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Comparative Study on Necessity and Essential Security Exception Clauses under the Field of International Investments

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Abstract. As global economic integration intensifies and transnational investment conflicts proliferate, host states often face difficulties in protecting public interests in crises. This Article compares the two major defenses commonly used by host states-Necessity in customary international law and the Essential Security Exception Clause (ESEC) in Investment treaties. Necessity demonstrates an extremely low success rate in practice, attributable to its stringent substantive requirements and onerous evidentiary burden. ESEC, with its self-judgment wording of "it thinks it is necessary", gives the host country greater discretion and gives priority to the application according to the principle of special law. In recent years, the success rate of defense has exceeded 70%, and many countries have been recognized for citing its restrictions on foreign investment in the medical field during the epidemic. This change highlights that international investment law is evolving from abstract customary rules to special treaty provisions, which can better adapt to new challenges such as epidemics and economic crises and balance public interests and investment protection.

Keywords: necessity, essential security exception clause, international investment.

1. Introduction

Against evolving transnational economic regulation frameworks and advancing Belt and Road cooperation, more and more international investments projects establish Cooperation relationship according to Bilateral Investment Treaty (BIT). However, at the same time, the world situation is turbulent, and Investment disputes also emerge endlessly. According to the annual report released by the International Centre for Settlement of Investment Disputes (ICSID) in 2024, 341 issues are being under the Acceptance of ICSID in the 2024 Financial Years [1]. The ICSID system's commercial law foundations structurally prioritize investment claim enforcement, creating continuous tension with host nations' constitutional prerogatives and essential public priorities. The acts implemented by the Country under some special status in order to maintain public interests or fundamental interests of the Country may cause adverse effects on the investor, under this background, the defense basis chosen by the Country mainly includes Article 25 Necessity of the Draft Articles on Responsibility of States for internationally Wrongful Act (hereinafter referred to as the "Draft") and the ESEC, in BIT. Although the two have similarities, they have completely different effects in judicial practice,

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and if references are made without distinction, it is very likely to obtain an Arbitration result unfavorable to the host country. For example, in case CMS, the Argentine government, in its Observations of defense, made references to the Necessity and Article 11 on essential security exceptions of the United States-Argentina BIT. The CMS arbitral tribunal considers that the application of the ESEC shall satisfy the establishment requirements of the Necessity [2]. However, the requirements of the crisis are very harsh, and in the series of Arbitration cases of Argentina, except for the case of LG&E, dozens of cases citing this defense have not been recognized by the arbitral tribunal. Therefore, in the current international investment environment, how the host state references these two Terms to obtain more favorable judgments results is the focus of this research discussion. Based on this, this article uses the comparative analysis method to compare Article 25 of the "Draft" Necessity with ESEC in the BIT, meanwhile, combined with the case analysis method, compares the differences in the applicable fields of the two Terms, aiming to explore the changing trend of the legal basis of the host state's defense references, and uses the results obtained from the comparison to analyze the reasons for this changing trend.

2. Literature review

2.1. The theoreticalcontroversy caused by the provisions on necessity in the "Draft"

In Law practice, there are situations of confusing situations of Necessity with Force Majeure, but the "Draft" distinguished between the two, Force Majeure is that a Country can no longer perform international obligations due to irresistible external forces of compulsion and has no room for choice, while the Country still has room for free choice when it is in a situation of Necessity [3].The compensation issue after references to the plea of Necessity is also highly controversial. Some scholars believe that the compensation obligations of the plea of distress should be demonstrated by references to the rules of expropriation compensation or relying on the broad concept of fairness, because although the benefits obtained by the referencing country are based on legitimate acts, they are not fair, and therefore compensation may be required; other scholars believe that there is not enough exhibit to prove the international practice of Tacking compensation Obligations, so there is no compensation Obligations after references to the plea of Necessity [4,5].The academia generally recognizes that references to the Necessity are not easily accepted, and some scholars have proposed that adding the ESEC, in the BIT is an effective means to cope with this dilemma [6].

2.2. Different standards exist for the application of Security Exception Clause (SEC)

Through analyzing the Arbitration practice of security exception, it is discovered that there is a large gap between the reasoning process and the results of the precedents, which leads to unpredictability in the application of SEC. In terms of the intensity of judicial scrutiny, for example, in DS512 case, Russia directly invoked Article XXI(b) of the General Agreement on Tariffs and Trade (GATT). The Panel report noted that the word "it considers necessary..." in this provision implies that the Member possesses the authority to judge. Members bear a good faith obligation in interpreting this exception, while measures safeguarding vital security interests require merely threshold rational justification [7]. And in the DS544 case, the panel held a highly cautious attitude towards the SEC, conducting strict substantive review centering on the critical situation of international relations [7]. Some scholars advocate that the ISDS Mechanism urgently requires developing a more coherent analytical framework through accumulated jurisprudence, so as to adapt to the needs of international investments development [8].

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Existing literature has demonstrated considerable theoretical depth in separately examining Necessity and SEC, but academia involves less in the field of horizontal comparative study of the two. Existing studies mostly focus on the vertical deepening of a single Clause, within critical circumstances scholarship researchers prioritize deconstructing the constituent requirements of Draft Article 25, and in the field of security exception, they focus on the empirical analysis of the arbitral tribunal Interpretation divergence. This analysis promotes clause optimization, bearing substantial implications for enhancing ISDS architecture. This study intends to analyze from the perspective of horizontal comparative study and study the trend of host country's defense Clause selection in future international Investment issues.

3. The dilemma of necessity and the rise of ESEC

Draft Article 25 stipulates that references to Necessity must meet four requirements to prevent Countries from abusing Rights. Article 25 of the Draft establishes four cumulative thresholds to forestall frivolous pleading of the necessity doctrine. Firstly, the measure needs to be the solely way to shield a quintessential interest. Secondly, such interest ought to be under a grave and drawing close peril. Thirdly, the measure shall not seriously impair a fundamental interest of different States or the international community. Fourthly, the state invoking necessity must establish both its non-culpability in creating the crisis and the obligation must not exclude necessity. It can be seen from the results of dozens of issues of the Argentina ICSID series that it is extremely difficult to successfully invoke the Clause as a defense.

At the same time, more and more Countries add an ESEC when signing or renewing BIT and specified some specific applicable circumstances. Empirical studies indicate that by early 2016, over 60% of International Investment Treaties (IITs) incorporated self-judging essential security exception clauses [9].

4. Comparison of necessity and essential security exceptions

4.1. In foundation aspect, comparing necessity and ESEC

4.1.1. Comparison of historical origins aspects

Analyzing the historical origin of critical situations shows that its institutional design is rooted in the traditional framework of international law. In 1949, the International Law Commission (ILC) initiated the codification of rules on State responsibility, and formal work commenced in 1953. The Draft aims to construct a framework of the law that binds the behavior of Countries, and its core follows the concept of "people's interests first." Article 25 of the Draft stipulates that when a Country protects its fundamental interests threatened by grave and drawing close peril, adopting the sole measure breaching international obligations may preclude illegality. This principle can be traced back to early international practice, such as Portugal suspending the repayment of British debt due to the internal war crisis in 1832, and the United Kingdom advocating self-defense in the Caroline case in 1837,both of which were recognized on the grounds of survival crisis or self-defense necessity, reflecting its applicability to public law issues such as national survival and political independence. Because the Draft was compiled in an era of imbalanced international power structure, strict application conditions are set for the Necessity, which not only providing legitimate self-help means under extreme crisis for weak Countrys, but also preventing strong Countrys from

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abusing in order to circumvent international obligations, the core is resolving the issue of State responsibility arising from extreme events between sovereign Countrys [3].

The ESEC in BIT, the wording of which is very similar to Article XXI of the GATT. Therefore, exploring the historical background and design concept of Article XXI of GATT is the key to understanding the ESEC in BIT. Under the background of the Cold War, the ideological confrontation intensified, and various countries worried that the reliance on strategic materials might be subject to economic coercion, and it was necessary to maintain policy flexibility while maintaining the free trade system. This Clause thus became a "safety valve" for balancing security and trade. Its Law design adopts the Principle of Strict Construction, takes "basic security interests" as a broad applicable condition, and grants member of the countries greater discretion through subjective judgment terms such as "it considers necessary...", which is more flexible than the strict requirements of the Necessity [10].This Clause possesses dual attributes of both public international law and international economic law, serving both military or political security goals and embedding in the framework of International Trade rules, and its characteristic of addressing security issues in economic rules becomes the institutional blueprint emulated by subsequent BIT.

4.1.2. Comparison of common law and special law aspects

The study of the ILC on the issue of fragmentation of international law has clarified the maxim of “The principle of lex specialis”. The basic rationale for its principle is that “lex specialis” is more specific and usually takes better account of the characteristics of the specific situation to which it applies than any applicable general Law, its application can also usually produce fairer results, and it usually better reflects the intention of legal subjects [11]. The ESEC prescribed in Article 33(5)(ii) of the Canada-China Bilateral Investment Treaty (2012) can highlight the advantage of special law [12]. ESEC exclusively delineates three categories of permissible measures in its substantive scope, namely, the trade control of military materials, the Transactions Limitations on security facilities related technologies and the enforcement of nuclear non-proliferation policies, while the Necessity is not stipulated. On the triggering scenario limitation, the ESEC stipulates that it is only applicable to wartime and international relations emergency, while the Necessity stipulates the abstract Standard of "grave and imminent peril". Furthermore, the design of the exception Clause conforms to the subjective intention of BIT signing, namely, promoting Investments according to the principle of sustainable development, strengthening bilateral economic Cooperation on the foundation of equality and mutual benefit, and safeguarding cooperative stability through the institutional confinement of exoneration parameters. And the field used by Necessity is extremely broad, and its legislative intention is mainly to maintain the seriousness of international obligations, but it has to be admitted that the Country has limited self-preservation under extreme survival crises, which is difficult to adapt to the specific requirements of investments agreements. From this, it can be concluded that in the field of international Investments, the ESEC, as a special law, shall take precedence over the general law of the Necessity.

4.2. The comparison of the necessity and essential security exception in law practice

4.2.1. The case of invoking the necessity

Gabčíkovo-Nagymaros Project Case reveals the practical dilemma of the plea of Necessity.In 1977, Hungary and Czechoslovakia executed a treaty to jointly construct the Gabcíkovo-Nagymaros Project.In 1989, Hungary unilaterally terminated the project citing ecological risks, asserting it

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constituted a state of the Necessity. After a comprehensive review, the International Court of Justice (ICJ) held that the situation faced by Hungary did not reach the urgency in "the crisis must be grave and imminent" stipulated in the Terms, and the ICJ denied that the unilateral measure taken by Hungary to terminate was the only means to respond to the danger [13]. That is, Hungary did not exhaust all means to find alternative schemes, even if such schemes cost more or were more expensive, so the "uniqueness" requirement was not met.

In the field of international Investments, similar logic is reproduced in the CMS v. Argentina case. In February 2002, Argentina abandoned its U.S. dollar currency peg through Emergency Law No. 25,561., and a floating Exchange Rate system would be implemented, and public utility Corporations would exchange U.S. dollars at an Exchange Rate of l: l.This led to the damage of interests of the U.S. Investment company CMS. Although the Tribunal recognized the strictness of the crisis, the CMS arbitral tribunal also rejected Argentina’s plea of the Necessity with the "sole means" requirement [2].

Article 25 of the Draft stipulates in a negative sentence pattern. Such expression naturally leans towards the logic of proving exceptions—the Tribunal only needs to find that any alternative means exists to negate the uniqueness requirement.

4.2.2. The case of invoking the ESEC

Since, as of June 2025, there have not been Arbitration cases of references to the BIT ESEC in the field of international Investments, this Headquarters for will draw on typical cases involving the Article 21 security exception of the GATT in WTO issues settlement. Although these cases originate from the field of trade, their legal Interpretation and Standards of assessment of core ideas such as "essential safty interests", "emergency in international relations", and "necessity" have relevance and inspiration for understanding the applicable logic of similar Terms in the BIT.

Case DS512. After the outbreak of the 2014 Annexation of Crimea by Russia and the War in Donbas, mutual Sanctions between Russia and Ukraine were continuously escalated. In July 2016, Russia suddenly cut off the land transport from Ukraine to Central Asia via Russia, on the grounds that "there was hostile behavior in Ukraine that harmed Russia's economic security". Ukrain has intiated legal proceedings. The key factor of the Panel Award depends on recognizing that Russia's behavior conforms to the requirements of Article XXI(b)(iii) of the GATT. The panel, after review, considered that the “emergency in international relations” did indeed exist, and there was exhibited to prove that the state of affairs between Russia and Ukraine concerned armed conflict. What’s more the truth that the enactment of multilateral sanctions against Russia since 2014 in reaction to the Ukraine crisis attested to the gravity of events [14]. However, economic security can constitute the essential security interests required by section Article XXI(b) of the GATT only when it is directly related to the survival function of the Country, and Russia has not demonstrated how the transit Goods of Ukraine threaten its survival function. The implication of this case for the field of international Investments lies in that, the implication of this case for the field of international Investments lies in that, when a host state takes emergency control measures due to genuine and serious armed conflict, resulting in damage to foreign capital, its references to the ESEC under the BIT has the possibility of success. To this end, the host state needs to provide conclusive exhibits to prove that the crisis has reached the severity of "emergency in international relations" under Article XXI(b)(iii) of the GATT, and the response of the international community can serve as strong corroboration. Under such extreme circumstances, the BIT arbitral tribunal may also flexibly interpret “fundamental security interests”, accept claims such as “economic security”, “energy security” or “public order”, but the prerequisite is that these interests must have a direct and close

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connection with the Country's core survival or political and military stability. Unless otherwise stipulated in the BIT.

Case DS567.Saudi Arabia implemented a blockade and severance of diplomatic relations against Qatar, and adopted a series of political, economic and diplomatic boycott measures. The focus of the controversy this Case is Saudi Arabia's anti-sympathy measures, Saudi Arabia Governmental Order, which prohibits its citizen and residents from expressing sympathy, support, or alignment with the government, leaders, or policies of Qatar in any way, and prohibits transactions or cooperation with Qatari entities or Individuals, and violators shall be subject to criminal penalties. beIN Media Group Limited-liability company (hereinafter referred to as "beIN") is Qatar's pay-TV sports channel,which monopolizes the regional sports content market by paying huge copyright fees and owns exclusive broadcasting rights for sports events in regions such as Middle East and North Africa. After the severance of diplomatic relations in August 2017, beoutQ was launched in Saudi Arabia, pirating the events broadcast live by beIN. For this Infringement, Saudi Arabia does not grant beIN Intellectual Property Human rights Remedies. For this Infringement, Saudi Arabia does not grant beIN intellectual property rights holders Remedies of power. The Panel considered the act of "not granting Salvage" was not unreasonable and did not reject this security exception defense against this act [14]. Because there were indeed reasons that threatened its fundamental interests, accusing a country of assisting terrorism and extremism, and the severance of diplomatic relations itself also proved the severity of the situation [14]. However, Saudi Arabia's condoning of bout without taking criminal penalties not only infringed on Qatar's Rights but also affected the interests of other Intellectual Property Rights holders of Third Party, so the arbitral tribunal ultimately did not support its defense [14]. In addition, Saudi Arabia articulated clearly that its fundamental security interest was to protect itself from the danger of terrorism and extremism. The Panel considered in this regard that Saudi Arabia's denial of judicial Salvage to Qatari nationals could be regarded as one Party of an overall policy of protecting nationals, sufficient to conduct an Assessment of measures' correlation [14]. This case may provide reference for the applicable boundary of ESEC of BIT in the field of international Investments, the host country needs to clearly define the specific security interests under threat, and prove that the Limitations are substantially related to the protection of such interests, and meanwhile, the arbitral tribunal shall conduct review through the principles of necessity, proportionality and good faith to prevent the measures from causing disproportionate damage to deprive the right of investors. Unless otherwise stipulated in the BIT. If the host country references the Necessity, it needs to face strict substantive review, which is difficult to provide interpretation space for the host country. However, the review focus of ESEC lies in the flexibility space necessity, proportionality, good faith, etc., which can leave more operational space for the host country.

5. Conclusion

This Article adopts comparative method and explores the theory and cases of the Necessity and ESEC. Finally, the international investments issues resolution presents the following trends, in the case where the treaty has expressly stipulated the SEC, the Country is more inclined to give priority to references to this path to claim exemption; while the Necessity, as a customary law, its application may gradually become a supplementary Remedies tool in the absence of a treaty. Moreover, according to the "The principle of lex specialis", in international Investments issues caused by new crises such as public health and economic crises, the ESEC can be flexibly applied. Future research can focus on the specific interaction of the two Terms in application. When conducting defense in the host state, how to permit the Terms to fully exert their own advantages, and when the Arbitration

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Tribunal makes an Award, what the specific boundary of the Necessity as a supplementary Clause is, all will still be the focus of theoretical research and practice that should be considered.

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