

## THE ESSENTIAL SECURITY INTEREST CONUNDRUM FOR INDIA

ADITI WARRIER

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<i>India-China relations strained in May 2020, with heightened tensions at the Galwan Valley border.<sup>1</sup> The situation escalated until both states deployed military forces and imposed various economic measures. This included India banning fifty-nine Chinese apps on June 29, 2020, 118 apps on September 2, 2020, and forty-three apps on November 24, 2020 (Ban or measures) under section 69A of the Information Technology Act, 2000.<sup>2</sup> The measures were undertaken to prevent information theft and unauthorized transmission of user data to servers abroad. Due to national security concerns, further details were not disclosed in the public domain.<sup>3</sup></i>	

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1. E.g., Marc Santora, *For China and India, A Border Dispute That Never Ended*, N.Y. TIMES (Jun. 16, 2020), <https://www.nytimes.com/2020/06/16/world/asia/india-china-border.html>.

2. See Press Release, Press Information Bureau Delhi, Government of India Blocks 43 Mobile Apps from Accessing by Users in India, MEITY Issues Order for Blocking Apps under Section 69A of the Information Technology Act (Nov. 24, 2020), <https://www.pib.gov.in/PressReleasePage.aspx?PRID=1675335> [hereinafter PIB Press Release].

3. Lok Sabha Answer by Minister of State for Elec. and Info. Tech., Chinese Investment in Data-Reliant Sectors, <http://164.100.47.194/>

*China responded by declaring that the measures were discriminatory in violation of WTO principles,<sup>4</sup> expressing serious concerns and firmly opposing the action as a measure of national security.<sup>5</sup>*

*This comment will examine whether the measures taken by India fall under the Essential Securities Interest (ESI) clause in the applicable trade and investment agreements. The ESI clause empowers states to take action in furtherance of their essential national security interests. It is a valid ground that can be invoked to escape treaty obligations. Until a few years ago, jurisprudence surrounding the ESI clause was limited, and its invocation was rare, but the tides are now shifting.*

## I. THE ESI CLAUSE

Most of the ESI clauses in multilateral trade and investment agreements draw their text from Article XXI of the General Agreement on Tariffs and Trade (GATT), which was included verbatim in the WTO Agreement,<sup>6</sup> the General Agreement on Trade in Services,<sup>7</sup> and the Agreement on Trade Related Aspects of Intellectual Property Rights.<sup>8</sup> The WTO Agreement on Trade Related Investment Measures also references Article XXI.<sup>9</sup> Similarly, India's trade agreements incor-

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Loksabha/Questions/QResult15.aspx?qref=17885&lsno=17 (Sept. 21, 2020) [hereinafter Lok Sabha MEITY Answer].

4. Statement, Ji Rong, Chinese Embassy in India Spokesperson, Response to Media Query on Reports that India will Continue to Ban Mobile Apps with Chinese Background (Jan. 27, 2021), [http://in.chineseembassy.org/eng/embassy\\_news/t1848846.htm](http://in.chineseembassy.org/eng/embassy_news/t1848846.htm); Statement, Ji Rong, Chinese Embassy in India Spokesperson, Statement on India's Blocking Certain Chinese Mobile Apps (Jun. 30, 2020) [http://in.chineseembassy.org/eng/embassy\\_news/t1793445.htm](http://in.chineseembassy.org/eng/embassy_news/t1793445.htm).

5. See Statement, Ji Rong, Chinese Embassy in India Spokesperson, Response to Media Query on India's Decision of Repeatedly Blocking Mobile Apps with Chinese Background (Nov. 25, 2020), <http://in.chinaembassy.org/eng/xwfw/xxfb/t1835382.htm>.

6. General Agreement on Tariffs and Trade 1994, art. XXI, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT, art. XXI].

7. General Agreement on Trade in Services, art. IV bis, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).

8. Agreement on Trade-Related Aspects of Intellectual Property Rights art. 73, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

9. Agreement on Trade-Related Investment Measures art. XXI, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186.

porate the ESI clause by reference to Article XXI and its interpretative notes<sup>10</sup> or by reproducing the Article itself in treaties.<sup>11</sup>

The Bilateral Investment Treaties (BIT) regime, on the other hand, uses different wording in its ESI clauses. India's BITs, including the India-China BIT, followed this latter trend,<sup>12</sup> until a model BIT was adopted in January 2016. Following the introduction of the model BIT, India provided notices of termination of existing BITs to seventy-five countries,<sup>13</sup> including China. The model BIT has an ESI clause similar to Article XXI.<sup>14</sup>

With respect to the BIT regime, the U.N. Conference on Trade and Development (UNCTAD) identifies four basic approaches to the ESI clause:<sup>15</sup> The self-judging clause, which uses the phrase "it considers necessary," such as in the Friendship, Commerce, and Navigation (FCN) treaties and the GATT, elaborated further in arbitrations concerning the Argentinian economic crisis;<sup>16</sup> Clauses with necessity as an objective precondition, whereby the necessity is determined by the consideration of the tribunal as opposed to a subjective consideration of the state party, such as in the India-Germany

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10. *See* Comprehensive Economic Cooperation Agreement, India-Sing., art. 2.13, Aug. 1, 2005 [hereinafter India Singapore CECA].

11. *See* Comprehensive Economic Cooperation Agreement, India-Malay., art. 12.2, Sept. 24, 2010 [hereinafter India Malaysia CECA].

12. *See* Bilateral Investment Treaty, India-China, art. 12, Aug. 1, 2007 [hereinafter India China BIT].

13. Department of Economic Affairs, <https://dea.gov.in/bipa>, (last visited Apr. 17, 2021).

14. Bilateral Investment Treaty, India-Braz., art. 24, Jan. 25, 2020 (signed, not enforced); Bilateral Investment Treaty, India-Belr., art. 33, Mar. 5, 2020 [hereinafter India Belarus BIT].

15. UNCTAD, *The Protection of National Security in IIAs*, UNCTAD Series on International Investment Policies for Development, ¶¶ 90-95 [hereinafter UNCTAD report].

16. *See* CMS Gas Transmission Co. v. Arg., ICSID Case No. ARB/01/8, Award (May 12, 2005); Enron Corp. and Ponderosa Assets, L.P. v. Arg., ICSID Case No. ARB/01/3, Award (May 22, 2007); Sempra Energy Int'l v. Arg., ICSID Case No. ARB/02/16, Award (September 28, 2007); LG&E Energy Corp. v. Arg., ICSID Case No. ARB/02/1, Decision on Liability (July 25, 2006); Continental Casualty Co. v. Arg., ICSID Case No. ARB/03/9, Award (September 5, 2008) [hereinafter Argentina Arbitration Awards].

BIT, subject of the *Deutsche Telekom AG v. India* arbitration;<sup>17</sup> Clauses with no reference to necessity, such as the India-China BIT, discussed in detail below, or the India-Mauritius BIT, discussed in *CC/Devas (Mauritius) Ltd., and others v. Republic of India*;<sup>18</sup> and finally, Clauses excluding judicial review, such as the 2016 India model BIT.

After the revocation of the earlier BITs, the ESI clause has taken a stronger shape under the 2016 model BIT. Unlike earlier versions, it contains a specific provision on non-judiciability,<sup>19</sup> which prohibits an arbitral tribunal from adjudicating the invocation of the ESI clause, including any claim for damages and/or related compensation.<sup>20</sup> This comment will examine the ESI clauses applicable under Article XXI of the WTO Agreement and under Article 14 of the India-China BIT.

## II. STATUS OF ARTICLE XXI

Article XXI of the WTO agreement allows a contracting party to deviate from its obligations in furtherance of its ESI.<sup>21</sup> The Geneva Session of the Preparatory Committee of GATT

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17. *Deutsche Telekom AG v India*, Interim Award, PCA Case No. 2014-10 (Dec. 13, 2017) [hereinafter DT Award].

18. *CC/Devas (Mauritius) Ltd., Devas Emp. Mauritius Private Ltd., and Telcom Devas Mauritius Ltd, v. Republic of India*, PCA Case No. 2013-09 (Jul. 25, 2016) [hereinafter Devas Award].

19. See *India Singapore CECA*, *supra* note 10, art. 6.12; *India Malaysia CECA*, *supra* note 11, art. 12.2; Model BIT Annex 1.

20. Model Text for Indian Bilateral Investment Treaty Annex 1 (2016); *India Malaysia CECA*, *supra* note 11 Annex 12; *India Brazil BIT*, *supra* note 14, Annex 1.

21. GATT art. XXI, *supra* note 6. Security Exceptions:

Nothing in this Agreement shall be construed to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or to prevent any contracting party from taking any action, which it considers necessary for the protection of its essential security interests relating to fissionable materials or the materials from which they are derived; relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; taken in time of war or other emergency in international relations; or to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

1947 determined the scope of the ESI clause to include measures necessary for security reasons while excluding measures implemented under the guise of security that actually have a commercial purpose.<sup>22</sup> The exception concerns measures taken in a time of war or other emergency in international relations. While the 1947 ESI clause has been invoked and discussed by the states and preparatory committees in several instances,<sup>23</sup> the WTO Dispute Settlement Body only considered the scope of the 1994 clause for the first time in 2019 in the *Russia – Traffic in Transit* case (DS512).<sup>24</sup> The law applied therein has also been applied in *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* case (DS567).<sup>25</sup> The WTO will also deliberate over the exception in several upcoming cases.<sup>26</sup>

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22. Second Session of the Preparatory Committee, *Thirty Third Meeting of Commission A* (July 24, 1947)

<https://docs.wto.org/gattdocs/q/UN/EPCT/APV-33.PDF> (last visited Apr. 4, 2021).

23. E.g., Report of the Working Party on Accession of the United Arab Republic, *United Arab Republic Boycott Against Israel and Firms Having Relations with Israel*, L/3362 (Feb. 25, 1970); Report of the Panel, *US Trade Measures affecting Nicaragua*, ¶5.2, L/6053 (Oct. 13, 1986); Communication to the Members of the GATT Council, *Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons*, L/5319/Rev.1 (May 18, 1982); Committee on Industrial Products, *Inventory of Non-Tariff Barriers*, COM.IND/6/Add.4 (Dec. 12, 1968).

24. Panel Report, *Russia – Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019) [hereinafter *Russia – Traffic in Transit*].

25. Panel Report, *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS567/R (adopted Jun. 16, 2020) [hereinafter *Saudi – IPR*].

26. Constitution of the Panel Established at the Request of China, *United States – Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS544/9/Rev.1 (Aug. 19, 2019); Constitution of the Panel Established at the Request of India, *United States – Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS547/9/Rev.2 (Aug. 19, 2019); Constitution of the Panel Established at the Request of EU, *United States – Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS548/15/Rev.1 (Aug. 19, 2019); Constitution of the Panel Established at the Request of Norway, *United States – Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS552/11/Rev.1 (Aug. 19, 2019); Constitution of the Panel Established at the Request of Russian Federation, *United States – Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS554/18/Rev.1 (Aug. 19, 2019); Constitution of the Panel Established at the Request of Switzerland, *United States – Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/

### III. CHALLENGE OF THE MEASURES UNDER WTO LAW

The Panel in *Russia – Traffic in Transit* held that, while a state may define what it considers to be its essential security interests,<sup>27</sup> an action must objectively be found to meet the requirements of Article XXI during Consultation or by the Panel.<sup>28</sup> The Panel laid down the following considerations to determine the applicability.

#### A. *Whether the Interest is an ‘Essential’ Security Interest of the State*<sup>29</sup>

An ESI includes the protection of territory and population from external threats, and the maintenance of law and public order internally. However, the Panel recognized that the specific interest that is considered directly relevant to the protection of the state will depend on the particular situation and perceptions of the state in question. Therefore, under Article XXI, the members may define what they consider to be an ESI.<sup>30</sup>

India undertook measures to block Chinese apps, citing concerns relating to “data security and safeguarding the privacy of 130 crore Indians.”<sup>31</sup> The Ministry of Home Affairs, responsible for the maintenance of internal security and domestic policy, identified these threats.<sup>32</sup> It is incontrovertible that the measures were pursuant to an essential security interest.

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DS556/16/Rev.1 (May. 2, 2019); Constitution of the Panel Established at the Request of Turkey, *United States – Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS564/16/Rev.1 (Aug. 19, 2019); Constitution of the Panel Established at the Request of Qatar, *United Arab Emirates - Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WTO Doc. WT/DS526/3 (Sept. 3, 2018); Panel Establishment Notice, *Japan – Measures Related to the Exportation of Products and Technology to Korea*, WTO Doc. WT/DS590/R, 14-5 (adopted Oct. 14, 2020); Request for Establishment of Panel by Hong Kong, *United States – Origin Marking Requirement*, WTO Doc. WT/DS597/5 (Jan. 15, 2021); Request for Establishment of Panel by Venezuela, *United States – Measures Relating to Trade in Goods and Services*, WTO Doc. WT/DS74/2/Rev.1 (Mar. 16, 2021).

27. *Russia – Traffic in Transit*, *supra* note 24 ¶ 7.145; *see also* Saudi– IPR, *supra* note 25, ¶ 7.242.

28. *Id.* ¶ 7.82.

29. *See id.* ¶ 7.131.

30. *Id.*

31. PIB Press Release, *supra* note 2.

32. *See* Lok Sabha MEITY Answer, *supra* note 3.

B. *Whether There Was a War or Other 'Emergency in International Relations'*<sup>33</sup>

The Panel has recognized emergencies in international relations to be defense or military interests, and maintenance of law and public order interests.<sup>34</sup> Political or economic differences do not qualify as an emergency unless they intensify to the point of severance of diplomatic and economic ties.<sup>35</sup> This is usually accompanied by rising tension in public opinion and hostility.<sup>36</sup> The Panel in the *Saudi Arabia- IPR* case specified that when a group of states repeatedly accuses another, that in and of itself, contributes to a situation of heightened tension or crisis.<sup>37</sup>

In the situation between India and China, an emergency in international relations could be established because of the military deployment at the Galwan border and other diplomatic conflicts between the states. These events were public, involved both party aggressions, and affected the territorial integrity of both states.

C. *Whether the Measures Were Undertaken 'In Time of the Emergency'*<sup>38</sup>

To successfully invoke the ESI clause, it is also essential that the measures are taken during the time of the emergency in international relations. The first notification of the Ban was released in June 2020, following the commencement of the border conflict. The measures are of a continuing nature, but the Panel has not yet specified whether there must be a termination date. Only the commencement date has been taken into consideration until now.<sup>39</sup>

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33. Russia – Traffic in Transit, *supra* note 24 ¶ 7.76.

34. *Id.*

35. See Saudi-IPR, *supra* note 25, ¶ 7.260.

36. See *id.*

37. *Id.* ¶ 7.263.

38. See Russia – Traffic in Transit, *supra* note 24 ¶ 7.77.

39. E.g., Saudi – IPR, *supra* note 25, ¶ 7.269.

D. *Whether the Link Between the Measures and the Essential Security Interest is Sufficiently Articulated to Examine the Veracity*<sup>40</sup>

The difficulties begin to arise when considering the articulation of the measures. The notifications have referred to a threat to sovereignty and integrity caused by theft and unauthorized transfer of data to servers located outside of India. There is no reference to the China border dispute at all. The standard applied by the Panel requires a ‘minimally satisfactory’ articulation.<sup>41</sup> The Panel accepted the articulation of Saudi Arabia’s essential security interest, which did not refer to the measures or emergency situation<sup>42</sup> and Russia similarly did not expressly articulate its essential security interest.<sup>43</sup> Therefore, India’s stated goal to “protect the interests of citizens and sovereignty and integrity of India on all fronts” may survive the test.

E. *Whether There Was a Minimum Standard of Plausibility That the Measures are Related to the Emergency for the Protection of the Essential Security Interest*<sup>44</sup>

The principle of good faith applicable through the Vienna Convention on Law of Treaties requires that the measures meet a minimum requirement of plausibility.<sup>45</sup> The relevant question here is whether the Ban is so remote or unrelated to the Galwan border dispute to make it implausible that India implemented the measures for the protection of its security interest. The purpose of the measures is to protect the interests of citizens and sovereignty and integrity of India on all fronts. This includes the information theft and unauthorized transfer of user data. The measures were taken following a time of a military standoff between China and India.

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40. See Russia – Traffic in Transit, *supra* note 24, ¶ 7.134.

41. *Id.* ¶ 7.137.

42. Saudi – IPR, *supra* note 25, ¶ 7.280 (‘Protecting itself from dangers of terrorism and extremism’).

43. Russia – Traffic in Transit, *supra* note 24, ¶ 7.136.

44. See *id.* ¶ 7.144.

45. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

#### IV. CHALLENGE OF THE MEASURES UNDER THE INDIA CHINA BIT

India unilaterally withdrew from the India-China BIT on October 3, 2018. However, pursuant to Article 16 of the BIT, the treaty will continue to be effective for a period of fifteen years after termination in respect of investments made before the date of termination, due to the survival or sunset clause in the agreement.<sup>46</sup> Therefore, any Chinese app that qualifies as an ‘investor’ and has made the investment prior to 2018, may bring a claim under the India-China BIT. Investments under the treaty are broadly defined as every kind of asset established or acquired in accordance with national laws. This includes shares, stock and debentures; rights to money; rights to any performance under a contract having a financial value; and business concessions conferred by law or under contract. It also encompasses intellectual property rights, which generally include websites and apps.<sup>47</sup>

The party may make claims of violation of the Fair and Equitable Treatment standard, the Most Favored Nation clause, the National Treatment clause, the Full Protection and Security clause and Expropriation under the BIT. However, the aforementioned substantive obligations will not apply if the ESI clause applies.<sup>48</sup> The ESI clause protects measures undertaken for the protection of essential security interests or in circumstances of extreme emergency. The measures must also be in accordance with the laws normally and reasonably applied on a non-discriminatory basis.<sup>49</sup>

The first consideration is the security interest itself, which must be an essential one. In performing this analysis, tribunals have held that deference must be given to the state.<sup>50</sup> Tribunals have highlighted the difference between an essential security interest that precludes expropriation and a public interest for an expropriation, specifying that since the ESI clause

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46. India China BIT, *supra* note 12 art. 16(2).

47. *Id.* art. 1(b).

48. *See* CMS Gas Transmission Co. v. Arg., ICSID Case No. ARB/01/8 (Annulment Proceeding), Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, ¶ 129 (25 Sept. 2007). This is also reflected in the text of Article 14 that begins with “Nothing in this Agreement precludes . . .”.

49. India China BIT, *supra* note 12 art. 14.

50. *See* Devas Award, *supra* note 17, ¶ 243.

excludes all the obligations of the BIT, including the obligation to provide compensation for a lawful taking, it must protect something of higher value than any public interest.<sup>51</sup> As stated above, the interests of protecting the privacy of citizens by information theft and unauthorized data transfers is integral to the sovereignty and integrity of India. In the technology age, information security has been considered a facet of national security.<sup>52</sup> Therefore, the interest would qualify the ESI standard and is not a mere public interest.

An argument that investors generally make concerns the necessity of the measures undertaken for the protection of the ESI. Investors argue that the standard of necessity is determined by customary international law's defense of necessity doctrine.<sup>53</sup> However, tribunals have consistently held the standard in ESI clauses to be lower.<sup>54</sup> Moreover, the determination of necessity by a tribunal arises only if the word 'necessary' has been included in the clause.<sup>55</sup> As was provided by the *El Paso v. Argentina* tribunal, the content of the treaty's provision is paramount, and what is not there cannot be read in.<sup>56</sup> The tribunal will also look at the nexus between the measures and the ESI. In this case, the measures are for the protection of the information of the people of India. Existence of an emergency is not a condition that needs to be satisfied under the BIT regime.

Finally, the measures must have been implemented according to the laws of India in a non-discriminatory manner. In the author's opinion, it is unclear from the clause whether the non-discriminatory criteria pertains to the application of the laws of India or to the measures themselves. The measures have been invoked under section 69A of the Information Technology Act, 2000, which allows for actions in case of activi-

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51. See DT Award, *supra* note 16, ¶ 236.

52. See, e.g., Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, ¶ 4, U.N. Doc. A/65/201 (Jul. 30, 2010).

53. See generally G.A. Res. 62/61, art. 25, Responsibility of States for Internationally Wrongful Acts (Dec. 6, 2007).

54. E.g., DT Award, *supra* note 16, ¶ 229.

55. See Devas Award, *supra* note 17, ¶ 241; also refer to ¶8 of this Commentary.

56. *El Paso Energy Int'l Co. v. Arg.*, ICSID Case No. ARB/03/15, Award, ¶ 590 (Oct. 31, 2011).

ties prejudicial to sovereignty and integrity of India, defense of India, security of state and public order.

The inclusion of the non-discriminatory standard necessitates India to give an explanation and justification for an investment restriction imposed under the ESI clause and that such measures are independent of the nationality of the investor.<sup>57</sup> The measures have been undertaken based on comprehensive reports compiled by the Indian Cyber Crime Coordination Center in the Ministry of Home Affairs.<sup>58</sup> Since the Press Note does not make any reference to the Galwan border issue or any interests other than cyber security, it must be established from the information unavailable to the public that the companies have not been discriminated against by the application of the law or the measures.

#### V. CONCLUSION

The ESI clause in trade and investment agreements has been increasingly relied upon by States. The WTO has ruled on two disputes in the past two years and has several pending in its docket. India has been subject to several BIT arbitrations concerning the ESI clause. While the Ban has not yet been internationally challenged, the threat is imminent. China has issued several declarations asserting the measures as a violation of WTO principles. A possible defense India has in case of a dispute is under Article XXI, whereby a claim may be asserted that the measures are necessary for the protection of ESI taken in the time of an emergency in international relations, in this case, the Galwan border dispute. The measures may also be challenged under the India-China BIT. Though terminated, it continues to apply as a result of the sunset clause. A defense lies under the ESI clause of the BIT.

The invocation of the ESI clause under the WTO and the BIT regimes is increasing in popularity. With several cases pending before the WTO concerning the application of the ESI clause and the increasing inclusions of a non-justiciable ESI clause in BITs by developed and developing states, the jurisprudence surrounding the clause is dynamic and reflective of the changing international political power plays.

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57. See UNCTAD Report, *supra* note 18 ¶ 83.

58. PIB Press Release, *supra* note 2.