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Essential Security Interests of States - Some Observations on the Emerging Practice under International Law

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Abstract. This paper tackles the notion of the essential security interest of a State as an exception enshrined in numerous treaties since the beginning of the 20th century. The purpose of the analysis is to establish whether the practice of international courts, tribunals, and other bodies competent to settle the disputes under international law has created any guidelines for interpretation of sometimes vague and discretionary terms used in the wording of essential security interest clauses included in different international treaties. The method is based on the exegetical analysis of jurisprudence of international courts, tribunals and dispute settlement bodies in cases concerning interpretation of essential security interest clauses. The protection of vital interests of the State, designed as an exception to treaty-based international obligations, has been well established in treaty practice. The wordings of particular essential security interest clauses differ depending on the objects and purposes of the particular treaties, but the core stipulations of the essential security interest clauses remain very similar. The analysis of the judgments, awards and decisions allows to formulate some general conclusions as to the application of essential security interest clauses. Measures allowed under essential security interest exception must be intended to protect 'essential security interests' of the invoking State. Although States remain discretion to define their essential security interests, it must be done in good faith, consistent with the ordinary meaning of the stipulation and treaties' object and purpose.

Keywords: essential security interest, ESI clause, GATT, investment arbitration, BIT, state of necessity.

JEL Classification: K33, K10, K29

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1. INTRODUCTION

It is universally acknowledged that every State has its inherent right to establish its international obligations based on, and in accordance with its sovereign will. There has been numerous attempts to define a will of a State, from Richelieu's *raison d'État* up to liberal aggregation of the preferences of domestic political groups (Moravcsik, 1997). In every case, it might be described as a rationality of governing referring to a sovereign state's goals and ambitions, be they military, economic, cultural, or otherwise. Today, in both political and legal discourse that *raison d'État* is identified with vital interest of a State, e.g. the existence and independence of the State, its security or certain economic interests.

Through the centuries, States have developed certain principles and notions in order to safeguard under international law its vital interests, the oldest and the broadest being the *domaine réservé* – the notion that certain matters are of such an utmost importance for a State that they are excluded from foreign interference and are not, in principle, regulated by the international law. Undoubtedly, the scope of the *domaine réservé* is not fixed, but is determined both by the treaty obligations of a State and the development of customary international law. As the Permanent Court of International Justice [hereinafter: PCIJ] observed in *Nationality Decrees in Tunis and Morocco* (1923): "[t]he question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations." Although this *dictum* is still relevant today, because of the evolution and expansion of international law and the increasing 'entanglement' of international and domestic laws there are hardly any subject-matters or policy areas that are inherently removed from the international sphere. Even the discretion with regard to regulating core elements of statehood is becoming restricted by successive development of international law, the growing international awareness of the rule of law principle might be of such an example. Nevertheless States are still very interested in preservation of its exclusive competences. Hence, while drafting their international obligations, States stipulate some specific exceptions which may secure their national interests without giving up their place in mutual development of international cooperation.

2. ESSENTIAL SECURITY INTEREST EXCEPTION IN THE ICJ'S JURISPRUDENCE

One of the exceptions mentioned above is an essential security interest exception [hereinafter: ESI]. In general, this exception entitles a State to pass emergency measures "necessary" for the maintenance of "public order" or the protection of "essential security interests" (cf. e.g. US-Iran Amity Treaty, 1955, at Article XX). The ESI clauses were developed through the 20th century in popular at that time treaties concerning friendship, commerce and navigation [hereinafter: FCN treaties]. On numerous occasions those ESI clauses were subject to the considerations of the International Court of Justice [hereinafter: ICJ], most notably in Nicaragua (1986) and Oil Platforms (2003).

The dispute between Nicaragua and the United States was the first dispute in which the ICJ's jurisdiction over the ESI clause was questioned. In 1984 Nicaragua instituted proceedings against the United States on the ground that the United States was responsible for illegal military and paramilitary activities on the territory and against Nicaragua. The United States challenged the ICJ's jurisdiction as well as the admissibility of the Nicaraguan claims (Nicaragua, 1986, para. 14). The US asserted that the ESI clause contained in bilateral FCN Treaty of 1956, which read as follows: "the present Treaty shall not preclude the application of measures: (d) (…) necessary to fulfil the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests." (US-Nicaragua FCN Treaty of 1956, Article XXI.1.d.) might have been treated as a basis for US measures undertaken against Nicaragua, since it was, in fact, a self-judging clause and hence only the United States were competent to assess legality of its actions (Nicaragua, 1986, para. 14).

The ICJ pronounced that this exception is an affirmative defence, still it does not deprive the court of its jurisdiction to determine whether measures taken by one of the Parties fall within such an exception (Nicaragua, 1986, para. 222). As to the self-judging character of the ESI clause, the ICJ specifically contrasted this provision

with GATT Article XXI, pointing out that mere wording of Article XXI of the 1956 FCN Treaty differs from the wording which was already to be found in GATT Article XXI. Said provision of GATT, while enumerating exceptions to the normal implementation of the GATT, stipulates that the GATT is not to be construed to prevent any contracting party from taking any action which it "considers necessary for the protection of its essential security interests", in such fields as nuclear fission, arms, etc. A contrario, as the ICJ's underlined, the 1956 FCN Treaty, on the contrary, speaks simply of "necessary" measures. not of those considered by a party to be such (Nicaragua, 1986, para. 222).

Moreover, the ICJ explained in Nicaragua 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. Therefore in every case the judge has to assess whether the risk run by these "essential security interests" is reasonable, and secondly, whether the measures presented as being designed to protect those interests are not merely useful but necessary (Nicaragua, 1986, para. 224). The ICJ concluded that the United States failed to demonstrate that its actions were justified under the ESI clause as enshrined in Article XXI of the 1956 FCN Treaty, but did not elaborate extensively on those conclusions stating merely that it did not consider that the mining of Nicaraguan ports, and the direct attacks on ports and oil installations, could possibly be justified as "necessary" to protect the essential security interests of the United States (Nicaragua, 1986, para. 224).

The ICJ revisited this issue in Oil Platforms. In 1992 the Islamic Republic of Iran filed an application instituting proceedings against the United States of America with respect to the destruction of Iranian oil platforms in Persian Gulf, alleging that the destruction caused by several warships of the United States Navy, in October 1987 and April 1988, to three offshore oil production complexes, owned and operated for commercial purposes by the National Iranian Oil Company, constituted a fundamental breach of various provisions of the 1955 US-Iran Amity Treaty and of international law. The United States argued that military actions taken against Iranian oil platforms were "necessary" to protect its "essential security interests" under Article XX of the 1955 US-Iran Amity Treaty. The United States cited to its interest in the flow of maritime commerce, its naval vessels in the Gulf, and financial losses of its citizens as "essential security interests," and explained that "armed action in self-defense" was necessary because diplomatic options had failed to deter Iran (Oil Platforms, 2003, para. 49).

Assessing the case, the ICJ had to determine whether the Article XX of the 1955 US-Iran Amity Treaty, which reads: "The present Treaty shall not preclude the application of measures: (…) necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests" shall be interpreted as excluding certain measures from the scope of the treaty and as a result, "as excluding the jurisdiction of the Court to test the lawfulness of such measures" (Oil Platforms, 1996, para. 49). Interpreting the 1955 US-Iran Amity Treaty in light of the relevant rules of international law, the ICJ concluded that the United States was only entitled to have recourse to force under the provision in question if it was acting in self-defence; as stipulated in Article 2.4 of the UN Charter (1945). The United States could exercise such a right of self-defence only if it had been the victim of an armed attack by Iran and the United States actions must have been necessary and proportional to the armed attack against it. The ICJ found that the United States had not succeeded in showing that these conditions were satisfied, and concluded that the United States was therefore not entitled to rely on the provisions of Article XX, paragraph 1 (d), of the 1955 US-Iran Amity Treaty.

Importantly, the ICJ stated that its reasoning, both in Oil Platforms and Nicaragua, relied primarily on the fact that the actions in question entailed the use of force. As the Court explained, "the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective … [entailing] the criteria of necessity and proportionality in the context of international law on self-defence." (Oil Platforms, 2003, para. 73). The ICJ however has not got the opportunity to assess the ESI clause in purely peaceful circumstances.

2. THE ESI AND THE INVESTMENT LAW. ARGENTINE CRISIS OF 2001

International law has, until recently, played a relatively marginal role in the management of financial crises. In this respect, the financial crisis that afflicted Argentina in late 2001 has revealed a new legal subject with the serious potential to constrain state autonomy in mitigating the effects of such crises, as the foreign investors invoked several treaty stipulations to challenge the regulatory measures implemented by Argentina in the wake of its financial predicament (Kurtz, 2008).

The economic history of Argentina is one of the most studied, owing to the "Argentine paradox" (Saleigh, 1996), its unique condition as a country that had achieved advanced development in the early 20th century but then experienced a severe reversal (della Paolera & Taylor, 1997). The depression, which began after the Russian and Brazilian financial crises, caused widespread unemployment, riots, the fall of the government, a default on the country's foreign debt, the rise of alternative currencies and the end of the peso's fixed exchange rate to the US dollar (Cibils et. al, 2002). The economy shrank by 28 percent from 1998 to 2002 (Saxton, 2003), over 50 percent of Argentines lived below the official poverty line and 25 percent were indigent (Pascoe, 2012).

In the aftermath of 2001 depression, several international arbitral tribunals were established in order to decide on the disputes between foreign investors and Argentina. However, from over forty cases brought to the investment tribunals against Argentina, in only three cases – *CMS* (2005), *LG&E* (2007) and *Enron* (2007) – the question of ESI exception was discussed in the context of investment arbitration. All three were decided on the basis of Article XI of the 1991 US-Argentina BIT, which provides that this 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". Yet the analysis undertaken by the tribunals differed.

In the *CMS* and *Enron* cases, the tribunals proceeded in their analysis by examining whether the purported treaty breach was "devoid of legal consequences by the preclusion of wrongfulness" (*CMS*, 2005, para. 318). The tribunal stressed that in order to determine if the ESI exception was applicable, firstly the gravity of the crisis must be assessed. It underlined that "the need to prevent a major economic breakdown, with all its social and political implications, might have entailed an essential interest of the State in which case the operation of the state of necessity might have been triggered" (*CMS*, 2005, para. 319). Consequently, in both cases the tribunals linked the ESI clause with state of necessity defence under customary international law. They looked at whether the measures adopted by Argentina were the only acceptable solution for the State to safeguard its interests and concluded that it was not (*Enron*, 2007, para. 309). In addition, they examined the requirement for the state not to have contributed to the situation of necessity and in the circumstances of both disputes, were of the view that Argentina's contribution to the crisis had been substantial (*Enron*, 2007, para. 312). Moreover, the tribunals explained that the object and purpose of the US-Argentina BIT of 1991 was, as a general proposition, to apply in situations of economic difficulty hardship that require the protection of the international guaranteed rights of its beneficiaries. And to this extent, any interpretation resulting in an escape route from the obligations defined cannot be reconciled with that object and purpose (*Enron,* 2007, para. 331). And as such, in the tribunals' opinion, a restrictive interpretation of any such exception is mandatory

On the other hand, in the *LG&E*, the tribunal decided first to apply the terms of the 1991 US-Argentina BIT and that, "to the extent required for the interpretation and application of its provisions, the general international law" (*LG&E*, 2007, para. 206). Similarly to the *CMS* and *Enron* tribunals, *LG&E* tribunal concluded that severe economic crises could not be excluded from the scope of Article XI of the 1991 US-Argentina BIT. It also rejected the argument that that Article XI of the 1991 US-Argentina BIT is only applicable in circumstances amounting to military action and war (*LG&E*, 2007, para. 238). But contrary to the findings of the tribunals in *CMS* and *Enron*, not only had Argentina not contributed to causing the severe crisis faced by the country, but the measures adopted by the government was established to slow down by all the means available the severity of the crisis and therefore the tribunal considered the ESI clause as embodied in Article XI of the 1991 US-Argentina BIT applicable (LG&E, 2007, para. 30).

3. THE ESI AND THE WTO LAW

Currently, the ESI clauses are mainly the domain of trade and investment law. Most of the ESI clauses in multilateral trade and investment agreements draw their text from Article XXI of the General Agreement on Tariffs and Trade (GATT, 1994), which was included verbatim in the WTO Agreement, Article IVbis of the General Agreement on Trade in Services (1994), and Article 73 of the Agreement on Trade Related Aspects of Intellectual Property Rights (1994).

Historically, GATT Article XXI has been subject to very few disputes[1]. Largely due to its subjective – or, as the ICJ put it *Nicaragua* – self-judging language, many WTO Members considered it "non-justiciable" and self-adjudicating (Bogdanova, 2019). However, in April 2019, a WTO panel issued the first-ever analysis of GATT Article XXI in *Russian Federation – Measures Concerning Traffic in Transit* [hereinafter: *Russia – Traffic in Transit*, 2019]. To date, this remains the only panel decision interpreting GATT Article XXI[2].

In *Russia – Traffic in Transit*, Ukraine challenged Russian measures limiting or prohibiting exports of certain goods to and from Ukraine. Russia defended its use of these measures by invoking GATT Article XXI(b)(iii), concerning measures "taken in time of war or other emergency in international relations." Russia asserted that there was an emergency in international relations between Ukraine and Russia that arose in 2014, evolved between 2014 and 2018, and continued to exist up to that moment (*Russia – Traffic in Transit*, 2019, para. 7.27.) and that this emergency presented threats to Russia's essential security interests. It argued that, under GATT Article XXI(b)(iii), both the determination of a Member's essential security interests and the determination of whether any action is necessary for the protection of a Member's essential security interests are at the sole discretion of the Member invoking the provision. The Panel refuted Russia's submission on self-judging character of GATT Article XXI and considered it only as Russia's defence. Most importantly, it set a "plausibility" standard, requiring Russia to prove "that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests" (*Russia – Traffic in Transit*, 2019, para. 7.138). In other words, the Panel examined whether r the measures are so remote from, or unrelated to, the emergency that it is implausible that Russia implemented the measures for the protection of its essential security

[1] Prior to the establishment of the WTO in 1995, GATT Article XXI was invoked in ten cases: *United States* – Embargo on strategic goods exports to Czechoslovakia (1949); *United States* - Suspension of obligations between the US and Czechoslovakia (1951); *Peru* - Prohibition of imports from Czechoslovakia (1954); *Ghana* - Ban on imports of Portuguese goods (1961); *United States* - Embargo on trade with Cuba (1962); *Egypt* - Boycott against Israel and secondary boycott (1970); *EC, Australia and Canada* - Trade measures against Argentina (1982); *United States* - Imports of sugar from Nicaragua (1982); *United States* - Embargo on trade with Nicaragua (1985); and EEC and ten other countries – trade measures against Yugoslavia (1991). Of all of the above mentioned cases, only one – *United States*- Embargo on trade with Nicaragua (1985) – saw the establishment of a panel, who explicitly stated that it would not consider the invocation of Article XXI by the United States. Since the establishment of the WTO in 1995 (until April 2019, when the first panel report with a GATT Article XXI analysis was issued) States invoked GATT Article XXI in three cases: *United States* — The Cuban Liberty and Democratic Solidarity Act (DS38) (1996); *Nicaragua* — Measures Affecting Imports from Honduras and Colombia (DS188) (2000); and *India* — Import Restrictions Maintained Under the Export and Import Policy 2002-2007 (DS279) (2002). None of these disputes has advanced past formal panel proceedings.

[2] Two other cases are pending: *United Arab Emirates* — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights (Qatar's challenge of the blockade enforced by members of the Gulf Cooperation Council against it) and *United States* — Certain Measures on Steel and Aluminium Products (challenges brought by China, India, the EU, Norway, Russia, Switzerland, and Turkey against the United States' enforcement of "national security" tariffs on steel and aluminium imports).

interests arising out of the emergency. It deemed an "emergency in international relations" as "an objective state of affairs" and defined it as "a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state" (*Russia – Traffic in Transit*, 2019, paras. 7.77, 7.111). The Panel then defined ESI as a concept obviously narrower than "security interests", which may generally be understood to refer to those interests relating to the quintessential functions of the State, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally (*Russia – Traffic in Transit*, 2019, para. 7.130). It is therefore incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity (*Russia – Traffic in Transit*, 2019, para. 7.134).

But it must be stressed, that the WTO law does not function in a clinical isolation from public international law (Bogdanova, 2019) and therefore adjudicators, when faced with intricate interpretative questions, frequently seek guidance from general international law. Hence the Panel invoked the principle of good faith as a factor which limits the State's right to claim ESI. It recalled that the obligation of good faith is a general principle of law and a principle of general international law which underlies all treaties, as codified in Article 31 and Article 26 of the Vienna Convention on the Law of Treaties (VCLT, 1969). In particular, the Panel stressed that the obligation of good faith requires that Members not use the exceptions in GATT Article XXI as a means to circumvent their obligations under the GATT and the discretion of a Member to designate particular concerns as "essential security interests" is limited by its obligation to interpret and apply GATT Article XXI(b)(iii) in good faith.

Furthermore, the Panel reiterated the notion of necessity which is also crucial for assessing the legality of measures undertaken under GATT Article XXI(b)(iii). In the Panel's view it was for Russia to determine the "necessity" of the measures for the protection of its essential security interests, that reasoning stems from logical necessity if the clause "which it considers" is to be given legal effect (*Russia – Traffic in Transit*, 2019, para. 7.146). But again, discretion of a Member to determine the "necessity" of the measures is limited by requirements of necessity accepted in general international law. Nevertheless, the Panel found that Russia had met the requirements for invoking GATT Article XXI(b)(iii) in relation to the measures at issue, and therefore the measures are covered by GATT Article XXI(b)(iii).

The WTO Panel's decision in *Russia – Traffic in Transit* might be regarded as standard-setting for future disputes concerning the ESI clauses in the WTO system and, more generally, international investment law. The reference to general international law, by invocation of the principle of good faith and customary requirements of necessity definitely brings some consistency and predictability to the interpretation of the generally vague terms of ESI. But although the theoretical considerations deserve a genuine commendation, the practical aspect of the decision seems somewhat deficient. In particular, it is hard not to question the assessment of good faith of Russia's conduct in relation to measures implemented because of "emergency in international relations between Ukraine and Russia that arose in 2014" (*Russia – Traffic in Transit*, 2019, para. 7.27.). It would be valuable for the impartiality of the analysis if the WTO Panel had addressed the possible Russia's contribution to said emergency in a way the ICSID tribunals addressed Argentina's contribution to its financial crisis in *CMS* and *Enron*. Without such an assessment, the Panel's decision may provoke comments as to its fairness.

6. CONCLUSIONS

The protection of vital interests of the State, designed as an exception to treaty-based international obligations, has been well established in treaty practice since the beginning of the 20th Century. It has been expressly included in international agreements, in OECD investment instruments and a number of bilateral investment treaties (Yannaca-Small, 2007). Although the wordings of particular ESI clauses differ depending on the objects and

purposes of the particular treaties (FCNs and BITs), the core stipulations of the ESI clauses remain very similar. Yet still there are some problems with interpretation of somewhat vague and arbitrary terms of the ESI clauses.

Although the jurisprudence on the matter of ESI is scarce, the analysis of the judgments, awards and decisions allows to formulate some general conclusions as to the application of ESI clauses under international law. Measures allowed under ESI exception must be intended to protect 'essential security interests' of the invoking State. Although States remain discretion to define their essential security interests, it must be done in good faith, consistent with the ordinary meaning of the stipulation and treaties' object and purpose. Further, what is "essential" depends on the proportionality between the threatened individual interest and the impact of the measure on the common interests of the multilateral system (Schill & Briese, 2009). As opposed to other general public or societal interests, an "essential security interest" equates to an interest threatened in armed attacks or other emergencies in international relations. Exceptionally, only when an economic crisis causes widespread disorder, extreme political disturbance, or other such security threats, may an economic interest be considered as an essential security interest.

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