Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties

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Earlier versions of this article were presented at the Agora on International Economic Law at the Second Biennial Conference of the European Society of International Law, held in Paris, May 18–20, 2006; the International Law Roundtable at Vanderbilt University, Jan. 2007; and the University of Pennsylvania Law School ad hoc series in Feb. 2007. We thank the participants at these events for criticisms and lively debates. In addition we thank Gabriel Bottini, Anu Bradford, Chris Brummer, Susan Frank, Tom Ginsberg, Larry Helfer, and Sonia Rolland for comments and feedback. In addition, we owe a deep debt to Anne–Marie Slaughter for her invaluable contributions to the analysis of the US–Argentina BIT and for mentorship and guidance along the way.

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I. INTRODUCTION

In the last weeks of 2001, Argentina experienced a financial collapse of catastrophic proportions.[1] In one day alone, the Argentine peso lost 40% of its value.[2] As the peso collapsed, a run on the banks ensued. According to *The Economist*, throughout the collapse, "income per person in dollar terms…shrunk from around $7,000 to just $3,500" and "unemployment [rose] to perhaps 25%."[3] This economic chaos meant that by late 2002, over half the Argentine population was living below the poverty line.[4] The crisis soon spread from the economic to the political sphere. In December 2001, one day of riots left 30 civilians dead and led to the resignation of President Fernando de la Rua and the collapse of the government. A "tragicomic spectacle of a succession of five presidents taking office over a mere ten days" followed.[5]

In response to the crisis, which has been likened to the Great Depression of the 1930s in the United States,[6] Argentina adopted a number of measures to stabilize the economy and restore political confidence. Among these efforts was a significant devaluation of the peso through the termination of the currency board which had pegged the peso to the U.S. dollar, the pesification of all financial obligations,[7] and the effec-

1. *See* PAUL BLUSTEIN, AND THE MONEY KEPT ROLLING IN (AND OUT): WALL STREET, THE IMF AND THE BANKRUPTING OF ARGENTINA 1–2 (2005). For a discussion of the economic background to the collapse, see Mario Damill, Roberto Frenkel & Martin Rapetti, *The Argentinean Debt: History, Default and Restructuring* 2–18 (Apr. 2005, revised Aug. 2005) (unpublished CEDES working paper), *available at* http://www0.gsb.columbia.edu/ipd/pub/Frenkel_SDR_Eng.pdf.

2. *See* Certificate Concerning the State of Necessity in Argentina, Guillermo Nielsen, Secretary of Finance of Argentina, Jan. 2003, ¶ 11 [hereinafter Nielsen Declaration] (on file with authors). Certification was made by the Argentine government to the courts adjudicating the debt cases and the ICSID cases arising out of the economic crisis.

3. Argentina's Collapse: A Decline Without Parallel, ECONOMIST, Mar. 2–8, 2002, at 26, 26.

4. Nielsen Declaration, *supra* note 2, ¶ 5; *see also Slump Turns Jobless Argentines Into Scavengers*, N.Y. TIMES, Sept. 21, 2002, at § 1, at 14. Beginning in late November 2000, massive strikes swept Argentina. On November 23, 2000, "[m]illions of workers stayed off their jobs in the largest national strike in years as a union–led protest against government austerity measures virtually paralyzed the country." *Argentina: Strikes Against Austerity*, N.Y. TIMES, Nov. 25, 2000, at A6.

5. BLUSTEIN, *supra* note 1, at 1.

6. *See, e.g.*, *A Survey of Capitalism and Democracy: Liberty's Great Advance*, ECONOMIST, June 28, 2003, at 4, 6 ("Argentina has endured an economic collapse to match the Great Depression of the 1930s….").

7. *See* Law No. 25561, Jan. 7, 2002, 29810 B.O. 1, *available at* http://infoleg.mecon.gov.ar/infolegInternet/verNorma.do?id=71477.

tive freezing of all bank accounts through a series of measures known collectively as the *Corralito*.[8]

Though these measures offered a long-term prospect of restored economic confidence and stability, they also imposed immediate and painful costs on all participants in the Argentine economy, including foreign investors. While Argentine citizens had little legal recourse, many foreign investors who were harmed by Argentina's response to the crisis sought legal protection under the regime of bilateral investment treaties (BITs) which Argentina had entered into during the 1980s and 1990s.[9] Such treaties offered investors guarantees including the internationalization of contractual breaches, national treatment, and most-favored nation protections.[10] In addition, these treaties often provided investors the possibility of direct investor-state arbitration before the International Centre for Settlement of Investment Disputes (ICSID).[11]

For investors harmed by Argentina's response to the economic crisis, the possibility of direct arbitration against the Argentine government for

8. *See* Decree No. 1570, Dec. 3, 2001, 29787 B.O. 1, *available at* http://infoleg.mecon.gov.ar/infolegInternet/verNorma.do?id=70355. For reference to the measures as the *Corralito*, see, for example, CARINA LOPEZ, STANDARD & POOR'S, THE ARGENTINE CRISIS: A CHRONOLOGY OF EVENTS AFTER THE SOVEREIGN DEFAULT (Apr. 12, 2002), http://www.standardandpoors.com/europe/francais/Fr_news/Argentine-Chronology-of-Events_12-04-02.html.

9. For a list of Argentinean BITs, see U.N. Conference on Int'l Trade & Dev. [UNCTAD], *Bilateral Investment Treaties 1959–1999*, at 26–27, U.N. Doc. UNCTAD/ITE/IIA/2 (Dec. 2000) (*prepared by* Abraham Negash), *available at* http://www.unctad.org/en/docs/poiteiiad2.en.pdf.

10. For a discussion of protections often found in BITs, see M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 233–58 (2004); Andrew Guzman, Book Note, *The International Law on Foreign Investment*, 6 EUR. J. INT'L L. 612, 613–14 (1995).

11. The International Centre for Settlement of Investment Disputes (ICSID) has been created under the auspices of the World Bank to hear such cases. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention], *available at* http://www.worldbank.org/icsid/basicdoc/basicdoc.htm. For a discussion of ICSID, see The World Bank Group, International Centre for Settlement of Investment Disputes: About ICSID, http://www.worldbank.org/icsid/about/about.htm (last visited Nov. 9, 2007). For investors in Latin America, the possibility of direct arbitration against a government represented a significant change from the Calvo Doctrine, according to which a government's liability toward foreigners can be no greater than that owed to nationals. As a result, disputes between foreigners and a host country could only be decided by the country's own legal system. For brief explanations of the Calvo doctrine, see *Bilateral Investment Treaties With Argentina, Treaty Doc. 103-2; Armenia, Treaty Doc. 103-11; Bulgaria, Treaty Doc. 103-3; Ecuador, Treaty Doc. 103-15; Kazakhstan, Treaty Doc. 103-12; Kyrgyzstan, Treaty Doc. 103-13; Moldova, Treaty Doc. 103-14; and Romania, Treaty Doc. 102-36: Hearing Before the Comm. on Foreign Relations*, 103rd Cong. 31–32 (1993) (responses of U.S. Department of State to questions asked by Senator Pell); 1 CARLOS CALVO, DERECHO INTERNACIONAL TEÓRICO Y PRÁCTICO DE EUROPA Y AMÉRICA 191 (Durand & Pedone–Lauriel eds., 1st ed. 1868).

breaches of BITs offered a potentially promising means to recoup losses suffered during the crisis. Claims framed as a violation of a BIT could be brought directly against Argentina through ICSID. Only limited means were available to challenge ICSID awards and such awards were generally perceived as enforceable in national courts. Not surprisingly, then, Argentina has become subject to no fewer than forty-three ICSID arbitrations brought by investors who assert that Argentina's response to the crisis harmed investments protected by various BITs.[12] Argentina's potential liability from these cases alone could be greater than U.S. $8 billion, more than the entire financial reserves of the Argentine government in 2002.[13] Some have speculated that the total value of potential claims against Argentina could reach U.S. $80 billion.[14]

Argentina's rhetorical response to this onslaught of cases has been to criticize the ICSID system and pressure for reforms.[15] Argentina's legal strategy, in contrast, has been to turn back to the very BITs under which investors have brought claims and to invoke a long-dormant treaty clause that appeared perfectly tailored to deal with just such a situation.[16] Argentina's BITs with the United States, Germany, and the Belgian-Luxembourg Economic Union (BLEU) each contain a non-precluded measures (NPM) provision that limits the applicability of investor protections under the BIT in exceptional circumstances. These NPM clauses allow states to take actions otherwise inconsistent with the treaty when, for example, the actions are necessary for the protection of essential security, the maintenance of public order, or to respond to a public health emergency.[17] NPM provisions effectively "permit host-

12. For a listing of concluded and pending cases before ICSID, see The World Bank Group, International Centre for Settlement of Investment Disputes: ICSID Cases, http://www.worldbank.org/icsid/cases/cases.htm (last visited Nov. 9, 2007).

13. Gabriel Bottini, Counsel, Office of the Attorney Gen., Republic of Arg., Issues of Jurisdiction and Merits Arising from the Argentine Litigation at ICSID, Lecture at the University of Pennsylvania Journal of International Economic Law Symposium: International Investment and Transnational Litigation: Challenges of Growing and Expanding Investor State Disputes (Feb. 2, 2007).

14. Wailin Wong, *Argentina Treasury Attorney: World Bank Claims Could Reach $80 Billion*, DOW JONES INT'L NEWS, Jan. 21. 2005.

15. *See* Julio Burdman, *La proteccion a las inversions extranjeras en Argentina (1989–2005): Una mirada político–económica*, *in* POLÍTICAS LIBERALES EXITOSAS: SOLUCIONES PENSANDO EN LA GENTE 139, 149 (Gustavo Lazzari & Martín Simonetta eds., 2005), *available at* http://admin.fnst.org/uploads/1198/Politicas_liberales_exitosas.pdf.

16. *See* CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶¶ 332-55 (May 12, 2005) [hereinafter CMS Award], *available at* http://www.worldbank.org/icsid/cases/CMS_Award.pdf.

17. *See, e.g.,* Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.–Arg., art. XI, Nov. 14, 1991, S. TREATY DOC. NO. 103–2 (1993) [hereinafter U.S.-

state impairment of covered investment" and, in turn, weaken the BIT "as an instrument for regulating host-state governments."[18] As long as the host-state's actions are taken in pursuit of one of the permissible objectives specified in the NPM clause, acts otherwise prohibited by the treaty do not constitute breaches of the treaty and states should face no liability under the BIT. The lawyers in Argentina's *Procuración del Tesoro de la Nación* have argued that the economic collapse of 2001–2002 triggered the NPM clauses of many of its BITs and thereby relieved it of liability.[19]

The history of NPM provisions reaches back far beyond Argentina's BITs concluded in the 1980s and 1990s. NPM clauses were regular elements of U.S. Friendship, Commerce, and Navigation (FCN) treaties beginning in the post-WWII era.[20] The NPM clause in the U.S.-Nicaragua FCN treaty was raised before the International Court of Justice (ICJ) in the 1984 *Nicaragua* case[21] and an equivalent clause in the U.S.-Iran Treaty of Amity[22] played an important part in the *Oil Platforms* case.[23] NPM clauses migrated from the early FCN treaties to the international investment regime beginning with the establishment of the German BIT program in the late 1950s. The first known investment treaty with an NPM clause was Germany's first BIT, which was concluded with Pakistan in 1959,[24] and NPM clauses can be found in nearly every subsequent German BIT. Likewise, the first ever U.S. BIT, concluded with Panama in 1982, contained an NPM clause.[25] Again, each subsequent U.S. BIT has contained such a clause. Though BITs have been the subject of considerable academic inquiry,[26] the NPM clauses

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Argentina BIT].

18. Kenneth J. Vandevelde, *Of Politics and Markets: The Shifting Ideology of the BITs*, 11 INT'L TAX & BUS. LAW. 159, 170 (1993).

19. For one such clause, see, for example, U.S.-Argentina BIT, *supra* note 17, art. XI.

20. *See* The Charles H. Sullivan Report on the Standard Provisions of the Treaty of Friendship Commerce and Navigation as They Evolved Through Jan. 1, 1962, at page 302 (on file with authors). One of the earliest NPM clauses appears in the U.S.-China FCN treaty. Treaty of Friendship, Commerce, and Navigation, U.S.-P.R.C., art. XXVI, Nov. 4, 1946, 63 Stat. 1299, *reprinted in* 43 AM. J. INT'L L. (SUPPLEMENT) 27, 47 (1949).

21. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 15 (June 27) [hereinafter Nicaragua Judgment (Merits)].

22. Treaty of Amity, Economic Relations, and Consular Rights, U.S.–Iran, art. XX, Aug. 15, 1955, 8 U.S.T. 899, T.I.A.S. 3853; 284 U.N.T.S. 93 [hereinafter U.S.–Iran FCN Treaty].

23. *See* Oil Platforms (Iran v. U.S.), Preliminary Objection, 1996 I.C.J. 803, 811 (Dec. 12).

24. Treaty for the Promotion and Protection of Investments, Protocol, F.R.G.–Pak., ¶ 2, Nov. 25, 1959, 457 U.N.T.S. 24 [hereinafter Germany-Pakistan BIT].

25. Treaty Concerning the Treatment and Protection of Investments, U.S.–Pan., art. X(1), Oct. 27, 1982, 21 I.L.M. 1227.

26. The academic scholarship on BITs can largely be classed into two groups. The first wave

they often contain surprisingly have gone almost unnoticed. Yet, NPM provisions are relatively wide-spread in the legal regime governing international investment. They appear regularly in the BITs of states that play a major role in the international financial system, such as Germany, India, the Belgian-Luxembourg Union, Canada, and the United States. They also arise sporadically in particular BIT relationships of numerous other states. Of the 2000 BITs presently in force, NPM clauses appear in at least 200 such treaties.

The prevalence of NPM clauses in BITs has significant implications for the international investment regime more generally. BITs have long been understood as extremely strong "legalized" instruments of investor protection, providing far-reaching guarantees for cross-border investment.[27] For example, the U.S. Senate Foreign Relations Committee report affirmed that the "principal purpose of the bilateral investment treaties is to encourage and protect U.S. investment in developing countries."[28] Yet, the presence of NPM clauses in BITs suggests that those protections do not apply in exceptional or crisis situations, when

of scholarship examined the development of BITs and their substantive protections. *See, e.g.,* RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES (1995); KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE (1992); Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, 269 RECUEIL DES COURS 251 (1997); Vandevelde, *supra* note 18. A second wave of scholarship has examined the diffusion of BITs and the impact of BITs on investment flows. *See, e.g.,* Zachary Elkins, Andrew T. Guzman, & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 60 INT'L ORG. 811 (2006); Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 75 (2005); Susan Rose-Ackerman & Jennifer Tobin, *Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties* (Yale Law Sch., Ctr. for Law, Econ. & Pub. Policy, Research Paper No. 293, 2005), *available at* http://ssrn.com/abstract=557121l; Eric Neumayer & Laura Spess, Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries? (May 2005) (unpublished manuscript), *available at* http://ssrn.com/abstract=616242; *see also* Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 643 (1998); Jason W. Yackee, *Sacrificing Sovereignty: Bilateral Investment Treaties, International Arbitration, and the Quest for Capital* (Univ. of S. Cal. Ctr. in Law, Econ., & Org. Working Paper No. C06–15, Oct. 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=950567. Only two scholars have even noted the inclusion of NPM clauses in BITs and their treatment has been cursory. *See* Jose E. Alvarez, *Political Protectionism and United States International Investment Obligations in Conflict: The Hazards of Exon–Florio*, 30 VA. J. INT'L L. 1, 15, 176 (1989); Vandevelde, *supra* note 18, at 170.

27. BITs generally rank highly on all three categories of legalization—obligation, precision, and delegation—suggested by Ken Abbott and his collaborators in the legalization project. For an explanation of the three categories, see Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401 (2000).

28. Investment Treaties with Senegal, Zaire, Morocco, Turkey, Cameroon, Bangladesh, Egypt, and Grenada, S. EXEC. DOC. NO. 100-32, at 2–3 (1988).

international investments are at most risk. The traditional understanding of BITs is that host states commit through such treaties not to injure foreign investors or, at least, to bear the costs if they do. NPM clauses perform a risk-allocation function, transferring the costs of harming an investment from host states to investors in exceptional circumstances. Under BITs that include NPM clauses, the state must compensate investors for harms that breach the treaty in ordinary circumstances, but in exceptional circumstances, such as the Argentine financial crisis, NPM clauses transfer those risks to the investor, and the state will not be liable for actions that would ordinarily breach the BIT. In an ever more globalized world in which the very kinds of exceptional circumstances covered by NPM clauses—financial crises, terrorist threats, and public health emergencies—are all too common, NPM clauses fundamentally limit the legal regime protecting foreign investors.

The interpretation and application of NPM clauses will therefore prove critical to determining both state freedom to respond to exceptional circumstances and the scope of investment protections accorded under BITs. Arbitral awards have recently been handed down by ICSID panels in the first four of the many cases brought against Argentina under the U.S.-Argentina BIT as a result of the economic crises. The four tribunals, however, took diametrically different approaches to the NPM clause of the U.S.-Argentina BIT. On identical facts, three tribunals found the NPM clause inapplicable and held Argentina liable for damages to investors in breach of the BIT.[29] A fourth tribunal found Argentina's invocation of the clause justified and held Argentina not liable for harms to investors caused during the period of necessity created by the economic crisis.[30] In addition, an Annulment Committee under the ICSID Convention reviewed the first of these awards to hold Argentina liable and found it to contain "errors and lucans" of law.[31] The split de-

29. Sempra Energy Int'l v. Argentine Republic, ICSID Case No. Arb/02/16, Award, ¶ 391 (Sept. 28, 2007) [hereinafter Sempra Award], *available at* http://www.investmentclaims.com/decisions/Sempra_Energy-Award.pdf; Enron Corp. Ponderosa Asset, L.P. v. Argentine Republic, ICSID Case No. Arb/01/3, Award (May 22, 2007) [hereinafter Enron Award], *available at* http://ita.law.uvic.ca/documents/Enron-Award.pdf; CMS Award, *supra* note 16, ¶ 359.

30. LG&E Energy Corp. v. Argentine Republic, ICSID Case No. Arb/02/1, Decision on Liability (Oct. 3, 2006), ¶¶ 226, 266 [hereinafter LG&E Decision on Liability], *available at* http://www.worldbank.org/icsid/cases/pdf/09_LGE_Liability_e.pdf.

31. CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. Arb 01/08, Decision of the ad hoc Committee on the Application for Annulment (Sept. 25, 2007), ¶ 136 [hereinafter CMS Annulment Decision]. Despite the Annulment Committee's findings of serious errors in the Award, it observed that it lacked jurisdiction under Article 52 of the ICSID Convention to overturn the Award. *Id.* ¶ 136.

cisions and, at times, poor jurisprudence of these tribunals are grounds for concern about the viability of an investor-state arbitral system without meaningful appellate review,[32] but also raise important questions about the interpretation and application of NPM clauses. How much freedom do NPM clauses give states to take actions in extraordinary circumstances that would otherwise breach a BIT? Are BITs really as strong a form of investor protection as they have been understood to be? In what sorts of situations can such clauses be invoked? What are the consequences of NPM clauses for states and investors in terms of liability and compensation? Ultimately, should states or investors bear the risks and costs of actions by states to respond to extraordinary circumstances?

For Argentina, the interpretation and application of the NPM provisions of its BITs has the potential to relieve the state of billions of dollars of liability and greatly ease its on-going economic recovery. More broadly, the interpretation and application of NPM clauses in a wide range of BITs will determine the risk allocation between states and investors in times of crisis. While a BIT's substantive provisions clearly afford investors strong protections in ordinary situations, the interpretation of NPM clauses will govern whether, in exceptional situations, the host state or investors will bear the costs of actions deemed necessary to respond to the crisis. That calculation, in turn, has implications for the willingness of states to enter into investment protection treaties, the pricing of cross-border investment, the distribution of investment flows, the policy options available to states in emergencies, and the policy responses to a range of international crises.

The interpretation and application of NPM clauses also raises more fundamental questions about the process of treaty interpretation itself. Ascertaining the meaning of NPM clauses will often depend on how states understood such clauses and the ways in which they memorialized those understandings in their treaty commitments. To what degree should states' shared understandings of such clauses control their interpretation? Must states document those understandings for them to be relevant in a subsequent arbitration? These issues become all the more pressing in the context of BITs, which confer direct rights on investors to arbitration, and in the ICSID forum, in which only one state party to

32. *See, e.g.*, Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1617–1625 (2005) (arguing for the establishment of an "Investment Arbitration Appellate Court" to prevent the proliferation of inconsistent individual decisions).

the treaty is formally before the tribunal. Unfortunately, the tribunals that have addressed NPM clauses to date have often failed to engage in the kind of rigorous treaty interpretation mandated by the Vienna Convention and instead have taken interpretive short-cuts that threaten the very legitimacy of the investor-state arbitration system.[33] Underlying the NPM analysis in this paper is a call for arbitral tribunals to return to first principles of treaty interpretation and to give serious consideration to the text of a treaty and, to the degree permissible under the Vienna Convention, the intent of states entering into such a treaty.

This Article casts new light on a long-dormant element of the international legal architecture of foreign investment with significant consequences for states, investors, and the international financial system more generally. In so doing, it offers four theoretical contributions to the existing literature on treaty interpretation, investment regulation, and international arbitration. The Article's first theoretical contribution is to question the standard assumption that BITs are solely instruments of investment protection by recognizing that such treaties often incorporate significant exceptions that preserve state freedom of action in exceptional circumstances. A second theoretical contribution is that the Article begins a heretofore overlooked exploration of the legal mechanisms through which states control and allocate risks in their bilateral treaty agreements. A third theoretical contribution relates to the process of treaty interpretation itself. The Article critiques the approach taken by all of the ICSID tribunals in the Argentina cases thus far, suggesting that their one-size-fits-all approach to interpretation does not reflect the range of meanings states have intended for NPM clauses. A final theoretical contribution is that the Article suggests that the ICSID system would be strengthened if arbitral tribunals were to import the margin of appreciation doctrine from the European Convention on Human Rights and Fundamental Freedoms (ECHR) to the international investment context with respect to issues that touch at the core constitutional issues of the state in question, using the margin as a template for determining the deference to be accorded to a state's own invocation of NPM provisions.

From a practical perspective, the Article provides an urgently needed framework for understanding, interpreting, and applying NPM provisions in BITs. The split ICSID decisions arising from the Argentine cri-

33. Some of these interpretive shortcuts are identified in the *CMS Annulment Decision*. *See* CMS Annulment Decision, *supra* note 31, ¶¶ 96–100 (noting, for example, that "it is quite unclear how the Tribunal arrived at its conclusion").

sis make this framework ever more timely. The framework presented here examines the interpretation of key elements of many NPM clauses and considers the consequences of their invocation for liability and compensation. Such a framework can help guide states in formulating policy responses in exceptional circumstances, can assist investors in identifying and pricing risk in their international investment decisions, and can aid arbitral tribunals in interpreting and applying NPM clauses in investment arbitrations.

This Article is the first of a two-part study. In a subsequent article we explore risk limitation and risk allocation devices in bilateral treaty agreements more generally. Whereas this Article focuses on the identification, interpretation, and application of NPM provisions in BITs, the companion article seeks to answer the broader question of when and why states include risk allocation devices, such as NPM clauses, in their bilateral instruments and seeks to explain the variance in state usage of such provisions. Taken collectively, the two articles offer the first detailed exploration of risk allocation in bilateral treaties. Such risk allocation devices may well have their most important consequences in the circumstances discussed in this paper, namely when NPM clauses shift the risk of investor harms from host states to investors themselves and thereby alter the basic relationships of international investment law.

This Article proceeds as follows. In Part II we will document the relatively widespread use of NPM clauses in international investment instruments and suggest that they are a critical, though largely unrecognized, element of the international investment regime. In Part III we will explore the relationship between NPM clauses and background defenses in customary international law, such as the state of necessity, and will argue that NPM clauses provide an additional exception from the substantive protections of a BIT. In Part IV we will examine the elements of NPM clauses from the practice of various states, identify key components, and consider the relationship between NPM clauses and the larger treaty in which they are situated. In Part V we will offer a detailed interpretive framework for assessing the applicability of NPM clauses that will be of use to states, investors, and arbitral tribunals. In Part VI we will consider the appropriate standards with which to review a state's invocation of an NPM clause and argue that the margin of appreciation doctrine, imported from European human rights law, offers a template for how arbitral tribunals can undertake such a review. In Part VII we will examine the consequences of a successful invocation of an NPM clause for a state's liability in international law and the duty to pay compensation. Part VIII will return briefly to the four recent cases against Argentina and seeks to explain the contradictory outcomes based on the tribunals' very different understandings of the function of NPM clauses. Part IX will examine the implications of various interpretations of NPM clauses for states, investors, and the international financial system more broadly. A brief conclusion will follow.

II. THE PREVALENCE OF NPM CLAUSES IN INTERNATIONAL INVESTMENT LAW

NPM clauses appear in a range of international treaties,[34] are a relatively frequent element in BITs, and play an important role in the legal regime of foreign investment more broadly. Though they are far from ubiquitous, they appear in all or most of the BITs concluded by a number of states of importance to international investment flows, including the United States, Germany, the Belgian-Luxembourg Economic Union, and India.[35] In addition, Canada has also included NPM clauses in its BITs concluded after the mid-1990s, expanding the NPM provisions over time.[36] Collectively, these six states account for more than 200 BITs containing NPM clauses.

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34. Many other bi- and multilateral agreements include NPM–type exceptions as well. In addition to the U.S. FCN treaties mentioned above, see *supra* note 20, such provisions can be found in the General Agreement on Trade in Services arts. XIV & XIV *bis*, Apr. 15, 1994, 1869 U.N.T.S. 183; 33 I.L.M. 1167; the North American Free Trade Agreement, U.S.-Can.-Mex., arts. 2101 & 2102, Dec. 17, 1992, 32 I.L.M. 612; the General Agreement on Tariffs and Trade arts. XX & XXI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194; and the Treaty Establishing the European Community (consolidated version) art. 30, Dec. 24, 2002, 2002 O.J. (C 325) 33, *available at* http://eur-lex.europa.eu/LexUriServ/site/en/oj/2002/c_325/c_32520021224en00010184.pdf. Regional and global human rights treaties recognize limitations on otherwise protected rights for specified, overarching public policy reasons, such as security and public order, as well. *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms arts. 8(2), 9(2), 10(2), 11(2), & 15, *opened for signature* Apr. 11, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; International Covenant on Civil and Political Rights arts. 4(1), 12(3), 13, 19(3), 21, 22(2), G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966).

35. Instead of citing all of these countries' BITs with NPM clauses, we refer the reader to the BIT country lists available at United Nations Conference on Trade and Development, Country-Specific Lists of BITs, http://www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1 (last visited Nov. 9, 2007), and to the discussion of these BITs' NPM clauses below in Section IV; *see infra* notes 67–129 and accompanying text.

36. Canada's early BITs did not include an NPM clause. Beginning in 1995, Canada's BITs contained a limited NPM clause with permissible objectives including the protection of human, plant, and animal life. *See* Treaty for the Promotion and Protection of Investments, Can.–Pan., art. XVII(3), Sept. 12, 1996, C.T.S. 1998/35, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/canada_panama.pdf. Canada's most recent BITs, based on its 2004 Model BIT, include a much more expansive NPM clause with permissible objectives including the integrity of the financial system, the protection of essential security inter-

In addition to these states, which include NPM clauses as a matter of course, several other countries include such provisions in their investment treaties on an occasional basis. NPM clauses can, for example, be found in Peru's BITs with Bolivia,[37] Paraguay,[38] and Venezuela;[39] Turkey's BITs with Qatar[40] and Morocco;[41] China's BITs with Singapore,[42] New Zealand,[43] and Sri Lanka;[44] Switzerland's BITs with Chad,[45] Mauritius,[46] Uganda,[47] and the United Arab Emirates,[48] and Uganda's BITs with Sudan[49] and Eritrea.[50] This list, though far from exhaustive, is in-

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ests, and actions required under the U.N. Charter. *See* Agreement for the Promotion and Protection of Investments, Can.-Peru, art. 10, Nov. 14, 2006, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/canada_peru.pdf.

37. Convenio sobre Promoción y Protección de Inversiones, Peru-Bol., art. 3(5), July 30, 1993 [hereinafter Peru–Bolivia BIT], *available at* http://www.unctad.org/sections/dite/iia/docs/bits/peru_bolivia.pdf.

38. Convenio sobre Promoción y Protección Reciproca de Inversiones, Peru–Para., art. 11(1), Feb. 1, 1994, [hereinafter Peru-Paraguay BIT], *available at* http://www.unctad.org/sections/dite/iia/docs/bits/peru_paraguay_esp.pdf.

39. Convenio sobre Promoción y Protección de Inversiones, Peru-Venez., art. 3(5), Jan. 12, 1996 [hereinafter Peru-Venezuela BIT], *available at* http://www.unctad.org/sections/dite/iia/docs/bits/peru_venezuela_esp.pdf.

40. Agreement Concerning the Reciprocal Promotion and Protection of Investments, Turk.–Qatar, art. VII(1), Dec. 25, 2001 [hereinafter Qatar-Turkey BIT], *available at* http://www.unctad.org/sections/dite/iia/docs/bits/turkey_qatar.pdf.

41. Agreement for the Promotion and Protection of Investments, Turk.-Morocco, art. 2(2), Apr. 8, 1997, [hereinafter Turkey-Morocco BIT] *available at* http://www.unctad.org/sections/dite/iia/docs/bits/turkey_morocco.pdf.

42. Agreement on the Promotion and Protection of Investments, P.R.C.-Sing., art. 11, Nov. 21, 1985, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/china_singapor.pdf.

43. Agreement on the Promotion and Protection of Investments, N.Z.-P.R.C., art. 11, Nov. 22, 1988, 1787 U.N.T.S. 186 (1994) [hereinafter New Zealand-China BIT].

44. Agreement on the Reciprocal Promotion and Protection of Investments, P.R.C.-Sri Lanka, art. 11, Mar. 13, 1986 [hereinafter Sri Lanka-China BIT], *available at* http://www.unctad.org/sections/dite/iia/docs/bits/china_srilanka.pdf.

45. Accord de commerce, de protection des investissements et de coopération technique, Switz.–Chad, art. 2,(3), Feb. 21, 1967 [hereinafter Swiss-Chad BIT], *available at* http://www.unctad.org/sections/dite/iia/docs/bits/switzerland_chad_fr.pdf.

46. Accord concernant la promotion et la protection réciproque des investissements, Switz.-Mauritius, art. 11(3), Nov. 26, 1998, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/switzerland_mauritius_fr.pdf.

47. Convention concernant l'encouragement et la protection réciproque des investissements, Switz.-Uganda, Aug. 23, 1971, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/switzerland_uganda_fr.pdf.

48. Accord concernant la promotion et la protection réciproque des investissements, Switz.-U.A.E., art. 11(4), Nov. 3, 1998, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/switzerland_uae_fr.pdf.

49. Agreement on the Reciprocal Promotion and Protection of Investments, Uganda-Sudan, art. 14, *available* http://www.unctad.org/sections/dite/iia/docs/bits/sudan_uganda.pdf.

50. Investment Promotion and Protection Agreement, Eri.-Uganda, art. 14, June 30, 2001, *avalable at* http://www.unctad.org/sections/dite/iia/docs/bits/uganda_eritrea.pdf.

dicative of the relatively wide-spread use of NPM clauses and their considerable importance to the international investment legal regime.

Even in BITs involving Germany or the United States, which already include NPM clauses as a matter of course, these two state's negotiating partners have often pushed for clarification or expansion of a particular treaty's NPM provisions. For example, in the negotiation of the U.S.-Panama BIT, Panama sought to ensure the applicability of the public order exception, and this standard exception was memorialized in a protocol to the treaty.[51] In the U.S.-Bangladesh BIT negotiations, Bangladesh sought assurances that the NPM clause would apply to employment questions, and this understanding was again reflected in the protocol.[52] When negotiating the U.S.-Russia BIT, Russian officials insisted that the self-judging nature of the NPM clause be explicitly stated, and this too was eventually reflected in the protocol to the treaty.[53] NPM clauses thus are of significance not just to those states that regularly include the provisions, but also to a range of other countries, including lesser-developed states.

III. DISTINGUISHING TREATY-BASED NPM CLAUSES FROM BACKGROUND DEFENSES IN CUSTOMARY INTERNATIONAL LAW

Customary international law provides states some legal flexibility in exceptional situations. As the International Law Commission (ILC)

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51. Panama Bilateral Investment Treaty, U.S.-Pan, Oct. 27, 1982, S. TREATY DOC. NO. 99-14, *available at* http://www.state.gov/documents/organization/43582.pdf ("Because of political sensitivities in Panama, the Panamanians insisted on a separate exchange of notes (information copy attached) clarifying the standard provision in the BIT which exempts measures taken for public order. In these notes the Parties agree that this exception is not meant to authorize either Party to take such measures in the territory of the other.").

52. *See* Letter of Submittal from Michael Armacost to President Reagan, May 9, 1986, *annexed to* Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Bangl., Mar. 12, 1986, S. TREATY DOC. NO. 99-23. (1986) ("The treaty's employment provision is also limited by paragraph 3 of the Protocol. That paragraph: (1) subjects the right of nationals or companies to employ personnel to Article X, which provides that Parties are not precluded from, inter alia, adopting measures necessary to maintain public order, protecting essential security interests, or prescribing special formalities for the establishment of investments.").

53. See Bilateral Investment Treaties With the Czech and Slovak Federal Republic, The Peoples' Republic of the Congo, the Russian Federation, Sri Lanka, and Tunisia, and Two Protocols to Treaties with Finland and Ireland: Hearing Before the S. Comm. on Foreign Relations, 102nd Cong., 66, 73 (1992) [hereinafter August 4, 1992 Hearings] (statement of Kenneth J. Vandevelde, Associate Professor of Law, Western State University College of Law, San Diego, California). For a clause to be "self-judging" means that the issue of whether its invocation is legally justified is removed from substantive review by other treaty parties as well as third-party dispute settlers; this independent evaluation by the invoking state remains, however, subject to a good faith review. *See infra* notes 295–313 and accompanying text.

Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Draft Articles) explain, there are secondary rules of customary international law that govern "the circumstances in which the wrongfulness of conduct under international law may be precluded."[54] Among these circumstances are *force majeure,* distress, and necessity, each of which can relieve a state of international liability. *Force majeure* can be invoked where "acts of God" outside a state's control intervene and make it impossible for the state to fulfill its legal obligations.[55] A situation of distress occurs when a state has no other way to safeguard a life in its care than to violate a legal rule.[56] Necessity arises when a state has no other means available to safeguard an essential interest and can do so without harming an essential interest of another state.[57] Each of these defenses precludes the wrongfulness of a state's actions and thereby allows the state to avoid liability.

NPM provisions are distinct from these customary defenses in terms of their substantive content, their theoretical justification, their source of legal authority, and their scope of applicability. First, the substantive content of NPM clauses differs from the relatively narrow background customary defenses. Background customary defenses provide an excuse for breaching a treaty that may absolve a state of international legal responsibility after the fact. In contrast, NPM clauses remove certain types of state actions from the substantive protections of a particular treaty instrument. Generally speaking, NPM clauses will remove a broader array of state actions from the protections of a particular treaty than would be excused after the fact by the relatively narrow group of ex-post defenses provided for in customary law.

Second, NPM provisions are distinct from customary defenses in terms of their theoretical justification. NPM clauses exempt from the protections of a treaty certain types of state actions because the actions are sufficiently related to particular state objectives. In contrast, customary defenses remove liability after the fact due to overriding systemic policy goals, such as the fact that an actor should not have to jeopardize his own life or a state imperil its essential interests.

54. *See* Int'l Law Comm'n, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, art. 24(14), U.N. Doc. A/56/10 (2001) [hereinafter ILC Draft Articles], *available at* http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

55. *See id*. art. 23.

56. *See id*. art. 24; *see also* Rainbow Warrior (N.Z. v. Fr.), 82 I.L.R. 499, 554–55 (1990).

57. *See* ILC Draft Articles, *supra* note 54, art. 25.

Third, NPM clauses have a different source of legal authority than do customary defenses. Customary defenses are secondary legal rules that relive liability after the fact. In contrast, NPM clauses are primary legal rules that limit the applicability of an international treaty with respect to certain types of conduct.[58] NPM clauses arise from treaty law, rather than from customary international law. Whereas background customary defenses are a general part of customary international law arising through state practice and *opinio juris,* NPM provisions are included in the specific language of a treaty. As such, they constitute the *lex specialis* rules in force between the two states parties to the particular BIT in which the NPM clause is included.[59]

Finally, NPM clauses are distinct from customary defenses in terms of their scope of applicability. Whereas customary defenses are applicable to all states as a general part of customary law, NPM clauses apply only to the states parties to a particular treaty that includes such a clause. NPM clauses arise where the two states parties to a BIT decide to include such a clause in their treaty relationship to further their particular interests. As a result, whereas customary defenses are uniform, NPM clauses exhibit considerable variation across states and treaty instruments. While there is only one version of *force majeure* in customary international law, there are a theoretically unlimited number of potential NPM clause formulations based on the particular bargains negotiated by the states parties to a BIT. Similarly, states can impart distinct meanings to the terms used in their NPM clauses. Even identical formulations of NPM clauses may not have uniform meaning because states may have understood those terms differently in drafting their treaties. As a result, the interpretation of NPM clauses requires a particularized analysis of the specific clause in question. We offer a framework for such analysis in Part IV.

In recent cases against Argentina, some tribunals have conflated NPM clauses and customary law defenses, perhaps due to their common use of the term "necessary."[60] The defense of necessity in customary

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58. *See* CMS Annulment Decision, *supra* note 31, ¶¶ 132–33.

59. Article 55 of the ILC Draft Articles confirms the principle of *lex specialis derogat legi generali,* stating that "[t]hese articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law." ILC Draft Articles, *supra* note 54, art. 55; *see also* Gabriel Bottini, *Protection of Essential Interests in the BIT Era*, 30 U. PA. J. INT'L L. (forthcoming 2008) (noting that BIT clauses are part of the primary treaty rules intended to define what constitutes a breach in the first place, whereas necessity is a secondary rule that may justify a violation once this has already occurred).

60. *See* CMS Award*, supra* note 16.

law provides that a state may not be liable for actions taken to "safeguard an essential interest against a grave and imminent peril."[61] In terms of the legal rules of treaty interpretation, equating NPM clauses with this background defense of necessity is inappropriate for two reasons: it fails to recognize the distinction between treaty and custom and, it violates the principle of effectiveness in treaty interpretation. Treaty and custom are separate sources of international law and consist of independent legal regimes. As the ICJ found in the *Nicaragua* case, "even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence."[62]

Reducing the NPM clause to merely a treaty-based reiteration of the necessity defense would violate the principle of effectiveness in treaty interpretation (*ut res magis valeat quam pereat*). As the WTO Appellate body found in the *U.S.-Gasoline* case,

> [o]ne of the corollaries of the "general rule of interpretation" in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.[63]

61. ILC Draft Articles, *supra* note 54, art. 25 ("Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (*a*) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (*b*) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole."). *See also* Gabcikovo–Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 39 (Sept. 25).

62. Nicaragua Judgment (Merits), *supra* note 21, at 95. In *Nicaragua*, the United States argued that background customary law had been "subsumed" or "supervened" by the existence of certain identical or nearly identical rules in the U.N. Charter. *Id*. The Court rejected this argument. For a further treatment by the Court of the relationship of custom and treaty, see North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 38 (Feb. 20). *See also* II INTERNATIONAL LAW OPINIONS 232 (A.D. McNair ed., 1956), as cited in ILC Draft Articles, *supra* note 54, art 25(4) (describing Anglo-Portuguese Dispute of 1832, in which the British government was advised that Portugal could invoke necessity to excuse the appropriation of British property).

63. Appellate Body Report, United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter United States—Standards for Reformulated and Conventional Gasoline]. Similarly, Professor Fitzmaurice observes, "texts are to be presumed to have been intended to have a definite force and effect, and should be interpreted so as to have such force and effect rather than so as not to have it and so as to have the fullest value and effect consistent with their wording." G. G. Fitzmaurice, The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points, 28 BRIT. Y.B. INT'L L. 1, 8 (1951); *see also* H. Lauterpacht, Restrictive Interpretation and the Principle of Effective-

Reading an NPM clause as equivalent to the customary defense of necessity would render the clause pointless because the customary defense of necessity would be available to states irrespective of the inclusion of the NPM clause in a BIT. In order to satisfy the principle of effectiveness in treaty interpretation, NPM clauses must be read as distinct rules that states create in their treaty relationships, independent of the necessity defense in customary international law.

Given that the necessity defense and NPM clauses are distinct rules of law, a further question arises as to the relationship between the two: namely, does an NPM clause replace the customary defense of necessity or do the two continue to coexist? The ICJ answered that question in the *Nicaragua* case, observing: "customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content."[64] The only circumstances in which the treaty rule could be said to replace the customary rule are if the treaty specifically indicates that it replaces customary rules or if the treaty provision and the customary rule are in such direct conflict that they cannot co-exist.[65] Where the treaty or the particular treaty provision in question is silent as to its relationship with customary law, as is the case with most BIT NPM provisions, then both the customary and treaty rule should be treated as applicable separately and independently. Hence, as a result of including NPM clauses in their BITs, states have created a treaty-based legal mechanism to allocate risks between themselves and investors in extraordinary circumstances that is distinct from, but coexistent with, defenses otherwise available in customary international law.

IV. THE ANATOMY OF NPM CLAUSES

Just as substantive protections found in BITs vary, so do NPM provisions. Even in the BITs of those states that include NPM exceptions as a general practice, the specific wording used varies. These differences arise in part from adjustments of the standard phrases used in model treaties over time and in part from modifications agreed upon in the

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ness in the Interpretation of Treaties, 26 BRIT. Y.B. INT'L L. 48 (1949).

64. Nicaragua Judgment (Merits), *supra* note 21, at 96.

65. In those cases, the interpretive rules of *lex specialis* and *lex posterior* dictate that the more specific and generally later treaty provision would trump the preexisting customary rule. *See* Vienna Convention on the Law of Treaties art. 30, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. For an early discussion, see Hans Aufricht, *Supersession of Treaties in International Law*, 37 CORNELL L.Q. 655, 656–57 (1952).

course of negotiations of particular BITs with a treaty partner. The specific formulations of NPM clauses define the extent of state freedom of action in exceptional circumstances and the protections available to investors in times of crisis. This section offers an overview of the principal types of NPM provisions by way of several representative examples, taken primarily from the practice of those states that most frequently include NPMs in their agreements.

A. Placement of NPM Clauses in Bilateral Investment Treaties

Many bilateral investment agreements consist of three types of documents: the main treaty text, a protocol attached thereto, and an exchange of notes accompanying them. In such a tripartite agreement structure, the main treaty text contains the principal substantive and procedural provisions, including guarantees of national and most-favored nation treatment, rules on expropriations and dispute settlement, as well as standard treaty provisions on, *inter alia*, entry into force, duration, and termination. Where a protocol is attached to the treaty, it often addresses primarily interpretive issues that are intended to clarify the meaning and scope of the treaty's core substantive provisions.[66] Any remaining issues not yet sufficiently addressed in these two documents may then be taken up in exchanges of notes between the negotiating governments.[67]

NPM provisions may appear either in the main treaty text or in the attached protocol, though they are more often found in the body of the treaty itself.[68] The United States, India, and the Belgium-Luxembourg

66. The choice to address such interpretive matters in the protocol rather than in the main treaty text will often be guided by considerations of linguistic economy and does not as such give rise to any normative hierarchy; rather, a protocol, considered as a document in its own right and regardless of its specific title, is an international treaty just like the BIT to which it relates. *Cf.* Vienna Convention, *supra* note 65, art. 2.

67. *See, e.g.*, U.S.-Argentina BIT, *supra* note 17 (including Exchange of Notes).

68. We have found no instance in which a general NPM clause is included in the exchange of notes. A related issue that is at times discussed in such notes, however, concerns the modalities for the entry of employees related to an investment. For example, the letters of exchange between Ceylon and Germany upon the conclusion of their 1963 BIT confirm the mutual understanding that "Ceylon will grant the necessary permits to German nationals who in connection with investments by German nationals or companies desire to enter and stay in Ceylon and to carry on an activity there as employees, *except as reasons of public order end security, of public health or morality may warrant otherwise.*" Treaty for the Promotion and Reciprocal Protection of Investments, Letters of Exchange, F.R.G.-Ceylon, Nov. 8, 1963 (emphasis added), *available at* http://www.unctad.org/sections/dite/iia/docs/bits/germany_ceylon.pdf. The practice of addressing limitations on the entry of personnel in the letters of exchange appears to have been pursued until the 1970s. Subsequent agreements in the 1980s and 1990s then switched to including a provision

Economic Union[69] follow this practice, as do most other states whose BITs contain such exceptions on an occasional basis. Germany generally places the NPM clause in the protocol rather than in the main treaty text.[70] This placement of the NPM provision in the protocol to the treaty is a structural-textual decision which does not affect or diminish the legal value of the NPM clause.[71] Once a state expresses its consent to be bound by the protocol's provisions—usually through ratification together with the main treaty text, as in the German practice—then NPM provisions included therein have the same legal effect as those found in the main treaty text.

B. Examples of NPM Clauses

A few examples of NPM clauses offer an overview of their form and structure. Germany has included NPM clauses in its BIT protocols since the first such instrument was signed with Pakistan in 1959; that treaty's NPM provision provided that "[m]easures taken for reasons of public security and order, public health or morality shall not be deemed as discrimination within the meaning of Article 2."[72] The "non-discrimination" standard to which the exception refers was replaced in subsequent German BITs with the now predominant national and most-favored-nation treatment standards which stipulate that investments by nationals of the other contracting party shall not be submitted to treat-

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in the protocol according to which "sympathetic consideration" was to be accorded to the issuing of entry permits for employees related to an admitted investment. *See, e.g.*, Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Protocol, Somal.-F.R.G., pmbl., Nov. 27, 1981, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/germany_somalia.pdf.

69. Upon ending the customs union with Germany following World War I, Luxembourg entered into an economic union with Belgium on July 2, 1921 (Belgium-Luxembourg Economic Union), which took effect on May 1, 1922. For documentation, see 18 CHRONIQUE DE POLITIQUE ÉTRANGÈRE 367–464 (July 1965).

70. In only three of 95 German BITs with NPM provisions reviewed has the NPM exception been moved to the main treaty body. *See* Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Thail.-F.R.G., art. 3(2), June 24, 2002, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/germany_thailand.pdf; Tratado sobre Fomento y Reciproca Protección de Inversiones de Capital, F.R.G.-El Sal., art. 3(7), Dec. 11, 1997 [hereinafter Germany-El Salvador BIT], *available at* http://www.unctad.org/sections/dite/iia/docs/bits/germany_elsalvador_sp_gr/pdf; Agreement for the Promotion and Protection of Investments, F.R.G.-India, art. 12, July 10, 1995, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/germany_india.pdf.

71. In German practice, the protocol's chapeau generally states that the additional "arrangements" agreed upon therein "shall be regarded as an integral part of the Treaty." Treaty Concerning the Promotion and Reciprocal Protection of Capital Investment, F.R.G.-Haiti, Aug. 14, 1973, 1016 U.N.T.S. 83, 88 (1976); *see also supra* note 66.

72. Germany-Pakistan BIT, *supra* note 24, Protocol, ¶ 2.

ment "less favorable than" that accorded to investments of one's own nationals, or nationals of third countries, respectively. The standard NPM provision in German BITs was adjusted accordingly, and now reads: "Measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed 'treatment less favorable' within the meaning of Article 3 [the article containing the national and most favored nation treatment standards]."[73]

U.S. BITs likewise have included NPM clauses since the beginning of the BIT program in the early 1980s. For example, the first U.S. BIT, signed with Panama in 1982, stipulates in Art. X that "[t]his treaty shall not preclude the application by either Party of any and all 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."[74] Over the years, the United States has developed new versions of its Model BIT and, hence, variations in the form and structure of the NPM clause have appeared over time. One of the more notable modifications occurred in the late 1990s when the United States clarified its position on the self-judging nature of the NPM clauses in its BITs by including explicit language to that effect, now stating that a party was not precluded from taking any measures that "it considers necessary" for the protection of the stated permissible objectives.[75] In the most recent 2004 U.S. Model BIT, the NPM provision reads: "Nothing in this Treaty shall be construed: …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 or security, or the protection of its own essential security interest."[76]

The Belgium-Luxembourg Economic Union (BLEU)[77] also habitually includes NPM clauses in its BITs. The typical NPM clause is

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73. Agreement on the Encouragement and Reciprocal Protection of Investments, Protocol, P.R.C.–F.R.G., ¶ 4(a), Dec. 1, 2003 [hereinafter China-Germany BIT], *available at* http://www.unctad.org/sections/dite/iia/docs/bits/china_germany.pdf.

74. Treaty Concerning the Treatment and Protection of Investments, U.S.-Pan., art. X(1), Oct. 27, 1982, 21 I.L.M. 1227 [hereinafter U.S.-Panama BIT]. A subsequent protocol amending the dispute settlement provisions of the original treaty was signed on June 1, 2000. *See* Protocol Amending Investment Treaty with Panama, U.S.-Pan., June 1, 2000, S. TREATY DOC. NO. 106-46, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/us_panama_2000.pdf.

75. For greater in–depth discussion of NPM clauses in U.S. BITs, see *infra* notes 316–33 and accompanying text.

76. *See* 2004 U.S. Model BIT art. 18(2) [hereinafter 2004 U.S. Model BIT], *available at* http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf

77. *See supra* note 69.

phrased as an exception to the subsequently defined treatment standard: "Except for measures required to maintain public order, such investments shall enjoy continuous protection and security, i.e. excluding any unjustified or discriminatory measure which could hinder, either in law or in practice, the management, maintenance, use, possession or liquidation thereof."[78] While the overwhelming number of BLEU BITs only give "public order" as a permissible NPM objective, a few add "security of the state" as another.[79]

India's BITs also include NPM provisions as a matter of course. The country's BIT program began in the mid-1990s as India's international trade expanded, with all currently operative BITs concluded in or after 1994. The first BIT, signed with the United Kingdom, contains the NPM clause in Article 11: "Notwithstanding paragraph (1) of this Article nothing in this Agreement precludes the host Contracting Party from taking action for the protection of its essential security interests or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non-discriminatory basis."[80] A few Indian NPM clauses also reserve the right of each contracting party to take measures necessary "for the prevention of diseases and pests in animals or plants."[81]

Finally, while Canada's first half-a-dozen BITs signed between 1989 and 1991 did not contain any NPM clauses, in the mid-1990s Canada began to include NPM clauses and has, since 1994,[82] incorporated in-

78. Agreement on the Reciprocal Promotion and Protection of Investments, Uganda-Belg.-Lux., art. 3(2), Feb. 1, 2005 [hereinafter Uganda-Belgium-Luxembourg BIT], *available at* http://www.unctad.org/sections/dite/iia/docs/bits/uganda_belgium.pdf.

79. *See* Accord concernant l'encouragement et la protection réciproques des investissements, Belg.-Lux.-Uzb., art. 3(2), Feb. 17, 1998 [hereinafter Uzbekistan-Belgium-Luxembourg BIT] (emphasis added), *available at* http://www.unctad.org/sections/dite/iia/docs/bits/belg_lux_uzbekistan_fr.pdf ("*Sous réserve des mesures destinées à maintenir l'ordre public et à garantir la sûreté de l'Etat*, ces investissements jouiront d'une sécurité et d'une protection constantes, excluant toute mesure injustifiée ou discriminatoire qui pourrait entraver, en droit ou en fait, la gestion, l'entretien, l'utilisation, la jouissance ou la liquidation desdits investissements."); *see also* Accord concernant l'encouragement et la protection réciproques des investissements, Belg.-Lux.-Mex., art. 3(2), Aug. 27, 1998 [hereinafter Belgium-Luxembourg-Mexico BIT], *available at* http://www.unctad.org/sections/dite/iia/docs/bits/belg_lux_mexico_fr.pdf.

80. Agreement for the Promotion and Protection of Investments, U.K.-India, art. 11(2), Mar. 14, 1994, 1995 India T.S. No. 27 [hereinafter U.K.-India BIT], *available at* http://www.unctad.org/sections/dite/iia/docs/bits/uk_india.pdf.

81. *See, e.g.*, Agreement for the Promotion and Protection of Investments, India-Neth., art. 12, Nov. 6, 1995, *available at* http://www.iisd.org/pdf/2006/investment_india_netherlands.pdf.

82. Agreement for the Promotion and Protection of Investments, Can.-Ukr., art. 17, Oct. 24, 1994, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/canada_ukraine.pdf.

creasingly detailed catalogues of permissible objectives in all of its investment protection agreements.[83] In revising its BITs, Canada took particular guidance from the investment provisions of Chapter 11 of the North-American Free Trade Agreement (NAFTA).[84] In the most recent 2004 Canadian Model BIT, the NPM exceptions are addressed in Art. 10.[85] Permissible objectives include measures necessary "(a) to protect human, animal or plant life or health; (b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or (c) for the conservation of living and non-living exhaustible natural resources."[86] Also included are measures necessary to preserve "integrity and stability of a Party's financial system,"[87] measures related to national and international security concerns,[88] and measures "adopted by a Party in conformity with a decision" of the WTO.[89]

C. Form and Structure of NPM Clauses

Despite textual variation, NPM clauses share several structural elements. First, NPM clauses require a link between the measures adopted by the host state that might breach the treaty and the permissible objectives stated in the provision (the "nexus" requirement). Second, they define the breadth, or "scope," of the NPM clause's application *vis-à-vis* the other treaty provisions. Third, they list the "permissible objectives" in the pursuit of which measures deviating from other substantive treaty provisions are not precluded by the BIT. Collectively, these terms determine whether states or investors will bear the costs of state action in exceptional circumstances.

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83. Agreement for the Promotion and Protection of Investments, Annex I, Can.-Uru., Oct. 9, 1997, 1999 Can. T.S. No. 31 [hereinafter Canada-Uruguay BIT] (including four and one half pages of text detailing exceptions).

84. *See* Andrew Newcombe, *Canada's New Model Foreign Investment Protection Agreement*, CAN. COUNCIL ON INT'L L. (Fall 2004), *available at* http://www.ccil-ccdi.ca/index.php?option=com_content&task=view&id=89&Itemid=76.

85. Canadian 2004 Model Foreign Investment Protection and Promotion Agreement (FIPA) art. 10 [hereinafter Canadian 2004 Model FIPA], *available at* http://www.dfait–maeci.gc.ca/tna–nac/documents/2004–FIPA–model–en.pdf.

86. *Id.* art. 10(1).

87. *Id.* art. 10(2)(c).

88. *Id.* art. 10(4). This provision is taken almost verbatim from Article 2102 of the North American Free Trade Agreement. North American Free Trade Agreement, Dec. 8-17, 1992, 32 I.L.M. 605, 699–700 [hereinafter NAFTA].

89. Canadian 2004 Model FIPA, *supra* note 85, art. 10(7).

1. The Nexus Requirement

NPM clauses require that measures taken by a state that would otherwise deviate from a treaty obligation must be sufficiently related to the permissible objectives specified in the clause (discussed *infra*). We term this relationship the "nexus requirement." The wording of this "nexus" requirement differs both across and within the practice of individual states, reflecting different allocations of risk between the states parties to a BIT and investors. One widely used phrasing requires that measures undertaken have to be "necessary" for the attainment of one of the permissible objectives.[90] Other NPM clauses define the nexus requirement by specifying that the state's measures must be "required,"[91] "directed to,"[92] or "have to be taken"[93] in furtherance of a permissible objective. Yet other BITs use less demanding formulations, stating that "measures taken for reasons of"[94] or "in the interest of"[95] one of the listed objectives are permissible.[96] The nexus requirement is of consid-

90. The NPM clauses in the U.S. BITs consistently use the "necessary for" wording. *See, e.g.*, Treaty Concerning the Encouragement and Reciprocal Protection of Investments, U.S.-Mozam., art. XIV, Dec. 1, 1998, S. TREATY DOC. NO. 106–31 (2000) [hereinafter U.S.-Mozambique BIT]; U.S.-Panama BIT, *supra* note 74, art. X(1). Similarly, the French language versions of the BITs by the Belgium–Luxembourg Economic Union refer to "mesures *nécessaires*" (emphasis added). *See, e.g.*, Accord concernant l'encouragement et la protection réciproques des investissements, Belg.-Lux.-Est., art. 3(2), Jan. 24, 1996, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/belg_lux_estonia_fr.pdf. For an example in Spanish speaking of "medidas necesarias," see Acuerdo para la Promocion y Proteccion Reciprocas de Inversiones, Arg.-Morocco, art. 3(3), June 13, 1996 [hereinafter Argentina-Morocco BIT], *available at* http://www.unctad.org/sections/dite/iia/docs/bits/argentina_morocco_sp.pdf.

91. The English language versions of the Belgium-Luxembourg BITs use "required." *See, e.g.*, Belgium-Luxembourg BIT with Uganda, *supra* note 78; Agreement on the Reciprocal Promotion and Protection of Investments, Kaz.-Belg.-Lux., art. 3(3), Apr. 16, 1998, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/kazak_belgo_lux.pdf.

92. *See, e.g.*, Agreement on the Promotion and Protection of Investments, N.Z.-P.R.C., art. 11, Nov. 22, 1988, 1787 U.N.T.S. 186 (1994). Some Belgium-Luxembourg BITs use the phrase "destinées à." *See*, *e.g.*, Belgium-Luxembourg-Mexico BIT, *supra* note 79, art. 3(2).

93. This is a common phrase in Germany's NPM clauses. *See* Agreement Concerning the Encouragement and Reciprocal Protection of Investments, Protocol, F.R.G.-Burundi, ¶ 3(a), Sept. 10, 1984, 1517 U.N.T.S. 288 (1988).

94. *See, e.g.*, Treaty Concerning the Promotion and Reciprocal Protection of Capital Investment, Protocol, F.R.G.-Haiti, ¶ 2(a), Aug. 14, 1973, 1016 U.N.T.S. 84 (1976); Swiss-Chad BIT, *supra* note 45.

95. *See* Agreement Concerning the Promotion and Reciprocal Protection of Investments, F.R.G.-U.S.S.R., Protocol, ¶ 2(c), June 13, 1989, 1707 U.N.T.S. 194 (1993) [hereinafter Germany-Russia BIT].

96. *See, e.g.*, Agreement for the Promotion and Reciprocal Protection of Investments, Kaz.-India, art. 12(2), Dec. 9, 1996, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/kazakh_india.pdf.

erable importance in the interpretation of NPM provisions for it governs how closely related state action must be to the objective pursued.

2. Scope

NPM clauses can either be drafted so as to apply to an entire BIT or can be written in a more limited form so that they apply only to a subset of the treaty's substantive provisions. The U.S., Indian, and Canadian NPM clauses, for example, are of "comprehensive scope" and apply to the treaty as a whole. The NPM clauses in U.S. BITs provide that "*[t]his Treaty* shall not preclude"[97] the application of the subsequently specified measures. As a result, the successful invocation of the NPM clause precludes the existence of a violation with respect to any and all substantive treaty provisions. This approach is even more explicit in the Indian and Canadian BITs, which note that "*nothing* in this Agreement"[98] shall preclude the host state from taking measures in pursuit of the stated permissible objectives.[99] Like certain types of general exceptions found in multilateral treaties,[100] NPM clauses of comprehensive scope establish exceptions to all treaty provisions.[101]

By contrast, "limited scope" NPM clauses apply only to specified provisions. In this sense, the German and BLEU NPM clauses are of "limited scope." The protocols to German BITs, for example, provide that measures undertaken in pursuit of one of the permissible objectives shall not be considered "treatment less favourable"[102] in the context of the national and most favored nation (MFN) treatment standards. The clause only applies to this particular standard and not to other treaty provisions, such as those on dispute settlement. In BLEU BITs, the NPM clause prefaces the pledge of "continuous protection and security" for foreign investments and the scope of the NPM clause is thus limited

97. *See, e.g.*, U.S.-Panama BIT, *supra* note 74 (emphasis added); U.S.-Mozambique BIT, *supra* note 90 (emphasis added).

98. *See, e.g.*, U.S.-India BIT, *supra* note 80, art. 11(2); Canadian 2004 Model FIPA, *supra* note 85, art. 10 (emphasis added).

99. For other examples of BITs with a comprehensive NPM clause, see, for example, Qatar-Turkey BIT, *supra* note 40, art. VII(1) ("This Agreement shall not preclude…"); Peru-Venezuela BIT, *supra* note 39, art. 3(5) ("Nada de lo acordado en el presente Convenio impedirá..."); Peru-Paraguay BIT, *supra* note 38, art. 11(1) ("El presente Convenio no impedirá…").

100. *See, e.g.*, Conference on Trade & Dev., *National Treatment*, at 44, UNCTAD Doc. UNCTAD/ITE/IIT/11(Vol. IV) (1999) (noting that general exceptions in international investment agreements "apply to all provisions in the agreement, not only to national treatment").

101. For an identical interpretation of similar language in the context of GATT art. XX, see *United States—Standards for Reformulated and Conventional Gasoline, supra* note 63.

102. *See, e.g.*, China-Germany BIT, *supra* note 73, Protocol, ¶ 4(a).

to allow only for what would otherwise be violations of the "continuous protection and security" guarantee.[103]

3. Permissible Objectives

NPM clauses seek to protect state freedom of action in certain domains of public policy from the restrictions or limitations that would otherwise be imposed by obligations created by a BIT. To achieve this end, NPM clauses specify the policy domains in which state action shall remain permissible even in the face of otherwise countervailing investment protection standards under the BIT. The following sections highlight the permissible objectives that occur with the greatest frequency.

a. Security

The security objective allows the state to act in the protection of its own security interests. There is some variation in the specific wording of the security objective. German BITs use the term "public security,"[104] whereas Indian and U.S. BITs employ the phrase "essential security interests."[105] Notably, and somewhat contrary to expectations, the formulation "national security"[106] is rarely used; equally rare are such cognates as "internal or external national security"[107] and "security of the state."[108] Indian NPM clauses furthermore authorize non-precluded measures in "circumstances of extreme emergency," which would include both security and other emergencies of particular gravity.[109]

b. International Peace and Security

From the inception of the U.S. BIT program, U.S. NPM clauses have included the "fulfillment of…obligations with respect to the mainte-

103. *See, e.g.*, Uganda-Belgium-Luxembourg BIT, *supra* note 78, art. 3(2). A similar example of the limited scope NPM clause can be found in the Turkey-Morocco BIT, *supra* note 41, art. 2(2) ("Each Contracting Party shall ensure fair and equitable treatment and subject to the strictly necessary measures to maintain the public order provide full protection and security for investments of investors of the other Contracting Party.").

104. *See, e.g.*, China-Germany BIT, *supra* note 73, Protocol, ¶ 4(a).

105. See*, e.g.*, U.K.-India BIT, *supra* note 80, art. 12(2); U.S.-Panama BIT, *supra* note 74, art. X(1); *see also* Canadian 2004 Model FIPA, *supra* note 85, art. 10(4)(a)–(b).

106. *See* Peru-Paraguay BIT, *supra* note 38, art. 11(1) (referring to "la seguridad nacional").

107. *See* Peru-Venezuela BIT, *supra* note 39, art. 3(5); Peru-Bolivia BIT, *supra* note 37, art. 3(5) (speaking of "seguridad nacional interna y externa").

108. *See* Belgium-Luxembourg-Mexico BIT, *supra* note 79, art 3(2) (including "la sûreté de l'Etat" as a permissible objective); Uzbekistan-Belgium-Luxembourg BIT, *supra* note 79, art. 3(2) (including "la sûreté de l'Etat" as a permissible objective).

109. *See, e.g.*, U.K.-India BIT, *supra* note 80, art. 11(2).

nance or restoration of international peace and security"[110] among permissible objectives. Similar phrasing can also be found in the 2004 Canadian Model BIT[111] as well as in the BIT between Turkey and Qatar.[112]

c. Public Order

The "public order" objective is part of almost all NPM clauses in the BITs concluded by Germany[113] and BLEU,[114] and also appears in agreements entered into by the United States,[115] India,[116] Peru,[117] Argentina,[118] and Turkey.[119] The term is rarely defined and may have divergent meanings within domestic legal orders. In domestic law, particularly of civil law states, public order often appears under its domestic linguistic labels "*ordre public*," "*orden público*," or "*öffentliche Ordnung*." Some BITs expand the already potentially broad concept of public order by including a separate reference to "law" as a permissible objective. For example, the BIT between China and BLEU adds defense of the state law to maintenance of public order as permissible objectives.[120] Likewise, the agreement between the Russian Federation and Germany provides that "[m]easures undertaken in the interests of law and order" shall not be regarded as discriminatory measures in the context of the treatment of investments.[121]

110. *See, e.g.*, U.S.-Panama BIT, *supra* note 74, art. X(1).
111. *See* Canadian 2004 Model FIPA, *supra* note 85, art. 10(4)(c).
112. Qatar-Turkey BIT, *supra* note 40, art. VII(1).
113. *See, e.g.*, Germany-El Salvador BIT, *supra* note 70, art. 3(7).
114. *See, e.g.*, Belgium-Luxembourg-Mexico BIT, *supra* note 79, art. 3(2).
115. *See, e.g.*, U.S.-Argentine BIT, *supra* note 17, art. XI.
116. *See, e.g.*, Agreement on the Mutual Promotion and Protection of Investments, Port.-India, art. 12, ¶ 2, July 28, 2000, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/portugal_india_por.pdf.
117. *See, e.g.*, Peru-Venezuela BIT, *supra* note 39, art. 3(5); Peru-Paraguay BIT, *supra* note 38, art. 11, ¶ 1; Peru-Bolivia BIT, *supra* note 37, art. 3(5).
118. *See, e.g.*, Acuerdo para la Promocion y Proteccion Reciproca de las Inversiones, Mex.-Arg., art. 2(5)(b), Nov. 13, 1996, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/mexico_argentina_sp.pdf; Argentina-Morocco BIT, *supra* note 89, art. 3(3).
119. *See* Qatar-Turkey BIT, *supra* note 40, art. VII(1); Turkey-Morocco BIT, *supra* note 41, art. 2(2).
120. *See* Agreement on the Reciprocal Promotion and Protection of Investments, Belg.-Lux.-P.R.C., art. 3(2), June 4, 1984, 1938 U.N.T.S. 334 [hereinafter BLEU-China BIT].
121. *See* Germany-Russia BIT, *supra* note 95, Protocol, ¶ 2(c). The treaty continues to be in force between Germany and the Russian Federation, the USSR's principal successor state.

d. Public Health

The permissible objective of public health is included in all of Germany's NPM clauses[122] and also appears in several BITs concluded by China. Related exceptions found in Canadian BITs allow measures "necessary to protect human, animal or plant life or health."[123] NPM clauses in BITs by India[124] and China[125] sometimes include the "prevention of diseases and pests in animals and plants."

e. Public Morality

Public morality, like public health, is a consistent element in Germany's NPM clauses.[126] It also appears in several BITs concluded by the United States[127] and Peru,[128] as well as in at least one Turkish agreement.[129]

f. Other Permissible Objectives

Some permissible objectives appear on a less frequent basis and/or are limited to particular national drafting practices. Indian BITs routinely include an "extreme emergency" term.[130] The Chinese BIT with Sri Lanka affirms, *inter alia*, 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 national interests."[131] This is an extremely broad formulation—allowing potentially unlimited deviation from the BIT—and appears in no other known NPM provision. Several Canadian NPM clauses cover the adoption of measures "relating to the

122. *See* China-Germany BIT, *supra* note 73, Protocol, ¶ 4(a).

123. *See, e.g.*, Canada-Uruguay BIT, *supra* note 83, Annex I § III 2(b); Canadian 2004 Model FIPA, *supra* note 85, art. 10(1)(a).

124. *See, e.g.*, Agreement for the Promotion and Protection of Investments, Czech Rep.-India, art. 12, Oct. 11, 1996 [hereinafter Czech-India BIT], *available at* http://www.unctad.org/sections/dite/iia/docs/bits/czech_india.pdf.

125. Agreement on the Promotion and Protection of Investments, P.R.C.-Sing., art. 11, Nov. 21, 1985, 1443 U.N.T.S. 293.

126. *See* China-Germany BIT, *supra* note 73, Protocol, ¶ 4(a).

127. *See, e.g.*, Treaty Concerning the Reciprocal Encouragement and Protection of Investments, U.S.-Egypt, art. X(1), Mar. 11, 1986, S. TREATY DOC. NO. 99-24 (1986); Treaty Concerning the Reciprocal Encouragement and Protection of Investments, U.S.-Cameroon, art. X(1), Feb. 26, 1986, S. TREATY DOC. No. 99-22 (1986); Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Sen., art. X(1), Dec. 6, 1983, S. TREATY DOC. NO. 99-15 (1986).

128. *See* Peruvian BITs, *supra* notes 37–39.

129. *See* Qatar-Turkey BIT, *supra* note 40, art. VII(1).

130. *See, e.g.*, Czech-India BIT, *supra* note 124, art. 12.

131. *See* Sri Lanka-China BIT, *supra* note 44, art. 11.

conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption,"[132] as well as "reasonable measures for prudential reasons" aimed at, *inter alia*, "ensuring the integrity and stability of a Contracting Party's financial system."[133]

132. Canada-Uruguay BIT, *supra* note 83, Annex I § III 2(c); *see also* Canadian 2004 Model FIPA, *supra* note 85, art. 10(1)(c).

133. Canada-Uruguay BIT, *supra* note 83, Annex I § III (3)(c); *see also* Canadian 2004 Model FIPA, *supra* note 85, art. 10(2)(c). This Canadian formulation with respect to protecting state finances was first included in the 2004 Model BIT and may be a response to the Argentine financial crisis and the current ICSID arbitrations addressing the question of whether a financial crisis gives rise to either the national security or public order objectives of the U.S.-Argentina BIT. The Canadian language clarifies beyond any doubt that response to such a financial crisis would be permissible under the BIT.

Country	Nexus	Permissible Objectives	Scope	Deference
U.S.	measures ▪ "necessary for"	Consistently/frequently included: ▪ essential security interests ▪ international peace and security ▪ public order Rarely/occasionally included: ▪ public morals	Comprehensive: "This Treaty shall not preclude ..."	Mostly ambiguous or implicitly self-judging; more recently turn toward explicitly self-judging language
Germany	measures ... ▪ "that have to be taken for" ▪ "taken for reasons of" ▪ "necessary for"	Consistently/frequently included: ▪ public security ▪ public order ▪ public health ▪ public morality Rarely/occasionally included: ▪ interest of law and order and security ▪ internal and external security	Limited: NPM measures shall not be deemed "treatment less favorable" for purposes of national and MFN treatment standards	No explicit indication one way or the other, but presumptively not self-judging
BLEU	measures ... ▪ "required to" ▪ "necessary to"	Consistently/frequently included: ▪ public order Rarely/occasionally included: ▪ security of the state ▪ public or national interest or security	Limited: NPM clause provides exception to treatment standard of "continuous protection and security"	No explicit indication one way or the other, but presumptively not self-judging
India	▪ "measures necessary for" ▪ "necessary measures" ▪ "taking action for the protection of"	Consistently/frequently included: ▪ essential security interests ▪ circumstances of extreme emergency Rarely/occasionally included: ▪ prevention of diseases and pests in animals or plants ▪ public order	Comprehensive: "[N]othing in this Agreement precludes ..."	No explicit indication one way or the other

TABLE 1: KEY PROVISIONS IN NPM CLAUSES OF PRINCIPAL USERS

V. THE INTERPRETATION AND APPLICATION OF NPM PROVISIONS

A. The Interpretive Approach

Despite the prevalence of NPM clauses in BITs, they were not a focus of investor-state arbitration until the Argentine financial collapse of 2001-2002. Yet, more than forty cases are now pending in ICSID in which these clauses are likely to prove decisive. The four ICSID cases recently decided against Argentina under the U.S.-Argentina BIT highlight the interpretive challenges presented by NPM clauses. The tribunals were presented with identical facts and the NPM clause contained in the U.S.-Argentina BIT, according to which "[t]his treaty shall not preclude the application by either Party of any and all 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."[134] Moreover, in each case Argentina advanced the same argument—that the actions taken in response to the crisis were necessary to protect essential security interests and maintain public order—and presented very similar expert testimony. Yet, the tribunals reached opposite conclusions, based on different interpretations of the treaty's NPM terms.[135] More specifically, the *CMS*, *Enron*, and *Sempra* Tribunals found that the NPM clause was inapplicable, while the *LG&E* Tribunal found the clause to apply and relieve Argentina of liability during the period of applicability.

Even setting aside the conflicting awards in these cases, the reasoning of the tribunals is deeply problematic from an interpretive perspective. At times, each tribunal appears to conflate customary international law and the treaty-based defense of the non-precluded measures provisions. None of the tribunals offer a coherent analysis of the "necessary for" nexus, nor do they fully define the contours of the permissible objectives of "essential security" and "public order." The tribunals fail to recognize or fully grapple with the variety of formulations of NPM clauses and the potential meanings of their terms. In essence, the tribunals take interpretive shortcuts that push toward uniform interpretation of treaty terms, but fail to do justice to the interpretive rules of the Vienna Con-

134. U.S.-Argentina BIT, *supra* note 17, art. XI..

135. *See* CMS Award, *supra* note 16; LG&E Decision on Liability, *supra* note 30. It is important to recognize that none of these past decisions is controlling in the interpretation of an NPM clause in a future case. *See* Statute of the International Court of Justice art. 30, June 26, 1945, 59 Stat. 1055, T.S. 993.

vention, much less the intents of the states party to the treaty. A coherent framework for the analysis of NPM clauses is, therefore, urgently needed to help states, investors, and arbitrators engage in the often difficult work of treaty interpretation and thereby determine the risk allocation states have chosen to incorporate into their BITs. This part of the Article provides such an interpretative framework.

The tribunals' interpretations of the NPM clause in the U.S.-Argentina BIT also raise a deeper question about the process of treaty interpretation itself. As will be discussed in more detail below, there is strong evidence that both the United States and Argentina intended their BIT's NPM clause to be self-judging and subject only to a good faith review. Yet, the states failed to expressly manifest that intent in the text of the treaty. In interpreting such treaties, a tribunal must decide what weight to give extrinsic evidence of state intent. The difficulty of ascertaining state intent is exacerbated in the context of an ICSID arbitration, in which investors bring a case directly, as only one of the two state parties to the BIT is formally before the tribunal, and the other state cannot necessarily be called upon to provide its interpretation or documentary evidence thereof. To accept such extrinsic evidence of intent may well deny investors the legitimate expectation of rights that appear—based on the text of the treaty—to be conferred under it, and may result in a range of potentially contradictory interpretations of similar or identical language in different BITs. Yet, failure to give effect to states' well-established intents can violate the legitimate expectations of states party to the treaty and can undermine the legitimacy of the investor-state arbitration system itself.

The interpretation of any treaty instrument must be guided by Articles 31 and 32 of the Vienna Convention on the Law of Treaties,[136] widely regarded as part of customary international law. Yet even these two articles often result in an unsatisfactory compromise between strict textual interpretation, as in Article 31, and the recognition of extrinsic sources of intent and meaning, as in Article 32.[137] The tribunals in the four Argentina cases essentially failed to grapple with this issue. While a satisfactory resolution of the use of external evidence and the balancing of competing interests in the interpretation of an NPM clause may

136. *See* Vienna Convention, *supra* note 65, arts. 31, 32.

137. *See generally* Alexander P. Fachiri, *Interpretation of Treaties*, 23 AM. J. INT'L L. 745 (1929); Philip Marshall Brown, *The Interpretation of Treaties*, 23 AM. J. INT'L L. 819 (1929) (both focusing on the use of preliminary materials in the interpretation of multilateral treaties).

be difficult, the Vienna Convention requires, and the dictates of legitimacy demand, that tribunals fully engage in that process.

Article 31 of the Vienna Convention instructs interpreters to look to the "ordinary meaning" of the text, in light of its "context" and the treaty's "object and purpose."[138] A term's context and the treaty's object and purpose can, at times, assist in establishing an ordinary meaning, but "context" is defined narrowly under the Vienna Convention—limited to the rest of the treaty and the documents concluded with it—and the "object and purpose" of a treaty may be contested. Hence, the Vienna Convention clearly prioritizes a textual approach to interpretation. While an "ordinary meaning" interpretation may be possible in some circumstances, many of the terms found in NPM clauses lack clear, ordinary meanings. What is, for example, the ordinary meaning of "public morality"? Does it carry the same meaning in a BIT between Germany and Pakistan as in a BIT between Germany and Switzerland? Article 31 of the Vienna Convention further recognizes that states may assign special meanings to treaty terms if those special meanings are clearly established.[139] Often, however, states fail to "clearly establish" special meanings, precisely because their understandings of terms do not seem to them "special" in the context of Article 31(4) of the Vienna Convention. In these situations, the interpretive methods of Article 31 may prove inadequate and a tribunal, operating under the framework of the Vienna Convention, must decide what weight to accord to external sources.

Where an Article 31 analysis results in ambiguity in a treaty's terms, Article 32 of the Vienna Convention allows recourse to external sources to aid in the interpretive process. Although the Convention does not directly look to the intent of the parties, Article 32 of the Vienna Convention clearly allows for recourse to circumstances of the adoption of a treaty, which may in turn be indicative of state intent. Article 32 looks to the *travaux préparatoires* to the treaty and the "circumstances of its conclusion."[140] Yet, the use of such external sources also opens the real possibility of divergent interpretations of similar or even identical treaty terms. For example, based on the *travaux* and the circumstances surrounding a treaty's conclusion, the term "public order" may have one meaning in a treaty between two civil law states and a very different meaning in a treaty between two common law states. Some may find

138. *See* Vienna Convention, *supra* note 65, art. 31.
139. *Id.* art. 31(4).
140. *Id.* art. 32.

this range of valid interpretations of similar terms troubling,[141] but it is both appropriate and necessary given that a goal of treaty interpretation is, even within the framework of the Vienna Convention, to give effect to the intent of the parties which entered into the treaty instrument.[142]

While there is an understandable attractiveness to assigning uniform meanings to similar or identical terms across various treaties,[143] overlooking the nuances of state intent, and skipping past external sources of interpretation, even the Vienna Convention recognizes that treaty interpretation is a far more nuanced process that may, at times, lead to divergent interpretations and may take into account circumstances external to the text of the treaty.[144] Such an interpretive process is, admittedly, more difficult than merely accepting the interpretation of a prior tribunal or a particular asserted "ordinary meaning." Yet, if the legitimacy of the investor-state arbitration system is to be preserved, the meanings of terms must be fully explored and the intent of state parties must be recognized, at least to the extent permitted by the Vienna Convention.[145] If the potentially competing expectations of states and investors are to be accommodated, ICSID tribunals must do the hard work of serious treaty interpretation.

The framework for the interpretation of NPM clauses we present here offers a foundation for such a nuanced interpretive process. It takes as its starting point the Vienna Convention's focus on the actual text of the agreement, but also recognizes the need—particularly in the context of bilateral treaties—to give effect to the intent of the parties where ordinary meanings prove illusive or ambiguous.[146] Even within the textual

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141. For a detailed discussion of the tension between diversity and uniformity in the interpretation of international obligations, see Philip C. Jessup, *Diversity and Uniformity in the Law of Nations*, 58 AM. J. INT'L L. 341 (1964).

142. *See* Aegean Sea Continental Shelf (Greece v. Turk.), 1978 I.C.J. 3, 63 (Dec. 19) (de Castro, J., dissenting) ("It is a well–established principle that the purpose of interpretation is to ascertain the true will of the parties. The terms used in a declaration of intention must be regarded as the means…to be used in order to reach a conclusion as to the intention of the authors of the declaration.").

143. *See* Quincy Wright, *The Interpretation of Multilateral Treaties*, 23 AM. J. INT'L L. 94, 103–104 (1929) (noting the danger of "misunderstandings that would result" from non–uniform interpretations). Some of the ICSID tribunals in the cases against Argentina have fallen victim to this seduction, particularly with respect to the interpretation of the "necessary for" clause in the US-Argentina BIT as equivalent to the customary law defense of necessity. *See* Enron Award, *supra* note 29, ¶ 309.

144. *See* Vienna Convention, *supra* note 65, arts. 31, 32.

145. For a discussion of the need for strongly documented jurisprudence to preserve the legitimacy of international dispute resolution, see Anne-Marie Slaughter & Laurence Helfer, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L. J. 273 (1997).

146. *See, e.g.*, Maltass v. Maltass, 1 Robb. Ecc. 67, 76 (1844) (U.K.) ("[I]n constru-

formalism of the Vienna Convention, interpretive space is afforded to recognize that ordinary meanings may differ between treaties; to look to special meanings established by the parties; to account for a term's context and the treaty's object and purpose; and to consider preparatory works and the circumstances of a treaty's conclusion where the text itself is ambiguous. The framework we offer, while based in the rules of the Vienna Convention, also recognizes the convention's shortcomings, notably the restrictions on recognizing the intent of the parties and the difficulty of giving effect to both the expectations of states parties and those of investors. It offers a process for the interpretation of NPM clauses, poses the questions that must be asked in construing the meaning of the text and the intent that lies behind that text, and suggests some of the possible meanings key NPM terms may carry in the practice of states that most commonly use NPM clauses.[147]

B. Interpreting Key Terms in NPM Clauses: Meanings and Ambiguities

Given that different interpretations of NPM terms may be appropriate in particular treaties and that distinct meanings may be implied from states' own practices and the bargains underlying specific BITs, the interpretative analysis offered here does not seek to provide a single interpretation of any BIT language. Rather, it undertakes the requisite processes of treaty interpretation needed to explore the potential range of meanings of NPM terms, suggesting particular usages of terms in the practice of three states that most commonly use NPM clauses—United States, Germany and India—and offering a framework of interpretation reflective of both the legal requirements of the Vienna Convention and the potential risk allocations intended by states. The framework offered

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ing…treaties, we ought to look at all the historical circumstances attending them, in order to ascertain what was the true intention of the contracting parties, and to give the widest scope to the language of the treaties in order to embrace within it all the objects intended to be included.") (on file with author); *see also* Hersch Lauterpacht, *Some Observations on Preparatory Work in the Interpretation of Treaties*, 48 HARV. L. REV. 549, 563–64 (1935).

147. This approach explicitly recognizes that:

> A treaty is not concluded in *vacuo*.… As a result of past developments, certain circumstances came into existence which the parties desired in some manner to regulate or alter and to accomplish this end they chose to enter into a treaty. The treaty, in short, stands, therefore, as a related part of the general setting in which the parties acted, and that setting must be taken into account if the purpose which the treaty was intended to serve is to be fully comprehended and effectuated.

Comment to Article 19, Draft Convention on the Law of Treaties, 29 AM. J. OF INT'L L. (SUPPLEMENT) 666, 953 (1935).

here may be of particular use to arbitrators as a guide for considering the potential meanings states may have assigned various treaty terms, but it puts the onus back on the tribunal itself to find an interpretation appropriate to each specific clause and individual treaty bargain.

1. The Nexus Requirement

The nexus requirement of NPM clauses requires a link between the actions taken by a state that would otherwise violate the treaty and the permissible objectives provided for in the NPM clause. The variety of linguistic formulations of the nexus requirement raises the first interpretive challenge. The most common formulation, particularly evident in U.S. practice, requires that the actions taken by the state are "necessary for" the ends permitted in the NPM clause.[148] Differences in word structure and phrasing are not uncommon. The BIT between China and New Zealand uses the phrasing "directed to,"[149] which suggests that actions are permissible as long as they are intended by the government to further a legitimate end. Perhaps the most lenient nexus standard is found in the BIT between India and Croatia, which merely uses the word "for" to establish the necessary nexus.[150] Such a formulation would, at least in its ordinary meaning, suggest a relatively thin nexus, under which measures would appear to be permissible as long as they merely further a permissible objective.

BITs for which the official language is not English obviously use different phrases and constructions to establish the nexus requirement than the common English versions noted above. Translations may not convey the exact meaning intended by the contracting parties. For example, the BIT between Bolivia and Peru provides: "nada le impedirá adoptar las medidas exigidas por razones de seguridad nacional interna y ex-

148. *See, e.g.,* Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Bahr., art. 14, Sept. 29, 1999, S. TREATY DOC. NO. 106–125 (2000) [hereinafter U.S.-Bahrain BIT] ("This Treaty shall not preclude a Party from applying measures which it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.").

149. The text provides that the treaty "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 *directed to* the protection of its essential security interests." New Zealand-China BIT, *supra* note 43, art. 11.

150. Agreement on the Promotion and Reciprocal Protection of Investments, India-Croat., art. 12(2), May 4, 2001, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/croatia_india.pdf ("Nothing in this agreement precludes the host Contracting Party from taking action *for* the protection of its essential security interests.") (emphasis added).

terna."[151] This provision uses the phrase "exigidas por," perhaps best translated as "required by" or "demanded by" to establish the nexus requirement. Whether this phrase creates a measurably different standard than the more common "necessary for" remains an open question and will require an arbitrator to consider the text of the treaty and, perhaps, the intent of the parties entering into the treaty.

Even with respect to the most common English language formulation of the nexus requirement—that the acts taken be "necessary for" the specified ends—at least four distinct interpretations of the identical language can be identified in state practice and international jurisprudence. Each of these potential interpretations could well be considered an "ordinary meaning" of the term "necessary for" under Article 31 of the Vienna Convention, and different states may have intended each of these meanings in particular BITs. Moreover, each potential interpretation results in a different set of circumstances in which an NPM clause transfers the risks and costs of state action in exceptional circumstances from states to investors. Several ICSID tribunals in the cases against Argentina have been quick to latch on to the first of these alternatives, which equates NPM clauses with the customary law defense of necessity, without any consideration of the well-established competing interpretations.

The equation of the term "necessary for" with the requirements of the customary international law defense of necessity, chosen by three of the four Argentina tribunals,[152] sets the highest nexus requirement. While the customary defense of necessity is separate and distinct from NPM clauses, the similar language used in the customary necessity defense has led some tribunals to use it as a point of comparison.[153] As framed by the International Law Commission (ILC), the customary defense of necessity is available in the limited circumstances in which the action taken is "the only way for the State to safeguard an essential interest against a grave and imminent peril" and that action "does not seriously impair an essential interest" of another state.[154] The ICJ confirmed this most restrictive reading of necessity in the *Gabcikovo-Nagymaros Project* case, finding that the defense was inapplicable because other means were available to Hungary to remedy the situation.[155] According to the

151. Peru-Bolivia BIT, *supra* note 37, art. 3(5).

152. *See* CMS Award, *supra* note 16; Enron Award, *supra* note 29.

153. *See* CMS Award, *supra* note 16, ¶¶ 353–78.

154. ILC Draft Articles, *supra* note 54, art. 25.

155. *See Gabčíkovo–Nagymaros Project*, 1997 I.C.J. at 40, 42. The Court noted "that, even supposing, as Hungary maintained, that the construction and operation of the dam would have

Commentaries to the Draft Articles, "[t]he plea [of necessity] is excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient."[156] An act is thus only necessary for the purposes of the necessity defense in customary law if it is the *only* means to secure an essential state interest. Reading the nexus element of an NPM clause as equivalent to the customary necessity defense would result in a narrow application of the clause and would not meaningfully enhance state freedom of action in exceptional circumstances beyond that already available in customary law. As a consequence, the risks and costs of exceptional state actions would largely rest with states themselves.[157] There is, however, good reason to doubt the appropriateness of the analogy to the necessity defense in the interpretation of "necessary for" in most BITs. If states merely intended the NPM clause to refer to the necessity defense in customary law, the NPM clause would not have been necessary in the first place as the customary defense of necessity would have been available to the state parties in any event.[158]

A second interpretation of the "necessary for" language is found in the ICJ's application of a similar term contained in U.S. FCN treaties. In *Nicaragua*,[159] for example, the ICJ noted that to satisfy the "necessary for" term of the U.S.-Nicaragua FCN Treaty, "the measures taken must not merely be such as tend to protect the essential security interests of the party taking them, but must be 'necessary' for that purpose."[160] Applying a restrictive standard, the Court concluded: "the mining of Nicaraguan Ports…cannot possibly be justified as 'necessary' to protect the essential security interests of the United States."[161] In 2003, the ICJ ex-

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created serious risks, Hungary had means available to it, other than the suspension and abandonment of the works, of responding to that situation. It could for example have proceeded regularly to discharge gravel into the river downstream of the dam." *Id*. at 42.

156. ILC Draft Articles, *supra* note 54, art. 25, ¶ 15.

157. For a treatment of an NPM clause in this way, see CMS Award, *supra* note 16.

158. If such an incorporation of the strict necessity standard had indeed been desired, one could at least have expected that states would have indicated such an intent, for example, with an affirmative statement that the agreement shall be without prejudice to available defenses under customary law. Note in this context the inconsistent reasoning of the Enron Tribunal which requires an explicit textual reference for a clause to be accepted as self–judging, but deems it appropriate to infer the incorporation of the necessity nexus requirement without such a reference. *See* Enron Award, *supra* note 29, ¶¶ 334 *et seq*.

159. The U.S.-Nicaragua FCN Treaty provides that "the present treaty shall not preclude the application of measures [by the state] necessary to protect its essential security interests." Treaty of Friendship, Commerce, and Navigation, U.S.-Nicar., art. XXI, Jan. 21, 1956, T.I.A.S. No. 4024, 9 U.S.T. 449 (1958).

160. Nicaragua Judgment (Merits), *supra* note 21, at 141.

161. *Id*.

amined a similar clause in the U.S.-Iran FCN treaty.[162] In that case, the acts taken by the United States involved the use of force in potential violation of Article 2(4) of the UN Charter. As a result, the ICJ again applied a restrictive interpretation, importing into the definition of necessity the requirements of self-defense in international law.[163] The Court included the necessity and proportionality requirements of the law of self-defense in the interpretation of the "necessary" term.[164] Yet, the ICJ recognized that the term "necessary for" in the FCN treaty was distinct from the necessity defense in customary law. Given the special context of the use of force in both the *Nicaragua* and *Oil Platforms* cases, the ICJ's narrow construction of "necessary for"[165] may not be applicable outside these special circumstances. An interpretation of "necessary for" based on the requirements of self-defense would again leave states very little freedom of action beyond that already available under customary international law and would largely make states themselves carry the costs of actions taken in exceptional circumstances.

In stark contrast to the narrow interpretation of "necessary for" in the customary defense of necessity and the ICJ's reading of FCN treaties, the European Court of Human Rights (ECtHR) has taken a much broader approach to the interpretation of the term "necessary." The European Convention on Human Rights and Fundamental Freedoms (ECHR) permits restrictions of a number of rights and freedoms[166] to the extent "necessary in a democratic society" and if the actions are taken, *inter alia*, "in the interests of national security…or public safety, for the prevention of disorder or crime, [and] for the protection of health or morals…."[167] In the 1976 case of *Handyside v. U.K.*, the ECtHR inquired into the meaning of the nexus requirement and asked whether "the protection of morals in a democratic society necessitated the various measures taken"[168] by the state. The ECtHR compared the term

162. U.S.–Iran FCN Treaty, *supra* note 22, art XX(1)(d).

163. Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, 183 (Nov. 6) [hereinafter Oil Platforms Judgment] ("In the present case, the question whether the measures taken were "necessary" overlaps with the question of their validity as acts of self–defence.").

164. *Id*. at 183, 196-97.

165. The Court found that it is a "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.'" *Id*. at 196.

166. ECHR, *supra* note 34, art. 8 (the right to respect for privacy and family life); art. 9 (freedom of thought conscience and religion); art. 10 (freedom of expression); art. 11 (freedom of assembly and association); Protocol, art. 1 (protection of property).

167. *Id.* art. 10(2).

168. Handyside v. United Kingdom, 24 Eur. Ct. H. R. (ser. A) at 21 (¶ 47) (1976) [hereinafter Handyside].

"necessary" with other nexus terms used elsewhere in the Convention, noting:

> [W]hilst the adjective "necessary", within the meaning of Article 10 para. 2, is not synonymous with "indispensable" (cf., in Articles 2 para. 2…and 6 para. 1, the words "absolutely necessary" and "strictly necessary" and, in Article 15 para. 1, the phrase "to the extent strictly required by the exigencies of the situation"), neither has it the flexibility of such expressions as "admissible", "ordinary" (cf. Article 4 para. 3), "useful" (cf. the French text of the first paragraph of Article 1 of Protocol No. 1), "reasonable" (cf. Articles 5 para. 3 and 6 para. 1) or "desirable."[169]

Situating "necessary" between indispensable and useful, the ECtHR concluded that "it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context."[170] Leaving national governments with a margin of appreciation to determine which measures are necessary to achieve the objectives authorized by the Convention,[171] the ECtHR will only examine whether the national determination falls within the internationally defined boundaries of that margin. The margin of appreciation is, of course, an interpretive process more than a particular standard. The breadth of the margin of appreciation varies based on the particular provision of the Convention being applied. Yet, in nearly all cases, the margin rests on an interpretation of the term "necessary" that is noticeably broader than that given to the same term in the context of the customary defense of necessity or the ICJ's interpretation of particular FCN treaties.

A fourth potential interpretation of "necessary for" effectively splits the difference between the necessity defense in customary international law and the approach employed by the ECtHR. This fourth approach might be called a "least restrictive alternative" test and stems both from U.S. constitutional practice and jurisprudence under the GATT and WTO. In U.S. practice, the state is allowed to take an action that burdens citizens' rights if it furthers an essential state interest, but only if it is the least restrictive alternative available to achieve a particular goal.[172] As the U.S. Supreme Court has held, "where state action im-

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169. *Id*. at 22 (¶ 48).

170. *Id*.

171. For a brief discussion of the margin of appreciation doctrine, see *infra* notes 288, 289, and 292, as well as the accompanying text.

172. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479, 488 (1960) ("[E]ven though the governmen-

pinges on the exercise of fundamental constitutional rights or liberties [it] must…be found to have chosen the least restrictive alternative."[173]

A variant of the least restrictive alternative approach to the "necessary for" formulation also has been employed by GATT and WTO panels. In the *Thailand Cigarettes* case, Thailand banned foreign produced cigarettes but allowed the sale of domestic produced cigarettes, justifying the measure based on Article XX (b) of GATT on the grounds that such restrictions were "necessary to protect human...health."[174] The GATT panel in that case disagreed, finding that

> the import restrictions imposed by Thailand could be considered to be "necessary" in terms of Article XX (b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.[175]

In other words, Thailand's actions could only be justified if they were the least restrictive means of achieving the legitimate policy objective. In this case, a ban on all foreign cigarettes was not the least restrictive means available and was deemed a breach of GATT obligations. Though this "least-restrictive-means" test is somewhat similar to the ECtHR's margin of appreciation approach, it will often be narrower when applied, since the margin of appreciation does not require the measure chosen by the state to be the least restrictive available as long as it falls within the court-determined margin.[176]

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tal purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.").

173. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 51 (1973). Petitioners may show that a measure fails the least restrictive alternative test if they can prove that other "less drastic" "methods of satisfying the State's interest" are available. *Id.* In the context of non–precluded measures provisions, interpretation of the "necessary for" provision as a least restrictive alternative test would mean that a state action could fall under the NPM clause unless claimants can identify a less restrictive alternative than the one chosen by the government that would have achieved the same permissible objectives. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-6 to 16-8 (1978).

174. General Agreement on Tariffs and Trade art. XX(b), Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT]; GATT, Annex, art. XXI. GATT 1947 is incorporated into GATT 1994. *See* General Agreement on Tariffs and Trade 1994 art. 1(a), Apr. 15, 1994, 33 I.L.M. 1125 (incorporating all provisions from GATT 1947 into GATT 1994).

175. Panel Report, *Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶ 75, WT/DS10/R (Oct. 5, 1990).

176. *See generally* DAVID M. BEATTY, CONSTITUTIONAL LAW IN THEORY AND PRACTICE (1995).

NPM provisions, even if they employ the common "necessary for" formulation, rarely provide conclusive interpretive guidance as to which of these or other possible interpretations should be given to their nexus term. Though some have suggested that the interpretation of the ICJ in the *Nicaragua* and *Oil Platforms* cases should be controlling,[177] those decisions are only binding on the parties to those disputes. Further, it only reflects the ICJ's interpretation of the U.S.-Nicaragua and U.S.-Iran FCN treaties in the special context of the use of force and of self-defense. As such, the determination of the appropriate nexus standard in any particular NPM provision will require first instance analysis by the tribunal interpreting that treaty. Given the range of potential meanings of even the standard "necessary for" phrase, a textual analysis will often leave considerable ambiguities. Thus, interpretation may require resorting to the supplementary means of interpretation provided for in Article 32 of the Vienna Convention.[178] What is *not* permissible in this process is interpreting the absence of specific interpretive guidance in the BIT as an authoritative indication that the nexus requirement was intended to merely mirror the strict necessity defense standard under customary law.[179] This might be a convenient option and attractive shortcut, but such an approach disregards the fact that the absence of interpretive guidance does not privilege a reading based on available customary law and fails to engage in the serious interpretation of competing and equally valid interpretations from other areas of international law.

The interpretation of "necessary" is likely to have considerable consequences for the allocation of risks and costs between states and investors. A narrow reading of "necessary" in an NPM clause will limit a state's freedom of action and cause the state to bear the costs of many actions that would otherwise violate the BIT. In contrast, a broader reading of "necessary" will transfer more of the risks of state action in exceptional circumstances to investors. The critical question that a third party dispute resolution mechanism will need to consider is whether evidence, either from the BIT itself or from the *travaux* provides guidance as to which of the potential interpretations of "necessary for" the parties may have intended. Absent such guidance—even in extrinsic sources—the least restrictive alternative approach developed by the

177. *See* CMS Award, *supra* note 16, ¶ 339 (stating the claimant's view of the treaty's emergency clauses).

178. *See* Vienna Convention, *supra* note 65, art. 32.

179. *See* Enron Award, *supra* note 29, ¶ 334.

GATT and WTO panels offers perhaps the best middle ground for balancing the legitimate expectations of both states and investors.

2. Permissible Objectives

A second set of terms contained in NPM provisions specifies the permissible ends towards which state action must be directed if the NPM clause is to preclude a violation of the treaty. While some permissible objectives may have ordinary meanings that can be determined from the text, others are less clear and may again present interpretive ambiguities that require recourse to background materials and the broader context of the bargain behind the treaty. Again, the interpretation of permissible objectives in NPM clauses will determine the types of measures states may take in exceptional circumstances without incurring liability and, ultimately, the allocation of risk between states and investors in exceptional circumstances.

a. Essential Security Interests

The terms "essential security interests" or "security interests" appear in a wide range of NPM clauses as one of the permissible objectives.[180] Other treaties use slightly different formulations, including "public security"[181] and "considerations of…security."[182] Whatever formulation is employed in the particular treaty, the key interpretative question is how a state's "essential security" or "security" is defined. Does it encompass merely situations of armed attack against the state or should it be construed more broadly to encompass preemptive action? Must the threat even be military, or can "essential security" be threatened by economic or public health crises?

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180. *See* 2004 U.S. Model BIT, *supra* note 76, art. 18 (using the standard language found in most earlier U.S. BITs: "Nothing in this Treaty shall be construed…to preclude a Party from applying measures…for the…protection of its own essential security interests."). Most Indian BITs use a similar formulation. The BIT between India and Egypt, for example, provides: "Nothing in this Agreement precludes the host Contracting Party from taking action for the protection of its essential[] security interests." Treaty for the Promotion and Reciprocal Protection of Investments, Egypt–India, art. 11(2), Apr. 9, 1997 [hereinafter Egypt-India BIT], *available at* http://www.unctad.org/sections/dite/iia/docs/bits/egypt_india.pdf.

181. *See, e.g.*, Agreement Concerning the Promotion and Reciprocal Protection of Investments, Protocol, F.R.G.-Bangl., ¶ 2(a), May 6, 1981, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/germany_bangladesh.pdf.

182. *See, e.g.*, Convention Concerning the Reciprocal Promotion and Protection of Investments, Belg.-Lux.-Cameroon, art. 4(2), Mar. 27, 1980, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/belg_lux_cameroun.pdf

As noted above, the ICJ has examined language contained in both the U.S.-Nicaragua and U.S.-Iran FCN treaties similar to the "essential security interests" clause in many NPM provisions. The ICJ's approach to these two treaties suggests a relatively wide, but not unlimited interpretation of the "essential security" term. In the *Nicaragua* case, the ICJ observed that "the concept of essential security interests certainly extends beyond the concept of an armed attack, and has been subject to very broad interpretations in the past."[183] The question as framed by the Court was "whether the risk run by these 'essential security interests' is reasonable."[184] In the *Nicaragua* case the ICJ did not need to further parse the meaning of "essential security interests" as it determined that the actions taken by the United States were not *necessary* to protect those interests, however defined, and hence, the United States' actions failed the nexus test, and were not permissible under the treaty.[185]

The ICJ revisited the interpretation of "essential security" in its 2003 decision in the *Oil Platforms* case.[186] Again, however, the Court did not directly opine on the scope of "essential security" interests.[187] In its Counter Memorial in the case, the United States defined its essential security interests to include "the uninterrupted flow of maritime commerce in the Gulf" which was "essential to the economy and security interests of many States, including the United States."[188] The ICJ noted approvingly that both the United States and Iran recognized "some of the interests referred to by the United States—the safety of United States vessels and crew, and the uninterrupted flow of maritime commerce in the Persian Gulf—as being reasonable security interests of the United States."[189] The conception of essential security interests advanced by the United States and acknowledged by the ICJ[190] appears to

183. Nicaragua Judgment (Merits), *supra* note 21, at 116.

184. *Id*.

185. *Id*. at 141.

186. For a discussion of the case, see Pieter H. F. Bekker, *International Decision:* Oil Platforms (Iran v. United States), 98 AM. J. INT'L L. 550 (2004).

187. Oil Platforms Judgment, *supra* note 163, at 196 (providing that U.S. actions "cannot be justified, under Article XX, paragraph 1(d), of the 1955 Treaty, as being measures necessary to protect the essential security interests of the United States, since those actions constituted recourse to armed force not qualifying, under international law on the question, as acts of self–defence, and thus did not fall within the category of measures contemplated, upon its correct interpretation, by that provision of the Treaty").

188. Counter Memorial of the United States, Oil Platforms (Iran v. U.S.), ¶ 3.11 (June 23, 1997) [hereinafter Counter Memorial of the U.S.], *available at* http://www.icj–cij.org/docket/files/90/8632.pdf.

189. Oil Platforms Judgment, *supra* note 163, at 196.

190. *Id*.

include economic interests—such as the flow of maritime commerce—as well as territorial or military interests.[191] The ICJ's interpretation of "essential security" is indicative of a broad reading of the term that goes well beyond pure military threats and encompasses other types of threats that may impact a state's security.

A similar essential security term is also found in the language of the GATT and WTO. GATT Article XXI provides for exceptions based on "the protection of [a party's] essential security interests,"[192] but does not further define what constitutes an "essential security interest."[193] The Article XXI exception has only been implicated in four GATT disputes and none of them have expressly addressed the scope of "essential security interests."[194] Academic commentary on this GATT provision suggests a broad interpretation of "essential security interests" in this context as well. For example, Schloemann and Ohlhoff have argued that "[a] wide range of legitimate 'essential security interests' are conceivable [under the GATT]. In principle, any policy interest of a certain intensity may be legitimately protected under Article XXI."[195] The United States has considered the invocation of the Article XXI exception in a broad range of circumstances, including the Helms-Burton Act boycott of Cuba and the Massachusetts Burma law.[196] To the degree such a broad invocation is accepted,[197] "essential security" may be seen as an

191. Counter Memorial of the U.S., *supra* note 188, ¶ 3.12 (identifying attacks on U.S. warships and commercial vessels as "serious threats" to essential U.S. security interests).

192. GATT, *supra* note 174, art. XXI; *see also* NAFTA, *supra* note 85, art. 2102 (1993) (using same language). For discussion of the clause, see Raj Bhala, *National Security and International Trade Law: What the GATT Says, and What the United States Does*, 19 U. PA. J. INT'L ECON. L. 263, 268–69, 275 (1998); Wesley A. Cann, Jr., *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power–Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 YALE J. INT'L L. 413 (2001).

193. *See* Peter Lindsay, Note, *The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?*, 52 DUKE L.J. 1277, 1278 (2003).

194. The cases include: Czechoslovakia v. United States in 1949, Nicaragua v. United States in 1984 (Nicaragua I), Nicaragua v. United States in 1985–1986 (Nicaragua II), and Yugoslavia v. European Community in 1991–1992. For a discussion of why none of these cases expressly reached an interpretation of "essential security," see Hannes L. Schloemann & Stefan Ohlhoff, *"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 AM. J. INT'L L. 424, 426, 432–39 (1999).

195. Schloemann & Ohlhoff, *supra* note 194, at 444.

196. As Ryan Goodman explains, "[t]he United States argued, in part, that these measures served its security interests because they responded directly to human rights violations committed by the respective regimes." Ryan Goodman, *International Human Rights Law in Practice: Norms and National Security: The WTO as a Catalyst for Inquiry*, 2 CHI. J. INT'L L. 101, 102 (2001).

197. Goodman argues that "in principle, the United States' position involves a wholly legitimate definition of 'security interests.'" *Id.* at 102.

even more encompassing term.[198] Two commentators note that "the concept of national security, or 'essential security interests,' is a function of contemporary sovereignty, and as such demands individualization, or individual definition, by the state concerned before its juridical application is possible…Any panel dealing with such issues will have to defer to the government concerned in that regard."[199]

Some states have made more explicit interpretations of the essential security term. The United States, for example, has asserted a broad interpretation of "essential security," both in its submissions to the ICJ in the *Oil Platforms* case and in testimony by the State Department to the U.S. Senate in BIT ratification hearings. As the State Department has observed with regard to the essential security objective, the executive's understanding has been that "essential security interests would include security-related actions taken in time of war or national emergency" and that "actions not arising from a state of war or national emergency must have a clear and direct relationship to the essential security interest of the Party involved."[200] At least to the degree that this understanding has been communicated to and shared with the United States' treaty partners, this definition of essential security appears to govern the interpretation of the NPM clauses in U.S. BITs.

In German practice, NPM clauses use the term "public security" rather than "essential security." Although there is no officially published interpretation of the "public security" objective in the specific context of Germany's NPM clauses, domestic usage of the term is highly suggestive as to its intended reach. German NPM clauses generally group the security objective and the public order objective together within a single reference to "public security and order" ("*öffentliche Sicherheit und Ordnung*"),[201] a phrase with a long pedigree[202] that is included in virtually all domestic state police laws to define the scope of the state's po-

198. *Id*.

199. Schloemann & Ohlhoff, *supra* note 194, at 450. Part of this deference stems from the phrase "as it considers necessary" included in GATT Article XXI. *See generally id.*

200. Letter of Submittal from Strobe Talbott, U.S. Sec'y of State, to U.S. Senate (June 26, 1995), S. TREATY DOC. No. 104–10, *available at* http://www.state.gov/documents/organization/43579.pdf.

201. For a discussion of the key terms, see MARKUS MÖSTL, DIE STAATLICHE GARANTIE FÜR DIE ÖFFENTICHE SICHERHEIT UND ORDNUNG: SICHERHEITSGEWÄHRLEISTUNG IM VERFASSUNGSSTAAT, IM BUNDESSTAAT UND IN DER EUROPÄISCHEN UNION [STATE GUARANTEE OF PUBLIC SECURITY AND ORDER] 119 (2002).

202. The phrase "public security and order" originated in ch. II, tit. 17 § 10 of the *Allgemeines Landrecht für die Preußischen Staaten* of 1794. *See* ALLGEMEINES LANDRECHT FÜR DIE PREUßISCHEN STAATEN VON 1794, at 620 (1970), *available at* http://www.smixx.de/ra/Links_F-R/PrALR/pralr.html (visited Nov. 19, 2007).

lice powers.[203] In the 1985 *Brokdorf* judgment, the Federal Constitutional Court summarized the core meaning of the "public security" element of the term as follows:

> The term "public security" comprises the protection of central legal interests such as the life, health, freedom, honor, property and assets of the individual as well as the integrity of the legal order and of the institutions of the state; a threat to public security will commonly be assumed in the face of an impending criminal violation of these protected interests.[204]

This definition contains three elements.[205] First, the integrity of the legal order is understood as covering the entire body of formally valid laws and regulations.[206] Second, the integrity of the individual's rights and legal interests is usually already addressed by the broader concept of the legal order, but on occasion the two may diverge.[207] The third protected element, the integrity of the institutions of the state, refers to the state's territorial integrity and political independence.[208] Taken collectively, these three protected elements suggest that the German interpretation of the essential security permissible objective is, likewise, relatively broad.

Indian BITs also use the "essential security" language as one of the permissible objectives.[209] While there is no formal guidance available as to the interpretation of this clause in Indian BITs, Indian domestic practice sheds light on India's understanding of the term. One possible reading of the Indian "essential security" clause is as a reference to the "security of the state," language which has received considerable treatment from Indian domestic courts. In *Union of India v. Tulsiram Patel*, the

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203. BODO PIEROTH, BERNHARD SCHLINK & MICHAEL KNIESEL, POLIZEI– UND ORDNUNGSRECHT [POLICE LAW] 123 (2d ed. 2004).

204. Brokdorf Judgment, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 14, 1985, 69 BVerfGE 315, 352 (F.R.G.), *translated at* http://www.ucl.ac.uk/laws/global_law/german-cases/cases_bverg.shtml?14may1985 (visited Nov. 16, 2007).

205. *See* Erhard Denninger, *Polizeiaufgaben [Police Functions]*, *in* HANDBUCH DES POLIZEIRECHTS [HANDBOOK OF POLICE LAW] 205–211 (Hans Lisken & Erhard Denninger eds., 3d ed. 2001); PIEROTH, SCHLINK & KNIESEL, *supra* note 203, at 124.

206. PIEROTH, SCHLINK & KNIESEL, *supra* note 203, at 127–32.

207. *Id.* at 132–135 (noting that threats to legal rights by natural phenomena, such as avalanches, and by individuals themselves, as in suicide, may affect the individual rights without implicating the integrity of the legal order).

208. *Id.* at 135–137.

209. *See, e.g.*, Egypt-India BIT, *supra* note 180, art. 11(2) ("Notwithstanding paragraph (1) of this Article nothing in this Agreement precludes the host Contracting Party from taking action for the protection of its essential, secutrity [sic] interests or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non-discriminatory basis.").

Indian Supreme Court drew a distinction between three categories: "The expressions 'law and order,' 'public order,' and 'security of the State' have been used in different Acts. Situations which affect 'public order' are graver than those which affect 'law and order'. Thus those situations which affect 'security of the State' are gravest."[210] Similarly, in the case of *Ram Manohar Lohia v. State of Bihar,* Supreme Court Justice Hidayatullah observed:

> One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of state. It is then easy to see that an act may affect law and order but not public order just as an act might affect public order but not security of state.[211]

Treating "essential security" in Indian BITs as equivalent to "security of the state" would set a rather high threshold, allowing the term to be triggered only in the most grave of situations.

The most recent interpretations of the "essential security" permissible objective arise in the context of the aforementioned ICSID arbitrations against Argentina, and confirm a broad reading of "essential security," at least as intended in the U.S.-Argentina BIT. Despite arguments by claimants in all of these cases that the NPM clause of the U.S.-Argentina BIT does not apply to situations of economic emergency, the tribunals interpreted the essential security and public order provisions broadly to encompass economic emergencies.[212] The *LG&E* tribunal found Article XI applicable to an economic emergency, observing:

> To 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. When a State's economic foundation is under siege, the severity of the problem can equal that of any military invasion.[213]

Though the *LG&E* Tribunal appears more willing to accept an economic emergency as grounds for invoking the NPM clause, even the CMS Tribunal noted that "there is nothing in the context of customary interna-

210. Union of India and Another v. Tulsiram Patel and Others, A.I.R. 1985 S.C. 1416 (India).

211. Ram Manohar Lohia v. State of Bihar, A.I.R. 1966 S.C. 740 (1965) (India).

212. LG&E Decision on Liability, *supra* note 30, ¶ 203; CMS Award, *supra* note 16, ¶ 340; Enron Award, *supra* note 29, ¶ 332.

213. LG&E Decision on Liability, *supra* note 30, ¶ 238.

tional law or the object and purpose of the treaty that could on its own exclude major economic crises from the scope of Article XI."[214] This broad interpretation appears to conform both to the text of Article XI of the U.S.-Argentina BIT and the intent of both states.

b. International Peace and Security

The permissible objective of "international peace and security" appears frequently in NPM clauses and has a relatively uncontested interpretation. For example, the 2004 Canadian Model BIT provides: "[n]othing in this agreement shall be construed to prevent any Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."[215] This provision is generally understood to allow states to take actions mandated by the UN Security Council in furtherance of its "primary responsibility for the maintenance of international peace and security."[216] As UN member states are required to "accept and carry out the decisions of the Security Council," the provision ensures that states parties will not be held in breach of their obligations under a BIT if they are acting in furtherance of a Security Council resolution.[217] In so doing, this permissible objective shifts the risks of state action in pursuance of UN mandates from states to investors.

There has been relative agreement as to the interpretation of this aspect of non-precluded measures provisions. The Organization for Economic Co-operation and Development (OECD) Draft Multilateral Agreement on Investment is instructive, though the drafting project was ultimately unsuccessful.[218] According to the commentaries to a similar clause in that instrument, the negotiating parties understood the language to "refer specifically to obligations under the UN Charter."[219] The

214. CMS Award, *supra* note 16, ¶ 359.

215. Canada 2004 Model FEPA, *supra* note 85, art. 10(4). The NPM provision of 2004 U.S. Model BIT, for example, provides that "nothing in this treaty shall preclude the application by either Party of measures necessary for…the fulfillment of its obligations with respect to the maintenance or restoration of international peace and security." 2004 U.S. Model BIT, *supra* note 76, art. 18.

216. U.N. Charter art. 24.

217. *Id.* art. 25.

218. Multilateral Agreement on Investment, Draft Consolidated Text, OECD Doc. DAFFE/MAI(98)7/REV1 (Apr. 22, 1998), Pt. VI(2)(c) [hereinafter MAI Draft Text], *available at* http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf.

219. *See* OECD Multilateral Agreement on Investment, Commentary to the Consolidated Text, 41, OECD Doc. DAFFE/MAI(98)8/REV1 (Apr. 22, 1998) [hereinafter MAI Draft Text Commentary], *available at* http://www1.oecd.org/daf/mai/pdf/ng/ng988r1e.pdf).

United States has confirmed that this reflects its view of the provision. According to the Letter of Submittal attached to the U.S.-Bahrain BIT, "[i]nternational obligations with respect to maintenance or restoration of peace or security would include, for example, obligations arising out of Chapter VII of the United Nations Charter."[220] Some U.S. BITs have clarified the meaning of this clause in their protocols. The Protocol to the U.S.-Argentina BIT, for example, provides: "[t]he Parties understand that, with respect to rights reserved in Article XI of the Treaty, 'obligations with respect to the maintenance or restoration of international peace or security' means obligations under the Charter of the United Nations."[221]

While this permissible objective is generally understood to refer to actions taken in pursuance of the UN Charter, some states might seek to invoke it with respect to actions mandated by regional organizations, rather than by the Security Council.[222] To the degree regional action has been taken pursuant to Chapter VIII of the UN Charter and considered necessary for the "preservation or restoration of international peace and security," the NPM provision would presumably be applicable. Situations in which the regional action was not taken in pursuance of Chapter VIII of the UN Charter, but solely under the mandate of the regional organization, are less clear.

A final context in which this objective might be raised by a state is with respect to the preservation of international peace and security on a unilateral basis or through a "coalition of the willing."[223] Such an action would not appear to fall within the general consensus as to the meaning of this permissible objective, though an arbitral tribunal would have to consider whether the states parties had intended a special meaning[224] for the term that would include such unilateral actions.

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220. Letter of Submittal of the U.S.-Bahrain BIT from Sec'y of State Albright to President Clinton, *annexed to* U.S.-Bahrain BIT, *supra* note 148.

221. U.S.-Argentina BIT, *supra* note 17, Protocol, ¶ 6.

222. An obvious example of this is the NATO intervention in Kosovo. That action was not approved by the Security Council, but was still aimed at the preservation of international peace and security. In the negotiations for the OECD Multilateral Agreement on Investment, some parties suggested adding a provision that measures taken in pursuant to "regional security arrangements" are permitted under the general exceptions clause, although no such text was added as of the May 1998 drafting session. MAI Draft Text Commentary, *supra* note 219, at 42.

223. If the state's own essential security interests were implicated, the action would, presumably, be covered by the essential security objective of most NPM clauses.

224. *Cf.* Vienna Convention, *supra* note 65, art. 31(4).

c. Public Order

Together with security, "public order" is the permissible objective most frequently included in NPM clauses. Yet, its meaning is subject to contestation due to its different usages in various domestic legal systems and traditions. Notably, the common and civil law systems have very different understandings of the phrase.[225] Though the interpretation of the public order term cannot simply be imported from domestic law,[226] the meaning of the term in domestic law may be relevant as indicative of either a special meaning assigned by the parties or as evidence of the

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225. *See* Ignaz Seidl-Hohenveldern, *Ordre Public (Public Order)*, *in* III ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 788, 789 (Rudolf Bernhardt ed., 1997) (noting that parties to an international agreement providing for such an exception "may have different conceptions of *ordre public*"). In the Anglo–American legal tradition, the issue of "public order" arises primarily in the context of riots on the streets or the application of the criminal law. *See, e.g*., Edmund H. Bennett, *Public Meetings and Public Order: The United States*, 4 LAW Q. REV. 237 (1888); George H. Dession, *Sanction, Law and Public Order*, 1 VAND. L. REV. 8 (1947–1948) (defining public order as "that measure of peace and observance of basic value patterns of a culture upon which the fruitful pursuit of legitimate interests in the given society depends" and discussing it in the context of the methods of the criminal law as the "ultimate sanctions for the achievement and preservation of public order"); George H. Dession, *The Techniques of Public Order: Evolving Concepts of Criminal Law*, 5 BUFF. L. REV. 22 (1955–1956); W. Ivor Jennings, *Public Order*, 8 POL. Q. 7, 11 (1937) (noting in the context of the 1936 U.K. Public Order Act that, in England, "the problem of public order...becomes simply a problem of preventing riot"). By contrast, the civil law concept of *ordre public,* originating in France with the Code Napoleon, is broader in scope and generally understood to encompass a country's basic value system as a whole, expressed through all of its domestic legislation and regulations, not just its criminal laws. *See, e.g.,* Seidl–Hohenveldern, *supra*, at 788; Günther Beitzke, *Ordre Public*, *in* II WÖRTERBUCH DES VÖLKERRECHTS [DICTIONARY OF INTERNATIONAL LAW] 665 (Hans–Jürgen Schlochauer ed., 1961); Wyndham A. Bewes, *Public Order (Ordre Public)*, 37 LAW Q. REV. 315, 318 (1921). The concept's principal area of application has been in the field of the conflict of laws, or private international law, where it performs the function of a "defense shield" against foreign legal acts that are deemed to contravene the national *ordre public*, with the consequence that such acts will not be given domestic effect. For a pertinent example, see Article 6 of the Introductory Law to the German Civil Code (*EGBGB*), which provides under the heading "*Öffentliche Ordnung* (*ordre public*)": "A legal norm of another country is not to be applied if its application leads to a result that is manifestly incompatible with essential principles of the German legal order. In particular, it is not to be applied if its application is manifestly incompatible with [constitutional] basic rights" (authors' translation). In the Anglo–American common law tradition, an essentially equivalent functional role is played by the concept of "public policy." *See* Bewes, *supra*, at 315; Max Habicht, *The Application of Soviet Laws and the Exception of Public Order*, 21 AM. J. INT'L L. 238, 238 n.1 (1927). Within the French *code civil*, a distinction exists between *ordre public interne*, which refers to those rules of domestic law that private contracting parties cannot set aside, and *ordre public international*, which is the concept applicable in the context of the conflict of laws. *See* Seidl-Hohenveldern, *supra,* at 788.

226. *But see* Seidl-Hohenveldern, *supra* note 225, at 789 (stating that due to the different *ordre public* conceptions prevailing among the parties to an agreement, "the material content of the obligations assumed…may vary from State to State," which suggests a domestically-informed interpretation).

broader context in which the treaty operates. That such conceptual differences may matter in investment arbitration has become evident in the recent *Enron* arbitration before ICSID, where the claimant's essentially common-law-informed interpretation of public order clashed with Argentina's civil law notion of "*orden público.*"[227]

Interpretations of the "public order" objective in international contexts similarly suggest a range of possible interpretations of the term. The OECD Draft Convention on the Protection of Foreign Property[228] contained a "public order" type exception, providing in Article 6 that derogations from its substantive provisions would be permissible if a state party was, *inter alia,* "involved in war, hostilities or other grave national emergency due to *force majeure* or provoked by unforeseen circumstances or threatening its essential security interests."[229] The commentary provided a few illustrative examples that emphasize security-related aspects of public order, such as "civil wars, riots, or other widespread civil disturbances" as well as natural disasters, including "storm damage, earthquakes, volcanic eruptions etc.…with effects on a national scale."[230] The commentary suggests by way of reference[231] that the exception was apparently intended to be reflective of the necessity defense under customary law, but some of the examples appear to go far beyond the normal applications of the customary defense.

The ultimately unsuccessful Multilateral Agreement on Investment (MAI)[232] also included a "public order" exception.[233] In a footnote, the draft explained that "[t]he public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society."[234] There remained disagreement

227. *See* Enron Award, *supra* note 29, ¶¶ 324, 338. The concept of "orden público" has been part of Argentine law since at least 1869 when it was included in Article 14 of the country's Civil Code. *See* Habicht, *supra* note 225, at 241.

228. O.E.C.D. Draft Convention on the Protection of Foreign Property, Text with Notes and Comments, 7 I.L.M. 118 (1968).

229. *Id.* at 130 (emphasis added).

230. *Id.* at 131.

231. The commentary refers to a remark made by Judge Anzilotti in the Oscar Chinn case, according to which "[n]ecessity may excuse the non–observation of international obligations…the plea of necessity…by definition implies the impossibility of proceeding by any other method than the one contrary to law." *Id.* at 132 (citing Oscar Chin Case*,* P.C.I.J. (ser. A/B) No. 63, 114).

232. MAI Draft Text, *supra* note 218.

233. For background and discussion, see Alexander Böhmer, *The Struggle for a Multilateral Agreement on Investment: An Assessment of the Negotiation Process in the OECD*, 41 GER. Y.B. INT'L L. 267 (1998).

234. MAI Draft Text, *supra* note 218, at 77 n.2.

among negotiating states, however, on what would qualify as a "fundamental interest." There appears to have been consensus that the application of a state's criminal laws, anti-terrorist measures, and money-laundering regulations[235] would fall under the "public order" heading, but there was no agreement as to how much broader the exception should be.[236]

In the U.S. BIT program, the "public order" objective has been understood as covering "measures taken pursuant to a Party's police powers to ensure public health and safety."[237] The United States has sought to differentiate the essential security and public order components of its BIT agreements.[238] With regard to the essential security objective, the United States' understanding has been that "essential security interests would [generally] include security-related actions taken in time of war or national emergency."[239] The differentiating characteristic between public order and national security, then, appears to lie in a combination of severity and scale; whereas the "public order" objective covers essentially law-enforcement related activities during peace time, "essential security interests" are implicated when the public order itself may be under severe stress due to armed hostilities or acute crises.

German practice has also developed a distinct meaning for the "public order" element of NPM clauses. As pointed out above, together with "public security," "public order" is one of the two categories defining the reach of the state's police powers. Whereas "public security" includes the integrity of the legal order in the form of all *written* laws and regulations, "public order" refers to the complementary[240] category of all *unwritten* social, and thus extra-legal, norms that are nonetheless deemed necessary for a peaceful and harmonious coexistence of the

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235. *See* MAI Draft Text Commentary, *supra* note 219, at 41.

236. At least one delegation made the interpretation conditional on the MAI's substantive scope, arguing that a broader understanding of "public order" would need to be considered if the MAI were not only to guarantee a national treatment standard, but also market access rights. *Id*. By contrast, another delegation suggested that the "public order" concept should exclude "economic purposes" and that measures taken in pursuit of it needed to be subject to the principle of proportionality. *Id*.

237. President's Message to the Senate Transmitting the Mongolia-United States Bilateral Investment Treaty with Annex and Protocol, Letter of Submittal by Sec'y of State Strobe Talbot, (June 16, 1995) [hereinafter Letter of Submittal]. For the text of the exception, see Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Mong., art. X, Oct. 6, 1994, S. TREATY DOC. No. 104-10 (1995) [hereinafter U.S.-Mong. BIT].

238. U.S.-Mong. BIT, *supra* note 237, art. X.

239. *See id*. art. XII.

240. *See* WÖRTERBUCH DER POLIZEI [DICTIONARY OF POLICE TERMINOLOGY] 1115 (*s.v. "Öffentliche Ordnung und Sicherheit"*) (Martin H. W. Möllers ed., 2001).

community.[241] The concept of "public order" thus defined has been criticized for its lack of objectively identifiable standards, susceptibility to ideological abuse, and disconnect from the requirements of democracy and the rule of law.[242] Nonetheless, it continues to be accepted by German courts as a residual legal category.[243] Because most areas of life today are regulated in some way by positive law, the practical relevance of the "public order" concept has receded.[244] Yet, the use of the term in Germany's NPM clauses suggests a broad exception to the substantive protections of a BIT and a considerable risk-shifting from states to investors in exceptional situations that implicate public order.

This brief juxtaposition shows that the terms used to identify permissible objectives, and particularly the "public order" objective, cannot simply be assumed to have identical meanings, even if they are lexically identical.[245] Such concepts tend to be deeply rooted in and infused with meaning by predominantly domestic legal and political practices. While directly importing domestic meanings[246] without explicit reference to

241. As the Federal Constitutional Court had noted in the Brokdorf case, "'[p]ublic order' refers to the entirety of unwritten rules the compliance with which, according to prevailing social and ethical views, is deemed indispensable for orderly human cohabitation within a particular geographic region." Brokdorf Judgment, *supra* note 204, at 352 (author's translation). This definition traces back to jurisprudence by the Prussian Higher Administrative Court. *See* Women's Boxing Competitions, 91 PrOVGE [DECISIONS OF THE PRUSSIAN HIGHER ADMINISTRATIVE COURT] 139, 140 (Nov. 9, 1933).

242. *See* PIEROTH, SCHLINK & KNIESEL, *supra* note 203, at 138–40.

243. *Id*. at 141.

244. *See* Denninger, *supra* note 205, at 211–14. An example in which the Federal Constitutional Court relied on the "public order" concept concerned the prohibition of a rally by right–wing extremists on Holocaust Memorial Day, with the Court arguing that such a rally would violate "fundamental social or ethical views" that infused that day with broadly shared symbolic value and meaning. *See id*. at 212 n.21 Another example is the prohibition of peep shows which had been justified on the basis of public order considerations. *See* Bundesverwaltungsgericht [Federal Administrative Court], Dec. 15, 1981, 64 BVERWGE 274.

245. Indian practice offers yet another definition of public order where it has been defined as

> the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquility…. [Such disturbances] affect the even tempo of life and public order is jeopardized because the repercussions of the act embrace large sections of the community and incite them to make further breaches of the law and order.

Arun Ghosh v. State of West Bengal, A.I.R. 1970 S.C. 1228, 1229–30 (India). Subsequent judicial interpretations and applications of "public order" have been equally broad. *See* Derek P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India*, 22 MICH. J. INT'L L. 311, 330–31 (2001).

246. *See* CHRISTOPH VON REYHER, DIE BILATERALEN KONZEPTE DER BUNDESREPUBLIK DEUTSCHLAND UND DER VEREINIGTEN STAATEN VON AMERIKA SOWIE DEREN BEDEUTUNG FÜR DIE ENTWICKLUNG DES SCHUTZES VON AUSLANDSINVESTITIONEN [THE BILATERAL CONCEPTS OF THE FEDERAL REPUBLIC OF GERMANY AND OF THE UNITED STATES OF AMERICA AND THEIR

such a procedure in the treaty instrument[247] may be inappropriate, international dispute settlers faced with incongruent meanings across the treaty's authentic texts will have to resort to the applicable rules of treaty interpretation dealing with plurilingual agreements[248] in order to establish the meaning that is to prevail at the international level.[249] In so doing, they may well need to consider, as an auxiliary means, the state parties' domestic understandings of the "public order" term in question.

d. Public Health

The public health term of NPM clauses raises perhaps the fewest interpretative ambiguities and clearly shifts the risk of state action to investors in the case of exceptional actions taken to protect public health. What distinguishes public health from most of the other permissible objectives is that the existence of threats is far more susceptible to objective scientific proof than, for example, the more subjective threats to a nation's security. As a consequence, the major question is what scientific standards have to be met in order for a phenomenon to qualify as a threat to public health sufficient to trigger an NPM. There may be some easy cases, such as an outbreak of human-to-human transmitted bird flu. Other cases, for example, those involving assessments of whether certain products are sufficiently carcinogenic, may be less clear.[250]

The case law of the WTO/GATT regime may suggest a possible emerging international consensus on the level of threat necessary to justify public health actions. Article XX(b) of the GATT permits states,

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SIGNIFICANCE FOR THE DEVELOPMENT OF THE PROTECTION OF FOREIGN DIRECT INVESTMENTS] 136 (2005) (arguing for the direct reliance on domestic meanings); *see also* Seidl-Hohenveldern, *supra* note 225.

247. Peru, for example, has explicitly provided for such an approach. *See, e.g.*, Peru-Paraguay BIT, *supra* note 38, art. 11(2) ("[t]oda expresión que no esté definida en el presente Convenio tendrá el sentido utilizado en la legislación vigente en cada Parte Contratante").

248. *See* Vienna Convention, *supra* note 65, art. 33.

249. *See generally* Dinah Shelton, *Reconcilable Differences? The Interpretation of Multilingual Treaties*, 20 HASTINGS INT'L & COMP. L. REV. 611 (1997).

250. In the asbestos cases before the World Trade Organization, for example, there was agreement among the parties that asbestos as such was toxic, but Canada and the EC differed with respect to the question of whether a specific variant of asbestos—chrysotile asbestos fibres—posed a health risk even under conditions of "controlled use" and thus needed to be banned as well. *See* Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos–Containing Products*, ¶¶ 16, 27, WT/DS135/AB/R (Mar. 12, 2001). While the panel had upheld the ban on the basis of the public health exception in Art. XX (b), *see* Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos–Containing Products*, ¶¶ 222–23, WT/DS135/R (Sept. 18, 2000), the Appellate Body did not reach that exception by deciding that there was no breach of the relevant Article III(4) of GATT to begin with.

subject to the requirements of the chapeau of Article XX,[251] to adopt and enforce measures otherwise inconsistent with the GATT's substantive provisions if "necessary to protect human, animal or plant life or health."[252] The standards for the use of such measures have been elaborated to some extent in the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement).[253] Article 2(2) of the SPS Agreement contains the basic standards clause which stipulates that "[m]embers shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5."[254] Article 3(1) obligates WTO members to base such measures on "international standards, guidelines or recommendations," where available. If they do so, their measures are presumed to be in accordance with the GATT. Higher standards than those found internationally are permissible if they are scientifically justified on the basis of an appropriate "risk assessment" undertaken pursuant to Article 5.[255]

In several cases brought before it, the WTO Dispute Settlement Body (DSB) addressed the specific requirements flowing from the SPS Agreement and made three important determinations[256] relevant to the

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251. The chapeau of Article XX provides that measures undertaken in pursuit of the exceptions therein are "[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." GATT, *supra* note 174, art. XX.

252. *Id*. art. XX(b).

253. *See* Agreement on the Application of Sanitary and Phytosanitary Measures, pmbl., Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493 [hereinafter SPS Agreement], *available at* http://www.wto.org/English/tratop_e/sps_e/spsagr_e.htm (stating that the WTO members desire "to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)"); *see also id.* art. 2(4) ("Sanitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b).").

254. *Id*. art. 2(2). Article 5(7) permits provisional measures under the "precautionary principle" in cases in which sufficient scientific evidence is lacking.

255. *Id*. art. 3(3).

256. For an article-by-article analysis of the SPS Agreement's provisions as interpreted by the WTO Dispute Settlement Body, see WTO Analytical Index: Dispute Settlement Understanding, Agreement on Sanitary and Phytosanitary Measures, Apr. 15 1994, Marrakesh Agreement Establishing the World Trade Organization, *available at* http://www.wto.org/english/res_e/booksp_e/analytic_index_e/sps_e.htm; *see also* Joost Pauwelyn, *The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First*

interpretation of NPM clauses. First, the Appellate Body affirmed that the appropriate standard of review at the dispute settlement stage required an "objective assessment of the facts" in accordance with Article 11 of the WTO Dispute Settlement Understanding, rather than complete deference to determinations made by the state invoking its right to adopt SPS measures.[257] Second, as regards the requirement that such measures must not be adopted without sufficient scientific evidence, the Appellate Body required that "there be a rational or objective relationship between the SPS measure and the scientific evidence."[258] Third, such "risk assessments" and the SPS measures adopted based on them need not necessarily reflect majority views within the relevant scientific community, but can be based on minority views coming from respected sources, as long as they are reasonable and the rational link between risk assessment and measures taken is preserved.[259]

The standards developed by the WTO—that measures be based on scientific evidence (or appropriate risk assessments) and that there be a rational link between that evidence (or risk assessment) and the measure claimed to have been adopted on the basis of it—seems to reflect both the ordinary understanding of public health and the likely bargain states would have struck between the protection of investment and the protection of the health of their citizens. The WTO standard suggests that, where states take measures to protect public health that are rationally related to respected scientific evidence, the risks and costs of such actions under a BIT shift from the state to investors.

Three SPS Disputes: EC-Hormones, Australia-Salmon and Japan-Varietals, 2 J. INT'L ECON. L. 641 (1999).

257. *See* Appellate Body Report, *European Communities–Measures Concerning Meat and Meat Products (Hormones)*, ¶¶ 116–19, WT/DS26/AB/R & WT/DS48/AB/R (Jan. 16, 1998) [hereinafter EC Hormones Case].

258. Appellate Body Report, *Japan-Measures Affecting Agricultural Products*, ¶ 84, WT/DS76/AB/R (Feb. 22, 1999) ("Whether there is a rational relationship between an SPS measure and the scientific evidence is to be determined on a case-by-case basis and will depend upon the particular circumstances of the case, including the characteristics of the measure at issue and the quality and quantity of the scientific evidence."). This "rational relationship" requirement also applies to measures adopted on the basis of "risk assessments" conducted pursuant to Article 5 of the SPS Agreement. *See* EC Hormones Case, *supra* note 257, ¶ 193.

259. *See* EC Hormones Case, *supra* note 257, ¶ 194; *see also* Appellate Body Report, *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 178, WT/DS135/AB/R (Mar. 12, 2001).

e. Public Morality

In contrast with the public health objective, public morality is a highly relational concept.[260] Public morality derives meaning from the predominant moral values shared by (usually) the majority in a given polity. As a legal concept it is aimed at regulating the conduct of members of that polity on the basis that they are deemed morally wrong.[261] The inherent relativity of the "public morality" term in a BIT may necessitate granting states broad freedom of action in pursuit of this objective in order to give effect to the bargain behind BITs containing this term. Though some political and social communities may have common understandings of public morality, even within the comparatively homogenous European Union, significant divides have emerged. It would clearly do injustice to the concept if a tribunal were to try to squeeze the public morality notions prevailing in, say, Germany and Pakistan, into a uniform meaning of the term in interpreting the relevant NPM exception in the Germany-Pakistan BIT of 1959.[262]

In the European context, both the ECtHR and the European Court of Justice (ECJ) have addressed questions of public morality. Their general approach has been to give considerable deference to determinations by national authorities that certain measures were necessary to protect a community's moral values. This approach was taken by the ECtHR in the *Handyside* judgment, which concerned permissible restrictions on freedom of expression based on considerations of morality under the ECHR:[263]

> [I]t is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State au-

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260. *See* Jeremy C. Marwell, *Trade and Morality: The WTO Public Morals Exception After Gambling*, 81 N.Y.U. L. REV. 802, 815 (2006) (noting that "[w]hat one society defines as public morals may have little relevance for another, at least outside a certain core of religious or cultural traditions").

261. *See* Christopher Wolfe, *Public Morality and the Modern Supreme Court*, 45 AM. J. JURISPRUDENCE 65, 65–66 (2000); *see also* Francesco Francioni, *International Law as a Common Language for National Courts*, 36 TEX. INT'L L.J. 587, 595–96 (2001) (arguing for the existence of an independent international concept of "public morality").

262. Germany-Pakistan BIT, *supra* note 24, Protocol, ¶ 2.

263. ECHR, *supra* note 34, art. 10(2).

> thorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them.[264]

The ECJ has adopted a similar line of reasoning, affirming that it was first and foremost a prerogative of each member state to fill out, within its jurisdiction, the meaning of "public morality."[265] In another case dealing with the question of whether legal abortions could be considered a "service" for purposes of EC law (and thus be regulated by it), the ECJ noted that it was in no position to replace a member state's moral judgment with its own,[266] and affirmed that they could legitimately restrict the procedure.[267]

The GATT also contains a "public morality" exception,[268] but cases involving the exception have only arisen recently[269] and are based on a similarly worded exception in the General Agreement on Trade in Services (GATS).[270] Conceiving of "public morality" as comprising "standards of right and wrong conduct maintained by or on behalf of a community or nation,"[271] the panel found the prohibition of the remote

264. Handyside, *supra* note 168, at 22 (¶ 48); *see also* Müller and Others v. Switzerland, 133 Eur. Ct. H.R. (ser. A) 22 (¶ 35) (1988).

265. *See* Case 34/79, Regina v. Henn and Darby, 1979 E.C.R. 3795, 3813; Case 121/85, Conegate Ltd. v. H. M. Customs and Excise, 1986 E.C.R. 1007, ¶ 14. For discussion of *Henn and Darby*, see Joseph H. H. Weiler, *Europornography—First Reference of the House of Lords to the European Court of Justice*, 44 MODERN L. REV. 91 (1981).

266. *See* Case C-159/90, Society for the Protection of Unborn Children Ireland Ltd. v. Stephen Grogan, 1991 E.C.R. I-4685, I-4739.

267. *Id*. ¶ 21. The case is discussed in David O'Connor, Note, *Limiting "Public Morality" Exceptions to Free Movement in Europe: Ireland's Role in a Changing European Union*, 22 BROOK. J. INT'L L. 695 (1997).

268. *See* GATT, *supra* note 174, art. XX(a). For general treatments, see CHRISTOPH FEDDERSEN, DER *ORDRE PUBLIC* IN DER WTO: AUSLEGUNG UND BEDEUTUNG DES ART. XX(A) GATT IM RAHMEN DER WTO-STREITBEILEGUNG [ORDRE PUBLIC AT THE WTO: INTERPRETATION AND SIGNIFICANCE OF ART. XX(A) GATT IN THE CONTEXT OF WTO DISPUTE SETTLEMENT] (2002); Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L L. 689 (1998).

269. Morality concerns had been addressed in pleadings in at least two cases under the old GATT. *See* Panel Report, *United States-Restrictions on the Import of Tuna*, 30 I.L.M. 1598, 1611 (Australia arguing that art. XX(a) could justify measures against the inhuman treatment of animals and that "a panel could not judge the morals of the party taking the measure"); Panel Report, *United States-Restrictions on the Import of Tuna*, 33 I.L.M. 842, 870 (the Netherlands and the EEC commenting in the context of art. XX(a) that "public morality [was] an issue which was normally strongly determined by specific religious and cultural traditions"). Neither of the two reports was officially adopted.

270. General Agreement on Trade in Services, Annex 1B, art. XIV(a), Apr. 15, 1994, 1869 U.N.T.S. 183, 33 I.L.M. 1167.

271. Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling*

provision of gambling services—the service at stake in the dispute—to generally fall within the public morality objective,[272] a conclusion affirmed by the Appellate Body.[273] Both the Panel and Appellate Body ultimately decided against the United States on other grounds, but they generally accepted the clearly stated domestic determinations that a measure served the purpose of protecting public morals.

The collective approach of the ECtHR, the ECJ, and the WTO may represent an emerging standard for the interpretation of public morality, namely, that a state invoking the public morality exception would need to adduce evidence that the adopted measures reflect or respond to prevailing moral views within its own polity and indeed are intended to protect them. Applying this standard to the public morality objective in NPM clauses would preserve for states considerable flexibility to respond to exceptional situations that implicate public morality. Such an approach is likely the only way to reconcile the competing conceptions of public morals. The deferential interpretation accorded to the term likewise indicates a considerable risk transfer from states to investors under a BIT containing this term.

The inherently relative definitions of terms such as public order or public morals also raise the broader question as to whether there can ever be a uniform international jurisprudence as to the meaning of culturally relative terms. It is, of course, always possible for states to provide precise meanings for such terms through definitions in a treaty. Where they do not do so, however, ascribing one state's or one culture's understanding of such terms to another would be inappropriate. The result may well be asymmetric treaty obligations in that the two states party to a BIT may have very different understandings of, for example, a public morality provision. Yet, in such a case, both states have agreed that public order or public morality can justify actions that would otherwise breach the treaty and have at least implicitly accepted that its treaty partner may understand public order differently.

f. Situations of Extreme Emergency

Many Indian BITs include a permissible objective of actions taken "in circumstances of extreme emergency."[274] Assessing the meaning of

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and Betting Services, ¶ 6.465, WT/DS285/R (Nov. 10, 2004).

272. *Id*. ¶ 6.474.

273. *See* Appellate Body Report, *United States—Measures Affecting the Cross–Border Supply of Gambling and Betting Services*, ¶ 299, WT/DS285/AB/R (Apr. 7, 2005) .

274. *See* Agreement for the Promotion and Protection of Investments, India-Switz., art. 11(2),

an extreme emergency in the practice of India and its treaty partners is difficult as there is no case law or scholarly commentary from India on the clause, nor are there available drafting materials from the Indian government. In one case, the Indian Supreme Court considered the interpretation of Article 12 of the 1965 Convention on Transit Trade of Land-locked States,[275] which also provides for exceptions in times of emergency.[276] While the Court noted that Article 12 provides some leeway to states, it did not offer any clear standards for determining whether a particular situation constitutes an "extreme emergency."

On its face, the clause appears to be relatively broad in scope—covering all kinds of emergencies, but would presumably have a relatively high threshold for invocation—the emergency must be extreme. Some evidence from Indian domestic practice provides insight into the likely intent of Indian treaty drafters. One potential reading of the clause based on Indian practice would construe it as a reference to a formal state of emergency.[277] Under the Indian Constitution, a state of emergency refers to a period of governance under an altered constitutional structure that can be proclaimed by the president in the face of grave threats to the nation from internal and external sources or from financial situations of crisis.[278]

Apr. 4, 1997 [hereinafter India-Switzerland BIT], *available at* http://www.unctad.org/sections/dite/iia/docs/bits/switzerland_india.pdf.

275. *See* Gramophone Co. of India Ltd. v. Birendra Bahadur Pandey and Ors, A.I.R. 1984 S.C. 667 (India).

276. Convention on Transit Trade of Land-locked States art. 12, June 9, 1967, 597 U.N.T.S. 8641 ("Exceptions in case of emergency: The measures of a general or particular character which a Contracting State is obliged to take in case of an emergency endangering its political existence or its safety may, in exceptional cases and for as short a period as possible, involve a deviation from the provisions of this Convention on the understanding that the principle of freedom of transit shall be observed to the utmost possible extent during such a period.").

277. On states of emergency in Indian constitutional law, see SHIVRAJ B. NAKADE, EMERGENCY IN INDIAN CONSTITUTION (1990).

278. *See* INDIA CONST. art. 352(1) ("If the President is satisfied that a grave emergency exists whereby the security of India or any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion, he may, by Proclamation, make a declaration to that effect in respect of the whole of India or of such part of the territory thereof...."). India has declared such a state of emergency on at least three occasions. Between October 26, 1962, and January 10, 1968, during the India-China war, the security of India was determined to be threatened by external aggression and a state of emergency declared. A second state of emergency was declared in December 1971 during the India-Pakistan war, and a third state of emergency was declared between June 1975 and March 1977 based on threats from internal disturbances. IMTIAZ OMAR, EMERGENCY POWERS AND THE COURTS OF INDIA AND PAKISTAN 7 (2002). With respect to financial crises, see INDIA CONST. art. 360 (providing for the declaration of emergency in financial crises).

Whether the extreme emergency clause in Indian BITs applies only to states of emergency or some broader set of circumstances is unclear. Indian law also provides for a number of lesser forms of emergency. For example, Article 356 of the Indian Constitution allows the president to assume powers generally reserved to states in situations of emergency where there has been a failure of a state government.[279] This approach is also suggested by the findings of a government commission established to examine federalism in India.[280] The commission found that there has been "no uniformity of approach" to the declaration of an emergency but that such provisions were particularly important in India due to "multitudinous people, with possibly divided loyalties."[281] In a recent case, the Indian Supreme Court has considered the Commission's report and noted that the "[t]he common thread in all the emergency provisions is that the resort to such provision has to be in exceptional circumstances when there be the real and grave situation calling for the drastic action."[282] This standard—based on exceptional circumstances and a grave threat—though originally developed in relation to Indian Constitutional practice, appears to be the best available articulation of the minimum threshold for invoking the extreme emergency NPM provision in Indian BIT agreements.

VI. REVIEWING THE INVOCATION OF NPM PROVISIONS: THE SCOPE OF DEFERENCE AND THE MARGIN OF APPRECIATION

Ultimately, the crucial question underlying the preceding discussions of the nexus requirement and the various permissible objectives of BITs is how much deference ought an arbitral tribunal pay to the respondent state's initial determination that a particular measure at issue falls within the NPM clause? Generally, NPM clauses will only become relevant when a state decides to invoke such a clause in response to asserted or potential treaty violations. The question, then, is whether that initial determination is subject to full substantive and conclusive review by arbitral tribunals charged with settling a dispute, or if assertions by national

279. INDIA CONST. art. 356. For a judicial interpretation of the article, see S. R. Bommai v. Union of India, (1994) 3 S.C.C. 1.

280. *See* GOV'T OF INDIA, COMM'N ON CENTRE-STATE RELATIONS, REPORT (1987–88), §§ 4.2, 4.3 (finding that emergency clauses should only be invoked in exceptional circumstances when there is a real and grave situation calling for drastic action).

281. *Id*. at ch. VII.

282. Rameshwar Prasad and Ors. v. Union of India and Anr. (Jan. 24, 2006), 2005 [Sup. Ct. India] 20.

authorities that a state action was covered by an NPM clause deserve some degree of deference, with the result that tribunals will undertake something less than full substantive review?

This is, in fact, a specific application of a more general question of international law, namely, the international relevance of a party's domestic determinations. The basic rule, of course, is that domestic determinations based on internal law that an act is not wrongful or otherwise excused cannot be adduced as proper justification for the nonperformance of international legal obligations.[283] Should such domestic determinations of the applicability of an NPM clause therefore simply be ignored or might they have some—even if limited—relevance for a tribunal's interpretation? Such relevance must indeed be affirmed where the treaty instrument in question itself provides for the relevance of domestic determinations, which is the case with many NPM clauses. As the ILC has pointed out, the basic rule of the irrelevance of domestic determinations may be modified by way of relevant primary rules,[284] and states can and do provide in their treaties for different levels of deference to their own domestic determinations.[285] Many BIT NPM clauses do accord to states greater deference for their own domestic determinations than would ordinarily be available.

In this section, we make two main arguments. First, we argue that the absence of an explicit specification of the level of deference to be accorded to an invocation of a BIT's NPM clause does not mean that every decision taken by national authorities in pursuit of one or more permissible objectives should be second-guessed by an arbitral tribunal, with the consequence that the tribunal would substitute its own view as to whether the actions in question further a permissible objective and meet the nexus requirements. Rather, certain treaty clauses and terms imply through their textual formulation some deference to state determinations, so that it is appropriate, both as a matter of treaty interpretation and judicial policy, to read NPM clauses as incorporating a "margin of appreciation" that grants states some latitude to make initial determinations as to whether their actions are covered by an NPM clause. The function of a tribunal, then, ought to be the determination of the permissible and legitimate boundaries of the margin of appreciation that arises from the terms of an NPM clause. We argue that the jurisprudential

283. *See* Vienna Convention, *supra* note 65, art. 27; ILC Draft Articles, *supra* note 54, arts. 3, 32.

284. *See* ILC Draft Articles, *supra* note 54, art. 32(2).

285. *See id.* art 3.

practice of the European Court of Human Rights provides useful guidance in how to operationalize such analysis and review.[286]

Second, we argue that even when states make NPM clauses explicitly self-judging, such as the United States has done, this does not entirely remove their invocation from review by an arbitral tribunal. Rather, what a self-judging clause indicates is that the state invoking the clause is to have a very wide margin of appreciation as to whether a measure is necessary to protect one of the permissible objectives. Such a margin, even if very wide, still has outer limits and we suggest that these limits are found in the general principle of performance of treaty obligations in good faith, as required by Article 26 of the Vienna Convention.[287] We discuss both types of NPM clauses—those that are silent as to the degree of deference to be accorded and those that are self-judging—in turn.

The determination of the applicable degree of deference in a tribunal's analysis is perhaps the single most important factor governing the risk allocation between states and investors under a BIT. While the nexus requirement and the scope of permissible objectives set the legal contours of the NPM clause, the applicable standard of review determines what deference will be accorded to a state's own determination that an NPM clause applies to a given situation. The greater the deference given to a state's own invocation of an NPM clause, the more the clause will serve to shift the risks and costs of exceptional state action from host states to investors since tribunals will have less room to invalidate the state's invocation.

A. Non-Self-Judging NPM Clauses: The Applicability of the Margin of Appreciation

When treaty partners do not specify—either explicitly in the text or implicitly through the context and drafting materials of a treaty—the degree of deference to be accorded to their invocation of an NPM clause, arbitrators must determine what deference to give to a state's determination. In such cases, arbitrators will have to deduce the appropriate deference from the treaty's language, subsequent practice in inter-

286. In this Article, we merely outline the relevance and appropriateness of a "margin" approach in the context of BITs and NPM clauses. In a forthcoming piece to be published in early 2008, we will discuss in greater depth the legal and normative justifications for such an approach and defend it against criticisms that have been levied against margins of appreciation in other contexts.

287. "Every treaty in force is binding upon the parties to it *and must be performed by them in good faith*." Vienna Convention, *supra* note 65, art. 26 (emphasis added).

preting and applying the treaty, its context and drafting materials. The fact that a BIT is textually silent on the issue of deference does not, however, automatically translate into a presumption in favor of full review to the extent that arbitrators may fully replace a state's assessment of a situation and the measures necessary to remedy it with their own. The permissible objectives of a BIT or language employed in defining the nexus requirement may indicate or even necessitate a lower standard of review that gives greater deference to a state's own invocation of an NPM clause. In such cases, the margin of appreciation, employed in similar circumstances by the European Court of Human Rights, offers a useful interpretive approach for reviewing sate behavior. We offer three distinct justifications for the use of the margin of appreciation in reviewing state behavior pursuant to particular BIT terms, such as NPM clauses: textual, jurisprudential, and practical.

Where the text of the treaty provision in question, explicitly or implicitly, suggests some deference to a state's own determination, it becomes appropriate to utilize an interpretive standard such as the margin of appreciation to give more deference to state policy determinations than would ordinarily be available. A treaty provision may, of course, explicitly indicate the level of deference to be provided, as is the case with expressly self-judging NPM clauses discussed below. Yet, even without an express reference to a standard of review, the treaty language may indicate the appropriateness of some deference to state determinations.

The very ambiguity and lack of a shared standard inherent in many of the NPM terms suggest that some deference be given to a state's own determination that the NPM clause is applicable. This is especially true with respect to those permissible objectives, such as essential security or public morality, which depend upon a particular domestic determination. As Hersch Lauterpacht recognized, it is "doubtful whether any tribunal acting judicially can override the assertion of a state that a dispute affects its security."[288] It is difficult to subject highly policy-relevant terms like public order, health and morality, or essential security interests, to judicial evaluation by an *ad hoc* tribunal in the same way as other, more technical legal terms, such as "most-favored-nation" treatment. Nor does it seem likely that the provisions of BITs were, at least in some cases, intended to authorize a third-party dispute settler to engage in such review.

288. HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 188 (1933).

With respect to the objective of public morality, for example, the deeply subjective nature of the concept makes it difficult for a tribunal to second-guess a state's invocation of the clause. Can an arbitral tribunal reasonably access the meaning of public morality in Germany or the United States, much less in Pakistan or Bahrain? In such cases, giving deference to state determinations may be the only way to reconcile two competing domestic understandings of a particular treaty term or concept. It seems quite implausible to assume that states, by concluding a BIT with an NPM clause, delegated the authority to conclusively determine whether their security, public morals or other permissible objectives had been threatened to an *ad hoc* arbitral tribunal set up to deal with investment disputes. But if such a delegation was not intended, then the only interpretation of the relevant terms that faithfully gives effect to the actual bargain struck by the states parties is one that acknowledges a degree of deference on the part of the arbitral tribunal to determinations made by domestic authorities relating to national security, public order and other subjective permissible objectives covered by an NPM clause.

Granting some degree of deference to a state's own invocation of NPM clauses is also appropriate as a matter of judicial policy. Although the ICSID system was established to deal specifically with investment disputes, ICSID tribunals have, to an ever greater degree, faced questions of a quasi-constitutional nature, such as the legally permissible responses to a massive economic collapse or the definition of public morality. Yet, ICSID tribunals are *ad hoc* tribunals established pursuant to the ICSID Convention to resolve investment disputes. They are not courts of appeal of any particular state and the members of an ICSID panel are often very distant, physically, politically, culturally, and socially, from the particular state or circumstances in question. They often lack the fact-finding capacity to fully appreciate the context of government policies. Without the kind of deep connection to the state, society, and community impacted by the dispute, such *ad hoc* panels are poorly positioned to engage in full substantive review of critical state policies that reach beyond pure investment law. Such tribunals are, therefore, ill positioned to undertake substantive review that essentially second-guesses core governmental policy. Hence, from a jurisprudential perspective, the more a particular dispute implicates questions of a quasi-constitutional nature and the more disconnected the tribunal from the particular societies impacted, the more appropriate it becomes for the tribunal to utilize an interpretive approach such as the margin of appreciation, that gives some deference to the first-order determinations of government policy by the state itself.

In contrast to the poor positioning of ICSID tribunals to undertake first-order review of quasi-constitutional issues, *ad hoc* tribunals are in a far better position to determine whether the policies chosen by a government are within the margin of appreciation suggested by the terms of a particular NPM clause. The European Court of Human Rights has already developed an extensive jurisprudence on ascertaining the appropriate margin of appreciation to apply given the terms of a particular treaty provision. *Ad hoc* tribunals can relatively easily determine the appropriate margin of appreciation to be accorded under a treaty clause, either on their own or by drawing on the approaches of the ECtHR. It is both far easier and far more appropriate for such a tribunal to determine whether a state's particular policy response falls within a relatively well-defined margin of appreciation than it is for the tribunal to second-guess that state's particular policy choices.

Finally, as a practical matter, the use of an interpretive approach such as the margin of appreciation may help preserve the legitimacy of the ICSID system. As ICSID tribunals have come to review issues of great national significance and of a quasi-constitutional nature, often awarding extraordinary sums to investors, the legitimacy of the ICSID system has been called into question.[289] Operationalizing the margin of appreciation in investment arbitration would help preserve the legitimacy of ICSID panels by defining their supervisory function, while preserving the primary responsibility of states to develop policy responses within their legal obligations in extreme situations.

Such "margins of appreciation" granted to domestic authorities are well known from other areas of international law[290] and especially from the jurisprudence of the ECtHR,[291] where the margin doctrine has be-

289. *See, e.g.*, Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration and the Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 337 (2007); Franck, *supra* note 32; Susan D. Franck, *ICSID Institutional Reform: The Evolution of Dispute Resolution and the Role of Structural Safeguards*, *in* INTERNATIONAL INSTITUTIONAL REFORM: PROCEEDINGS OF THE HAGUE JOINT CONFERENCE ON CONTEMPORARY ISSUES IN INTERNATIONAL LAW 268 (Agata Fijalkowsi ed., 2007).

290. For the most recent discussion of margins of appreciation, see Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907 (2005).

291. *See id.*, at 926–27. The literature on the margin of appreciation has become quite voluminous; among general treatments, see, for example, YUTAKA ARAI–TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR (2002); STEVEN GREER, THE MARGIN OF APPRECIATION: INTERPRETATION AND DISCRETION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2000); HOWARD CHARLES YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF

come an important device to balance domestic treaty execution with international supervision. Although it has featured most prominently in the human rights area, the "margin of appreciation" as a tool of judicial deference and self-restraint is not restricted in its application to any specific subject area of the law. The margin doctrine simply acknowledges the fact that in many legally regulated areas of human activity there will often be a range of actions and behaviors that satisfy the requirements of an applicable international legal obligation, and that first and foremost, it is for the domestic authorities to decide which one to adopt.[292]

The development of such a margin in the specific context of the NPM exceptions discussed here would recognize that a situation covered by one of the NPM permissible objectives may be subject to a spectrum of assessments, several of which may rise to the level of legitimately triggering the NPM exception, and that a range of possible responses may be developed by states to deal with such situations. Both because the state may be better positioned to assess the situation and possible policy responses and due to the uncertainties that often affect the policy-making space, the development of a margin of appreciation in NPM assessments would allow tribunals to engage in a substantive review while preserving for states some of the freedom of action they sought through the inclusion of an NPM clause.[293] The principal task for a tribunal adjudicating claims involving a non-self-judging NPM clause would then be to determine the appropriate boundaries of the margin of appreciation and, hence, respondent state's freedom of action. In the ECtHR's jurisprudence, states do not possess "an unlimited power of appreciation";

EUROPEAN HUMAN RIGHTS JURISPRUDENCE (1996); Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843 (1999); Jeffrey Brauch, *The Margin of Appreciation and the European Court of Human Rights: A Threat to the Rule of Law*, 11 COLUM. J. INT'L L. 113 (2005); Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, 3 CONN. J. INT'L L. 111, 118 (1987).

292. *See, e.g.*, Cossey v. United Kingdom, 184 Eur. Ct. H. R. (ser. A) 22 (1990) (Martens, J., dissenting) (remarking that states possess a margin of appreciation not "as a matter of right, but as a matter of judicial self–restraint"); Ronald St. John, *The Margin of Appreciation*, *in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 83, 123 (Ronald St. John Macdonald, Franz Matscher & Herbert Petzold eds., 1993) (noting that the margin of appreciation doctrine serves to balance the Court's and member states' respective spheres of authority); Paul Mahoney, *Marvellous Richness of Diversity or Invidious Cultural Relativism?*, 19 HUM. RTS. L.J. 1, 4 (1989) (noting that the doctrine is seen by some commentators as an "auto-limitation by the Court of its own powers").

293. As the ECtHR had put it in the seminal Handyside judgment, "it is in no way the Court's task to take the place of the competent national [authorities] but rather to review [under the applicable Convention article] the decisions they delivered in the exercise of their power of appreciation." Handyside, *supra* note 168, at 23 (¶ 50).

rather, a domestic margin "goes hand in hand" with international "supervision," and such supervision "concerns both the aim of the measure challenged and its 'necessity.'"[294]

As in the ECtHR's jurisprudence,[295] the margin of appreciation given to a state would vary in breadth, based on the character of the permissible objectives asserted and the level of state interference with investor rights. Deference would, presumably, be smallest with regard to situations in which objective standards are available for assessing the permissible objective and required nexus and would be largest where objective standards are lacking, or where meanings and standards differ considerably between treaty parties.[296] Applied to the permissible objectives discussed here, deference would have to be highest with respect to issues of "public morality," lowest in the area most susceptible to scientifically validated evidence, such as "public health," and somewhere in between intermediate as concerns threats to "security." The result of the development of such a margin of appreciation would be to recognize fully the bargain inherent in BITs with NPM provisions by preserving some freedom of action for states in extraordinary circumstances and to give arbitral tribunals a highly tractable approach to analyzing state actions under NPM clauses without the need to fully substitute a tribunal's

294. *Id*. at 23 (¶ 49).

295. For variation in the "width" of the margins recognized by the ECtHR, see the contributions in The Doctrine of the Margin of Appreciation Under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practice, 19 HUM RTS. L.J. 1 (1998) (discussing the margins of appreciation under various Convention provisions) and the literature cited in *supra* note 90. Notably, the margin of appreciation for state interference with property rights, as protected under Article 1 of ECHR Additional Protocol No. 1 (1952), is a relatively wide one. *See* Yves Winisdoerffer, *Margin of Appreciation and Article 1 of Protocol No. 1*, 19 HUM RTS. L. J. 18 passim (1998); *see also* Ronald St. John Macdonald, *The Margin of Appreciation Doctrine in the Jurisprudence of the European Court of Human Rights*, *in* 1–2 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 95, 139–56 (Andrew Clapham & Frank Emmert eds., 1990). The test that the Court applies to determine whether a measure that affects property rights falls within the margin's boundaries asks "whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights." Macdonald, *supra*, at 141.

296. This gradation based on the availability of objective standards echoes the approach adopted by the ECtHR. *See* Paul Mahoney, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 HUM. RTS. L.J. 57, 78–80 (1990); Macdonald, *supra* note 292, at 103 (noting that "the margin of appreciation is probably wider in the absence of applicable European standards"). *Compare* Handyside, *supra* note 168, at 22 (¶ 48) (noting the absence of a uniform standard of morality and that the "requirements of morals" are varying "from time to time and from place to place") *with* Sunday Times v. United Kingdom, 30 Eur. Ct. H. R. (ser. A) at 36 (¶ 59) (1979) (noting the difference in the margins of appreciation between determining issues of public morality and questions that concern "far more objective notions").

determination—often removed from the events and facts—for a state's own analysis.

B. Self-Judging NPM Clauses: Residual Good Faith Review

While many BITs are silent as to the appropriate level of review to be undertaken by an arbitral tribunal, others, particularly those of the United States, may be explicitly self-judging, thus seeking to limit the scope of review that an arbitral tribunal can undertake. The explicitly self-judging NPM clauses in U.S. BITs provide that "[t]his treaty shall not preclude a party from applying measures *which it considers necessary* for the fulfillment of its obligations with respect to international peace and security or the protection of its own essential security interests."[297] Such explicitly self-judging NPM clauses, containing the "it considers necessary" language or similar formulations could be read as an absolute bar to judicial or arbitral review. Some states have argued that a general principle exists in international law according to which disputes involving political questions impinging on a country's vital interests—such as the permissible objectives covered by BIT NPM clauses—are non-justiciable and exempt from review by international courts and tribunals.[298] In the original GATT context, for example, the claim has been made that when a state invokes the national security exception, "a panel could not or should not be established."[299] The rationale behind the non-justiciability position is the alleged absence of "judicially manageable standards"[300] of a legal nature for the evaluation of national security interests.[301] Similarly, in domestic practice, a number of states have a political question doctrine according to which the judi-

297. U.S.-Bahrain BIT, *supra* note 148, art. 14.

298. *See, e.g.*, Nicaragua Judgment (Merits), *supra* note 21, at 220–36 (Oda, J., dissenting); *id*. at 285 (Schwebel, J., dissenting); THOMAS J. BODIE, POLITICS AND THE EMERGENCE OF AN ACTIVIST INTERNATIONAL COURT OF JUSTICE (1995); LAUTERPACHT, *supra* note 288, at 6–48; Dapo Akande & Sope Williams, *International Adjudication of Security Issues: What Role for the WTO?*, 43 VA. J. INT'L L. 365, 373 n.24, 381 (2003); Ian Brownlie, *Justiciability of Disputes and Issues in International Relations*, 42 BRIT. Y.B. INT'L L. 142 (1967); Robert Yorke Hedges, *Justiciable Disputes*, 22 AM. J. INT'L L. 560 (1928); William H. Thayer, *International Arbitration of Justiciable Disputes*, 26 HARV. L. REV. 416 (1912–1913). As early as 1756, Emmerich de Vattel had noted that "[a]rbitration is a very reasonable mode...for the decision of every dispute *which does not directly interest the safety of the nation*." EMMERICH DE VATTEL, II THE LAW OF NATIONS 278 (Joseph Chitty ed., T. & J.W. Johnson & Co. 1858) (1758) (emphasis added).

299. Akande & Williams, *supra* note 298, at 374.

300. See C. Todd Piczak, *The Helms-Burton Act: U.S. Foreign Policy Toward Cuba, the National Security Exception of the GATT and the Political Questions Doctrine*, 61 U. PITT. L. REV. 287, 318–26 (1999–2000).

301. *See* Akande & Williams, *supra* note 298, at 381–82.

ciary will not address explicitly political questions which must instead be resolved by the state's executive or legislative authorities.[302]

Three factors militate against excluding even explicitly self-judging BITs entirely from arbitral review. First, the stipulated principle of non-justiciability remains ultimately an appeal to judicial discretion. States have again and again brought cases in international fora with national security implications, vitiating the general acceptance of such a position that would be needed for it to pass as either a general principle or as customary international law. Accordingly, international tribunals, including the ICJ, ECJ, the ECtHR as well as various arbitral tribunals, have never recognized the political nature of a question as a legal bar to the exercise of their jurisdiction and have regularly pronounced on cases concerned with national security issues.[303]

Second, even a self-judging NPM clause remains within the jurisdiction of an arbitral tribunal, because states remain subject to the general obligation, enshrined in Article 26 of the Vienna Convention, to carry out their obligations "in good faith."[304] Hence even Judge Schwebel, who supported the United States' interpretation of the essential security clause in its FNC treaty with Nicaragua, held that it would still be up to a tribunal to determine whether a party had invoked that clause in good faith.[305] While the United States generally follows the self-judging model of NPM clauses, it appears to have come to accept a residual good faith requirement. As Senator Helms noted in September 2000,

302. *See* THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? (1992); TIM KOOPMANS, COURTS AND POLITICAL INSTITUTIONS: A COMPARATIVE VIEW 98–104 (2003); THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES (Nada Mourtada–Sabbah & Bruce E. Cain eds., 2007); Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457 (2005); Jared S. Pettinato, *Executing the Political Question Doctrine*, 33 N. KY. L. REV. 61 (2006); Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441 (2004); Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203 (2002).

303. *See* Richard B. Bilder, *Judicial Procedures Relating to the Use of Force*, *in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 269 (Lori Fisler Damrosch & David Scheffer eds., 1983); Akande & Williams, *supra* note 298, at 382–83.

304. Vienna Convention, *supra* note 65, art. 26. On "good faith" generally, see J. F. O'CONNOR, GOOD FAITH IN INTERNATIONAL LAW (1991). For an affirmation of the relevance of the "good faith" standard in the specific context of self–judging NPM clauses included in BITs, see Vandevelde, *supra* note 18, at 176–81.

305. *See* Nicaragua Judgment (Merits), *supra* note 21, at 311 (Schwebel, J., dissenting) (finding that "the Treaty fails to provide a basis of jurisdiction for the Court in this case, certainly for the central questions posed by it, unless, at any rate, United States reliance upon Article XXI(1)(d) is, on its face, without basis").

"the United States considers this language to be self-judging, though, in the words of the State Department, 'each Party would expect the provisions to be applied by the other in good faith.'"[306] This more recent US approach suggests that even an explicitly self-judging NPM clause is not beyond the jurisdiction of an arbitral tribunal and is still subject to review for the state's good faith invocation of the clause.

A third reason for subjecting even an explicitly self-judging NPM clause to residual good-faith review is that such review ensures a balance between state freedom of action and investor protection. Such residual review ensures that, even when states have sought to preserve considerable freedom of action and transfer the risks of state action in extreme situations to investors, they cannot do so on mere pretext. Residual good faith review thus requires even states that have adopted explicitly self-judging NPM clauses to analyze their own invocation of the clause and articulate a rationale for the clause's applicability. As a result, states are forced to internalize and apply the international legal standards of good faith in developing their responses to extraordinary situations. Where the state's invocation of the clause cannot be justified in good faith, the state must bear the costs of its actions.

If a self-judging NPM clause remains subject to a good faith review, a tribunal must then determine what such a residual "good faith" standard requires in practice. While good faith has long been a core principle of international law,[307] a workable standard of good faith review has yet to be fully developed.[308] Unfortunately, the paucity of case law on such an important legal principle means that arbitral tribunals will have to develop their own approaches to whether the good faith requirement

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306. Bilateral Investment Treaties with Azerbaijan, Bahrain, Bolivia, Croatia, El Salvador, Honduras, Jordan, Lithuania, Mozambique, Uzbekistan, and a Protocol Amending the Bilateral Investment Treaty with Panama: Report by the Chairman of the Senate Committee on Foreign Relations, S. REP. NO. 106-23 (2000), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_reports&docid=f:er023.106. The United States has, however, been less clear as to whether it would find that requirement subject to arbitral review. A 1998 review of bilateral investment treaties by the United Nations Committee on Trade and Development observed: "The United States has taken the position that the determination of whether a measure is necessary for the protection of a country's essential security interests is a matter exclusively within its competence, not subject to review by any international tribunal." UNITED NATIONS COMM. ON TRADE & DEV., BITS IN THE MID-1990S, at 86 (1998). In the ICJ context, the United States has asserted that similar language in fact precludes any judicial review. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1984 I.C.J. 392 (Jurisdiction and Admissibility).

307. *See* Draft Declaration on Rights and Duties of States, G.A. Res. 375(IV), Annex, art. 13, U.N. GAOR, 4th Sess. (Dec. 6, 1949) [hereinafter Draft Declaration on Rights and Duties of States].

308. *See generally* JOHN O'CONNOR, GOOD FAITH IN INTERNATIONAL LAW (1991).

has been met. In developing and applying such a standard, an arbitral tribunal will have to consider the nature of the bargain inherent in a BIT with a self-judging NPM clause. In essence, an arbitral tribunal will still utilize the margin of appreciation we suggested with respect to non-self judging NPM clauses. In the case of explicitly self-judging NPM clauses, however, tribunals will grant a particularly wide leeway that balances the investor protection goals of a BIT with the states parties' explicit desire to determine themselves when the NPM clause is applicable, subject to background rules of good faith. Drawing on the work of a range of scholars and international organizations, such a standard could be said to encompass two basic elements: first, whether the state has engaged in honest and fair dealing and, second, whether there is a rational basis for the assertion of the NPM provision.

The "good faith" standard in treaty performance is well established. The 1949 Draft Declaration on the Rights and Duties of States included such a standard at Article 13.[309] As ILC's commentary on the provision noted, it was seen as "a re-instatement of the fundamental principle *pacta sunt servanda*."[310] Perhaps the best articulation of the honesty and fair dealing element of the concept of good faith is contained in the 1935 Harvard Research on the Law of Treaties, according to which "[t]he obligation to fulfill in good faith a treaty engagement requires that its stipulations be observed in their spirit as well as according to their letter, and that what has been promised be performed without evasion or subterfuge, honestly, and to the best of the ability of the party which made the promise."[311] The question then is whether the state has acted honestly and to the best of its ability in deciding to invoke the NPM clause. Where evidence exists that a state uses the exception just as a pretext for ulterior economic motives, or where the connection between the measures taken and national security is so spurious as to clearly breach the good faith requirement,[312] a tribunal would be competent to determine that the NPM clause was not invoked in good faith.[313]

309. "Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty." Draft Declaration on the Rights and Duties of States, *supra* note 307, art. 13.

310. Draft Declaration on Rights and Duties of States with Commentaries, 1 YB. INT'L L. COMM'N 286, 288 (1949).

311. *Codification of International Law*, 29 AM. J. INT'L L. (SUPPLEMENT) 1, 981 (1935).

312. An illustrative example of this is provided by Sweden's attempt in 1975 to justify import quotas on footwear for national security reasons under the GATT. *See* John A. Spanogle, Jr., *Can Helms-Burton Be Challenged Under the WTO*?, 27 STETSON L. REV. 1313, 1331 (1998).

313. The only way to avoid even the good faith test would be to exclude the article containing

A state's general conduct, the declaration of a national emergency, relevant national legislation, and the transparency of the state's decision making process might all be relevant in assessing this honesty and fair dealing requirement. In other words, reliance on a self-judging NPM exception would pass the honesty and fair dealing prong of the good faith test as long as there is no obvious and deliberate misuse of it.

The second element of a good faith review involves a determination of whether there was a rational basis for the state's invocation of the NPM clause. This element of the good faith test may have been best expressed by the International Whaling Commission in its evaluation of the good faith requirements of the UN Convention on the Law of the Sea.[314] According to the Commission, good faith requires "fairness, reasonableness, integrity and honesty in international behaviour."[315] The reasonableness requirement stressed by the Commission demands that the state have some rational basis for its actions. For an NPM clause to be invoked in good faith, the question a tribunal must ask is whether a reasonable person in the state's position *could have* concluded that there was a threat to national security or public order sufficient to justify the measures taken. Two examples are illustrative. If a state were to invoke a self-judging NPM clause and claim a security threat from a possible alien landing, a tribunal would have to conclude there was no rational basis to believe such a landing was likely and hence the clause had not been invoked in good faith. In contrast, should an island state invoke an NPM clause to build sea barriers citing the potential for global warming to raise sea levels, notwithstanding potentially contradictory scientific evidence, the tribunal would have to conclude that the state had a rational basis for its determination and the self-judging NPM clause had, in fact, been invoked in good faith.

A good faith standard based around these two key elements of honesty and fair dealing and rational basis offers a number of important advantages to an arbitral tribunal assessing the invocation of a self-judging NPM clause. First, it reflects the nature of the bargain inherent in a self-judging NPM clause, namely that a state will be able to determine for itself—consistent with the background norm of good faith in interna-

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the exception from the tribunal's terms of reference.

314. *See* United Nations Convention on the Law of the Sea art. 300, Dec. 10, 1982, 21 I.L.M. 1261 ("States Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.").

315. International Whaling Commission, Res. 2001-1 (2001), *available at* http://www.iwcoffice.org/meetings/resolutions/resolution2001.htm.

tional law—whether the provision applies. Second, it explicitly avoids a tribunal's second-guessing of government policy choices for which *ad hoc* tribunals may be poorly positioned. Instead, the tribunal must review the honesty and reasonableness of the state's invocation of the clause, something arbitral tribunals are far better positioned to do. Third, it still imposes significant constraints on the freedom of states to take non-precluded measures by reviewing the honesty and reasonableness of governmental action, thereby balancing investor protection goals with state freedom of action.

C. Implicitly Self-Judging NPM Clauses? A Consideration of US Practice

In adopting a policy of making such clauses self-judging, the United States has been largely unique among states utilizing NPM clauses. Beginning in 1982, when the United States developed its first model BIT, the US executive and legislative branches insisted on an expansive interpretation of NPM clauses in all BITs and have moved toward a more and more explicitly self-judging interpretation over time. The first U.S. BIT, signed with Panama in 1982, uses standard NPM language, but is not explicitly self-judging.[316] Over time, the U.S. BIT program has become increasingly explicit in the self-judging nature of the provisions. By the late 1990s, this view was stated plainly in the Model U.S. BIT's NPM clause, which included the "*which it considers necessary*" phrase, making the NPM clause explicitly self-judging.

While more recent BITs, negotiated on the basis of the later model treaties, are explicitly self-judging, the United States has continued to assert that even the earlier, not-explicitly-self-judging NPM clauses should, in fact, be read as self-judging and subject only to the more limited good faith review discussed above. From the perspective of an arbitral tribunal, a determination of whether an NPM clause is implicitly self-judging will turn on whether there is evidence to suggest either that the parties established a special meaning for the clause or that the context of the treaty and its drafting materials indicate a self-judging meaning was intended by the parties. While a treaty-by-treaty analysis will be required to make that determination, compelling evidence in U.S. BIT practice indicates that even non-expressly self-judging U.S. NPM clauses should be treated as implicitly self-judging and subject only to good faith review.

316. *See* U.S.-Panama BIT, *supra* note 74, art. 10.

The catalyst for the U.S. policy of self-judging of NPM clauses was the *Nicaragua* case before the ICJ. Nicaragua based jurisdiction in part on the alleged violation of the U.S.-Nicaraguan Friendship, Commerce, and Navigation (FCN) treaty by the United States. The United States objected to the idea that a commercial treaty could restrict actions it deemed vital for the protection of its national security.[317] Indeed the United States argued that the "essential security interests exception" in the FCN treaty, which is very similar to the NPM provision in various BITs then under negotiation, was self-judging, even though it lacked the "it considers necessary" language.[318] The ICJ nevertheless granted jurisdiction over the suit and eventually found the equivalent language to the NPM clause in that treaty not to apply.[319] Thereafter, the United States began taking special care to ensure that it had sufficient latitude within any specific BIT to take any measures it deemed necessary to protect its essential security interests.

A determination of the level of deference to give to non-explicitly self-judging BITs must look to the context and negotiating history of the treaty, where available. All U.S. BITs must be presumed to follow whatever Model BIT is operative at the time they are negotiated, unless otherwise specified in a protocol or annex to the treaty. In 1988, the U.S. Senate considered and ratified a group of eight BITs. These treaties were drafted based on a then-operative model treaty discussed by the Senate in the ratification process. Article X of this model treaty contains the NPM clause. In the ratification process, the U.S. Senate attached an understanding to each of the treaties, according to which "[u]nder Article X of the treaty either party may take all measures necessary to deal with any unusual and extraordinary threats to national security."[320] The Senate did not intend any change in the treaty as negotiated, however. On the contrary, the commentary to the model treaty states explicitly that the understanding merely "clarifies and highlights the importance of this article."[321] In the view of the U.S. Senate, the text of the NPM provision accorded "to the United States [the right] to take whatever steps deemed necessary by the President for national security reasons, notwithstanding any other provisions of the treaties."[322] The position of

317. Vandevelde, *supra* note 18, at 171.
318. *See* Nicaragua Judgment (Merits), *supra* note 21, at 116.
319. *Id*. at 115.
320. S. EXEC. REP. No. 32, 100th Cong., 2d Sess., 9–11 (1988).
321. *Id*. at 8.
322. *Id*.

the United States in 1988 was thus extremely clear—the President could take any measures he deemed necessary to protect national security.

In addition, the U.S. Department of State released a formal policy statement on these treaties that specifically sought to avoid the "Nicaragua problem," noting that the United States had negotiated these treaties "with certain assumptions about the scope of their obligations and the kinds of issues which they submit to compulsory arbitration, assumptions we believe our treaty partners share. Specifically…the United States Government preserves its right to protect its essential security interests."[323] Even so, the U.S. Senate refused to ratify the treaty until an executive understanding was attached, according to which "either Party may take all measures necessary to deal with any unusual and extraordinary threat to its national security."[324] These clarifications were designed to ensure that nothing in an investment treaty would constrain the country's freedom of action when security or public order issues were at stake. However, from the point of view of the original ideology underlying the United States' drive to conclude BITs, this shift "weaken[ed the BIT] as an instrument for regulating host-state governments, facilitating uncompensated expropriations or other host-state impairments of investment."[325]

U.S. policy-makers understood the potential consequences of their actions, but were prepared to take the risk of greater host country latitude to impair investments as the price for guaranteeing their own relative freedom of action. In the ratification process of a set of similar BITs in August 1992, the Senate considered whether "the protections afforded investors diminished if each party can be the sole judge of its interests" and concluded that, despite these risks, the provisions were "in the national interest."[326] As part of the materials submitted with these five treaties, the State Department included the U.S. Model BIT, accompanied by an official "description" of each article.[327] The description of Model Article X—the NPM clause—states:

323. Bilateral Investment Treaties with Panama, Senegal, Haiti, Zaire, Morocco, Turkey, Cameroon, Bangladesh, Egypt and Grenada: Hearings Before the S. Comm. on Foreign Relations, 99th Cong. (1988), *quoted in* Alvarez, *supra* note 26, at 38.

324. S. EXEC. REP. No. 32, 100th Cong., 2d Sess., at 9–11 (1988) (Senate Foreign Relations Committee recommending that Senate give advice and consent to BITs with Senegal, Zaire, Morocco, Turkey, Cameroon, Bangladesh, Egypt, and Grenada).

325. Vandevelde, *supra* note 18, at 170–71.

326. August 4, 1992 Hearings, *supra* note 53, at 51.

327. *See* United States Model Bilateral Investment Treaty as of February 1992 [hereinafter 1992 Model BIT], *in* August 4, 1992 Hearings, *supra* note 51, at 65 (emphasis added).

> A Party's essential security interests include actions taken in times of war or national emergency, as well as other actions bearing a clear and direct relationship to the essential security interests of the Party concerned. *Whether these exceptions apply in a given situation is within each Party's discretion. We are careful to note, in each negotiation, the self-judging nature of the protection of a Party's essential security interests*.[328]

Once again, the United States asserted a self-judging interpretation and the State Department confirmed it had made this position apparent to its negotiating partners.[329] The parties to these U.S. BITs appear to have shared an understanding that even a non-explicitly self-judging NPM clause should be interpreted as self-judging. In the BIT concluded the same year with the Russian Federation this shared understanding was explicitly noted in the Protocol attached to the main treaty text, at the request of the Russian negotiators.[330]

The Letters of Submittal accompanying U.S. BITs submitted to the Senate for ratification likewise confirm the self-judging nature of U.S. NPM clauses. For example, the Letter of Submittal accompanying the 1997 U.S. BIT with Azerbaijan,[331] whose NPM clause (Art. XIV ¶ 1) is not explicitly self-judging, nonetheless provides that "[m]easures to protect a Party's essential security interests are self-judging in nature, although each Party would expect the provisions to be applied by the other in good faith."[332] Notably, the documents accompanying explicitly self-judging BITs have indicated that the change of language did not represent a policy change, but merely "makes explicit the implicit understanding that measures to protect a Party's essential security interests are self-judging in nature, although each Party would expect the provisions to be applied by the other in good faith."[333]

The United States has maintained a consistent interpretation of its NPM clauses as self-judging, even in ICSID proceedings brought by

328. Description of the United States Model Bilateral Investment Treaty (BIT)—February 1992, *in* August 4, 1992 Hearings, *supra* note 51, at 65 (emphasis added).

329. *Id*.

330. Treaty Concerning the Encouragement and Reciprocal Protection of Investment, Protocol, U.S.-Russ., ¶ 8, June 17, 1992, 31 I.L.M. 799 (stating that "[w]ith respect to Article X, paragraph 1, the Parties confirm their mutual understanding that whether a measure is undertaken by a Party to protect its essential security interests is self-judging").

331. Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Azer., Aug. 1, 1997, *available at* http://www.state.gov/documents/organization/43478.pdf.

332. Letter of Submittal, Dep't of State (Sept. 8, 2000), art. XIV, *annexed to id*.

333. Letter of Submittal, Dep't of State (Apr. 24, 2000), *annexed to* U.S.-Bahrain BIT, *supra* note 148, art. XIV.

American investors against foreign states. A September 2006 letter from James H. Thessin, Principle Deputy Legal Advisor at the U.S. Department of State, to Abraham D. Sofaer, former Legal Advisor at the U.S. Department of State, addressed the interpretation of Article XI of the U.S.-Argentina BIT, specifically in the context of an ICSID arbitration against Argentina. The letter states that "notwithstanding the decision of the ICJ in the *Nicaragua* case, the position of the U.S. Government is that the essential security language in our…Bilateral Investment Treaties is self-judging, i.e., only the Party itself is competent to determine what is in its own essential security interests."[334]

If the U.S. government is to be taken at its word that it informed negotiating partners of its self-judging interpretation of the NPM clause—and there is no reason not to accept the State Department's assertion in sworn testimony to the U.S. Senate—the self-judging nature of the NPM clause was part of the bargain struck between the United States and its treaty partners, even where that understanding was not expressly stated in treaty language. Certainly since 1992, and perhaps throughout the entire U.S. BIT program since 1982, even non-explicitly self-judging NPM clauses were treated as self-judging, given the understanding of the United States and its treaty partners to that effect. As Kenneth Vandevelde has observed: "It is difficult to avoid the conclusion that since 1984 the United States has interpreted the essential security interests exception to be self-judging, although the Russia BIT represents the first time since 1986 that the United States has made its position clear publicly."[335]

In the case of such non-explicitly self-judging U.S. NPM clauses, arbitral tribunals will need to engage in careful, treaty-by-treaty analysis of the text, context, background materials, and circumstances of a treaty's conclusion to determine whether the parties shared an understanding of the NPM clause as implicitly self-judging. The treaty text would still be the starting point for any analysis, but to illuminate how the treaty partners expected NPM clauses to operate in practice, arbitra-

334. Letter from James H. Thessin, Principle Deputy Legal Advisor, U.S. Dep't of State to Abraham D. Sofaer, Senior Fellow, Hoover Inst., Stanford Univ. (Sept. 15, 2006) (on file with authors). Argentina has likewise accepted this self–judging interpretation and never has suggested any alternative reading of the article. These interpretations are directly relevant to Article XI of the US-Argentina BIT and therefore constitute "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation," pursuant to Article 31(3)(b) of the Vienna Convention on the Law of Treaties. *See* Vienna Convention, *supra* note 65, art. 31(3)(b).

335. Vandevelde, *supra* note 18, at 174.

tors would have to give due weight to the actual and demonstrable intentions behind the provision. Where such evidence exists, it would be fully appropriate for a tribunal to apply a good-faith standard of review, discussed above, rather than a substantive review informed by a margin of appreciation, as would be appropriate for non-self-judging NPM clauses.

VII. NPM CLAUSES AND LIABILITY

NPM clauses raise two important questions with respect to state liability under a BIT, each of which has implications for the allocation of risks and costs between states and investors. A first question is whether NPM clauses actually relieve states of responsibility, liability, and the duty to pay compensation for acts that would otherwise breach a BIT. If NPM clauses do not relieve responsibility and liability, they would have no practical impact on the allocation of costs, as states would bear the costs of action regardless of the inclusion of an NPM clause. In contrast, if NPM clauses do relieve states of liability, the successful invocation of such a clause would transfer the costs of action in exceptional cases from the state to an investor. Assuming NPM clauses relieve a state of liability, the second question still remains: for what period of time should the NPM clause be deemed to apply and liability remain precluded?

A. Implications of NPM Clauses for State Responsibility, Liability and Compensation

In most cases, NPM clauses will absolve states of international responsibility, liability to investors, and any duty to pay compensation either to the other state party or directly to investors. NPM clauses are generally articulated as exceptions to a BIT's substantive provisions, and not merely as justifications or excuses for breach. NPM clauses create this exception through the use of the phrase "shall not preclude the applicability of measures" or "shall not apply to" particular measures. The exceptions contained in NPM clauses preclude the very applicability of the specified substantive obligation(s) of the BIT to acts that fall within the scope of the clause. If a certain action is covered by the terms of the exception, the result is the preclusion of wrongfulness, not because a violation of a particular obligation is justified under the circumstances, but because the obligation does not apply to that action in the first place.[336] In other words, the NPM clause exempts measures adopted for the specified permissible objectives from some or all substantive obligations under the BIT. NPM clauses may exempt covered state actions either from all the substantive protections of a BIT or only from certain treatment standards, based on the specific terms used in the BIT.[337]

It is a well established principle of international law, codified in Article 2 of the ILC Draft Articles, that for an action to give rise to an "internationally wrongful act of a State," such an "action" must "constitute[] a breach of an international obligation of the State."[338] By its very terms, an NPM clause specifies that actions taken consistent with it "shall not be precluded" by the treaty. Hence, such actions do not breach the treaty. In its commentaries to the Draft Articles, the ILC recognizes "there is no exception to the principle stated in article 2 that there are two necessary conditions for an internationally wrongful act—conduct attributable to the State under international law and the breach by that conduct of an international obligation of the State."[339] The plain language of NPM clauses makes clear that acts properly taken under that article are not internationally wrongful at least so long as they remain necessary to achieve one of the permissible objectives specified in the clause.

As long as the acts taken by a state are not internationally wrongful by virtue of an NPM clause, there is no state liability and no compensation can be due. Pursuant to Article 31 of the Draft Articles, compensation is only due for "injury caused by the internationally wrongful act."[340] Absent such an internationally wrongful act, state responsibility is not engaged and no compensation is due to the claimant. This position was confirmed by the ICSID Tribunal in *LG&E*, which found: "Article XI establishes the state of necessity as a ground for exclusion from wrongfulness of an act of the State, and therefore, the State is exempted from liability."[341]

336. *Cf.* BLACK'S LAW DICTIONARY 559–60 (6th ed. 1990) (noting, *inter alia*, that an exception is the "[e]xpress exclusion of something from operation of contract or deed," referring to "a person, thing, or case specified as distinct or not included").

337. *See supra* notes 97–103 and accompanying text.

338. ILC Draft Articles, *supra* note 54, art. 2. *See generally* Phosphates in Morocco (Italy v. Fr.), 1938 P.C.I.J. (ser. C) No. 74 (June 14).

339. ILC Draft Articles, *supra* note 54, art. 2(9); *see also* Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24); Factory at Chorzów (F.R.G. v. Pol.), 1925 P.C.I.J. (ser. A) No. 9 (May 24).

340. ILC Draft Articles, *supra* note 54, art. 31.

341. LG&E Decision on Liability, *supra* note 30, ¶ 261.

A reading of NPM clauses to do something less than provide an exception to the substantive protections of the BIT and, thereby, preclude the wrongfulness of a state's actions would violate the principle of effectiveness in treaty interpretation. The principle of effectiveness means that, in the interpretation of a treaty, its terms must be construed in such a way as to give each of them effect and not render them meaningless.[342] Reading an NPM clause merely to authorize such acts but not bar liability—would deny any meaning or effect to the "shall not preclude" phrase or its equivalent in a BIT, rendering it a legal nullity since, even without an NPM clause, a state could always take such actions and face the consequences of liability after the fact.

Even if an NPM clause removes the wrongfulness of a state's actions and, hence, any duty to pay compensation to the other state party to the treaty, it still must be determined whether the state could have some residual liability toward investors harmed by the state's actions, rather than to the other state party to the treaty. There are, of course, circumstances in which international law provides for such liability, for example in the field of expropriation, in which failure to pay compensation to foreign property owners can result in international responsibility.[343] Both the legal formulation and the function of NPM clauses, however, indicate that they must relieve a state of any such residual liability to investors as well as primary responsibility to the other state party, at least in the ICSID forum. Any residual duty a state may owe to investors for a breach of a BIT must stem from the BIT instrument itself. As the NPM clause specifies that the BIT "shall not preclude" state actions that fall under it and removes such actions from the scope of the BITs protections, no residual liability can be left under the BIT.[344] In essence, the NPM clause means that the state assumed no obligations either toward the other state party or its investors with respect to actions covered by the NPM clause. While there may be other sources of liability that states may have toward investors, such as the rules of expropriation in cus-

342. *See* United States—Standards for Reformulated and Conventional Gasoline, *supra* note 63, at 621.

343. *See generally* ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 391–415 (2003); M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 344–88 (2d ed. 2004).

344. The situation will be different in the case of limited scope NPM clauses, such as those included in Germany's BITs, which apply only to the specified treatment standards and not to the treaty as a whole. While a violation of the national treatment standard covered by the German NPM clause would thus not give rise to any claims for compensation, the provisions on expropriation would still apply if the severity of interference with the investment were to reach that level.

tomary law, those issues are distinct from the BIT.[345] Hence, investors would have to seek compensation in other fora, such as domestic courts.

By preventing the wrongfulness of a state's actions and thereby precluding both responsibility and liability, NPM clauses effectively shift the costs of such actions from the state to investors. Whereas, without the NPM clause, the state would be required to compensate investors for harms resulting from state action in breach of the BIT, the NPM clause prevents the duty to pay compensation and causes investors to bear the costs of state actions that fall within the scope of the NPM clause.

B. Period of Applicability

A second question with respect to liability relates to the period during which the exceptions provided for in the NPM clause apply. An NPM clause involves a nexus between particular actions taken by a state and a set of permissible objectives. Even if initially the nexus requirement is satisfied and the NPM clause is successfully invoked, at some point in the future that nexus might be severed by, for example, factual developments that remove the threat to, say, essential security, public order, or public health. Once that nexus is severed, the NPM clause would no longer apply and actions by the state might again give rise to liability. The key question then is at what point that nexus is severed and the potential for liability returns.

The text of the NPM provision provides the legal starting point for such an inquiry.[346] Take for example a standard U.S. NPM provision: "[t]his Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order…or the protection of its own essential security interests."[347] The text makes clear that it is the *measures* necessary to respond to threats to public order or national security that are not precluded by the treaty. Hence, liability cannot attach to acts that would otherwise violate the treaty from the moment the state takes such measures until the time such measures cease or are no longer *necessary* for the maintenance of public order or the protection of national security interests.

345. If an ICSID tribunal has jurisdiction over such non-BIT sources of liability, the NPM clause would not apply and the state might face direct liability to investors outside the BIT and NPM regime. *See* ICSID Convention, *supra* note 11, art. 25.

346. Vienna Convention, *supra* note 65, art. 31.

347. *See* 2004 U.S. Model BIT, *supra* note 76, art. 18.

As used in an NPM clause, *measure* can be defined as "an action taken as a means to an end" or a "legislative bill or enactment."[348] It is the legislative act or acts taken in response to the public order or national security threat that is not precluded by the BIT. As long as the act itself occurred under the NPM clause, even if its long-term impact continues to such a time when the act itself would not have been initially justified under the NPM clause, no liability should attach as there was no internationally wrongful act by the state outside the period of NPM applicability.

Other acts might involve continuing affirmative interference by the state with the rights of investors under the BIT. In this situation, acts are only permissible during the period of NPM applicability, and responsibility could attach for acts subsequent to the severing of the nexus requirement by developments on the ground. The determination of such an end point must, however, go beyond a simple conclusion that there is not, say, a present threat to public order from riots on the streets. A government cannot be required to take decisions that would reignite the very same threats to essential security and public order that existed at the time such measures were initially adopted. Say, for example, a state justified travel restrictions that would violate a BIT under the "public health" objective of an NPM clause as a response to a quickly spreading pandemic disease and the spread of the disease was largely stopped at the border. The state could not then be held liable for the continuation of those restrictions just because there was no pandemic threat within the state itself since, by lifting the restrictions, the disease could well spread into the State and the situation of emergency that justified the initial invocation of the NPM clause would return.

The duration of the period in which otherwise precluded measures are permitted under an NPM clause must look to the likely impact of the reversal or removal of those measures. Rather than examining only potentially reversible facts on the ground, a legal analysis of the end point for the applicability of Article XI should be based either on the state's own termination of the measures taken in response to the crisis or on economic and social evidence and analysis demonstrating that such measures have become unnecessary to prevent a return to the conditions that initially gave rise to the invocation of the NPM clause. During the period when the NPM clause is applicable, the costs of state actions are

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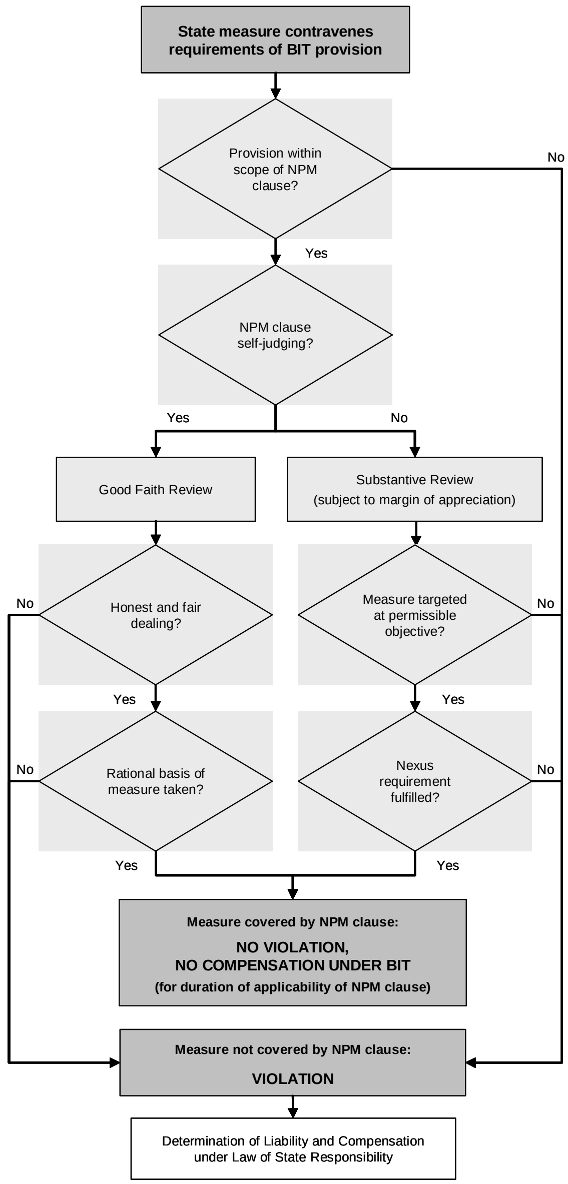
348. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1117 (3d ed. 1992); *see also* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1400 (10th ed. 1993) (defining *measure* as "a step planned or taken as a means to an end; *specif.* : a proposed legislative act").

shifted to investors; once the nexus between state actions and a permissible objective is severed, however, liability shifts back to the state, which could then be required to compensate investors for subsequent harmful acts.

FIGURE 1: APPLICATION OF NPM CLAUSE FLOW CHART



VIII. JUDICIAL INTERPRETATION AND APPLICATION OF NPM CLAUSES: REVISITING THE ARGENTINA CASES

Two of the BITs under which cases have been brought against Argentina—the U.S.-Argentina BIT and the Belgium-Luxembourg Economic Union-Argentina BIT (BLEU-Argentina BIT)—include NPM clauses.[349] In each of these cases Argentina has invoked the NPM clause,[350] arguing that the measures it took were not precluded by the BIT, that there was no internationally wrongful act, and, hence, no compensation is due to investors. Moreover, based on the long-standing United States policy of self-judging NPM clauses, Argentina has claimed that the NPM provision in the U.S.-Argentina BIT is self-judging and Argentina's invocation of the clause subject only to good faith review.[351] Though more than forty cases are presently pending against Argentina, only four awards involving NPM clauses have been handed down by ICSID tribunals as of October 2007.[352] The four awards illustrate both the interpretive challenges presented by NPM clauses and the dangers of interpretive short-cuts by arbitral tribunals. Moreover, the four awards highlight very different understandings of the risk allocation functions of NPM clauses. Whereas the tribunals in the cases of *CMS v. Argentina, Enron v. Argentina* and *Sempra v. Argentina* found the NPM clause inapplicable, the tribunal in *LG&E v. Argentina* found the clause properly invoked and Argentina's liability precluded for a specified period during the crisis.[353] Though the contra-

349. *See* U.S.-Argentina BIT, *supra* note 17, art. 11; Convenio para la promoción y la protección reciproca de las inversions, Belg.-Lux.-Arg., art. XX, June 28, 1990 [hereinafter BLEU-Argentina BIT], *available at* http://www.unctad.org/sections/dite/iia/docs/bits/belg_lux_argentina_esp.pdf.

350. The case brought under the BLEU-Argentina BIT is ARB/03/7 (2005). For the complete list of cases brought against Argentina under the U.S.-Argentina BIT, see The World Bank Group, ICSID: List of Pending Cases, http://www.worldbank.org/icsid/cases/pending.htm (last visited Nov. 9, 2007).

351. LG&E Decision on Liability, *supra* note 30, ¶¶ 208-218.

352. The four cases decided to date are: *CMS, supra* note 16; *LG&E Energy*, *supra* note 30; *Enron*, *supra* note 29; and *Sempra*, *supra* note 29. The *CMS* case is presently subject to annulment proceedings. The arbitral panel in the *CMS* case consisted of Francisco Orrego Vicuna (President), Marc Lalonde and Francisco Rezek. The *LG&E* panel consisted of Tatiana de Maekelt (President), Francisco Rezek, and Albert Jan van den Berg. The *Enron* panel consisted of Francisco Orrego Vicuna, Albert Jan van den Berg and Pierre Yves Tschanz. It is interesting to note the very different holdings despite the overlap of panel members.

353. *See* Enron Award, *supra* note 29, ¶¶ 226–66 ("Argentina is exempt of responsibility, and accordingly, the Claimants should bear the consequences of the measures taken by the host State…."); CMS Award, *supra* note 16, ¶ 387. The divergent decisions raise the problem of an arbitral system without meaningful appellate authority and no means of resolving different outcomes based on nearly identical facts. *See* Franck, *supra* note 32.

dictory outcomes cannot be reconciled, they can be explained by the tribunals' very different understandings of the bargain that lies behind the U.S.-Argentina BIT and the risk allocation function of the NPM clause in the treaty.

A. The Jurisprudence of the ICSID Panels

While the four tribunals reach different substantive outcomes and their decisions take distinct approaches to the function of NPM clauses, they do agree on at least two critical points. First, the tribunals interpret the essential security and public order provisions of the U.S.-Argentina BIT broadly so as to encompass economic emergencies,[354] as suggested in our interpretive analysis of the clause above. A second area of agreement between the tribunals is their interpretation of the NPM clause in the U.S.-Argentina BIT as not self-judging.[355] While the language of the NPM clause in the U.S.-Argentina BIT is not explicitly self-judging, Argentina has argued that it should be interpreted as self-judging, again based on long-standing practice of the United States. The tribunals, therefore, apply a substantive review to Argentina's invocation of the clause rather than a good-faith test. Yet, the tribunals justify this common approach on very different grounds. For the *CMS* Tribunal, the non-self-judging character of the U.S.-Argentina NPM clause is based on a textual comparison of the NPM clause in the treaty with other instruments, such as GATT, that are explicitly self-judging and the ICJ's treatment of similar language in the *Nicaragua* case.[356] In contrast, the determinations by the *LG&E* Tribunal and the *Enron* Tribunal are, in part, based on supposed consideration of the parties' understandings at the time the treaty was concluded. In the words of the *LG&E* Tribunal: "[b]ased on the evidence before the Tribunal regarding the understanding of the Parties in 1991 at the time the Treaty was signed, the Tribunal decides and concludes that the provision is not self-judging."[357] In reaching this conclusion, the *LG&E* tribunal recognizes that the "language of the BIT does not specify who should decide what constitutes essential security measures–either Argentina itself, subject to a review under a good faith standard, or the Tribunal," and looks to both the background materials and broader context of the treaty negotia-

354. *See supra* note 212 and accompanying text.
355. Enron Award, *supra* note 29, ¶ 337; LG&E Decision on Liability, *supra* note 30, ¶ 212; CMS Award, *supra* note 16, ¶ 373; Sempra Award, *supra* note 29, ¶ 388.
356. CMS Award, *supra* note 16, ¶ 371.
357. LG&E Decision on Liability, *supra* note 30, ¶ 212; Enron Award, *supra* note 29, ¶ 337.

tions.[358] Despite their agreement on the non self-judging nature of the NPM clause, only the *Sempra* tribunal gives serious consideration to the weighty evidence of the common intent of the United States and Argentina that the clause should be self-judging.[359] Yet, the *Sempra* tribunal, notably composed of two arbitrators who also served in the *CMS* case dismisses the relevance of that evidence.[360]

The areas of disagreement between the four tribunals are significant and reflective of two very different understandings of the function of the NPM clause in the U.S.-Argentina BIT. A first key difference among the decisions is their approach to the relationship between the NPM clause in the treaty and the customary law defense of necessity.[361] The *CMS* Tribunal, the *Enron* Tribunal, and the *Sempra* Tribunal effectively read the requirements of the customary international law defense of necessity into the NPM clause of the treaty, testing Argentina's invocation of the NPM clause against the basic requirements of the necessity defense in customary international law.[362] The *Enron* Tribunal observes: "because there is no specific guidance" as to the interpretation of the NPM clause "under the treaty…[it is] necessary to rely on the requirements of the state of necessity under customary law."[363] Likewise, the *CMS* Tribunal begins its analysis of Article XI with explicit reference to "Article 25 of the Articles on State Responsibility" which addresses the necessity defense in customary law and asks whether "the plea of neces-

358. LG&E Decision on Liability, *supra* note 30, ¶ 212. For example, the tribunal considers when the U.S. policy with respect to self–judging NPM clauses became explicit and finds that did not occur until 1992, after the U.S.-Argentina BIT was signed. *Id*. ¶ 213. Despite the agreement of the two tribunals that the NPM clause in the U.S.-Argentina BIT is not self–judging, there is reason to question both tribunals' decisions. As noted above, prior to the conclusion of the U.S.-Argentina BIT, the United States had asserted a self-judging interpretation of the NPM clause in its BITs. *See supra* notes 313–32 and accompanying text.

359. *See* Enron Award, *supra* note 29, ¶ 337; LG&E Decision on Liability, *supra* note 30, ¶ 212; CMS Award, *supra* note 16, ¶ 371.

360. *See* Sempra Award, *supra* note 29, ¶¶ 382–88.

361. For a discussion of the treatment of the state of necessity in the two cases, see August Reinisch, *Necessity in International Arbitration—An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on* CMS v. Argentina *and* LG&E v. Argentina, 3 TRANSNATI'L DISP. MGMT. (2006); Stephan W. Schill, *International Investment Law and the Host State's Power to Handle Economic Crises*, 24 J. INT'L ARB. 265, 277–84 (2007).

362. CMS Award, *supra* note 16, ¶ 357 (asking if, "in the context of Article 25 of the Articles on State Responsibility [the necessity defense], the act in question does not seriously impair an essential interest of the State or States towards which the obligation exists"); *see also* Sempra Award, *supra* note 29, ¶ 376 ("The Treaty provision is inseparable from the customary law standard.").

363. Enron Award, *supra* note 29, ¶ 333.

sity would…be precluded."[364] In contrast, the *LG&E* Tribunal considers Article XI of the BIT and the state of necessity in customary international law independently and does not impose the requirements of customary international law on Argentina's invocation of the treaty-based NPM clause. The *LG&E* Tribunal notes:

> The concept of excusing a State for the responsibility for violation of its international obligations during what is called a "state of necessity" or "state of emergency" also exists in international law. While the Tribunal considers that the protections afforded by Article XI have been triggered in this case, and are sufficient to excuse Argentina's liability, the Tribunal recognizes that satisfaction of the state of necessity standard as it exists in international law (reflected in Article 25 of the ILC's Draft Articles on State Responsibility) supports the Tribunal's conclusion.[365]

Although the fact that the customary defense of necessity has been satisfied may *support* the *LG&E* Tribunal's findings, the successful invocation of the NPM clause is based on a separate test and distinct evidence, independent from the customary defense of necessity itself. For the *LG&E* Tribunal, the NPM clause is a separate risk allocation device and an explicit part of the bargain in the U.S.-Argentina BIT, providing the states-parties greater protections than would have been available in customary law. For the *CMS*, *Enron,* and *Sempra* Tribunals, in contrast, the NPM clause appears to be merely a textual restatement of the preexisting customary defense of necessity.

As both a legal and policy matter, the approach taken by the *LG&E* Tribunal is far more appropriate. Legally, reading the customary defense of necessity into the NPM clause both violates the Vienna Convention rule of *lex specialis* and the canonical rule that each treaty provision must be given effect.[366] As a matter of policy, the incorporation of the necessity defense into the NPM clause fails to recognize the actual understandings of the U.S.-Argentina BIT, whereby in exchange for granting investors greater protections than would have been available in customary law, the states also sought to preserve for themselves greater freedom of action through the NPM clause than would have been available in customary international law. The flawed approach of the *CMS*

364. CMS Award, *supra* note 16, ¶¶ 353, 358. The *CMS* tribunal did analyze Article XI of the treaty independently of the customary defense of necessity, but read the customary law standards for invoking necessity back into its analysis of the NPM clause. *Id*. ¶¶ 353–58

365. LG&E Award, *supra* note 30, ¶ 245.

366. *See supra* notes 60–62 and accompanying text.

Tribunal in conflating customary and treaty law is suggested by the decision of the Annulment Committee in the *CMS* case. While the Annulment Committee found that it lacked the power under the limited review provisions of the ICSID Convention to overturn the decision, it found that the "errors made by the Tribunal could have had a decisive impact on the operative part of the Award. As admitted by *CMS*, the Tribunal gave an erroneous interpretation of Article XI."[367]

A second area of significant disagreement between tribunals is the level of deference they accord Argentina's invocation of the NPM clause. While all the tribunals agree the clause is not self-judging, the *CMS*, *Enron,* and *Sempra* Tribunals apply a far more rigorous standard to the nexus requirement under the NPM clause, importing the customary law requirements of necessity and requiring Argentina to show that the actions taken were the only ones available to the government. Although the *Sempra* Tribunal recognizes that "it is not the task of the tribunal to substitute its view for the government's choices," its interpretation of the "only available means" requirement essentially removes all policy responses from the government simply by finding that there were more than one possible response to the crisis.[368] In contrast, the *LG&E* Tribunal takes an approach somewhat closer to the margin of appreciation doctrine we advocate above. The Tribunal suggests, for example, that were it "to conclude that the provision is self-judging, Argentina's determination would be subject to a good faith review anyway, which does not significantly differ from the substantive analysis presented here."[369] In essence, then, the *LG&E* Tribunal reduces the level of scrutiny of Argentina's invocation of Article XI down to something close to a good faith review and appears to afford Argentina a margin of appreciation in which to make its own determinations of the appropriate responses to the crisis. For example, the *LG&E* Tribunal found:

> Certainly, the conditions in Argentina in December 2001 called for immediate, decisive action to restore civil order and stop the economic decline. . . . Article XI refers to situations in which a State has no choice but to act. A State may have several re-

367. CMS Annulment Decision, *supra* note 31, ¶ 135.
368. Sempra Award, *supra* note 29, ¶¶ 350–51. This approach fails to give the government any policy flexibility and does not recognize that some policy options may be more or less effective in responding to the crisis.
369. LG&E Award, *supra* note 29, ¶ 214.

> sponses at its disposal to maintain public order or protect its essential security interests.[370]

This approach recognizes the subjective nature of certain permissible objectives and that states, rather than tribunals, are in the best position to craft appropriate responses to emergency situations.

A third area of substantive disagreement between the tribunals is the question of compensation. While the *CMS* Tribunal did not find either the requirements of necessity in customary international law or the standards of the NPM clause met, it suggested that neither provision would, even if properly invoked, excuse the state invoking the clause of liability and the duty to pay compensation.[371] In contrast, the *LG&E* Tribunal opined that "Article XI establishes the state of necessity as a ground for exclusion from wrongfulness of an act of the State, and therefore, the State is exempted from liability."[372] As a consequence, the *LG&E* Tribunal found that Argentina was not liable for damages to investors during the period of emergency.[373] Given that the very purpose of the NPM clause was to guarantee states greater freedom of action in the face of extraordinary circumstances in exchange for enhanced protections for investors, the approach taken by the *LG&E* Tribunal appears to far better reflect the bargain inherent in NPM clauses. If such clauses were not intended to prevent liability, they would not in fact serve the purpose of guaranteeing greater freedom of action to states in cases of emergency.

B. Explaining the Differences: The Function of NPM Clauses

While the holdings of the four tribunals cannot be reconciled, the contradictory awards can be explained by the tribunals' different understandings of the function performed by NPM clauses and the nature of the bargain inherent in the U.S.-Argentina BIT. Each of the tribunals appreciates that the U.S.-Argentina BIT represents a bargain between the two contracting states. In the *CMS* case, the Tribunal notes that "[i]t

370. *Id*. ¶¶ 238–39.

371. The *CMS* Tribunal observed, for example, that "the plea of state of necessity may preclude the wrongfulness of an act, but it does not exclude the duty to compensate the owner of the right which had been sacrificed." Hence, "in the absence of agreement between the parties the duty of the tribunal in these cases is to determine the compensation due." CMS Award, *supra* note 16, ¶¶ 388, 394.

372. LG&E Award, *supra* note 30, ¶ 261.

373. *Id*. ¶ 266 ("Based on the analysis of the state of necessity, the Tribunal concludes that, first, said state started on December 1, 2001 and ended on April 26, 2003; second, during that period Argentina is exempt of responsibility, and accordingly, the Claimants should bear the consequences of the measures taken by the host State.").

must also be kept in mind that the scope of a given bilateral treaty, such as this, should normally be understood and interpreted as attending to the concerns of both parties." If the treaty were interpreted otherwise, "it could well result in unbalanced understanding of Article XI."[374] Similarly, the *LG&E* Tribunal notes that "[t]he provisions included in the international treaty are to be interpreted in conformity with the interpretation given and agreed upon by both parties at the time of its signature."[375] The *Enron* Tribunal notes that "what is relevant is the intention the parties had in signing the treaty."[376] In approaching the NPM clause, then, each tribunal engages in a formal analysis of the text of the provision, but claims to do so with reference to the intent of the parties and, at least implicitly, to the bargains underlying the treaties.

Yet, the Tribunals' awards reflect very different understandings of the particular function of the NPM clause intended by the United States and Argentina. For the *CMS* Tribunal, the bargain inherent in the BIT is one of investor protection and, hence, the NPM clause has a minimal function that does not significantly limit investor protection. As the Tribunal observed, "[t]he Treaty in this case is clearly designed to protect investments at a time of economic difficulties or other circumstances leading to the adoption of adverse measures by the Government."[377] Further, the *CMS* Tribunal observed that "[i]f the Treaty was made to protect investors it must be assumed that this is an important interest of the States parties."[378] The NPM clause is thus seen as merely a restatement of the limited preexisting necessity defense. Similarly, the *Enron* Tribunal finds that the treaty is intended to "apply in situations of economic difficulty and hardship that require the protection of the internationally guaranteed rights of the beneficiaries."[379] Hence, for the *Enron* Tribunal, a "restrictive interpretation" of the NPM clause "is mandatory."[380]

In contrast, the *LG&E* Tribunal recognizes that the treaty provides for a balancing of interests between investor protection and state freedom of action. That Tribunal notes that it "must decide whether the conditions that existed in Argentina during the relevant period were such that the State was entitled to invoke the protections included in Article XI of the

374. CMS Award, *supra* note 16, ¶ 360.
375. LG&E Award, *supra* note 30, ¶ 213.
376. Enron Award, *supra* note 29, ¶ 337.
377. CMS Award, *supra* note 16, ¶ 354; Sempra Award, *supra* note 29, ¶ 373.
378. CMS Award, *supra* note 16, ¶ 357.
379. Enron Award, *supra* note 29, ¶ 331.
380. *Id*.

Treaty."[381] In essence, for the *LG&E* Tribunal, the NPM clause is an explicit textual instrument to shift the costs of state action in exceptional circumstances from states to investors.

These different understandings of the nature of the function of the NPM clause and the background bargain behind the U.S.-Argentina BIT guide the divergent interpretative approaches of the Tribunals. The *CMS*, *Enron,* and *Sempra* Tribunals, focusing on a bargain of investor protection and a limited role for the NPM clause, read the customary law requirements of necessity into the clause and restrict its applicability. The *LG&E* Tribunal recognizes a bargain that balances investor protections and state freedom of action. It therefore treats the NPM clause as an essential element of the treaty that explicitly shifts costs to investors separate from the customary defense of necessity. These different understandings of the bargain in the treaty also drive the Tribunals' approaches to compensation. For the *CMS*, *Enron* and *Sempra* Tribunals, compensation remains due, even if the NPM clause is appropriately invoked, precisely because the Tribunal sees the BIT as designed to protect investors. In contrast, for the *LG&E* Tribunal, the successful invocation of the NPM clause alleviates responsibility during the period of emergency because the clause is specifically intended to balance investor protections with state freedom of action.

While the contradictory outcomes of the arbitrations can be explained with reference to the four Tribunals' understandings of the function of NPM clauses, the interpretations of the NPM clause in the U.S.-Argentina BIT highlight the difficult choices with respect to ascertaining state intent and the problems of interpretive shortcuts in that process. While all four tribunals claim to look to state intent in determining the meaning of the NPM clause, none of them engage in the serious work necessary to really determine that intent or the appropriate meaning of the NPM clause terms. This lack of interpretive rigor and the divergent awards challenge the very legitimacy of *ad hoc* investor-state arbitration. Similarly, the *CMS* Annulment Committee's rejection of the legal reasoning in the *CMS* award underscores the interpretative difficulties and problematic jurisprudence of, at least, that tribunal. Moreover, the awards indicate the pressing need for a coherent and consistent approach to NPM clauses, such as that advanced above, that is based on a treaty's text, but recognizes both the intent of states that include such clauses and the risk allocation function they intended NPM provisions to perform.

381. LG&E Award, *supra* note 30, ¶ 205.

IX. THE SYSTEMIC IMPLICATIONS OF THE INTERPRETATION AND APPLICATION OF NPM CLAUSES

The interpretation of NPM clauses must be an individualized process that considers the text of the clause, its context, the object and purpose of such treaties, the *travaux*, and the circumstances surrounding their conclusion. Yet, the interpretation and application of these clauses and, particularly, the degree of deference given to their invocations by national governments, have far reaching implications for the international legal and economic systems. These implications reach well beyond the Argentina cases and have potentially significant consequences for the risk allocation between states and investors, the willingness of states to enter into international agreements, the trajectory of investment flows, the pricing of cross-border investments, and the policy responses of states to extraordinary events such as economic crises. In this final section, we explore these broader policy implications that arise out of the interpretation and application of NPM clauses and suggest that both the inclusion of NPMs in BITs and their interpretation is of considerable importance to the future of international cooperation and the stability of the international economic system.

A. NPM Clauses, Risk Allocation, and Investment Pricing

Perhaps the most significant implication of the interpretation and application of NPM clauses relates to the risk allocation between states and investors. As customary international law offers only limited investor protections, cross-border investments made under such a customary law regime are at some risk of uncompensated impairment by host states.[382] BITs provide investors with broader guarantees for the security of their investments by ensuring compensation and providing a forum in which investors can pursue claims against states.[383] In essence, then, BITs shift the costs of potentially adverse state action from investors (who would bear the costs under a customary law regime) to the host state of inbound investments. The inclusion of an NPM clause in such a

382. Though customary international law does require compensation in the case of expropriation, investors would generally bear the costs of lesser forms of interference. For a discussion of investor protection in customary international law, see SORNARAJAH, *supra* note 10; Guzman, *supra* note 10, at 614.

383. BITs are often described as part of a "grand bargain" in which host states provide far reaching guarantees as to the security of investments in hopes of increasing in–bound investment flows. Salacuse & Sullivan, *supra* note 26, at 75; *see also* Yackee, *supra* note 26, at 10 (describing BITs as a "grand bargain").

BIT, in turn, reverses that risk allocation, shifting the risks and costs of state actions that meet the nexus requirement and are taken in pursuit of a permissible objective, back to investors. In short, NPM clauses reallocate risks to investors, creating a less favorable legal regime for investors, but giving states considerable freedom of action to respond to exceptional threats.

The interpretation of NPM clauses by arbitral tribunals also has considerable bearing on the degree to which such clauses shift risks from states to investors. The more narrowly NPM clauses are construed and the more arbitral tribunals engage in substantive reviews of state invocations of NPM clauses, the more those risks and costs remain with host states, pursuant to the substantive protections of a BIT. In contrast, the more broadly the terms of an NPM clause are construed and the more arbitral tribunals defer to state invocations of NPM clauses, the more those clauses will shift the risks and costs of host-state actions back to investors. The interpretation of NPM clauses thereby governs the ultimate allocation of risks between host-states and investors with respect to state actions taken in response to exceptional circumstances. With present day threats posed by terrorism, financial collapse, public health emergencies, and environmental disasters, just to name a few, this risk allocation is likely to be of ever-greater significance.[384]

In an international market environment which rationally prices investment returns, the inclusion of an NPM clause in a BIT ought to result in investors demanding higher returns for investments made under such a BIT than they would absent the NPM clause. Investors will seek a risk premium in the form of higher returns to account for the potential of uncompensated state actions. As a result, the host states of investments under a BIT with an NPM clause will have to pay more for capital inflows than they would absent that clause. Moreover, if investment opportunities in such states cannot command the risk premiums investors should demand, capital flows should decline, as investors shift to either more lucrative or safer host states for their investments. In essence, then, when states decide to include NPM clauses in their BITs, they engage in a compromise through which they increase their own costs of capital, but preserve for themselves greater freedom of action to respond to extraordinary circumstances.

384. For a more detailed discussion of the security threats states face today, see G. John Ikenberry & Anne-Marie Slaughter, *Forging a World of Liberty Under Law: U.S. National Security in the 21st Century* (Final Paper of the Princeton Project on National Security, Sept. 27, 2006), *available at* http://www.wws.princeton.edu/ppns/report/FinalReport.pdf.

The interpretation of NPM clauses by arbitral tribunals should also impact the pricing of cross-border investments. Given that the more broadly such clauses are interpreted, the more risks shift from states to investors, broader interpretations of NPM clauses ought to increase the costs of capital for states as investors perceive greater potential for uncompensated state-interference with their investments. In contrast, narrow interpretations of NPM clauses that minimize the risk-shifting function of such clauses ought to have a more mild impact on the costs of capital as the range of state actions that will fall under the NPM clause is diminished. Hence, even broad interpretations of NPM clauses do not give states a free pass to interfere with foreign investments; those states essentially pay for the right to invoke the NPM clause through the higher costs of capital they will face in the financial markets.

B. Clauses and the Legitimacy of Investor-State Arbitration

The interpretation of NPM clauses often touches on the core domestic functions of the state—the preservation of security, order, or morals. In the wake of the Argentine cases, the legitimacy of *ad hoc* tribunals to regulate within these core sovereign domains of domestic governments has been called into question. Particularly in light of the *CMS Annulment Decision*, which reaffirms Argentina's obligations to pay hundreds of millions of dollars in compensation, despite the finding of "errors" that "could have had a decisive impact on the operative part of the award, the legitimacy of subjecting such core state policy decisions to *ad hoc* arbitration," is questionable.[385] Argentina, for example, is now looking for a "diplomatic exit from ICSID suits."[386] Moreover, whereas international economic law has largely been based on objective rules that derive from treaties with identifiable ordinary meanings, NPM clauses present arbitral tribunals with far more subjective terms, the possibility of divergent meanings, and questions of constitutional significance. Our argument for importing the margin of appreciation doctrine from the European human rights context to international economic law offers a potent means of resolving this legitimacy deficit. The margin of appreciation would provide arbitrators with a legal mechanism to embrace the ambiguity of some NPM terms and to reconcile potentially divergent understandings of other terms by varying the deference shown to a state's own invocation of an NPM clause. Significantly, the use of

385. CMS Annulment Decision, *supra* note 31, ¶¶ 135–36.
386. Shane Romig, *Argentina Seeks Diplomatic Exit from ICSID Suits*, DOW JONES NEWSWIRES, Oct. 15, 2007.

the margin of appreciation as an interpretive tool might well preserve the legitimacy of the *ad hoc* arbitral system[387] by granting states space to develop and implement the policies they deem necessary and focusing the tribunal on its supervisory role. Just as the European Court of Human Rights was able to enhance its legitimacy and credibility through the use of the margin of appreciation,[388] *ad hoc* tribunals may be able to rescue their credibility by borrowing from the ECtHR.

The choice of the standard with which to review a state's invocation of an NPM clause will often be determinative of the risk allocation between states and investors for actions taken in extraordinary circumstances. Where states chose to specify explicitly or implicitly a self-judging NPM clause, they effectively preserve for themselves the right to determine, subject to the confines of good faith, whether the clause applies to a given action and whether the state or investors will bear the cost of that action. As BITs are bilateral agreements between two states, the states are free to choose any risk allocation they agree upon, including one that places a greater burden on investors, as long as both states understood that risk allocation when they drafted the treaty. Even if such a self-judging NPM clause limits protections for investors, it is a perfectly legitimate choice states may make in structuring their bilateral relations. Where states have made such a choice, investors ought to recognize their more limited protections and act accordingly. Similarly, arbitral tribunals ought to give effect to the intent of state parties to preserve for themselves the determination of risk allocation by applying a good-faith review.

In contrast, where NPM clauses are silent as to the appropriate standard of review and there is no evidence of a shared understanding that the clause was self-judging, the application of the margin of appreciation would serve an important balancing function, simultaneously preserving state freedom of action in exceptional circumstances and ensuring a level of investor protection commensurate with the terms states chose to include in their NPM clauses. With respect to technical, objective NPM terms, the narrow margin of appreciation will constrain a state's invocation of the NPM clause. In such cases, the NPM clause will allocate costs to investors when a state's actions meet those technical standards and allocate those costs to the state when its actions do not

387. The legitimacy of this system has been recently called into question as ad hoc arbitral tribunals have sought to hold states liable for policy decisions that fall within the core sovereign competencies of the state and have done so inconsistently. *See generally* Franck, *supra* note 32.

388. Slaughter & Helfer, *supra* note 145, at 317-318.

conform to the objective terms of the NPM clause. With respect to subjective or broad NPM terms or where the two states' understandings of those terms are difficult to reconcile, a wider margin of appreciation gives somewhat more deference to a state's invocation of the clause, while retaining a supervisory review that ensures protections for investors.

For states considering whether or not to provide investment protection through BITs or other treaty instruments, both the drafting and interpretation of NPM clauses will impact their willingness to enter into such agreements and the depth of interstate cooperation. Despite the perceived benefits of BITs in terms of increased inbound investment,[389] many states are unwilling to allow *ad hoc* tribunals to review core state policies or to compensate investors for the potentially significant costs that may result from a state's response to an emergency. Including NPM clauses in BITs provides states with a legal mechanism to regulate and control these risks, thereby reducing the sovereignty costs of cooperation. While treaties with NPM clauses may provide fewer guarantees for investors in exceptional circumstances, states may be more willing to enter into agreements that control risks through NPM clauses. However, if arbitral tribunals interpret NPM clauses so narrowly as to deprive states of a legal mechanism to reallocate risks in exceptional circumstances, some states may continue to avoid entering into BIT agreements and others may refuse to renew existing treaties when they expire. For states that do seek to enter into BITs with NPM clauses, a coherent approach to NPM interpretation by arbitral tribunals, perhaps through the framework we offer above, will help ensure that states are able to draft clauses that memorialize their preferred risk-allocation.

An interpretive approach based around the margin of appreciation has the important benefit of helping structure the expectations of all actors in the international investment system. First, it gives the states that draft BITs the ability to choose between objective, technical NPM terms, which will generate a relatively narrow margin of appreciation and broader, subjective terms, which will be result in a wider margin of appreciation. It puts investors on notice that an NPM clause will be interpreted with reference to the margin of appreciation implied by its terms and thereby allow investors to structure their investments based on the likely risks they face under the given terms of an NPM clause. For arbi-

389. *See* Salacuse & Sullivan, *supra* note 26. Even these perceived benefits have been called into question with new evidence suggesting that BITs may not actually alter cross-border investment flows. *See* Tobin & Ackerman, *supra* note 26.

trators, the margin of appreciation approach offers a tractable way to balance between the competing interests of investor protection and state freedom of action in an NPM clause. Likewise, it gives arbitrators a way of reconciling the different meanings of a given term in an NPM clause, affording a broader margin where states lack a shared understanding.

C. Non-Precluded Measures Clauses and Investor Expectations

Despite the clear legitimacy benefits of the use of the margin of appreciation doctrine to interpret NPM clauses, investors may perceive the application of a margin of appreciation or the determination that NPM clauses are self-judging as detrimental to their interests. Admittedly, the process of treaty interpretation advanced herein is likely to be more favorable to states, at least on the surface, than it is to investors. As BITs are treaties between states parties, primary analysis must focus on the actual bargain struck by the states parties themselves. BITs may, however, confer rights on individuals and those rights ought to be respected in the process of treaty interpretation and application. The analysis with respect to the scope of deference of BIT interpretation in no way undermines the rights such treaties confer on individuals. Rather, it provides a mechanism for accurately ascertaining the nature and breadth of rights states have chosen to grant to individuals through such treaties.

Investors may also have legitimate expectations as to how their investments will be treated under a BIT, even absent an express conferral of rights in a treaty. In determining an appropriate scope of deference for the interpretation of an NPM clause term, such legitimate expectations ought to be recognized. However, in most cases investors will not have *legitimate* expectations that their own views of terms such as public order or essential security will in fact be the applicable standard for the interpretation of an NPM clause. In some cases, investors may be able to claim a legitimate expectation that a non-expressly self-judging NPM clause will not subsequently be treated as self-judging. This could well be the case, for example, if the evidence that the states parties understood a non-expressly self-judging NPM clause as self-judging was kept secret or classified until it was raised in a subsequent arbitral proceeding. With respect to the U.S. BIT program, however, the U.S. interpretation of NPM clauses as self-judging has been so consistent, open, and notorious since 1984, that any investor expectations that such clauses were not self-judging cannot be legitimate and should not be given significant weight by arbitral tribunals.

While investors may find in the short run that the greater deference to state invocations of NPM clauses that flows from the use of the margin of appreciation reduces their investment security, this approach, in fact, best represents the actual guarantees states provide to investors through BIT instruments. Moreover, investors are best placed to respond to the actual legal protections offered by particular BIT instruments and structure their longer-term investments accordingly. For example, investors may react to the fact that a particular BIT has a self-judging NPM clause or that a specific state interprets its NPM clauses as self-judging and limit their risk under that BIT by demanding higher returns from investments in such a state or by investing elsewhere. Hence, in the longer term, states will be forced to internalize the actual costs of self-judging NPM clauses or vague NPM terms that result in a wide margin of appreciation through the reduced investment flows or higher prices of foreign direct investment that are likely in such a legal framework.

D. NPM Clauses, Modern Threats, and Global Stability

In the present world, states often face pressing and unexpected threats, whether terrorist attacks, financial crises or natural disasters. As states craft policy responses to these threats they will have to consider their BIT obligations and any cost and risk shifting that may result from NPM clauses. If states bear the full costs of harms to investors caused by a response to a crisis, their available policy options may be constrained. Where, as is the case with Argentina, the total cost of BIT claims based on harms to investors could top $80 billion, some states may simply not be able to afford their preferred policy in response to a crisis. Instead they may be forced to follow a sub-optimal policy that may or may not achieve an equally desirable outcome. Where states include NPM clauses and tribunals give effect to those clauses, the costs of host-state action will shift to investors, perhaps allowing the state to pursue its preferred policy response. While, at least in the short term, this flexibility may burden investors, in the context of present-day global threats it is fully understandable and, perhaps even wise, for states to preserve for themselves the right to craft preferred policy responses to pressing threats.

The use of a margin of appreciation by arbitral tribunals will ensure states the leeway implied by NPM clause terms to undertake preferred policy options in response to international crises. The margin of appreciation would allow states to pursue their preferred policy solutions, but would require them to justify their choices to an international tribunal performing a supervisory function. This would, in turn, require states both to produce reasoned explanations for why it was necessary to compromise investor interests and might result in states internalizing the legal rules governing international investments as part of their own deliberative process.[390]

Similarly, the interpretation and application of NPM clauses may prove important to recovery from international financial crises and the development of a sovereign bankruptcy mechanism. Discussion of financial crises and various proposals from both academe and the International Monetary Fund for a sovereign bankruptcy system have largely focused on sovereign debt and the collective action problems associated with defuse bondholders.[391] The Argentine case, however, highlights the fact that financial collapses may give rise to financial claims by investors under a state's BITs. Even if a state is able to negotiate an advantageous "hair cut" with debt-holders, it can still face directly enforceable liabilities under its BIT obligations.[392] NPM clauses may thus prove to be an essential, if heretofore overlooked, element of a state's post-conflict economic recovery. States may chose to draft NPM clauses that explicitly include responses to economic crises among permissible objectives and arbitral tribunals may interpret terms such as "essential security" to include catastrophic economic collapse. In such cases, states may be relieved of the obligations they would otherwise face under a BIT, thereby facilitating post-crisis recovery. Moreover, any formal sovereign bankruptcy mechanism that may emerge will have to address investment liability under BITs as well as ordinary debt liabilities. Ensuring that risks and costs of a response to an economic collapse shift

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390. For a discussion of how such internalization of norms operates in the area of human rights law, see Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and Human Rights Law,* 54 DUKE L. J. 621 (2004).

391. The primary proposal for a sovereign debt restructuring mechanism was authored by Anne O. Krueger of the International Monetary Fund. *See* ANNE O. KRUEGER, A NEW APPROACH TO SOVEREIGN DEBT RESTRUCTURING (2002), *available at* http://www.imf.org/external/pubs/ft/exrp/sdrm/eng/index.htm. Her proposal, however, only addresses debt restructuring and not investment arbitration. For academic commentary and alternative approaches, see Patrick Bolton & David A. Skeel, Jr*., Sovereign Debt Restructuring: Redesigning the International Lender of Last Resort*, 6 CHI. J. INT'L L. 177 (2005); Lee C. Bucheit & Mitu Gulati, *Sovereign Bonds and the Collective Will*, 53 EMORY L.J. 869 (2002); and Daniel K. Tarullo, *Sovereign Debt Restructuring: The Role of the IMF in Sovereign Debt Restructuring*, 6 CHI. J. INT'L L. 287 (2005).

392. Sovereign debt litigation and BIT investment arbitration have become recently intertwined in a case in which Italian bondholders have initiated ICSID arbitral proceedings against Argentina. For a discussion of this, see *Jilted Argentine Bondholders Appeal to World Bank in Final Throw of the Dice*, CREDIT MAGAZINE, Dec. 7, 2006, *available at* http://atfa.org/cgi–data/news/files/32.shtml.

from states that include NPM clauses in their BITs to investors will be an important part of any such sovereign bankruptcy mechanism.

X. CONCLUSION

The way states choose to allocate risks in exceptional circumstances has important and far-reaching consequences. In many cases, the risk allocation performed by NPM clauses can be highly beneficial to states, investors, and, perhaps, the international economic system more generally. Investors can often account for increased risks they face under NPM clauses through investment strategies and the pricing of their investments. Given the risk allocation performed by NPM clauses, however, all parties to the international investment system must structure their behavior around relatively clear legal rules. In order for them to do so, arbitral tribunals need to develop a consistent and coherent approach to such clauses. Ultimately, however, each NPM clause will have to be interpreted on its own terms and in light of the risk allocation intended by the parties to that treaty. Arbitral tribunals must undertake such interpretation with extraordinary care and diligence.

We have sought to explore some of those terms and their meanings here. As the system continues to develop, states will need to draft treaties that put all parties on notice of the risk allocation being performed by the particular NPM clause in question. Arbitral tribunals will have to develop consistent interpretive approaches. Investors will have to structure their investments accordingly. As we have argued, the margin of appreciation may provide the best legal mechanism for arbitral review that preserves for states the freedom of action to respond to crises that they intended when drafting NPM clauses, yet maintains the supervisory authority of an arbitral tribunal to hold states liable when their policies exceed the margin of appreciation derived from the terms of the treaty itself.

As arbitral tribunals are confronted with NPM clauses in investor-state disputes, they will have to develop both a framework for interpreting such clauses and methodologies for reconciling the inherent subjectivity and potentially divergent understandings of their terms. The contradictory decisions in the four recently decided cases against Argentina and the *CMS Annulment Decision* noted above highlight the urgent need for a harmonized approach that is legally and theoretically justifiable. The framework we offered in Part V provides such a coherent approach for the interpretation of NPM clauses that is grounded in the Vienna

Convention, yet also recognizes the intent of states parties in entering into BITs. More broadly, the challenges presented by the interpretation of NPM clauses must serve as a reminder of the urgent need for diligent and serious interpretation of treaty terms. Reliance on interpretive shortcuts or inappropriate invocation of legal doctrines from other areas of international law is dangerous and may further erode the legitimacy of an already fragile investor-state arbitral system. Whatever the treaty clause in question, even *ad hoc* tribunals must undertake the diligent process of treaty interpretation called for by the Vienna Convention and deserved by investors and states alike.