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Non-Precluded Measures Provisions in Bilateral Investment Treaties of South Asian Countries

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Abstract
This paper provides a first-ever detailed study of NPM provisions in all stand-alone BITs which are in force in South Asian countries. It studies 147 BITs of South Asian countries in order to map the NPM provisions in them. It makes an in-depth analysis of the NPM provisions found in these BITs, and then makes an analysis of the consequences of not having NPM provisions in BITs. This follows the dissection of the NPM provisions found, so as to study each and every permissible objective and nexus requirement link in these provisions. This is followed by suggestions and conclusions, where the paper holds that NPM provisions are not sufficiently used in the BITs of these countries and these countries should incorporate this provision more frequently in order to ensure some much-needed regulatory latitude to these countries.

I. NON-PRECLUDED MEASURES: AN OVERVIEW

Non-Precluded Measures (NPM) provisions in Bilateral Investment Treaties (BITs) have acquired a great deal of importance in international investment law. Despite that importance, there is still a dearth of academic literature in this area. While some work has been done in general,[1] country- or region-specific studies are still rare. Except for

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1. William W. BURKE-WHITE and Andreas Von STADEN, "Investment Protection in Extraordinary Times: The Interpretation of Non-Precluded Measure Provisions in Bilateral Investment Treaties" (2008) 48 Virginia Journal of International Law 307; Jűrgen KURTZ, "Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis" (2010) 59 International and Comparative Law Quarterly 325; Andrew NEWCOMBE, "The Use of General Exceptions in IIAs: Increasing Legitimacy or

India,[2] no study has been done on the NPM provisions in BITs signed by all South Asian countries, or signed by an individual South Asian country. In this regard, this paper aims to make a contribution by studying NPM clauses in BITs signed by South Asian countries. For this purpose, the paper studies 147 stand-alone BITs of South Asian countries which are in force; these comprise seventy-two BITs of India,[3] twenty-five BITs of Pakistan,[4] twenty-three BITs of Sri Lanka,[5] twenty-one BITs of Bangladesh,[6] four BITs of Nepal,[7] and two BITs of Afghanistan.[8] In undertaking this study, both doctrinal and empirical research methodologies are followed. Therefore, in an attempt to shed some light on NPM provisions in the BITs of South Asia, the paper has focused mainly on the following areas: the importance of studying NPM provisions in context of South Asian countries (Part I); the mapping of NPM clauses in the BITs of South Asian countries (Part II); permissible objectives provided in the BITs of South Asian countries (Part III); and nexus requirement links in the BITs of South Asian countries (Part IV). However, before we address these issues as such, we first need to clarify the concept of NPM provisions.

A. *NPM Provisions: An Analysis*

NPM clauses are basically exceptions to the scope of the application of BITs. As the text suggests, these provisions allow states to take actions which are otherwise inconsistent with their treaty obligations.[9] These actions, when taken by states, are usually considered to be consistent with a BIT if they fall under the permissible objectives specified in the NPM clauses. In other words, NPM clauses transfer the cost of harm done to investment from host states to investors in exceptional circumstances.[10] It can also be said that NPM provisions allow the host states to impair

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Uncertainty?" in Armand De MESTRAL and Céline LÉVESQUE, eds., *Improving International Investment Agreements* (London: Routledge, 2013), 275.

2. Prabhash RANJAN, "Non-Precluded Measures in Indian International Investment Agreements and India's Regulatory Power as a Host Nation" (2012) 2 Asian Journal of International Law 21.

3. India has signed eighty-four BITs, of which seventy-two are in force (10 December 2014), online: Ministry of Finance, Government of India <http://finmin.nic.in/bipa/bipa_index.asp>.

4. Pakistan has signed forty-six BITs, of which twenty-five are in force; UNCTAD IIA database (21 January 2015), online: Investment Policy Hub UNCTAD <http://investmentpolicyhub.unctad.org/IIA/CountryBits/160#iiaInnerMenu>.

5. Sri Lanka has signed twenty-nine BITs, of which twenty-four are in force; UNCTAD IIA database (21 January 2015), online: Investment Policy Hub UNCTAD <http://investmentpolicyhub.unctad.org/IIA/CountryBits/198#iiaInnerMenu>.

6. Bangladesh has signed thirty BITs, of which twenty-four are in force; UNCTAD IIA database (21 January 2015), online: Investment Policy Hub UNCTAD <http://investmentpolicyhub.unctad.org/IIA/CountryBits/16#iiaInnerMenu>; BITs signed by Bangladesh can also be found at the website of the Ministry of Industries, Government of Bangladesh, Bilateral Agreements (21 January 2015), online: MOIND <http://www.moind.gov.bd/site/page/f7aa7575-5196-476b-907b-3ea65e885717>.

7. Nepal has four BITs in force out of six BITs that it has signed, UNCTAD IIA database (21 January 2015), online: Investment Policy Hub UNCTAD <http://investmentpolicyhub.unctad.org/IIA/CountryBits/147#iiaInnerMenu>.

8. Afghanistan has signed three BITs; all are in force; UNCTAD IIA database (21 January 2015), online: Investment Policy Hub UNCTAD <http://investmentpolicyhub.unctad.org/IIA/CountryBits/1#iiaInnerMenu>.

9. Burke-White and Staden, *supra* note 1 at 314.

10. *Ibid*., at 401.

the investments covered under BITs by being an instrument of regulation in the hands of host states.[11] Therefore, NPM provisions are important and probably the most effective device to ensure sufficient regulatory space for host states to pursue their non-investment policy objectives.[12] Examples of their importance are the cases filed by investors against Argentina during the Argentine crisis, where NPM clauses were invoked by Argentina for the default of investments made in its territory before different investment arbitral tribunals.[13] The decisions of these tribunals were not consistent, and they had given quite divergent rulings.[14] Nonetheless, these cases not only generated a debate on the interpretative methodology followed by these tribunals but also emphasized the significance of NPM provisions in the BITs for protecting a state's regulatory space.[15] In recent years there has been a plethora of examples where disputes have emerged between foreign investors and host states over regulatory measures taken by the state, such as measures relating to environmental policy,[16] sovereign decisions regarding privatization,[17] urban policy,[18] monetary policy,[19] taxation,[20] and many others.[21] It is clear that these disputes arose when host states tried to broaden the sphere of their regulatory space.

11. Kenneth J. VANDEVELDE, "Of Politics and Markets: The Shifting Ideology of the BITs" (1993) International Tax and Business Lawyer 159 at 170.
12. Kurtz, *supra* note 1 at 343.
13. *CMS Gas Transmission Co. v. Argentina*, Annulment Proceedings, [2005] ICSID Case No. ARB/01/8 [*CMS Annulment*]; *CMS Gas Transmission Co. v. Argentina*, [2005] ICSID Case No. ARB/01/8 [*CMS*]; *Enron Creditors Recovery Corp v. Argentina,* Annulment Proceedings, [2010] ICSID Case No. ARB/01/3 [*Enron Annulment*]; *Enron Corporation v. Argentina*, [2007] ICSID Case No. ARB/01/3 [*Enron*]; *Sempra Energy International v. Argentina*, Annulment Proceedings, [2010] ICSID Case No. ARB/02/16 [*Sempra Annulment*]; *Sempra Energy International v. Argentina*, [2007] ICSID Case No. ARB/02/16 [*Sempra*]; *LG&E Energy Corporation v. Argentina*, [2006] ICSID Case No. ARB/02/1 [*LG&E*]; *Continental Casualty Company v. Argentina*, [2008] ICSID Case No. ARB/03/9 [*Continental*].
14. See *supra* note 13; Christina BINDER, "Necessity Exceptions, the Argentine Crisis and Legitimacy Concerns" in Tulio TREVES, Francesco SEATZU, and Seline TREVISANUT, eds., *Foreign Investment, International Law and Common* (Routledge, 2014), 71.
15. Kurtz, *supra* note 1 at 347.
16. *Metalclad Corporation v. United Mexican States* 5, ICSID 236; *Methanex Corporation v. United States of America* (2005) 44 I.L.M. 1345; *Ethyl Corp. v. Canada*, Award on Jurisdiction, [1998] 38 I.L.M. 708 (NAFTA Ch. 11 Arb. Trib. 1998); for further study, Mary E. FOOTER, "Bits and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment" (2009) 18 Michigan State International Law Review 33.
17. *Eureko BV v. Republic of Poland*, Partial Award, [2005] UNCITRAL Ad Hoc Arbitration; *Aguas del Tunari, S.A. v. Bolivia*, Decision on Respondent's Objections to Jurisdiction, [2005] 20 ICSID REV. 450 (ICSID Arb. Trib. 2005); *Biwater Gauff Ltd. v. United Rep. of Tanzania*, [2008] ICSID Case No. ARB/05/22 (ICSID Arb. Trib. 2008).
18. *MTD Equity v. Republic of Chile*, [2005] 44 I.L.M. 91.
19. *Azurix Corp. v. Argentine Rep.*, [2007] 47 I.L.M. 445 (ICSID Arb. Trib. 2007); *Suez/InterAguas v. Argentina*, [2004] ICSID Case No. ARB/03/17 (ICSID Arb. Trib. 2004); *Suez/Vivendi v. Argentina*, [2004] ICSID Case No. ARB/03/19 (ICSID Arb. Trib. 2004); see *supra* note 13.
20. *Occidental Exploration and Production Co v. Republic of Ecuador*, Award, [2004] LCIA Case No. UN 3467.
21. Rudolf DOLZER and Christoph SCHREUER, *Principles of International Investment Law* (Oxford: Oxford University Press, 2008) at 7–8; Asha KAUSHAL, "Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime" (2009) 50 Harvard Journal of International Law 491 at 511–12.

Thus, the question arises: How can states create such regulatory space within the contours of the BIT? States can devise such a mechanism by creating specific exceptions in the treaty to assure that host states have sufficient regulatory latitude.[22] Nearly all investment treaties cover one or two exceptions in order to protect the essential interests of the Contracting Parties from the coverage of the treaty obligations.[23] Some of these exceptions are narrowly drafted[24] and some are broad in scope.[25] However, there are also exceptions which apply to all or many BIT obligations.[26] For example, Article 15 of India-Australia BIT provides for:

> 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.[27]

The above provision allows Contracting Parties to take measures for the protection of their essential security interests and for the prevention of diseases. Even if these measures harm the foreign investments, they shall not be construed as violating any treaty provision. These exceptions are, in general, called non-precluded measures clauses.[28] The importance of studying NPM provisions in the context of South Asia will be discussed below.

B. *Why Study NPM Provisions in the Context of South Asian Countries?*

Given the fact that all South Asian countries are either developing countries or least developed countries and tend to invite more and more investments in order to generate capital in their countries, the examination of this important provision in the BITs of these countries becomes necessary.

Thus it is pertinent to go through a brief study of each South Asian country in respect of the following three aspects—which can be the common factors to all the

22. Dolzer and Schreuer, *supra* note 21.
23. Jeswald W. SALACUSE, *The Law of Investment Treaties* (Oxford: Oxford University Press, 2010) at 340–1.
24. E.g. Restricting the application of a specific treaty provision to a particular circumstance or transaction, *Agreement Between the Government of the United Mexican States and the Government of the Republic of Korea for the Promotion and Reciprocal Protection of Investment*, November 2000, art. 6(3).
25. E.g. Controlling exceptions which allows the contracting parties to deny the benefits of treaty to investments of companies controlled by third country nationals if the companies lack "substantial business activities" in the home country—*Treaty Between the United States of America and the Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment*, 19 May 1992 (entered into force 12 January 1994), art. 1(2).
26. Andrew NEWCOMBE and Lluís PARADELL, *Law and Practice of Investment Treaties: Standards of Treatment* (Alphen Aan Den Rijn: Kluwer Law International, 2009) at 481.
27. *Agreement Between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments*, 26 February 1999 (emphasis added).
28. NPM provisions can also be called by other names, such as General Exception clauses—Ranjan, *supra* note 2 at 25.

South Asian countries—in order to understand the importance of studying NPM provisions in the context of South Asia:

1. The number of BITs signed by South Asian countries;
2. Foreign Direct Investment (FDI) inflows in South Asian countries; and
3. The rise in investment cases globally and against South Asian countries.

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

1. *Number of BITs signed by South Asian countries*

The number of BITs signed by South Asian countries shows the acceptance of these countries to be held accountable under international law for their regulatory conduct that impacts foreign investment. Hence, if we analyze BITs signed by these countries, Pakistan has signed forty-six BITs to date.[29] While it signed its first BIT with Germany in 1959,[30] by 1990 it had signed seven BITs with China,[31] France,[32] Germany,[33] Korea,[34] Kuwait,[35] the Netherlands,[36] and Sweden.[37] However, between 1990 and 2014 it had signed thirty-nine BITs.[38] Sri Lanka has signed in total twenty-nine BITs;[39] it had signed seventeen BITs[40] by 1990, and from 1990 to 2014 it had signed a further

29. *Supra* note 4.
30. Investor-State Dispute Settlement, (UNCTAD Series on Issues in Investment Agreements II, UN 2014) (10 April 2015), online: UNCTAD <http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf>.
31. *Agreement Between the Government of the Islamic Republic of Pakistan and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of the Investments*, 12 February 1989 (entered into force 30 September 1990) [*China-Pakistan BIT*].
32. *Agreement Between the Government of the French Republic and the Government of the Islamic Republic of Pakistan on the Promotion and Mutual Protection Investments*, 1 June 1983 (entered into force 14 December 2015) [*France-Pakistan BIT*].
33. *Treaty Between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments*, 25 November 1959 (entered into force 29 July 1961).
34. *Agreement Between the Government of the Republic of Korea and the Government of the Islamic Republic of Pakistan for the Promotion and Protection of Investments*, 25 May 1988 (entered into force 15 April 1990) [*Korea-Pakistan BIT*].
35. *Agreement on the Promotion and Safeguarding of Capital Movement and Investment Between the Government of the State of Kuwait and the Government of the Islamic Republic of Pakistan*, 17 March 1983 (entered into force 15 March 1986) [*Kuwait-Pakistan BIT*].
36. *Agreement on Economic Cooperation and Protection of Investments between the Kingdom of the Netherlands and the Islamic Republic of Pakistan*, 4 October 1988 (entered into force 1 October 1989) [*Netherlands-Pakistan BIT*].
37. *Agreement on the Mutual Protection of Investments Between Sweden and Pakistan*, 12 March 1981 (entered into force on 14 July 1981) [*Sweden-Pakistan BIT*].
38. *Supra* note 4.
39. *Supra* note 5.
40. *Ibid*.; BITs with the Belgium-Luxembourg Economic Union (BLEU) (1982), China (1986), Denmark (1985), Finland (1985), France (1980), Germany (now terminated, it has signed a new BIT with Germany) (1963), Italy (1987), Japan (1982), Korea (1980), Malaysia (1982), Netherlands (1984), Norway (1985), Romania (1981), Singapore (1980), Sweden (1982), Switzerland (1981), and the United Kingdom (1980).

twelve BITs.[41] Bangladesh has signed thirty BITs[42] in total; nine BITs by 1990,[43] the other twenty-one BITs between 1990 and 2015.[44] Nepal has signed six BITs[45] in total to date; two BITs were signed before 1990[46] and four after 1990.[47] Bhutan and the Maldives have not signed any BITs with any country to date.[48] Afghanistan signed all of its three BITs between 1990 and 2015.[49] India has signed eighty-four BITs to date, all after 1990.[50] In India, after economic reforms in 1991, foreign investment policy was liberalized and Bilateral Investment and Protection Agreements (BIPAs) were entered into with other countries to protect and promote investments on a reciprocal basis to ensure more FDI inflow in the country.[51] While, in the absence of any literature, it is difficult to say with certainty about other countries in South Asia, there is hardly any doubt that the Indian BITs were signed to attract more FDI inflows.[52]

It is clear that South Asian countries started entering into BITs with other countries at a faster rate after 1990. It can also be said, though there is little evidence available, that BITs were signed to ensure more FDI inflows in these countries. Therefore, this rapid increase in the number of BITs shows the willingness of these countries to be subjected to treaty obligations in order to attract foreign investments into their territories.

2. *FDI inflows in South Asian countries*

Although increased FDI inflow is considered good for the economy in any country, at the same time it also increases the vulnerability of that country to BIT claims. This is because any policy decision that impacts the investment can bring the state before an international tribunal. Therefore it is pertinent to assess the FDI inflow situation in South Asian countries. FDI inflow in Pakistan was US$278 million[53] to 1990; however, it soared up to US$1,747 million by 2014.[54] FDI inflow in Sri Lanka was US$43 million[55] to 1990, then increased to US$944 million to 2014.[56] FDI inflow

41. *Supra* note 5.
42. *Supra* note 6.
43. *Ibid*.; BITs with BLEU (1987), France (1985), Germany (1981), Korea (1986), Turkey (1987), Canada (1990), Romania (1987), the United Kingdom (1980), and the USA (1986).
44. *Supra* note 6.
45. *Supra* note 7.
46. *Agreement Between the Government of the French Republic and the Government of His Majesty the King of Nepal on the Promotion and Mutual Protection Investments*, 2 May 1983 (entered into force 13 June 1985), and *Treaty Between the Federal Republic of Germany and the Kingdom of Nepal Concerning the Encouragement and Reciprocal Protection of Investments*, 20 October 1986 (entered into force 7 July 1988).
47. *Supra* note 7.
48. 7 December 2014, online: UNCTAD IIA Database <http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu>.
49. *Supra* note 8.
50. *Supra* note 3.
51. Prabhash RANJAN, "India and Bilateral Investment Treaties—A Changing Landscape" (2014) ICSID Review-Foreign Investment Law Journal 419 at 421.
52. *Ibid*.
53. 15 July 2015, online: UNCTADSTAT <http://unctadstat.unctad.org/wds/TableViewer/tableView.aspx?ReportId=96740>.
54. *Ibid*.
55. *Ibid*.
56. *Ibid*.

in Bangladesh was just US$3 million[57] to 1990; however, by 2014 this figure had risen to US$1,527 million.[58] FDI inflow in Nepal was US$6 million to 1990,[59] but by 2014 it had grown to US$30 million.[60] FDI inflow in Afghanistan was zero (in US million dollars)[61] to 1990; however, by 2014 it had risen to around US$54 million. FDI inflow in India grew at an exceptional rate after 1990. While it could manage to attract only US$237 million as FDI[62] to 1990, this figure soared to US$ 34,417 million by 2014.[63]

There is no doubt that the "economic reforms" that took place after 1990 in most of these countries were crucial to the increased FDI inflow into their territories.[64] But at the same time, with increased FDI inflow came higher responsibility for the protection of these investments. This, though indirectly, made South Asia more vulnerable to BIT claims.

3. *Rise of investor-state arbitration against states globally and against South Asian countries*

The BIT regime has seen tremendous growth from 1990; this can be determined by the fact that whereas there were only around 300 BITs signed before 1990,[65] nearly 2,935 BITs existed as of October 2015.[66] This shows how fast this regime has grown.

However, the downside of this tremendous growth can be seen in the rise of the number of investor-state arbitrations. With the growth in number of BITs, there is also growth in the number of investment disputes. The total number of known treaty-based Investor State Dispute Settlement (ISDS) cases by the end of 2012 was 514.[67] However, by the end of 2013, the number of known treaty-based cases increased to 568.[68] And, by the end of 2014, investors initiated forty-two new ISDS cases, thereby taking overall number of known ISDS cases to around 610.[69] Of all the forty-two cases which were

57. *Ibid.*
58. *Ibid.*
59. *Ibid.*
60. World Investment Report 2015, Country Fact Sheet: Nepal (19 July 2015), online: UNCTAD <http://unctad.org/sections/dite_dir/docs/wir2015/wir15_fs_np_en.pdf>.
61. *Supra* note 53; zero does not denote that there was no FDI inflow at all, it just shows that the figure was not in US million dollars.
62. *Supra* note 53.
63. World Investment Report 2015, Country Fact Sheet: India (19 July 2015), online: UNCTAD <http://unctad.org/sections/dite_dir/docs/wir2015/wir15_fs_in_en.pdf>.
64. Pravakar SAHOO, "Foreign Direct Investment in South Asia: Policy, Trends, Impact and Determinants" (2015), online: ADB Institute Discussion Paper No. 56, <http://www.adb.org/sites/default/files/publication/156693/adbi-dp56.pdf>.
65. Jeswald W. SALACUSE, "BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries" (1990) 24 The International Lawyer 503 at 655; for a listing of 309 bilateral investment treaties concluded up to 31 December 1988, Anthena J. PAPPAS, "References on Bilateral Investment Treaties" (1989) 4 ICSID Review—Foreign Investment Law Journal 189 at 194–203.
66. *Supra* note 48.
67. Investor-State Dispute Settlement (UNCTAD Series on Issues in Investment Agreements II, UN 2014) (10 April 2015), online: UNCTAD <http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf>.
68. UNCTAD, "Recent Developments in Investor-State Dispute Settlement (ISDS)", IIA Issue Note No. 1 (April 2014), online: UNCTAD <http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf> (25 April 2015).
69. UNCTAD, "Recent Trends in IIAs and ISDS", IIA Issue Note No. 1, Feb 2015, online: UNCTAD <http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf> at 5.

brought against states in 2014,[70] sixty percent of them were filed against developing countries and forty percent were filed against developed countries.[71] It is also worth mentioning that the share of cases against developed countries was forty-seven percent in 2013, and thirty-four percent in 2012, while the historical average is twenty-eight percent.[72] These data show that developing countries are subjected to BIT claims on more accounts than the developed countries globally.

In the case of South Asia, a large number of investor-state cases have already been filed against these countries. Pakistan has been subjected to these cases on eight accounts,[73] Sri Lanka on three accounts,[74] Bangladesh on one account,[75] and India on sixteen accounts.[76] In most of the decided cases, decisions have gone in favour of the investors.[77]

Thus, a combination of three factors—a rise in number of BITs signed, increasing FDI inflows, and rising investor-state cases against South Asian countries—clearly shows that all South Asian countries are more vulnerable to BIT claims than ever before. The possibility of the regulatory measures of these countries being challenged by BIT claims is, thus, quite high. Therefore, in order to see whether these countries will have sufficient regulatory latitude to pursue their non-investment policy objectives, a study of NPM provisions is important in the context of South Asia.

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70. *Ibid.*

71. *Ibid.*

72. *Ibid.*

73. *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29; *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3 (II); *Agility for Public Warehousing Company K.S.C. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/11/8; *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1; *Mr Ali Allawi v. Pakistan* (12 January 2015), online: Italaw <http://www.italaw.com/cases/2032>; *Progas Energy Ltd v. Pakistan* (12 January 2015), online: Italaw <http://www.italaw.com/cases/2044>; *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1.

74. *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3; *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2.

75. *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7.

76. *Bechtel Enterprises Holdings, Inc. and GE Structured Finance (GESF) v. The Government of India*, Tribunal Rules for Bechtel and GE in Dabhol Power Project Arbitration (9 September 2003), online: Bechtel <http://www.bechtel.com/newsroom/releases/2003/09/tribunal-rules-dabhol-power-project-arbitration/>; *ABN Amro N.V. v. Republic of India*, (12 April 2015), online: Rimantas Daujotas blog <http://rdaujotas.com/lt/publikacijos/0/42/-icsid-foreign-investment-requirement-in-case-of-borrowed-funds>; *ANZEF Ltd. v. Republic of India*; *BNP Paribas v. Republic of India*; *Credit Lyonnais S.A. (now Calyon S.A.) v. Republic of India*; *Credit Suisse First Boston v. Republic of India*; *Erste Bank Der Oesterreichischen Sparkassen AG v. Republic of India*; *Offshore Power Production C.V., Travamark Two B.V., EFS India-Energy B.V., Enron B.V., and Indian Power Investments B.V. v. Republic of India*; *Standard Chartered Bank v. Republic of India Bycell (Maxim Naumchenko, Andrey Polouektov and Tenoch Holdings Ltd) v. India* (28 November 2014), online: Italaw <http://www.italaw.com/cases/1933>; *Deutsche Telekom v. India* (28 November 2014), online: Italaw <http://www.italaw.com/cases/2275>; *Khaitan Holdings Mauritius v. India* (28 November 2014), online: Italaw <http://www.italaw.com/cases/2262>; *Louis Dreyfus Armateurs SAS (France) v. The Republic of India* (28 November 2014), online: <http://www.pcacases.com/web/view/113>; *Vodafone International Holdings BV v. India* (28 November 2014), online: Italaw <http://www.italaw.com/cases/2544>; *White Industries Australia Limited v. India* (30 November 2011), online: Italaw <http://www.italaw.com/cases/1169>.

77. *AAPL v. Sri Lanka*, *supra* note 74; *Deutsche Bank AG v. Sri Lanka*, *supra* note 74; *Saipem S.p.A. v. Bangladesh*, *supra* note 75; *White Industries v. India*, *supra* note 76.

Against this background, this paper intends to analyze and assess the NPM clauses in the BITs of the South Asian countries. Within this approach, Section II will delve into the detailed study of NPM clauses in the BITs of South Asian countries. In doing such research activity, it will deal in detail with the placement, form, and structure of NPM clauses in these countries. Section III provides a detailed analysis of the different provisions relating to permissible objectives provided in the BITs of these countries. Section IV will then delve into the nexus requirement links provided by these NPM clauses, with some reference to the interpretative methodologies followed by arbitral tribunals during the Argentine crisis. In conclusion, an assessment shall be made in Section V of the BITs signed by these countries with respect to NPM provisions. It will also suggest necessary changes with regard to NPM clauses in these BITs.

II. MAPPING THE NPM PROVISIONS

Whether NPM provisions are a common element in BITs globally is a difficult question to answer. It is more difficult given the fact that hardly any research has been done in respect of NPM provisions in BITs globally. However, there are academic papers available which suggest that NPM provisions are a relatively more common element in BITs than in other international treaties, and that they play an important role in the legal regime of foreign investment;[78] this seems to be true, bearing in mind that the high frequency of NPM provisions is limited only to the BITs of a certain number of countries.[79] But at the same time, it would not be right to say that NPM provisions are common elements in all BITs globally. This also tells us that other countries do not very frequently and consistently incorporate NPM provisions into their BITs. The reason for this inconsistency is unknown; according to Salacuse, "NPM clauses are subject to the negotiation dynamics of the states negotiating an investment treaty".[80] One can relate this reasoning to the status and negotiation capability of a country to agree or not agree the terms of the BIT. As BITs were signed by developing countries to attract FDI flows into their territories,[81] it is possible that developing countries might have made some compromises on their regulatory powers while negotiating BITs by not including NPM provisions or any other exceptions in their BITs.

If we analyze the frequency of NPM clauses in the BITs of South Asian countries, the outcome is quite surprising. In South Asia, the number of BITs signed by these

78. Burke-White and Staden, *supra* note 1.

79. See BITs signed by the US, Germany, BLEU, India, and Canada.

80. Email from Professor Jeswald W. SALACUSE to author (14 April 2015) (on file with author).

81. Eric NEUMAYER and Laura EPESS, "Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?" (23 February 2015), online: LSE Research <http://eprints.lse.ac.uk/627/1/World_Dev_(BITs).pdf>; Andrew T. GUZMAN, "Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties" (1998) 38 Virginia Journal of International Law 639 at 651–7; Zachary ELKINS, Andrew T. GUZMAN, and Beth A. SIMMONS, "Competing for Capital: The Diffusion of Bilateral Investment Treaties 1960–2000" (2006) 60 International Organization 811 at 813; Jose E. ALVAREZ, "The Emerging Foreign Direct Investment Regime" (2005) 99 Proceedings of the Annual Meeting (American Society of International Law) 94–7; Kenneth J. VANDEVELDE, "Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties" (1998) 36 Columbia Journal Transnational Law 501 at 516; Fiona BEVERIDGE, *Treatment and Taxation of Foreign Investment under International Law*, 1st edn (Manchester: Juris Publishing, Manchester University Press, 2000); M. SORNARAJAH, *The International Law on Foreign Investment*, 2nd edn (Cambridge: Cambridge University Press, 2004).

countries is 198;[82] out of these 198, 152 are in force.[83] The surprise comes when one examines the NPM clauses in these BITs.[84]

Table 1. NPM provisions in BITs of South Asian countries

Country	Number of BITs signed	Number of BITs in force	NPM clause (in BITs which are in force)
Afghanistan	3	3	0[85]
Bangladesh	30	24	4[86]
Bhutan	0	0	NA
India	84	72	70
Maldives	0	0	NA
Nepal	6	4	1
Pakistan	46	25	2
Sri Lanka	29	24	3[87]
TOTAL	198	152[88]	80

Table 1 shows that India is the only country in this region which has NPM provisions in almost all of its BITs.[89] It is difficult to ascertain why other countries have not included NPM provisions more frequently in their BITs. Out of these 147 BITs studied, only eighty contain NPM provisions.[90] These numbers become more surprising when India is excluded from the list. South Asian countries, excluding India, have eighty BITs in force altogether, out of which only ten contain NPM provisions.[91] This number is not even close to ten percent of the total number of BITs signed by these countries. This certainly cannot be said to be an encouraging outcome for countries looking for more and more regulatory latitude. This section will now delve into the specific traits of the NPM provisions found in these BITs.

A. *Placement of NPM Clauses in BITs*

Generally, any BIT consists of three documents; the main body, the protocol, and the exchange of notes between the parties. NPM provisions in the BITs of South Asian countries are usually found in the main body.[92] However, "NPM-like provisions" have

82. *Supra* note 48.
83. *Ibid.*
84. *Ibid.*
85. This study does not include the Afghanistan-Iran BIT because of its unavailability in the public domain.
86. Study could be undertaken on only twenty-one BITs, as the other three BITs signed by Bangladesh are not available in the public domain.
87. Sri Lanka-Malaysia BIT could not be studied because of its unavailability in the public domain.
88. Though the total number of BITs which are in force is 152, research could only be done on 147 BITs as the texts of five BITs were not available in the public domain. These five BITs are Afghanistan-Iran, Sri Lanka-Malaysia, Bangladesh-China, Bangladesh-Singapore, and Bangladesh-Canada.
89. India does not have NPM provisions in BITs with Argentina and Russia.
90. See Table 1.
91. *Ibid.*
92. E.g. *Agreement Between the Government of the Republic of India and the Government of the Republic of Armenia for the Promotion and Protection of Investments* (signed 23 May 2003, entered into force 30 May 2006); *Agreement Between the Government of Republic of Finland and the Government of*

also been found in the protocols[93] and in the notes of exchange[94] between the Contracting Parties. The next subsection will examine the form and structure of NPM provisions in these BITs.

B. *Form and Structure of NPM Clauses in BITs*

Study relating to the formulation of NPM provisions can be made on the basis of the following two grounds:

1. Based on textual grounds;[95] and
2. Based on structural elements.[96]

1. *Textual grounds*

NPM provisions can be studied on the basis of the following textual traits:

(a) Model NPM provision;

(b) Modified Model NPM provision; and

(c) GATT Article XX type.

A model BIT is not a legally binding document.[97] It is a document drafted to provide a balance between investment and non-investment policies based on a country's own domestic policies by keeping in view the requirements and needs of that country for entering into future BITs. Thus, it provides a guideline to the state as to how the state will advance in future negotiations while concluding a BIT with another state.[98]

(a) *Model NPM provision* and (b) *Modified Model NPM provision*. These approaches basically shed light on the dynamics of NPM provision on the basis of the language of the NPM provision used in the model BIT of a country. Hence, these approaches are best suited for studying a country that has a model BIT. India[99]

Nepal on the Promotion and Protection of Investment (signed 3 February 2009, entered into force 28 January 2011), etc.

93. Ad art. 2, Protocol, Pakistan-Germany BIT; Ad art. 2, Protocol, Afghanistan-Germany BIT, etc.
94. If we see the exchange of letters between the parties in the Nepal-France BIT it provides for exceptions such as public morality and public order for fair and equitable treatment in art. 3. Little evidence has been found of NPM provisions in the exchange of notes in South Asian BITs. For more detail, see Table 2.
95. Inspiration has been taken from Ranjan, *supra* note 2.
96. Inspiration has been taken from Burke-White and Staden, *supra* note 1.
97. *SADC Model Bilateral Investment Treaty Template with Commentary*, 9 January 2015, Southern African Development Community July 2012, online: IISD <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf>.
98. *Ibid.*
99. *Indian Model Text of Bilateral Investment Promotion and Protection Agreement*, 2003, art. 13, online: <http://finmin.nic.in/the_ministry/dept_eco_affairs/icsection/Indian%20Model%20Text%20BIPA.asp>, "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".

and Sri Lanka[100] are the only countries that have model BITs in the South Asian region. The other countries in South Asia either do not have any model BIT, or are in the process of preparing one.[101] Hence, studying NPM provisions using this approach would not be the best way to proceed with the present study. However, a pertinent study relating to GATT Article XX-type provisions can be made through this approach.

(c) *GATT Article XX type*. Those NPM provisions which bear a resemblance to or which are close to the language of GATT Article XX[102] are called Article XX-type NPM provisions. Article XIV of the General Agreement on Trade in Services (GATS) has a similar form to Article XX of GATT.[103] To date, only around twenty-five to thirty BITs contain GATT- or GATS-like NPM provisions (XX-NPM) out of more than 2,900 BITs signed.[104]

In South Asia, XX-NPM provisions are rare. The only BIT which has a XX-NPM provision is the India-Colombia BIT.[105] Article 13 of this BIT contains a broad range of exceptions; however, only Article 13(5) of the BIT can be said to be a XX-NPM provision.[106] Although Article 13(5) resembles GATT Article XX, it varies from Article XX's original form. Still, it can be said that XX-NPM provisions provide enough space for regulatory discretion to host states. With this, I will now move on to the second approach, a study based on structural elements.

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100. Hamed AL-KADY, "Revision of Model BITs: Salient Features and Global Trends" (7 March 2015), online: Investment Policy Hub UNCTAD <http://investmentpolicyhub.unctad.org/Upload/Documents/DOWNLOAD13-UNCTAD_Revision%20of%20Model%20BITs.pdf> at 9.

101. Nida MEHMOOD, "Pakistan's BIT Dilemma" (19 January 2015), online: The Nation <http://nation.com.pk/columns/15-Jul-2013/pakistan-s-bit-dilemma>.

102. *General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187 (entered into force 1 January 1948), art. XX [*GATT*]; For a detailed study on art. XX jurisprudence, Mitsuo MATSUSHITA, Thomas J. SCHOENBAUM, and Petros C. MAVROIDIS, *The World Trade Organization: Law, Practice, And Policy*, 2nd edn (Oxford: Oxford University Press, 2006); Lorand BARTELS, "The Chapeau of Article XX GATT: A New Interpretation" (2014) University of Cambridge Faculty of Law Research Paper No. 40/2014; Juan OCHOA, "General Exceptions of Article XX of the GATT 1994 and Article XIV of the GATS" (12 April 2015), online: University of Oslo <http://www.uio.no/studier/emner/jus/jus/JUS5850/h12/tekster/ochoa-general-exceptions.pdf>.

103. *General Agreement on Trade in Services*, 1869 U.N.T.S. 183 (entered into force 1 January 1995) [*GATS*], art. XIV.

104. Andrew NEWCOMBE, "General Exceptions in International Investment Agreements", Draft Discussion Paper BIICL Eighth Annual WTO Conference, London, 13–14 May 2008, online: <http://www.biicl.org/files/3866_andrew_newcombe.pdf>.

105. *Agreement for the Promotion and Protection of Investments Between the Republic of Colombia and the Republic of India*, 10 November 2009 (entered into force 3 July 2013) [*India-Colombia BIT*].

106. Art. 13(5), India-Columbia BIT:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the investors of the other Contracting Party or a disguised restriction on investment of investors of a Contracting Party in the territory of the other Contracting Party, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Contracting Party of measures:
>
> a) necessary to maintain public order;
> b) necessary to protect human, animal, plant life or health;
> c) relating to the protection of the environment or the conservation of exhaustible natural resources, if such measures are made effective in conjunction with restrictions on domestic production or consumption;
> d) in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

2. *Structural elements*

This approach is best suited for the purposes of the present study. It has the following five components:

(a) Scope;

(b) Permissible objectives;

(c) Nexus requirement;

(d) Self-judging and non-self-judging NPM clauses; and

(e) Limitations on NPM Provisions.

(a) *Scope*. NPM provisions have a comprehensive scope. This means it precludes the regulatory measures taken by host states from incurring any obligations arising out of any provision of the treaty. However, there are also "limited scope exceptions" which apply only to one or some provisions of the treaty. It is argued here that these limited scope exceptions, which are narrow in scope, should not be conflated with NPM provisions. In this sense, this approach is different from that taken by William Burke-White and Andreas Von Staden, where they say that there can be two types of NPM provisions: first, NPM provisions with comprehensive scope, and second, NPM provisions with limited scope.[107] There is hardly any doubt that the NPM provisions are also called "general exceptions". *Black's Law Dictionary* defines the word "general" as "universal, not particularized".[108] It means that the term "general exception" would act as an exception having universal application. This, in the context of BITs, would mean that it would cover all the BIT provisions. So here the question arises: Can a general exception have limited scope? The answer to this, after making the analysis above, would be "no". Therefore, it is argued here that NPM provisions have only comprehensive scope. Thus, allowing the proposition that there can be two types of NPM provisions would not be correct; limited scope exceptions are specific treaty exceptions restricted to just one or two treaty provisions, and are different from NPM provisions. However, for the purposes of this section, a study shall be made as follows:

(i) NPM provisions with comprehensive scope; and

(ii) Exceptions with limited scope.

Most of the countries in the South Asian region contain both comprehensive scope and limited scope exceptions. Table 2 explains this dynamic. It is worth noting that all of the limited scope exceptions are found either in protocols or in notes of exchange in the BITs of the South Asian countries. Table 2 shows that even limited scope exceptions are not common in these BITs. They are in low numbers in the BITs of these countries.

(b) *Permissible objectives*. These basically specify, within the NPM provision, areas in which the state can exercise its regulatory authority to achieve its non-investment policy objectives without attracting any obligation created by the BIT. In other words, permissible

107. Burke-White and Staden, *supra* note 1 at 331.

108. Henry Campbell Black, *Black's Law Dictionary*, 4th edn (St Paul: West Publishing, 1968) at 812.

Table 2. NPM provisions with comprehensive and limited scope

Country	NPM clauses with comprehensive scope	Exceptions with limited scope
Afghanistan	0	1[109]
Bangladesh	4[110]	1[111]
Bhutan	NA	NA
India	70[112]	0
Maldives	NA	NA
Nepal	1[113]	2[114]
Pakistan	2[115]	1[116]
Sri Lanka	3[117]	1[118]

objectives mean those non-investment policy objectives that are listed in NPM provisions and for which the host country can deviate from its BIT obligations.[119] An attempt has been made to identify these permissible objectives in the BITs of South Asian countries in Table 3.

109. Protocol, Afghanistan-Germany BIT, art. 2.

110. *Agreement Between the Government of the Republic of India and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investments*, 2 February 2009 (entered into force 7 July 2011), art. 12 [*India-Bangladesh BIT*]; *Treaty Between the United States of America and the People's Republic of Bangladesh Concerning the Reciprocal Encouragement and Protection of Investment*, 12 March 1986 (entered into force 25 July 1989), art. X [*US-Bangladesh BIT*]; *Agreement Between the Government of People's Republic of Bangladesh and the Government of Republic of Uzbekistan on Reciprocal Protection and Promotion of Investments*, 18 July 2000 (entered into force 24 January 2001), art. 11 [*Uzbekistan-Bangladesh BIT*]; and *Agreement Between the Republic of Turkey and the People's Republic of Bangladesh Concerning the Reciprocal Encouragement and Protection of Investments*, 12 November 1987 (entered into force 21 June 1990), art. X [*Turkey-Bangladesh BIT*].

111. *Agreement Between the Federal Republic of Germany and the People's Republic of Bangladesh Concerning the Promotion and Reciprocal Protection of Investments*, 6 May 1981 (entered into force 14 September 1986), Protocol, art. 2 [*Bangladesh-Germany BIT*].

112. All seventy BITs (in force) entered into by India except India-Argentina BIT and India-Russia BIT.

113. Art. 14, Finland-Nepal BIT.

114. *Treaty Between the Federal Republic of Germany and the Kingdom of Nepal Concerning the Encouragement and Reciprocal Protection of Investments*, 20 October 1986 (entered into force 7 July 1988), Protocol, art. 3(a) [*Nepal-Germany BIT*]; *Agreement Between the Government of the Republic of France and the Government of the Majesty of the Kingdom of Nepal on the Reciprocal Encouragement and Protection of Investment*, 2 May 1983 (entered into force 13 June 1985), Exchange of letter 1 para. 2 [*Nepal-France BIT*].

115. *Agreement Between the Government of the Republic of Mauritius and the Government of the Islamic Republic of Pakistan for the Promotion and Reciprocal Protection of Investments*, 3 April 1997 (entered into force 3 April 1997), art. 12 [*Mauritius-Pakistan BIT*]; and *Agreement Between the Government of the Republic of Singapore and the Government of the Islamic Republic of Pakistan on the Promotion and Protection of Investments*, 8 March 1995 (entered into force 4 May 1995), art. 11 [*Singapore-Pakistan BIT*].

116. Art. 2, Pakistan-Germany BIT; Exchange of Notes 3, Pakistan-Germany BIT.

117. *Agreement Between the Government of the Democratic Socialist Republic of Sri Lanka and the Government of the People's Republic of China on the Reciprocal Promotion and Protection of Investments*, 13 March 1986 (entered into force 25 March 1987), art. 11 [*China-Sri Lanka BIT*]; *Agreement Between the Government of the Democratic Socialist Republic of Sri Lanka and the Government of the Republic of India for the Promotion and Protection of Investment*, 22 January 1997 (entered into force 13 February 1998), art. 12 [*India-Sri Lanka BIT*]; and *Treaty Between the United States of America and the Democratic Socialist Republic of Sri Lanka Concerning the Encouragement and Reciprocal Protection of Investment*, 20 September 1991 (entered into force 1 May 1993), art. X [*US-Sri Lanka BIT*].

118. *Treaty Between the Federal Republic of Germany and the Democratic Socialist Republic of Sri Lanka Concerning the Promotion and Reciprocal Protection of Investments*, 7 February 2000 (entered into force 16 January 2004), Protocol, art. 3(a) [*Sri Lanka-Germany BIT*].

119. Ranjan, *supra* note 2 at 35.

Table 3. Permissible objectives in NPM provisions in BITs of South Asian countries[120]

	Permissible objectives						
Country	Security	Public order	Public health	Public morality	International peace and security	Emergency situations	Misc.
Bangladesh	4	2	0	1	2	2	0
India	65	4	15	1	1	62	8[121]
Nepal	1	1	0	0	0	1	0
Pakistan	2	0	2	0	0	0	0
Sri Lanka	2	1	1	0	1	1	1[122]

Table 3 shows more emphasis has been placed on either essential security interests or circumstances of extreme emergency. Important permissible objectives like health, public order, environment, and morality have not been able to attract much attention from these countries.

(c) *Nexus requirement links*. Nexus requirement in an NPM clause is the link between adopted measures and the objective sought through those measures.[123] As the language of NPM provisions varies from one BIT to another, the wording in a nexus requirement link also varies from one NPM clause to another. For example, the NPM provision in the Armenia-India BIT[124] has "for" as its nexus requirement link,[125] whereas the Denmark-India BIT[126] has "necessary" as its nexus requirement link.[127] Therefore, the nexus requirement links can be worded differently; some examples are: "for",[128] "directed to",[129] "necessary",[130] and "relating to".[131] The significance of the nexus requirement

120. Numbers given under every permissible objective are indicative of the number of times these permissible objectives have been used as an independent permissible objective in NPM provisions of the BITs of South Asian countries; for detailed study see Section III.

121. These miscellaneous provisions are: tax (India-Colombia BIT); illegal activities (India-Colombia BIT); measures relating to financial services for prudential reasons (India-Colombia BIT); measures relating to vital interests (India-Uzbekistan BIT); armed conflict (India-Italy BIT); national emergency situations (India-Italy BIT); civil disturbance (India-Italy BIT); and environment related measures (India-Colombia BIT).

122. Art. 11, China-Sri Lanka BIT, provides for, "protection of its national interest".

123. Ranjan, *supra* note 2 at 47.

124. *Agreement Between the Government of the Republic of India and the Government of the Republic of Armenia for the Promotion and Protection of Investments*, 23 May 2015 (entered into force 30 May 2006) [*India-Armenia BIT*].

125. Art. 12 of Armenia-India BIT: "nothing in this Agreement precludes the host Contracting Party from taking action *for* the protection of …" (emphasis added).

126. India and Denmark, *Agreement Concerning the Promotion and Reciprocal Protection of Investments*, New Delhi, 6 September 1995 (entered into force 28 August 1996) [*India-Denmark BIT*].

127. Art. 12 of Denmark-India BIT: "Nothing in this Agreement precludes the host Contracting Party from taking *necessary* measures in accordance with its laws normally and reasonably applied …" (emphasis added).

128. *Supra* note 124.

129. *Agreement Between the Government of the Republic of Mauritius and the Government of the Republic of India for the Promotion and Protection of Investments*, 4 September 1998 (entered into force 20 June 2000) [*India-Mauritius BIT*].

130. India-BLEU BIT.

131. India-Colombia BIT.

link lies in the fact that it determines the degree of connection between the measures taken and the objective sought.[132] Table 4 identifies the various nexus requirement links used in NPM provisions in the BITs of South Asian countries.

Table 4. Nexus requirement links in NPM provisions in BITs of South Asian countries

Country	Nexus requirement links/(number of times used in BITs having NPM clause)
Bangladesh	1. for (1)[133]
	2. necessary (2)[134]
	3. to (1)[135]
India	1. for (49)[136]
	2. necessary (20)[137]
	3. relating to (2)[138]
	4. directing to (1)[139]
	5. to (2)[140]
	6. in pursuance of (1)[141]
Nepal	1. necessary (1)[142]
Pakistan	1. directed to (2)[143]
Sri Lanka	1. directed to (1)[144]
	2. for (1)[145]
	3. necessary (1)[146]

132. Ranjan, *supra* note 2 at 47; e.g. "necessary" is stricter than "related to"; *United States-Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body of World Trade Organization, 21-2, WTO Doc No WT/DS2/AB/R (29 April 1996), at 17–18.

133. India-Bangladesh BIT.

134. US-Bangladesh BIT, and Turkey-Bangladesh BIT.

135. Uzbekistan-Bangladesh BIT.

136. Armenia-India BIT, Bahrain-India BIT, Bangladesh-India BIT, Belarus-India BIT, Brunei-India BIT, Bulgaria-India BIT, China-India BIT, Croatia-India BIT, Cyprus-India BIT, Egypt-India BIT, Greece-India BIT, Hungary-India BIT, Iceland-India BIT, Portugal-India BIT, Indonesia-India BIT, Israel-India BIT, Jordon-India BIT, Kazakhstan-India BIT, Kyrgyzstan-India BIT, Lao-India BIT, Latvia-India BIT, Libya-India BIT, Lithuania-India BIT, Macedonia-India BIT, Mexico-India BIT, Mongolia-India BIT, Mozambique-India BIT, Myanmar-India BIT, Oman-India BIT, Philippines-India BIT, Poland-India BIT, Qatar-India BIT, Romania-India BIT, Serbia-India BIT, Slovakia-India BIT, Sri Lanka-India BIT, Sudan-India BIT, Syria-India BIT, Taiwan-India BIT, Tajikistan-India BIT, Thailand-India BIT, Trinidad and Tobago-India BIT, Turkey-India BIT, Turkmenistan-India BIT, Ukraine-India BIT, United Kingdom-India BIT, Vietnam-India BIT, Yemen-India BIT, Switzerland-India BIT.

137. Australia-India BIT, Austria-India BIT, BLEU-India BIT, Bosnia and Herzegovina-India BIT, Colombia-India BIT, Czech-India BIT, Denmark-India BIT, Finland-India BIT, France-India BIT, Germany-India BIT, Korea-India BIT, Kuwait-India BIT, Malaysia-India BIT, Morocco-India BIT, Netherlands-India BIT, Saudi Arabia-India BIT, Sweden-India BIT, Spain-India BIT; Nexus Requirement Link "necessary" has been used *three times* in India-Colombia BIT in its different subclauses.

138. Colombia-India BIT; Nexus Requirement Link "relating to" has been used *twice* in India-Colombia BIT in its different subclauses.

139. Mauritius-India BIT.

140. Italy-India BIT, and Uzbekistan-India BIT.

141. Colombia-India BIT.

142. Finland-Nepal BIT.

143. Mauritius-Pakistan BIT, and Singapore-Pakistan BIT.

144. China-Sri Lanka BIT.

145. India-Sri Lanka BIT.

146. US-Sri Lanka BIT.

Table 4 shows various nexus requirement links as applied in the NPM provisions. Sometimes one NPM clause uses more nexus links through various sub-clauses in the provision. This can be shown in the case of India, where the total number of nexus requirement links that are shown in Table 4 is seventy-five, while the number of BITs with NPM provisions counts only seventy, which technically means there should have been only seventy nexus requirement links. However, a study of the NPM provision of the India-Colombia BIT reveals that the NPM provision uses four nexus requirement links through several of its sub-provisions.[147]

(d) *Self-judging and non-self-judging NPM clauses*. Self-judging clauses appear in a number of treaties (mutual assistance, extradition, trade, investment, private international law).[148] Any provision having self-judging characteristics will have three basic traits or elements: first, the state will have enough space for unilateral considerations, i.e. the state will have the right to ascertain the legality of extraordinary measures; second, the provision allows for independent assessment by the state claiming derogation and thus grants the state discretion to do so; and third, the threshold for the standard of review by the tribunal or court will get diluted to the examination of just good faith by the tribunal.[149]

What makes these provisions special is the manner in which they are drafted; therefore, it is the construction of the language of a particular provision rather than its content that is important. The phrase "if the requested state considers" grants the state enough discretion to take any measure to protect its essential interests without being subjected to the external evaluation of measures taken by it. Different drafting techniques are used to grant such kinds of discretion in different international treaties, which is expressed in phrases such as "if the state considers", "in the state's opinion", or "if the state determines", etc.[150] Also, the presence of self-judging clauses in treaty provision cannot be presumed; it has to be expressly incorporated in the treaty.[151]

It is pertinent here to also discuss non-self-judging clauses (NSJCs). NSJCs come into play when treaty provisions explicitly or implicitly do not specify the degree of deference to be accorded to the invocation of NPM provisions by one of the parties.[152] In other words, it becomes the job of the tribunal to determine the deference to be given to the state's determination. Thus it does not grant the parties the discretion to evaluate their own situation. Rather, it posits an objective test of whether the exception is applicable in any given circumstances.[153] To put it simply, it does not leave any discretion with the parties.

147. Art. 13, India-Colombia BIT.
148. Stephen SCHILL and Robyn BRIESE, "If the State Considers: Self-Judging Clauses in International Dispute Settlement" (2009) 13 Max Planck Yearbook of United Nations Law 61–140.
149. *Ibid*.
150. Burke-White and Staden, *supra* note 1.
151. Schill and Briese, *supra* note 148.
152. Burke-White and Staden, *supra* note 1 at 376.
153. Schill and Briese, *supra* note 148.

Table 5. Self-judging and non-self-judging clauses

Country	Number of self-judging clauses (SJC)	Number of non-self-judging clauses (NSJC)
Bangladesh	0	4
India	1[154]	69
Nepal	0	1
Pakistan	0	2
Sri Lanka	0	3

Table 6. Limitations on NPM provisions

Country	Conditions/Limitations used in NPM provisions
Bangladesh	1. in accordance with its laws normally (2)[155] 2. reasonably (1)[156] 3. non-discriminatory manner (2)[157]
India	1. in accordance with its laws normally (62)[158] 2. reasonably (52)[159] 3. non-discriminatory manner (67)[160] 4. good faith (5)[161] 5. no arbitrary or unjustifiable discrimination (2)[162] 6. judicial review (1)[163] 7. in exceptional circumstances (1)[164]
Nepal	1. no arbitrary or unjustifiable discrimination (1)[165] 2. no disguised investment restriction (1)[166]
Pakistan	NO CONDITIONS
Sri Lanka	1. in accordance with its laws normally (1)[167] 2. reasonably (1)[168] 3. non-discriminatory manner (1)[169]

Against this background, where SJCs can provide much discretion to a state to justify its actions without incurring any international obligation, a study of the BITs of South Asian countries is much needed. Table 5 lists the number of BITs that have SJCs or NSJCs. Thus it can be seen here that, except on one occasion, in all NPM provisions the language is of NSJCs only. It means less discretion while justifying the measure taken by the party for breach of treaty provisions.

154. Art. 13(4), India-Colombia BIT.
155. India-Bangladesh BIT, and Uzbekistan-Bangladesh BIT.
156. India-Bangladesh BIT.
157. India-Bangladesh BIT, and Uzbekistan-Bangladesh BIT.
158. India-Armenia BIT, Australia-India BIT, Austria-India BIT, Bahrain-India BIT, Bangladesh-India BIT, Belarus-India BIT, Bosnia and Herzegovina-India BIT, Brunei-India BIT, Bulgaria-India BIT, China-India BIT, Colombia-India BIT, Croatia-India BIT, Cyprus-India BIT, Czech-India BIT, Denmark-India BIT, Egypt-India BIT, Finland-India BIT, France-India BIT, Hungary-India BIT, Iceland-India BIT, Portugal-India BIT, Indonesia-India BIT, Israel-India BIT, Jordon-India BIT, Kazakhstan-India BIT, Korea-India

(e) *Limitations on NPM provisions*. Almost all NPM provisions contain some restrictions or limitations on their applicability. Common conditions/limitations to which NPM provisions are subjected are "non-discriminatory", "reasonable", "good faith", etc. Table 6 lists this dynamic in more detail. Thus it can be seen here that there is no dearth of limitations which restrict the invocation of NPM provisions. This certainly creates balance between the regulatory space of the host state and the protection of investments.

This ends the analysis of the anatomy of NPM provisions. The next section will explain the permissible objectives in the NPM provisions of South Asian countries.

BIT, Kuwait-India BIT, Kyrgyzstan-India BIT, Lao-India BIT, Latvia-India BIT, Libya-India BIT, Lithuania-India BIT, Macedonia-India BIT, Malaysia-India BIT, Mexico-India BIT, Mongolia-India BIT, Morocco-India BIT, Mozambique-India BIT, Myanmar-India BIT, Netherlands-India BIT, Oman-India BIT, Philippines-India BIT, Poland-India BIT, Qatar-India BIT, Romania-India BIT, Saudi Arabia-India BIT, Serbia-India BIT, Slovakia-India BIT, Sri Lanka-India BIT, Sudan-India BIT, Sweden-India BIT, Syria-India BIT, Taiwan-India BIT, Tajikistan-India BIT, Thailand-India BIT, Trinidad and Tobago-India BIT, Turkey-India BIT, Turkmenistan-India BIT, Ukraine-India BIT, United Kingdom-India BIT, Uzbekistan-India BIT, Vietnam-India BIT, Yemen-India BIT, Italy-India BIT, Spain-India BIT, Switzerland-India BIT.

159. India-Armenia BIT, Australia-India BIT, Bahrain-India BIT, Bangladesh-India BIT, Belarus-India BIT, Brunei-India BIT, Bulgaria-India BIT, China-India BIT, Colombia-India BIT, Croatia-India BIT, Cyprus-India BIT, Denmark-India BIT, Egypt-India BIT, Hungary-India BIT, Iceland-India BIT, Indonesia-India BIT, Israel-India BIT, Jordon-India BIT, Kazakhstan-India BIT, Korea-India BIT, Kyrgyzstan-India BIT, Lao-India BIT, Latvia-India BIT, Libya-India BIT, Lithuania-India BIT, Macedonia-India BIT, Malaysia-India BIT, Mexico-India BIT, Mongolia-India BIT, Morocco-India BIT, Mozambique-India BIT, Myanmar-India BIT, Oman-India BIT, Philippines-India BIT, Poland-India BIT, Qatar-India BIT, Romania-India BIT, Saudi Arabia-India BIT, Serbia-India BIT, Slovakia-India BIT, Sri Lanka-India BIT, Sudan-India BIT, Sweden-India BIT, Syria-India BIT, Taiwan-India BIT, Tajikistan-India BIT, Thailand-India BIT, Trinidad and Tobago-India BIT, Turkey-India BIT, Turkmenistan-India BIT, Ukraine-India BIT, United Kingdom-India BIT, Vietnam-India BIT, Yemen-India BIT, Italy-India BIT, Spain-India BIT, Switzerland-India BIT.

160. India-Armenia BIT, Australia-India BIT, Austria-India BIT, Bahrain-India BIT, Bangladesh-India BIT, Belarus-India BIT, Bosnia and Herzegovina-India BIT, Brunei-India BIT, Bulgaria-India BIT, China-India BIT, Colombia-India BIT, Croatia-India BIT, Cyprus-India BIT, Czech-India BIT, Denmark-India BIT, Egypt-India BIT, Finland-India BIT, France-India BIT, Greece-India BIT, Hungary-India BIT, Iceland-India BIT, Portugal-India BIT, Indonesia-India BIT, Israel-India BIT, Jordon-India BIT, Kazakhstan-India BIT, Korea-India BIT, Kuwait-India BIT, Kyrgyzstan-India BIT, Lao-India BIT, Latvia-India BIT, Libya-India BIT, Lithuania-India BIT, Macedonia-India BIT, Malaysia-India BIT, Mexico-India BIT, Mongolia-India BIT, Morocco-India BIT, Mozambique-India BIT, Myanmar-India BIT, Netherlands-India BIT, Oman-India BIT, Philippines-India BIT, Poland-India BIT, Qatar-India BIT, Romania-India BIT, Saudi Arabia-India BIT, Serbia-India BIT, Slovakia-India BIT, Sri Lanka-India BIT, Sudan-India BIT, Sweden-India BIT, Syria-India BIT, Taiwan-India BIT, Tajikistan-India BIT, Thailand-India BIT, Trinidad and Tobago-India BIT, Turkey-India BIT, Turkmenistan-India BIT, Ukraine-India BIT, United Kingdom-India BIT, Uzbekistan-India BIT, Vietnam-India BIT, Yemen-India BIT, Italy-India BIT, Spain-India BIT, Switzerland-India BIT.

161. Bosnia and Herzegovina-India BIT, Czech-India BIT, France-India BIT, Korea-India BIT, and Netherlands-India BIT.

162. Colombia-India BIT, and Croatia-India BIT.

163. Israel-India BIT.

164. India-Switzerland BIT.

165. Nepal-Finland BIT.

166. Nepal-Finland BIT.

167. India-Sri Lanka BIT.

168. India-Sri Lanka BIT.

169. India-Sri Lanka BIT.

III. PERMISSIBLE OBJECTIVES IN NPM PROVISIONS

This section undertakes the study of each permissible objective found in the BITs of South Asian countries.

A. *Essential Security Interest*

Out of the eighty BITs having NPM provisions in this region,[170] seventy-three have an essential security interest (ESI) as one of the permissible objectives.[171] Given the fact that these BITs use few permissible objectives in the NPM provisions, ESI assumes importance as it can be used for both security and non-security issues.[172] However, before an ESI can be used to exonerate the state from defaulting on its international law obligation, the state will have to prove that the measures taken were "essential" for its security interest. Now the question arises: What is the meaning of "essential" here? Some scholars have argued that the ordinary meaning of essential is "vitally important".[173] *Black's Law Dictionary* provides for the meaning of essential as "indispensably necessary" or "important in the highest degree" or "requisite".[174] This means that the word "essential" before "security interest" sets a high threshold for a state to prove that the security interests taken are indispensably necessary. Once it is settled that security interests can be applied only in situations of the highest degree of importance, we should turn our attention to the meaning and scope of the term "security interest". For this purpose, an enquiry should be made into understanding the word "security". To start with the investment law regime, NAFTA, Chapter XXI, in its Article 2102, contains ESI as an exception and provides an exhaustive list of exceptions under ESI; however, it is mainly concerned with war, traffic in arms, etc.[175] The Energy Charter Treaty, Article 24, on exceptions, provides for the protection of the essential security interests of its signatories. However, it also stipulates ESI in terms of military necessity, war, and armed conflict.[176] In FTAs, Article 10(18)(2)(b) of the India-Korea IIA[177] and Article 6(12)(1)(b) of the India-Singapore IIA[178] also provides for ESI, but again in the context of the military and war, etc. Thus most of these instruments provide for the meaning of ESI in the provision itself. However, what happens if the provision is silent on the scope or meaning of ESI? It has been argued by many scholars that a plain reading should be taken while interpreting ESI;[179]

170. See Table 1.
171. See Table 3.
172. Ranjan, *supra* note 2 at 36.
173. *Ibid*., at 37.
174. Black, *supra* note 108 at 718.
175. *North American Free Trade Agreement*, 32 I.L.M. 289 (1993).
176. *Energy Charter Treaty*, 34 I.L.M. 360 (1995); "Essential Security Interests Under International Investment Law, International Investment Perspectives: Freedom of Investment in a Changing World" (2007 edn, OECD) 93.
177. *Comprehensive Economic Partnership Agreement Between Republic of India and Republic of Korea*, 7 August 2009 (entered into force 1 January 2010), art. 10(18)(2).
178. *Comprehensive Economic Partnership Agreement Between Republic of India and Republic of Singapore*, 29 June 2005 (entered into force 1 January 2005), art. 6(12)(1)(b).
179. August REINISCH, "Necessity in International Investment Arbitration—an Unnecessary Split of Opinions in Recent ICSID Cases?" (2007) 7 Journal of World Investment and Trade 191 at 209;

however, there are also many investment law scholars who have argued for a broad meaning of ESI.[180] Also, the broad meaning given to ESI by various investment arbitration tribunals while interpreting Article 11 of the US-Argentina BIT provides an alternate interpretation for ESI.[181] These tribunals held that the inclusion of economic emergency within the meaning of ESI was justified;[182] thus they gave a broad meaning to the term ESI.

In the WTO regime, two important exceptions pertinent to the present study are the general exceptions[183] and security exception[184] of GATT. However, in BITs such types of demarcation have not been observed, which means ESI deals with both security and non-security issues.[185] Thus, ESI in BITs is different from in Article XXI of GATT, which only provides for security exceptions. ESI in BITs is used in a general sense, as it covers more issues than just conventional security related issues.

With the evolution of international law, the meaning of security has also changed from its conventional meaning of state security in war or armed conflict to various other issues.[186] It now encompasses diverse issues such as economic

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José E. ALVAREZ and Kathryn KHAMSI, "The Argentine Crisis and Foreign Investors" (2008–09) 1 Oxford Yearbook of Investment Law and Policy 379; William J. MOON, "Essential Security Interests in International Investment Agreements" (2012) 15 Journal of International Economic Law 481.

180. Andrew NEWCOMBE and Lluís PARADELL, *Law and Practice of Investment Treaties: Standards of Treatment* (Alphen Aan Den Rijn: Kluwer Law International, 2009) at 497–9; Tarsicio GAZZINI, "Foreign Investment and Measures Adopted on Grounds of Necessity: Towards a Common Understanding" (2010) 7 Transnational Dispute Management, 1 at 17–18; Prabhash RANJAN, "Protecting Security Interests in International Investment Law" in Mary FOOTER, Julia SCHMIDT, and Nigel D. WHITE, eds., *Security and International Law* (Oxford: Hart Publishing, 2016).

181. *Supra* note 13.

182. *CMS*, *supra* note 13 at para. 360; *LG&E*, *supra* note 13 at para. 238; *Sempra*, *supra* note 13 at para. 374; *Enron*, *supra* note 13 at para. 332.

183. *GATT*, art. XX, *supra* note 102.

184. *GATT*, art. XXI, *supra* note 102.

185. Ranjan, *supra* note 180.

186. Hitoshi NASU, "The Expanded Conception of Security and International Law: Challenges to the UN Collective Security System" (2011) 3 Amsterdam Law Forum 15–33; for a detailed study on security, David A. BALDWIN, "The Concept of Security" (1997) 23 Review of International Studies 5–26; Barry BUZAN, *People, States and Fear: The National Security Problems in International Relations* (Brighton: Wheatsheaf, 1983) at 6; Jessica T. MATHEWS, "Redefining Security" (1989) 68 Foreign Affairs 162–77; Richard H. ULLMAN, "Redefining Security" (1983) 8 International Security 129–53; Mariano-Florentino CUÉLLAR, "Reflections on Sovereignty and Collective Security" (2004) 40 Stanford Journal of International Law 230–9; Gershon SHAFIR, "Legal and Institutional Responses to Contemporary Global Threats: An Introduction to the U.N. Secretary-General's High-Level Panel Report on Threats, Challenges and Change" (2007) 38 California Western International Law Journal 6–14; William M. REISMAN, "In Defense of World Public Order" (2001) 95 American Journal of International Law 834; Gianluca GENTILI, "European Court of Human Rights: An Absolute Ban on Deportation of Foreign Citizens to Countries Where Torture or Ill-treatment is a Genuine Risk" (2010) 8 International Journal of Constitutional Law 311–22; Lena SKOGLUND, "Diplomatic Assurances Against Torture—An Effective Strategy? A Review of Jurisprudence and Examination of the Arguments" (2008) 77 Nordic Journal of International Law 319–64; David P. FIDLER, "The UN and the Responsibility to Practice Public Health" (2005) 2 Journal of International Law and International Relations 58–9; Lorraine ELLIOTT, "Imaginative Adaptations: A Possible Environmental Role for the UN Security Council?" (2003) 24 Contemporary Security Policy 47–68; Crispin TICKELL, "The Inevitability of Environmental Security" in Gwyn PRINS, ed., *Threats Without Enemies: Facing Environmental Insecurity* (London: Earthscan 1993), 23; UN General Assembly Thematic Debate on Human Security, New York, 22 May 2008 (25 June 2011), online: UN <http://www.un.org/ga/president/62/ThematicDebates/humansecurity.shtml>; Gary KING and Christopher J.L. MURRAY, "Rethinking Human Security" (2001) 116 Political Science

security,[187] environmental security,[188] energy and resource security,[189] food security,[190] bio-security,[191] and health security,[192] etc. This reasoning bolsters the proposition that the scope of ESI has been broadened to encompass even the conventionally non-security-related issues.

To analyze this aspect in the context of South Asia, almost all ESI provisions in South Asian BITs are silent on their content.[193]Also, some of the NPM provisions in these BITs use different words, like "vital interests and security",[194] "war, armed conflict, national emergency or civil disturbances",[195] and "national interest".[196] To deal with these terms separately, "vital interest" basically grants the state the freedom from international obligations when circumstances adversely affect its prestige or potentially threaten its existence.[197] "National emergency" is a broad term; it includes more than just security interest. The *LG&E* Tribunal accepted that economic crisis can be subsumed either under "essential security interest" or under "national emergency".[198] It again should be left to a margin of appreciation decided on by the state, as different states have a different understanding of the matter.[199] "National interest" brings down the threshold of proving an emergency situation, as the more strict term "emergency" is absent; it provides that states will only have to show that the measures

Quarterly 585–610; Amitav ACHARYA, "Human Security: East Versus West" (2001) 56 International Journal 442 at 460.

187. Vincent CABLE, "What is International Economic Security?" (1995) 71 International Affairs 305–24.

188. Simon DALBY, *Security and Environmental Change* (Cambridge: Polity Press, 2009) at chapter 2; Simon DALBY, *Environmental Security*, 1st edn (Minneapolis: University of Minnesota Press, 2002).

189. Sam RAPHAEL and Doug STOKES, "Energy Security" in Alan COLLINS, ed., *Contemporary Security Studies,* 2nd edn (Oxford: Oxford University Press, 2010), 306–17.

190. Wael ALLAM, "Food Supply Security, Sovereignty and International Peace and Security: Sovereignty as a Challenge to Food Supply Security" in Ahmed MAHIOU and Francis SNYDER, eds., *Food Security and Food Safety* (Leiden: Martinus Nijhoff Publishers, 2006) 325–50; Melaku G. DESTA, "Food Security and International Trade Law: An Appraisal of the World Trade Organisation Approach" (2001) 35 Journal of World Trade 449–68.

191. David P. FIDLER and Lawrence O. GOSTIN, *Biosecurity in the Global Age: Biological Weapons, Public Health, and the Rule of Law* (Stanford: Stanford University Press, 2008); Mark WHEELIS and Malcolm DANDO, "Neurobiology: A Case Study of the Imminent Militarisation of Biology" (2005) 87 International Review of the Red Cross 553–71; David L. HEYMANN, "The Evolving Infectious Disease Threat: Implications for National and Global Security" (2003) 4 Journal of Human Development 191–207.

192. David P. FIDLER, "From International Sanitary Conventions to Global Health Security: The New International Health Regulations" (2005) 4 Chinese Journal of International Law 325–92; Lincoln CHEN and Vasant NARASIMHAN, "Human Security and Global Health" (2003) 4 Journal of Human Development 181–90.

193. Except for the Nepal-Finland BIT.

194. Uzbekistan-India BIT; Uzbekistan-Bangladesh BIT.

195. Italy-India BIT.

196. China-Sri Lanka BIT.

197. Michael J. HAHN, "Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception" (1991) 12 Michigan Journal of International Law 558 at 562.

198. *LG&E*, *supra* note 13 at para. 244.

199. National emergency provisions in the constitutions of South Asian countries are quite different from each other; art. 352 of the Indian Constitution; arts. 232, 233 of the Constitution of Pakistan; arts. 141A, 141B, and 141C of the Constitution of Bangladesh; art. 220 of the Constitution of Sri Lanka; chapter 9, arts. 143–148 of the Constitution of Afghanistan; and part 19, art. 143 of the Interim Constitution of Nepal.

taken were in the interest of the country. What is "interest" will again have to be left to the host state. The Nepal-Finland BIT is the only BIT having an NPM clause that provides for the protection of ESI in time of war or armed conflict, or other emergency in international relations.[200] Thus it imposes upon the state a condition that security interests should be used only in a time of war or armed conflict, or other emergency in international relations. The phrase "other emergency in international relations" can also be found in Article XXI(b)(iii) of GATT, and in Article 2102(1)(b)(ii) of NAFTA.[201] This term is certainly broader than "war" or "armed conflict"; despite its vague structure, the expression is independent of any other term used here. The term "emergency" is more serious in nature, different from routine tensions or disagreements. The phrase could apply to those international situations which involve the future threat of war or armed conflict. Also, "emergency" can refer to an economic, social, or political situation as well. The best reading of this phrase would thus allow it to be used in almost all situations of a serious nature.[202]

As has already been discussed in Section II, self-judging clauses can play a vital role in providing states with a large regulatory space. Therefore, if ESI does not provide for its content, it means that a state through its SJC can determine the meaning of ESI. Among the BITs in South Asian countries, only one BIT has a SJC in its NPM provision;[203] the other BITs having NPM provision are non-self-judging.

Given the fact that all South Asian countries are grappling with various regional problems, for example terrorism, financial problems, or issues relating to natural calamities,[204] ESI can play a vital role by providing justification for regulatory measures taken in cases of the above-mentioned regional problems. Since regional problems can best be understood by the countries in that particular region, it is argued here that the margin of appreciation should always be given to the host states.

B. *Public Order*

Public order as a permissible objective has not been used very frequently in the BITs of South Asian countries. It appears in only eight of these BITs.[205] In the context of India, public order appears in four BITs: Colombia-India, Portugal-India, Morocco-India, and Qatar-India. Article 13(5) of the India-Colombia BIT poses a high threshold for the use of this exception as it is qualified by the word "necessary", which means that only in situations of extreme urgency can the public order exception be invoked. The chapeau of this provision also puts some limitations on the use of exceptions given under it.[206] The Portugal-India and Qatar-India BITs do not put any limitation on the

200. Finland-Nepal BIT.

201. *North American Free Trade Agreement*, 17 December 1992, U.S.-Can.-Mex., art. 2102(1)(b)(ii), 32 I.L.M. 605, 699–700 (1993).

202. Matsushita *et al.*, *supra* note 102 at 596–7; Dapo AKANDE and Sope WILLIAMS, "International Adjudication on National Security Issues: What Role for the WTO?" (2003) 43 Virginia Journal of International Law 365 at 400.

203. Art. 13(4), India-Colombia BIT.

204. Burke-White and Staden, *supra* note 1 at 407.

205. See Table 3.

206. The chapeau puts limitations on measures; for example, the use of the exceptions must not be arbitrary or unjustifiable, and there must not be disguised restriction on investment.

invocation of this exception except that the measure should be used in a non-discriminatory manner. However, the Qatar-India BIT, apart from having a permissible objective of "public order", provides for "morality affecting public order" as a separate permissible objective. It means that this permissible objective can be invoked only in those situations where public order is affected by issues of morality. The Morocco-India BIT sets a higher threshold as it provides for "strictly necessary" as a qualification for public order to be used as an exception. This "strictly necessary" requirement is more stringent than the "necessary" requirement. It means a state seeking to justify its actions under an NPM provision will have to show that it fulfils the requirements of the "strictly necessary" test. Pakistan does not have public order as a permissible objective in its BITs. This is surprising given that the public order situation in Pakistan has faced many problems in the past, and indeed in the present;[207] in this situation it is suggested that Pakistan should include public order as a permissible objective in its BITs. Bangladesh has two BITs containing public order as a permissible objective: the US-Bangladesh and Turkey-Bangladesh BITs. Both of these BITs require a high-threshold necessity test to be passed in order to justify state action to invoke public order exception. In Sri Lanka, the public order exception appears only in the US-Sri Lanka BIT. It again sets a high-threshold requirement: "necessary". Nepal, in its Finland-Nepal BIT, contains a public order exception. It also sets a high threshold for exceptions to be invoked by states as it provides for "necessary" as a requirement to be satisfied.

The meaning of "public order" differs from one jurisdiction to another.[208] For example, in France, Italy, and Switzerland, it plays a fundamental and even constitutional role; whereas in the US and Germany, it is used to describe a class of offences and sum of behavioural norms, respectively.[209] Also, in the *US Gambling* case in the WTO, the panel acknowledged that the meaning of "public order" can vary in time and space and it depends on various factors such as social, cultural, ethical, and religious values.[210] Thus, an attempt to ascertain the meaning in international law using Article 31 of Vienna Convention on the Law of Treaties (VCLT) shall be made.

1. *Ordinary meaning*

In the absence of any clear text available in these BITs, the dictionary meaning shall be taken to define the term. The fourth edition of *Black's Law Dictionary,* though, does not provide for the definition of "public order"; however, it does provide for the definition of "disorder". It defines "disorder" as "turbulent or riotous behaviour;

207. "Defence Notes" (12 March 2015), online: Defence Journal <http://www.defencejournal.com/april98/security&defence2.htm>; Iftikhar Tariq KHANZADA, "Pakistan and the Daily Deteriorating Law and Order Situation" (10 April 2015), online: Liberty Voice <http://guardianlv.com/2013/11/pakistan-and-the-daily-deteriorating-law-and-order-situation/>; "Law and Order Situation in Pakistan" (12 March 2015), online: <http://prr.hec.gov.pk/Chapters/1834-3.pdf>.

208. Burke-White and Staden, *supra* note 1 at 357; George H. DESSION, "The Technique of Public Order: Evolving Concepts of Criminal Law" (1955) 5 Buffalo Law Review 22.

209. Security-Related Terms in International Investment Law and in National Security Strategies, OECD, May 2009.

210. *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* Panel Report, WT/DS285/R (10 November 2004), para. 6.461.

immoral or indecent conduct; the breach of public decorum and morality".[211] However, the ninth edition of *Black's Law Dictionary* defines disorder as "A public disturbance; a riot <civil disorder>".[212] Thus, the meaning of "public order" can be ascertained as the absence of disorder.

2. *Object and purpose*

The preamble of any BIT can be relied upon to determine the object and purpose of the treaty. However, different BITs have different preambles. Thus, ascertaining one uniform meaning of "public order" is not possible. Therefore, imposing on a country an internationally uniform definition of "public order", which may not correspond to the country's own values and might prevent the country from justifying a measure based on its domestic order, would go against the object and purpose of that BIT.[213]

It is possible that the scope and meaning of "public order" was purposely not included in the BITs. Thus, it is suggested that the arbitral tribunals should give due deference to the country concerned while interpreting "public order".

C. *Public Health*

Human health has been recognized by the WTO as being "important in the highest degree".[214] The safety of public health is no doubt a matter of the utmost importance for any state. However, bound by the obligations of BITs, states sometimes give up on welfare measures that might go against its BIT obligations.[215] Therefore, it would be wise to include issues like public health exceptions in BITs. To look at the situation in South Asia, public health appears in nineteen BITs of South Asian countries.[216] This Article includes formulations such as "for the prevention of diseases or pests",[217] "the prevention of diseases and pests in animals or plants",[218] or "to protect human, animal, plant life or health",[219] etc., within the ambit of public health. This paper shall refer to them as "public health-related provisions". These formulations are broad in scope, as compared to "public health exceptions", as they also include life and health issues for animals and plants.[220] It means that the host

211. Black, *supra* note 108 at 556.

212. Bryan A. GARNER, *Black's Law Dictionary*, 9th edn (St Paul, MN: West Thompson Reuters Business, 2009) 538.

213. Nicolas F. DIEBOLD, "The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger And the Undermining Mole" (2008) 11 Journal of International Economic Law 43 at 54.

214. WTO Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-containing Products*, WT/DS135/AB/R, 12 March 2001, para. 172; WTO Agreements and Public Health, Summary Executive at p. 11, online: <https://www.wto.org/english/res_e/booksp_e/who_wto_e.pdf>.

215. Ranjan, *supra* note 180 at ftn. 38:

> While BITs do not prohibit states from adopting regulatory measures of any kind, states will have to pay damages to foreign investors if these regulatory measures are found to be inconsistent with their BIT obligations. This dissuades states from adopting such regulatory measures.

216. See Table 3.

217. Australia-India BIT.

218. China-Sri Lanka BIT.

219. Colombia-India BIT.

220. Ranjan, *supra* note 2 at 46.

state can also take measures in cases of the failure of crops or spread of diseases in animals. Also, it becomes relatively easy to prove the condition of public health emergencies as the host state only needs scientific evidence to prove its existence or continuance, as compared to security-related issues.[221] The WTO regime, through the jurisprudence of the cases decided by panels and appellate bodies, also provides guiding principles in understanding public health exceptions and their applicability.[222]

In terms of South Asia, India has fifteen BITs having public health or public health-related provisions: Australia-India,[223] BLEU-India,[224] Bosnia and Herzegovina-India,[225] Colombia-India,[226] Czech-India,[227] Denmark-India,[228] France-India,[229] Germany-India,[230] Korea-India,[231] Kuwait-India,[232] Malaysia-India,[233] Mauritius-India,[234] Netherlands-India,[235] Italy-India,[236] and Spain-India.[237] Pakistan has public

221. Burke-White and Staden, *supra* note 1 at 361.

222. For further study, Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos–Containing Products*, paras. 16, 27, WT/DS135/AB/R (12 March 2001); *Thailand-Restrictions on Importation of Cigarettes*, BISD 37S/200; *Agreement on the Application of Sanitary and Phyto-sanitary Measures*, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1A, 1867 U.N.T.S. 493, online: WTO <http://www.wto.org/English/tratop_e/sps_e/spsagr_e.htm>; art. XX(b) of GATT.

223. *Agreement Between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments*, 26 February 1999 (entered into force 4 May 2000), art. 15.

224. *Agreement Between the Government of The Republic of India and the Belgo-Luxembourg Economic Union for the Promotion and Protection of Investments*, 31 October 1997 (entered into force 8 January 2001), art. 12(2).

225. *Agreement Between Bosnia and Herzegovina and the Republic of India for the Promotion and Protection of Investments*, 12 September 2006 (entered into force 13 February 2008), art. 12.

226. Art. 13(5)(b), India-Colombia BIT.

227. *Agreement Between the Czech Republic and the Republic of India for the Promotion and Protection of Investments*, 10 October 1996 (entered into force 6 February 1998), art. 12.

228. India and Denmark, *Agreement Concerning the Promotion and Reciprocal Protection of Investments*, 6 September 1995 (entered into force 28 August 1996), art. 12(2).

229. *Agreement Between the Government of the Republic of India and the Government of the Republic of France on the Reciprocal Promotion and Protection of Investments*, 2 September 1997 (entered into force 17 May 2000), art. 12.

230. *Agreement Between the Federal Republic of Germany and the Republic of India for the Promotion and Protection of Investments*, 10 July 1995 (entered into force 13 July 1998), art. 12.

231. *Agreement Between the Government of the Republic of India and the Government of the Republic of Korea on the Promotion and Protection of Investments*, 26 February 1996 (entered into force 5 July 1996), art. 10(2).

232. *Agreement Between the State of Kuwait and the Republic of India for the Encouragement and Reciprocal Protection of Investment*, 27 November 2001 (entered into force 28 June 2003), art. 14(2).

233. *Agreement Between the Government of the Republic of India and the Government of Malaysia for the Promotion and Protection of Investments*, 1 August 1995 (entered into force 12 April 1997), art. 10(2).

234. *Agreement Between the Government of the Republic of Mauritius and the Government of the Republic of India for the Promotion and Protection of Investments*, 4 September 1998 (entered into force 20 June 2000), art. 11.

235. *Agreement Between the Republic of India and the Kingdom of the Netherlands for the Promotion and Protection of Investments*, 6 November 1995 (entered into force 1 December 1996), art. 12.

236. *Agreement Between the Government of the Republic of India and the Government of the Italian Republic for the Promotion and Protection of Investments*, 13 November 1995 (entered into force 26 March 1998), art. 12.

237. *Agreement on the Promotion and the Reciprocal Protection of Investments Between the Republic of India and the Kingdom of Spain*, 30 September 1997 (entered into force 15 December 1998), art. 13.

health exceptions in two of its BITs: Mauritius-Pakistan[238] and Singapore-Pakistan.[239] Sri Lanka has a public health-related exception in only its China-Sri Lanka BIT.[240] Bangladesh and Nepal have no public health exceptions in their BITs.[241] For the purposes of simplicity, an analysis will be made of different "public health-related provisions" separately; the approach for such a study will be as follows:

1. Prevention of disease and pests;
2. Prevention of disease and pests in animals and plants;
3. Public health; and
4. Other formulations.

1. *Prevention of disease and pests*

This kind of formulation appears in five BITs of South Asian countries.[242] All of these BITs, except in one case,[243] use "necessary" as a nexus requirement link. The Kuwait-India BIT sets a higher threshold as it provides for the prevention of disease and pests as a specific measure in circumstances of extreme emergency, apart from using "necessary" as a nexus requirement link. It is also pertinent to note here that this formulation does not provide for the bearer of the disease—human or animal. Thereby, it sets the threshold lower than any other provision that makes any such distinction. Therefore, a broad meaning can be given to this formulation so as to include both humans and animals in cases of disease.

2. *Prevention of disease and pests in animals and plants*

This kind of formulation appears in eleven South Asian BITs.[244] Six of these BITs use "necessary" as a nexus requirement link;[245] four of them use "directed to";[246] and one of them uses "to" as a nexus requirement link.[247] It is obvious that "necessary" is more

238. *Agreement Between the Government of the Republic of Mauritius and the Government of the Islamic Republic of Pakistan for the Promotion and Reciprocal Protection of Investments*, 3 April 1997 (entered into force 3 April 1997), art. 12.

239. *Agreement Between the Government of the Republic of Singapore and the Government of the Islamic Republic of Pakistan on the Promotion and Protection of Investments*, 8 March 1995 (entered into force 4 May 1995), art. 11.

240. *Agreement Between the Government of the Democratic Socialist Republic of Sri Lanka and the Government of the People's Republic of China on the Reciprocal Promotion and Protection of Investments*, 13 March 1986 (entered into force 25 March 1987), art. 11.

241. See Table 3. This study does not take account of the NPM provisions with limited scope, as there are instances where Nepal is found to have a limited scope NPM provision in one of its BITs having public health exception. However, Bangladesh does not have any public health exception in any of its NPM provisions.

242. Australia-India BIT, BLEU-India BIT, Denmark-India BIT, Malaysia-India BIT, and Kuwait-India BIT.

243. BLEU-India BIT; it uses "for" as a nexus requirement link.

244. Bosnia and Herzegovina-India BIT, Czech-India BIT, France-India BIT, Germany-India BIT, Korea-India BIT, Mauritius-India BIT, Netherlands-India BIT, Italy-India BIT, Mauritius-Pakistan BIT, Singapore-Pakistan BIT, and China-Sri Lanka BIT.

245. Bosnia and Herzegovina-India BIT, Czech-India BIT, France-India BIT, Germany-India BIT, Korea-India BIT, and Netherlands-India BIT.

246. Mauritius-India BIT, Mauritius-Pakistan BIT, Singapore-Pakistan BIT, and China-Sri Lanka BIT.

247. Italy-India BIT.

stringent, as it sets a higher threshold than "directed to" or "to" as a nexus requirement link. In terms of which is more stringent, a "necessary" > "directed to" > "to" kind of formulation can be made. It is also pertinent to mention here that the word "disease" in this formulation is used only for animals. Thus it leaves human health issues unaddressed.

3. *Public health*

This formulation can be found in four BITs of South Asian countries.[248] All of these four BITs use "directed to" as a nexus requirement link; which means states will not have to prove that measures taken by them were necessary. It means that states will have more regulatory latitude in cases of public health.

4. *Other formulations*

The India-Colombia BIT uses the language "to protect human, animal, plant life or health", and the India-Spain BIT uses "in circumstances of extreme emergency posing a threat to the life or health of human beings, animals or plants". The India-Colombia BIT uses the language of GATT Article XX(b).[249] It covers a wide range of items. It takes into consideration the life and health issues of humans, animals, and plants. Here, life and health terms need some discussion. Protection of life means protection of both life and limb from any possible threat. Health may or may not fall under this category. Also, the phrase "life or health" means that proving either a life threat or a health threat will justify the action taken by the state. Thus, this type of formulation covers in itself a broad range of life- and health-related aspects. The same interpretation can be made for the public health exception in the Spain-India BIT, wich uses the phrase "life or health"; but the Spain-India BIT also sets a higher threshold for the measures, as it says that measures should be taken only in circumstances of extreme emergency.

There are 400 million poor people in South Asia,[250] and it is a well-established notion that poverty creates ill-health because it forces people to live in environments that make them sick, without decent shelter, clean water, or adequate sanitation.[251] Sometimes, due to external or internal factors, endemic diseases like Ebola, swine flu, bird flu, and so on spread in public, creating panic among people. And the section of society which gets most affected by these endemic diseases are the poor. Therefore, it is suggested that the host state should maintain maximum regulatory latitude in the area of public health in the BIT itself.

D. *Circumstances of Extreme Emergency*

Ranjan argues that circumstances of extreme emergency (CEE), in *stricto sensu,* is not a permissible objective,[252] as CEE refers only to the circumstances and not the objective sought. However, this paper defers from the analysis made by Ranjan on this

248. *Supra* note 246.

249. *Supra* note 102.

250. "South Asia: The End of Poverty" (14 April 2015), online: The World Bank <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/0,,contentMDK:20969099~pagePK:146736~piPK:146830~theSitePK:223547,00.html>.

251. "Poverty and Health" (14 April 2015), online: World Health Organisation <http://www.who.int/hdp/poverty/en/>.

252. Ranjan, *supra* note 2 at 42.

because the word "circumstances" itself leaves space for any permissible objective term to fall under its purview. For example, the absence of a public health exception or any other permissible objective in an NPM provision can be covered by a CEE permissible objective, subject to the fulfilment of the conditions of "extreme" and "emergency". Therefore, this paper would label CEE as the "jack of all permissible objectives", as it may perform the function of all other permissible objectives absent in BITs, thus providing the host state with the maximum discretion and regulatory latitude. Limitations on CEE, i.e. the burden on the host state to prove the existence of circumstances of "extreme emergency", will have to be examined on a case-by-case basis. Also, the deference of standard of review to a host state may make the task of proving the existence of "extreme emergency" easier for the host state.

In the context of South Asia, in India CEE are found in sixty-two of its BITs.[253] However, the India-Uzbekistan[254] and India-Italy BITs[255] use a lower level of threshold, as they provide for "national emergency" and "emergency", respectively, i.e. without the prefix "extreme" in it.[256] Bangladesh in two of its BITs use CEE as a permissible objective: India-Bangladesh[257] and Uzbekistan-Bangladesh.[258] However, the Uzbekistan-Bangladesh BIT uses only the word "emergency" and not CEE.[259] Thus, it provides a lower degree of threshold to the host state. Nepal, in its Finland-Nepal BIT,[260] uses the phrase "other emergency in international relations". This can be interpreted to include a wide range of scenarios; however, it will depend mainly on the nature of the standard of review. Sri Lanka in its India-Sri Lanka BIT[261] uses CEE as a permissible objective.

E. *Morality*

Two South Asian BITs contain morality as a permissible objective: Turkey-Bangladesh[262] and Qatar-India.[263] The phrasing in the Turkey-Bangladesh BIT[264]

253. See Table 3.
254. *Agreement on Reciprocal Protection and Promotion of Investments Between the Government of the Republic of India and the Government of the Republic of Uzbekistan*, 18 May 1999 (entered into force 28 July 2000), art. 13(2).
255. Art. 12, India-Italy BIT.
256. Ranjan, *supra* note 2 at 43.
257. *Agreement Between the Government of the Republic of India and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investments*, 2 February 2009 (entered into force 7 July 2011).
258. *Agreement Between the Government of People's Republic of Bangladesh and the Government of Republic of Uzbekistan on Reciprocal Protection and Promotion of Investments*, 18 July 2000 (entered into force 24 January 2001), art. 11.
259. *Ibid*.
260. *Agreement Between the Government of Republic of Finland and the Government of Nepal on the Promotion and Protection of Investment*, 3 February 2009 (entered into force 28 January 2011).
261. *Agreement Between the Government of the Democratic Socialist Republic of Sri Lanka and the Government of the Republic of India for the Promotion and Protection of Investment*, 22 January 1997 (entered into force 13 February 1998).
262. *Agreement Between the Republic of Turkey and the People's Republic of Bangladesh Concerning the Reciprocal Encouragement and Protection of Investments*, 12 November 1987 (entered into force 21 June 1990).
263. *Agreement Between the Government of the Republic of India and the Government of the State of Qatar for the Reciprocal Promotion and Protection of Investments*, 4 April 1999 (entered into force 15 December 1999).
264. Art. 10 "… maintenance of public order and morals …", Turkey-Bangladesh BIT.

bears some resemblance with GATS Article XIV(a)[265] and GATT Article XX(a)[266]. However, what is interesting here is the text of the Qatar-India BIT, which provides for "morality affecting public order".[267] It means morality as an exception can only be invoked when it affects the public order of that country. As it is very hard to prove that there is a violation of the morality norms of a country, the provision is very stringent. This provision requires not only evidence of morality violation but also proof of the breach of public order, and furthermore requires evidence that this breach of public order has taken place solely because of morality issue(s) in a country. This is definitely very stringent and it makes invoking the morality defence almost impossible.

In the *US-Gambling* case,[268] the WTO panel analyzed the definition of "public morality" as "standards of right and wrong conduct maintained by or on behalf of a community or nation",[269] and "the content of these concepts for members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values".[270] In the *China Audio-visual* case,[271] the appellate tribunal accepted that even restrictions on the trading rights of China in violation of China's accession protocol can be considered as a violation of "public morality"; thus, the tribunal gave a very broad meaning to public morality.[272] In the *EU-Seal Ban* case,[273] the appellate body even went to the extent of accepting arguments put forward by the EU that the ban on seal imports to the EU was justified under Article XX(a) of GATT as it clearly addresses the morality of persons in EU territory consuming seal products from inhumane commercial hunts.[274]

To ascertain the meaning of "public morality" from commonly accepted objective evidence is not only difficult but also seemingly impossible because of social, cultural, political, and economic differences between different jurisdictions and regions.[275]

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265. *GATS*, *supra* note 103, art. XIV(a).

266. *GATT*, *supra* note 102, art. XX(a).

267. Art. 11(2), Qatar-India BIT.

268. *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Appellate Body Report, para. 5, 296, WT/DS285/AB/R (2005); *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Panel Report, para. 1.1, 3.278, WT/DS285/R (2004).

269. *United States–Measures Affecting the Cross-Border Supply of Gambling and Betting Services, supra* note 268 at para. 6.465.

270. *US—Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* WTO Doc WT/DS285/R (2004) at para. 6.461 [*US—Gambling*].

271. *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Appellate Body Report, WTO Doc WT/DS363/AB/R, AB-2009-3 (2009).

272. *Ibid*., at 332. However, the Appellate Body later rejected it as there was an alternative available for China.

273. *WTO European Communities-Measures Prohibiting The Importation And Marketing Of Seal Products*, 22 May 2014, WT/DS400/AB/R, AB-2014-1,3

274. *EU-Seal Ban* case, *ibid*., at para. 6.1.c.ii-iii; Rob HOWSE, Joanna LANGILLE, and Katie SYKES, "Sealing the Deal: The WTO's Appellate Body Report in EC—Seal Products" (4 June 2014), online: American Society of International Law <http://www.asil.org/insights/volume/18/issue/12/sealing-deal-wto%E2%80%99s-appellate-body-report ec%E2%80%93-seal-products>.

275. Jeremy C. MARWELL, "Trade and Morality: The WTO Public Morals Exception After Gambling" (2006) 81 New York University Law Review 802 at 805; Steve CHARNOVITZ, "The Moral Exception in Trade Policy" (1997) 38 Virginia Journal of International Law 689; Christoph T. FEDDERSEN, "Focusing on Substantive Law in International Economic Relations: The Public Morals of

Therefore, it is submitted that every country should have some leeway to decide what is moral according to its own domestic values.

F. *International Peace and Security (IPS)*

In South Asia, IPS appears in four BITs: India-Colombia, US-Bangladesh, Turkey-Bangladesh, and US-Sri Lanka. The India-Colombia BIT clearly states that obligations are in the context of the UN Charter.[276] The rest of the BITs do not refer to the UN Charter as such, but states "maintenance or restoration of international peace or security".

It is generally understood that this exception refers to obligations under the UN Charter.[277] Basically, it saves states from the paradoxical situation that is created by the complex dynamics of interstate relationships; e.g. if a state undertakes a measure owing to a Security Council resolution and thereby affects the investor, it would simply mean a contradiction between the obligations of a state to the UN and the obligations of that state in its BITs. Although, according to Article 103 of the UN Charter,[278] obligations to the UN have supremacy over any other obligation in international law, it would still leave the question of the obligations of a state to an investor unanswered. This exception attempts to create a balance between the obligations of a state to the UN, on the one hand, and the obligations in its BITs, on the other hand. It basically says states will not be held responsible for a breach of their obligations under their BITs if they were working under obligations created by the UN. Thus, South Asian countries should incorporate provisions like this so as to avoid any chance of being caught up in a conflict of different norms.

GATT's Article XX (a) and 'Conventional' Rules of Interpretation" (1998) 7 Minnesota Journal of Global Trade 75.

276. Art. 13(5)(d) of India-Colombia BIT.

277. Burke-White and Staden, *supra* note 1 at 355; OECD *Multilateral Agreement on Investment, Commentary to the Consolidated Text*, 41, OECD Doc. DAFFE/MAI(98)8/REV1 (22 April 1998), online: <http://www1.oecd.org/daf/mai/pdf/ng/ng988r1e.pdf>.

278. Art. 103, "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail", UN Charter; for a detailed study on art. 103, Rudolf BERNHARDT, "Article 103" in Bruno SIMMA, *The Charter of the United Nations—A Commentary*, 2nd edn, vol. II (Oxford: Oxford University Press, 2002), at 1292; Rain LIIVOJA, "The Scope of the Supremacy Clause of the United Nations Charter" (2008) 57 International and Comparative Law Quarterly 583–612; Robert KOLB, "Does Article 103 of the Charter of the United Nations Apply Only to Decisions or Also to Authorizations Adopted by the Security Council?" (2004) 64 Zeitschrift fur auslandisches offentliches Recht und Volkerrecht 21–35; Bardo FASSBENDER, "The United Nations Charter as Constitution of the International Community" (1997) 36 Columbia Journal of Transnational Law 529; *Separate Opinion of Vice-President Ammoun, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] I.C.J. Rep 16; Derek BOWETT, "The Impact of Security Council Decisions on Dispute Settlement Procedures" (1994) 5 European Journal of International Law 89; Alexander ORAKHELASHVILI, "The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions" (2005) 16 European Journal of International Law 59 at 88; *R (Al-Jedda) v. Secretary of State for Defence* [2007] U.K.H.L. 58.

G. *Miscellaneous*

Miscellaneous exceptions have been found in the BITs of South Asian countries. These are listed in Table 7.

Table 7. Other miscellaneous permissible objectives

Permissible objective	BITs	Remarks
Tax	India-Colombia[279]	Tax matters have been expressly excluded from the purview of the BITs.
Investment through illegal activities	India-Colombia[280]	No protection under BIT when investment is derived from illegal activities.
Financial services for prudential reasons	India-Colombia[281]	States are free to take reasonable measures for the wellbeing of their economies; those measures shall not be considered as violating the obligations under the BIT.
Vital interests	India-Uzbekistan BIT[282]	This is a broad exception which can cover not only security but also non-security issues.
Armed conflict	India-Italy BIT[283]	This can be considered as related to security interests.
National emergency	India-Italy BIT[284]	This is a broad exception which can cover not only security but also non-security issues.
Civil disturbance	India-Italy BIT[285]	This has already been discussed in Section III.B.
Environment	India-Colombia BIT[286]	This is the only BIT in the South Asian region which specifically provides for the protection of the environment. Resembles Article XX of GATT.
National interest	China-Sri Lanka BIT[287]	This is a broad exception which can cover not only security but also non-security issues that might affect the interests of a nation.

With this, a detailed enquiry into the permissible objectives used in the BITs of the South Asian countries has been completed. The next section will examine the nexus requirement links.

IV. NEXUS REQUIREMENT LINKS (NRLS)

As has already been discussed in Section II, the "nexus requirement link" assumes importance in determining the degree of connection between the measures taken and the objective sought by the host state. Different South Asian BITs use different NRLs, and these different phrases have different meanings. Therefore, studying these NRLs is

279. Art. 13(1).
280. Art. 13(2).
281. Art. 13(3).
282. Art. 13(2).
283. Art. 12.
284. Art. 12.
285. Art. 12.
286. Art. 13(5)(c).
287. Art. 11.

important in helping us to understand their impact and effects on these BITs. These NRLs shall be studied under two broad headings:

A. "Necessary" as NRL; and

B. Non-"Necessary" as NRL.

A. *"Necessary" as NRL*

Twenty-two South Asian BITs use "necessary" as a NRL;[288] out of these, India has "necessary" NRLs in eighteen BITs,[289] Bangladesh has them in two BITs,[290] and Sri Lanka and Nepal both have "necessary" in one BIT.[291] Necessity serves two purposes. First, it creates a fine balance between an investor's interests and the state's interest. Second, it distinguishes between legitimate state actions and illegitimate state actions that are taken as an instrument of protectionism.[292] This NRL has acquired significance against the background of interpretations taken by different tribunals while deciding the ISDS cases against Argentina for the measures taken by it during its economic crisis.[293] Tribunals in *CMS v. Argentina*,[294] *Sempra v. Argentina*,[295] and *Enron v. Argentina*[296] conflated the meaning of "necessity" under customary international law (CIL) with the meaning of "necessary" under Article XI of the US-Argentina BIT. Also, those tribunals did not provide any legal justification for such interpretative methodologies. The annulment committees of those tribunals criticized the approaches taken by the tribunals. The *CMS* annulment committee[297] in fact went to the extent of saying that the tribunal made a manifest error of law by conflating two concepts.[298]

288. See Table 4.
289. *Ibid.*
290. *Ibid.*
291. *Ibid.*
292. Benn MCGRADY, "Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures" (2008) 12 Journal of International Economic Law 153 at 154.
293. Jim SAXTON, "Argentina's Economic Crisis: Causes and Cures" (June 2003) Joint Economic Committee United States Congress; José E. ALVAREZ and Kathryn KHAMSI, "The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime" (2008/2009) Yearbook on International Investment Law and Policy 379, online: Columbia Centre on Sustainable Investment <http://www.vcc.columbia.edu/pubs/documents/Alvarez-final_000.pdf>; Institute for International Law and Justice Working Paper 2008/5; William W. BURKE-WHITE, "The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System" (2008) 3 Asian Journal of International Health Law and Policy 199; Burke-White and Staden, *supra* note 1; Michael WAIBEL, "Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E" (2007) 20 Leiden Journal of International Law 637; Sarah SCHILL, "The 'Necessity Defense' and the Emerging Arbitral Conflict in its Application to the U.S-Argentina Bilateral Investment Treaty" (2007) 13 Law and Business Review of the Americas 547; Stephen W. SCHILL, "International Investment Law and Host State's Power to Handle Economic Crises—Comment on the ICSID Decision in LG&E v. Argentina" (2007) 24 Journal of International Arbitration 265; and David FOSTER, "Necessity Knows no Law!—LG&E v. Argentina" (2006) 9 International Arbitration Law Review 149.
294. *CMS*, *supra* note 13.
295. *Sempra*, *supra* note 13.
296. *Enron*, *supra* note 13.
297. *CMS Annulment*, *supra* note 13.
298. *Ibid.*, at para. 131.

However, these cases are just one set of class of cases which adopted different methodologies for interpreting the term "necessary". The tribunal in *LG&E v. Argentina*[299] first justified Argentina's measures under Article 11 of the US-Argentina BIT, and then again tried to support it under Article 25 of Draft Articles on State Responsibility, as in CIL. Though it tried to maintain the distinction between customary claim and treaty claim, it failed to clarify the precise content of Article 11 of the US-Argentina BIT, and thereby fell short of giving reasons for supporting a specific treaty norm with a more general customary norm. The tribunal in *Continental Casualty v. Argentina*[300] rejected the suggested equivalence between Article 11 of the US-Argentina BIT and the CIL defence of necessity.[301] It held that the term "necessary" should be interpreted in line with GATT and WTO case-law.[302] In this way, the tribunal in this case moved away from the "no other means available" test to the WTO's "least restrictive alternative" test.[303]

This shows that there is great degree of divergence amongst the tribunals on the meaning of "necessary". With respect to South Asia, in all twenty-two BITs where a "necessary" NRL has been found, there is no definition of the term "necessary". The absence of any concrete definition of "necessary" in the treaty exception would anyway force the tribunals to look for the meaning of "necessary" elsewhere. Thus, it is suggested here that arbitral tribunals, while interpreting "necessary", instead of engaging in finding the balance between the benefits of regulatory measures and the impact on investment by these measures, should try to look into the aspect of whether or not any less restrictive measure is available (the least-restrictive-alternative test).[304] When such a less restrictive measure is available, measures taken by host states shall be said to be not "necessary". Therefore, in the context of South Asian BITs, "necessary" can be interpreted by relying on the WTO jurisprudence that was used in the *Continental Casualty* case. This approach is suitable for the South Asian region; not only will it prevent any excessive restriction on foreign investments from host states, it will also serve the regulatory power of these countries better. This is because arbitral tribunals would focus more on finding whether or not a less restrictive measure is available than on questioning the regulatory objective.[305] This can help South Asian countries significantly, as the question of harm done to investments will shift from the intent of the government or state to the availability of any less restrictive measure. With this, a study of Non-"Necessary" NRLs will be made in the following section.

299. *LG&E* (decision on liability), *supra* note 13.
300. *Continental*, *supra* note 13.
301. *Ibid.*, para. 168.
302. *Ibid.*, para. 85.
303. William W. BURKE-WHITE and Andreas von STADEN, "Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations" (2010) 35 Yale Journal of International Law 283, 325.
304. Ranjan, *supra* note 2 at 50.
305. *Ibid.*

B. *Non-"Necessary" NRLs*

Non-"necessary" NRLs include every other NRL except "necessary" NRLs. In this section a study will be made in respect of only those NRLs which are found in the BITs of South Asian countries. These are as follows:

1. *For*

"For" is found in fifty-one BITs of South Asian countries.[306] It is one of the most lenient nexus standards found in the BITs of South Asian countries. Such a formulation, at least in its ordinary meaning, suggests a relatively thin nexus, under which measures would appear to be permissible as long as they merely further a permissible objective.[307]

2. *Directed to*

This type of formulation is found in four BITs of South Asia.[308] This suggests that actions are permissible as long as they are intended by the government to further a legitimate end.

3. *Relating to*

This is found in just one BIT of South Asia.[309] It simply involves an examination of whether the "means" and "ends" of the measure are reasonably related.[310] In other words, there must be "a close and genuine relationship of ends and means".[311] That is, based on an analysis of the text of the measure itself, it must be determined whether the design and structure of the measure are closely related to the goal of the measure.[312]

4. *To*

"To" is found in three BITs of South Asia.[313] It provides a comparatively thin nexus between the measures taken and the objective sought. It provides much deference to the host state in this regard, as states only have to show that the measures taken were under the scope of one of the permissible objectives; no further justification of measures would be necessary.

5. *In pursuance of*

There is only one BIT in South Asia which provides for this type of formulation.[314] The ordinary meaning of pursuance is "engagement in an activity or course of action"; it basically assumes that the state already has some existing obligation in international law in general, apart from treaty obligations. Therefore, it lays down such a

306. See Table 4.
307. Burke-White and Staden, *supra* note 1 at 342.
308. See Table 4.
309. India-Colombia BIT.
310. Simon LESTER, Bryan MERCURIO, and Arwel DAVIES, *World Trade Law: Text, Material and Commentary*, 2nd edn (Oxford: Hart Publishing, 2012) at 368.
311. Appellate Body Reports, US—Shrimp, para. 136; China—Raw Materials, para. 355; China Rare Earth Appellate Body Report, para. 5.105.
312. See *supra* note 311.
313. See Table 4.
314. India-Colombia BIT.

formulation which can harmoniously resolve the conflict between two different obligations of a state under international law.

Thus, it can be seen that there are in total six NRLs that are used in the BITs of South Asian countries.[315] Most prevalent among them is the "for" NRL, and then comes the "necessary" NRL. Having "for" as a NRL gives states some leeway to take regulatory measures without much difficulty in justifying their action, which seems to be a reasonable choice for these countries.

V. CONCLUSION

The importance of NPM provisions lies in the fact that they grant host states sufficient regulatory latitude in cases of extreme circumstances to pursue their non-investment policy objectives. In fact, NPM provisions are not only important but also the most effective device to ensure adequate regulatory space for host states.

However, the study done in this paper shows that NPM provisions are not adequately present in the BITs of these countries. Except for India, other countries have incorporated this provision in only a few of their BITs. This approach is confusing in the sense that these countries have included this provision in some of their BITs; therefore not including NPM provisions in their other BITs is difficult to understand. Therefore, it is suggested that these countries should include NPM provisions in their BITs more frequently in order to ensure sufficient regulatory latitude while pursuing non-investment policy objectives.

The in-depth analysis of NPM provisions made in Section II also gives surprising results; regarding permissible objectives, important public policy objectives like public health, environment, public order, and so on have been found in only very few instances. This region, as argued in Section III, is already surrounded by many regional problems. Against this background, it is argued here that countries in this region must specify terrorism, financial crises, or even situations of natural calamities as part of ESI in their NPM provisions. It is also submitted that all South Asian countries should include public health exceptions in all of their BITs. South Asian countries should also include CEE as a permissible objective in their BITs, as it may include in its scope any type of permissible objective that the states might not have been able to include in the NPM provisions while negotiating or drafting. This situation of having few or no permissible objectives dealing with issues like public health, environment, public order, and so on pushes states to the edge of facing BIT claims in cases of default. Thus, it is submitted that these countries should include at least those permissible objectives which are important from a South Asian perspective.

Self-judging clauses are important as they provide the host state with the discretion to assess cases of emergency. In this respect, South Asian BITs seem to have completely ignored the importance of these clauses. Of all the BITs signed by these countries, as studied in this paper, only one contains a self-judging clause. The other BITs contain only non-self-judging clauses. This cannot be considered an acceptable situation as it

315. See Table 4.

deprives the state of the ability to assess emergency situations. As the meaning of emergency situations may vary from country to country, it is considered best for the country to assess the situation on its own. Thus, it is submitted that South Asian countries must incorporate self-judging clauses in their BITs.

On the issue of nexus requirement links, not many South Asian countries have "necessary" as a nexus requirement link. This nexus requirement link imposes a very high threshold on the host state to justify its measures taken in the pursuit of non-investment policy objectives. In this sense, it is good that it is not found in many BITs of South Asian countries, as these countries will not have to satisfy its high threshold requirement. A lesson must be learnt from the events which took place in the Argentine crisis and its aftermath. Thus, it is submitted that South Asian countries may avoid or ignore phrases like "necessary"—which impose a high threshold of proving the necessity of state actions—while engaging in BIT negotiations.

As all the countries in this region are developing countries, it would be better for South Asian countries to learn from the Argentine crisis and prepare beforehand for any future problem, rather than waiting for problems to arise and then reacting to those situations.

With this, it is suggested here that South Asian countries must renegotiate their existing BITs so as to incorporate NPM provisions, and these countries must also strive to incorporate NPM provisions in their future BITs.