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Non-Precluded Measures (NPM) in Bilateral investment Treaty (BIT) (An appraisal study)

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ABSTRACT

Non-precluded measures (hereinafter NPM) clauses have become a problematic in the modern international investment regime. As an integral aspect of attempts to recalibrate the publicprivate balance in investment treaties, these clauses are intended as a corrective to the proinvestor interpretations of early arbitral tribunals. They provide for the primacy of public policy over investment protection standards under certain conditions. This paper attempts to identify the proper way in the drafting of NPM clauses and identify their common elements. It will examine the terms that must be met in order that host states can have resort to them, as well as the role that is provided or denied to arbitrators in circumscribing the suitability of an impugned measure in relation to the objective being pursued. Furthermore, recent investment arbitrations have pointed out the latent interpretive ambiguities that can be in NPM clauses. In fact, it will be argued that while NPM clauses do raise some difficulties with respect to extending the policy space of contracting parties, they are slightly effective in ensuring that public policy is a permanent feature of arbitrators' matrix of decisionmaking.

Keywords: Non-Precluded Measures, NPM, Bilateral investment Treaty, BIT.

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Introduction

The modern investment treaty regime is understood as a system of governance that ensures the protection of foreign investors and their cross-border investments. Indeed, the proliferation of international investment agreements (IIAs) was devised with investment protection as its founding principle. As such, the traditional template for substantive legal protections was oriented toward the safeguarding of private interests and as a constraint on the protectionist tendencies of host states.3 The consequences flowing from this imbalanced approach have become apparent in recent decades, with the inherent tension between the regulatory autonomy of host states and the legal protections accorded to foreign investors being exposed by the growing frequency of treaty-based investment arbitrations. Measures taken for the protection of public health, national security, the environment and manifold other purposes have been alleged to violate international obligations. At the same time, broader organizational and conceptual challenges have weighed upon the international investment regime. The strained reasoning of some arbitral tribunals has sparked allegations of inconsistency, incoherence, and democratic illegitimacy, with structural weaknesses and an absence of institutional discipline acting to compound dissatisfaction with the existing system. Responses to this dynamic are generally characterized as a 'backlash' against the international investment regime, and are best viewed on a continuum, with minor tweaks to substantive protections at one pole and outright repudiation of its conceptual foundations at the other. Despite the divergent approaches adopted by host states, the central dilemma remains constant: how to best balance investment protection with regulatory autonomy?

This contribution seeks to explore the evolving role of NPM clauses in seeking to achieve this balance within IIAs. These clauses provide for a number of policy concerns in relation to which the host state is permitted to take measures that would otherwise constitute a violation of its obligations under the treaty. Permissible objectives typically include the safeguarding of national security, ensuring public order, protecting the environment, preserving exhaustible natural resources, and responding to public health emergencies. In essence, they effect an expansion of a host state's regulatory autonomy with respect to certain non-investment policy objectives, at the expense of the legal protections accorded to foreign investors. The NPM clause is therefore a vital tool that is increasingly insisted upon by drafters and negotiators in order to balance public interests and private interests and investment concerns and noninvestment concerns. Thus, it is essential to establish a normative framework to contextualize NPM clauses within the broader investment regime,

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identify the trends in drafting techniques within treaty-practice, and explore the different interpretations by arbitral tribunals.

This task necessarily begins with The Relationship Between Non-Precluded Measures and State of Necessity This will comprise the first section of this chapter. Second 2 will articulate the structure of non-precluded measures. Moving to the nexus requirements of non-precluded measures, it will then examine the scope of the non-precluded measures.

I. The Relationship Between Non-Precluded Measures and State of Necessity

The terms of NPM and necessity can be conflated. For instance, in construing Article XI of the U.S.-Argentina BIT, the CMS, Sempra and Enron tribunals relied on the requirements of the state of necessity defense, therefore conflated these two defenses. The annulment committees later looked into this issue and resolved it based on their authority under Article 52 of the ICSID Convention.[1]

For the first time, the CMS annulment committee addressed this issue. Its findings separated the basis of NPM and necessity and functions as a guidance for the tribunals. Argentina claimed, before the CMS annulment committee, that the CMS tribunal erred by exceeding its power since it had not applied the NPM clause (Article XI) of the U.S.-Argentina bilateral investment treaty and failed to clarify the reasons of its decision.[2] The committee opined that both disputing parties and the tribunal had 'conflated' the NPM clause and the necessity defense as a customary law, by applying the requirements of necessity to interpreting the NPM.[3]

The committee mainly clarified the relationship between Article XI of the BIT and Article 25 of ARSIWA with respect of their application. After the committee introduced the distinction between primary and secondary rules, it specified how these

[1] Andreas Von Staden, "Towards Greater Doctrinal Clarity in Investor-State Arbitration: The CMS, Enron, and Sempra Annulment Decisions", Law and Economics Research Paper Series, Working paper No. 2010-13 (November 2010), available online: http://ssrn.com/abstract=1725909 (last visited 17 Feb 2021).

[2] ICSID Case No.ARB/01/8; Enron Creditors Recovery Corp. Ponderosa Assets. LP v Argentine Republic, (30 July 2010) Decision on Annulment, ICSID Case No.ARB/01/3 [Enron Annulment]; Sempra Energy Int'l v Argentine Republic, (29 June 2010) Decision on Annulment, para36.

[3] *Ibid*, 123.

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two defenses must be applied by investment tribunals.[4] The committee, further, interpreted Article XI as a primary rule of international law (lex specialis). Relying on the ICJ's holding in the Oil Platforms case,[5]the committee held that, "if the Tribunal was satisfied by the arguments based on Article XI, it should have held that there had been 'no breach' of the BIT."[6]

Regarding Article 25, the committee, identified it as a secondary rule[7] and ruled that, "the excuse based on customary international law could only be subsidiary to the exclusion based on Article XI."[8] In other words, the CMS annulment committee suggested that the tribunal may first consider whether an act cannot be considered a potential treaty breaches by a treaty NPM provision (Article XI) that is applied as lex specialis, and then it should consider Argentina precluded from liability for a breach under customary international law (Article 25) applied as lex specialis.

In its analysis, the committee differentiated the two defenses and pointed out that Article XI "covers measures necessary for the maintenance of public order or the protection of each Party's own essential interests, without qualifying such measures.....while Article 25 subordinates the state of necessity to four conditions"[9]

II. The Structure of Non-Precluded Clauses

Before discussing the standard of review of NPM, it is important to understand the structural components of NPM clauses. In this section, I will shed light on the structural elements of NPM clauses, which will function as a basis for our analysis to determine the proper standard of review.

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[4] S.R. Subramanian, "Too Similar or Too Different: State of Necessity as a Defense under Customary International Law and the Bilateral Investment Treaty and their Relationship", (2012) 9 (1) Manchester Journal of International Economic Law, 68, para 133.

[5] Case Concerning Oil Platforms (Islamic Republic of Iran v. United States), Judgement, (6 November 2003) Judgement, ICJ, at 196, para 73 [Oil Platforms], available online at: http://www.icj-cij.org/docket/files/90/9715.pdf (last visited 19 Feb 2021).

[6] *See* CMS Gas Transmission Co v The Argentine Republic, (25 September 2007) Annulment Decision, ICSID Case No.ARB/01/8.

[7] *See* ILC, Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (4 April 2006), Doc. A/CN.4/L.682 [ILC Fragmentation Report], online at: http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf (last visited 25 Feb 2021).

[8] CMS Annulment, supra (note 37), para 132.

[9] *Ibid*, para 130.

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Despite the slight differences in the formulation of NPM clauses in the bilateral investment treaties of various countries, they include similar attributes. NPM clauses, in general, contain the following attributes: 1) Nexus requirement; 2) Scope; 3) Permissible objectives.[10]

III. The Nexus Requirement

First, NPM clauses provide for a nexus requirement. This condition imposes on the measures that are adopted by a state to be appropriately related to the permissible objectives enumerated in the clause. In other words, there must be a link between the measures taken by a state and the permissible objectives set forth in the clause. For instance, the NPM clause of the U.S.-Argentina BIT[11] requires that measures adopted by states correspond to one of permissible objectives set forth in the clause and be 'necessary' to achieve the objectives.

In the same context, the measures cannot be covered by the clause if the state has an alternative and more convenient measure to attain the objective. As can be seen, the term 'necessary' is a requirement of the nexus requirement in the NPM clause of the U.S.-Argentina BIT. However, NPM clauses in other BITs contain different languages regarding the nexus requirement. They contain formulations such as "require",[12] "directed to"[13] and "have to be taken for reasons of."[14] These languages of the nexus requirement functions as vital link between the taken measures and the permissible objectives in the NPM clause.

These formulations provide for a framework of a reasonable and non-abusive application of these measures. Various languages used in the nexus requirement can establish various frameworks offering host states different levels of freedom in taking measures to attain the permissible objectives.

[10] William W. Burke-White, "The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of
ICSID System", (2008) 3 Asian Journal of WTO and International Health Law and Policy 199, 206.
[11] U.S.-Argentina BIT (1994), Article II, signed 14 November 1991; entered into force 20 October 1994. Available online: http://investmentpolicyhub.unctad.org/Download/TreatyFile/127.
[12] Lebanon-Belgium-Luxemburg BIT (1999) Article 3(3).
[13] Sri-Lanka-China BIT (1986) Article 11.
[14] Germany-Bangladesh BIT (1981) Protocol 2 (a).

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As opposed to the language of 'necessary', nexus requirements with lenient standards of language provide states a wider scope of freedom to react to emergency situation and offer more opportunities for a successful invocation of NPM clauses.

Second, states that incorporate the NPM clauses in BITs usually specify the scope of their applicability to the provisions of BITs. The specification can be broad, encompassing all treaty obligations, or narrow, including only certain substantive provisions of the treaty. The NPM clauses in Indian BITs are illustrative examples of broadly formulated and applied to preclude violation of any substantive provision of the treaty. For example, the NPM clause in the India-China BIT states that "nothing in this Agreement precludes the host Contracting Party from taking action for the protection of its essential security interests..."[15] In this NPM clause, this formulation indicates that the clause has a broad scope and applies to all obligations resulting from the treaty.[16]

In comparison, some BITs provide for limited scope. For instance, German BITs NPM clauses are drafted in limited scope, the application of these clauses precludes the violation of only some treaty obligations specified by the parties.[17] Therefore, a state that has taken measures 'for reasons of ' achieving public policy objectives such as public security and order, public health or morality will not bear liability with respect to violating the aforementioned treaty obligations.

It should be noted that the scope of the clause does not extend to all obligations under the treaty and is limited only to three specific articles (obligations) of the BIT, which are fair and equitable treatment, national and most-favored nation treatment. Therefore, a state that adopted measures contrary to the treaty will be liable for its actions if they violate treaty obligations other than the abovementioned three obligations.[18]

There are also NPM clauses restricting both the scope of the treaty's responsibilities and permissible objectives. The example of this type would be the Uganda-Belgium-Luxemburg BIT which contains a provision stating that "except for measures required

[15] India-China BIT (2006), Article 14.
[16] *See*, Finland-India BIT (2002) Article 12(2).
[17] *See* Protocol to China-Germany BIT (2003), section 4.
[18] The scope of NPM clauses can also be limited to other treaty provisions such as expropriation or nationalization
(Belgian-Luxemburg-China BIT).

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to maintain public order, investments shall enjoy continuous protection and security..."[19] On one hand, the provision allows host states to adopt necessary measures only to safeguard and maintain public order, and excludes other emergency circumstances encompassing a state's need to protect public health, environment and other essential security interests.

On the other hand, the scope of the provision is limited only to that particular treaty obligation to ensure continuous protection and security under the provision of fair and equitable treatment. According to this NPM clause, in order to preclude liability, a host state can impose measures directed only at protecting public order. The adoption of measures directed at achieving other public policy objectives such as public health and environment cannot be justified under this clause and will eventually trigger state liability.

Additionally, the state measures taken to protect public order may preclude state's liability only with respect to the treaty obligation of providing fair and equitable treatment for foreign investments. However, it may not preclude state's liability for violating any other obligations under other treaty, for example national and most-favored nation treatments, even if the imposed measures were directed at protecting public order, and not other public policy objectives.

It should be pointed out that if states want to have more freedom and flexibility in protecting their public policy objectives, they may incorporate NPM clauses with wider scope that could apply to all treaty obligations. Conversely, if states want to grant a greater protection to foreign investors, they can draft the NPM clauses with narrower scope that only apply to certain obligations under the treaty.

IV. The scope of Non-Precluded Clauses

The last element of the NPM clause is the permissible objectives, which are considered the motive behind the adoption of measures contrary to state's treaty obligations. Permissible objectives cover particular public policy aspects that states consider essential to be protected. These public policy areas are excluded from limitations imposed by the treaty obligations. Thus, states are usually offered a great deal of freedom in adopting measures directed at attaining the permissible objectives set out in the NPM clause. Put differently, state's actions directed at achieving public

[19] Uganda - Belgium-Luxembourg BIT (2005), Article 3(2).

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policy objectives specified in the NPM clause shall be considered permissible even if they contradict the obligations established in the treaty. Since permissible objectives "delineate the boundaries of state sovereignty that will not be compromised by the state's IIA Obligations",[20] the nature and language of this element of the NPM clause is deemed to be crucial. Public policy objectives in the context of protecting public order, health, morality, security and other essential state interests are considered as permissible objectives in most BITs.[21]

Conclusion

To conclude, the evolution of non-precluded measures clauses in IIAs is representative of the broader effort to bolster the role of the public interests within the regime of international investment protection. From their roots in the FCN treaties of the mid-nineteenth century, NPM clauses are becoming ever-more prominent, with the emergence of an observable trend towards their explicit inclusion in BITs and FTAs. Both the more-favored WTO-style model and "prohibition and restriction" model stipulate the permissible objectives, scope of application, and the requisite relationship between the impugned measure and the aim being pursued in order to qualify under the NPM clause.

In fact, the conditions for invoking NPM clauses, particularly those acting as a barrier to arbitrariness and unjustified discrimination, prevent the pendulum from swinging too far in the pro-state direction and provide the limitations of host states' capacity to have recourse to these exceptions. The possibility of good faith review with respect to NPM clauses for "essential security" supports this effort, while the self-judging and non-justiciable variant undermines it somewhat. Nevertheless, ambiguities remain as to the appropriate interpretive approach that should be taken by arbitral tribunals. The jurisdiction/merits debate remains as yet unsettled, and some tribunals have not adequately separated NPM clauses both from primary obligations and from other customary international law defenses to a potential breach. Perhaps the most disappointing of all for those advocates of NPM clauses in the investment regime, some tribunals have failed to engage with these technical innovations.

[20] Barnali Choudhury, "Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements", (2010-11) 49 Columbia Journal of Transnational Law 670, 688.
[21] *See* Article XI, the U.S.-Argentina BIT (1994).

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