

PART I
Chapter 5

**Essential Security Interests under
International Investment Law***

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Introduction

Under many international agreements, states have negotiated language which provides that even when states have entered into treaty commitments, such commitments do not prevent them from taking measures in order to protect their essential security interests.

How often are provisions on essential security interests found in investment agreements? What is their scope? Is the state entitled to be the sole judge for invoking these provisions, *i.e.* are they self-judging? Is there relevant customary international law on this issue? How have arbitral tribunals interpreted essential security provisions? The present article focuses on these questions. It analyses: i) the frequency and scope of these provisions in international investment agreements and instruments to which OECD members are party; ii) the way customary international law bears on this issue; and iii) the views of arbitral tribunals who expressed themselves on these issues in specific cases.

1. State practice in international investment agreements

How do international investment agreements deal with exceptions related to the protection of essential security interests? A number of multilateral instruments provide for these exceptions, although most of those surveyed for the present article are limited in their scope to circumstances related to periods of war, traffic of arms or other emergency. A number of Bilateral Investment Treaties (BIT) also contain provisions making the protection of essential security interests of the state a defence to justify an action of the state otherwise prohibited. The provisions included in all multilateral/regional agreements surveyed for this article appear to have an explicitly self-judging character since they give the right to a state party to take any measures that “it considers necessary” for the protection of its essential security interests. Most BITs do not include this language: among Model BITs, only the 2004 Model US BIT and the 2004 Canada FIPA do so.

1.1. OECD instruments

Applying to the pre-establishment phase, **the OECD Codes of Liberalisation of Capital Movements and of Current Invisibles Operations** in Article 3 stipulate that the provisions “shall not prevent a Member from taking action which it

considers necessary for the “ii) ...protection of its essential security interests...”:

According to the Investment Committee’s commentaries to the Codes, this safeguard provision is “deemed to address exceptional situations. In principle, it allows members to introduce, reintroduce or maintain restrictions not covered by reservations to the Code and, at the same time, exempt these restrictions from the principle of progressive liberalisation. However, OECD members have been encouraged to lodge reservations when they introduce restrictions for national security concerns, rather than keeping these restrictions outside the disciplines of the Codes. This has not only the advantage of enhancing transparency and information for users of the Codes it also constitutes a first step towards eventual liberalisation, especially when national security is not the predominant motive for restrictions, i.e. accompanied by economic considerations”.¹

The Codes allow each OECD member government to take measures which “it considers necessary”, which means that this provision is explicitly self-judging.

In 1986, the OECD Council adopted a Recommendation² which called upon member countries to be as transparent as possible in their notification to the Organisation of measures related to essential security interests under the **National Treatment Instrument of the OECD Declaration on International Investment and Multinational Enterprises**. It recommended to member countries *inter alia* that:

“b) in the context of possible changes to or reviews of existing measures or in considering the introduction of new measures, they practice restraint in their use of the limitation to accord National Treatment for ... essential security interests, aiming at circumscribing their measures related to ... essential security interests to areas where such concerns are predominant;

c) they examine the possibility of amending measures based on ... essential security interests in a manner which allows the reduction or avoidance of the direct or indirect impact of this discrimination against the activities of foreign-controlled enterprises outside the area where ... essential security interests concerns are prevalent;

[...]

e) in areas where restrictions are placed on the operations of foreign-controlled enterprises for reasons of ... essential security interests, and in particular in areas where such enterprises are excluded in their entirety, they study the possibility of alternative regulations which would allow them to fulfil their objectives concerning ... essential security interests and also permit foreign-controlled enterprises to operate in the countries concerned.”

This Recommendation attempts to limit the effects of discrimination against foreign investors on the basis of essential security interests, by enhancing transparency through notification. The Investment Committee also issued a clarification to the effect that these provisions should not be used as an escape clause (see Annex 5.A1).

The 39 governments adhering to the National Treatment Instrument are currently in the process of updating their list of measures based on essential security interests in accordance with the notification obligation under Article 1 of the Third Revised Decision of the Council on National Treatment.

The **draft MAI** provided for the exception of essential security interests in its Article on General Exceptions.³ Its scope was limited to the protection of essential security interests related to periods of war, armed conflict, or other emergency; or to the implementation of national policies or international agreements respecting the non-proliferation of weapons of mass destruction; or relating to arms production. It envisaged however a clause aimed at preventing a disguised protection of economic interests or actions that are disproportionate in relation to the protected interests.

General exceptions:

“2. Nothing in this Agreement shall be construed:

- a) to prevent any Contracting Party from taking any action which it considers necessary for the protection of its essential security interests:
 - (i) taken in time of war, or armed conflict, or other emergency in international relations;
 - (ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons of mass destruction;
 - (iii) relating to the production of arms and ammunition;

[...]

4. Actions or measures taken pursuant to this Article shall be notified to the Parties Group.

5. If a Contracting Party (the “requesting Party”) has reason to believe that actions or measures taken by another Contracting Party (the “other Party”) under this article have been taken solely for economic reasons, or that such actions or measures are not in proportion to the interest being protected, it may request consultations with that other Party in accordance with Article V, B.1 (State-State Consultation Procedures). That other Party shall provide information to the requesting Party regarding the actions or measures taken and the reasons therefore.”

1.2. Regional and multilateral agreements

1.2.1. NAFTA

NAFTA Chapter XXI “Other Provisions”,⁴ contains an exception for essential security interests in its Article 2102. According to this Article which applies to the Agreement as a whole, including the Investment Chapter:

“1. Subject to Articles 607 (Energy – National Security Measures) and 1018 (Government Procurement Exceptions), nothing in this Agreement shall be construed:

- [...] (b) to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests
- (i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,
 - (ii) taken in time of war or other emergency in international relations, or
 - (iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices; or

These essential security provisions have also an explicitly self-judging character. However, their scope is limited to measures relating to arms traffic, taken in time of war or other emergency in international relations, relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons.

1.2.2. Energy charter treaty

The Energy Charter Treaty Article 24 on exceptions provides also for the protection of the essential security interests of its signatories. It stipulates that:

“The provisions of this Treaty other than those referred to in paragraph (1) shall not be construed to prevent any Contracting Party from taking any measure which it considers necessary:

- (a) for the protection of its essential security interests including those
 - (i) relating to the supply of Energy Materials and Products to a military establishment; or
 - (ii) taken in time of war, armed conflict or other emergency in international relations;

Like NAFTA, these provisions have an explicitly self-judging character. While similar in some ways to the NAFTA text, its list of covered security

interests is illustrative, containing the word “including” which NAFTA Article 2102(1)(b) lacks.

1.2.3. GATS

The General Agreement on Trade in Services, in its Article XIVbis provides also for essential security exceptions related to nuclear materials or the supply of services for the purpose of provisioning a military establishment, or taken in time of war or other emergency in international relations and it is also explicitly self-judging: “Nothing in this Agreement shall be construed... to prevent any Member from taking action which it considers necessary for the protection of its essential security interests”. [Emphasis added]

1.3. BITs and investment chapters of other FTAs

A provision on the protection of essential security interests is found in the new model BITs of Canada (2004),⁵ Germany (2005),⁶ India (2003)⁷ and the United States (2004),⁸ but not in the model BITs of France or the UK.

The forty-three states⁹ whose BITs (concluded) were reviewed for this survey can be divided into four categories:

- *States which have never included an essential security interest provision.* Ten of the thirty-nine reviewed states are in this category: Brazil, Canada (based on the former model BIT), Denmark, Greece, Iceland, Ireland, Italy, Norway, Slovenia and South Africa.
- *States which have included an essential security interest provision most of the time (in more than fifty per cent of their BITs).* Five are in this category: Germany, India, Mexico and the Belgian-Luxembourg Economic Union.¹⁰
- *States which have included an essential security interest provision all the time: United States (including all of its FTAs).*¹¹
- *States which have sporadically included an essential security interest provision, i.e., when concluding a BIT with a state in the second or third category.* The other twenty-seven of the reviewed states are in this category.¹²

The essential security interest provisions differ in their content and scope.

- *Most provisions use a standard of essential security interests which is not further limited or defined, i.e. an open-ended term, such as the US-Argentina BIT, while some others more precisely define and circumscribe the security interests covered, for instance to cover only cases of traffic in arms, ammunition and implements of war as well as the non-proliferation of nuclear weapons (such as the Canada Model FIPA);*
- *Some provisions are drafted to be explicitly self-judging, e.g., allowing a party to take measures “it considers necessary” to protect its essential security*

interests: 2004 US Model BIT and the Canada Model FIPA (although its scope is much narrower – see above), while others do not include this language.

- Most provisions apply to the treaty generally, while some others only apply to specific provisions of the BIT:
 - Expropriation or nationalization: Belgian-Luxembourg Economic Union-China BIT.
 - Non-Discrimination: Japan-China BIT.
 - Dispute Settlement: Austria-Mexico BIT.
 - Application of Host-Country Law to foreign investment: United Kingdom-India BIT.

2. Customary international law – necessity

What is the situation under customary international law? Can a host state be excused from its treaty obligations? It is well recognised under customary international law that this is the case for obligations which, by their terms or nature, do not exclude such an excuse. According to the International Law Commission's (ILC) Draft Articles on State Responsibility¹³ (Articles 20-25), there are some circumstances under which states may not be held responsible for breaching their international obligations. These circumstances which justify an otherwise wrongful act by the state include consent (Article 20), self-defence (Article 21),¹⁴ countermeasures (Article 22), *force majeure* (Article 23), distress (Article 24) and necessity (Article 25).

According to Article 25:

- “1. Necessity may not be invoked by the State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
- (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril;
 - (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.”

The ILC in its comments makes clear that “the plea for necessity arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the state invoking necessity on the other. These

special features mean that necessity will only *rarely be available* to excuse non-performance of an obligation and that it is subject to strict limitations to safeguard against possible abuse” [emphasis added].¹⁵

A study of the cases demonstrates that necessity has been invoked to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the state and its people in time of public emergency, or ensuring the safety of a civilian population. As the ILC points out, “to emphasize the exceptional nature of necessity and concerns about its possible abuse, Article 25 is cast in negative language (“Necessity may not be invoked ...unless”). The ILC set restrictive conditions to account for the admissibility of the necessity exception. Professor Crawford, Special Rapporteur of the ILC noted that, “when a State invokes the state of necessity, it has full knowledge of the fact that it deliberately chooses a procedure that does not abide an international obligation”.¹⁶

Conditions for the invocation of necessity

In *Gabcikovo-Nagymaros* case,¹⁷ mentioned by the ILC in its commentaries, the International Court of Justice recognised that the necessity defence was customary international law and that interests extending beyond a state’s borders such as ecological damage could justify its invocation.¹⁸

However, there are important limitations. First, necessity may only be invoked to *safeguard an essential interest from a grave and imminent peril*. The ILC Committee of experts on State Responsibility through its Chairman Roberto Ago, stated in 1980 that the “essential state interest” that would allow the state to breach its obligation must be a vital interest, such as “political or economic survival, the continued functioning of its essential services, the maintenance of internal peace, the survival of a sector of its population, the preservation of the environment of its territory or a part thereof, etc.”¹⁹ The report by Professor Crawford, noted that “essential” cannot be defined and must depend on the specific facts of each case.²⁰

The ICJ “had no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the *Gabcikovo-Nagymaros* Project related to an ‘essential interest’ of that state, within the meaning given to that expression in Article 33 of the Draft of the International Law Commission” – the predecessor to Article 25 – embracing therefore Roberto Ago’s report.

As for the element of “imminent peril”, the ICJ in the *Gabcikovo-Nagymaros* Project case said that:

“That does not exclude ... that a ‘peril’ appearing in the long term might be held to be ‘imminent’ as soon as it is established, at the relevant point in time, that the

realisation of the peril, however far off it might be, is not thereby any less certain and inevitable.”

Moreover, the course of action taken must be the “only way” available to safeguard that interest of the state. If other steps could safeguard the interest, even if they are more difficult or costly to the state, these alternative means must be invoked. In the *Gabcikovo-Nagymaros Project* case, the ICJ was not convinced that the suspension and abandonment of the project was the only means available to Hungary to protect against its essential interest and noted that it could have “resorted to other means in order to respond to the dangers that it apprehended”.²¹

A second limitation for invoking necessity is that the conduct in question must not seriously impair an essential interest of the other state or states concerned, or of the international community as a whole. In other terms, the interest relied on must outweigh all other considerations, “not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective”.²²

In the *Gabcikovo-Nagymaros Project* case the Court affirmed the need to take into account any countervailing interest of the Slovak Republic.²³

Third, necessity cannot be invoked to exclude wrongfulness of a non-conforming measure where the international obligation in question explicitly²⁴ or implicitly excludes the plea of necessity. In case of implicit exclusion of necessity, the non-availability of such a plea emerges from the object and the purpose of the agreement.

Fourth, necessity may not be used as an excuse if the responsible state has contributed to the situation of necessity. Professor Crawford’s report indicates that the contribution must be “sufficiently substantial and not merely incidental or peripheral”. In *Gabcikovo-Nagymaros*, the ICJ considered that Hungary “had helped, by act or omission to bring” about the situation of alleged necessity by entering into and later seeking to abrogate a treaty despite the fact that it had full knowledge that the project would have certain environmental consequences.²⁵

3. Interpretations by arbitral tribunals in investor-state disputes

Arbitral tribunals are called upon to interpret treaties in accordance with Article 31 of the Vienna Convention of the Law of Treaties.²⁶ Therefore, any analysis of a treaty containing an essential security exception begins with the particular text of the essential security clause. Scholars and tribunals have recently begun to examine the relationship between essential security provisions in treaties and the customary international law principle of necessity.²⁷ Jurisprudence on investor-state disputes involving essential security interest considerations is limited to three cases (discussed below). In

these cases, the respondent state invoked, and the tribunals considered, both the specific treaty provisions on essential security and the customary international law on necessity.

3.1. Can economic emergency qualify as an essential security interest?

Only the tribunals in *CMS v. Argentine Republic*²⁸, *LG&E v. Argentine Republic*²⁹ and *Enron v. Argentine Republic*³⁰ have so far discussed the essential security interest exception in the context of investment arbitration. All three cases arose in connection with the economic crisis that faced Argentina in 2000 with the “pesification” of its economy³¹. In these cases Argentina argued that it should be exempted from liability on the grounds that a state of necessity or emergency, which was brought on by an economic, social and political crisis, had occurred in Argentina. The *CMS* and *Enron* tribunals came to the same conclusions but the conclusions of the *LG&E* tribunal differed³² despite the fact that it was faced with similar facts arising out of the same government measure and was called to interpret the same treaty provisions in the BIT between the US and Argentina, including Article XI of the BIT which provides:

“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.”

In the *CMS* and *Enron* cases, the tribunals proceeded in their analysis by examining whether the purported treaty breach was “devoid of legal consequences by the preclusion of wrongfulness”.³³ The *CMS* and *Enron* tribunals examined the necessity defence under customary international law and discussed Article 25 of the Draft Articles on State Responsibility and the work and commentaries of the International Law Commission in this regard. They looked at whether the measures adopted by Argentina were the “only way” for the state to safeguard its interests and concluded that it was not.³⁴ In addition, they examined the requirement for the state not to have contributed to the situation of necessity and in the circumstances of both disputes, were of the view that Argentina’s contribution to the crisis had been substantial.³⁵ The *CMS* tribunal finally concluded that “while there were elements of necessity partially present here and there....the requirements of necessity under customary international law have not been fully met so as to preclude the wrongfulness of the acts”.³⁶ Similarly, the *Enron* tribunal concluded that “in light of the various elements that have been examined ... the requirements of the state of necessity under customary international law have not been fully met in this case”³⁷.

The *CMS* and *Enron* tribunals also examined the treaty itself, although they again relied principally on requirements under the customary

international law doctrine of necessity: first whether the object and purpose of the treaty “exclude necessity”,³⁸ in reference to ILC Draft Article 25.2(a), and second, whether the measure “seriously impair[s] an essential interest of the State or States towards which the obligation exists”,³⁹ in reference to Article 25.1(b). Although neither of the tribunals set forth its interpretation of specific, relevant terms of the essential security provision, they both concluded that major economic crises could not in principle be excluded from the scope of essential security interests under Article XI.

The CMS tribunal stated in this regard that:

*“There is nothing in the context of customary international law or the object and purpose of the treaty that could on its own exclude major economic crises from the scope of Article XI ... If the concept of essential security interests were to be limited to immediate political and national security concerns, particularly of an international character, and were to exclude other interests, for example major economic emergencies, it could well result in an unbalanced understanding of Article XI. Such an approach would not be entirely consistent with the rules governing the interpretation of treaties.”*⁴⁰

The Enron tribunal stated that:

*“... the object and the purpose of the Treaty is, as a general proposition, to apply in situations of economic difficulty hardship that require the protection of the international guaranteed rights of its beneficiaries. To this extent, any interpretation resulting in an escape route from the obligations defined cannot be easily reconciled with that object and purpose. Accordingly, a restrictive interpretation of any such alternative is mandatory.”*⁴¹

*“... in the context of investment treaties there is still need to take into consideration the interests of the private entities who are the ultimate beneficiaries of those obligations ... The essential interest of the Claimants would certainly be seriously impaired by the operation of Article XI or state of necessity in this case.”*⁴²

In the LG&E case, the tribunal sought first to apply the terms of the BIT and that, “to the extent required for the interpretation and application of its provisions, the general international law.”⁴³ As in the CMS and Enron cases, the LG&E tribunal did not set forth its interpretation of specific, relevant terms of the essential security provision, but nonetheless similarly concluded that severe economic crises could not be excluded from the scope of Article XI. It rejected the argument that Article XI is only applicable in circumstances amounting to military action and war and stated:

“To conclude that such a severe economic crisis could not constitute an essential security interest is to diminish the havoc that the economy can wreak on the lives of an entire population and the ability of the Government to lead. When a State’s

economic foundation is under siege, the severity of the problem can equal that of any military invasion.”⁴⁴

The LG&E tribunal also stated that, although the protections of Article XI were sufficient to address Argentina’s liability in that case, it believed its holding was supported by its review of ILC Draft Article 25’s requirements of the “state of necessity standard as it exists in international law”.⁴⁵ It rejected the assertion by the claimants that the measures implemented by Argentina were not the only means available to respond to the crisis and affirmed that Article XI refers to situations in which a state has no choice but to act. Finally, it considered that not only had Argentina not contributed to causing the severe crisis faced by the country, but on the contrary the attitude adopted by the government had shown “a desire to slow down by all the means available the severity of the crisis”.

The point of disagreement between the tribunals which brought them to come to different conclusions was the degree of the gravity of the economic crisis. The CMS and *Enron* tribunals concluded the crisis was “severe but did not result in total economic and social collapse”⁴⁶ and “the argument that such a situation compromised the very existence of the State and its independence so as to qualify as involving an essential interest of the State is not convincing”⁴⁷. For its part, the LG&E tribunal considered the crisis serious enough to threaten “total collapse of the Government and the Argentine State”⁴⁸ and stated that, “from 1 December 2001 until 26 April 2003, Argentina was in a period of crisis during which it was necessary to enact measures to maintain public order and protect its essential security interests”. It therefore excused Argentina from liability for any breaches of the Treaty but for a limited period (1 December 2001 to 26 April 2003)⁴⁹ which marked in its view the beginning and the end of the period of extreme crisis.⁵⁰

“This exception [from liability] is appropriate only in emergency situations; and once the situation has been overcome, i.e. certain degree of stability has been recovered; the State is no longer exempted from responsibility for any violation of its obligations under the international law and shall reassume them immediately”.

3.2. The self-judging character of essential security provisions

An important question is: who must decide whether the essential security interests of the state are at stake? As the CMS tribunal asked, is the state adopting the measures the only judge of the legality of the invocation of essential security interests, or is that invocation “subject to some form of judicial review”?⁵¹

The CMS tribunal stated that “when States intend to create for themselves a right to determine unilaterally the legitimacy of extraordinary

measures importing non-compliance with obligations assumed in a treaty, they do so expressly”.⁵² Along these lines, the *Enron* tribunal stated that “truly exceptional and extraordinary clauses such as a self-judging provision normally must be expressly drafted to reflect that intent, as otherwise there can well be a presumption about not having that meaning in view of its exceptional nature”⁵³. Both tribunals remarked that the ICJ had taken a clear stand in respect of this issue referring to the ICJ Awards in the *Nicaragua* (1986),⁵⁴ *Gabcikovo-Nagymaros* (1997)⁵⁵ and *Oil Platforms* (2003)⁵⁶ cases. In light of these discussions, the CMS and *Enron* tribunals concluded that Article XI of the BIT is not self-judging.⁵⁷

The LG&E tribunal reached the same conclusion in holding that: “[b]ased on the evidence before the Tribunal regarding the understanding of the Parties in 1991 at the time the Treaty was signed, the Tribunal decides and concludes that the provision is not self-judging”.⁵⁸

4. Summing up

The right to protect essential security interests of the state, as an exception to treaty commitments, has been well established in treaty practice. It has been expressly included in international agreements, in OECD investment instruments and a number of bilateral investment treaties. In some cases, treaty provisions stating the exception are expressly limited, with the covered security interests precisely defined and circumscribed. Jurisprudence is scarce. Recently, three arbitral tribunals, faced with claims arising out of the Argentina crisis, examined the necessity defence under customary international law as well as the essential security provision in the U.S.-Argentina BIT. The relationship between the necessity doctrine under customary international law and the essential security provision in BITs remains uncertain. While all three tribunals agreed that essential security provisions applied to economic interests, they came to different conclusions about the applicability of the defence in the factual circumstances, two of them denying the application of this exception and the third one allowing it.

To the question of who is the judge in deciding whether the essential security interests of the state are at stake, a number of agreements, including multilateral agreements and OECD investment instruments, explicitly give this role to the state itself. This may not be the case with certain bilateral investment treaties which do not include explicit self-judging language. The tribunals that have examined the issue in connection with investor-state disputes have refused to accept that essential security clauses, absent explicit language providing that they are self-judging, are inherently self-judging.

Notes

1. OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations: User's Guide, OECD 2003, www.oecd.org/daf/investment.
2. Recommendation of the OECD Council on "Member country measures concerning National Treatment of foreign-controlled enterprises in OECD member countries and based on considerations of public order and essential security interests", adopted at its 646th meeting on 16 July 1986.
3. www.oecd.org/daf/mai.
4. See in www.dfait-maeci.gc.ca/nafta-alena/chap21-en.asp?#Article2101.
5. Article 10 – General exceptions: this provision is very similar to the Article 2102 of NAFTA, self-judging and limited in scope.
6. Article 3 (Protocol to the Treaty).
7. Article 12: Applicable laws.
8. Article 18: Essential security.
9. OECD members; observers to the Investment Committee (Argentina, Brazil, Chile); other non-member adherents to the Declaration (Estonia, Latvia, Lithuania, Israel, Slovenia, Romania); China, Russia, India and South Africa.
10. Germany (79 BITs of 88 reviewed), India (20 BITs of 24 reviewed), Mexico (9 BITs of 15 reviewed) and Belgian-Luxembourg EU (30 BITs of the 58 reviewed).
11. All of 46 US BITs reviewed. US FTAs concluded and entered into force with Australia, Bahrain, Chile, Central America-Dominican Republic, Israel, Jordan, Morocco, NAFTA, Oman and Singapore.
12. Argentina (4 BITs of 43 reviewed), Australia (1 BIT of 20 reviewed), Chile (1 BIT of 49 reviewed), China (10 BITs of 59 reviewed), the Czech Republic (4 BITs of 65 reviewed), Estonia (2 BITs of 16 reviewed), France (3 BITs of 91 reviewed), Hungary (2 BITs of 55 reviewed), Israel (1 BIT of 12 reviewed), Japan (3 BITs of 19 reviewed), Korea (3 BITs of 80 reviewed), Latvia (2 BITs of 22 reviewed), Lithuania (3 BITs of the 24 reviewed), New Zealand (1 BIT of 4 reviewed), Poland (3 BITs of 31 reviewed), Portugal (1 BIT of 46 reviewed), Romania (3 BITs of 45 reviewed), Russia (5 BITs of 26 reviewed), the Slovak Republic (1 BIT of 31 reviewed), Spain (7 BITs of 60 reviewed), Sweden (2 BITs of 52 reviewed), Turkey (3 BITs of 41 reviewed), UK (1 BIT of 91 reviewed), Austria (2 BITs of 23 reviewed), Finland (11 BITs of 49 reviewed), the Netherlands (3 BITs of 87 reviewed), Switzerland (10 BITs of 94 reviewed).
13. International Law Commission, Draft Articles on State Responsibility, Articles 20-25 in http://untreaty.un.org/ilc/texts/instruments/English/commentaries/9_6_2001.pdf.
14. Self-defence is more evidently relevant in the areas of territorial integrity and military strategy, and in the case of an armed attack. The act constituting a lawful measure of self-defence should be taken in conformity with the Charter of the United Nations.

Commentary

(1) The existence of a general principle admitting self-defence as an exception to the prohibition against the use of force in international relations is undisputed. Article 51 of the Charter of the United Nations preserves a state's inherent right of self-defence in the face of an armed attack and forms part of the definition of the obligation to refrain from the threat or use of force laid down in Article 2, Paragraph (4).

15. International Law Commission, Draft Articles on State Responsibility, Commentary (2) to Article 25 in http://untreaty.un.org/ilc/texts/instruments/English/commentaries/9_6_2001.pdf.
16. J. Crawford, "Second Report on State Responsibility", UN General Assembly, International Law Commission, 51st Session, Geneva, 23 July 1999, A/CN.4/498/Add2, pp.27-28.
17. *Gabcikovo-Nagymaros* (Hungary v. the Slovak Republic), 1997 I.C.J. 7, 40 (Sept. 25, 1997). The object of the underlying Hungary-Slovak Republic treaty was that the countries enter into a joint investment primarily to produce hydroelectricity, improve navigation along the river, and control flooding. Implementing the treaty was problematic. In both countries, and in particular in Hungary, there was an increasing concern about the economic viability of the project and its environmental impact. Ultimately Hungary stopped work on its part of the project. By submitting the dispute to the ICJ, Hungary claimed, *inter alia*, that it had violated its treaty obligation because of a "state of ecological necessity", indicating that the large reservoir would cause unacceptable ecological risks, including artificial floods, a diminution in the quality of water, and the extinction of various flora and fauna.
18. For a detailed discussion on necessity see Andrea K. Bjorklund, "Emergency Exceptions to International Obligations in the Realm of Foreign Investment: The State of Necessity as a Circumstance Precluding Wrongfulness", *Report for the International Law Association Committee on International Investment 2006*; Vaughan Lowe, "Precluding Wrongfulness or Responsibility: A Plea for Excuses", 10 *Euro. J. Int'l L.* 405 (1999).
19. *Documents of the Thirty-Second Session* (1980), 2 Y.B. Int'l L. Comm'n 14, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 1).
20. *Second Report on State Responsibility: Addendum*, Int'l L. Comm'n, 51st Session, at 30, U.N. Doc. A/CN.4/498/Add.2 (1999).
21. *Gabcikovo*, 1997 ICJ at 44-45.
22. ILC Commentaries para. 17.
23. I.C.J. Reports 1997, p.7, at p. 46, para 58.
24. Certain humanitarian conventions applicable to armed conflict expressly exclude reliance on military necessity.
25. *Gabcikovo*, 1997 ICJ at 45.
26. Article 31(1) of the Vienna Convention provides that a treaty must be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Article 31(2) further explains that the relevant context includes the treaty's text, its preamble and annexes and any related agreements or instruments, *Vienna Convention on the Law of Treaties*, 23 May, 1969, 1155 U.N.T.S. 331.
27. Scholars have debated whether, by their nature and purpose, i.e., to protect investors in difficult circumstances, investment protection treaties do not exclude such an excuse. See A. Reinisch: "BITs generally aim at protecting investors against host states measures that are typically taken in situations of economic difficulties ... It is exactly in these situations where the protection offered by BITs is applicable ... If this rationale is accepted, it is hard to see why it should be abandoned once the economic difficulties grow even worse and thus the risk of investor-adverse measures is even increased. The specifically negotiated

investment protection standards of a BIT would replace the customary international law minimum standard of treatment and thereby also replace the defences available under customary international law justifying derogations from it. It would defeat the object and purpose of a BIT if states were allowed to rely upon a general necessity defence in situations for which they subscribed to special treaty protection” in “Necessity in International Investment Arbitration – An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on *CMS v. Argentina* and *LG&E v. Argentina*”, *TDM Vol. 3, issue 5, December 2006*. Also see A. Bjorklund “the state of necessity has an uneasy relationship with the obligations States have undertaken in their investment treaties ... the potential far-reaching nature of the necessity defence has led it to be strictly cabined” in “Emergency Exceptions to International Obligations in the Realm of Foreign Investment: The State of Necessity as a Circumstance Precluding Wrongfulness” *op. cit.* No. 18.

28. *CMS Gas Transmission Company v. Argentine Republic*, ICSID case No. ARB/01/8, Award 12 May, 2005.
29. *LG&E Energy Corp., L&E Capital Corp., LG&E International Inc v. Argentine Republic*, ICSID case No. ARB/02/1, Decision on Liability, 3 October 2006.
30. *Enron Corporation Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No ARB/01/3, Award, May 22, 2007.
31. The original arbitration claim filed by Enron at ICSID in 2001, was unrelated to the Argentine financial crisis, and pertained to a series of tax measures which Enron alleged to have been illegally imposed on its Argentine investments. Later, Enron added an “ancillary claim” related to losses alleged to have been sustained during the financial crisis. Subsequently, the taxes in dispute were struck down by an Argentine court. Enron dropped that portion of its arbitration claim in 2005, while proceeding with the claims related to the financial crisis, in www.iisd.org/investment/itn/news.asp, May 27, 2007.
32. It is worth noting that the CMS and Enron Tribunals had the same president. However, interestingly enough, one of the arbitrators was common to the LG&E and Enron Tribunals and another one common to the CMS and LG&E Tribunals: these Tribunals came to different conclusions.
33. CMS, para. 318, *Enron*, para 339.
34. The Tribunal was not in a position to say “which of these policy alternatives would have been better,” which was a decision beyond the scope of the Tribunal’s task. CMS para. 323. In *Enron*, the Tribunal declined the responsibility to point out which alternative was recommendable: “it is not the task of the Tribunal to substitute for the governmental determination of economic choices, only to determine whether the choice made was the only way available, and this does not appear to be the case”. *Enron*, para 309.
35. “The crisis was not of the making of one particular administration and found its roots in the earlier crisis of the 1980s and evolving governmental policies of the 1990s that reached a zenith in 2002 and thereafter. Therefore, the Tribunal observes that governmental policies and their shortcomings significantly contributed to the crisis and the emergency and while exogenous factors did fuel additional difficulties they do not exempt the Respondent from its responsibility in the matter”. CMS Para. 329. “...there has been a substantial contribution of the State to the situation of necessity and it cannot be claimed that the burden falls entirely on exogenous factors. This has not been the making of a particular administration as it is a problem that had been compounding its effects for a decade, but still the State must answer as a whole”. *Enron*, para 312.

36. CMS para 331.
37. *Enron* para 313.
38. CMS para 353.
39. *Idem* para 357.
40. *Idem* paras. 359-360.
41. *Enron* para 331.
42. *Idem* para 342.
43. LG&E para 206.
44. *Idem* para 238.
45. *Idem* para 245.
46. CMS para 355.
47. *Enron*, para 306.
48. LG&E para 231.
49. *Idem* para 229.
50. These dates corresponded, on the one hand, with the government's announcement of the measure freezing funds and, on the other hand, with the election of President Kirchner.
51. CMS para 366.
52. *Idem* para 370. The Tribunal noted in this connection that the US position towards the support of self-judging clauses emerged after the decision in the Nicaragua case.
53. *Enron* para 335.
54. Case Concerning Military and Paramilitary Activities In and Against Nicaragua (*Nicaragua v. United States of America*), Judgement of 27 June 1986, para 221-222.
55. In *Gabcikovo-Nagymaros Project*, the ICJ referring to the views and the work of the ILC, noted the cumulative conditions of necessity under international law and that “the State concerned is not the sole judge of whether those conditions are met”, paras. 51-52.
56. Case Concerning Oil Platforms (*Islamic Republic of Iran v. United States of America*), Judgment of 6 November 2003, para. 43.
57. CMS, para 373, *Enron* para 339.
58. LG&E para 212.

ANNEX 5.A1

Public Order and Essential Security Interests under the OECD National Treatment Instrument

(Investment committee's clarification reproduced in national treatment
of foreign-controlled enterprises, OECD, 2005)

The Declaration excludes from the scope of the National Treatment instrument those measures necessary to maintain public order and essential security interests. Interpretation of these concepts depends on the specific context in which they are applied and may evolve over time as circumstances warrant. However, these provisions should be applied with caution, bearing in mind the objectives of the instrument, and should not be a general escape clause from adhering governments' commitments. Public order and security can, in certain circumstances, be interpreted to include public health. In addition, measures taken for economic, cultural or other reasons should be identified as such and should not be shielded by an excessively broad interpretation of public order and essential security interests.

Excessive recourse to public order and essential security interests as a justification for measures not conforming to National Treatment weakens the application of the instrument and raises questions about the overall balance of commitments by adhering governments. Attention is drawn to the following considerations:

- Special attention should be given to measures covered by this provision where similar measures are reported as exceptions by most adherents. While the particular circumstances of individual countries must be taken into account, coherence of the instrument requires that similar measures be classified in the same way by different countries. The key factor is whether or not security considerations are predominant.

- In some cases, for example in the transport and communications fields, circumstances have evolved and it is difficult to see how restrictions on foreign investment can be justified entirely by national security considerations.
- Where motivations are mixed, (i.e. partly commercial and partly national security) the measure should preferably be shown as an exception rather than as a transparency item. In this connection, new measures not conforming to National Treatment can be taken if genuinely justified by national security considerations, and this is true even if the country concerned previously lodged an exception for related measures in the same sector.
- Where, in respect of a particular non-conforming measure, members had lodged a reservation to the inward direct investment item of the *Code of Liberalisation of Capital Movements*, there is no apparent reason why the same measure cannot be reported as an exception to National Treatment, even if its motivation rests partly on national security considerations. Indeed, as the National Treatment instrument deals with enterprises already operating in the territory of the country concerned, recourse to national security concerns should be less common than under the Code.

ANNEX 5.A2

*Table of BITs and FTAs (Investment Chapters)
Containing Provisions on Essential
Security Interests*

BIT	Provisions on essential security interests	No. of BITs with essential security provision/ No. of BITs studied
Model BITs		
1. Canada Model BIT (2004)	<p style="text-align: center;">Article 10 – General Exceptions</p> <p>[...]</p> <p>4. Nothing in this Agreement shall be construed:</p> <p>(a) to require any Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests;</p> <p>(b) to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests</p> <p>(i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,</p> <p>(ii) taken in time of war or other emergency in international relations, or</p> <p>(iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices; or</p> <p>(c) to prevent any Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.</p>	
2. France Model Treaty		None
3. German Model Treaty (2005)	<p style="text-align: center;">Protocol to the Treaty</p> <p>3. Ad Article 3</p> <p>(a) The following shall more particularly, though not exclusively, be deemed “activity” within the meaning of Article 3 (2): the management, maintenance, use, enjoyment and disposal of an investment. The following shall, in particular, be deemed “treatment less favourable” within the meaning of Article 3: unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind, unequal treatment in the case of impeding the marketing of products inside or outside the country, as well as any other measures having similar effects. Measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed “treatment less favourable” within the meaning of Article 3.</p>	
4. India Model BIT (2003)	<p style="text-align: center;">Article 12</p> <p style="text-align: center;">Applicable Laws</p> <p>(1) Except as otherwise provided in this Agreement, all investment shall be governed by the laws in force in the territory of the Contracting Party in which such investments are made.</p> <p>(2) Notwithstanding paragraph (1) of this Article nothing in this Agreement precludes the host Contracting Party from taking action for the protection of its essential security interests or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non discriminatory basis.</p>	
5. UK Model Treaty (2005)		None
6. US Model Treaty (2004)	<p style="text-align: center;">Article 18: Essential Security</p> <p>Nothing in this Treaty shall be construed:</p> <p>1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or</p> <p>2. to preclude a Party from applying measures that it considers necessary for 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.</p>	

BIT	Provisions on essential security interests	No. of BITs with essential security provision/ No. of BITs studied
Sample BITs and FTAs		
Substantial exclusions (treatment, protection...)		
7. Argentina-Belgium BIT (Brussels, 28 June 1990)	Artículo 5 Medidas Privativas y Restrictivas de Propiedad [...] 1. En caso de que imperativos de utilidad publica, de seguridad o de interés nacional justifiquen una derogación de lo indicado en el párrafo 1, deberán cumplirse las siguientes condiciones: a/ que las medidas sean tomadas según el respectivo procedimiento legal; b/ que ellas no sean discriminatorias, ni contrarias a un compromiso específico; c/ que las mismas estén acompañadas de disposiciones que prevean el pago de una indemnización adecuada y efectiva.	4 BITs (Germany, ¹ Peru and the U.S.) out of 43 reviewed include such a provision.
8. Australia-India BIT (New Delhi, 26 February 1999) Entry into force: 4 May 2000	Article 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.	1 BIT out of 20 reviewed includes such a provision.
9. Belgian-Luxembourg Economic Union-China (Brussels, 4 June 1984) Entry into force: 5 October 1986	Article 4 1. Neither Contracting Party shall in its territory take the measure of expropriation, nationalization or other similar measures on the investment of the investor of the other Contracting Party except for the necessity of security and public interest under the following conditions: (1) measures taken pursuant to the domestic legal procedure; (2) measures are non-discriminatory if compared with the measures taken against the investment or investor of a third State; (3) rules on the payment of compensation are provided.	30 BITs ² of the 58 reviewed include such a provision. ³

BIT	Provisions on essential security interests	No. of BITs with essential security provision/ No. of BITs studied
10. Chile-Germany BIT (Bonn, 21 October 1991) Entry into force: 18 July 1999	<p style="text-align: center;">PROTOCOLO</p> <p>(2) Ad Artículo 3</p> <p>a) Por "actividades" en el sentido del párrafo 2 se entenderán en especial, pero no exclusivamente la administración, la utilización, el uso y el aprovechamiento de una inversión. Se considerará especialmente como trato "menos favorable" en el sentido del Artículo 3: la limitación en la adquisición de materias primas e insumos auxiliares, energía y combustibles, así como cualesquiera medios de producción y explotación, la obstaculización de la venta de productos en el interior del país y en el extranjero, y toda medida de efectos análogos. Las medidas que haya que adoptar por razones de seguridad y de orden público, de salud pública o de moralidad, no se considerarán como trato "menos favorables" en el sentido del Artículo 3.</p>	1 BIT out of 49 reviewed includes such a provision.
11. China-Philippines (Manila, 20 July 1992) Entry into force: 8 September 1995	<p style="text-align: center;">Article 4</p> <p>1. Either Contracting Party may, for reasons of national security and public interest, expropriate, nationalize or take similar measures (hereinafter referred to as "expropriation") against investments of investors of the other Contracting Party in its territory, but the following conditions shall be met:</p> <p>a) under domestic legal procedure; b) without discrimination; c) upon payment of fair and reasonable compensation.</p>	10⁴ of the 59 BITs reviewed include such a provision.
12. Czech Republic-United States BITO (Washington, signed 22 October 1991) Entered into force: 19 December 1992	<p style="text-align: center;">Article X</p> <p>1. 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.</p> <p>2. This Treaty shall not preclude either Party from prescribing special formalities in connection with the establishment of investments, but such formalities shall not impair the substance of any of the rights set forth in this Treaty.</p>	4 BITs (U.S., Guatemala, India and Mauritius) ⁵ of the 65 reviewed include such a provision.

BIT	Provisions on essential security interests	No. of BITs with essential security provision/ No. of BITs studied
13. Estonia-United States BIT (Washington, 19 April 1994) Entered into force: 16 February 1997	Article IX 1. 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.	2 BITs⁶ of the 16 BITs reviewed contain such a provision.
14. France-Bangladesh BIT (Paris, 10 September 1985) Entry into force: 3 October 1986	Echange de Lettre n°3 [...] <p><i>a)</i> L'expression « activité » signifie, dans le paragraphe 1 de l'article 5 particulièrement, mais non exclusivement, la gestion, la maintenance, l'usage et la jouissance d'un investissement. L'expression « traitement moins favorable » signifie dans le paragraphe 1 de l'article 5 notamment : toute restriction à l'achat de matière premières ou de matières auxiliaires, d'énergie ou de combustible ou de moyens de production ou d'exploitation de out genre, toute entrave, ainsi que toute autre mesure ayant un effet analogue, dans le cadre de la réglementation de chacune des Parties contractantes. Les mesures qui ont été prises pour des motifs de sécurité publique et d'ordre, de santé publique ou de moralité ne sont pas considérées comme un « traitement moins favorable » au sens de l'article 5...</p>	3 BITs (India and Philippines) ⁷ of the 91 BITs reviewed contain such a provision.
15. Germany-Russian Federation BIT (Bonn, 13 June 1989) Entry into force: 5 August 1991	Protocol to the Agreement [...] <p>(2) <i>In relation to Article 3</i></p> [...] <p>(c) "Discriminatory measures" within the meaning of Article 3, paragraph 4, should include, in particular, unjustified restrictions on the acquisition of raw materials and auxiliary materials, energy and fuel, all types of means of production and revolving resources, obstacles to the marketing of products and the use of credits, and restrictions on the work of personnel and other measures having similar consequences. Measures undertaken in the interests of law and order and security, morality or public health shall not be regarded as "discriminatory measures".</p>	79 BITs of the 88 BITs reviewed contain such a provision. ⁸

BIT	Provisions on essential security interests	No. of BITs with essential security provision/ No. of BITs studied
16. Hungary-India BIT (New Delhi, 3 November 2003)	<p style="text-align: center;">Article 12 Applicable Laws</p> <p>1. Except as otherwise provided in this Agreement, all investments shall be governed by the laws in force in the territory of the Contracting Party in which such investments are made.</p> <p>2. Notwithstanding paragraph 1 of this Article nothing in this Agreement precludes the host Contracting Party from taking action for the protection of its essential security interests or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non discriminatory basis.</p>	<p>2 BITs⁹ of the 55 BITs reviewed contain such a provision.</p>
17. India-Czech Republic BIT (Prague, 11 October 1996) Entry into force: 6 February 1998	<p style="text-align: center;">Article 12 Exception</p> <p>The provisions of this Agreement shall not in any way limit the right of either Contracting Party in cases of extreme emergency to take action in accordance with its laws applied in good faith, on a non discriminatory basis, and only to the extent and duration necessary for the protection of its essential security interests, or for the prevention of diseases and pests in animals or plants.</p>	<p>20 BITs¹⁰ out of the 24 BITs reviewed contain such a provision.</p>
18. Israel-Germany BIT (Bonn, 24 June 1976)	<p style="text-align: center;">Protocol</p> <p>[...] (2) Ad Article 3 (a) The following shall more particularly, though act exclusively, be deemed 'activity' within the meaning of paragraph 2 of Article 3: the management, maintenance, use, and enjoyment of an investment. The following shall, in particular, be deemed 'treatment less favourable' within the meaning of paragraph 2 of Article 3: restricting the purchase of raw or auxiliary materials of energy or fuel or of means of production or operation of any kind, impeding the marketing of products inside or outside the country, as well as any other measures having similar effects, if directed in a discriminatory way against nationals or companies of the other Contracting Party. Measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed 'treatment less favourable' within the meaning of Article 3.</p>	<p>1 BIT out of the 12 BITs reviewed contains a NS provision.</p>

BIT	Provisions on essential security interests	No. of BITs with essential security provision/ No. of BITs studied
19. Japan-China BIT (Beijing, 27 August 1988) Entry into force: 14 May 1989	Protocol [...] <p>3. For the purpose of the provisions of paragraph 2 of Article 3 of the Agreement, it shall not be deemed "treatment less favourable" for either Contracting Party to accord discriminatory treatment, in accordance with its applicable laws and regulations, to nationals and companies of the other Contracting Party, in case it is really necessary for the reason of public order, national security or sound development of national economy.</p>	3 BITs¹¹ of the 10 BITs reviewed contain such a provision.
20. Korea-China (Beijing, 30 September 1992) Entered into force: 4 December 1992	Protocol [...] <p>2. For the purpose of the provisions of paragraph 2 of Article 3 and (2) of Article 13 of the Agreement, it shall not be deemed "treatment less favourable" for the Government of either State to accord discriminatory treatment, in accordance with its applicable laws and regulations, to investors of the other State, in case it is indispensable for the reason of a public purpose, national security or sound development of national economy and, provided that such discriminatory treatment undertaken for the reason of a public purpose, national security or sound development of national economy shall not aim at specifically investors of the other State or at joint companies in which investors of the other State have holdings.</p>	3 BITs¹² of the 80 BITs reviewed contain such a provision.
21. Latvia-United States BIT (Washington, 13 January 1995) Entered into force: 26 December 1996	Article IX <p>1. 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.</p>	2 BITs¹³ of the 22 BITs reviewed contain such a provision.

BIT	Provisions on essential security interests	No. of BITs with essential security provision/ No. of BITs studied
22. Lithuania-Belgium BIT (Brussels, 15 October 1997) Entered into force: 4 April 1999	Art.4. Mesures privatives et restrictives de propriété. [...] <p>2. Si des impératifs d'utilité publique, de sécurité ou d'intérêt national justifient une dérogation au paragraphe 1^{er}, les conditions suivantes doivent être remplies :</p> a) les mesures sont prises selon une procédure légale ; b) elles ne sont ni discriminatoires, ni contraires à un engagement spécifique ; c) elles sont assorties de dispositions prévoyant le paiement d'une indemnité adéquate et effective.	3 BITs¹⁴ of the 24 BITs reviewed contain such a provision.
23. New Zealand-China BIT (Wellington, 22 November 1988) Entry into force: 25 March 1989	Article 11 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 directed to the protection of its essential security interests, or to the protection of public health or the prevention of disease and pests in animals or plants.	1 BIT of the 4 BITs reviewed contains such a provision.
24. Poland-United States BIT (Washington, 21 March 1990) Entry into force: 6 August 1994	Article XII Reservation of Rights [...] <p>3. 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.</p>	3 BITs¹⁵ of the 31 BITs reviewed contain such a provision.
25. Portugal-India BIT (Lisbon, 28 June 2000)	Artigo 12 Leis aplicáveis [...] <p>2 — Apesar do previsto no n.o 1 do presente artigo, nada neste Acordo impede a Parte Contratante receptora do investimento de tomar medidas para a protecção dos seus interesses essenciais de segurança, ordem pública ou, em circunstâncias de emergência extrema, de acordo com a respectiva legislação, aplicada de forma não discriminatória.</p>	1 BIT of the 46 BITs reviewed contains such a provision.

BIT	Provisions on essential security interests	No. of BITs with essential security provision/ No. of BITs studied
<p>26. Romania-Egypt BIT (Cairo, 24 November 1994) Entry into force: 3 April 1996</p>	<p style="text-align: center;">Protocol</p> <p>[...]</p> <p>(1) Referring to Article 2 a) "Less favourable treatment" shall mean particularly: any limitation imposed upon buying of raw materials and auxiliary materials, energy and fuel as well as of means of production and exploitation of any kind and any obstacle to the sale of products on the territory of the country and abroad, as well as any other measures to the same effect. Measures taken on security, order, public health and morality grounds are not considered to mean "less favourable treatment" in the sense of Article 2.</p>	<p>3 BITs¹⁶ out of the 45 BITs reviewed contain such a provision.</p>
<p>27. Russia-Hungary BIT (Moscow, 6 March 1995) Entry into force: 29 May 1996</p>	<p style="text-align: center;">Article 2 Promotion and Reciprocal Protection of Investments</p> <p>[...]</p> <p>3. This Agreement shall not preclude the application of either Contracting Party of measures, necessary for the maintenance of defence, national security and public order, protection of the environment, morality and public health.</p>	<p>5 BITs¹⁷ of the 26 BITs reviewed contain such a provision.</p>
<p>28. Slovak Republic-United States BIT (Washington Signed 22 October 1991) Entered into force: 19 December 1992</p>	<p style="text-align: center;">Article X</p> <p>1. 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.</p> <p>2. This Treaty shall not preclude either Party from prescribing special formalities in connection with the establishment of investments, but such formalities shall not impair the substance of any of the rights set forth in this Treaty.</p>	<p>1 BIT of the 31 BITs reviewed contains such a provision.</p>
<p>29. Spain-Bolivia BIT (Madrid, 29 October 2001) Entry into force: 9 July 2002</p>	<p style="text-align: center;">Artículo 4. Trato nacional y cláusula de nación más favorecida.</p> <p>[...]</p> <p>5. Las medidas que se adopten por razones de orden público o seguridad y salud pública no se considerarán tratamiento «menos favorables» en el sentido del presente artículo.</p>	<p>7 BITs¹⁸ of the 60 BITs reviewed contain such a provision.</p>

BIT	Provisions on essential security interests	No. of BITs with essential security provision/ No. of BITs studied
30. Sweden-Russia BIT (Moscow, 19 April 1995) Entry into force: 7 June 1996	Article 3 Treatment of Investments [...] <p>(3) Each Contracting Party may have in its legislation limited exceptions to national treatment provided for in Paragraph (2) of this Article. Any new exception will not apply to investments made in its territory by investors of the other Contracting Party before the entry into force of such an exception, except when the exception is necessitated for the purpose of the maintenance of defence, national security and public order, protection of the environment, morality and public health.</p>	2 BITs ¹⁹ of the 52 BITs reviewed contain a NS provision.
31. Turkey-United States BIT (Washington, 3 December 1985) Entry into force: 18 May 1990	Article X <p>1. 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.</p> <p>2. This Treaty shall not preclude either Party from prescribing special formalities in connection with the establishment of investments, but such formalities shall not impair the substance of any of the rights set forth in this Treaty.</p>	3 BITs ²⁰ of the 41 BITs reviewed contain such a provision.
32. United Kingdom-India BIT (London, 14 March 1994) Entry into force: 6 January 1995	Article 11 Applicable Laws [...] <p>(2) Notwithstanding paragraph (1) of this Article nothing in this agreement precludes the host Contracting Party from taking action for the protection of its essential security interests or in circumstances of extreme emergency in accordance with its laws normally and reasonable applied on a non-discriminatory basis.</p>	1 BIT of the 91 BITs reviewed contains such a provision.
33. United States-Argentina BIT (Washington, 14 November 1991) Entered into force: 20 October 1994	Article XI <p>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.</p>	The 44 BITs ²¹ reviewed contain such a provision.

BIT	Provisions on essential security interests	No. of BITs with essential security provision/ No. of BITs studied
34. United States-Australia FTA (18 May 2004) Entered into force: 1 January 2005	<p style="text-align: center;">CHAPTER TWENTY-TWO GENERAL PROVISIONS AND EXCEPTIONS Article 22.2: Essential Security</p> <p>Nothing in this Agreement shall be construed:</p> <p>(a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or</p> <p>(b) to preclude a Party from applying measures that it considers necessary for 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.</p> <p style="text-align: center;">Dispute Settlement Mechanism Exclusions</p>	6 FTAs containing a chapter on Investment also contain such a provision. ²²
35. Austria-Mexico BIT (29 June 1998) Entry into force: 26 March 2001	<p style="text-align: center;">ARTICLE 19 Exclusions</p> <p>The disputes settlement provisions of this Part shall not apply to the resolutions adopted by a Contracting Party which, for national security reasons, prohibit or restrict the acquisition of an investment in its territory, owned or controlled by its nationals, by investors of the other Contracting Party, according to the legislation of each Contracting Party.</p>	2 BITs²³ of the 23 BITs reviewed contain such a provision.
36. Finland-Mexico BIT (22 February 1999) Entry into force: 30 August 2000	<p style="text-align: center;">Artículo 18 Exclusiones</p> <p>El mecanismo de solución de controversias de esta Sección no será aplicable a las resoluciones adoptadas por una Parte Contratante, la cual, de acuerdo con su legislación y por razones de seguridad nacional, prohíban o restrinjan la adquisición por inversionistas de la otra Parte Contratante de una inversión en el territorio de la primera Parte Contratante, que sea propiedad o esté efectivamente controlada por sus nacionales.</p>	11 BITs²⁴ of the 49 BITs reviewed contain such a provision.

BIT	Provisions on essential security interests	No. of BITs with essential security provision/ No. of BITs studied
37. Mexico-Sweden BIT (3 October 2000) Entry into force: 1 July 2001	Article 18 Exclusions The dispute settlement provisions of this Section shall not apply to the resolutions adopted by a Contracting Party which, in accordance with its legislation, and for national security reasons, prohibit or restrict the acquisition by investors of the other Contracting Party of an investment in the territory of the former Contracting Party, owned or controlled by its nationals.	9 BITs²⁵ out of the 15 BITs reviewed contain such a provision.
38. NAFTA (Canada, Mexico and United States)	Article 1138: Exclusions 1. Without prejudice to the applicability or non-applicability of the dispute settlement provisions of this Section or of Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures) to other actions taken by a Party pursuant to Article 2102 (National Security), a decision by a Party to prohibit or restrict the acquisition of an investment in its territory by an investor of another Party, or its investment, pursuant to that Article shall not be subject to such provisions. 2. The dispute settlement provisions of this Section and of Chapter Twenty shall not apply to the matters referred to in Annex 1138.2.	
39. Netherlands-Mexico BIT (13 May 1998)	Article Twelve Exclusions The dispute settlement provisions of this Schedule shall not apply to the resolutions adopted by a Contracting Party for national security reasons.	3 BITs²⁶ out of the 87 BITs reviewed contain a NS provision.
40. Switzerland-Mexico BIT (10 July 1995) Entry into force: 14 March 1996	Article 12 Exclusions The dispute settlement provisions of this Schedule shall not apply to the resolutions adopted by a Party which, for national security reasons, prohibit or restrict the acquisition of an investment in its territory, owned or controlled by its nationals, by investors of the other Party, according to the legislation of each Party.	10 BITs²⁷ out of the 94 BITs reviewed contain a NS provision.
NO PROVISION		
41. Brazil	No BIT found with a provision on national security (8 BITs reviewed)	
42. Canada	No BIT found with a provision on national security (25 BITs reviewed)	
43. Denmark	No BIT found with a provision on national security (37 BITs reviewed)	
44. Greece	No BIT found with a provision on national security (35 BITs reviewed)	
45. Iceland	No BIT found with a provision on national security (3 BITs reviewed)	
46. Ireland	No BIT found with a provision on national security (1 BIT reviewed)	
47. Italy	No BIT found with a provision on national security (18 BITs reviewed)	
48. Norway	No BIT found with a provision on national security (16 BITs reviewed)	

BIT	Provisions on essential security interests	No. of BITs with essential security provision/ No. of BITs studied
49.	Slovenia	No BIT found with a provision on national security (17 BITs reviewed)
50.	South Africa	No BIT found with a provision on national security (17 BITs reviewed)

1. **Protocolo**

[...]

(2) Ad artículo 3

a) Por “actividades” en el sentido des apartado 2 del artículo 3 se consideraran en especial pero no exclusivamente, la administración, la utilización, el uso y el aprovechamiento de una inversion. Se consideraran en especial pero no exclusivamente come “trato menos favorable” en el sentido del artículo 3 a las medidas menos favorables que afecten la adquisición de materias primas y otros insumos, energía combustibles, así como medios de producción y de explotación de toda clase o la venta de productos en el interior del país y en el extranjero. No se considerarán come “trato menos favorable” en el sentido del artículo 3 las medidas que se adopten por razones de seguridad interna o externa y orden publico sanidad publica o moralidad

2. These BITs were concluded with Albania, Algeria, Argentina, Armenia, Benin, Bolivia, Burundi, Burkina Faso, Cameroon, China, Comoros, Cyprus, El Salvador, Estonia, Georgia, Guinea, India, Kazakhstan, Latvia, Lebanon, Lithuania, Mexico, Macedonia, Mongolia, Moldova, Paraguay, Philippines, Ukraine, Uzbekistan and Vietnam.

3. The Indian BIT is the only one with a differing provision:

Art. 12 Règles applicables

[...]

(2) Aucune disposition du présent Accord ne s’opposera à ce que l’une ou l’autre Partie contractante impose des interdictions ou des restrictions, dans la mesure nécessaire à la <protection> de ses intérêts essentiels en matière de sécurité ou à la prévention des maladies, parasites et prédateurs.

4. The other countries are Belgium (see above in the table), Brunei Darussalam, Republic of Korea, New-Zealand (see below in the chart), Singapore, Japan, Sri Lanka, Germany and Poland. Hereafter are the different types of dispositions:

– In the BIT with Korea:

P R O T O C O L

2. For the purpose of the provisions of paragraph 2 of Article 3 and (2) of Article 13 of the Agreement, it shall not be deemed “treatment less favourable” for the Government of either State to accord discriminatory treatment, in accordance with its applicable laws and regulations, to investors of the other State, in case it is indispensable for the reason of a public purpose, national security or sound development of national economy and, provided that such discriminatory treatment undertaken for the reason of a public purpose, national security or sound development of national economy shall not aim at specifically investors of the other State or at joint companies in which investors of the other State have holdings.

– In the BIT with Singapore same provision as with New Zealand and Sri Lanka:

ARTICLE 11 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.

– In the BIT with Germany as well as with Brunei Darussalam:

Protocol to the Agreement

4. Ad Article 3

(a) The following shall more particularly, though not exclusively, be deemed “activity” within the meaning of Article 3 (2): the management, maintenance, use, enjoyment and disposal of an investment. The following shall, in particular, be deemed “treatment less favourable” within the meaning of Article 3: unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind as well as any other measures having similar effects. Measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed “treatment less favourable” within the meaning of Article 3.

– In the BIT with Poland:

Article 4

1. Either Contracting Party may for security reasons or a public purpose, nationalize, expropriate or take similar measures (hereinafter referred to as “expropriatory measures”) against investments investors of the other Contracting Party in its territory. Such expropriatory measures shall be non-discriminatory and shall be taken under due process of national law and against compensation.

5. See below the two BITs’ provisions not cited elsewhere in the table:

The BIT with Guatemala contains the following provision :

Article 11

Essential Security Interests

Nothing in this Agreement shall be construed to prevent either Contracting Party from taking measures to fulfil its obligations with respect to the maintenance of international peace or security.

The BIT with Mauritius contains the following provision:

Article 12

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 form of action in accordance with its laws applied in good faith, on a non discriminatory basis, and only to the extent and duration necessary for 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.

6. BIT with Belgium:

Art. 4. Expropriation et indemnisation.

[...]

2. Si des impératifs d'utilité publique, de sécurité ou d'intérêt national justifient une dérogation au paragraphe 1, les conditions suivantes devront être remplies :

- a) les mesures seront prises selon une procédure légale ;
- b) elles ne seront ni discriminatoires, ni contraires à un engagement spécifique ;
- c) elles seront assorties de dispositions prévoyant le paiement sans délai d'une indemnité adéquate et effective.

7. The two BITs have different provisions:

The BIT with India :

Article 12

Exceptions

Les dispositions du présent accord ne restreignent en aucune façon le droit de l'une ou de l'autre Partie contractante dans les cas d'extrême urgence de prendre des mesures conformément à ses lois appliquées de bonne foi et de façon non discriminatoire et uniquement dans les limites et pour la durée nécessaires visant à assurer la protection de ses intérêts essentiels de sécurité ou la prévention des maladies et épidémies animales ou végétales.

The BIT with the Philippines:

Article 3

Les investissements français ne pourront faire l'objet d'expropriation ou de nationalisation, ou de toute autre forme de dépossession, que pour cause d'utilité publique ou dans l'intérêt public, ou pour le bien national, ou dans l'intérêt de la défense nationale et moyennant une juste indemnité [...]

8. The **60 BITs** with Antigua and Barbuda, Argentina, Bangladesh, Barbados, Benin, Bolivia, Bosnia, Botswana, Bulgaria, Burkina Faso, Burundi, Cambodia, Central Africa, Chad, Chile, China, Congo, Costa Rica, Côte d'Ivoire, Cuba, Dominica, Ethiopia, Gabon, Guinea, Indonesia, Israel, Jordan, Kenya, Liberia, Mali, Malta, Mauritania, Mauritius, Nicaragua, Oman, Panama, Papua New Guinea, Pakistan, Peru, Poland, Qatar, St Lucia, St Vincent & Grenadines, Sierra Leone, Singapore, Syria, Swaziland, Somalia, Turkey, Uruguay, Venezuela, Sri Lanka, Sudan, Tanzania, Togo, Tunisia, Uganda, Yemen, Zambia, Zimbabwe contain the provision, in almost always similar terms, of the German Model BIT.

The **17 BITs** with Algeria, Cameroon, El Salvador, Guinea, Guyana, Iran, Korea, Malaysia, Madagascar, Mexico, Niger, the Philippines, Rwanda, Senegal, Sudan, United Kingdom, Yugoslavia, contain the following disposition:

Protocole

[...]

2. a) Seront considérés comme traitement « moins favorable » au sens de l'article 3 notamment toute restriction des fournitures de matières premières et consommables, des fournitures en énergie et de combustibles ainsi que d'outillage et de moyen de production de toute sorte, toute entrave à la vente des produits à l'intérieur et à l'extérieur du pays ainsi que toute autre mesure ayant un

effet similaire. Toute mesure prise en raison de la sécurité et de l'ordre publics, de la santé publique ou des bonnes mœurs ne représente pas un traitement « moins favorable » conformément à l'article 3.

In the Haiti and Romania BITs, there is no real mention of security as in others but same stance and almost same meaning with order and morality:

PROTOCOL

[...]

(2) Ad Article 2

(a) The following, in particular but not exclusively, shall be deemed to be activities for the purposes of Article 2, paragraph 2: the management, application, use and enjoyment of an investment. The following, in particular, shall be deemed to be "less favourable treatment" for the purposes of Article 2, paragraph 2: any restriction on the purchase of raw or auxiliary materials, energy and fuel, and means of production or operation of any kind; any non-statutory impediment to the sale of products on the domestic or foreign markets, and any other measures having similar effects. Measures taken for reasons of public safety and order, or public health or morality shall not be deemed to be "less favourable treatment" for the purposes of Article 2.

The BIT with India contains the following provision:

Article 12

Prohibitions and Restrictions

Nothing in this agreement shall prevent either Contracting Party from applying prohibitions or restrictions to the extent necessary for the protection of its essential security interests, or for the prevention of diseases and pests in animals or plants.

The BIT with Mexico contains a 2nd provision:

Article 20

Exclusions

The dispute settlement provisions of this Section shall not apply to the resolutions adopted by a Contracting State, which for national security reasons, prohibit or restrict the acquisition of an investment in its territory, owned or controlled by its nationals, by nationals or companies of the other Contracting State, according to the legislation of the relevant Contracting State.

2nd provision in similar terms in the BITs with St Lucia, Singapore:

PROTOCOL

[...]

(3) Ad Article 3

[...]

(b) The Contracting Parties shall within the framework of their national legislation give sympathetic consideration to applications for the entry and sojourn of persons of either Contracting Party who wish to enter the territory of the other Contracting Party in connexion with the making and carrying through of an investment; the same shall apply to nationals of either Contracting Party who in connexion with an investment wish to enter the territory of the other Contracting

Party and sojourn there to take up employment. Such entry shall however be subject to limitations justified on grounds of public policy, public security or public health. Applications for work permits shall also be given sympathetic consideration.

2nd provision in similar terms in the **23 BITs** with Bangladesh, Benin, Cameroon, Central Africa, Chad, Congo, Côte d'Ivoire, Guinea, Indonesia, Korea, Liberia, Malaysia, Madagascar, Mauritius, Pakistan, Rwanda, Sri Lanka, Sudan, Tanzania, Togo, Tunisia, Uganda, Zambia, generally in an attached exchange of letters

“To facilitate and promote investment made by German nationals or companies in the territory of the Republic of the Sudan in accordance with Article 1 of the Treaty and paragraph 1 of the Protocol, the Republic of the Sudan undertakes to grant the necessary permits to German nationals, who in connection with such investments desire to enter into and stay in the Republic of the Sudan and to carry on an activity there as an employee, unless reasons of public order or security or public health or morality warrant otherwise.”

9. The BIT with Russia:

Article 2

Promotion and Reciprocal Protection of Investments

[...]

3. This Agreement shall not preclude the application of either Contracting Party of measures, necessary for the maintenance of defence, national security and public order, protection of the environment, morality and public health.

10. Containing a similar clause as with the Czech Republic are the BITs with Australia, Belgium, France, Germany, Mauritius and the Netherlands.

The BITs with Austria, Croatia, Egypt, Ghana, Hungary, Indonesia, Kazakhstan, Oman, Portugal, Sri Lanka, Sweden, Switzerland, Thailand and the United Kingdom contain a provision drafted in similar terms:

Article 11

Applicable Laws

[...]

(2) Notwithstanding paragraph (1) of this article nothing in this Agreement precludes the host Contracting Party from taking action for the protection of its essential, security interests or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non-discriminatory basis.

11. The BITs with Korea and Viet Nam include the same provision:

Article 15

1. Notwithstanding any other provisions in this Agreement other than the provisions of Article 10, each Contracting Party may:

(a) take any measure which it considers necessary for the protection of its essential security interests;

i) taken in time of war, or armed conflict, or other emergency in that Contracting Party or in international relations; or

- (ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons;
12. The BIT with Germany reproduces the clause of the German model BIT and for the BIT with Japan, see the endnote above.
13. BIT with Belgium

Art. 4. Mesures privatives et restrictives de propriété

[...]

2. Si des impératifs d'utilité publique, de sécurité ou d'intérêt national justifient une dérogation au paragraphe 1, les conditions suivantes doivent être remplies : a) les mesures sont prises selon une procédure légale ; b) elles ne sont ni discriminatoires, ni contraires à un engagement spécifique ; c) elles sont assorties de dispositions prévoyant le paiement d'une indemnité adéquate et effective.
14. See below in the table for the provision in the BIT with the United States. For the BIT with Kuwait:

Article 4 Treatment of Investments

[...]

- (4) The following shall, in particular, be deemed "treatment less favourable" within the meaning of this Article: restricting the purchase of intermediate as well as raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind, impeding the marketing of products inside or outside the country, as well as any other measures having similar effects. Measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed "treatment less favourable" within the meaning of this Article.
15. The provision of the BIT with Uruguay is:

Artículo II

Promoción, admisión

- 1) Cada Parte Contratante fomentará en su territorio, las inversiones realizadas por inversores de la otra Parte Contratante y admitirá estas inversiones conforme a sus leyes y reglamentos. Las Partes Contratantes reconocen el derecho de cada una de ellas de no permitir actividades económicas por razones de seguridad, orden público, salud pública o moralidad, así como otras actividades que por ley se reserven a sus propios inversores.

The provision of the BIT with Germany is:

PROTOCOL

[...]

- (2) Ad Article 3
- [...]
- (b) Measures that have to be taken for reasons of public security and order, for the protection of life and health or public morality shall not be deemed "treatment less favourable" within the meaning of Article 3 .
16. For the BIT with the US, see below endnote 96 and for the BIT with Romania, the disposition which amounts to the same protection without mentioning security, see above, endnote 83.

The BIT with Mauritius contains the following provision:

ARTICLE 2

PROMOTION AND ADMISSION

(1) Each Contracting Party shall, in its State territory, promote as far as possible investments made by investors of the other Contracting Party and admit such investments in accordance with its national laws and regulations. However, this Agreement shall not prevent a Contracting Party from applying restrictions of any kind or taking any other action to protect its essential security interests or public health or to prevent diseases or pests in animals or plant.

17. See in the table for the disposition included in the BIT with Sweden and for the provision of the BIT with Germany. The other BITs' provisions are:

– Provision of the BIT with Thailand:

Article 3

Treatment of Investment

[...]

3. Each Contracting Party shall reserve the right to accord and to introduce exceptions from a national treatment and most favoured nation treatment as defined in paragraphs 1 and 2 of this article to investors of the other Contracting Party and their investments, including re-investments for the purpose of national security or public order.

– Provision of the BIT with the US:

ARTICLE X

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.

18. BITs with Albania, Bosnia, Equatorial Guinea, Guatemala, Jamaica, Namibia and Nigeria.
19. The Mexican BIT's provision can be found in the section below on “Dispute Settlement mechanism exclusions”.
20. The provision in the BIT with Germany is contained in the Protocol of the Treaty and is drafted in the following manner:

3. Ad Article 2:

(a) The following in particular shall be deemed “conditions” within the meaning of Article 2: restricting the purchase of raw or auxiliary materials, energy and fuel or means of production or operation of any kind, impeding the marketing of products inside or outside the country, as well as any other measures having similar effects. Measures of a general nature enforced by a Contracting Party without discrimination in respect of its nationals and companies and in respect of nationals and companies of third States, and measures that have to be taken for reasons of public security and order, public health or morality, shall not be deemed “conditions” within the meaning of Article 2.

In the BIT with Qatar, the provision is the following:

Article VII

Preclusions

1. This Agreement shall not preclude the application by either Contracting Party of measures necessary for the maintenance of public order and morals, 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.

21. The same provision as in the BIT with Argentina is 25 BITs: Armenia, Bangladesh, Congo, Czech and Slovak, DRC, Estonia, Grenada, Haiti, Jamaica, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Mongolia, Morocco, Panama, Poland, Romania, Russia, Senegal, Sri Lanka, Tunisia, Turkey and Ukraine.

The other BITs contain the following dispositions:

– Albania, Azerbaijan, Bolivia, Bulgaria, Cameroon, Croatia, Ecuador, Georgia, Honduras, Jordan, Nicaragua, Trinidad and Tobago, Uzbekistan BIT:

Article XIV

Measures Not Precluded By This Treaty

1. This Treaty shall not preclude a Party from applying measures necessary for 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.

– Egypt BIT:

ARTICLE X

MEASURES NOT PRECLUDED BY TREATY

1. This Treaty shall not preclude the application by either Party or any political or administrative subdivision thereof of any and all measures necessary for the maintenance of public order and morals, the fulfilment of its existing international obligations, the protection of its own security interests, or such measures deemed appropriate by the Parties to fulfil future international obligations.

– Bahrain, El Salvador, Mozambique BIT:

Article XIV

1. This Treaty shall not preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

– The last BIT concluded, with Uruguay, is drafted following the 2004 model BIT and therefore includes the following disposition:

Article 18: Essential Security

Nothing in this Treaty shall be construed:

1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or

2. to preclude a Party from applying measures that it considers necessary for 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.

22. The FTAs are with Chile, Central America – Dominican Republic, Morocco, Oman and Singapore.
23. The provision in the BIT with India is:

Article 12

Applicable Laws

[...]

(2) Nothing in this Agreement precludes the host Contracting Party from taking necessary action in abnormal circumstances for the protection of its essential security interests or in circumstances of extreme emergency in accordance with its laws applied on a non discriminatory basis.

24. A similar provision is found in the BITs with Armenia, Belarus, Bosnia, Ethiopia, Guatemala, Kyrgyzstan, Nicaragua, Nigeria, Tanzania, Zambia:

Article 15

General Exceptions

1. Nothing in this Agreement shall be construed as preventing a Contracting Party from taking any action necessary for the protection of its essential security interests in time of war or armed conflict, or other emergency in international relations

25. Same provision in the BIT with Uruguay.

For the BIT with the Netherlands and with Switzerland, see below in the table, and see above in the table for the BIT with Austria and Finland.

See endnote 77 for the BIT with Belgium and endnote 83 for the two provisions of the BIT with Germany.

The BIT with Cuba contains the following provision:

Artículo Décimo Segundo

Exclusiones

No estarán sujetas al mecanismo de solución de controversias de este Apéndice, las resoluciones que adopte una Parte por razones de seguridad nacional o aquellas resoluciones que prohíban o restrinjan la adquisición de una inversión en su territorio, que sea propiedad o esté controlada por nacionales de esa Parte, por inversionistas de la otra Parte, de conformidad con la legislación nacional de cada Parte.

26. For the provision of the BIT with India, see above endnote 85.

The BIT with Uruguay contains the following provision:

Article 2

1) Either Contracting Party shall, within the framework of its law and regulations, promote economic cooperation through the protection in its territory of investments of nationals of the other Contracting Party. Subject to its right to

exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments.

2) Those activities which, due to reasons of security, morality, sanitation or public order, are forbidden or reserved to nationals of the Contracting Parties, are excluded from the provisions of this Agreement.

27. For the provision in the BIT with India, see above endnote 85. Here are the other provisions:

- BIT with Chad:

Art. 2

[...]

Les mesures prises pour des raisons de sécurité, d'ordre, de santé et de moralité publics, ne sont pas considérées comme «traitement moins favorable» au sens du premier paragraphe de cet article.

- BIT with Egypt, Jordan and Sudan:

Art. 4

Les Parties Contractantes n'entraveront pas la gestion, l'entretien, l'utilisation, la jouissance, l'accroissement et, le cas échéant, la liquidation de tels investissements. En particulier, chaque Partie Contractante facilitera sur son territoire de tels investissements et délivrera à cet effet les autorisations nécessaires, y compris les autorisations relatives à la mise en oeuvre des accords de fabrication, à l'assistance technique, commerciale ou administrative, ainsi qu'à l'emploi d'experts et d'autres personnes qualifiées de l'autre Partie Contractante ou d'un État tiers, et ceci conformément à sa législation en vigueur en la matière.

Cependant, chaque Partie Contractante peut refuser des permis d'emploi pour des raisons de sécurité.

- BIT with Mauritius:

Art. 11 Autres règles et engagements particuliers

[...]

(3) Aucune disposition du présent Accord ne pourra être interprétée comme empêchant une Partie contractante de prendre toute mesure nécessaire à la protection de ses intérêts essentiels en matière de sécurité, ou pour des motifs de santé publique ou de prévention des maladies affectant les animaux et les végétaux.

- BIT with Uganda:

Protocole

[...]

Add article 3, alinéa 1

Les mesures prises pour des raisons d'ordre public et de sécurité ainsi que de santé publique ou des principes de moralité ne seront pas considérées comme déraisonnables ou discriminatoires.

- BIT with Uruguay:

Art. 2 Promotion, admission

(1) Chaque Partie Contractante encouragera, dans la mesure du possible, les investissements des investisseurs de l'autre Partie Contractante sur son

territoire et admettra ces investissements conformément à sa législation. Les Parties Contractantes se reconnaissent mutuellement le droit de ne pas autoriser des activités économiques pour des raisons de sécurité, d'ordre, de santé ou de moralité publics, ainsi que les activités réservées par la loi à leurs propres investisseurs.

- BIT with UAE:

Art. 11 Autres règles et engagements particuliers

[...]

(4) Aucune disposition du présent Accord ne sera interprétée comme empêchant une Partie Contractante d'entreprendre toute action demandée par la sécurité, l'ordre, la santé ou la moralité public.