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“Essential Security” for the United States in TPP and Beyond

Catherine H. Gibson · Tuesday, December 22nd, 2015

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The Trans-Pacific Partnership (TPP) Agreement (official text here) is one in a series of significant investment agreements that the United States will negotiate in the coming months and years – next in line are the Transatlantic Trade Investment Partnership (TTIP) Agreement and the United States-China bilateral investment treaty. Of importance in these treaties are not only the substantive protections, but also the exceptions.

As discussed in more detail here, the United States has long included a provision in its investment treaties that seeks to preserve a host state’s ability to take measures to protect its “essential security interests.” The language of these essential security provisions has evolved over time and, among other revisions, was made explicitly self-judging in the 2004 United States Model BIT. This self-judging essential security provision was carried over in TPP, at Article 29.2 of the Exceptions Chapter. As TPP Article 29.2 states, nothing in the agreement shall be construed to preclude a party from “applying measures that it considers necessary for the fulfilment of its obligations with respect to . . . the protection of its own essential security interests.” This TPP text mirrors Article 18 of the 2012 US Model BIT.

Because of its breadth and self-judging nature, this provision has the potential to broadly undermine the substantive protections of the agreement. Self-judging provisions – which permit action that the action state itself “considers necessary,” for example – have been a matter of general concern for some time in international law. Scholars including Stephan Schill and Robyn Briese, for example, have previously expressed concern about such clauses due to the “obvious potential for their misuse and a consequent undermining of international cooperation.” During the International Law Commission’s discussions of exceptions to general rules of state responsibility, members noted that such self-judging provisions might weaken the rule of law or contradict the principle of sovereign equality in the context of state-to-state disputes. Kenneth J. Vandevelde likewise takes the position that self-judging exceptions to treaty provisions are “especially troubling” and “very difficult to reconcile with a treaty intended to establish the rule of law.” Although Roger Alford has noted that states have generally *not* abused the similarly self-judging provision of the World Trade Organization’s General Agreement on Tariffs and Trade, it may be difficult to predict how states might use (or misuse) a self-judging exception clause going forward.

The breadth of the TPP’s essential security provision arises from not only its self-judging nature, but also the lack of explicit definition or limitation for the term “essential security” in the

agreement. As reportedly noted by Vietnam's vice minister of industry and trade, the lack of definition for this term in TPP means that the essential security clause might be invoked to permit otherwise TPP-non-compliant conduct that is intended to protect state-owned enterprises in national security and defense sectors. Alternatively, as suggested by the Electronic Frontier Foundation, governments might attempt to rely on this provision in seeking backdoors to decrypt communications in a manner that would otherwise be inconsistent with TPP's Technical Barriers to Trade Chapter. Arbitral tribunals would have to decide whether such actions constituted "essential security" measures – and before such decisions are issued, investors and other private parties, as well as states, would be left to guess as to what conduct might fall within its provisions.

In light of these concerns, the United States and its negotiating partners might seek to limit the essential security clause in TTIP and the United States-China BIT. A review of global investment-treaty practice reveals at least two ways in which these clauses could be so limited. First, some investment treaties require a state taking essential security measures to notify its treaty partners that it is taking essential security measures and provide treaty partners certain information about these measures. Alternatively, other investment treaties limit essential security provisions by setting out certain subject-matter limits for what may constitute essential security interests.

A number of Japan's treaties limit their essential security provisions by including notification requirements. Article 19.2 of the Japan-Peru BIT, for example, requires a state taking an essential security measure to notify its treaty partner – before the measure enters into force, or as soon as possible thereafter – of the sector that will be affected by the measure, the obligations to which an exception will be taken, the legal source of authority for the measure, and other information. A similar provision appears at Article 16.3 of the Japan-Korea BIT.

A somewhat weaker notice requirement is set out in the New Zealand-China Free Trade Agreement. Under this agreement, a party taking "essential security" measures must "to the extent possible" notify such measures, and their termination, to a joint commission created by the agreement. The New Zealand-Hong Kong Closer Economic Partnership Agreement – which lacks an investment chapter– requires that this type of notice is delivered "promptly" and "to the fullest extent possible". The WTO's General Agreement on Trade in Services (GATS) contains similar language at Article XIV*bis*, which requires that the Council for Trade in Services "shall be informed to the fullest extent possible" of essential security measures and their termination.

Another approach to limiting essential security clauses is to limit their subject matter to actions related to arms traffic, war, nuclear non-proliferation, or similar areas. One such limiting clause is set out in the Canada-China BIT. The first clause of the Canada-China BIT provision includes the typical language that "[n]othing in this Agreement shall be construed . . . to prevent a Contracting party from taking any actions that it considers necessary for the protection of its essential security interests". Thereafter, the agreement provides the following examples of "essential security" measures:

(i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,

(ii) in time of war or other emergency in international relations, or

(iii) relating to the implementation of national policies or international agreements respecting the

non-proliferation of nuclear weapons or other nuclear explosive devices.

By providing these examples, the Canada-China BIT provides some guidance and limitation on the types of measures that might constitute "essential security" measures. A similar provision is contained in the Canada-Peru BIT, in the Canada-European Comprehensive Economic and Trade Agreement (CETA), in Japan's treaties noted above, and in the GATS.

In fact, documents transmitting US BITs to the Senate for ratification from the 1990s and early 2000s also indicate that subject-matter limitations may have been contemplated in the essential security provisions of these US BITs. For example, the transmission documents from the US-Jordan BIT – which was signed in 1997 and entered into force in 2003 – state that that essential security measures would include "security-related actions taken in time of war or national emergency" and that "[a]ctions not arising from a state of war or national emergency must have a clear and direct relationship to the essential security interest of the Party involved." Similar language appears in other transmission documents of the same era, including the documents for the US BITs with Albania, Kyrgyzstan, and Ukraine.

In order to achieve effective investment treaties, the United States and its negotiating partners must ensure that potentially very broad exceptions – such as the "essential security" provision in TPP and US BITs – do not undermine substantive protections. Treaties of Japan, Canada, New Zealand, and other countries demonstrate that states may maintain their freedom to protect their "essential security" interests, while still affirming substantive protections, by placing certain limits on the exercise of essential security measures. Although the broad essential security provision may remain in TPP, the United States and its treaty partners should take advantage of the opportunity to revisit and refine this provision in TTIP, the United States-China BIT, and beyond.

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