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When the Exception Overtakes the Rule: COVID-19, Security Exemption Clauses, and International Investment Agreements

Kayla Maria Rolland*

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* Kayla Maria Rolland is an articling student with the Ministry of the Attorney General, in Toronto, Canada. The views and opinions expressed in this paper are solely those of the author and should not be taken as the views of either the Attorney General of Ontario or the Government of Ontario. Research was completed as part of academic coursework from January to April 2021. Immense gratitude goes to Professor Andrea Bjorklund for her guidance while completing this paper.

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Abstract

In the trade and investment law regimes built in the post-war period, "security exemption clauses" were included within trade and investment agreements as a safety valve, permitting States to deviate from their commitments in the event that their security interests were implicated. Initially, these clauses were understood to be narrowly limited to instances of war and interstate conflict. With the rise of the national security state in the decades since, however, the concept of security interests has ballooned to encompass an ever-growing set of issues, with some fearing that the rules may become irrelevant. This has been particularly facilitated through "third generation" security exemption clauses and their inclusion of self-judging language. The COVID-19 pandemic in particular adds a new dimension to this phenomenon. As a case study analysis of the text of the Chile-Hong Kong, China SAR bilateral investment treaty (BIT) will demonstrate, it may be feasible for States to invoke security exemption clauses to justify measures taken in response to the COVID-19 pandemic in some contexts, particularly with third generation, self-judging security exemption clauses. The expanding notions of security exemption clauses have significant implications for the investor-State dispute system as a whole.

> "The expansion of the national security state has become a major cause for concern in the literature on crime, terrorism, and armed conflict, but there has been *little consideration of its effect on trade and investmen*t."[1]

A. Introduction

In the trade and investment law regimes built following World War II, "security exemption clauses" were included within trade and investment agreements as a safety valve, permitting States to deviate from their commitments in the event that their security interests were implicated. These clauses "provide States with a means to protect their most fundamental security interests even where they collide with treaty obligations".[2]

Initially, these clauses were understood to be narrowly limited to instances of war and interstate conflict. With the rise of the national security state in the decades since, however, the concept of security interests has ballooned, particularly through the increasing use of self-judging language, to encompass an ever-growing set of issues, with some fearing a "risk [of] allowing the exception to swallow the rule".[3] The COVID-19 pandemic in particular adds a new dimension to this phenomenon. With the looming possibility of a wave of investor-State disputes related to measures taken by States to address the pandemic, the potential invocation of security exemption clauses demonstrates the ever-growing boundaries of clauses.

B. Overview of Security Clauses & Evolving Interpretations

I. Overview of Security Clauses

The inclusion of security exemption clauses within international investment agreements (IIAs) is a relatively recent phenomenon. Most older IIAs do not contain security exemption clauses, but they have grown increasingly common

1 See J. Benton Heath, 'The New National Security Challenge to the Economic Order', 129 *Yale Law Journal* (2020) 4, 1020, 1029 [Heath, 'The New National Security Challenge'].

2 S. Blanco & A. Pehl, *National Security Exceptions in International Trade and Investment Agreements: Justiciability and Standards of Review* (2020), 71.

3 J. Benton Heath, 'Trade and Security Among the Ruins', 30 *Duke Journal of Comparative & International Law* (2020) 2, 223, 243-244 [Heath, 'Trade and Security'].

in more recent agreements.[4] The content and form of security exemption clauses varies. Some security exemption clauses use terms that are quite broad, providing States with significant discretion in defining a security interest. Others take a narrower approach that lists more specific conditions in which the clause may be invoked.[5] Different terms are used, including "national security, essential security interests, international peace and security, or public order".[6]

Scholars Sebastián Mantilla Blanco and Alexander Pehl identify three generations of security exemption clauses in trade and investment law, beginning with the "Security Exceptions" clause within Article XXI *General Agreement on Tariffs and Trade* (GATT) in 1947.[7] This clause has been a reference point in drafting many of the IIAs that would follow.[8]

The second generation of security exemption clauses, which spanned from the 1950's through to the mid-1990's, were heavily impacted by "trade liberalization, the promotion of foreign investment, and international dispute settlement mechanisms."[9] When security exemption clauses were included in these instruments, they were very narrow and often permitted a high degree of scrutiny. A critical development was the increasing exclusion of the self-judging language "it considers" from agreements, which had its origins within Article XXII GATT.[10]

The third generation that Blanco and Pehl have identified is considered the "antithesis of the second generation," and reached its peak during the mid-2010's.[11] These clauses sought to reserve a high degree of discretion for States. Some have gone as far as to expressly exempt the security exemption clauses from arbitral jurisdiction.[12] Increasingly, many IIAs also include specialized

4 J. Arato, K. Claussen & J. Benton Heath, 'The Perils of Pandemic Exceptionalism', 114 *American Journal of International Law* (2020) 4, 627, 630.

5 United Nations Conference on Trade and Development, 'The Protection of National Security in IIAs' (2009), available at https://unctad.org/system/files/official-document/diaeia20085_en.pdf (last visited 11 February 2024) [UNCTAD, 'The Protection'].

6 *Ibid.,* at XVIII.

7 *General Agreement on Tariffs and Trade*, 30 October 1947, 55 UNTS 187 [GATT]; See J. Lee, 'The Coronavirus Pandemic and International Investment Arbitration – Application of "Security Exemption" Clauses in Investment Agreements', 13 *Contemporary Asia Arbitration Journal* (2020) 1, 185, 189.

8 Blanco & Pehl, *supra* note 2, 2.

9 *Ibid*.

10 *Ibid*.

11 *Ibid*.

12 *Ibid*, 3, 67.

exemptions within security exemption clauses such as to "protect public health,"[13] or to "prevent disease,"[14] although overall this remains quite rare.[15] This third generation of security exemption clauses also saw a dramatic re-introduction of self-judging language, potentially altering the predictability of the broader system by allowing States to unilaterally take measures "it considered necessary" to protect its essential security interests. By 2016, at least 134 countries were bound by such clauses.[16] As these clauses have broadened, there has been a growing sense among States that they must be included within new IIAs.[17] This resurgence of self-judging language has accelerated evolving interpretations of what may be considered measures taken for essential security interests.

As a consequence of these variations in language between agreements, the circumstances in which these clauses may be invoked varies based on the specific language of the IIA in question, and there are differences in the degree of autonomy that States are allotted in responding to perceived threats. Arbitral tribunals are often called upon to clarify the meaning of these terms and their scope.[18] A significant challenge with regard to security exemption clauses is a lack of international jurisprudence at present to assist with clarifying State obligations.[19]

States enter IIAs with the intention of inducing foreign investors with the provision of particular guarantees regarding cross-border investments.[20] Application of security exemption clauses have significant consequences, as "if the security exception applies, the investor is deprived of the IIA's protection"

13 Arato, Claussen & Heath, *supra* note 4 at 630.

14 See 'COVID-19: Public Health Emergency Measures And State Defenses In International Investment Law' (28 April 2020), Clearly Gottlieb 3, available at https://www.clearygottlieb.com/-/media/files/alert-memos-2020/public-health-emergency-measures-and-state-defenses-in-international-investment-law-pdf.pdf (last visited 11 February 2024).

15 See F. Sebastiani, 'Investor-State Disputes During the Covid-19 Pandemic: Balancing Public Health Concerns and Foreign Investors' Rights', *La Revue des Juristes de Sciences Po* (2020), fn. 4.

16 K. Sauvant *et al*., 'The Rise of Self-Judging Essential Security Interest Clauses in International Investment Agreements', 188 *Columbia FDI Perspectives* (2016) 1, available at https://academiccommons.columbia.edu/doi/10.7916/D8Z60PKP (last visited 11 February 2024).

17 See UNCTAD, 'The Protection', *supra* note 5, at XVII-XVIII.

18 *Ibid.,* at XVIII-XIX, 74.

19 *Ibid.,* at 44-45.

20 See W. Moon, 'Essential Security Interests in International Investment Agreements', 15 *Journal of International Economic Law* (2012) 2, 481, 483.

and guarantees.[21] Clauses act as exceptions to a State's obligations under an IIA, freeing States from adopting measures that would otherwise be inconsistent with the agreement.[22] While most provisions apply generally to the treaty as a whole, some may apply only to specific provisions of the IIA.[23]

This essay will concentrate on security exemption clauses, however, it must be briefly noted that, even in the absence of such clauses, States may still justify measures under rules of customary international law, including force majeure, necessity, and duress.[24] It is notable that disputes regarding Argentine measures in the 1990's appeared to suggest, however, that when stand-alone security exemption clauses are included in IIAs, these must be turned to in lieu of the necessity defence.[25]

II. Evolving Notions of Security Interests

Security exception clauses within IIAs were originally conceived to address military threats and other related matters. As a consequence of this history, the requirements of security exemption clauses may be easily met in the context of events such as international or civil wars, terrorism, and armed rebellion.[26] The concept of national security has continued to evolve, however, to include health, environmental, political and economic threats.[27]

Today, government policies related to national security identify a wide range of risks and vulnerabilities unimaged in the post-war era, including climate change, domestic industrial policy, and cybercrime.[28] National security rhetoric is also increasingly emerging in global economic affairs. The challenges posed by the invocation of security exemption clauses extend beyond mere abuses – with "good faith but novel" claims as posing the most significant challenges to the system as a whole.[29]

21 C. Schreuer, 'The Protection of Investments in Armed Conflicts', in F. Baetens (ed.), *Investment Law Within International Law* (2013), 3, 17.
22 See Blanco & Pehl, *supra* note 2, 39.
23 K. Yannaca-Small, 'Essential Security Interests Under International Investment Law', in OECD (ed.), *International Investment Perspectives: Freedom of Investment in a Changing World* (2007), 93, 99.
24 See UNCTAD, 'The Protection', *supra* note 5, 34.
25 Lee, *supra* note 7, 192.
26 Schreuer, *supra* note 21, 17.
27 See UNCTAD, 'The Protection', *supra* note 5, 7.
28 See Heath, 'The New National Security Challenge', *supra* note 1, 1020; see Heath, *Trade and Security, supra* note 3, 6.
29 See Heath, 'The New National Security Challenge', *supra* note 1, 1020.

Economic crises presented the first challenge to the conventional understanding of a threat to a State's essential security interests. At the end of 2001, Argentina experienced a catastrophic financial collapse. In response to the crisis, the country adopted a series of measures to stabilize the economy.[30] Several of these measures impacted foreign investors.[31] In consequence, some of the investor-State arbitration cases that arose in the 2000's – including *CMS v. Argentina*, *LG&E v. Argentina*, and *Continental Causality v. Argentina* – helped to define the contours of the use of security exemption clauses.[32] Argentina did not deny that its measures impacted investors, rather it invoked the security exemption clauses within its various bilateral investment treaties (BITs).[33] While the outcomes of these cases varied, all established that nonmilitary threats, including an economic crisis, could implicate a State's security interests.[34]

The Argentinian cases coincided with the broader trend of expansion of the national security state. The end of the Cold War saw the national security paradigm shift from an adversarial interstate focus to a concept increasingly intertwined with human rights, law enforcement, and economic globalization.[35] The result was a proliferation in security interests.[36] The "War on Terror" in the early 2000's resulted in a shift in national security strategy, where countries sought to control the entire environment in which (often non-State) adversaries operated. As these strategies widened, so did the number of products or industries considered "security sensitive".[37] The most expansive modern security threats now consist of "actor-less" threats. These are threats where responsibility cannot be attributed to a single State.[38] These threats are more diffuse and are likely to become permanent fixtures of contemporary life rather than a temporary occurrence.[39]

One of these actor-less threats is cyber-security. The concept is vague and relates more accurately to multiple different threats requiring different

30 See W. Burke-White, 'The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System', 3 *Asian Journal of WTO & International Health Law and Policy* (2008) 1, 199, 202-203.
31 *Ibid.,* 203; UNCTAD, 'The Protection', *supra* note 5, XVI.
32 UNCTAD, 'The Protection', *supra* note 5, 8.
33 See Burke-White, *supra* note 30, 204-205.
34 See Heath, 'The New National Security Challenge', *supra* note 1, 1037-1038.
35 See Heath, 'The New National Security Challenge', *supra* note 1, 1033-1034.
36 See Heath, *Trade and Security, supra* note 3, 4.
37 Heath, 'The New National Security Challenge', *supra* note 1, 1042.
38 Heath, *Trade and Security, supra* note 3, 5-6.
39 See Heath, 'The New National Security Challenge', *supra* note 1, 1034.

policy responses.[40] The expansion of security to include cyber-security has far-reaching consequences, as any part of international commerce that has a digital component ("which is, increasingly, nearly all of it") may be captured in disputes regarding national security.[41] States have increasingly taken actions to restrict the cross-border flows of data and restrict the entry of foreign companies into sensitive sectors. Stretched to its furthest extreme, some States have begun to view the possession of large amounts of personal data by foreign firms as a security concern in itself.[42]

Climate change is another one of these actor-less threats.[43] For many, it is considered "cast as the existential threat to end all others – a security issue par excellence".[44] Climate activists have advocated for the exemption of climate measures from trade and investment obligations.[45]

Public health measures may be challenged in investor-State disputes. Outside of periods of crisis, efforts to promote public health, such as tobacco labelling laws or bans on harmful chemicals, have been challenged. Measures may also be challenged during periods of crisis.[46] In the context of COVID-19, this has raised the issue of whether the protection of public health can constitute a security interest. Some scholars have expressed that broad approaches to essential security interests capture public health emergencies, and thus security exemption clauses may be invoked as a defence.[47]

In the trade context, scholars have identified a tension between drafting provisions that are expansive enough to address evolving concerns, with the danger of providing States with a *carte blanche* that allows them to override their obligations.[48]

40 *Ibid.*, 15.
41 *Ibid.*, 5-6.
42 *Ibid.*, 15-17.
43 *Ibid.*, 1034.
44 See Heath, *Trade and Security, supra* note 3, 7.
45 See Arato, Claussen & Heath, *supra* note 4, 634.
46 See N. Bernasconi-Osterwalder, S. Brewin & N. Maina, 'Protecting Against Investor–State Claims Amidst COVID-19: A Call to Action for Governments', *International Institute for Sustainable Development* (2020), 3-4, available at https://www.iisd.org/system/files/publications/investor-state-claims-covid-19.pdf (last visited 11 February 2024).
47 See Moon, *supra* note 20, 498.
48 See Heath, *Trade and Security, supra* note 3, 18-19.

C. State Measures Taken in Response to the COVID-19 Pandemic

On March 11th, 2020, the World Health Organization (WHO) declared COVID-19 a pandemic after exponential global spread led to cases within 114 countries.[49] Some of the most widely invoked measures were very restrictive for businesses, including lockdowns, border closures, suspension of production, import and export restrictions, and nationalization of healthcare and other social services.[50] Many of these measures were adopted hastily with little regard for a State's obligations under trade and investment agreements.[51] The economic consequences of these measures have been immense.[52] The COVID-19 pandemic has also seen increased domestic screening of foreign investment on national security grounds.[53]

Investor-State disputes often follow economic, financial, or other crises.[54] In consequence, lawyers internationally have predicted a wave of investor-State disputes to follow the pandemic.[55] Some have gone as far as to call the risk "unprecedented."[56] Claims could be raised by investors on the basis of fair and equitable treatment (FET), full protection and security (FPS), national treatment (NT), or indirect expropriation.[57] Concerns have been raised regarding the burden these claims could pose to States seeking to rebuild their economies following the crisis.[58] Pointing to the Argentine crisis, many fear "unpredictable and largely contradictory [...] awards possibly reaching hundreds of millions –

49 See K. Sullivan, 'A Brief History of COVID, 1 Year In', *Everyday Health* (2021), available at https://www.everydayhealth.com/coronavirus/a-brief-history-of-covid-one-year-in/ (last visited 11 February 2024).

50 See Arato, Claussen & Heath, *supra* note 4, 628; J. Paffey & K. Campbell, 'Investor-State Disputes Arising From COVID-19: Balancing Public Health and Corporate Wealth', *Lexology* (2020), available at https://www.lexology.com/library/detail.aspx?g=89234581-29f2-4284-97e5-47a98010b3ca (last visited 11 February 2024).

51 See Lee, *supra* note 7, 186.

52 See Bernasconi-Osterwalder, Brewin & Maina, *supra* note 46, 2.

53 See UNCTAD, 'The Protection', *supra* note 5, 7.

54 See Bernasconi-Osterwalder, Brewin & Maina, *supra* note 46, 3-4.

55 See Corporate Europe Observatory, 'Cashing in on the Pandemic: How Lawyers are Preparing to Sue States Over COVID-19 Response Measures' (2020), available at https://corporateeurope.org/en/2020/05/cashing-pandemic-how-lawyers-are-preparing-sue-states-over-covid-19-response-measures (last visited 11 February 2024).

56 Bernasconi-Osterwalder, Brewin & Maina, *supra* note 46, 1.

57 See Arato, Claussen & Heath, *supra* note 50.

58 See 'Cashing in on the Pandemic', *supra* note 55.

or even billions – of dollars while cases based on similar facts lead to decisions finding no treaty breach at all."[59]

Measures must each be analyzed on an individual basis and within their specific context and relevant IIA.[60] Various stakeholders have speculated, however, about the kinds of State measures that could result in possible investor-State disputes. Due to the importance of handwashing, several South American countries suspended water service disconnections to households who had outstanding payments. While these measures were praised by the WHO, this negatively impacted foreign-owned utility companies. As Spain buckled under the weight of COVID-19 hospitalizations, multiple private hospitals refused to admit COVID-19 patients. In response, Spain's Ministry of Health took temporary control over private hospitals, potentially giving rise to claims of expropriation. Israel has granted compulsory licences to drug manufacturers, allowing manufacturers other than the patent holder to produce and distribute medicines and vaccines for COVID-19. These compulsory licences could trigger claims of expropriation. With the global economy significantly impacted by COVID-19, efforts taken by States to prevent or address a financial crisis could also face legal action.[61]

D. Security Clauses as a Defence – Chile-Hong Kong, China SAR BIT (2016) Case Study

I. Introduction to the Case Study

This case study will address the hypothetical of an investor-State dispute arising between investors and a State by looking at the text of the Chile-Hong Kong, China SAR BIT (2016).[62] As no actual disputes are known at present, this analysis will remain extremely broad and imprecise. Nevertheless, a set of general facts and a specific security exemption clause provides an opportunity for analysis that helps to elucidate some of the tensions that relate to security exemption clauses in investor-State disputes.

This case study poses a good opportunity for a hypothetical analysis as the Chile-Hong Kong, China SAR BIT is an excellent example of a recent IIA

59 Bernasconi-Osterwalder, Brewin & Maina, *supra* note 46, 1.
60 See Lee, *supra* note 7, 200.
61 See 'Cashing in on the Pandemic', *supra* note 55.
62 *Chile-Hong Kong, China SAR Investment Agreement*, signed 18 November 2016, entered into force July 14 2019, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5413/download (last visited 11 February 2024).

with a "third generation" security exemptions clause. The specific language of the clause provides some unique opportunities for discussion, particularly as it implies that it is self-judging.

Like most countries, the measures adopted by Chile to date in response to COVID-19 have had negative impacts on both local and foreign companies. The country's energy sector, which benefits from significant foreign investment, for example, has seen delays in the construction of new projects as a result of curfews, border closures, and lockdowns.[63]

As with many modern IIAs, the Chile-Hong Kong, China SAR BIT (2016) contains a security exemption clause in Article 18(6). Relevant sections of the clause are reproduced below. Emphasis added is mine:

> "6. This Agreement does not:
> ... (b) prevent a Party from taking an action that *it considers* necessary to protect its essential security interests:
> ....(iii) *taken in time* of war or *other emergency in international relations*"

II. Analysis: Who Determines the Situation?

Early in the COVID-19 pandemic, scholar Jaemin Lee provided a helpful framework for assessing the feasibility of the use of security exemption clauses as a defence to measures taken in response to the virus. Surveying the texts of many IIAs, Lee identified several common threads that are relevant in determining whether a security exemption clause may be invoked as a defence. These include the questions of: Who determines the situation? Were measures taken in the time of an emergency? Do measures relate to essential security interests?[64]

The question of whether security exemption clauses are "self-judging" is considered a significant debate in treaty interpretation in investor-State disputes. Lee offers one approach. In their analysis, Lee turns to the recent World Trade Organization decision of *Russia – Measures Concerning Traffic in Transit* that addressed Article XXI GATT in the trade context for guidance on the interpretation of security exemption clauses in IIAs, asserting that this approach

63 See C. Salas & M. Valderrama, 'Energy Arbitration in Latin America: Potential State Defences in Future Covid-19-Related Cases', *Global Arbitration Review* (13 October 2020), available at https://globalarbitrationreview.com/review/the-arbitration-review-of-the-americas/2021/article/energy-arbitration-in-latin-america-potential-state-defences-in-future-covid-19-related-cases#footnote-076 (last visited 11 February 2024).

64 See Lee, *supra* note 7, 192-199.

is relevant as the wording in the security exemption clauses of many IIAs is very similar to Article XXI GATT. In the trade context, the decision set out that security determinations are "a decision that can and should first be made by an invoking State." The panel also concluded, however, that an adjudicative body with proper jurisdiction can review "whether the invocation satisfies the requirements set forth in the security exceptions provision".[65] Essentially, the panel determined that, in the context of trade, a State's determination is not entirely self-judging as it remains a justiciable issue, though, the panel concluded that a high degree of deference should be given to the invoking State's conclusions on the existence of a national security concern, the absence of which could be "a 'mere excuse to circumvent' an applicable treaty".[66]

Other sources have expressed far greater hesitancy in identifying broad trends regarding whether security exemption clauses are self-judging.[67] Blanco and Pehl in particular take opposition to Lee's approach and caution against blindly transplanting the approaches taken towards Article XXI GATT in the trade context to security exemption clauses in IIAs. They assert that, given the diversity among security exemption clauses, it is impossible to define a universal interpretation of whether or not a security exemption clause is self-judging.[68] In particular, no published decision has yet been required to interpret a provision that mirrors the language of "it considers" from Article XXI GATT, as most disputes have centered around second generation security exemption clauses.[69] Likewise, in the event that the clause is not self-judging, it is impossible to identify a universal standard of review.[70]

The Chile-Hong Kong, China SAR BIT provides a unique opportunity for analysis as the clause explicitly includes the language of "it considers" not yet approached by a published decision. This language may be contrasted with the language of Article XI of the Argentina-U.S. BIT of 1991, that was at issue in the Argentine cases and does not contain similar language:

> "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or

65 *Ibid.*, 193-194.
66 *Ibid.*, 194.
67 See UNCTAD, 'The Protection', *supra* note 5, XIX.
68 See Blano & Pehl, *supra* note 2, 1-2.
69 *Ibid.*, 40-41.
70 *Ibid.*, 1-2.

> restoration of international peace or security, or the Protection of its own essential security interests."[71]

In the Argentine cases, all tribunals rejected the self-judging nature of the clause in the U.S-Argentina BIT based on treaty wording and the interpretation by parties at the time of signing.[72] As scholar Tarcisio Gazzini asserts in an analysis of Article XI in relation to the Article 31(1) of the *Vienna Convention on the Law of Treaties* (VCLT), "the use of the expression 'measures necessary' and not 'measures the host State considers as necessary,' as in the case of similar provisions in other treaties, clearly militates against the self-judging argument".[73]

Arbitral tribunals have placed significant emphasis on the exact wording used in an applicable treaty and have typically indicated that a self-judging provision must be express. The absence of the language "it considers" or "considers necessary" has often been viewed by arbitral tribunals as a clear sign that the clause is not self-judging.[74] The Chile-Hong Kong, China SAR BIT is representative of third generation security exemption clauses. As it includes the express language of "it considers", it may be presumed to be self-judging.

The self-judging nature of clauses is considered unusual in investment law, as international tribunals have long asserted their authority in reviewing the decision-making processes of national bodies within State parties.[75] As the Chile-Hong Kong, China SAR BIT contains express language designating it a self-judging clause, in principle, an arbitral tribunal is barred from judicial review of the measure at stake.[76] In responding to the COVID-19 crisis, Chile would be permitted substantial deference to identify the measures it considers necessary to respond to a threat to its security.

Some have highlighted, however, that "the self-judging nature of a national security exception in IIAs does not provide a complete shield from judicial scrutiny."[77] States must still carry out their obligations in good faith, as a consequence of the general obligation under article 26 of the Vienna Convention

71 *Ibid.,* 40-41.
72 See UNCTAD, 'The Protection', *supra* note 5, 49-50.
73 T. Gazzini, 'Interpretation Of (Allegedly) Self-Judging Clauses In Bilateral Investment Treaties', in M. Fitzmaurice, O. Elias & P. Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (2010), 239, 245; *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 [VCLT].
74 See Blano & Pehl, *supra* note 2, 42-44.
75 See Heath, 'The New National Security Challenge', *supra* note 1, 1025.
76 See UNCTAD, 'The Protection', *supra* note 5, 39.
77 *Ibid.,* 40.

on the Law of Treaties. In the context of security exemption clauses, this good faith requirement is perceived to require States to engage in honest and fair dealing and have a rational basis for the assertion of an exception. Although it may be practically difficult to establish a violation on this basis, evidence such as contradictory behavior by a State could be advanced by investors to argue that measures were not taken in good faith.[78] The ultimate question is "whether a reasonable person in the State's position could have concluded that there was a threat to national security sufficient to justify the measures taken".[79] This allows arbitral tribunals to distinguish between security concerns and disguised protectionism.[80] Measures are also generally understood to be required to meet overarching requirements of non-arbitrariness and non-discrimination.[81] Further, States must act in accordance with all other of their international obligations.[82]

In conclusion, significant latitude would be provided to Chile in terms of determining the measures it considers necessary to respond to a threat to its security as a consequence of the self-judging language within its security exemption clause, provided it acts in good faith.

III. Were Measures "Taken in the Time of [...] Other Emergency in International Relations"?

1. "In the Time of... "

"Taken in the time" necessitates a temporal requirement that measures be taken during the period of an active threat to a State's security interests.[83] As Lee highlights, this question is often approached objectively, looking at specific dates that the threat occurred.[84] In regard to the Chilean case study, measures taken while the pandemic is clearly underway are likely to satisfy this test, as evidence abounds regarding the threat posed by COVID-19 during this period.

This analysis will grow more difficult during the pandemic recovery period, however, as the question of the severity of the threat grows more nuanced. States'

78 *Ibid.*, 39-41.
79 *Ibid.*, 40.
80 *Ibid.,* 39-41.
81 See Arato, Claussen & Heath, *supra* note 4, 631.
82 See UNCTAD, 'The Protection', *supra* note 5, 89.
83 See Lee, *supra* note 7, 196.
84 *Ibid*.

exposure to possible claims is likely to increase as the crisis persists.[85] As countries enter a recovery period, claims that measures are disguised protectionism and have been taken in bad faith may be easier to advance, even in light of the self-judging nature of these clauses. This is particularly salient as COVID-19 is predicted to remain a threat for years to come, albeit hopefully growing less severe over time as immunity grows.[86] As the recovery phase extends and COVID-19 poses a less significant threat to public health, it will likely grow more difficult for States to assert that measures are taken in response to the threat of the virus.[87]

Further, arbitral tribunals addressing similar facts could even reach different determinations regarding whether the severity of the threat of COVID-19 continues to constitute a sufficient threat. While the Argentine cases all agreed that an economic crisis could constitute an emergency of international relations, they diverged on the level of severity required. *CMS*, *Enron*, and *Sempra* held that only an economic crisis imperilling a State's existence would be of a sufficient scale to meet the requirements of the security exemption clause. In contrast, *LG&E* and *Continental Causality* looked at the relevant economic, political, and social conditions and found that they, in the aggregate, satisfied the security exemptions clause.[88] This generates a degree of inconsistency and a lack of predictability that has led to legitimacy criticism by States that will be addressed further below.

The South Centre, an intergovernmental organization of developing countries, published a parallel analysis of the potential invocation of the Article 73 security exemption clause in the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement and argued for a more expansive approach to the temporal requirement that would encompass "an extended period of continuing requirement for medicines and vaccines to prevent re-emergence once the virus has been brought under control".[89] As the global economy aims to recover from

85 See Arato, Claussen & Heath, *supra* note 4, 633.

86 M. Greshko, 'COVID-19 Will Likely Be With Us Forever. Here's how we'll Live With it' (22 January 2021), National Geographic, available at https://www.nationalgeographic.com/science/article/covid-19-will-likely-be-with-us-forever-heres-how-well-live-with-it (last visited 11 February 2024).

87 F. Abbott, 'The TRIPS Agreement Article 73 Security Exceptions and the COVID-19 Pandemic', *South Centre*, Working Paper No. 116 (2020) 9, available at https://www.southcentre.int/wp-content/uploads/2020/08/RP-116.pdf (last visited 11 February 2024).

88 See UNCTAD, 'The Protection', *supra* note 5, 9-10.

89 Abbott, *supra* note 87, 9.

the devastating impacts of the COVID-19 pandemic, though, there would likely be significant resistance to these calls, particularly from investors.

2. "...or Other Emergency in International Relations"

The language within Article 18(6) also requires that measures be "taken in time of war or other emergency in international relations". In determining the existence of an emergency in international relations, the panel in the *Russia* case looked at the reaction of the international community.[90] Similarly, in the analysis by the South Centre, declarations by the WHO were suggested as objective evidence of the existence of an emergency in international relations.[91] In a hypothetical dispute, Chile could easily advance evidence of an emergency in international relations, pointing to extensive evidence as documented by numerous international bodies like the WHO.

To summarize, measures taken by Chile during the period in which the threat of COVID-19 is indisputable would likely satisfy the requirement that they be taken in the time of an emergency of international relations. Measures taken by the State at a later recovery period may be more difficult to defend, however, if there is greater diversity of opinion regarding the threat of the virus at that time.

IV. Do Measures Relate to Essential Security Interests?

The final question in this analysis is whether measures relate to an "essential security interest". Lee asserts that this "means interests relating to the core function of a State such as protection of its territory or its people".[92]

There is general agreement that the protection of the health of the country's population falls within "essential security interests" in IIAs. In a policy document on "The Protection of National Security in IIAs," the United Nations Conference on Trade and Development concluded that, "while the safety of the nation and its people is clearly at the core of the provision, one could reasonably argue that threats to the health of the population or the environment are covered too."[93] The South Centre is also in agreement with this approach, arguing that, "It is difficult to foresee [...] deciding that protecting the national population

90 See Lee, *supra* note 7, 196.
91 See Abbott, *supra* note 87, 7.
92 See Lee, *supra* note 7, 198.
93 UNCTAD, 'The Protection', *supra* note 5, 7.

from a pandemic is not within the essential security interests of the State."[94] Beyond mere questions of the protection of public health, the COVID-19 pandemic could also raise other essential security interests for States that could bolster its claims.[95] These may include, for example, economic concerns and an escalation of hostilities that could further a State's argument that its essential security interests have been implicated.

As measures taken by Chile would be to protect the national population from the pandemic, an aim generally considered to be part of a State's essential security interests, this part of the test is likewise satisfied in the context of Chile.

To conclude, in a hypothetical investor-State dispute between Hong Kong investors and Chile, it appears that the security exemption clause within the Chile-Hong Kong, China SAR BIT could be successfully raised by Chile. This clause is representative of the new era of third-generation security exemption clauses, which are often self-judging and provide States with a high degree of deference, absent bad faith. Measures taken during the period where COVID-19 remains an indisputable threat would likely be easy to justify, given the expansive amount of evidence regarding the existence of an emergency of international relations. Measures taken in the recovery period may be more difficult to justify if there is greater debate regarding the threat posed by the virus. Finally, the protection of public health is easily captured by the term of essential security interests.

It is worth reiterating that the feasibility of the application of security exemption clauses to measures taken in response to the COVID-19 pandemic must be assessed on a case-by-case basis, based on the specific context and language of relevant IIAs. This hypothetical and its conclusions are reflective of *one* context and *one* IIA. Second generation clauses and any clauses that are not self-judging will face higher barriers to success. However, this case study offers two important conclusions. First, there is a possibility of success for the application of security exemption clauses to measures taken in response to the COVID-19 pandemic in some contexts. Second, it demonstrates how second-generation security exemptions clauses, especially those that are self-judging, assist with expanding the boundaries of what may be considered a security interest.

94 Abbott, *supra* note 87, 10.
95 *Ibid.*, 6.

E. Implications for the Broader Investor-State Dispute Settlement System

In a recent article, scholars Julian Arato, Kathleen Claussen, and J. Benton Heath assert, that "the [COVID-19] pandemic reveals the structural weakness of the exceptions-oriented paradigm of justification in international economic law."[96] While security exemption clauses provide States with latitude to determine their own responses to perceived threats and demonstrate flexibility in the system, they also threaten to expand so far that they begin to distort and undermine the regime.[97] This has the potential for significant impacts felt by investors who rely on the guarantees that States can now circumvent. In short, *if everything becomes an exception, the rules simply become meaningless*. Arato, Claussen, and Heath assert that the pandemic will accelerate a growing trend towards "exceptionalism" in international economic law. Where deviations from primary rules are permitted through "exceptions", it is inevitable that exceptions will proliferate.[98]

The unpredictability concerns raised by the trend towards exceptionalism are related to broader concerns relating to the consistency and predictability of decisions by arbitral tribunals in investor-State dispute settlement, including divergent approaches to substantive standards.[99] The Argentine cases in particular raise questions for States about how arbitral tribunals may approach security exemption clauses under similar sets of facts, but reach divergent conclusions. The exceptions paradigm also generates questions about the system's ability to respond to crisis – a reliance on exceptions entrenches the idea that current obligations are insufficiently flexible and unduly tether a State's ability to respond to an emergency like a pandemic.[100] This relates to broader sovereignty criticisms of investor-State dispute settlement.[101]

Particularly as the interpretation of a security threat expands, these issues pose challenges to the perceived legitimacy of the investor-State dispute regime.

96 See Arato, Claussen & Heath, *supra* note 4, 627.
97 *Ibid.,* 631.
98 *Ibid.,* 628.
99 United Nations Conference on Trade and Development, 'Possible Reform of Investor-State Dispute Settlement (ISDS)' (2018) 3 (on file with the author) [UNCTAD, 'Possible Reform'].
100 See Arato, Claussen & Heath, *supra* note 4, 631.
101 A. Bjorklund, 'The Legitimacy of the International Centre for Settlement of Investment Disputes', in N. Grossman *et al.* (eds), *Legitimacy and International Courts* (2018), 234, 269-270.

The COVID-19 pandemic occurred at a moment of increasing resistance to global political and economic legitimacy.[102] These measures also risk further criticism and uncertainty in areas where some believe investment law is in most need of reform, such as industrial policy, digital data, and health and environmental issues.[103] In light of these growing questions of legitimacy, some indicate the result could be to view the solution as a wholesale abandonment of the system.[104]

F. Conclusion

The evolving concept of security interests in international investment law risks turning security exemption clauses, initially designed as safety valves permitting some degree of State discretion, into a far more powerful provision with significant allowances for State discretion, permitting States to act contrary to their treaty obligations.

While initially understood to be narrowly limited to instances of war and interstate conflict, the concept of security interests has ballooned, particularly through the increasing use of self-judging language, to encompass an ever-growing set of issues. With the looming possibility of a wave of investor-State disputes related to measures taken by States to address the pandemic, the potential invocation of security exemption clauses in regard to public health measures demonstrates the ever-growing boundaries of these rules. As the Chile-Hong Kong, China SAR BIT case study demonstrates, there are opportunities for State success with this strategy, particularly in regard to more recent third-generation security exemption clauses.

These issues pose long-term challenges to the regime of investor-State dispute settlement. If every rule is subject to an exception, the rules ultimately risk losing all meaning.

102 See Arato, Claussen & Heath, *supra* note 4, 627.
103 See Heath, *Trade and Security, supra* note 3, 26-27.
104 See Arato, Claussen & Heath, *supra* note 4, 634.