The Essential Security Exception under International Investment Law

Analysis of the Dispute between Huawei and the Swedish Government as a Case Study

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Abstract

Along with the rapid development of investment and trade in the context of economic globalisation, a number of legal issues, risks and disputes related to the essential security exception have gradually emerged in the field of international investment. Although contracting states have consciously agreed on essential security exception regulations in the international investment system, the provisions of essential security exception regulations in investment agreements vary from country to country, and there are differences in the interpretation and application of the exception provisions by arbitral tribunals. Essential security interests are also the core issue of the current dispute between the Swedish government and Huawei. The study of the essential security exception therefore has both symbolic and practical significance. This article explores the jurisprudential features of the essential security exception as well as its application and interpretation in legal practice, and uses the dispute between Huawei and the Swedish government as a case study, which analyses the decision of the Administrative Court, finds the issues at stake and demonstrates the possible direction of the case . On this basis some improvements are suggested on the principle of the essential security exception.

Keywords: international investment law, essential security exception, International Centre for Settlement of Investment Disputes(ICSID), Huawei and the Swedish Government, the General Agreement on Tariffs and Trade (GATT), international investment agreements (IIAs), bilateral investment treaty (BIT), host country

Abbreviations

BIT	Bilateral Investment Treaty
EU	European Union
GATT	the General Agreement on Tariffs and Trade
ICSID	International Centre for Settlement of Investment Disputes
IIAs	International Investment Agreements
LEK	the Act on Electronic Communications
OECD	Organisation for Economic Co-operation and Development
PTS	The Swedish Post and Telecom Authority
UNCTAD	UN Conference on Trade and Development

1. Introduction

1.1 Background

Along with the rapid development of investment and trade in the context of economic globalisation, a number of legal issues, risks and disputes have gradually emerged in these fields. In the field of international investment law, on the one hand, host countries need international investment to promote their own economic development, and on the other hand, they need to ensure that some of their country's essential interests are not violated in the process of international investment. Essential security interest clauses play an important role in balancing the interests protected by the rules of international investment law with the essential interests of the host State itself. They are also widely found in model bilateral investment agreements, regional investment agreements or other agreements containing investment provisions. Host countries reduce the legal risk of withdrawal or non-compliance by including essential security exceptions in trade and investment agreements as a safety valve.[1] The country is guaranteed the ability to protect essential national interests in certain circumstances by taking the necessary regulatory measures. Despite the high standards that need to be met to qualify for these exceptions, the clause gives some flexibility to conduct regulatory measures in good faith.[2]

Although in the international investment regime, contracting states have consciously agreed on essential security exceptions, the provisions of national security exceptions in investment agreements vary from country to country, and there are differences in their interpretation and application. In the Argentine series of cases, for example, although the Argentine government raised the same defence under the same essential exception clause to the International Centre for Settlement of Investment Disputes (ICSID), the tribunals in different cases gave

[1] Anne van Aaken, 'International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis' (2009) 12(2) Journal of International Economic Law <https://doi.org/10.1093/jiel/jgp022> accessed 30 April 2022.

[2] GATT, the Chapeau of article XX; Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights' (2002) 13 European Journal of International Law 753, 814.

different interpretations and rulings.[3] Therefore, it is important to start from the definition of the essential security exception clause to clarify the nature and scope of the clause, and thus provide theoretical support for the analysis of the application of the clause in judicial practice.

The essential security interest is also the central point of contention at the legal level in the current dispute between Chinese company Huawei and the Swedish government. In 2020, when the Swedish Post and Telecommunications Authority (PTS) announced the conditions of the 5G spectrum auction, it demanded that any operator bidding for the auction should not use equipment from Chinese suppliers Huawei and ZTE on the grounds of national security.[4] Huawei took the Swedish PTS to the Administrative Court in Stockholm, where the court ruled against Huawei and rejected Huawei's application for leave to appeal.[5] During this period, Huawei also referred the dispute to the ICSID, and on 21 January 2022, the ICSID officially registered Huawei's request to initiate arbitration proceedings, and the case is currently pending.[6] Due to the ongoing nature of the case and the complexity of the application of the essential security interest clause, this article will analyse the application of the essential security exception clause in this case based on the above general analysis of the clause and then demonstrate and enumerate the possible outcomes of the ICSID.

1.2 Purpose and Research Question

The overarching aim of this thesis is to study and analyse the understanding of the essential security exception principle in arbitration practice. Demonstrate the possible legal consequences and resolution of disputes between Huawei and the Swedish government.

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[3] CMS v. Argentine Republic, ICSID case No. ARB/01/8, Award 12 May, 2005; LG&E Energy Corp., L&E Capital Corp., LG&E International Inc v. Argentine Republic, ICSID case No. ARB/02/1, Decision on Liability, 3 October 2006; Enron Corporation Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No ARB/01/3, Award, May 22, 2007.

[4] PTS, Decision on the authorisation to use radio transmitters in the 3.5 GHz and 2.3 GHz bandS Annex A1 - Conditions for authorisation to use radio transmitters in the allocated frequency band within 3400-3720 MHz, (ref. no. 18-8496, 2020) para 28.

[5] Huawei Technologies Sweden AB v. PTS, FÖRVALTNINGSRÄTTEN I STOCKHOLM, case No. 24231-20/2378-21, 22 June, 2021.

[6] Huawei Technologies Co., Ltd. v. Kingdom of Sweden (ICSID pending Case No. ARB/22/2)
<https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/22/2> accessed 28 April 2022.

A second purpose is to analyse in depth the relationship between the protection of essential security interests and investment protection and free trade which were presented in the agreements in the new era. Finding new and better ways to promote a balance of related interests. Explore future trends in the protection of essential security interests.

In order to achieve the aim, the thesis addresses the following research questions:
1. What are the issues at stake in international investment litigation or arbitration cases involving the essential security exception? How has the essential security exception been applied in legal practice?

2. How does the essential security exception apply to the dispute between Huawei and the Swedish government, and what are the possible legal consequences of the dispute based on a general analysis of legal rules and previous cases?

1.3 Scope and Constraints

The analysis of the essential security exception principle in this article is broad in scope and includes definitions, core elements, legal features, but also their interpretation and application in judicial practice. It is mainly based on previous agreements, cases or decisions and focuses on the application of the current status of the provisions. The results of this analysis are used to demonstrate the possible outcome of the dispute between Huawei and the Swedish government. In addition, the legal analysis of the dispute between Huawei and the Swedish government is mainly from the perspective of the essential security exception principle, without considering other substantive legal issues. The analysis of the case is based on the above-mentioned study of the general features of the essential security exception clause, i.e. the main content is the substantive legal analysis, without considering political or other factors too much, although some other factors do exist influentially.

1.4 Materials and Method

The research questions are relevant to the essential security exception principle and the dispute between Huawei and the Swedish government. It is essential to analyse the international investment law and essential security exception principle before demonstrating the possibilities of the results of the dispute between

Huawei and the Swedish government. The dissertation mainly used the legal dogmatic method and also used case study as empirical methodology to support analysis.

The legal dogmatic method is used to clarify and analyse the definition, core elements and features of the essential security exception principle. This part of analysis is based on legislative practice, executive actions and court decisions. The legal dogmatic method involves the systematic elaboration, analysis and critical evaluation of legal rules, doctrines or concepts, their conceptual foundations and interrelationships.[7] The underlying tools required for a dogmatic method include statutory materials, case reports, textbooks and books, legal journals, parliamentary debates, government reports, etc.[8]

Depending on the nature of these tools, they can be classified as primary and secondary sources of sources. Primary sources establish the law and include cases, statues, regulations, treaties, and constitutions. Secondary sources explain the law but are non-binding. Normally, the primary sources have the greatest and most direct influence on the outcome of a certain legal issue.[9] The secondary sources are not determinative, but can also influence the creation and interpretation of the law[10], which may play a complementary role in some legal analysis.

When using a legal dogmatics method, there are usually two distinct layers. A general level, i.e. a scientific processing of all the material, and a more specific sense, i.e. a system that conceptualises and systematically values the application of the law.[11] The dissertation employs both levels of analysis. The Chapter 2 analyses the definition, characteristics and application of the essential security exceptions in international investment law in a general sense, based on a scientific processing of the relevant legal material. In Chapter 3, the results of the analysis

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[7] Khushal Vibhute & Filipos Aynalem, 'Legal Research Methods Teaching Material' [2009] <https://chilot.files.wordpress.com/2011/06/legal-research-methods.pdf> accessed 30 April 2022.

[8] Khushal Vibhute & Filipos Aynalem, 'Legal Research Methods Teaching Material' (2009) 72 <https://chilot.files.wordpress.com/2011/06/legal-research-methods.pdf> accessed 30 April 2022.

[9] 'Legal Research Resources for the Public: Types of Resources, Primary vs. Secondary Authority' (University of Michigan Law Library) <https://libguides.law.umich.edu/c.php?g=748873&p=6725487> accessed 1 May 2022

[10] Raul Narits, 'Principle of Law and Legal Dogmatics as Methods Used by Constitutions Courts' (2007) 12 Juridica International 19.

[11] Raul Narits, 'Principle of Law and Legal Dogmatics as Methods Used by Constitutions Courts' (2007) 12 Juridica International 19.

in Chapter 2 are used as a basis for an analysis of the specific application of the legal principle in the context of the dispute between Huawei and the Swedish government.

The empirical method is used in chapter 3 in order to analyse how the essential security exceptions apply in the specific case as a case study. i.e. the dispute between Huawei and the Swedish government.[12]

Empirical legal research includes both an empirical component and a legal component. Legal research requires not only the application of classical legal research methods, i.e. doctrinal methods, but also a combination of black-letter law research and non-doctrinal research.[13] When the response to the problem defined in the research question is "not entirely premised on a specific system of legal rules" and does not involve a hermeneutical quest for legal meaning and/or interpretation, a complementary approach from the social sciences can be used, i.e. a response that cannot be provided exclusively using legal and doctrinal research methods.[14] Empirical legal research differs from theoretical research in the normative disciplines of jurisprudence in that it captures the law in practice through real-life data. Such data may be based on legislation or case law as part of the real world.[15]

Case study is a "strategy" for qualitative research that is distinguished and established in the field of empirical qualitative research.[16] A case study is an 'intensive study of a single case where the purpose of that study is – at least in part – to shed light in a larger class of cases (a population)'.[17] The qualitative approach of case studies can be applied as part of an interdisciplinary and empirical legal research project, which complements legal research based on valid

[12] Lisa Webley, 'Stumbling Blocks in Empirical Legal Research: Case Study Research' (2016) Law and Method <www.lawandmethod.nl/tijdschrift/lawandmethod/2016/10/lawandmethod-D-15-00007> accessed 1 May 2022.
[13] Ian Dobinson and Francis Johns, 'Qualitative Legal Research', in Wing Chui and Mike McConville (eds.), *Research Methods For Law* (Edinburgh University Press 2007).
[14] Banakar Reza, 'Reflections on the Methodological Issues of the Sociology of Law' (2000) 27 Journal of Law and Society 282,283.
[15] Epstein Lee and Martin D. Andrew, *An Introduction to Empirical Legal Research* (OUP 2014).
[16] John.W. Creswell, *Research Design, Qualitative, Quantitative and Mixed Methods Approaches* (SAGE Publishing 2003).
[17] John Gerring, 'What Is a Case Study and What Is It Good For?' (2004) 98 JSTOR <http://www.jstor.org/stable/4145316> accessed 1 May 2022.

research questions.[18] Hutchinson's research suggests that case studies for exploratory reasons can be embedded in empirical legal research, i.e. legal case studies will allow for the exploration of typical examples of legal cases that have produced different legal outcomes.[19] For example, legal case studies cover data from trial transcripts and decisions or interviews with litigants.[20] The third chapter of this paper analyses case studies as an empirical research method. The application of the basic safety exception in practice is explored by parsing and examining an ongoing pending case. This section does not use legal interpretations and doctrine exclusively and requires the assistance of some empirical material, including government policies and company documents, and also incorporates certain political circumstances. As this is a pending case with potentially different legal outcomes possibilities, Chapter 3 focuses on the different legal outcomes of the case in the hope that it will be of some guidance and inspiration for future related cases.

The legal material in this article consists mainly of international law, domestic law, investment agreements and case law. One of the research objectives of this article is to develop an understanding of the principle of the essential security exception in the field of international investment law. This principle is initially rooted in the field of international trade law, namely Article 21 of the General Agreement on Tariffs and Trade. The use of the essential security exception in the field of international investment law is relatively unclear and unified, and its specific content varies from one bilateral, multi-variant IIA or model IIA to another.

This article analyses the definition, development, nature and jurisprudential basis of this principle in the field of international investment law in the context of Article 21 of the GATT and IIAs containing the essential security exception clause. In the section on the case study of the dispute between Huawei and the Swedish government, the paper also refers to parts of Swedish and Chinese law that may be relevant to the dispute in this case. The paper also uses material other than legal material such as empirical material. In the case study section of chapter

[18] Aikaterini Argyrou, 'Making the Case for Case Studies in Empirical Legal Research' (2017) 12(3) utrecht law review <www.utrechtlawreview.org> accessed 1 May 2022.
[19] Terry C M Hutchinson, *Research and Writing in Law* (4th edn, Pyrmont, N.S.W. : Lawbook Co. 2018).
[20] Terry C M Hutchinson, *Research and Writing in Law* (4th edn, Pyrmont, N.S.W. : Lawbook Co. 2018).

3, the decision of the Swedish Administrative Court in the case and the documents submitted by the parties that could be gathered are analysed in order to analyse their claims and the circumstances of the case. This dissertation considers the decision of the Administrative Court in the case study as empirical material because the decision was not handed down by the Supreme Administrative Court and is not final and therefore does not have absolute legal effect. The Swedish system of general administrative courts is a three-tiered system of final adjudication consisting of twelve Administrative Courts, four Administrative Courts of Appeal and one Supreme Administrative Court, meaning that each case is heard from the Administrative Courts and can be appealed twice until a final decision is made by the Supreme Administrative Court.[21] In addition, there is no official English version of the administrative decision on the court's official website, only the Swedish version. I do not have the ability to read Swedish and therefore the analysis of the decision is based on an unofficial English translation of it. Although the translated version is somewhat less accurate, it serves the function of addressing the research question and fulfilling the purpose of the study well, as it only selects parts that are relevant to the topic of the article.

When it comes to the application of essential security interests in international investment tribunals (ICSID), this essay selects a representative selection of relevant case law to examine, mainly the Argentine series.[22] The essential security exception has come under increasing scrutiny as the investor-state arbitration process against Argentina has been highly reported in many media outlets.[23] The existing ICSID case law interpreting this provision basically stems from Argentina's response to the catastrophic financial crisis that hit the country between 2001 and 2002.[24] As a result of a number of factors, interest in

[21] 'Court statistics 2020', Official statistics of Sweden, <https://www.domstol.se/globalassets/filer/gemensamt-innehall/styrning-och-riktlinjer/statistik/2021/court_statistics_2020.pdf> accessed 7 May 2022.

[22] CMS Gas Transmission Company v. Argentine Republic, ICSID case No. ARB/01/8, Award 12 May, 2005; LG&E Energy Corp., L&E Capital Corp., LG&E International Inc v. Argentine Republic, ICSID case No. ARB/02/1, Decision on Liability, 3 October 2006; Enron Corporation Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No ARB/01/3, Award, May 22, 2007.

[23] William J. Moon, 'Essential Security Interests in International Investment Agreements' (2012) 15 Journal of International Economic Law 481.

[24] 'Essential Security Interests in International Investment Agreements' (2012) 15(2), Journal of Internationall Economic Law <https://www.researchgate.net/publication/256017301_Essential_Security_Interests_in_International_Investment_Agreements> accessed 6 May 2022.

Argentina's economic situation began to weaken in the late 1990s. By January 2002, 25% of the urban workforce was unemployed, the majority of the population was living below the poverty line and political and social unrest ensued.[25] Foreign investors filed a series of claims against the government, alleging violations of key obligations under the US-Argentina BIT.[26] According to the claimants, the government's measures targeting various utility sectors violated the foreign investors' contractual right to adjust their tariffs in line with the US inflation index. In its defence, Argentina invoked the defence of necessity in the US-Argentina BIT and international customary law.[27] In turn, ICSID's hearings and decisions in related cases have been significant for the application of the doctrine.

In addition, secondary sources of material have contributed significantly to the analysis of this paper. The analysis of some of the literature relating to the international economic order, international investment and trade law is important, which also supports the selection of case law for this essay. Online sources, including official governmental and non-governmental websites and databases of international investment agreements, provide much material to study for the analysis.

[25] 'Essential Security Interests in International Investment Agreements' (2012) 15(2), Journal of Internationall Economic Law <https://www.researchgate.net/publication/256017301_Essential_Security_Interests_in_International_Investment_Agreements> accessed 6 May 2022.

[26] Kurtz Jürgen, 'Adjudging the Exceptional at International Investment Law: Security, Public Order, and Financial Crisis' (2010) 59 International and Comparative Law Quarterly 325.

[27] 'Essential Security Interests in International Investment Agreements' (2012) 15(2), Journal of Internationall Economic Law <https://www.researchgate.net/publication/256017301_Essential_Security_Interests_in_International_Investment_Agreements> accessed 6 May 2022.

2. Understanding of Essential Security Exception in International Investment Law

2.1 Introduction

In recent years, countries around the world have gradually attached greater importance to national security, and essential security exception clauses have gradually become a common provision in international investment agreements.[28] The setting of essential security exception clauses can, to a certain extent, reduce the legal risk of international disputes, and it is of great significance in balancing the relationship between host countries and investors.[29]

In this chapter, the analysis and interpretation of the essential security exception is based on the concept and theoretical foundation and combined with some specific cases. It points out the possible dilemmas and problems of the clause in judicial practice, discusses the controversial focus of its application in cases and analyses the nature, review path and legal consequences of the clause produced by arbitral tribunals. This will set the scene for the analysis of the application and legal consequences of the essential security exception clause in the dispute between Huawei and the Swedish government in Chapter 3.

2.2 Definition of Essential Security Exception

Before clarifying the definition of essential security exception, it is necessary to have a knowledge of the exception clause in international trade and investment law. An exception clause is a clause which, in certain circumstances, exempts a State party from responsibility and excludes the unlawfulness of its conduct.[30] The effect of an exception is to limit the scope of substantive obligations in a treaty by

[28] Katia Yannaca-Small, 'Essential Security Interests under International Investment Law' [2007] OECD <https://www.oecd.org/daf/inv/investment-policy/40243411.pdf> accessed 1 May 2022.

[29] Robert Brew, 'exception clauses in international investment agreements as a tool for appropriately balancing the right to regulate with investment protection' [2019] Canterbury Law Review 205.

[30] GATT art XX XXI; GATS art XIV.

abrogating a peremptory norm in the relevant context.[31] The essential security exception clauses were first rooted in the field of international trade law and were later transplanted to the field of investment law. For example, article XXI of GATT provided that:

> Security Exceptions, nothing in this Agreement shall be construed (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests (i) relating to fissionable materials or the materials from which they are derived; (ii) 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; (iii) taken in time of war or other emergency in international relations; or (c) 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.[32]

It was an important reference for the conclusion of investment and trade agreements at the time and for decades afterwards, and was at the heart of the first generation of security exceptions.[33]

An essential security exception clause is a type of exception clause which refers to the ability of a State to take the necessary regulatory measures to safeguard the essential security interests of the State and exempt from legal liability for breach of treaty obligations when a State party is faced with an essential security risk to the State or other similar specific urgent circumstances. Security is often treated as an exception, both in domestic law and in international trade law.[34] The security exception gives parties to a treaty the flexibility to respond to security-related matters.[35]

Currently, essential security exception clauses are widely used in the field of investment law, and are reflected in bilateral investment agreements and regional

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[31] Hage J, Waltermann A and Arosemena Solorzano G, 'Exceptions in International Law' in Bartels L, Paddeu F(eds), *Exceptions in international law* (Oxford: Oxford University Press 2020).

[32] GATT art XXI.

[33] Sebastián Mantilla Blanco and Alexander Pehl, 'National Security Exceptions In International Trade And Investment Agreements' [2020] Germany:springer briefs in law Press 5.

[34] J. Benton Heath, 'Trade and Security Among the Ruins' (2020) 30 Duke Journal of Comparative and International Law 223.

[35] GATT art XXI; GATS art XIV bis; Argentina–United States BIT art XI.

investment agreements. For example, Argentina–US BIT art XI provides that this Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests. Article 12 in Germany–India BIT (1995) provides that nothing in this Agreement shall prevent either Contracting Party from applying prohibitions or restrictions to the extent necessary for the protection of its essential security interests.'[36] Also eg US Model BIT (2012) art 18(2): 'Nothing in this Treaty shall be construed … to preclude a Party from applying measures that it considers necessary for … the protection of its own essential security interests.'[37] Article 11 of the US-Argentina BIT; also, Article 18 of the 2012 version of the US Model BIT, Article 17 of the 2015 version of the Indian Model BIT, Article 10 of the 2004 version of the Canadian Model BIT, etc. Regional economic and trade agreements include Article 32.2 of the US-Mexico-Canada Agreement (USMCA), Chapter 17 of the Regional Comprehensive Economic Partnership Agreement (RCEP) Article 13, etc. These exception clauses define the scope of essential security interests to a certain extent and clarify the ability of the host country to exclude adverse legal consequences arising from the breach of the agreement for the purpose of protecting certain interests.

2.3 Jurisprudential Basis of Essential Security Exception

2.3.1 Balance of conflicting interests

In international investment, the investor brings the host country the benefits it needs in terms of capital and technology, and the host country provides the investor with facilities such as markets and friendly investment climate, and there are mutual interests on both sides. On the other hand, however, there is a potential conflict of interest between the two parties when considering essential security interests. The host country has the right to regulate and tends to seek maximum freedom to deal with perceived threats to its national security. Foreign investors, on the contrary, want the highest possible level of protection and predictability

[36] Article 12 in Germany–India BIT (1995).
[37] US Model BIT (2012) art 18(2).

when investing in the host country.[38] The creation of an essential security exception serves to align interests by sharing the risk with investors when the interests protected by the host country are lost. The host country and the investor specify the exception clause in advance through the investment agreement, while also imposing more stringent conditions on the clause[39] to prevent abuse by the host country. As far as possible, a balance between investment liberalisation and the preservation of the host country's interests is needed to be achieved.

2.3.2 Duality: Permission or Defence

Exceptions in international law are theoretically dualistic in nature, i.e. they are either permissive or defensive.[40] This dualistic structure of exceptions poses certain interpretative difficulties for international trade and investment law, and the distinction between the two is of significant normative importance. If the exception is permissive, then when a government confirms that its measures fall within the scope of the exception, the order under the treaty does not apply. In other words, the exception is a clause that limits the substantive obligations in the treaty. If the exception is a defence, when the government wishes to use the clause it needs to acknowledge the failed performing its obligations under the treaty, but go on to prove that it is in pursuit of an interest that the parties have mutually agreed is of priority (i.e. prove that the conduct was lawful).[41]

From a practical point of view, tribunals rarely address the duality of the exception directly and the distinctive feature of decided cases is that they almost always lack a doctrinal basis for distinguishing between a permission and a defence.[42] But it is possible to judge whether they regard the exception as a permission or a defence by the tribunal's analytical approach. Recent decisions in investment arbitration have typically described the exception as a permission.[43]

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[38] 'The Protection of National Security in IIAs' [2009] UNCTAD <https://unctad.org/webflyer/protection-national-security-iias> accessed 2 May 2022.

[39] GATT, the Chapeau of article XX; Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights' (2002) 13 European Journal of International Law 753, 814.

[40] Jorge E. Viñuales, 'Seven ways of escaping a rule: Of exceptions and their avatars in international law', L. Bartels and F. Paddeu(eds), *Exceptions in International Law* (Oxford University Press, 2017).

[41] Caroline Henckels 'permission to act: the legal character of general and security exceptions in international trade and investment law' (2020) 69 International and Comparative Law Quarterly 557.

[42] Caroline Henckels, 'permission to act: the legal character of general and security exceptions in international trade and investment law' (2020) 69 International and Comparative Law Quarterly 557.

[43] LG&E v. Argentina (2006) and El Paso v. Argentina (2011), CMS v. Argentina annulment committee decision (2007), CC Devas v. India (2016).

However, if the exception is regarded as a permission it may also face jurisdictional issues, and in practice arbitral tribunals are not uniform in their interpretation and judgement.[44] Clarifying the nature of the exceptions rule would facilitate consistency and regularity of decisions.

2.3.3 Essential Security Exceptions and Necessity Provisions

The necessity provision refers to article 25 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the United Nations, also known as the Necessity Clause. The articles refer to the ability of the State to exclude the wrongfulness of an act of the State in breach of an international obligation when it takes the only measure to protect its essential interests by implementing a response to a grave and imminent peril.[45] Similar to the essential security exception, both are related to the right of self-protection[46] and are capable of exempting the State in question from certain wrongful acts under certain conditions. When the necessity clause was invoked in a series of cases concerning the Argentine economic crisis, such as CMS, Sempra and Enron, it also gave rise to considerable disagreement and was interpreted differently by different arbitral tribunals. However, there are significant differences between the two. Firstly, the scopes of their objectives are different.

In terms of the objectives of the clauses, while both are aimed at providing an exemption in specific circumstances, the essential security exception clause, as a predetermined clause in an investment agreement, is subject to the setting and interpretation of the clause by the contracting parties and generally has a broader scope of objectives than necessity.[47] Secondly, the legal origins of the two are different. The necessity clause belongs to international customary law, while the legal principle of the essential security exception is treaty law.[48]

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[44] Caroline Henckels, 'permission to act: the legal character of general and security exceptions in international trade and investment law' (2020) 69 International and Comparative Law Quarterly 557.

[45] Maira Agius, 'The Invocation of Necessity in International Law', (2009)56(2) Netherlands International Law Review.

[46] Roman Boed, 'State of Necessity as a Justification for Internationally Wrongful Conduct', (2001) 1 Yale Human Rights and Development Law Journal 4.

[47] Roman Boed, 'State of Necessity as a Justification for Internationally Wrongful Conduct', (2001) 1 Yale Human Rights and Development Law Journal 4.

[48] Katia Yannaca-Small, 'Essential Security Interests under International Investment Law' [2007] OECD <https://www.oecd.org/daf/inv/investment-policy/40243411.pdf> accessed 2 May 2022.

In the Gabcikovo-Nagymaros case, the International Law Commission mentioned in its commentary that the International Court of Justice had recognised that the defence of necessity was customary international law and that interests beyond national boundaries, such as ecological damage, could be invoked to justify it.[49] Thirdly, the invocation of the necessity clause has certain limitations. The first is that necessity may be invoked only to protect an essential interest against a grave and imminent peril. The second limitation is that the conduct in question must not seriously impair the essential interests of other States or of the State concerned or of the international community as a whole. Thirdly, necessity cannot be invoked to preclude the wrongfulness of an incompatible measure when the international obligation in question expressly or implicitly precludes a plea of necessity. Fourthly, necessity cannot be invoked as a defence if the responsible State has contributed to the circumstances of need.[50]

2.4 Application of the Essential Security Exception in Practice

2.4.1 Self-judging Nature

The essential security exceptions can be typologically analysed according to the presence or absence of the wording such as "it considers" in the clause, i.e., they are divided into two categories: self-judging and non-self-judging. In short, it is whether the determination of essential security exceptions is self-judged by the host country. This is also directly related to the question of whether the international investment dispute settlement agency has the authority to review cases where the essential security exception is invoked as a defence. The self-judgmental nature of the essential security exception clause is usually expressed in the treaty language by the words "it considers", "it considers necessary", and other similar words to indicate the host country's self-judgement implication. Those that do not contain such language are determined to be non-self-judgmental in nature.

Article 31 (1) of the Vienna Convention on the Law of Treaties provides that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning

[49] Gabcikovo-Nagymaros (Hungary v. the Slovak Republic), 1997 I.C.J. 7, 40 (Sept. 25, 1997).

[50] Katia Yannaca-Small, 'Essential Security Interests under International Investment Law' [2007] OECD <https://www.oecd.org/daf/inv/investment-policy/40243411.pdf> accessed 2 May 2022.

to be given to the terms of the treaty in their context and in the light of its object and purpose"[51], i.e. the terms of an international treaty must be stated in an objective manner. The States concerned tend to derogate from their obligations under international law by reserving discretion based on the interpretation of the essential security exception clause as being self-judging in nature, which in principle must be made clear by the explicit use of language in the clause conferring discretion on the parties, i.e. the nature of self-judgement must be made clear.[52] In addition to some discussion of this in ICSID arbitration practice, the Permanent Court of Arbitration in The Hague (PCA) has also clarified this. For example, in DT AG v. India, the tribunal highlighted the absence of the term "it considers" in the investment agreement. They held that only clear wording in the clause could be considered self-judgmental in nature.[53]

Some countries and scholars have insisted that even essential security exceptions that do not explicitly contain self-judgement language should be interpreted as self-judging in nature. For example, in the 1990s, the U.S. government issued a public statement in the Nicaragua v. U.S. trade sanctions case, stating that it considered the essential security exceptions in its BIT to be self-judging, despite the opposite in ruling from ICSID.[54] The determination of whether a provision is self-judging should focus on the treaty context, the international environment, and the historical and cultural traditions and customary practices of the parties to the treaty. Therefore, taking into account the U.S. judicial practice and the government's usual position on international investment disputes, Diane A. Desierto argues that the U.S. essential security exceptions that do not explicitly contain self-judging language are "implicitly self-judging" in nature.[55]

In practice, when a dispute involves issues of essential national security, the parties often argue that the adjudicating body does not have jurisdiction. Such as the jurisdictional objections raised by the U.S. in the Nicaragua case and the Iranian Oil Platforms case. In the Iranian Oil Platforms case, the court stated that

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[51] Vienna Convention on the Law of Treaties 1969, article 31 (1).

[52] Stepban Scbill and Robyn Briese. '"If the State Considers": Self-Judging Clauses in International Dispute' A. von Bogdandy and R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law* (2009).

[53] Deutsche Telekom AG v India, Interim Award (13 December 2017) PCA Case No. 2014-10, para 231.

[54] The Republic of Nicaragua v. The United States of America, 1986 I.C.J. 14, para35 (June 27, 1986).

[55] Diane A. Desierto, 'Necessity and "Supplementary Means of Interpretation" for Non—precluded Measures in Bilateral Investment Treaties' [2009] University of Pennsylvania Journal of International Law 930.

the essential security exception only provided a basis for a possible defence, not a basis for a jurisdictional objection.[56] In the Argentine series of cases, neither tribunal denied jurisdiction in the case, despite inconsistent findings as to whether Article 11 of the U.S.-Argentine BIT has a self-judging attribute.[57] Thus, the self-judging attributes of the essential security exception are irrelevant to adjudicatability.

2.4.2 Review Procedure

International dispute settlement bodies such as ICSID and the International Investment Court have jurisdiction over essential security exception clauses with a self-judging nature, and the clause applies a limited scope of good faith review.[58] In the field of international law, there is no clear legal text explaining the basic principle of good faith review, but some scholars have expressed their opinions in the context of judicial practice of international investment dispute handling. Among them, William W. Burke-White and Andreas Von Staden argue that a good faith review of the essential security exception should include two basic elements: first, whether the state engaged in good faith and fair dealing. Under this standard, the central question for good faith review by international dispute bodies should be whether the host state acted in good faith and to the best of its ability when invoking the essential security exception. If there is evidence that the host state merely used the exception clause as a pretext for harming the interests of investors or that there is no substantial connection between the measures taken and essential security interests, the host state may be deemed not to have invoked the essential security exception on the basis of the protection of national security interests and then clearly fails to meet the requirement of good faith and fair dealing, and the international investment dispute settlement agencies will be entitled to rule that the host state did not invoke the essential security exception in good faith.[59]

Second, whether there is a reasonable basis for invocating the exception clause. A reasonable person in the host country's position would be required to perceive the

[56] Sebastián Mantilla Blanco and Alexander Pehl, 'National Security Exceptions In International Trade And Investment Agreements' [2020] Germany:springer briefs in law Press 5.
[57] the U.S.-Argentine BIT Article 11
[58] Stepban Scbill, Robyn Briese. '"If the State Considers": Self-Judging Clauses in International Dispute' A. von Bogdandy and R. Wolfrum (eds.), Max Planck Yearbook of United Nations Law (2009).
[59] William W. Burke-White and Andreas Von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' (2007) 48 Virginia Journal of International Law 379, 380.

host country's intent to protect essential security; otherwise, the agencies may conclude that the host country did not invoke the essential security exception in good faith.[60]

When the application of a non-self-judging essential security exception clause is controversial, the legitimacy and reasonableness of the application of the clause should be reviewed by the arbitral tribunal, which is able to conduct a substantive review and is not limited only by the principle of good faith. Although most arbitral tribunals have the right to conduct a comprehensive review of non-self-judging security exceptions, how to review the clauses is not uniform in international practice. There are two main ways to review the interpretation of non-self-judging essential security exceptions: first, to completely exclude the invocation of external resources, and to review and interpret only the clause itself. For example, in Deutsche Telekom AG v. India, the arbitral tribunal refused to introduce external sources such as general international law into the interpretation of the clause, and held that the clause should be interpreted according to its original meaning.[61] Secondly, the clause itself can be supplemented by referring to external sources, or, by referring to similar external sources, the clause can be reviewed directly on the basis of external sources. For example, in the CMS case, Enron case, Sempra case, there is the invocation of the customary international law of necessity clause, or the invocation of the GATT and WTO exceptions in the tribunal of the Continental case.[62] In individual cases, the right to invoke is also in the hands of the tribunal, so there is a risk that different tribunals may interpret it differently. For example, in the CMS case, the invocation of necessity in customary international law was unreasonable. The arbitral tribunal in that case equated the elements and conditions of the necessity clause in customary international law with the elements and conditions of the essential security exception in the U.S.-Argentine BIT.[63] The differences between the necessity clause and the essential security exception have already been analysed above, and

[60] William W. Burke-White and Andreas Von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' (2007) 48 Virginia Journal of International Law 380.
[61] Deutsche Telekom v. India, PCA Case No. 2014-10.
[62] CMS case, Enron case, Sempra case, Continental case.
[63] CMS case.

the conditions of application of necessity are more stringent, so the equivalence of the two increases the requirement of reviewing the essential security exception.

2.4.3 Legal Consequences

The legal consequences of the application of the essential security exception are mainly discussed whether the host state still needs to provide relief to the investor after the application of the relevant exemption clause. There are three main views on this: one is that the host country needs to bear the responsibility of relief. The CMS tribunal took this view, and in the CMS case, the Argentine government argued that after the exclusion of the wrongful conduct, it should be exempted from liability for relief. However, the tribunal rejected this argument, explaining that the Argentine government's claim increased the potential cost and expense to the State or the public of the other party.[64] Even if the host country excluded the legality of the act by the defence, it was only temporarily exempted from its responsibility to compensate, and still needed to compensate when it could.[65] Second, it is advocated that the host country and the investor should negotiate to determine. This view is that the host country should negotiate with the investor to determine the final amount of relief. In essence, it is also believed that the host country should provide relief to the investor even if the defence is successful, but because both parties share the risk, the process of negotiation tends to reduce the responsibility of the host country. Thirdly, the host country should be exempted from the responsibility of relief. In the Continental case, the tribunal argued that if Argentina's defence was sufficient and successful, it would be exempted from any responsibility, because the necessity of the harmful conduct after its defence was successful had ruled out the illegality of its breach of its obligations under the agreement, and it should be exempted from the legal consequences. Logically, the absence of illegality in the conduct of a state necessarily excludes responsibility.

[64] CMS case.

[65] José E. Alvarez, ‘‘Beware: Boundary Crossings’ – A Critical Appraisal of Public Law Approaches to International Investment Law’ (2016) The Journal of World Investment & Trade.

3. Case Study: Analysis of the Dispute between Huawei and the Swedish Government

3.1 Procedural Issues

When announcing the terms of the 5g spectrum auction in 2020, the Swedish Post and Telecommunications Authority required any operator bidding for the auction not to use equipment from Chinese suppliers Huawei and ZTE on national security grounds.[66]Huawei then took the Swedish Post and Telecommunications Authority to the Administrative Court in Stockholm, Sweden, where the court ruled against Huawei and rejected Huawei's application for leave to appeal.[67] On 31 December 2020, Huawei issued a "Notice of Dispute" to the Swedish government under the 1982 China-Sweden Bilateral Investment Treaty, claiming that the Swedish government's ban on The Swedish government's ban on the use of Huawei's equipment by domestic telecoms operators is a breach of its commitments under the relevant investment treaty.[68] On 21 January 2022, ICSID officially registered Huawei's request to initiate arbitration proceedings and the case is currently pending.[69]

3.2 Controversial Focus

As stated in the Administrative Court's decision, essential security interests are currently the main central point of contention at the legal level in the dispute between Huawei and the Swedish government. The analysis of the focus of the dispute in this subsection is based primarily on the doctrinal study of the essential

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[66] PTS, Decision on the authorisation to use radio transmitters in the 3.5 GHz and 2.3 GHz bandS Annex A1 - Conditions for authorisation to use radio transmitters in the allocated frequency band within 3400-3720 MHz, (ref. no. 18-8496, 2020) para 28.

[67] Huawei Technologies Sweden AB v. PTS, FÖRVALTNINGSRÄTTEN I STOCKHOLM, case No. 24231-20/2378-21, 22 June, 2021.

[68] Huawei Technologies Co., Ltd., Written Notification of Dispute Pursuant to Article 6 bis of the Agreement on the Mutual Protection of Investments entered into between the Kingdom of Sweden and the People's Republic of China on 29 March 1982, as amended on 27 September 2004 (2020.12.31).

[69] Huawei Technologies Co., Ltd. v. Kingdom of Sweden (ICSID pending Case No. ARB/22/2) <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/22/2> accessed 28 April 2022.

security exception and the text of the Administrative Court's decision. The text of the Administrative Court's decision is comprehensive in its content, including both procedural and substantive legal issues and disputes. The Administrative Court decision covers aspects such as whether an application to the European Court of Justice for a preliminary ruling is required, whether the PTS measure was procedurally erroneous, whether the PTS decision was sufficiently precise, whether there was an obligation to notify the report, whether the PTS was justified in combining the permission to use the radio transmitter with the terms of a requirement of importance to Swedish security, whether the PTS was entitled to decide on the conditions in question, whether EU law applies to the conditions on appeal and whether these conditions restrict essential rights and freedoms.[70] As the essential security interest is the central topic examined in this paper, this subsection is mainly selected for reference in the analysis relating to the application of the essential security exception and does not deal with the analysis and evaluation of procedural legal issues or the application and interpretation of other laws.

3.2.1 The Link between 5G Construction and the Security of Sweden and the Burden of Proof and Evidentiary Requirements

The Administrative Court must examine whether section 6, paragraph 7 of the Act on Electronic Communications (LEK) is fulfilled, i.e. section 6, paragraph 7 states that permission shall be granted if the use of radio can be passed without causing harm to Swedish security.[71] The government wants Sweden to be able to face the security challenges that come with the expansion of wireless digital infrastructure, such as 5G networks. It is therefore important to set conditions that take Sweden's security into account when building such socially significant infrastructure. The government believes that there should be an opportunity to exclude components, suppliers, operators and radio users that do not maintain a sufficiently high level of security.[72] In order to be able to obtain a licence under the assumption that the

[70] Huawei Technologies Co., Ltd. v. Kingdom of Sweden (ICSID pending Case No. ARB/22/2) <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/22/2> accessed 28 April 2022.
[71] The Electronic Communications Act (LEK) 2003, § 6 first paragraph 7.
[72] Infrastruktur Departementet, Skydd av Sveriges säkerhet vid radioanvändning (Regeringens proposition 2019/20:15) para. 28 f.

use of radio would be detrimental to Swedish security, LEK has introduced a provision that, stating that permission to use radio transmitters may be combined with conditions on requirements that are of significance for Sweden's security.[73]

Regarding the evidentiary requirements under LEK, Huawei stated that according to EU case law, the Court requires that the harm to national security needs to meet the question of being a real, present and sufficiently serious threat. Huawei referred to the ECJ judgments in C-78/18, Commission v. Hungary and C-66/18.[74] In the Commission v. Hungary judgement, the ECJ stated what requirements need to be met when a Member State invokes considerations of public policy and public security to restrict essential freedoms under EU law.[75] In Case C-78/18, a Member State had enacted legislation restricting the free movement of capital, which was a presumption of principle and without distinction. The European Court of Justice stated that considerations of public order and security may only be invoked where there is a real and sufficiently serious threat affecting an essential public interest.[76] In Case C-66/18, the EU ruled that a Member State - which had adopted specific measures on the maintenance of public order in its national legislation - had failed to put forward arguments which demonstrated in a concrete and detailed manner that certain activities would constitute a real, present and sufficiently serious threat to the essential interests of a Member State.

The Administrative Court considered that the requirement set out by the European Court of Justice should not be regarded as a genuine evidential requirement, but rather as a directive to show that it is not sufficient to invoke mere presumptions, hypotheses or abstract assumptions to justify restrictions on the freedoms and rights protected by public order and security. The Administrative Court also found that the current evidentiary requirements in the LEK meant that there had to be objective grounds for adoption. The burden of proof in the LEK is therefore in line with EU law.[77]

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[73] Infrastruktur Departementet, Skydd av Sveriges säkerhet vid radioanvändning (Regeringens proposition 2019/20:15) para. 31.
[74] Huawei Technologies Sweden AB v. PTS, FÖRVALTNINGSRÄTTEN I STOCKHOLM, case No. 24231-20/2378-21, 22 June, 2021 p25.
[75] C-78/18 - Commission v Hungary 2020.
[76] C-66/18 - Commission v Hungary 2020.
[77] Huawei Technologies Sweden AB v. PTS, FÖRVALTNINGSRÄTTEN I STOCKHOLM, case No. 24231-20/2378-21, 22 June, 2021 p26.

3.2.2 Whether the People's Republic of China is Engaged in Activities that Threaten the Security of Sweden

When reviewing if Huawei was being used as a means by the People's Republic of China to conduct security threat activities against Sweden. The Administrative Court held that the judgement on this issue involves, on the one hand, an assessment of Huawei's ties with the Chinese government, and on the other, an assessment of whether the Chinese state's pressure on Huawei may cause damage to Sweden's security.

From the perspective of Huawei's links to the Chinese government, PTS argued that Huawei has links to the Chinese state through, among other things, the China Intelligence Law and the Chinese state's influence over trade unions. PTS also cites its interpretation of the relevant provisions of the China Intelligence Law and its interpretation of trade unions as evidence. Huawei argues that the China Intelligence Law does not give Chinese intelligence agencies the power to order all Huawei companies in China, all Huawei companies outside of China, or the employees of those Huawei companies to engage in surveillance or disable communications of telecommunications operators, and Huawei's argument that the PTS claim that Huawei's shareholding employees were influenced by the trade unions, which in turn were influenced by the Chinese Communist Party, was a hypothetical claim with no basis in fact. The evidence of PTS consisted mainly of specific information from advisory bodies. In contrast to this evidence, the evidence adduced by Huawei consisted mainly of their legal opinions and other statements concerning the relevant situation in the People's Republic of China. Finally the Administrative Court found that it could be assumed that the Chinese government exerted pressure on Huawei through Chinese intelligence laws and trade unions.[78]

From the perspective of whether the Chinese government's pressure on Huawei could harm Sweden's security, PTS claims that Huawei's products could be used to spy on or disrupt Sweden's 5G network. Huawei denied that its products could be used in this way and stated that its products had been extensively tested internally and externally and complied with the relevant international standards.

[78] Huawei Technologies Sweden AB v. PTS, FÖRVALTNINGSRÄTTEN I STOCKHOLM, case No. 24231-20/2378-21, 22 June, 2021 p31.

The Administrative Court noted that the case concerned alleged non-technical vulnerabilities and not allegations that Huawei's products contained technical vulnerabilities. Here too, the PTS evidence consisted mainly of information provided by the consultancy.[79] The Administrative Court found that the evidence in the case supported that there was no effective means of checking the software that was potentially installed and that the supplier had control over the supply of spare parts. Even though Huawei submitted that there was no information that Huawei was involved in any activities that threatened security, the Administrative Court found that the investigation supported the idea that the Chinese state could put pressure on Huawei to the extent that the radio equipment of an operator using Huawei products in critical functions would be detrimental to Sweden's security.[80]

3.3 Situation at ICSID Hearings

The decision of the Administrative Court is not the end of the dispute between Huawei and Sweden. On 21 January 2022, ICSID officially registered Huawei's request to initiate arbitration proceedings, and the case is currently pending. Although there may be an intention to deal a settlement of the case between Huawei and the Swedish government, the content of this subsection is mainly based on the assumption that the case will be heard by ICSID.

It is important to note that the substance of the case was different between the Swedish Administrative Courts and ICSID. In this case, the Administrative Court resolved a dispute between an individual and an authority over public procurement for the construction of the 5G network in Sweden, whereas the ICSID heard a dispute between an individual and the State in relation to an investment. The Administrative Court had the competence to rule on the public procurement actions of PTS, whereas ICSID could not make PTS change the procedure or outcome of the public procurement, but could only claim damages.

3.3.1 Whether the ICSID Has Jurisdiction in the Case

The key issue in international investment arbitration is whether ICSID has jurisdiction. There have been numerous cases where ICSID has rejected

[79] Huawei Technologies Sweden AB v. PTS, FÖRVALTNINGSRÄTTEN I STOCKHOLM, case No. 24231-20/2378-21, 22 June, 2021 p33.

[80] Huawei Technologies Sweden AB v. PTS, FÖRVALTNINGSRÄTTEN I STOCKHOLM, case No. 24231-20/2378-21, 22 June, 2021 p33.

arbitration requests due to "lack of jurisdiction". For example, Ping An v. Belgium.[81] Returning to Huawei v. Sweden, the first issue for the tribunal and the parties to the dispute was to clarify whether the matter fell within the jurisdiction of the tribunal. The resolution of this issue goes back both to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (also known as the Washington Convention) and to the specific provisions of the 1982 China-Sweden Bilateral Investment Treaty.

According to Article 25(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (also known as the Washington Convention), the requirements to qualify for ICSID arbitration are threefold: 1. the party to the dispute must be a government or governmental organisation or institution of a Contracting State; the party to the dispute must be a natural or legal person of a Contracting State; 2. the subject matter of the arbitration must be a "legal dispute" arising out of an "investment"; 3. "ICSID's jurisdiction over the dispute must be agreed in writing by both parties to the dispute and cannot be revoked unilaterally after both parties have agreed. This means that the dispute between Huawei and Sweden is subject to the above conditions, Huawei being a Chinese company and the Swedish Postal and Telecommunications Administration (PTS) being a government agency. The dispute that Huawei referred to ICSID for resolution arose out of a Swedish ban on Huawei's operations in Sweden. The PTS issued conditions for the auction of 5G spectrum, which required participating telecoms operators not to install Huawei's telecoms equipment in new networks for national security reasons, and for those already installed with Huawei's equipment, to remove it from their existing infrastructure and core functions. The PTS's request directly damages Huawei's reputation and business interests in Europe, and the dispute is therefore a legal dispute arising from the investment.

Therefore, the most crucial aspect of the determination of jurisdiction in an ICSID arbitration is the written consent of the parties, i.e. whether there is a consensus between China and Sweden to refer the dispute involved in this case to ICSID for resolution. Here it comes down to the interpretation of the relevant provisions of the 1982 investment agreement between China and Sweden. Firstly, according to

[81] Ping An v. Belgium case.

Article 6 of the agreement (which was amended in 2004), any dispute concerning an investment shall be settled amicably to the extent possible, and the investor may also take the dispute to an arbitral tribunal for international arbitration, subject to the satisfaction of certain preconditions. Based on the above analysis, the dispute falls within the jurisdiction of the arbitral tribunal as it is an investment-related dispute. Article VI of the 2004 revised agreement added a new requirement of "preliminary procedure" for international investment arbitration, i.e. the jurisdiction of the arbitral tribunal could only be established if the requirements of the preliminary procedure were met. In the case between Ping An and the Belgian government, the Belgian Government argued that the tribunal lacked jurisdiction because the claimant had not submitted the arbitration at the time required by the preceding procedure.[82] Particular attention should therefore be paid to the requirements of the preliminary procedure. According to article VI, paragraphs 2 and 3 of the agreement, as follows:

> Article 6 bis: (2) An investor may decide to submit a dispute to a competent domestic court of the Contracting State in whose territory the investment is made. The investor may nevertheless have access to international dispute settlement on the condition that the investor has withdrawn its case from the domestic court before a final judgement has been delivered on the subject matter. (3) If a dispute referred to in paragraph 1 of this Article cannot be settled amicably within three (3) months following the date on which the dispute was raised by the investor through written notification, each Contracting State hereby consents to the submission of the dispute, at the investor's choice, for resolution by international arbitration to one of the following fora: i) the International Centre for Settlement of Investment Disputes (ICSID) for settlement by arbitration under the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States[83]

Upon learning of the ban imposed by the Swedish government, Huawei appealed to the Administrative Court of Stockholm. On 22 June 2021, the Administrative Court of Stockholm issued its judgement in the case, rejecting Huawei's appeal.[84] Huawei gave notice of the dispute on 31 December 2020, more than three months after the date of filing the lawsuit, and the dispute remains unresolved. In light of the above, the circumstances of this case comply with the antecedent procedures required by the agreement. There is a high probability that the case will fall within ICSID jurisdiction.

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[82] Ping An v. Belgium case.

[83] Amendment to the Agreement on Mutual Protection of Investments Between the Government of the Kingdom of Sweden and the Government of the People's Republic of China of March 29 1982, Article 6 bis.

[84] Huawei Technologies Sweden AB v. PTS, FÖRVALTNINGSRÄTTEN I STOCKHOLM, case No. 24231-20/2378-21, 22 June, 2021.

3.3.2 Application of the Essential Security Exception in this Case

This subsection adopts the same order of review as the arbitral tribunal in LG&E case and Continental case, i.e. the nature of the essential security exception clause in the BIT is examined first, followed by an analysis of its specific application.[85] In this case, only Article VII of the 1982 BIT between Sweden and China comes close to an exception clause in its textual formulation, which provides that "Nothing in this Agreement shall prejudice any rights or benefits accruing under Nothing in this Agreement shall prejudice any rights or benefits accruing under national or international law to the interests of a national or a company of one Contracting State in the territory of the other Contracting State. "[86]It does not refer to essential security or national security, but only in general terms to interests protected by national or international law, and does not specify the scope of the content. Assuming that the clause is an essential security exception, it is also non-self-judging because it does not contain the expression “it considers”.

If Article 7 is considered to be an essential security exception of a non-self-judging nature, it is for the arbitral tribunal to review the legality and reasonableness of the application of the exception, as noted in chapter 2. In such cases where the formulation is vague and the scope is unclear, the arbitral tribunal may invoke external sources to interpret whether the circumstances of the case are essential security interests. Under article 31, paragraph 3, subparagraph 3, of the Vienna Convention on the Law of Treaties, the rules of general international law may be taken into account.[87] Examples are the invocation of necessity clause in customary international law or the GATT and WTO exceptions. By drawing on external provisions to examine the provision, it is possible to interpret them more precisely and at the same time preserve the integrity of the interpretation of international law. Since there is no doubt that foreign investments are subject to the law and administrative control of host States[88], if Article VII is not considered to be an essential security exception, it can be judged on the legal basis of

[85] LG&E case and Continental case.
[86] China - Sweden BIT (1982) article VII.
[87] Vienna Convention on the Law of Treaties 1969, article 31 (1).
[88] Christoph Schreuer, ‘Investment, International Protection’ [2011] <https://www.univie.ac.at/intlaw/wordpress/pdf/investments_Int_Protection.pdf> accessed 6 May 2022.

fulfilling the protection of the interests of the host State as well as using WTO law and the GATT interpretation of essential security interests.

The next step is to make a judgement as to whether the case qualifies for the essential security exception substantively. Evidence and factual findings are made in accordance with the aspects listed in 3.3 Focus of the dispute. If the case were to be tried at ICSID, the tribunal's review of whether it is an essential security interest would prevail. The findings of the PTS or the Swedish Security Service may not have the same status and weight as they were tried before the Swedish Administrative Court.

4. Analysis and Conclusions

4.1 The Balance between Trade Liberalisation, Investment Protection and National Autonomy

The multilateral trading system established by the enactment of the General Agreement on Tariffs and Trade in 1947 and the creation of the World Trade Organisation (WTO) in 1994 has made a significant contribution to trade liberalisation and global economic efficiency. In order to ensure trade liberalisation, countries gave up some of their sovereign rights when acceding to these international agreements. This is reflected in the operation of essential principles such as the most favoured nation principle and the principle of national treatment. However, in order to balance the pursuit of trade liberalisation and national sovereignty, under some circumstances, GATT Article 21 allows, to a certain extent, a Member State to impose sanctions on any other Member State in the name of national security.[89] In the field of international investment law this is reflected in the possibility for host countries to exclude the illegality of taking wrongful acts against foreign investors due to considerations of essential security interests.

It is clear that economic sanctions run counter to the ultimate objectives of the WTO and GATT, namely the promotion of trade liberalization, non-discrimination, predictability and multilateralism in international trade policymaking.[90] Such sanctions pose a clear obstacle to trade liberalisation by allowing the selective imposition of barriers and to some extent undermine the principle of non-discrimination. Such sanctions undermine predictability as the host country can take measures without notice or even published notice. And the provision appears to allow unilateral action without the consent of WTO members.[91] This contradicts the four key objectives of the WTO. For these

[89] Sandeep Ravikumar, 'The GATT Security Exception: Systemic Safeguards Against Its Misuse' [2016] National University of Juridical Sciences (NUJS).
[90] WTO website, <https://www.wto.org/> ; GATT. accessed 6 May 2022
[91] Report of the Panel, Decision Concerning Article XXI of the General Agreement, L/5426, GATT B.I.S.D. (29th Supp.) (December 2, 1982) ('Decision concerning Article XXI').

reasons, the scope of the essential security exception to Article 21 of the GATT needs to be determined in such a way as to ensure that the potential for abuse of the provision is minimised, while at the same time it needs to be able to effectively protect the essential security interests of States.

On the face of it, GATT article XXI appears to give Members broad and virtually unfettered powers to impose trade restrictions. However, sufficient safeguards and mechanisms exist in the WTO system to prevent abuse of the Article, while maintaining the strength and relevance of the WTO as an important part of the international law system.[92]

And in the field of international investment law, some IIAs also typically provide that the host country will not use exceptions as disguised restrictions on trade or investment. This approach is commonly used in Association of Southeast Asian Nations (ASEAN) investment agreements. Article 13 of the ASEAN Investment Framework Agreement, for example, provides that: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on investment flows, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures; (a) necessary to protect national security and public morals; (Emphasis added.) "[93]

This approach ensures that the host country will not be able to abuse this exception to derogate from its treaty obligations or to use security threats as a pretext for protectionist measures. This condition may be particularly important in cases where the host country seeks to protect its strategic industries from foreign takeovers.[94]

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[92] Sandeep Ravikumar, 'The GATT Security Exception: Systemic Safeguards Against Its Misuse' [2016] National University of Juridical Sciences (NUJS).
[93] The Framework Agreement on the ASEAN Investment Area (1998), article 13.
[94] 'The Protection of National Security in IIAs' [2009] UNCTAD <https://unctad.org/webflyer/protection-national-security-iias> accessed 2 May 2022.

4.2 How is the Scope of Essential Security Interests Defined?

One of the issues at stake in the case was whether the construction of the 5g network involved essential national security interests and thus precluded the unlawfulness of state protection measures. For this question, the Administrative Court mainly cited provisions in Swedish domestic law, namely the Electronic Information Act, which affirm that the licensing of radio transmitters can be combined with conditions for requirements of importance to Swedish security.[95] Since the scope of the essential security interest was not specified in the investment agreement between Sweden and China, the Administrative Court took the approach of invoking domestic law to reflect the importance of radio transmitters to national security. If the case had been heard at ICSID, would the tribunal's path of judgement have been consistent with that of a domestic administrative court?

The essential security exception, as an exemption from liability in the field of international investment law, has at its core the concept of "essential security". Article 21 of the GATT broadly divides the exceptions into three categories: essential security disclosures, essential national security and the UN Charter's international peace and security obligations.[96] The analysis of the first two of these is directly linked to how the threshold for objective assessment of essential security interests is set. Thus, the definition of essential security interests directly determines the interpretation and scope of application of the essential security exceptions in IIAs.

Article 21(b) of the GATT, after conferring on Contracting Parties in the chapeau a broad discretionary power "in its opinion" over "essential national security interests", binds its power by a hierarchical enumeration in the latter subparagraph to fissile and fusion material, direct or indirect activities to supply military facilities, and war or international emergency. direct or indirect activities, and war or international emergencies. These three categories all relate to the area of

[95] Infrastruktur Departementet, Skydd av Sveriges säkerhet vid radioanvändning (Regeringens proposition 2019/20:15) para. 31.
[96] GATT art XXI.

national military security, and their strict categorisation amounts to a threshold for the objective assessment of "essential national security interests".[97]

According to information from the UNCTAD Investment Policy Centre database, of the 394 IIAs that contain basic security exceptions, a total of 156 explicitly enumerate the scope of national security in their provisions.[98] Some of the basic security exceptions in these agreements are fully consistent with Article 21 of the GATT, while most of the basic security exceptions in these agreements are modifications and breakthroughs based on the framework of Article 21 of the GATT. For example, the essential security interests in Article 21 of GATT include non-proliferation of biological, chemical, nuclear weapons or other nuclear explosive devices. Some treaties further interpret this scope as a national security exception for "international agreements or domestic policies relating to the non-proliferation of biological, chemical, nuclear weapons or other nuclear explosive devices", which extends the scope of "national security" to which the article can be applied.[99] In the light of national economic development, some countries have broken new ground in concluding IIAs by drawing on Article 21 of the GATT, in particular by providing for a distinctive scope of "national security" in the national security exception. In some of the IIAs concluded by the Czechia, the BITs provide for special cases involving national security interests "in connection with criminal or criminal offences" within the national security exception.[100] Some treaties include "public infrastructure protection" in the scope of "national security" and specify the areas and scope of "public infrastructure" by way of enumeration.[101]

The nature of the security threats faced by states has changed profoundly since the end of the Cold War. In the past, security was framed to a large extent in terms of competition between states. In contrast, after 1989, states became increasingly concerned. Fragmented threats such as terrorism, transnational crime, corruption,

[97] GATT art XXI.
[98] Investment Policy Hub, 'Mapping of IIA Content', <https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping> accessed 9 May 2022.
[99] Canada - China BIT (2012) article 33 (b), Japan - Oman BIT (2015).
[100] Bahrain - Czech Republic BIT (2007) article 11.
[101] The association of south-east Asian nations (asean) - Japan EPA article 8.

infectious diseases, environmental degradation and climate change.[102] Among the most transformative changes are some of the actor-less risks, such as climate change, which do not have malicious intent towards countries or their populations.[103] The 2018 Global Risks Report published by the World Economic Forum, for example, shows that the top threats to New Zealand are natural disasters and extreme weather. The New Zealand Defence Force also stated in 2018 that climate change is one of the biggest security challenges facing New Zealand and that tackling global warming will gradually drain New Zealand's resources.[104]

Measures taken by a state for reasons of economic interest may also constitute an essential security exception, and the Argentine series of cases cited in Chapter 2 of this paper dealt with whether economic interests could constitute an essential security exception. The reasoning of certain tribunals in these cases has subsequently been applied to a range of other non-military matters designated as security threats, including infectious diseases, environmental damage and cyber security.[105]

These cases all came at a time when the Argentine economy was facing a crisis (pesification) in 2020. In 2001 and 2002, Argentina adopted a series of emergency economic measures in response to a severe financial crisis, which caused investors to challenge Argentina to an arbitral tribunal under a bilateral investment agreement.[106]

The CMS tribunal, the Enron tribunal and the LG&E tribunal, although none of them interpreted the specific scope of the essential security provision, all concluded that a major economic crisis could not in principle be excluded from the scope of the essential security interest under the U.S.-Argentine BIT Article 11.

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[102] Heath. J. Benton, 'The New National Security Challenge to the Economic Order' (2019) 129, Yale Law Journal <https://ssrn.com/abstract=3361107> accessed 12 May 2022.
[103] Laura K. Donohue, 'The Limits of National Security' (2011) 48(4) American Criminal Law Review <https://www.ojp.gov/ncjrs/virtual-library/abstracts/limits-national-security> accessed 12 May 2022.
[104] New Zealand Ministry Of Defence, 'The Climate Crisis: Defence Readiness And Responsibilities' (2018) <https://www.defence.govt.nz/assets/Uploads/66cfc96a20/Climate-Change-and-Security-2018.pdf> accessed 12 May 2022.
[105] Heath. J. Benton, 'The New National Security Challenge to the Economic Order' (2019) 129, Yale Law Journal <https://ssrn.com/abstract=3361107> accessed 12 May 2022.
[106] José E. Alvarez, 'The Public International Law Regime Governing International Investment' (2011) 11 Martinus Nijhoff Publishers.

The CMS tribunal stated that "if the concept of essential security interests were to be limited to immediate political and national security concerns, particularly of an international character, and were to exclude other interests, for example major economic emergencies, it could well result in an unbalanced understanding of (the U.S.-Argentine BIT) Article XI. Such an approach would not be entirely consistent with the rules governing the interpretation of treaties."[107]

Enron tribunal stated that "… in the context of investment treaties there is still need to take into consideration the interests of the private entities who are the ultimate beneficiaries of those obligations … The essential interest of the Claimants would certainly be seriously impaired by the operation of Article XI or state of necessity in this case."[108]

LG&E tribunal stated that "To conclude that such a severe economic crisis could not constitute an essential security interest is to diminish the havoc that the economy can wreak on the lives of an entire population and the ability of the Government to lead. When a State's economic foundation is under siege, the severity of the problem can equal that of any military invasion."[109]

Although the different tribunals differed in the extent to which they adopted the Argentine defence, they all agreed that a major economic crisis was not excluded from the scope of essential security interests. The difference between the different tribunals was mainly the severity of the economic crisis. The CMS and Enron tribunals concluded that the crisis was "severe, but did not lead to a total economic and social collapse"[110] a situation that was not sufficient to undermine the existence of the state and its independence.[111] The LG&E tribunal, on the other hand, found that the crisis was sufficiently severe to threaten "the total collapse of the government and the Argentine state"[112] and stated that "from 1 December 2001 to 26 April 2003, Argentina was in a period of crisis during which it was necessary to enact measures to maintain public order and protect its essential security interests.[113]

[107] CMS paras. 359-360
[108] Enron para 342.
[109] LG&E para 238.
[110] CMS para 355.
[111] Enron, para 306.
[112] LG&E para 231.
[113] LG&E para 229.

4.3 Negative List of Foreign Investment Access

The essential security exception clause plays an important role in international investment agreements as a safety valve balancing free trade and the essential interests of States. However, the ambiguity and discretionary nature of its provisions, which can lead to unclear and unstable law, has led to numerous dilemmas in its application in arbitration practice. The essential security exception has evolved and adapted in response to changes in society and the rule of law, in order to address new issues and crises in the international economic environment. In the dispute between Huawei and the Swedish government, one of the issues at stake is whether the construction of a 5g network is an essential security interest that can preclude the illegality of provisional measures taken by the host state. This also leads us to turn our attention to the relationship between the construction of certain infrastructure in a country and its essential security interests. In order to deal with potential conflicts between investment and trade in certain industries and sectors and the country's essential security interests, the essential security exceptions in international investment agreements can be used as a way to mitigate losses and obtain compensation ex post, or the "negative list" of foreign investment access in the international investment sector can be used as an ex ante tool The use of a 'negative list' for foreign investment access in the international investment sector can also be used as an ex ante tool to reduce disputes.

"Negative lists" in the field of international investment are usually associated with pre-entry national treatment. Generally speaking, there are two models for granting pre-entry national treatment, the Positive List and the Negative List. The former is also referred to as the GATS-oriented model in the United Nations Conference on Trade and Development (UNCTAD) document on investment issues.[114] The latter means that "all industry sectors and measures are open, unless specifically reserved or explicitly listed in the appendix as non-conforming".[115] The term "inconsistency" in this category refers to incompatibility with the general treaty obligations undertaken by the contracting parties, which may reserve certain measures that are incompatible with "national treatment",

[114] 'Series on International Investment Policies for Development-Preserving Flexibility in IIAs: The Use of Reservations' [2005] UNCTAD/ITE/IIT <https://unctad.org/en/Docs/iteiit20058annexes_en.pdf> accessed 13 May 2022.

[115] Patrick F. J. Macrory, Arthur E. Appleton and Michael G. Plummer, *The World Trade Organisation : legal, economic and political analysis* (New York : Springer 2004).

"most-favoured-nation treatment" and "performance requirements". The international law dimension of measures that are inconsistent with, for example, "performance requirements". "Negative lists" are commonly found in investment treaties that provide for "inconsistent measures" to be retained by the Contracting State. Some countries have also adopted "negative lists" in the sense of domestic law, whereby the host country enacts a legal policy in the form of domestic law that sets out a separate negative list of restrictions or prohibitions on foreign investment access, such as the negative lists for foreign investment access in China and Germany. The beginnings of the 'negative list' system in modern international law can be traced back to the 1953 Treaty of Amity, Commerce and Navigation between the United States and Japan[116]; in contrast, the 'negative list' system in international investment law emerged much later. The United States was the first to use a negative list in the form of a list in its BIT, in the Appendix to the US-Panama BIT, which states that "Consistent with the provisions of Article II(1) [National Treatment], each Party reserves the right to make or to maintain limited exceptions within each of the sectors or matters listed below..."[117] The 1992 North American Free Trade Agreement (NAFTA) between the United States, Mexico and Canada The North American Free Trade Agreement (NAFTA), signed by the US, Mexico and Canada in 1992, is a representative investment treaty that applies a 'negative list' system. As the US-style BITs and FTAs spread the "negative list" system, it was gradually adopted by other countries.

A negative list can enhance the transparency of a host country's investment policy as opposed to a positive list. It enhances the transparency of the host country's investment environment by allowing foreign investors quick access to information on restricted sectors, and provides an effective benchmark to test the degree of openness and investment liberalisation in each economy.[118] This transparency advantage is rooted in the logical structure of the negative list: it is about clarifying the boundaries of government power and promoting openness and attracting foreign investment by limiting government power in the area of investment access.

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[116] Friendship Commerce and Navigation Treaty between the United States of America and Japan (1953), Art. VII.

[117] Treaty Between The United States Of America And The Republic Of Panama Concerning The Treatment And Protection Of Investment-Annex 1982.

[118] OECD, *Foreign Direct Investment and Recovery in Southeast Asia* (OECD Publishing 2009).

By restricting access to foreign investment in certain sectors, the host country can have better control over its basic security interests, but it also faces the problem of the lack of a clear legal basis for certain restrictions. To achieve the transparency effect of the negative list, it is imperative to ensure certainty in its content, i.e. to avoid ambiguous wording. The types of measures and their basis should be precisely stated in order to minimise the scope for arbitrary interpretation by the public authorities.

In addition, liberalisation and commitments regarding new market access are key elements in the China-EU Comprehensive Investment Agreement Negotiations, such as the removal of quantitative restrictions, equity caps or joint venture requirements in several sectors. On the EU side, the market is already open and mainly oriented towards the services sector under the General Agreement on Trade in Services (GATS). And sensitive EU regulations in areas such as energy, agriculture, fisheries, audiovisual and public services have been retained in the CAI. For its part, China has also made commitments to open up in many areas. In manufacturing, for example, China has made a comprehensive commitment with only very limited exclusions (especially in sectors with significant overcapacity). This would match the degree of openness of the EU. Previously, China has not made such far-reaching market access commitments with any other partner.[119] The CAI will further substitute the previous China-Sweden BIT and the specific provisions related to the succession of agreements have been concluded in the CAI. The CAI will ensure better access for EU investors to a fast-growing consumer market of 1.4 billion and a more level playing field for them in China. This is important for global competitiveness and the future growth of EU industry. It is believed that with very clear and transparent terms of the investment agreement, the likelihood of future disputes between China and the EU in the investment sector will be greatly reduced.

4.4 Final Conclusions

The first research question presented in the introduction of this thesis read:

[119] 'Key elements of the EU-China Comprehensive Agreement on Investment' (2020) European Commission <https://ec.europa.eu/commission/presscorner/detail/es/ip_20_2542> accessed 14 May 2022.

“What are the issues at stake in international investment litigation or arbitration cases involving the essential security exception? How has the essential security exception been applied in legal practice?”

As has been thoroughly discussed in the above investigation, primarily chapter 2 and 4, the thesis shows that the issues at stake concerning essential security exceptions are the scope of the essential security interests, the nature of the clause to judge, the clause's consideration of conflicting interests, etc. In combination with the analysis of the jurisprudence of the essential security exception and the study of representative case law, it is concluded that the application of the essential security exception in legal practical is primarily concerned with determining whether the clause has a self-judging nature based on the linguistic description of the clause, that the review process differs for different clauses of this nature and follows the principle of good faith and has different legal consequences depending on the circumstances of the case.

In the light of the judicial application of the essential security exception and, in particular, its disadvantages, it is concluded that the development and promotion of the regime needs to take into account the balance between free trade, investment protection and the protection of national interests. The definition of essential security interests needs to be flexible and evolve with the society and economic situations, using the principles of proportionality and non-discrimination as criteria, and can be determined in conjunction with the reasoning of case law tribunals. A clear and transparent negative list for investment market access could be another way to adjust the application of essential security interests in the international investment arena.

The second research questions, “How does the essential security exception apply to the dispute between Huawei and the Swedish government, and what are the possible legal consequences of the dispute based on a general analysis of legal rules and previous cases?”, is also scrutinised in the thesis, primarily in the case study in chapter 3. Based on the close reading of the pending case, the conclusion is that if we limit ourselves to an analysis and interpretation of the decision of the Administrative Court, the construction of the 5G network is a matter of national security for Sweden and Huawei may in fact be a threat to Sweden's national

security. However, based on an examination of the essential security exception, the outcome of the case at the ICSID may be significantly different from that of the Administrative Court. The reason for this is that the ICSID's decision is based primarily on the international investment agreement signed by the parties, whereas the 1982 bit between China and Sweden is very vague or arguably silent on the essential security exception, which leaves the ICSID without a basis for its judgement. The application of the basic security exception places great emphasis on the clarity of the provisions, particularly with regard to the nature of self-determination. Therefore, ICSID will to a large extent find that the Swedish government has no self-determination in its judgement on the basic security exception, and that instead the tribunal's review of whether it is an essential security interest would prevail. The findings of the PTS or the Swedish Security Service may not have the same status and weight as they were tried before the Swedish Administrative Court, which means the uncertainty for two parties will increase.

The author prefers that the parties will reach a settlement agreement before the hearing, as opposed to waiting for a longer arbitration. And I would prefer that the parties would proceed to develop or adapt a more detailed BIT, which would clearly set out the essential security exceptions. In order to reduce future conflicts in related areas, after all, this dispute is not good for both Huawei and the Swedish government. Huawei has almost lost the Swedish 5G market, and other EU countries may use this as a model to impose sanctions on Huawei. The controversy has also affected the pace and speed of the Swedish government's 5G construction to some extent, potentially missing the opportunity to become the first to set the industry standard.

5. Summary

The essential security exception, a common provision in IIAs, refers to the possibility of excluding the illegality of a contracting party and exempting it from liability in certain circumstances. The clause was first rooted in trade law, and the text takes different forms in many IIAs. The issues at stake concerning essential security exceptions are the scope of the essential security interests, the nature of the clause to judge, the clause's consideration of conflicting interests, etc. When it comes to the application of the essential security exception in practice, the Argentine series of cases and the DT AG v. India cases are used to analyse the self-judgmental nature of the essential security exception clause, the review process based on good faith review and the legal consequences of applying the essential security exception, respectively.

The case study of the dispute between Huawei and the Swedish government uses the decision of the Administrative Court as the main material. Procedural issues and points of contention are elaborated upon, and in conjunction with the above-mentioned study of the essential security exception principle, predictions are made that the Swedish domestic investigation will be given less weight in the ICSID hearings, and thus may result in decisions that differ significantly from those of the Administrative Court.

Combining the above legal theory analysis and case studies, this article gives several concerns for improving and promoting the essential security exceptions. Firstly the regime needs to take into account the balance between free trade, investment protection and the protection of national interests. Secondly, The definition of essential security interests needs to be flexible and evolve with the society and economic situations, using the principles of proportionality and non-discrimination as criteria. Thirdly, a clear and transparent negative list for investment market access could be another way to adjust the application of essential security interests in the international investment arena.

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