The Chinese Journal of Comparative Law (2015) pp. 1–25
doi:10.1093/cjcl/cxx007

The 'Necessary' Nexus Requirement Link in General Exception Provisions of South Asian Bilateral Investment Treaties and Some Insight on Its Interpretative Approach in the Context of South Asia

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Abstract

Nexus requirement links (NRLs) in general exception provisions of bilateral investment treaties (BITs) are an important connecting factor between measures taken by States and objectives pursued by States. This article attempts to make a first-ever detailed study of NRLs as necessary features of general exception provisions in all BITs in force that are signed by South Asian countries. The objective of this study is to map and ascertain a suitable interpretative approach of 'necessary' NRLs against the background of various interpretative methodologies adopted by different investment tribunals. For this purpose, the article delves into the meaning of NRLs in general, the relevance of studying 'necessary' NRLs in South Asia, and the mapping of 'necessary' NRLs, and it concludes by offering a suitable interpretative approach in the South Asian context.

Keywords: *bilateral investment treaty; foreign direct investment; investor–State dispute settlement; Nexus requirement link; general exceptions; South Asian countries*

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Introduction

Nexus requirement links (NRLs) in general exception provisions of bilateral investment treaties (BITs) are an important connecting factor between measures taken by States and the objectives behind those measures. This article studies 'necessary' NRLs that are found in the BITs of South Asian countries. The reason for studying NRLs in the BITs of South Asian countries has assumed importance as there is a plethora of investor–State dispute settlement cases (ISDS) pending against South Asian countries. The purpose of this study is to fill the gaps in academia where the study of 'necessary' NRLs has never found attention, especially in the context of South Asian countries. For this purpose, the article studies 190 BITs of South Asian countries and maps the 'necessary' NRLs found in them.[1] It then proceeds to explore the meaning of 'necessary' in international law, followed by an approach to determine its meaning in specific investment treaty regimes based on the decisions of various tribunals and academic debate. After that, it inquires into the relationship between 'necessary' in investment treaty regimes and 'necessity' in international law, followed by suggestions and a conclusion.

However, before we move directly to a discussion of NRLs, it would be better to first understand the meaning of general exception clauses. General exception clauses work as an instrument embedded in the BIT itself that, when invoked by the host States, makes the other provisions of the same BIT redundant. As the text suggests, the actions of the host States that are inconsistent with the BIT obligations are generally allowed by virtue of general exception provisions.[2] Therefore, those actions by States that violate BIT provisions are usually accepted as being consistent with a BIT if the State has invoked the general exception clause. Here, the host State dismisses its liability of harm done to an investment in exceptional circumstances using a general exception clause.[3] Thus, general exception provisions permit States to regulate the investments in exceptional circumstances in their territories.[4] Hence, in order to pursue their non-investment policy objectives, the general exception provision is an effective device to ensure regulatory latitude for States.[5]

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1 Here, the expression 'bilateral investment treaty' (BIT) includes all stand-alone BITs (that are in force), investment chapters in various free trade agreements (FTAs) and any other investment agreements signed by South Asian countries. This expression shall be used throughout this article and should be understood to have incorporated all standalone BITs, FTAs, and investment agreements signed by South Asian countries.

2 William W Burke-White and Andreas Von Staden, 'Investment Protection in Extraordinary Times: The Interpretation of Non-Precluded Measure Provisions in Bilateral Investment Treaties' (2008) 48 Virginia JIL 307, 314.

3 Ibid 401.

4 Kenneth J Vandevelde, 'Of Politics and Markets: The Shifting Ideology of the BITs' (1993) 11 Berkeley J Intl L 159, 170.

5 Jürgen Kurtz, 'Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis' (2010) 59 ICLQ 325, 343.

Unlike the General Agreement on Tariffs and Trade (GATT), which distinguishes between general exceptions[6] and security exceptions,[7] general exception provisions in BITs do not provide any such demarcation. These provisions usually use an expression known as 'essential security interests' (ESIs) that deal with both security and non-security issues.[8] ESIs in general the exception provisions of BITs are used in a general sense, as they cover more issues than just conventional security-related issues.[9] Here, however, general exceptions provisions must be distinguished from security exception provisions found in different free trade agreements (FTAs) and BITs that contain the list of security-related areas.[10] The security exception provisions containing ESIs can be of two types: first, those that have a self-judging clause, which means BITs that provide discretion to the State to assess the security-related situations and thereby allows the State to deviate from BIT obligations,[11] and, second, having non-self-judging clauses, where the tribunal determines what deference is to be given to the assessment made by the State.[12]

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6 General Agreement on Tariffs and Trade, 30 October 1947, 58 UNTS 187, art XX (GATT).

7 Ibid art XXI.

8 Prabhash Ranjan, 'Protecting Security Interests in International Investment Law' in Mary Footer, Julia Schmidt, and Nigel D White (eds), *Security and International Law* (Hart Publishing 2016). However, whether ESIs should be interpreted narrowly or broadly has received divided opinion from various scholars. For more on essential security interests (ESIs), see A Reinisch, 'Necessity in International Investment Arbitration: An Unnecessary Split of Opinions in Recent ICSID Cases?' (2007) 7 J World Investment & Trade 191, 209; JE Alvarez and K Khamsi, 'The Argentine Crisis and Foreign Investors' in Karl P Sauvant (ed), *The Yearbook on International Investment Law and Policy 2008/2009* (OUP 2009) 379.

9 Amit Kumar Sinha, 'Non-Precluded Measures Provisions in Bilateral Investment Treaties of South Asian Countries' Asian JIL (28 April 2016) on CJO 2016 DOI <http://dx.doi.org/10.1017/S2044251316000023> assessed 12 March 2017.

10 Comprehensive Economic Partnership Agreement between Republic of India and Korea (7 August 2009) <http://commerce.nic.in/trade/INDIA%20KOREA%20CEPA%202009.pdf> accessed 19 March 2017 (India–Korea CEPA); Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the Association of South East Asian Nations and the People's Republic of China (15 August 2009) <http://fta.mofcom.gov.cn/inforimages/200908/20090817113007764.pdf> accessed 19 March 2017; Free Trade Agreement between the Government of New Zealand and the Government of the People's Republic of China (2008) <http://www.chinafta.govt.nz/1-The-agreement/2-Text-ofthe-agreement/0-downloads/NZ-ChinaFTA-Agreement-text.pdf> accessed 19 March 2017; Agreement between Japan and the Republic of Singapore for a New Age Economic Partnership (13 January 2002) <http://www.mofa.go.jp/region/asia-paci/singapore/jsepa-1.pdf> accessed 19 March 2017; Agreement between Canada and the Republic of Peru for the Promotion and Protection of Investment (14 November 2006) <http://www.treaty-accord.gc.ca/text-texte.aspx?id=105078> accessed 19 March 2017; Singapore–Australia Free Trade Agreement (28 July 2003) <http://www.fta.gov.sg/fta.safta.asp?hl=4> accessed 19 March 2017; United States–Chile Free Trade Agreement (1 January 2004) <http://www.ustr.gov/tradeagreements/free-trade-agreements/chile-fta/final-text> accessed 19 March 2017.

11 SW Schill and R Briese, '"If the State Considers": Self-Judging Clauses in International Dispute Settlement' in A von Bogdandy and R Wolfrum (eds), *Max Planck Yearbook of UN Law*, vol 13 (Brill 2009) 61.

12 Ibid.

In South Asia, of the 103 BITs having general exceptions provisions, 81 contain an ESI as one of the permissible objectives.[13] Among these South Asian BITs, only four BITs have self-judging clauses in their general exception provisions or security exception provisions;[14] the other BITs having general exception provisions are non-self-judging.

The formulation and textual composition of these types of provisions may vary from one BIT to another. The examples of textual variation of these provisions can be easily seen in South Asian BITs.[15] However, only a handful of general exception provisions having similarity with Article XX of the GATT[16] can be found in South Asian BITs.[17] The Agreement for the Promotion and Protection

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13 Sinha (n 9).

14 Agreement for the Promotion and Protection of Investments between the Republic of Colombia and the Republic of India (10 November 2009), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/796>. art 13(4) (India–Colombia BIT); Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore (2005) art 6.12, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2707> accessed 25 February 2017 (India–Singapore CECA); India–Malaysia FTA, Comprehensive Economic Cooperation Agreement between the Government of Malaysia and the Government of the Republic of India (18 February 2011), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2629> art 12.2 (India–Malaysia FTA); India–Japan EPA, Comprehensive Economic Partnership Agreement between Japan and the Republic of India (16 February 2011), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2627>. art 115; India–Korea CEPA (n 10) art 2.9.

15 Eg, Agreement between the Government of the United Mexican States and the Government of the Republic of India on the Promotion and Protection of Investments (25 July 2005), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1578> art 31 (Mexico–India BIT) provides for:

'Security Exceptions:

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 nondiscriminatory basis.'

Mauritius–Pakistan BIT, Investments Promotion and Protection Agreement (IPPA) between the Republic of Mauritius and the Islamic Republic of Pakistan (03 April 1997), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1987>. art 12 (Mauritius–Pakistan BIT) provides for;

'Prohibitions And Restrictions:

The provisions of this Agreement shall not in any way limit the right of either, Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases and pests in animals or plants.'

16 GATT (n 6).

17 Framework Agreement on the Promotion, Protection and Liberalization of Investment between Asia-Pacific Trade Agreement Participating States (2009) art 5 <http://investmentpolicyhub.unctad.org/IIA/treaty/3269> accessed 25 February 2017 (APTA Agreement); Agreement on South Asian Free Trade Area (2004) art 14 <http://commerce.nic.in/trade/safta.pdf> accessed 25 February 2017 (SAFTA); Final Framework Agreement on the BIMSTEC Free Trade Area (15 January 2004) art 8 <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3099> assessed 25 February 2017 (BIMSTEC Agreement); Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India (2014) art 21 <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3337> accessed 25 February 2017 (ASEAN–India Investment Agreement); Comprehensive Economic Cooperation Agreement between the Government of

of Investments between the Republic of Colombia and the Republic of India (India-Columbia BIT), the Association of Southeast Asian Nations–India Investment Agreement, the India–Malaysia FTA, the India–Singapore Comprehensive Economic Cooperation Agreement, the South Asian Free Trade Area, the Asia-Pacific Trade Agreement, and the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation are a few of the BITs in South Asia that contain a general exception clause resembling Article XX of the GATT.[18] These differences in textual variation provide us with the opportunity to assess these provisions on two levels: first, on the number of permissible objectives provided and their nature and, second, on the basis of NRLs and their gravity. In this context, NRLs in general exception provisions assume an important role, which is discussed in the sections to follow.

Before moving to 'necessary' NRLs in the context of South Asia, it would be pertinent to understand the meaning of NRLs. They are textual formulations that are found in general exception clauses[19] establishing the links between measures adopted by host States and the objective sought by such States through those measures.[20] The importance of NRLs lies in the fact that they determine the gravity in the relationship between the measures engaged by States and objectives sought to be achieved by the State.[21] This degree of connection actually decides the threshold for how smoothly or intricately a State can take regulatory measures affecting foreign investments. Various types of NRLs are used in general exception provisions of different BITs, and all of these different NRLs have diverse connotations. South Asian BITs also use different types of NRLs.[22] For example, the NRL in the India–Bangladesh BIT[23] is 'for',[24]

Malaysia and the Government of the Republic of India (2011) art 12 <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2629> accessed 25 February 2017; India–Singapore CECA (n 14) art 6.11.

18 India–Colombia BIT (n 14) art 13(5); ASEAN–India Investment Agreement (n 17) art 21; India–Malaysia BIT Agreement between the Government of the Republic of India and the Government of Malaysia for the Promotion and Protection of Investments (03 August 1995), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1576>. art 12 (India–Malaysia BIT); India–Singapore CECA (n 14) art 6.11; SAFTA (n 17) art 14; APTA Agreement (n 17) art 5; BIMSTEC Agreement (n 17) art 8.

19 For more on general exception clauses in South Asian countries, see Prabhash Ranjan, 'Non-Precluded Measures in Indian International Investment Agreements and India's Regulatory Power as a Host Nation' (2012) 2 Asian JIL 21; Sinha (n 9).

20 Sinha (n 9).

21 Ranjan (n 19).

22 See Table 1.

23 Agreement between the Government of the Republic of India and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investments (7 July 2011) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/265>. (India–Bangladesh BIT).

24 India–Bangladesh BIT (n 23) art 12(2): '[N]othing in this Agreement precludes the host Contracting Party from taking action *for* the protection of its' (emphasis added).

whereas the NRL in the Turkey–Bangladesh BIT[25] is 'necessary'.[26] Here, it is evident that NRLs can be formulated differently—some examples are: 'for',[27] 'directed to',[28] 'necessary',[29] and 'relating to'.[30] It can also be seen by studying the different formulations of NRLs that some NRLs are more robust than others—for example, a 'necessary' NRL is stricter than a 'for' NRL.[31] The stricter the NRL, the more difficult it would be for a State to take, or to adopt, any regulatory measures.

Studying NRLs in the context of South Asia

In South Asia, where circumstances like terrorist threats, environment-related problems, and public health emergencies are too common, less strict NRL formulations in general exception provisions in BITs could provide more regulatory latitude to host States. There is no dearth of examples where States have argued the application of general exceptions provisions before numerous international tribunals.[32] Decisions given by tribunals on matters relating to general exceptions are conflicting and non-consistent; some have interpreted it as being equivalent to a necessity defence in customary international law;[33]

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[25] Agreement between the Republic of Turkey and the People's Republic of Bangladesh Concerning the Reciprocal Encouragement and Protection of Investments (12 November 1987), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/275>. (Bangladesh-Turkey BIT).

[26] Bangladesh–Turkey BIT (n 25) art X: 'This agreement shall not preclude the application by either Party of measures *necessary* for the maintenance of public order…' (emphasis added).

[27] Agreement between the Government of the Republic of India and the Government of the Republic of Armenia for the Promotion and Protection of Investments (23 May 2015) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/138>. (India–Armenia BIT).

[28] Agreement between the Government of the Republic of Mauritius and the Government of the Republic of India for the Promotion and Protection of Investments (4 September 1998) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1577>. (Mauritius–India BIT).

[29] Belgium-Luxembourg Economic Union–India (BLEU) BIT, Agreement between the Belgium-Luxemburg Economic Union and the Government of the Republic of India Concerning the Encouragement and Protection of Investments (31 October 1997), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/369>. (India-BLEU BIT).

[30] India–Colombia BIT (n 14).

[31] Ranjan (n 19) 47; eg, 'necessary' is stricter than 'related to'. *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, Appellate Body (29 April 1996) 17–18, 21–2.

[32] *CMS Gas Transmission Co v Argentina*, ICISD Case no ARB/01/8, Annulment Proceedings (25 September 2007) (*CMS Gas*, Annulment); *CMS Gas Transmission Co v Argentina*, ICISD Case no ARB/01/8 (12 May 2005) (*CMS Gas*); *Enron Creditors Recovery Corp v Argentina*, ICSID Case no ARB/01/3, Annulment Proceedings (30 July 2010) (*Enron*, Annulment); *Enron Corporation v Argentina*, ICSID Case no ARB/01/3 (22 May 2007) (*Enron*); *Sempra Energy International v Argentina*, ICSID Case no ARB/02/16, Annulment Proceedings (29 June 2010) (*Sempra*, Annulment); *Sempra Energy International v Argentina*, ICSID Case No ARB/02/16, 28 September 2007) (*Sempra*); *LG&E Energy Corporation v Argentina*, ICISD Case no ARB/02/1 (3 October 2006) (*LG&E*); *Continental Casualty Company v Argentina*, ICSID Case no ARB/03/9 (5 September 2008) (*Continental*).

[33] *CMS Gas* (n 32); *Enron* (n 32); *Sempra* (n 32).

others have adopted different approaches, which shall be discussed below.[34] The examination of flaws and virtues of different approaches adopted by these tribunals reveals the importance of NRL formulations. Therefore, the need to study NRLs assumes importance.

The study of 'necessary' clauses in South Asia also assumes importance for three main reasons: first, South Asian countries have signed BITs at an exceptional rate since 1990;[35] second, there is increasing foreign direct investment (FDI) inflow in these countries;[36] and, third, there are a rising number of BIT cases against these countries.[37] We need to delve into these issues separately.[38] In regard to the first issue, acceptance of a large number of BITs by South Asian countries reflects the willingness to undertake obligations under all of these BITs to protect investment within their territories. These obligations make South Asian countries vulnerable in international law for any measure taken by them that jeopardizes foreign investments. The total number of BITs signed by South Asian countries before 1990 was 33; however, the current number of total BITs signed by South Asian countries is 230.[39] This shows how fast these countries have signed BITs after 1990 and, thereby, have become subjected to international obligations more than ever before. In regard to the issue of FDI inflow in South Asian countries, notwithstanding the fact that FDI is considered a sound economic factor for host States, a host State's vulnerability to BIT claims increases with the increase in FDI inflows, given that the home States of the foreign investors have BITs with the host State. FDI inflow in these countries before 1990 was US $567 in total; however, this inflow had reached US $48,434 by 2015.[40] This puts obligations upon South Asian countries to protect this huge inflow of FDIs into their territories. In this respect, it can be seen that the vulnerability of these countries to investor–State dispute settlement (ISDS) cases is certainly higher than before. With respect to the third issue, South Asian countries are already facing a large number of ISDS cases. To date, there are eight cases filed against Pakistan;[41] Sri Lanka has faced four ISDS

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[34] LG&E (n 32); *Continental* (n 32); Christina Binder, 'Necessity Exceptions, the Argentine Crisis and Legitimacy Concerns' in Tulio Treves, Francesco Seatzu and Seline Trevisanut (eds), *Foreign Investment, International Law and Common Concerns* (Routledge 2014) 71, 76.

[35] Sinha (n 9) at 5.

[36] Ibid.

[37] Ibid.

[38] For the purposes of a comparative study, the year 1990 is taken as a base year in this section because most of the South Asian countries started moving towards liberalization after 1990.

[39] International Investment Agreements <http://investmentpolicyhub.unctad.org/IIA> accessed 19 January 2017.

[40] South Asian Association for Regional Cooperation FDI <http://unctadstat.unctad.org/wds/ReportFolders/reportFolders.aspx>. accessed 19 January 2017.

[41] *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case no ARB/01/13 (23 May 2004); *Bayindir Insaat Turizm Ticaret VeSanayi AS v Islamic Republic of Pakistan*, ICSID Case no ARB/03/29 (27 August 2009); *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case no ARB/03/3 (II) (26 September 2005); *Agility for Public Warehousing Company KSC v Islamic Republic of Pakistan*, ICSID Case no ARB/11/8 (01 August 2016); *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case no ARB/12/1 (04 July 2017) (Pending); *Mr Ali Allawi v Pakistan*,

cases;[42] Bangladesh has been subjected to one ISDS case;[43] and India is facing 22 cases against it.[44] In many of these cases, investors have emerged as successful parties.[45]

The combination of these three factors indicates that the chances of South Asian countries facing ISDS claims are certainly higher than ever before. In this scenario, in order to ascertain how much leverage these countries can have during emergency situations, one must make a proper study of 'necessary' formulations in general exception provisions.

Of all the NRL formulations that exist in general exception provisions in the BITs of South Asian countries, the 'necessary' NRL has assumed the utmost importance for two reasons: first, it is, so far, the strictest NRL found not only in BITs of South Asian countries but also in almost all the BITs signed globally. Second, the divergent interpretations made by various investment tribunals have brought it into the centre of various scholarly and academic discussions. Therefore, without undermining the importance of other NRLs, this article deals only with the issues relating to 'necessary' NRLs.

UNCITRAL (12 January 2015) <http://www.italaw.com/cases/2032> accessed 15 January 2017; *Progas Energy Ltd v Pakistan* UNCITRAL (12 January 2015) <http://www.italaw.com/cases/2044> accessed 15 January 2017; *Karkey Karadeniz Elektrik Uretim AS v Islamic Republic of Pakistan*, ICSID Case no ARB/13/1 (8 June 2016) (Pending).

42 *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, ICSID Case no ARB/87/3 (27 June 1990); *Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka*, ICSID Case no ARB/00/2 (15 March 2002); *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case no ARB/09/2 (09 June 2016).

43 *Saipem SpA v People's Republic of Bangladesh*, ICSID Case no ARB/05/7 (30 June 2009).

44 *Bechtel Enterprises Holdings, Inc and GE Structured Finance (GESF) v Government of India*, Tribunal Rules for Bechtel and GE in Dabhol Power Project Arbitration (9 September 2003) <http://www.bechtel.com/newsroom/releases/2003/09/tribunal-rules-dabhol-power-project-arbitration/> accessed 15 January 2017; *ABN Amro NV v Republic of India*, (12 April 2015) <http://rdaujotas.com/lt/publikacijos/0/42/-icsid-foreign-investment-requirement-in-case-of-borrowed-funds> accessed 15 January 2017; *ANZEF Ltd v Republic of India, BNP Paribas v Republic of India, Credit Lyonnais SA (now Calyon SA) v Republic of India, Credit Suisse First Boston v Republic of India, Erste Bank Der Oesterreichischen Sparkassen AG v Republic of India, Offshore Power Production CV, Travamark Two BV, EFS India-Energy BV, Enron BV, and Indian Power Investments BV v Republic of India,Standard Chartered Bank v Republic of India Bycell (Maxim Naumchenko, Andrey Polouektov and Tenoch Holdings Ltd) v India* (28 November 2014) <http://www.italaw.com/cases/1933> accessed 15 January 2017; *Deutsche Telekom v India*, ICSID Additional Facility (28 November 2014) <http://www.italaw.com/cases/2275> accessed 15 January 2017; *Khaitan Holdings Mauritius v India*, UNCITRAL (28 November 2014) <http://www.italaw.com/cases/2262> accessed 15 January 2017; *Louis Dreyfus Armateurs SAS (France) v Republic of India*, PCA Case no 2014-26 (28 November 2014) <http://www.pcacases.com/web/view/113> accessed 15 January 2017; *Vodafone International Holdings BV v India*, UNCITRAL (28 November 2014 <http://www.italaw.com/cases/2544> accessed 15 January 2017; *White Industries Australia Limited v India*, UNCITRAL (30 November 2011) <http://www.italaw.com/cases/1169> accessed 15 January 2017.

45 *AAPL* (n 42); *Deutsche Bank AG* (n 42); *Saipem SpA* (n 43); *White Industries* (n 44).

The importance of NRLs in South Asia can also be ascertained by the fact that, in a recent ISDS case filed against India,[46] India questioned the appointment of two arbitrators on the basis of the interpretation of the term 'necessary' in general exception clauses made by them in previous ISDS cases where they sat as arbitrators.[47] While the decision on merit is still pending before the tribunal, India had partial success since its request to remove one of the arbitrators from the panel was accepted.

'Necessary' in South Asian BITs

In South Asia, there are 32 BITs that contain 'necessary' as a NRL[48] in their general exception provisions; of these, India and Bangladesh have 'necessary' as a NRL in 25 and four BITs respectively. Pakistan, Nepal, and Sri Lanka have 'necessary' in one, three, and four BITs respectively. Bhutan and Maldives have 'necessary' in two BITs and one BIT respectively. The 'necessary' formulation functions in at least two capacities; it not only balances the investor's right *vis-à-vis* the State's interest but also separates justified regulatory actions from the protectionist measure taken under the pretext of necessity.[49] The significance of this NRL can be ascertained by the diverse interpretations made by tribunals in ISDS cases filed against Argentina for its default of foreign investments.[50] Based on these interpretations, many scholars have devised

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[46] *CC/Devas (Mauritius) Ltd, Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v Republic of India*, PCA Case no 2013-09 (2013) <https://www.italaw.com/cases/documents/1963> accessed 10 April 2017.

[47] Ibid paras 51–9.

[48] These 32 BITs include many regional investment agreements in which all or some South Asian countries are parties. Therefore, counting of necessary in BITs of individual countries may seem to be more than 32 BITs.

[49] Burke-White and Staden (n 2) 307; Benn McGrady, 'Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures' (2008) 12 J Intl Economic Law 153, 154.

[50] Jim Saxton, 'Argentina's Economic Crisis: Causes and Cures' (Joint Economic Committee United States Congress, June 2003); Alvarez and Khamsi (n 8) 379; William W Burke-White, 'The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System' (2008) 3 Asian J WTO & Intl Health L & Policy 199; Burke-White and von Staden (n 2); Michael Waibel, 'Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E' (2007) 20 Leiden JIL 637; Sarah Hill, 'The Necessity Defense and the Emerging Arbitral Conflict in its Application to the U.S.–Argentina Bilateral Investment Treaty' (2007) 13 Law & Bus Rev Am 547; Stephen W Schill, 'International Investment Law and Host State's Power to Handle Economic Crises: Comment on the ICSID Decision in *LG&E v Argentina*' (2007) 24(3) J Intl Arbitration 265; David Foster, 'Necessity Knows No Law!: *LG&E v Argentina*' (2006) 9 (6) Intl Arb L Rev 149. See also, Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (14 November 1991), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/127>. (US-Argentina BIT) art 11: This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.'

Table 1. Various NRLs in general exception provisions in BITs of South Asian countries

State	NRLs (number of times used in BITs)
Bangladesh	'necessary' (four)[52] 'for' (one)[53] 3. 'to' (one)[54]
India	'necessary' (25)[55] 'directing to' (one)[56] 'for' (49)[57] 'to' (two)[58] 'in pursuance of' (one)[59] 'relating to' (two)[60]
Nepal	'necessary' (three)[61]
Pakistan	'directed to' (two)[62] 'necessary' (one)[63]
Sri Lanka	'directed to' (one)[64] 'necessary' (four)[65] 'for' (one)[66]
Bhutan	'necessary' (two)[67]
Maldives	'necessary' (one)[68]

several interpretative guidelines of their own that will be discussed in another section.[51]

Table 1 shows the different NRLs found in different general exception provisions of South Asian BITs.

Therefore, the study of 'necessary' in South Asian BITs is desired in order to ascertain the proper interpretation of the term. Before an independent inquiry can be made in this regard, it would be pertinent to understand the meaning of 'necessary'. Thus, this article will make an inquiry into the following areas: (i) 'necessary' under customary international law (CIL); (ii) 'necessary' as an independent treaty standard; and (iii) an inquiry as to their relationship with each other.

[51] Kurtz (n 5) 325; Burke-White and Staden (n 2) 307; Diane A Desierto, 'Necessity and Supplementary Means of Interpretation for Non-Precluded Measures in Bilateral Investment Treaties' (2009) 31 U Pa J Intl L 827; Tarcisio Gazzini, 'Necessity in International Investment Law: Some Critical Remarks on *CMS v Argentina*' (2008) 26 J Energy & Natural Resources L 450; August Reinisch, 'Necessity in International Investment Arbitration: An Unnecessary Split of Opinions in Recent ICSID Cases?' (2007) 7 J World Investment & Trade 191, 209; Schill (n 51) 50; Matthew Parish, 'On Necessity' (2010) 11 J World Investment & Trade 169.

[52] Treaty between The United States of America and The People's Republic of Bangladesh Concerning The Reciprocal Encouragement and Protection of Investment (12 March 1986), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/278>; Turkey–Bangladesh BIT, Agreement between the Republic of Turkey and the People's Republic of Bangladesh Concerning the Reciprocal Encouragement and Protection of Investments (12/11/1987), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/275> APTA Agreement (n 17); SAFTA (n 17).

[53] India–Bangladesh BIT (n 23).

[54] Agreement between the Government of People's Republic of Bangladesh and the Government of the Republic of Uzbekistan on Reciprocal Protection and Promotion of Investment (18 July

'Necessity' in CIL

Before any inquiry can be made as to the relation of 'necessary' as a treaty standard with 'necessity' in CIL, it would be pertinent to inquire into the meaning of 'necessity' in CIL. The normative authority of 'necessity' in international law as CIL can be reflected in the International Law Commission's (ILC)

2000), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/279> (Uzbekistan–Bangladesh BIT).

[55] Agreement between The Government of Australia and The Government of The Republic of India on the Promotion and Protection of Investments (26 February 1999), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/154> (Australia–India BIT); Austria–India BIT, Agreement between the Government of the Republic of Austria and the Government of the Republic of India for the Promotion and Protection of Investments (31 January 2001), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/192> (Austria–India BIT); BLEU–India BIT (n 29); Bosnia and Herzegovina–India BIT, Agreement between Bosnia and Herzegovina and The Republic of India for The Promotion and Protection of Investments (12 September 2006), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/475>; India–Colombia BIT (n 14); Czech–India BIT, Agreement between the Czech Republic and the Republic of India for the Promotion and Protection of Investments (11 October 1996), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/939> Denmark–India BIT, Agreement concerning the promotion and reciprocal protection of investments (06 Septemebr 1995), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1009>; Finland–India BIT, Agreement between The Government of The Republic of India and The Government of The Republic of Finland on The Promotion and Protection of Investments (07 November 2002), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1185>; (Finland–India BIT); France–India BIT, Agreement between The Government of The French Republic and The Government of The Republic of India on Reciprocal Encouragement and Protection Investments (02 September 1997), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1231>; Germany–India BIT, Agreement between the Federal Republic of Germany and the Republic of India for the Promotion and Protection of Investments (10 July 1995), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1340>; Korea–India BIT, Agreement between The Government of The Republic of India and The Government of The Republic of Korea on The Promotion and Protection of Investments (26 February 1996), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1568>; Kuwait–India BIT, Agreement between The State of Kuwait and The Republic of India for The Encouragement and Reciprocal Protection of Investment (27 November 2001), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1569>; India–Malaysia BIT (n 18); Morocco–India BIT, The Government of the Kingdom of Morocco and the Government of the Republic of India for the Promotion and Protection of Investments (13 February 1999), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1580>; Netherlands–India BIT, Agreement between the Republic of India and the Kingdom of the Netherlands for the promotion and protection of investments (06 November 1995), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1584>; Saudi Arabia–India BIT, Agreement between The Government of The Republic of India and Government of The Kindgom of Saudi Arabia Concerning The Encouragement and Reciprocal Protection of Investments (25 January 2006), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1594>; Sweden–India BIT, Agreement between the Government of the Kingdom of Sweden and the Government of the Republic of India for the Promotion and Reciprocal Protection of Investments (04 July 2000), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1602>; Spain–India BIT, Agreement for the Reciprocal Promotion and protection of investment between the Kingdom of Spain and the Republic of India (30 September 1997), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1599>. The Nexus requirement link (NRL) 'necessary' has been used three times in the India–Colombia BIT (n 14) in its different sub-clauses.

[56] Mauritius–India BIT (n 28).

[57] Armenia–India BIT (n 27); Bahrain–India BIT, Agreement between the Government of the Republic of India and the Government of the Kingdom of Bahrain for the Promotion and Protection of Investments (13 January 2004), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/252>; India–Bangladesh BIT (n 23); Belarus–India BIT, Agreement between the Government of the Republic of India and the Government of the Republic of Belarus for the Promotion and Protection of Investments (27 November 2002), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/301>; Brunei–India BIT, Agreement between the Government of the Republic of India and the Government of His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam on the Reciprocal Promotion and Protection of Investments (22 May 2008), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/517>; Bulgaria–India BIT, Agreement between the Government of the Republic of India and the Government of the Republic of Bulgaria for the Promotion and Protection of Investments (19/10/1998), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/533>. China–India BIT, Agreement between the Government of the Republic of India and the Government of the People's Republic of China for the Promotion and Protection of Investments (21 November 2006), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/742>. Croatia–India BIT, Agreement between the Government of the Republic of Croatia and the Government of the Republic of India on the Promotion and Reciprocal Protection of Investments (04 May 2001), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/861>; Cyprus–India BIT, Agreement between the Government of the Republic Of India and the Government of Republic of Cyprus for the Mutual Promotion and Protection of Investments (09 April 2002), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/923>; Egypt–India BIT, Agreement between the Government of the Arab Republic of Egypt and the Government of the Republic of India for the Promotion and Reciprocal Protection of Investments (09 April 1997), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1078>; Greece–India BIT, Agreement between Government of Hellenic Republic and the Government of the Republic of the India on the Promotion and Reciprocal Protection of the Investments (26 April 2007), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1463>; Hungary–India BIT, Agreement between the Republic of Hungary and the Republic of India for the Promotion and Protection of Investments (03 November 2003), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1523>; Iceland–India BIT, Agreement between the Government of the Republic of India and the Government of the Republic of Iceland for the Promotion and Protection of Investments (29 June 2007), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1560>; Portugal–India BIT, Agreement between the Portuguese Republic and the Republic of India on the Mutual Promotion and Protection of Investments (28 June 2006), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1588>; Indonesia–India BIT, Agreement between the Government of the Republic of Indonesia and the Government of the Republic of India for the Promotion and Protection of Investments (10 February 1999), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1563>; Israel–India BIT, Agreement between the Government of the Republic of India and the Government of the State of Israel for the Promotion and Protection of Investments (29 January 1996), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1564>. Jordon–India BIT, Agreement between the Government of the Republic of India and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments (30 November 2006), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1566>; Kazakhstan–India BIT, Agreement between the Government of the Republic of Kazakhstan and Government of the Republic of India for the Promotion and Reciprocal Protection of Investments (9 December 1996), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1567>; Kyrgyzstan–India BIT, Agreement between the Government of the Republic of India and the Government of Kyrgyz Republic for The Promotion and Protection of Investments (16 May 1997), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1570>; Lao–India BIT, An Agreement between the Government of the Republic of India and The Government of the Lao People s Democratic Republic for the Promotion and Protection of

Investments (09 November 2000), <http://investmentpolicyhub.unctad.org/Download/Treaty File/1571>; Latvia–India BIT, Agreement between the Government of the Republic of India and the Government of the Republic of Latvia for the Promotion and Protection of Investments (18 February 2010), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1572>; Libya–India BIT, Agreement between the Republic of India and the Great Socialist People's Libyan Arab Jamahiriya for the Promotion and Protection of Investments (26 May 2007), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1573>; Lithuania–India BIT, Agreement between the Government of the Republic of India and the Government of the Republic of Lithuania for the Promotion and Protection of Investments (31 March 2011), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1574>; Macedonia–India BIT, Agreement between the Government of the Republic of India and the Government of the Republic of Macedonia for the Promotion and Reciprocal Protection of Investments (17 March 2008), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1575>; Mexico–India BIT (n 15); Mongolia–India BIT, Agreement between the Government of the Republic of India and the Government of Mongolia for the Promotion and Protection of Investments (03 January 2001), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1579>. Mozambique–India BIT, Agreement between the Government of the Republic of Mozambique and the Government of the Republic of India for the Reciprocal Promotion and Protection of Investments (19 February 2009), <http://investmentpolicyhub.unctad.org/Download/Treaty File/1581>; Myanmar–India BIT, Agreement between the Government of the Republic of India and the Government of the Union of Myanmar for The Reciprocal Promotion and Protection of Investments (24 June 2008), <http://investmentpolicyhub.unctad.org/Download /TreatyFile/1582>; Oman–India BIT, Agreement between the Government of the Sultanate of Oman and the Government of the Republic of India for the Promotion and Protection of Investments (02 April 1997), <http://investmentpolicyhub.unctad.org/Download/Treaty File/1585>; Philippines–India BIT, Agreement between the Government of the Republic of India and the Government of the Republic of the Philippines for the Promotion and Protection of Investments (28 January 2000), <http://investmentpolicyhub.unctad. org/Download/TreatyFile/1586>. Poland–India BIT, Agreement between the Government of the Republic of India and the Government of the Republic of Poland for the Promotion and Protection of Investment (07 October 1996), <http://investmentpolicyhub.unctad. org/Download/TreatyFile/1587>; Qatar–India BIT, Agreement between the Government of the Republic of India and the Government of the State of Qatar for the Reciprocal Promotion and Protection of Investments (07 April 1999), <http://investmentpolicyhub.unctad. org/Download/TreatyFile/1590>; Romania–India BIT, Agreement between the Government of the Republic of India and the Government of Romania for the Promotion and Reciprocal Protection of Investments (17 November 1997), <http://investmentpolicyhub.unctad. org/Download/TreatyFile/1591>; Serbia–India BIT, Agreement between the Government of the Republic of India and the Federal Government of the Federal Republic of Yugoslavia for the Reciprocal Promotion and Protection of Investments (31 Januray 2003), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1596>; Slovakia–India BIT, Agreement between the Republic of India and the Slovak Republic for the Promotion and Reciprocal Protection of Investments (25 September 2006), <http://investmentpolicyhub. unctad.org/Download/TreatyFile/1597>; Sri Lanka–India BIT, Agreement between the Government of the Democratic Socialist Republic of Sri Lanka and the Government of the Republic of India for the Promotion and Protection of Investment (22 January 1997), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1600>; Sudan–India BIT, Agreement between the Government of the Republic of India and the Government of the Republic of the Sudan for the Promotion and Protection of Investments (22 October 2003), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1601>; Syria–India BIT, Agreement between the Government of the Republic of India and the Government of the Syrian Arab Republic on the Mutual Promotion and Protection of Investments (18 June 2008), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1605>; Taiwan–India BIT,

Agreement between the India Taipei Association in Taipei and the Taipei Economic and Cultural Center in New Delhi on the Promotion and Protection of Investments (17 October 2002), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1606>; Tajikistan–India BIT, Agreement between the Government of the Republic of India and the Government of the Republic of Tajikistan for the Promotion and Protection of Investments (13 December 1995), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1607>; Thailand–India BIT, Agreement between the Government of the Kingdom of Thailand and the Government of the Republic of India for the Promotion and Protection of Investments (10 July 2000), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1608>; Trinidad and Tobago–India BIT, Agreement between the Government of the Republic of India and the Government of Republic of Trinidad and Tobago for the Promotion and Protection of Investments (12 March 2007), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1609>; Turkey–India BIT (n 25); Turkmenistan–India BIT, Agreement between the Government of the Republic of India and the Government of Turkmenistan for the Promotion and Protection of Investments (20 September 1995), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1611>; Ukraine–India BIT, Agreement Government of the Republic of India and the Government of Ukraine for the Promotion and Protection of Investments (01 December 2001), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1612>; United Kingdom–India BIT, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Promotion and Protection of Investments (14 March 1994), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1613>; Vietnam–India BIT, Agreement between the Government of the Republic of India and the Government of the Socialist Republic of Vietnam for the Promotion and Protection of Investments (08 March 1997), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1616>; Yemen–India BIT, Agreement between the Government of the Republic of India and the Government of the Republic of Yemen for the Promotion and Protection of Investments (01 October 2002), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1617>; Switzerland–India BIT, Agreement between the Swiss Confederation and the Republic of India for the Promotion and Protection of Investments (04 April 1997), <http://investmentpolicyhub.unctad.org/Download

58 Italy–India BIT, Agreement between the Government of the Italian Republic and the Government of the Republic of India on the Promotion and Protection of Investments (23 November 1995), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/5457>; Uzbekistan–India BIT (n 54).

59 India–Colombia BIT (n 14).

60 Ibid. The NRL 'relating to' has been used twice in India–Colombia BIT (n 14) in its different sub-clauses.

61 Finland–Nepal BIT (n 55); BIMSTEC Agreement (n 17); SAFTA (n 17).

62 Mauritius–Pakistan BIT (n 15); Singapore–Pakistan BIT, Agreement between the Government of the Republic of Singapore and the Government of the Islamic Republic of Pakistan on the Promotion and Protection of Investments (08 March 1995), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2126>.

63 SAFTA (n 17).

64 China–Sri Lanka BIT, Agreement between the Government of the Democratic Socialist Republic of Sri Lanka and the Government of the People's Republic of China on the Reciprocal Protection and Promotion of the Investments (13 March 1986), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/781>.

65 US–Sri Lanka BIT, Treaty between the United States of America and the Democratic Socialist Republic of Sri Lanka Concerning the Encouragement and Reciprocal Protection of Investment (20 September 1991), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2295>; APTA Agreement (n 17); BIMSTEC (n 17); SAFTA (n 17).

66 Sri Lanka–India BIT (n 57).

67 BIMSTEC (n 17); SAFTA (n 17).

68 SAFTA (n 17).

Articles on State Responsibility.[69] The International Court of Justice (ICJ), in various cases, has reiterated and acknowledged that 'necessity' is part of CIL.[70] 'Necessity', as mentioned in the ILC's articles, provides for when the defence of necessity can be invoked.[71]

The state of necessity simply dictates that any action taken by a State that in normal circumstances would have been unlawful can be justified in exceptional circumstances, if that action was its only option to protect its interests.[72] The 'defence of necessity' can only be taken when the primary rules of a particular regime have been breached and where the defence for such a breach works as a secondary rule.[73] In this respect, the plea of 'necessity' acts as a safeguard for those States that are alleged to have breached their international legal obligations.[74] It encompasses in itself all those actions, in the traditional sense, of a State that are not in consonance with international obligations.[75] However, 'necessity' in its modern sense does not comprise itself of all actions of States constituting a wrongful act.[76] The instances cited by the ILC[77] include only judicial decisions involving issues like monetary obligations,[78] the use of force,[79] and commercial activities.[80] Therefore, the defence of necessity is available to States only in narrow or exceptional circumstances that are also very

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69 International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001) art 25 (ILC Articles on State Responsibility).

70 *Gabčíkovo-Nagymaros Project* (*Hungary v Slovakia*) [1997] ICJ Rep 7, para 51; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, para 140.

71 ILC Articles on State Responsibility (n 69) art 25(1):

'1. 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 means 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.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) the international obligation in question excludes the possibility of invoking necessity, or

(b) the State has contributed to the situation of necessity.'

72 Ibid.

73 August Reinisch, 'Necessity in Investment Arbitration' (2010) 41 Netherlands YB Intl L 137 at 148; Roman Boed, 'State of Necessity as a Justification for International Wrongful Conduct' (2000) 3 Yale Human Rights & Development LJ 1, 4.

74 ILC Report on State Responsibility (n 69).

75 Tarcisio Gazzini and others, 'Necessity across International Law: An Introduction' (2010) 41 Netherlands YB Intl L 3; Robert D Sloane, 'On the Use and Abuse of Necessity in the Law of State Responsibility' (2012) 6 AJIL 447.

76 Ian Brownlie, *Principles of Public International Law* (6th edn, OUP 2003) 448.

77 ILC Report on State Responsibility (n 69).

78 Beate Rudolf and Nina Hüfken, 'Argentinean State Bonds-Defense of Necessity in Relationship between State and Private Debtors-Customary International Law and General Principles of Law' (2007) 101 AJIL 857.

79 James Crawford, The International Law Commission's Articles on State Responsibility, art. 25(1), (2002) 81.

80 Ibid.

evident from negative language (for example, the use of the word 'unless') in which Article 25 is concluded. The codification of the defence of necessity was purposely done by the ILC in order to limit the loose contours of 'necessity knows no law' like situations.[81] Also, for a State to make a plea of 'necessity', there has to be the presence of a wrongful act on the part of that State.[82] It works as an affirmative defence for a state that has committed a wrongful act.[83] In the *Gabčíkovo-Nagymaros Project* case, the ICJ accepted that necessity is 'deeply rooted in general legal thinking.'[84]

'Necessary' as an independent treaty standard

A 'necessary' NRL in general exception provisions, having textual similarity to the 'necessity' clause of Article 25 of the ILC Articles on State Responsibility, is not usually found in investment treaties.[85] However, BITs do contain some provisions to deal with emergency situations. In order to tackle problems arising during extraordinary situations, some countries tend to keep regulatory space for them while making investment commitments with other countries.[86] 'Necessity' serves different meanings and functions in different treaty-based regimes.[87] It works as a tool to determine whether the regulatory actions taken by the State are justifiable.[88] In this way, it limits the actions taken by the State that adversely affect the interest protected by that specific treaty regime rather than just working as an excuse by a State for non-fulfilment of its international obligations.[89] However, 'necessity' does not provide any scale or measurement that can determine whether an action by the State is justified. Practically, it is also not possible that 'necessity' can determine what types of actions or omissions by the State are justified or not justified.[90] Situations and circumstances behind every State action are different, and whether or not it is justified is governed and determined by that particular treaty regime.

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81 Sarah F Hill, 'The "Necessity Defense" and the Emerging Arbitral Conflict in its Application to the US-Argentina Bilateral Investment Treaty' (2007) 13 L & Bus Rev Am 547, 550–57.

82 Ibid.

83 Desierto (n 51) 827.

84 See Gabcikovo-Nagymaros Case (n 70) 37.

85 Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law* (British Institute of International and Comparative Law 2008) 340.

86 SR Subramanian, 'Too Similar or Too Different: State of Necessity as a Defence under Customary International Law and the Bilateral Investment Treaty and Their Relationship' (2012) 9 Manchester J Intl Economic L 68.

87 Andrew D Mitchell and Caroline Henckels, 'Variations on a Theme: Comparing the Concept of "Necessity" in International Investment Law and WTO Law' (2013) 14 Chicago J Intl L 93, 97.

88 Ibid.

89 Kurtz (n 5).

90 One such example of a necessary clause in a BIT could be India–Australia BIT (n 55) art 15: 'Prohibitions and Restrictions:
Nothing in this Agreement precludes the host Contracting Party from taking, in accordance with its laws applied reasonably and on a non-discriminatory basis, measures necessary for the protection of its own essential security interests or for the prevention of diseases or pests.'

Therefore, courts and tribunals have developed their own criteria to determine whether a measure is necessary.[91]

An inquiry as to their relationship with each other

There can be two broad reasons for the use of Article 25 of the ILC Articles on State Responsibility—that is, the 'necessity' clause in cases of the violation of BIT provisions.[92] First, BITs usually do not contain 'necessity' clauses that also provide for the requirement to invoke them, and, because of this, tribunals or courts resort to requirements as set out in the 'necessity' clause in the ILC Articles on State Responsibility.[93] Also, though the recourse to CIL is not contingent upon being provided under the text of the BIT, the possibility to resort to CIL still may not be negated by the tribunal in absence of express text in the BIT. Thus, second, sometimes the text of the Investment Treaty Arbitration clause in BITs allows tribunals to use customary international law.[94] Also, Article 42(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States provides for the application of rules of international law to be applied by tribunals as may be applicable to the disputes pending before them, thereby allowing tribunals to resort to CIL as well when faced with problems of interpretation such as in the case of necessity.[95]

When tribunals use norms established by Article 25 of the ILC Articles on State Responsibility to interpret the 'necessary' clauses in BITs, despite having separate 'necessary' clauses in BITs, it becomes a problem of harmonization of the two sources. In contrast to Article 25, the text of general exception provisions in BITs merely specifies the classes of measures contemplated under permissible objectives without providing those classes of action that will inevitably result in a breach of treaty obligations or in their termination. Since necessity clauses in BITs through specified permissible objectives provide very limited classes of cases, the State can justify its action only under those permissible objectives provided under necessity clauses in BITs. However, the same is not the case with the Article 25 defence. The Article 25 defence includes a plethora of issues and interests.[96] If parties to the BITs had desired to have the necessity provision textually similar to Article 25, such as

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91 Kurtz (n 5).

92 Alberto Alvarez-Jiménez, 'New Approaches to the State of Necessity in Customary International Law: Insights from WTO Law and Foreign Investment Law' (2010) 19 Am Rev Intl Arb 463.

93 Ibid.

94 One such example of this could be India–Austria BIT (n 55) art 9(3)(iii):

> 'The arbitral award shall be made in accordance with the provisions of this Agreement and the general principles of International Law.'

95 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965, 575 UNTS 159); Alvarez-Jiménez (n 92).

96 Dissertio (n 51).

formulation, they would have had necessity clauses in BITs more analogous to Article 25.[97] The absence of an Article 25-type formulation in general exception provisions simply goes against the approach of interpreting a necessity clause in BITs along the lines of necessity clauses in the ILC Articles on State Responsibility.[98]

Analysis by tribunals on the interconnection between necessity clauses in CIL and necessary NRLs in general exception provisions

The *Enron*, *CMS*, and *Sempra* tribunals,[99] after establishing *prima facie* that Argentina had breached certain provisions of the BIT, examined and rejected the necessity plea first under CIL and then under Article XI of the US–Argentina BIT. Confusion on the part of these tribunals to treat necessity under CIL on the same level with necessary NRLs in general exception provisions, without providing any interpretative justification, led to severe criticism by annulment committees, as one annulment committee[100] held that such an approach by tribunals was a manifest error of law.[101]

However, necessary was also interpreted by other tribunals with different methodologies. One such approach was followed by the *LG&E* tribunal,[102] which tried to justify Argentina's measures under the general exception clause by drawing support from the necessity clause under CIL. Its effort to maintain the distinction between the specific treaty norm and the norm of CIL was correct. However, its failure to provide the content of the general exception clause and rationale to support the general exception clause with norms in CIL was lacking in its decision. The *Continental* tribunal,[103] while rejecting the conflation of the general exception clause under the BIT and the necessity clause in CIL,[104] suggested that the interpretation of 'necessary' should be based on the World Trade Organization's (WTO) jurisprudence.[105] The tribunal resorted to the 'least restrictive alternative' test as developed by WTO case law by distancing itself from the 'no other means available' test.[106] The *El Paso* tribunal,[107] while interpreting the term 'necessary' in Article XI of the US–Argentina BIT, relied on the CIL meaning of 'necessity' and concluded

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97 Ranjan (n 19).
98 Dissertio (n 51).
99 See note 32 for all three cases.
100 *CMS Gas*, Annulment (n 32) para 131.
101 Sinha (n 9).
102 *LG&E* (n 32).
103 *Continental* (n 32).
104 Ibid para 168.
105 Ibid para 85.
106 William W Burke-White and Andreas von Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations' (2010) 35 Yale J Intl L 283, 325.
107 *El Paso Energy International Company v Argentine Republic*, ICSID Case no ARB/03/15 <date?>.

that since Argentina has contributed to the situation of necessity, therefore, it cannot take the defence under Article XI of the US–Argentina BIT. The *El Paso* tribunal, like the *CMS*, *Enron*, and *Sempra* tribunals, also tried to interpret the term 'necessary' in line with CIL's meaning of necessity as provided under Article 25 of the ILC Articles on State Responsibility.[108]

The approach of conflating two concepts attracted criticism not only from the annulment committees of these tribunals but also from scholars around the globe. Christina Binder says elements of Article 25 of the ILC Articles on State Responsibility are not simple and create a problem when applied to economic emergencies since economic emergencies are always affected by both internal and external factors.[109] William Burke-White and Andreas Von Staden, while talking about the types of possible interpretative methods that can be undertaken,[110] refer to the equation of the term 'necessary' with the requirement of necessity under CIL as unsound. They reject this approach by asserting that if the necessity defense in CIL was intended, then there would not have been arguments in favour of general exception clauses in BITs in the first place. Jűrgen Kurtz rejects this approach on both textual and historical grounds.[111] Prabhash Ranjan also seems to have rejected this approach when he says that '[i]f … treaty makers intended to use the ILC Article 25 defense to achieve the permissible objectives given in NPM provisions, there was no need to have an NPM provision because the customary defense is anyway available.'[112]

One resonant difference between Article 25 of the Vienna Convention on the Law of Treaties (VCLT) and treaty exceptions lies in the language of these provisions.[113] Article 25 of the VCLT uses the phrase 'ground for precluding the wrongfulness', which means it assumes in itself that a wrongful act has already been committed, whereas, in treaty exceptions, wrongfulness is not assumed; it is contested whether the act was wrongful or not. Also, before continuing, it would be wise to understand the rationale of WTO case law in relation to the interpretation of the necessity clause, as provided under Article XX of the GATT.

Interpretation of " under WTO jurisprudence vis-à-vis Article XX of the GATT

Necessity appears numerous times throughout the WTO Agreements.[114] However, the general exception provisions, as provided under Article XX and

[108] Ibid paras 551–630.
[109] Binder (n 34) 77–8.
[110] William Burke-White and von Staden (n 2) 343.
[111] Kurtz (n 5).
[112] Ranjan (n 19) 48.
[113] Vienna Convention on the Law of Treaties (1969, 1155 UNTS 331).
[114] Eg, General Agreement on Tariffs and Trade (1994, 55 UNTS 194) arts III:3, VII:3, XI:2(b) and (c), XII:2(a), XVIII:9, XIX, XX(a), (b), (d), (i), XXI(b); Agreement on the Application of Sanitary and Phytosanitary Measures (1994, 1867 UNTS 493) arts 2.1, 2.2, 5.6; Agreement on Technical

Article XIV of the GATT and the General Agreement on Trade in Services (GATS), respectively, containing necessary provisions, have received the most attention from WTO tribunals. WTO tribunals, through various case laws, have devised a detailed test to determine the meaning of 'necessary' under these provisions.[115] This two-tier test, as adopted by WTO tribunals, includes a weighing and balancing process, followed by the determination of less trade-restrictive measures. This approach was adopted by the appellate body in *Brazil – Retreaded Tyres*.[116] According to this approach, as held by the Appellate Body in *Brazil – Retreaded Tyre*:

> a panel must assess all the relevant factors, particularly the extent of the contribution to the achievement of a measure's objective and its trade restrictiveness, in the light of the importance of the interests or values at stake … this result must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective.[117]

In a similar manner, WTO tribunals refer to three-step analysis as adopted by the Appellate Body in *Korea – Beef*.[118] In this approach, the importance of measures adopted by the State,[119] how such measures will contribute to achieving the intended goals set out by the State,[120] and the effects of such measures on trade and commerce are usually taken into consideration.[121] After analysing these three factors, the WTO tribunals try to find out whether any alternative measure was available to the State. If so, the tribunals then determine if the alternative measure was realistic in achieving the intended goals set by the State.[122] The importance of looking at alternative measures is so that the State is not allowed to take the defence of necessity if the alternative measure is found to be less restrictive on international commerce than the measure originally taken by the State.[123]

The similarity between general exception provisions of BITs and the defence provided by Articles XX and XXI of the GATT are conspicuous, as these two

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Barriers to Trade (1994, 1868 UNTS 120) arts 2.2, 12.3, 12.7; Agreement on Safeguards (1994, 1869 UNTS 154) art 5.1; Agreement on Government Procurement (1994, 1869 UNTS 508) art XXIII; General Agreement on Trade in Services (1994, 1869 UNTS 183) arts XII:2(d), XIV(a), (b) (c), XIV bis:1(b); Agreement on Trade-Related Aspects of Intellectual Property Rights (1994, 1869 UNTS 299) arts 8.1, 27.2, 39.3, 73(b).

115 Michael Ming Du, 'The Rise of National Regulatory Autonomy in the GATT/ WTO Regime' (2011) 14 J Intl Economic L 639, 672.

116 *Brazil – Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/AB/R, Appellate Body (2007) [*Brazil – Retreaded Tyres*].

117 Ibid para 178.

118 *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc WT/DS161/AB/R Appellate Body (11 December 2000) para 161 [*Korea – Beef*].

119 Ibid para 162.

120 Ibid para 163.

121 Ibid.

122 Ibid.

123 *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R, Appellate Body (7 April 2005) paras 309–11 (*US – Gambling*).

articles provide for both general exceptions and security exceptions that are also usually covered under general exception provisions in BITs.[124] The approach of WTO tribunals has been consistent in applying the least restrictive alternative test involving exceptions as provided under Articles XX and XXI of the GATT.[125] Recent scholarly works have pointed out that the least restrictive alternative test is a more balanced approach since it harmonizes the conflicting interests of the disputing parties compared to the only means available test, which was adopted by the International Centre for Settlement of Investment Disputes against Argentina.[126] The GATT panel, in *US – Section 337*[127], explained the importance of the least restrictive alternative test in the following words:

> A contracting party cannot justify a measure inconsistent with another GATT provision as 'necessary' in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.[128]

The only investment arbitration case related to the Argentine crisis that has followed the approach of the WTO panels and Appellate Body while interpreting 'necessary' is the *Continental* case. As pointed out by scholars, the tribunal in the *Continental* case distanced itself from the no other alternative test and tilted in favour of the least restrictive alternative test.[129] By relying on WTO case law, the tribunal in this case justified measures taken by Argentina under the general exception clause in the US–Argentina BIT.[130] Working on the jurisprudence of the WTO tribunals, it framed the two-step approach to ascertain the meaning of necessary. First, it had to identify the contribution of the measure in achieving the intended goals, and, second, it had to determine whether there was any alternative measure available to the State, which, in turn, was more suitable to achieve the intended goals than the measure originally taken by the State.[131]

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[124] Burke-White and von Staden (n 105).

[125] Alan O Sykes, 'The Least Restrictive Means' (2003) 70 U Chicago LR 403, 416.

[126] Mads Andenas and Stefan Zleptnig, 'Proportionality and Balancing in WTO Law: A Comparative Perspective' (2007) 20 Cambridge Rev Intl Affairs 71; Andrew D Mitchell, 'Proportionality and Remedies in WTO Disputes' (2006) 17 EJIL 985; Thomas Sebastian, 'World Trade Organization Remedies and the Assessment of Proportionality: Equivalence and Appropriateness' (2007) 48 Harvard ILJ 337.

[127] United States - Section 337 of the Tariff Act of 1930, Report by the Panel adopted on 7 November 1989, (L/6439 - 36S/345), available on <https://www.wto.org/english/tratop_e/dispu_e/87tar337.pdf> accessed on 12 July 2017.

[128] *Andrew D Mitchell* (n 126).

[129] Burke-White and Staden (n 105) 325.

[130] *Korea – Beef* (n 118); *Brazil – Retreaded Tyres* (n 116); *US Gambling* (n 123).

[131] *Continental* (n 32) para 156.

It is argued here that the least restrictive alternative test should be applied to interpret necessary in general exception provisions; however, such reliance should be preceded by a weighing and balancing approach as adopted by various WTO tribunals. These two approaches, while maintaining their separate periphery, complement each other in the interpretation of necessary. Where the weighing and balancing approach provides us with the preliminary determination of the measure taken by the State, the least restrictive alternative test provides the confirmation of such a determination. Thus, this article argues that the least restrictive alternative test should be used to interpret necessary; however, this test must be preceded by the weighing and balancing test in order to ascertain a balanced outcome while interpreting necessary in general exception provisions.

Example from South Asia: new Indian Model BIT

In January 2016, India came up with its new Model BIT to review its current BIT regime and ISDS mechanism.[132] The reasons that augmented the framing of this new Model BIT, as India already had a 2003 Model BIT, were the backlash from the *White Industries* case[133] and the growing number of ISDS cases against India after 2011.[134] The new Model BIT can certainly be said to be tilted in favour of the host State. This shift in approach by India can be easily understood with its confrontation with numerous ISDS cases after 2010. Some of the salient features of the new Model BIT are the inclusion of an enterprise-based definition of investment; the exclusion of a most-favoured-nation and fair-and-equitable-treatment provisions; the incorporation of the police power doctrine, among other tests, like sole effect and proportionality, to

[132] Model Text for the Indian Bilateral Investment Treaty, Ministry of Finance, Government of India, <http://pib.nic.in/newsite/PrintRelease.aspx?relid=133412> accessed 16 February 2017.

[133] *White Industries Australia Limited v India*, UNCITRAL (30 November 2011) <http://www.italaw.com/cases/1169> accessed 13 February 2017 (*White Industries*). White Industries obtained an arbitral award in its favour in a contractual dispute with Coal India, an Indian public sector company, and sought enforcement of the award before the Delhi High Court. Simultaneously, Coal India approached the Calcutta High Court to have the award set aside, and the request was granted. White Industries appealed to the Supreme Court in 2004 and the final decision is still pending. In 2010, White Industries took the matter to arbitration on the grounds that the inordinate delay in Indian courts to enforce the arbitration award violates the India–Australia BIT (n 55). White Industries argued that the delay violated the provisions on fair and equitable treatment (FET), expropriation, MFN treatment, and free transfer of funds. The tribunal dismissed White Industries' allegations related to violation of the FET, expropriation and free transfer of funds. However, the tribunal ruled that India violated the MFN provision of the India–Australia BIT and awarded White Industries AUS $4 million <https://www.iisd.org/itn/2012/04/13/the-white-industriesarbitration-implications-for-indias-investment-treaty-program/> accessed 15 January 2017.

[134] Prabhash Ranjan and Pushkar Anand, 'The 2016 Indian Model Bilateral Investment Treaty: A Critical Deconstruction' (2018) 38 NW J Intl L & Business (forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2946041> accessed 15 May 2017.

determine indirect expropriation; full protection and security only for the physical protection of an investment and investors and not for any other obligations; the inclusion of both general and security exceptions in general exception provisions; the compulsory exhaustion of local remedies and some jurisdictional qualifications[135] in the ISDS clause; and so on.[136]

Article 32 of this new Model BIT deals with the general exception clause.[137] This is a very detailed and exhaustive provision as it provides for a long list of permissible objectives that includes, *inter alia*, public morals, public order, human health and life, environment, and compliance with domestic laws.[138] An important feature of this provision is that it only uses 'necessary' as the NRL in the provision.[139] Another important feature of this clause is that it lays down the meaning of 'necessary'. It provides that 'necessary' means adopting a less restrictive measure in the footnote of the clause.[140] This shows the inclination of the Indian government towards the least restrictive alternative approach in determining whether a measure was 'necessary' or not. This may be a template as to how all South Asian countries should draft their BITs.

Before this new Model BIT came out in 2016, many Indian scholars had already argued that 'necessary' should be interpreted on the least restrictive alternative approach rather than on any other test.[141] Ranjan argues that the least restrictive alternative approach is the right approach for interpreting 'necessary' in international investment agreements even before the new Model BIT came into the picture.[142] This approach, however, is still missing from almost all South Asian BITs.

However, this adherence to only the least restrictive alternative approach without having reference to the weighing and balancing approach will lead to more complications as tribunals will only be concerned with the existence of alternative measures rather than looking into the intention behind the measure taken by the host State. In *US – Gambling*,[143] the Appellate Body, while

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[135] The investor is allowed to bring a case against India only when the matter falls under chapter II of the Model BIT, which includes provisions such as full protection and security, national treatment, expropriation, monetary transfers, and compensation for losses. The investor cannot bring a case against India for the breach of any other provision in the BIT.

[136] Ibid.

[137] Model Text for the Indian Bilateral Investment <http://indiainbusiness.nic.in/newdesign/upload/Model.BIT.pdf> accessed 15 May 2017 (Indian Model BIT).

[138] Ibid art 32.

[139] Ranjan and Anand (n 133).

[140] Ibid n 6, in Indian Model BIT (n 136) art 32:

> 'In considering whether a measure is "necessary", the Tribunal shall take into account whether there was no less restrictive alternative measure reasonably available to a Party.'

[141] Prabhash Ranjan, 'India's International Investment Agreements and India's Regulatory Power as a Host Nation' (PhD dissertation, King's College London, 2012); Amit Kumar Sinha, 'Non-Precluded Measures in Bilateral Investment Treaties of South Asian Countries: A Legal Study' (LLM thesis, South Asian Universities, 2015).

[142] Ranjan (n 19); Ranjan (n 140).

[143] *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/R, Panel Report (10 November 2004).

interpreting 'necessary' in Article XIV of the GATS, held that the weighing and balancing approach is inherent in the necessity analysis.[144] In this scenario, the State making default of the foreign investment will just have to prove that there was no alternative measure available to justify its default. This approach is inherently problematic. The term 'necessary' in itself requires the State to provide reasons for taking those measures that are in breach of international obligations. When we leave out the weighing and balancing approach, we inadvertently dilute the gravity of the term 'necessary' as NRL, and we also fail to distinguish justified regulatory measures from protectionist measures taken by States. Therefore, it is argued here that reliance on the least restrictive alternative approach should occur with the weighing and balancing approach.

Conclusion

This article concludes that by resorting to the least restrictive alternative approach, WTO dispute settlement bodies and tribunals, in the interpretation of 'necessary' clauses in BITs, have followed the right approach. One such possible methodology is discussed below. Dian Disertio's argument is theoretically sound when she argues that the WTO and BITs represent two different regimes, and her suspicion that any attempt to conflate these two regimes might create problems is equally acknowledgeable.[145] However, in the case of a lack of explicit meaning of 'necessary' in the general exception provision of a treaty, Article 31(3)(c) of the VCLT—that is, 'any relevant rules of international law applicable in the relations between the parties'—provides the right approach for tribunals to interpret 'necessary' in the treaty provision. If, in this approach, tribunals use the help of the WTO's jurisprudence, it does not make the approach of the tribunals, *ipso facto*, unsound. It is surprising that Disertio, while rejecting Article 25 of the ILC's Articles on State Responsibility as a proper interpretative tool, accepts that it can be considered as any relevant rule of international law. However, her analysis in regard to the WTO regime does not undertake any such evaluation of Article 31(3)(c).[146] Therefore, it is submitted that GATT/WTO jurisprudence can be used as an interpretative tool while interpreting 'necessary' in treaty exceptions under the authority of Article 31(3)(c) of the VCLT, provided that the correct methodology is followed.

It is suggested here that tribunals, while dealing with the question of interpretation of necessary, should look into whether there was a less restrictive measure available to the State in place of trying to find out the equilibrium between benefits of the measure and its effect on investment.[147] The availability of less restrictive measures means the original measure was not necessary, and, thus, the State cannot take the defence of necessity under general

[144] *US – Gambling* (n 123) para 306.
[145] Disertio (n 51).
[146] Ibid.
[147] Burke-White and Staden (n 2) 325.

exception provisions. Also, the absence of the explicit meaning of necessary in general exception provisions in BITs will certainly drive the tribunal to look for the meaning of necessary in related regimes like the WTO. Thus, in BITs signed by South Asian countries, necessary should be interpreted along the lines of jurisprudence developed by WTO case law for interpreting necessary. It is emphasized here that this approach is suitable for South Asian countries as it harmonizes the interests of the State with the interests of the investor by providing a balance between the State's right to regulate and excessive restriction on investments. With this approach, tribunals will focus more on the availability of less restrictive measure with States rather focusing on the intent of the State behind the regulatory measure.[148] This approach would be more objective in nature in comparison to ascertaining the intent of the State behind the regulatory measure, which is highly subjective. In this scenario, this approach is beneficial for South Asian countries as a question of the impact of any measure on investment will be zeroed in on the availability of less restrictive measures than the subjective intent behind the regulatory measures of these countries.[149]

South Asian countries contain a necessary NRL in 32 BITs. This NRL inflicts high standards for States to vindicate their right to regulate in cases of default of foreign investments. It is clear that of the 190 BITs, only 32 BITs contain this NRL. The absence of necessary NRLs from South Asian BITs would mean that these countries will not have to justify the conditions of necessary during emergency situations. Thus, it is suggested here that South Asian countries may avoid the inclusion of necessary in the general exception provisions of BITs, which will, in turn, give them more regulatory sphere. However, at the same time, it is very important to maintain the balance between the interests of States and the interests of investors. These countries should ensure this balance while avoiding necessary in their BITs.

[148] Ranjan (n 19) 50.
[149] Sinha (n 9).