing outcomes in both awards on the question of ESI.

However, the matter is not as straightforward as it appears. For instance, the DT Tribunal took a more serious line on the government's concerns over a political scandal surrounding the Devas Agreement, which it identified to

63. *Id.*, para 283.
64. DT (n 39) para 288.
65. *Id.*, para 290.
66. Continental Casualty Co. v. Argentine Republic, Award (5 September 2008) ICSID Case No. ARB/03/9, paras 196-198.
67. UNCTAD study (n 13) 93. It is interesting to note that this paragraph concerning the test for proportionality was brought to the attention of the DT Tribunal by the Claimant in its arguments on the ESI clause. See DT (n 39) para 204.
68. *Id.*, 94-95.

be one of the reasons behind the CCS's decision to annul it. The CC Devas Tribunal also noted that "a mix of factors was at play" in the events leading to termination of the Agreement by the CCS, the foremost being the media coverage of the issue and fears of a political scandal.[69] However, the CC Devas Tribunal relied solely on the press release by the CCS to conclude that none of the other factors played a role in its decision to terminate the Agreement.[70] In an article recently published in the ICSID Review, the author noted that "[t]he 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."[71] The substantial latitude given by the CC Devas Tribunal to India is further evidenced by the fact that the Tribunal was happy to accept the annulment decision despite the fact that CCS did not specifically allocate the spectrum to be used for military purposes, finding instead that the CCS had the power and discretion to leave the actual allocation to the relevant administrative authorities.[72]

B. Implications of the Devas awards and future ESI clauses

The divergence in reasoning between the two tribunals has once again given rise to concerns of inconsistency in investment arbitration. Some scholars have pointed out that the conflicting decisions on ESI clauses are a missed opportunity to develop a *jurisprudence constante* on exception clauses in investment arbitration.[73] However, the author disagrees.

The author believes that coherent decision making must always take priority over the need to ensure and contribute to the development of a consistent body of jurisprudence in investment arbitration. Many others have previously argued along the same lines.[74]

For instance, Prof. Kaufmann-Kohler, who chaired the DT arbitration, has (on a separate occasion) expressed the opinion that tribunals could consider

---

69. CC/Devas (n 50) paras 321-322.
70. *Id.*, para 334.
71. Ridhi Kabra, *Return of Inconsistent Application of the "Essential Security Interest'" Clause in Investment Treaty Arbitration: CC Devas v. India and Deutsche Telekom v. India* (2020) 0 ICSID Rev/FILJ 1, 13.
72. CC/Devas (n 43) para 335.
73. Ridhi Kabra (n 71) 30-31.
74. Zachary Douglas, Can A Doctrine of Precedent be Justified in Investment Treaty Arbitration? (2010) 3 ICSID Rev/FILJ 104, 109.

adopting principles of law from previous awards where there is a consistent line of cases, rather than a single decision, which would later develop into *jurisprudence constante* and customary international law.[75] In DT, the Tribunal's refusal to refer to the award in *Continental Casualty* or indeed, to even mention the award in this context at all, suggests a deliberate distancing from the reasoning that had led the Continental tribunal to apply the proportionality principle in the first place. It indicates a de-novo approach to the understanding of necessity in investment arbitration and for that, the DT Tribunal cannot be faulted.

Proportionality, like necessity, finds application across various areas of international law, such as armed conflict, human rights law, international criminal law. It has also been used in and referred to by UNCTAD as a test for determining necessity as an objective precondition to invoking ESI clauses in BITs, as the author has argued above.[76] The application of proportionality in investment treaty arbitration is also unique, giving due consideration to balance between the obligations owed by the State to the investor and its right to regulate. Juxtaposing this with the fact that the Continental decision is a standalone one, which drew heavy criticism for failing to apply the rules of interpretation in Articles 31 and 32 of the VCLT and for its "interpretative leap" to WTO jurisprudence on the standard of proportionality,[77] it is clear that the DT Tribunal was justified in staying away from the Continental approach altogether. In any event, there was no reason for the DT Tribunal to expound on the rule of proportionality and least restrictive alternatives when it had already determined that India had failed to satisfy the first requirement for necessity i.e. establishing the nexus between an essential interest and the measure taken.

On facts and arguments brought by the parties before the Tribunal, the coherence in the reasoning of the DT award on ESI cannot be denied. That said, it is too early to suggest that the twofold test for necessity as developed by the DT Tribunal may form *jurisprudence constante*, or that it will even be taken into consideration by future tribunals. In any event, both tribunals have been consistent in their refusal to apply the criteria

75. Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse? – The 2006 Freshfields Lecture*, (2007) 23 Arb Int, 357.
76. UNCTAD Study (n 14) 93.
77. José Alvarez and Tegan Brink, *Revisiting the Necessity Defence: Continental Casualty v. Argentina* (2010) Institute for International Law and Justice (IILJ) Working Paper 2010/3, 20 https://www.iilj.org/publications/revisiting-the-necessity-defense-continental-casualty-v-argentina-tegan-brink-to-be-added/ accessed 25 September 2020.

for necessity from the ILC Articles and customary international law and have instead reverted to the basics of treaty interpretation under Articles 31 and 32 of the VCLT. This, in context of the observations and decisions by the Annulment Committees in CMS, Enron and Sempra, could be the first step in establishing *jurisprudence constante* in a regime that had failed to achieve any consistency whatsoever in the past.

The lack of clarity in past BITs concerning key terms and phrases such as "necessary" or "essential security interests" led to inconsistent interpretations by investment tribunals, a majority of whom relied on the ILC Articles as a "*tabula in naufragio*, 'a plank in a shipwreck'" to ascertain the meaning of these clauses.[78] This was bound to occur, given the vague character of such ESI clauses.

In recent years, however, States are increasingly resorting to adopting the language of GATT Articles XX and XXI into their model ESI clauses.[79] The wide-ranging general exceptions clause in GATT Article XX and the more nuanced security exceptions clause in GATT Article XXI appear to have captured the attention of States, who seem inclined to import this standard almost entirely into new BITs.

The Brazil-India BIT,[80] which was concluded in January 2020, also contains a "General Exceptions" clause at Article 23, as well as a "Security Exceptions" clause at Article 24. The general exceptions clause appears to be a nearly identical adoption of the language of GATT Article XX. The interpretation of the word "necessary" in this Article has also been provided at footnote 4, which states that "[i]n considering whether a measure was "necessary", it shall be taken into account whether there was no less restrictive alternative measure reasonably available to a Party."[81]

Even more interesting is the "Security Exceptions" clause at Article 24, which reads as follows:

> *"24.1. Nothing in this Treaty shall be construed:*

78. James Crawford (n 13) 135.
79. Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments (14 November 2006, entered into force on 20 June 2007), Article 10; Japan-Singapore Economic Partnership Agreement (13 January 2002, entered into force on 30 November 2002), Article 83; New Zealand-China Free Trade Agreement (7 April 2008, entered into force on 1 October 2008), art. 200.
80. Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India (25 January 2020).
81. *Id.*, art. 23.

to require a Party to furnish any information, the disclosure of which it considers contrary to its essential security interests; or

to prevent a Party from taking any action which it considers necessary for the protection of its essential security interests including but not limited to:

i) action relating to fissionable and fusionable materials or the materials from which they are derived;

ii) action taken in time of war or other emergency in domestic or international relations;

iii) action 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;

iv) action taken so as to protect critical public infrastructure including communication, power and water infrastructures from deliberate attempts intended to disable or degrade such infrastructure; or

v) any policy, requirement or measure including, without limitation, a requirement obtaining (or denying) any security clearance to any company, personnel or equipment.

c) to prevent a Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

24.2 Each Party shall inform the other Party to the fullest extent possible of measures taken under Article 24.1 and of their termination.

24.3 Nothing in this Treaty shall be construed to require a Party not to adopt or maintain measures in any legislation or regulations which it considers necessary for the protection of its essential security interests, especially when it relates to a non-Party.

24.4 This Article shall be interpreted in accordance with the understanding of the Parties on security exceptions as set out in Annex I, which shall form an integral part of this Treaty."

> *Annex I to the Brazil-India BIT, which has been included as an interpretative note to the Security Exceptions clause, reads as follows:*

"Annex I. Security Exceptions

> *The Parties confirm the following understanding with respect to interpretation and/or implementation of Article 24 of this Treaty:*
>
> *The measures referred to in Article 24.3 are measures where the intention and objective of the Party imposing measures is for the protection of essential security interests, and in the case of India, the applicable measures referred to in Article 24.3 are currently set out in the regulations framed under the Foreign Exchange Management Act, 1999 and the rules and regulations made thereunder. India shall, upon request by the other Party, provide information on the measures concerned;*
>
> *Where the Party asserts as a defence that conduct alleged to be a breach of its obligations under this Treaty is for the protection of its essential security interests protected by Article 24, any decision of such Party taken on such security considerations and its decision to invoke Article 24 at any time, whether before or after the commencement of arbitral proceedings shall be non-justiciable. Such a conduct shall not be open for review by any arbitral tribunal." [emphasis supplied]*

It is therefore evident that the parties to the above BIT have heavily drawn inspiration from Articles XX and XXI of the GATT, along with a few embellishments of their own, which, in the author's opinion may be viewed as a knee-jerk reaction to India's experience in arguing ESI before the Devas tribunals. India has negotiated non-justiciable ESI clauses in the past;[82] however, the nuanced manner in which the above ESI clause has been drafted is a further indication that States are carefully considering the importance of ESI defences, and are seeking to widen their regulatory powers to whatever extent they can get away with.

Another point of interest is the so-called 'self-judging' clause, which is seen at Article 24.1(b). The phrase "which it considers necessary" is in the nature of a self-judging clause and is also found in the ESI clause of

82. Article 6.12 of the Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore (2005).

the 2012 US Model BIT.[83] Self-judging clauses, as defined by Schill and Briese, are "provisions in international legal instruments by means of which states retain their right to escape or derogate from an international obligation based on unilateral considerations and based on their subjective appreciation of whether to make use of and invoke the clause vis-à-vis other states or international organisations."[84] Adjudication in such cases, if at all, would be reduced to a good faith standard of review, as opposed to a substantive assessment.

The obvious danger that such clauses present is that they considerably widen the scope for derogation by States, thereby undermining the rule of *pacta sunt servanda*.[85] For this reason, adjudicating authorities always approach such clauses with more caution. For instance, in the Nicaragua case before the ICJ, US argued that the ESI clause in the US-Nicaragua FCN Treaty was self-judging even though the language of the clause was not explicitly self-judging – an argument that was categorically rejected by the ICJ.[86] Interestingly, the self-judging argument was also espoused by Argentina in its arguments (as mentioned above). The *CMS*, *Enron* and *Sempra* tribunals noted the security exceptions clause at GATT Article XXI in their assessments. While the *CMS* and *Enron* tribunals accepted GATT Article XXI to be self-judging, the *Sempra* tribunal disagreed, finding instead that "the very fact that such article has not been excluded from dispute settlement is indicative of its non-self-judging nature".[87]

---

83. Article 18 of the US Model BIT (2012) states as follows:
"Article 18. Essential Security
Nothing in this Treaty shall be construed:
1. *To require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or*
2. *To preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace and security, or the protection of its own essential security interests."* [emphasis supplied].

84. Stephan W. Schill and Robyn Briese, "*If the State Considers*": *Self-Judging Clauses in International Dispute Settlement'* (2009) 13 Max Plank Yearbook of United Nations Law 61, 68.

85. Christina Binder, *Stability and Change in Times of Fragmentation: The Limits of Pacta Sunt Servanda Revisited*, (2012) 25 909, 916.

86. *Nicaragua* (n 24) 115-116.

87. CMS (n 15) paras 339, 370; Enron Corpn. Ponderosa Assets, LP v. Argentine Republic, ICSID Case No. ARB/01/3, Award (22 May 2007), para 327; *Sempra Energy International v Argentina*, ICSID Case No. ARB/02/16, Award (28 September 2007), para 384. See also Tarcisio Gazzini, "Interpretation of (Allegedly) Self-judging Clauses in Bilateral Investment Treaties" in M. Fitzmaurice, O. Elias and P. Merkouris

The application of GATT Article XXI in WTO disputes was first discussed in the WTO Panel Report in *Russia – Traffic*. Russia argued that the "self-judging" nature of GATT Article XXI precluded the Panel from reviewing the impugned measures under Article XXI(b)(iii).[88] The Panel interpreted Article XXI in context of the object and purpose of the GATT, which is "to promote the security and predictability of the reciprocal and mutually advantageous arrangements and the substantial reduction of tariffs and other barriers to trade".[89] The Panel finally considered the chapeau clause in Article XXI(b) and concluded that the "which it considers" language does not extend to the circumstances described in subparagraphs (i) to (iii), whose requirements have to be independently shown to be fulfilled by the invoking State and thus, merit a substantial review. The Panel also took into account the negotiating history of GATT Article XXI, where the Member States had agreed that the exception provision must not be unfettered so as to allow for potential abuse of the exceptions by the States.[90] The negotiating history of GATT Article XXI also suggests that there is a need for balance between potential abuse and latitude granted to States while identifying the essential security interests of that State.[91]

The Panel held that Article XXI could not be construed as a totally self-judging clause. The only latitude granted to the State under GATT Article XXI was to determine what constitutes an essential security interest in its own estimation. However, that would not preclude a dispute settlement panel from objectively reviewing whether those measures fulfil independently the requirements of subparagraphs (i) to (iii) of GATT Article XXI(b).[92]

The Panel rightly made a balanced interpretation of GATT Article XXI. It would not be an exaggeration to consider the likelihood that investment tribunals would also interpret such "self-judging" ESI clauses in BITs along similar lines. Even assuming the "non-justiciable" nature of Article 24 of the Brazil-India BIT (as stipulated in Annex I), it would still fall to the Tribunal to rule upon whether the impugned measure would fall under the list of exceptions under Article 24 or the like. In other words, the nexus requirement referred to by the DT Tribunal would still have to be proved.

(eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Brill 2010), 243.

88. *Russia – Measures concerning Transit in Traffic*, WTO Case No. WT/DS512/R, Panel Report (5 April 2019), 38-39 (*Russia – Traffic*).
89. *Id.*, 42.
90. *Id.*, 50.
91. *Ibid.*
92. *Id.*, 50-51.

4. CONCLUSION

For a long time, there has been a marked lack of consensus amongst investment tribunals concerning the interpretation and application of ESI clauses. The likeness in nature of the ESI clauses and the general defence of necessity in customary international law indicates, at first glance, that these two opposable norms could be interchangeable in their application. However, the Argentine cases established that the same is not true. There is a marked distinction in the way ESI clauses operate, and while they might be a treaty manifestation of the customary international law of necessity, they have a different effect on the State's liability to pay compensation. In the investment arbitration regime, which is in essence compensation-centric, this distinction cannot be taken lightly.

In both of the Devas awards, the two tribunals, regardless of their differences and the fact that both were interpreting very differently worded ESI clauses, both found common ground in the idea that it would not be feasible to equate the ESI clause with ILC Article 25 and customary international law. Both decisions are consistent with each other as well as with the decisions of the LG&E Tribunal and the Annulment Committees in CMS, Enron and Sempra.

There can be said to be an emerging *jurisprudence constante* on the question of necessity in investment arbitration, in the context of the rules of interpretation to be observed for ESI clauses. The biggest indicator of this pendulum swing is the fact that both tribunals arrived at the relevant standards to be applied to the respective ESI clauses, through the exercise of applying Articles 31 and 32 of the VCLT and arrived at different conclusions because the clauses were worded differently. Furthermore, the tribunals converged in their overall approach to the margin of appreciation doctrine, which they found to be more suitable when considering whether or not a measure adopted by a State was to protect its essential security interests. Even though the DT Tribunal chose to tread more carefully in its consideration of the doctrine, it was still found to have merit in the eyes of both tribunals.

While it is certainly laudable that some level of consistency could be achieved, there is also the issue of ESI clauses themselves, which are evolving faster than tribunals can agree on how they ought to be interpreted, keeping pace with the States' need to preserve their regulatory space, free from the encumbrances placed by BIT protections. The ongoing trend of importing the WTO/GATT standard into BIT protections may prove to

be detrimental to States, because of the tendency of investment tribunals to adopt a more stringent policy when interpreting ESI clauses, so as to not upset the balance between the State's sovereign right to safeguard its essential interests as against the protections granted to the investor under the BIT.