Sovereign Investment

CONCERNS AND POLICY REACTIONS

Editors
Karl P. Sauvant
Lisa E. Sachs
Wouter P.F. Schmit Jongbloed

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THE EVOLUTION OF THE ESSENTIAL SECURITY EXCEPTION IN U.S. TRADE AND INVESTMENT AGREEMENTS

*James Mendenhall**

Introduction

For many years, negotiators of international trade and investment agreements would try their best to avoid openly discussing the "essential security exception" that allowed countries to take measures to protect national security even if such measures might otherwise run afoul of international legal rules. To be sure, the issue would occasionally flare up, as it did between the United States and the European Communities (EC) in the late 1990s regarding the Helms-Burton Act, which is discussed in further detail *infra*. However, by and large, negotiators of commercial agreements believed it was inadvisable to draw too much attention to the matter, given its potential to destabilize the rule of law that the international community was trying to establish.

The crux of the problem is straightforward: For decades, the United States has firmly held the view that essential security exceptions in trade and investment agreements are self-judging. According to this view, when challenged, the defending government has only to invoke essential security as a justification for its measures, and international tribunals would have no authority to second-guess that determination or the government's good faith in doing so. Without making any judgments as to whether this is good or bad policy, the potential loopholes such an interpretation creates are clear, significant, and, if abused, might undermine the network of carefully crafted

* Special thanks to Geoff Antell and Christopher Swift for providing research assistance for this chapter.

and balanced rules negotiated over several decades. Hence the unstated desire to avoid discussing the issue.

In the post 9/11 world, however, the problem can no longer drift on the margins of negotiation and debate. This chapter examines U.S. policy on the essential security exception over the last several decades, particularly as that policy has been expressed in the language of U.S. trade and investment agreements. Much has been written about the U.S. position,[1] and the topic has been the subject of expert opinions by Professors José Alvarez, Ann-Marie Slaughter, and William Burke-White in several investor-state arbitration proceedings, as discussed below. The intent of this chapter is not to summarize the debate again, though some summary is necessary, but to provide further perspective as a former U.S. negotiator of investment agreements, particularly in light of recent developments in the language used in such agreements and the North American Free Trade Agreement (NAFTA) negotiating texts released in 2004. Secondarily, the chapter will examine the utility of essential security exceptions in protecting the U.S. Government's authority to screen inbound investments through proceedings conducted by the Committee on Foreign Investment in the United States (CFIUS), particularly in the context of recent changes to the statute and regulations governing such proceedings.

The relationship between the essential security exceptions in commercial agreements and investment screening mechanisms points, perhaps, to a new direction in how such matters may be handled in the future. This chapter examines two notable trends. First, unlike earlier agreements, the latest generation of U.S. agreements now explicitly removes from the scope of review any actions that a party asserts fall within the scope of the exception. At the same time, in the area of investment screening, the international community, including the United States, is developing best practices to ensure that screening mechanisms like CFIUS operate as intended: *i.e.*, as tools to protect essential security, and not as a means of disguised protectionism. While these international practices are non-binding, they may nonetheless help counterbalance the trend in U.S. commercial agreements towards insulating investment screening decisions from external accountability.

A. General U.S. Policy on the Relationship between International Agreements and Essential Security

Issues of national security implicate equities that transcend commercial relations between states. The highly contentious debates about treatment of prisoners, preemptive military action, or the like, are well beyond the scope of this chapter. Nevertheless, a broader examination of U.S. policy views with respect to the intersection between

1. *See, e.g.*, Dapo Akande and Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 Va. J. Int'l Law 365 (2003) [hereinafter "Akande and Williams"]; 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*, 48 Va. J. Int'l Law 307 (2008) [hereinafter "Burke-White and Von Staden"]; Jose E. Alvarez, *Political Protectionism and the United States International Investment Obligations in Conflict: The Hazards of Exon-Florio*, 30 Va. J. Int'l Law 1 (1989) [hereinafter "Alvarez"].

international law, national security, and international dispute settlement is useful in setting the stage for this discussion.

A reasonable place to begin is the so-called "Connally Reservation," which the United States attached to its submission to the compulsory jurisdiction of the International Court of Justice (ICJ) in 1946. The reservation stated that the United States withheld from the Court's compulsory jurisdiction "[d]isputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America."[2] By its express terms, the reservation was *self-judging*, meaning that the United States reserved for itself the right to decide whether a matter fell within its domestic jurisdiction and, thus, outside the jurisdiction of the ICJ.

The ICJ's treatment of this reservation and similar reservations adopted by other nations has been examined in depth elsewhere, and will not be taken up at any great length here.[3] To summarize, some ICJ judges felt that the reservation was invalid,[4] while others carefully avoided taking a position on the matter.[5] Nonetheless, one example of its use, analyzed in detail by Stanimir Alexandrov, is particularly relevant to the subject of this chapter.[6]

In the *Case concerning the Aerial Incident of July 1955,* the United States challenged Bulgaria's actions in shooting down a civilian airliner. Bulgaria accepted the Court's jurisdiction under article 36(6) of the ICJ Statute and subsequently invoked the Connally Reservation on the basis of reciprocity. Initially the United States objected that Bulgaria's invocation of the reservation was in bad faith. Upon further consideration, however, the U.S. Government withdrew the objection, explaining that:

> [Its] contention was to the effect that reservation (b) did not authorize or empower Bulgaria to make an arbitrary determination that a particular matter

2. United States Declaration Respecting Recognition of the Compulsory Jurisdiction of the International Court of Justice, Aug. 14, 1946, 61 Stat. 1218, T.I.A.S. No. 1598, 1 U.N.T.S. 9 (1947).
3. *See generally* Stanimir Alexandrov, Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice (Martinus Nijhoff, 1995) [hereinafter "Alexandrov"].
4. *See Certain Norwegian Loans (Fr. v. Nor.)*, 1957 I.C.J. 9, 69 (July 6) (Geurro, J., dissenting) (stating that: "Such reservations must be regarded as devoid of all legal validity. It has rightly been said already that it is not possible to establish a system of law if each State reserves to itself the power to decide itself what the law is.") [hereinafter "Norwegian Loans"]; *Id.*, at 34 (Lauterpacht, J., dissenting); and *Interhandel Case (Switz. v. U.S.) (Preliminary Objections)*, 1959 I.C.J. 6, 99-102 (Lauterpacht, J., dissenting) (concluding that the reservation invalidated the entire U.S. submission to the Court's compulsory jurisdiction, and that "[a]ccordingly, there being before the Court no valid Declaration of Acceptance, the Court cannot act upon it in any way even to the extent of examining objections to admissibility and jurisdiction other than that exercised in the automatic reservation.").
5. In the *Norwegian Loans* dispute, because both parties accepted the validity of the reservation, the Court concluded that:

   > In consequence the Court has before it a provision which both Parties to the dispute regard as constituting an expression of their common will relating to the competence of the Court. The Court does not therefore consider that it is called upon to enter into an examination of the reservation in the light of considerations which are not presented by the issues in the proceedings. The Court, without prejudging the question, gives effect to the reservation as it stands and as the Parties recognize it.

   Norwegian Loans, *supra* note 4, at 40.
6. Alexandrov, *supra* note 3.

> was essentially within its domestic jurisdiction. The necessary premise of the argument was that the Court must have jurisdiction for the limited purpose of deciding whether a determination under reservation (b) is arbitrary and without foundation. On the basis of further study and consideration of the history and background of reservation (b) and the position heretofore taken by the United States with respect to reservation (b) in litigation before the Court, it has been concluded that the premise of the argument is not valid and that the argument must therefore be withdrawn. As it was declared by the United States to this Court in the *Interhandel Case (Switzerland v. United States)*, when the United States has made a determination under reservation (b) that a particular matter is essentially within its domestic jurisdiction, that determination is not subject to review or approval by any tribunal, and it operates to remove definitively from the jurisdiction of the Court the matter which it determines. A determination under reservation (b) that a matter is essentially domestic constitutes an absolute bar to jurisdiction irrespective of the propriety or arbitrariness of the determination. Although the United States has adhered to the policy of not making any arbitrary determination under reservation (b), the pursuit of that policy does not affect the legal scope of the reservation.[7]

Faced with the fact that the Connally reservation effectively prevented the United States from having its cases heard before the ICJ, and in response to the adverse ICJ decision in *Military and Paramilitary Activities in and Against Nicaragua,* discussed *infra*, the United States eventually withdrew its submission to the ICJ's compulsory jurisdiction. As State Department Legal Adviser Abraham Sofaer explained:

> [A]lthough we have tried seven times, we have never been able successfully to bring a state before the Court. We have been barred from achieving this result not only by the fact that few other states accept compulsory jurisdiction but also by the principle of reciprocity as applied to our 1946 declaration . . . . Even though we had pledged never to invoke our Connally reservation in bad faith to cover a manifestly international dispute, we were compelled to acknowledge that its invocation in any case would be binding as a matter of law. Hence, Bulgaria's reciprocal invocation of the Connally reservation forced us to discontinue the case . . . . For the United States to recognize that the ICJ has authority to define and adjudicate with respect to our rights of self-defense, therefore, is effectively to surrender to that body the power to pass on our efforts to guarantee the safety and security of this nation and its allies . . . . We believe that, when a nation asserts a right to use force illegally and acts on that assertion, other affected nations have the right to

7. The Agent of the Government of the United States of America to the Registrar, *Aerial Incident of July 27, 1955* (*U.S. v. Bulg.*), I.C.J. Pleadings, 650 at 676–77 (May 13, 1960).

> counter such illegal activities. The United States cannot rely on the ICJ properly and fairly to decide such questions.[8]

The U.S. position was thus starkly stated. In its view, the Connally reservation served to bar the ICJ's jurisdiction even in cases where the invocation of the reservation was in bad faith.[9] The United States adhered to this view despite the fact that the reservation effectively precluded it from bringing a case before the ICJ. This experience illustrates the potential dangers of including self-judging reservations or exceptions allowing a country to decide for itself whether it shall be held accountable under international rules. If this principle is abused, the dispute settlement system could be effectively disabled. Despite this potential problem, however,the United States has continued to include essential security exceptions in its international trade and investment agreements. What is more, it has continued to assert that such exceptions are self-judging.

B. EXPERIENCE IN THE GATT/WTO

The General Agreement on Tariffs and Trade (GATT)[10] was negotiated in 1946–1947, approximately one year after the United States agreed to the compulsory jurisdiction of the ICJ subject to the Connally reservation. The GATT established basic rules for international trade in goods including, *inter alia*, prohibitions against discrimination with respect to goods imported from other GATT Contracting Parties,[11] rules governing the imposition of antidumping and countervailing duties and safeguard measures,[12] and rules with respect to the imposition of certain types of import restrictions and quotas.[13] The GATT also established a formal dispute settlement mechanism,[14] albeit a weak one. Although the GATT authorized arbitration for settling disputes, the agreement also allowed any Contracting Party—including the Party that lost the dispute—to block the adoption of the panel's report.

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8. *Statement of Abraham D. Sofaer Before S. Foreign Relations Comm., Dec. 4, 1985*, DEP'T ST. BULL. 86, Jan. 1, 1986.
9. Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. OF INT'L LAW 705 (1988). Franck has taken a contrary view of the reservation, arguing that:
   > As I have written elsewhere: "The Connally Reservation did not license the United States to refuse to litigate any case for any reason whatsoever, that a 'good faith' caveat was to be implied, is to be given some support by the fact that Connally was not invoked by U.S. lawyers to withdraw the Nicaraguan case from the I.C.J.'s jurisdiction."

   Id. at 714 (quoting Thomas M. Franck and John Lehman, *Messianism and Chauvinism in America's Commitment to Peace through Law*, *in* THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 3 (Lori Damrosh ed., Transnational Pub., 1987)).
10. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter "GATT"].
11. *Id.* at Arts. I & III.
12. *Id.* at Art. VI.
13. *Id.* at Arts. XI & XIII.
14. *See generally*, *id.* at Arts. XXII–XXIII

In addition to these provisions, Article XXI of the GATT codified the essential security exception, which was stated as follows:

> 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.

This provision was carried over into the World Trade Organization (WTO) agreements,[15] and virtually identical provisions are included in Article XIV *bis* of the WTO General Agreement on Trade in Services (GATS)[16] and Article 73 of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).[17] GATT Article XXI(a) is relatively straightforward and has never been the subject of a decision by a dispute settlement panel. It is, however, relevant to the discussion of CFIUS reviews and shall be referenced later in this chapter. GATT Article XXI(c), in turn, is also relatively straightforward and would cover, for example, trade sanctions mandated by the United Nations Security Council under Chapter VII of the United Nations Charter. GATT Article XXI(b) is the provision most relevant to the discussion here. On the one hand, the agreement's opening paragraph, or *chapeau,* states that a Contracting Party may take measures that "*it considers* necessary for the protection of its essential

15. The GATT 1994 is part of the WTO agreements, and incorporates the GATT 1947 and several related legal instruments. *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 2 (Cambridge University Press, 1999), 1867 U.N.T.S. 14 (1994).
16. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, THE LEGAL TEXTS: THE RESULT OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 275 (Cambridge University Press, 1999), 1869 U.N.T.S. 183 (1994) [hereinafter "GATS"].
17. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULT OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (Cambridge University Press, 1999) 1869 U.N.T.S. 299 (1994) [hereinafter "TRIPS"].

security interests . . . ."[18] The phrase "it considers" is the textual linchpin to the U.S. argument that the entire clause is self-judging. On the other hand, subparagraphs (i) through (iii) are relatively narrow, and the text does not imply that the list is merely illustrative.[19] It does not, for example, state that essential security interests "include" the items in the subparagraphs, which would be a typical formulation for indicating that a list is non-exhaustive. Therefore, based on a strictly textual interpretation, if a country sought to justify a trade restriction under Article XXI(b), it would need to cast the justification in terms of one of the three subparagraphs.

These two aspects of Article XXI(b) give rise to the question of whether the "it considers" language in the *chapeau* eviscerates the limitations in the subparagraphs. Put differently, could a GATT Contracting Party (or a WTO Member under the WTO Agreements) simply decide that a matter fell within one of the subparagraphs even when there was no apparent factual justification for doing so, and could a GATT (now WTO) dispute settlement panel review the matter?

There are strong grounds for arguing that the "it considers" language of Article XXI(b) indicates that a panel cannot second-guess such a determination if a country believes in good faith that a measure falls within one of the three subparagraphs. While the matter is far from settled, there is significant international jurisprudence that suggests support for this view. For example, in *Military and Paramilitary Activities In and Against Nicaragua*, the ICJ contrasted the essential security clause in the United States-Nicaragua Treaty of Friendship, Commerce and Navigation[20] which did not contain the "it considers" language, with Article XXI of the GATT, stating as follows:

> That the Court has jurisdiction to determine whether measures taken by one of the Parties fall within such an exception, is also clear *a contrario* from the fact that the text of Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade. This provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it "considers necessary for the protection of its essential security interests," in such fields as nuclear fission, arms, etc. The 1956 Treaty speaks simply of "necessary" measures not of those considered by a party to be such.[21]

Similarly in the 2005 arbitration award in *CMS Gas Transmission Company v. Argentine Republic,* the Tribunal was:

> . . . convinced that when States intend to create for themselves a right to determine unilaterally the legitimacy of extraordinary measures importing noncompliance

18. GATT, *supra* note 10, at Art. XX(b) (emphasis added).
19. *Id*. at Art. XX(b)(i)–(iii).
20. Treaty of Friendship, Commerce and Navigation, Nicar.-U.S., Jan. 21, 1956, 9 U.S.T. 449 [hereinafter "U.S.-Nicaragua FCN"].
21. *Military and Paramilitary Activities In and Against Nicaragua* (*Nicar. v. U.S.*), Judgment, 1986 I.C.J. 14, para. 222 (June 27).

> with obligations assumed in a treaty, they do so expressly. The examples of the GATT and the bilateral investment treaty [BIT] provisions offered above [the U.S.-Russia and U.S.-Bahrain BITs] are eloquent examples of this approach.[22]

The Russian and Bahrain BITs are discussed in further detail below.

A much more difficult question arises with respect to situations in which there is no evidence that a country believes in good faith that the conditions in the subparagraphs are met but invokes the exception nonetheless. Certainly, countries are obligated to interpret and apply treaties in good faith. Accordingly, a country could not, consistent with Articles 26 and 31 of the Vienna Convention on the Law of Treaties and customary international law, make a blatantly incredible assertion that a measure fell within one of the subparagraphs. However, this point is analytically distinct from the question of whether a state may reserve for itself the right to determine whether its invocation of the exception is appropriate. In other words, the simple fact that there is an obligation to interpret treaties in good faith does not answer the practical question of *which entity* decides whether that obligation has been met.

Some commentators have sought to find textual support for the view that a panel could review whether a country has invoked Article XXI in good faith. As Akande and Williams note:

> [A] good faith test means that the member invoking Article XXI(b) must genuinely—or "in fact" or subjectively—consider that there is some threat to its security interests which needs protecting. A panel may therefore seek to ensure that the State is not using Article XXI as a cloak for taking protectionist action or for pursuing other aims.... This level of review can be derived, firstly, from the terms of Article XXI(a) and (b) itself....[23]

Under this approach, the panel would not be second-guessing the substance of the determination but rather would assess the state of mind of the state taking the measure: for example, whether it really thought it was doing the right thing even if there was little or no evidence that its proffered determination had any basis. If the party did not believe in good faith that it was justified in invoking the exception, then it did not actually "consider" the exception applicable. Therefore, based on the plain meaning of Article XXI(b), the exception would not apply.

The interpretation offered by Akande and Williams is certainly plausible, although the United States has never gone that far. Although the United States has repeatedly asserted that countries should invoke essential security exceptions only in good faith, it has also been of the view that even bad faith interpretations are unreviewable. The statement of Legal Adviser Sofaer, quoted above, states this position quite clearly. The United States has not been so blunt in public explanations of GATT Article XXI but the

22. *CMS Gas Transmission Co. v. Arg. Republic*, ICSID Case No. ARB/01/8, Certified Award, ¶ 370 (May 12, 2005), 44 I.L.M. 1136 (2007).
23. Akande and Williams, *supra,* note 1, at 390. *See also* Burke-White and Von Staden, *supra*, note 1, at 377–78.

position is certainly implied. For example, at a GATT Council meeting in 1982, the U.S. representative:

> . . . stressed that the GATT had no role in a crisis of military force. The General Agreement left to each contracting party the judgment as to what it considered to be necessary to protect its security interests. The contracting parties had no power to question that judgment. He said that even if the contracting parties were endowed with such a power and the expertise to exercise it sensibly, the GATT would not have any capacity to sanction a judgment in a dispute involving embargoed trade.[24]

In 1998, the then-General Counsel of the Office of the U.S. Trade Representative (USTR), Susan Esserman, explained during a Congressional hearing that the United States invoked the essential security exception in response to a challenge by the EC to the Helms-Burton law (discussed in further detail below). According to Ms. Esserman, "We made it very clear in the strongest possible terms that we thought it was very inappropriate for the WTO to address those issues. In the strongest possible way we told them that we were not going to show up—."[25] Clearly, in this view, once a country invokes the essential security exception, that is the end of the matter.

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24. GATT Council, *Minutes of Meeting Held on June 29-30, 1982*, at 13-22, CM1159 (Aug. 10. 1982).

25. *WTO—Dispute Settlement Body: Hearing Before the H. S. Comm. on International Economic Policy and Trade*, 105th Cong. 5 (1998) (statement of Susan Esserman, Gen. Counsel, United States Trade Rep.). Ms. Esserman was interrupted at this point in her remarks and did not elaborate. The United States was more circumspect in its formal communications before the WTO. The minutes of the October 16, 1996 meeting of the WTO Dispute Settlement Body, describe the U.S. intervention as follows:

> [T]he United States would invite the Communities and its member States to reflect on the fact that certain measures included in its request for the establishment of a panel had not only been in force for some years, or decades, but had been expressly justified by the United States under the GATT 1947 as measures taken in pursuit of essential U.S. security interests.
>
> In the light of this history, and given the minimal trade and investment effects of the Libertad Act on overall European interests, the United States asked the Communities to reconsider whether to press their grievances over the U.S. policy with regard to Cuba before the WTO. This organization had been established to manage trade relations between Member governments not diplomatic or security relations that might have incidental trade or investment effects. The Communities and its Member States might wish to consider whether the WTO was well equipped to address, let alone resolve, the type of disagreement they had brought to the DSB. In particular, it was worth thinking very concretely what the Communities and its Member States would expect to achieve by invoking the dispute settlement proceedings in the WTO and what such proceedings might put at risk. The United States found it difficult to see any desirable result for this body, the United States, or other Members through the course of action that the Communities and its member States had proposed. By injecting this disagreement regarding Cuba with the United States over foreign and security policy into the WTO, the Communities had taken this organization into unexplored territory. For that reason, the United States would not join a consensus to establish a panel at the present meeting. He suggested that before embarking on such a course of action, the parties concerned should step back and take the necessary time to consider another path.

WTO Dispute Settlement Body, Minutes of Meeting Held on Oct. 16, 1996, WT/DSB/M/24 (Nov. 26, 1996).

A textual argument for this position might be articulated as follows: A party's "consideration" of whether the preconditions in GATT Article XXI(b) have been met is purely subjective, and the only evidence of such consideration is the party's own statement of its views when the matter arises. While an objective observer may find the interpretation arbitrary or even absurd, it is the party's own consideration that governs the matter. As explained later, this is the position that the United States has now explicitly adopted in recent free trade agreements (FTAs).

In practice, there may be little difference between the U.S. view and a view permitting an assessment of whether the government taking a measure is acting in good faith. As Akande and Williams recognize, a "good faith" review presents evidentiary challenges, and it is not clear how a panel would assess the state of mind of the decision makers taking the measure.[26] Such challenges are particularly problematic given GATT Article XXI(a), which allows a member to withhold any information it considers contrary to its essential security interests. One can imagine that this exception would allow a country to withhold much of the information necessary to determine whether its actions were taken in good faith.[27] In short, while a "good faith" review is not impossible,[28] it is likely to be very difficult.

There has never been a serious attempt to resolve the matter in the GATT or WTO. In 1982, the Contracting Parties agreed to the *Decision Concerning Article XXI of the General Agreement*, which stated that "until such time as the Contracting Parties may decide to make a formal interpretation of Article XXI it is appropriate to set procedural guidelines for its application."[29] Those guidelines included the obligation to notify "trade measures taken under Article XXI" and stated that, when actions are taken under Article XXI, "all contracting parties affected by such action retain their full rights under the General Agreement."[30] These procedural guidelines have not helped

26. Akande and Williams, *supra* note 1, at 394.

27. The United States has invoked this provision at least once, albeit not in the context of dispute settlement. As reported by the World Trade Organization:

> During the discussion at the Third Session of a Czechoslovak complaint concerning United States national security export controls, in response to a request by Czechoslovakia for information under Article XIII:3 on the export licensing system concerned, the US representative stated that while it would comply with a substantial part of the request, "Article XXI . . . provides that a contracting party shall not be required to give information which it considers contrary to its essential security interests. The United States does consider it contrary to its security interest—and the security interest of other friendly nations—to reveal the names of the commodities that it considers to be most strategic."

WORLD TRADE ORG., GUIDE TO GATT LAW AND PRACTICE 601 (1995) [hereinafter "GATT Guide"].

28. *See*, *e.g.*, *LG&E Energy Corp. v. Arg.*, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 214 (Oct. 3, 2006) (finding that Argentina's actions were excused, at least temporarily, under the public order and essential security exception in the U.S.-Argentina BIT). The arbitral panel did not find the exception to be self-judging, but stated that, "Were the Tribunal to conclude that the provision is self-judging, Argentina's determination would be subject to a good faith review anyway, which does not significantly differ from the substantive analysis presented here." *Id.*

29. Decision Concerning Article XXI of the General Agreement, GATT Doc. 2/5426 (1982).

30. *Id.*

elaborate the types of measures that fit within the scope of the exception or clarify the self-judging nature of the provision.

Furthermore, as explained extensively in the literature, parties have on occasion sought to justify their actions under Article XXI, but no GATT or WTO panel has ever definitively resolved the matter.[31] In 1985, when Nicaragua challenged the U.S. trade embargo against it, the terms of reference for the dispute stated explicitly that "the Panel cannot examine or judge the validity or motivation for the invocation of Article XXI(b)(iii) by the United States."[32] In 1996, the EC initiated a WTO challenge to the U.S. Cuban Liberty and Democratic Solidarity Act (Helms-Burton law), which codified certain U.S. sanctions against Cuba.[33] As noted above, the United States publicly stated that the challenge was improper and that the law fell within the scope of Article XXI. While there was no carve-out from the terms of reference for the panel, and a panel was actually composed, the parties settled the dispute and the authority for the panel eventually lapsed.[34] Discussions regarding the scope of Article XXI are sparsely scattered elsewhere throughout the history of the GATT and WTO, but no definitive decisions were ever taken.

Nevertheless, unlike in the ICJ context described above, the essential security exception has not been a great hindrance to parties bringing dispute settlement cases

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31. A general description of official discussions on this matter under the GATT appears in GATT Guide, *supra* note 27, at 600–606.

32. GATT Council, Meeting of March 12, 1986, at 7, C/M/196 (Apr. 2, 1986). This restriction on the terms of reference gave rise to a certain degree of frustration by the panel, which stated that the circumstances:

> [R]aise in the view of the Panel the following more general questions: If it were accepted that the interpretation of Article XXI was reserved entirely to the contracting party invoking it, how could the CONTRACTING PARTIES ensure that this general exception to all obligations under the General Agreement is not invoked excessively or for purposes other than those set out in this provision? If the CONTRACTING PARTIES give a panel the task of examining a case involving an Article XXI invocation without authorizing it to examine the justification of that invocation, do they limit the adversely affected contracting party's right to have its complaint investigated in accordance with Article XXIII:2? Are the powers of the CONTRACTING PARTIES under Article XXIII:2 sufficient to provide redress to contracting parties subjected to a two-way embargo?

Panel Report, *United States—Trade Measures Affecting Nicaragua* ¶ 5.17, L/6053 (Oct. 13, 1986) (unadopted).

33. Cuban Liberty and Democratic Solidarity (Libertad) (Helms-Burton) Act of 1996, 22 U.S.C. §§ 6021–6091 (2011).

34. The EC's position in the context of the Helms-Burton dispute stands in contrast to a position the European Economic Community (EEC) took in 1982. As explained in one commentary:

> During the Council discussion in 1982 of trade restrictions applied for noneconomic reasons by the EEC, its member States, Canada and Australia against imports from Argentina . . . the representative of the EEC stated that "the EEC and its member States had taken certain measures on the basis of their inherent rights, of which Article XXI of the General Agreement was a reflection. The exercise of these rights constituted a general exception, and required neither notification, justification or approval, a procedure confirmed by thirty-five years of implementation of the General Agreement. He said that in effect, this procedure showed that every contracting party was—in the last resort—the judge of its exercise of these rights."

GATT Guide, *supra* note 27, at 600 (citations omitted). The representatives of Canada and Australia expressed similar views. *Id.*

in the GATT or WTO.[35] One can speculate as to why this might be. It might be that, given the commercial nature of the disputes under the GATT, the measures being challenged are far less likely to implicate essential security than the types of actions that are often at issue in ICJ proceedings. Thus, while a country could theoretically invoke essential security for virtually any measure challenged through the GATT or WTO dispute settlement system, such actions would be more likely to undermine the country's credibility and the integrity of the system than in the ICJ context.

It could also be that, at least under the GATT, countries did not feel compelled to invoke the essential security exception when they could instead simply block adoption of a panel report. This theory seems less likely since, as noted, the same or similar language has been carried over into the WTO agreements. There, too, the exceptions have not been problematic despite the fact that, under WTO rules, losing countries cannot alone block adoption of reports issued by panels or the WTO Appellate Body. In fact, since the creation of the WTO, apart from the panel constituted in the dispute over the Helms-Burton law, no dispute settlement panel has been called upon to interpret the essential security exceptions in any of the WTO agreements.

One might conclude based on this brief history that a self-judging exception carries little risk in commercial agreements. Such a judgment might be too hasty. While the United States has asserted that the essential security exception is self-judging, this is not necessarily a consensus position, as the EC's challenge to the Helms-Burton law demonstrates. Thus, even if the U.S. interpretation is correct, there has perhaps been enough uncertainty about the matter that countries have shown a degree of self-restraint in invoking the exception. In contrast, there was no ambiguity in the text of the Connally reservation. It was very clearly self-judging and provided an easy "out" for countries seeking to avoid the Court's jurisdiction.

Furthermore, it is important to recognize that WTO rules do not contain the types of investment rules that are codified in BITs. For example, the WTO Agreement on Trade Related Investment Measures (TRIMs) is little more than a restatement of trade rules already existing in GATT Articles III and XI. The GATS covers investments by foreign persons providing services through "mode 3," *i.e.*, through a local commercial presence; however, the scope of protection is still relatively narrow. GATS requires national treatment and market access for mode 3 services, but only in sectors in which a country has made a specific commitment.[36] As a result, the commitments are often fairly narrow and usually relate to sectors that are not problematic from a security perspective.

Apart from TRIMs and GATS (as it relates to mode 3), the WTO rules do not cover investment. Foreign investment—which by definition entails a foreign presence within a country's border—is much more likely to raise essential security concerns than trade.

35. No less than 101 dispute settlement reports were adopted under the GATT. As of September 30, 2011, 427 disputes have been initiated under WTO rules, and 129 panel or Appellate Body reports have been adopted. WORLD TRADE ORGANIZATION DISPUTE SETTLEMENT BODY, ANNUAL REPORT (2011) OVERVIEW OF STATE OF PLAY OF WTO DISPUTES, WT/DSB/54/Add.1 (2011).
36. GATS, *supra* note 16 at Arts. XVI & XVII.

The true testing ground for the exception may, therefore, be investment agreements, including Friendship, Commerce, and Navigation (FCN) treaties, BITs and investment chapters in FTAs. U.S. agreements in each of these categories are discussed below. The essential security exceptions in each of these agreements are provided in Appendix 13.

C. EXPERIENCE UNDER U.S. TREATIES OF FRIENDSHIP, COMMERCE, AND NAVIGATION

The United States was late to the international scene in starting a serious BIT program, and did not negotiate its first BIT until 1982.[37] The United States had, however, negotiated many FCN treaties before that time. FCN treaties negotiated in roughly the same time period as the GATT incorporate provisions similar to GATT Article XXI.[38] There is,

37. Germany and Pakistan entered into the first BIT in 1959. As explained by Vandevelde, "[a]lthough the [U.S.] BIT program was inaugurated in 1977, early in the Carter administration, U.S. officials did not reach agreement on a model negotiating text until the end of 1981." Kenneth J. Vandevelde, *Of Politics and Markets: The Shifting Ideology of the BITs*, 11 INT'L. TAX & BUS. L. 159, 160 (1993). The U.S. did not conclude its first such treaty until 1982, when it entered into a BIT with Panama.

38. *See, e.g.*, article XXIV of the U.S.-Germany FCN:

> The present Treaty shall not preclude the application by either Party of measures: . . . (b) relating to fissionable materials, to radioactive byproducts of the utilization or processing thereof, or to materials that are the source of fissionable materials; (c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment; (d) necessary to fulfill its obligations for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.

Treaty of friendship, Commerce and Navigation, U.S.-Germany, art. XXIV, Oct. 29, 1954, 7 U.S.T. 1839, *available at* http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005344.asp [hereinafter "U.S.-Germany FCN"].

Article XXIV(1) of the U.S.-Italy FCN:

> Nothing in this Treaty shall be construed to prevent the adoption or enforcement by either High Contracting Party of measures: . . . (c) relating to fissionable materials, to materials which are the source of fissionable materials, or to radioactive materials which are byproducts of fissionable materials; (d) relating to the production of and traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment; (e) necessary in pursuance of obligations for the maintenance of international peace and security, or necessary for the protection of the essential interests of such High Contracting Party in time of national emergency.

Treaty of Friendship, Commerce and Navigation, U.S.-Italy, art. XXIV(1), Feb. 2, 1948, 12 U.S.T. 131. *available at* http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005443.asp, [hereinafter "U.S.-Italy FCN"]

Article XXI(1) of the U.S.-Japan FCN:

> The present Treaty shall not preclude the application of measures: . . . (b) relating to fissionable materials, to radioactive byproducts of the utilization or processing thereof, or to materials that are the source of fissionable materials; (c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment; (d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.

Treaty of Friendship, Commerce, and Navigation, U.S.-Japan, art. XXI(1) April 9, 1953, TIAS 2863 *available at* http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005539.asp [hereinafter "U.S.-Japan FCN"].

For a list of U.S. FCN treaties, *see* U.S. TRADE COMPLIANCE CTR., http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/index.asp.

however, at least one notable difference: The essential security provisions in the FCN treaties do not include the "it considers" language that provides the textual hook for asserting that the exception is self-judging.

The ICJ took up the matter in the landmark decision in *Military and Paramilitary Activities in and Against Nicaragua*. That decision has been analyzed extensively elsewhere and will not be reexamined in detail here. In summary, Nicaragua claimed that the United States "breached express obligations under the Charter of the United Nations, the Charter of the Organization of American States and other multilateral treaties, and has violated fundamental rules of general and customary international law . . . ."[39] Nicaragua asserted, *inter alia*, that the ICJ had jurisdiction over the dispute under the terms of the U.S.-Nicaragua FCN. The Court was thus faced with the question of whether the FCN Treaty provided a basis for jurisdiction in light of article XXI of the Treaty, which provided that a state may take measures "necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests."[40] In its judgment, the Court concluded that Article XXI of the FCN Treaty:

> [C]annot be interpreted as removing the present dispute as to the scope of the Treaty from the Court's jurisdiction. Being itself an article of the Treaty, it is covered by the provision in Article XXIV that any dispute about the "interpretation or application" of the Treaty lies within the Court's jurisdiction. Article XXI defines the instances in which the Treaty itself provides for exceptions to the generality of its other provisions, but it by no means removes the interpretation and application of that article from the jurisdiction of the Court as contemplated in Article XXIV.[41]

In short, the Court found that the essential security exception was not self-judging. In his dissent, Judge Schwebel took a different view, and argued that:

> [T]he preclusion clause is an exclusion clause. In my view, where a treaty excludes from its regulated reach certain areas, those areas do not fall within the jurisdictional scope of the Treaty . . . . That this Treaty's preclusion clause is indeed an exclusion clause is indicated not only by its terms but by the . . . *travaux préparatoires*. Thus apart from the Treaty's essentially commercial concerns—I remain of the view that the Treaty fails to provide a basis of jurisdiction for the Court in this case, certainly for the central questions posed by it, unless, at any rate, United States reliance upon article XXI (1)(d) is, on its face, without basis.[42]

Thus, Judge Schwebel accepted the fact that the provision was self-judging despite the lack of the "it considers" language. In his view, the fact that the treaty stated that it did

39. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Memorial of Nicaragua on Questions of Jurisdiction and Admissibility, 1984 I.C.J. 361, ¶ 163 (June 30).
40. U.S.-Nicaragua FCN, *supra* note 20, at Art. XXI.
41. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, 116 (June 27).
42. *Id*. at 310–11.

not preclude measures necessary to protect essential security was sufficient to remove the matter from the Court's jurisdiction. At the same time, he also appeared open to the view that a "good faith" review by an international tribunal was permissible.

The *travaux préparatoires* to which Judge Schwebel referred is described in paragraph 101 of his dissent. The documents included two memoranda[43] that had been attached to the U.S. pleadings in *United States Diplomatic and Consular Staff in Tehran*. The first document, entitled "Memorandum on Dispute Settlement Clause in Treaty of Friendship, Commerce and Navigation with China," stated that "certain important subjects, notably immigration, traffic in military supplies, and the 'essential interests of the country in time of national emergency,' are specifically excluded from the purview of the treaty." The second document, entitled "Department of State Memorandum on Provisions in Commercial Treaties relating to the International Court of Justice," stated that "purely domestic matters as immigration policy and military security are placed outside the scope of such treaties by specific exceptions (citations omitted)."

The excerpts from the two memoranda do not, however, demonstrate that Nicaragua actually agreed with the U.S. interpretation during the course of the negotiation, nor are they crystal clear that the exceptions were in fact self-judging. As will be seen, this is a persistent problem with U.S. assertions that the essential security exception is self-judging. The United States has continuously proclaimed the self-judging nature of the exception and has taken great care to express that view in the course of its own domestic procedures for approval or ratification of its international trade and investment agreements. Yet, there is often little evidence that the partner to the agreement held the same view, at least for many of the early agreements that the U.S. negotiated. In fact, as will be seen in the discussion of the NAFTA, it appears that at least one of the parties in that context did not agree.

D. EXPERIENCE UNDER BITS BEFORE 2001

Early U.S. BITs carried over much of the FCN and GATT language, with some additional modifications. For example, Article X(1) of the 1982 U.S.-Panama BIT states that:

> This treaty shall not preclude the application by either Party of any and all measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace and security, or the protection of its own essential security interests.[44]

Reminiscent of concepts from the Connally reservation, the exchange of letters between the two Governments explained that:

> Paragraph I of Article X refers only to those domestic measures taken by either Party the object of which is to maintain public order, fulfill its obligations with

43. The memoranda are available at http://www.icj-cij.org/docket/files/64/9551.pdf.

44. Treaty Concerning the Treatment and Protection of Investments, U.S.-Pan., art. X(1), Oct. 27, 1982, S. Treaty Doc. 99–14 (1986) [hereinafter "U.S-Panama BIT"].

> respect to the maintenance or restoration of international peace and security or protect its own essential security interests.[45]

As with the earlier FCNs, noticeably missing from the Panama BIT provision is the "it considers" language that would have expressly made the provision self-judging.[46]

As described in detail by other commentators, after the decision in *Military and Paramilitary Activities In and Against Nicaragua*, the U.S. Administration and Congress engaged in a discussion clarifying the understanding of the United States with respect to the essential security exception in BITs.[47] However, with two exceptions, the language of the essential security provision in U.S. BITs did not change much until the late 1990s. The first exception was the 1992 U.S.-Russia BIT, in which the parties expressly agreed in a Protocol that the essential security exception was self-judging.[48] The second exception was the NAFTA, which will be discussed separately below. Apart from those two deviations, however, formally agreed upon text affirming the self-judging nature of the essential security provision did not appear in another U.S. BIT until 1998. However, official explanations of the provision grew more elaborate.

In 1992, the State Department provided the Senate Foreign Relations Committee with a description of the 1992 U.S. Model BIT. The document explained that the essential security exception:

> [R]eserves the right of a Party to take measures it regards as necessary for . . . the protection of its own essential security interests . . . A Party's essential security interests include actions taken in times of war or national emergency, as well as other actions bearing a clear and direct relationship to the essential security interests of the Party concerned. Whether these exceptions apply in a given situation is within each Party's discretion. We are careful to note, in each negotiation, the self-judging nature of the protection of a Party's essential security interests.[49]

Thus, while the State Department asserted that the exception in the Model BIT was self-judging, it also sought to protect against abuse of the provision by indicating that

45. This exchange of letters is available at http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp._005356.asp, at 65.
46. At the same time, the inclusion of the term "public order" in the BIT arguably made this provision broader than the essential security exception in earlier FCNs.
47. Burke-White and Von Straden, *supra* note 1, at 352–53, 383–86.
48. *See* Treaty Concerning the Protection of Investment, U.S.-Russ., art. 8, Apr. 3, 1992, 31 I.L.M. 777 (never entered into force). Article 8 of the Protocol states that "With respect to Article X, paragraph 1, the Parties confirm their mutual understanding that whether a measure is undertaken by a Party to protect its essential security interests is self-judging." *Id*. at art. 8. See *also Bilateral Investment Treaties with the Czech and Slovak Federal Republic, the Peoples' Republic of the Congo, the Russian Federation, Sri Lanka, and Tunisia, and Two Protocols to Treaties with Finland and Ireland: Hearing before the S. Comm. on Foreign Relations*, 102d Cong. 795 (Aug. 5, 1992) [hereinafter "1992 Senate"].
49. 1992 Senate, *supra* note 48, at 65. *See also* Burke-White and Von Staden, *supra* note 1, at 318–20.

any measure taken ostensibly to protect essential security must have a "clear and direct relationship to the essential security interest of the Party involved."[50]

The State Department's explanation highlights the inherent problem with a self-judging exception. On the one hand, the provision was not intended to allow a limitless scope of activity. On the other hand, the state itself would be solely responsible for policing its own actions and ensuring that its invocations of the exception were appropriate. The transmittal letters accompanying the submission of U.S. BITs to the Senate around this time include similar unilateral declarations, although they did not use the term "self-judging."[51]

50. 1992 Senate, *supra* note 48, at 65.

51. *See*, *e.g.*, 1994 U.S.-Jam. BIT Transmittal Letter, which asserts that the essential security clause:

> [R]eserves the right of a Party to take measures for the maintenance of public order, the fulfillment of its international obligations with respect to international peace and security, or those measures it regards as necessary for protection and security, or those measures it regards as necessary for the protection of its own essential security interests. These provisions are common in international investment agreements.
>
> The maintenance of public order would include measures taken pursuant to a Party's police powers to ensure public health and safety. International obligations with respect to peace and security would include, for example, obligations arising out of Chapter VII of the United Nations Charter. The Jamaica BIT differs from the prototype in its explicit reference to the UN Charter. Measures permitted by the provision on the protection of a Party's essential security interests would include security related actions taken in time of war or national emergency, actions 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

Treaty Between the United States of America and Jamaica Concerning the Reciprocal Encouragement and Protection of Investment, With Annex and Protocol, U.S.-Jam., Feb. 4, 1994, S. Treaty Doc. 103–35 (1997), *available at* http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005434.asp (emphasis added). *See also* transmittal letters accompanying other BIT agreements the United States has entered into: Treaty Between the United States of America and Mongolia Concerning the Encouragement and Reciprocal Protection of Investment, With Annex and Protocol, U.S.-Mong. Oct. 6, 1994, art. X, S. Treaty Doc. No. 104-10 (1995); Treaty Between the United States of America and the Government of the Republic of Trinidad and Tobago Concerning the Encouragement and Reciprocal Protection of Investment, With Annex and Protocol, U.S.-Trin. & Tobago, Sept. 26, 1994, art. XIV, S. Treaty Doc. No. 104-14 (1995); Treaty Between the United States of America and the Government of the Republic of Albania Concerning the Encouragement and Reciprocal Protection of Investment, With Annex and Protocol, U.S.-Alb., Jan. 11, 1995, art. XIV, S. Treaty Doc. 104–19 (1998), *available at* http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_002622.asp [hereinafter "U.S.-Albania BIT"]; Treaty Between the Government of the United States of America and the Government of the Republic of Latvia Concerning the Encouragement and Reciprocal Protection of Investment, With Annex and Protocol, U.S.-Lat. Jan. 13, 1995, art. IX, U.S.-Lat., S. Treaty Doc. No. 104–12 (1995); Treaty Between the Government of the United States of America and the Government of the Hashemite Kingdom of Jordan Concerning the Encouragement and Reciprocal Protection of Investment, With Annex and Protocol, U.S.-Jordan, Jul. 2, 1997, art. XIV, S. Treaty Doc. No. 106–30 (2000); Treaty Between the United States and the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment, With Annex and Protocol, U.S.-Bahr., Sept. 22, 1999, art. XIV, S. Treaty Doc. 106–25 (2001), *available at* http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_002777.asp [hereinafter "U.S.-Bahrain BIT"].

By 1995, the U.S. transmittal letters were more direct. For example, the Transmittal Letter accompanying the 1995 U.S.-Albania BIT[52] provides the following explanation:

> International obligations with respect to peace and security would include, for example, obligations arising out of Chapter VII of the United Nations Charter. Measures permitted by the provision on the protection of a Party's essential security interests would include security-related actions taken in time of war or national emergency. Actions 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. Measures to protect a Party's essential security interests are self-judging in nature, although each Party would expect the provisions to be applied by the other in good faith. These provisions are common in international investment agreements.[53]

The United States here expressly asserts that the exception is self-judging and tacks on an admonition that the exception should be applied in "good faith."

Three comments are necessary at this point in the chronology. First, on its face, the language of these various BITs (apart from the U.S.-Russia BIT) is not *obviously* self-judging. As noted, the relevant sections do not contain the "it considers" language that appears in the analogous GATT and WTO provisions. Without such language, the argument that the provision is self-judging becomes much more difficult. In fact, in several recent investor-state arbitration proceedings interpreting the Argentina-U.S. BIT (which does not contain the "it considers" language), the U.S. view did not prevail.[54]

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52. U.S.-Albania BIT, *supra* note 51. Article XVI(1) states that:
> This Treaty shall not preclude a Party from applying measures necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

Id. at art. XVI(1).

53. *Id*. at 14. *See also* U.S. Department of State Transmittal Letter, Treaty Between the Government of the United States of America and the Government of the Republic of Honduras Concerning the Encouragement and Reciprocal Protection on Investment, U.S.-Hond., Jul. 1, 1995, S. Treaty Doc. 106–27 (2001), *available at* http://tcc.export.gov/Trade _Agreements/All_Trade_Agreements/exp_005347.asp, which states:
> The first paragraph of Article XIV reserves the right of a Party to take measures for the fulfillment of its international obligations with respect to maintenance or restoration of international peace or security, as well as those measures it regards as necessary for the protection of its own essential security interests . . . .Under paragraph 3 of the Protocol to the Treaty, the parties expressed their understanding that international obligations with respect to maintenance or restoration of peace or security means obligations under the United Nations Charter. The pertinent portion of the Charter is Chapter VII 'Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.' Measures permitted by the provision on the protection of a Party's essential security interests would include security-related actions taken in time of war or national emergency. Actions not arising from a state of war or national emergency must have a clear and direct relationship to the essential security interests of the Party involved. Measures to protect a Party's essential security interests are self-judging in nature, although each Party would expect the provisions to be applied by the other in good faith.

54. Four tribunals have interpreted Article XI of the U.S.-Arg. BIT, and none concluded that the provision was self-judging. *See Sempra Energy Int'l v. Arg*., ICSID Case No. ARB/02/16, Award, ¶ 374 (Sept. 28, 2007),

Second, as noted, the State Department asserted that, during the course of the various BIT negotiations, the United States made its view clear that the exception was self-judging.[55] The NAFTA negotiating history discussed below appears to confirm this point. However, absent express language in the *travaux préparatoires* affirming the self-judging nature of the exception, it is far less clear that any given negotiating partner agreed with the U.S. interpretation. Indeed, as will be explained, it does not appear that Canada agreed to the U.S. interpretation during the NAFTA negotiations. This means that unilateral U.S. declarations that the exception is self-judging have only limited value. As stated by the investor-state arbitration tribunal in *Sempra Energy International v. Argentine Republic*, in respect of the U.S.-Argentina BIT, the U.S. position on the self-judging nature of the exception:

> [D]oes not necessarily result in the conclusion that such was the intention of the parties in respect of the Treaty under consideration. Truly exceptional and extraordinary clauses, such as a self-judging provision, must be expressly drafted to reflect that intent, as otherwise there can well be a presumption that they do not have such meaning in view of their exceptional nature.... In the case of the Treaty, nothing was said in respect of a self-judging character, and the elements invoked in support of this view originate for the most part in U.S. Congressional discussions concerning broader issues, or in indirect interpretations arising mainly with respect to the eventual application of model investment treaties used by the U.S.[56]

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available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC694_En&caseId=C8 ("Essential security interests can eventually encompass situations other than the traditional military threats for which the institution found its origins in customary law. However, to conclude that such a determination is self-judging would definitely be inconsistent with the object and purpose noted. In fact, the Treaty would be deprived of any substantive meaning."); [hereinafter "Sempra Energy"] *CMS Gas Transmission Co.*, *supra* note 22, at ¶ 370; *LG&E Energy Corp.*, *supra* note 28, at ¶ ¶ 212–14 ("Based on the evidence before the Tribunal regarding the understanding of the Parties in 1991 at the time the Treaty was signed, the Tribunal decides and concludes that the provision is not self-judging...") [hereinafter "LG&E"]; *Enron Creditors Recovery Corp. Ponderosa Assets, L.P. v. Arg.*, ICSID Case No. ARB/01/3, Award, ¶ 339 (May 22, 2007). For detailed examination of the cases *see* Burke-White and Von Staden, *supra* note 1, at 394–98. As discussed in those awards, the topic was the subject of debate between Professor José Alvarez, who took the view that exception was not self-judging, and Professors Ann-Marie Slaughter and William Burke-White, who appeared to take a contrary view. The *Sempra*, *CMS Gas*, and *Enron Creditors* were eventually annulled on other grounds. The *ad hoc* Committee in *Sempra* annulled the underlying award in part because the tribunal conflated the standards set forth in the essential security exception in the BIT and under the doctrine of necessity under customary international law. *See Sempra Energy Int'l v. Arg.*, ICSID Case No. ARB/02/16, Annulment Proceeding, (June 29, 2010), *available at* http://italaw.com/documents/SempraAnnulmentDecision.pdf. The *ad hoc* Committee in *CMS Gas Transmission Co.* criticized the underlying tribunal decision for similar reasons but partially annulled the award on other grounds. *CMS Gas Transmission Co. v. Arg. Republic*, ICSID Case No. ARB/01/8, Annulment Proceeding, (Sept. 25, 2007). The *ad hoc* Committee in *Enron Creditors* did not take a position on whether the tribunal improperly conflated the essential security exception in the BIT with the customary international law standard of necessity. *Enron Creditors Recovery Corp. Ponderosa Assets, L.P. v. Arg.*, ICSID Case No. ARB/01/3, Annulment Proceeding, (July 30, 2010). None of the *ad hoc* Committees took a position on the self-judging nature of the essential security exception in the BIT.

55. *See* Burke-White and Von Staden, *supra* note 1, at 325–53, 383–86; *see also* 1992 Senate, *supra* note 48, at 65.

56. *Sempra Energy*, *supra* note 54, at ¶ ¶ 379–80.

Third, in light of these concerns, it would be reasonable to ask why the United States did not make the self-judging nature of the exception explicit in the treaty. Perhaps the United States could not reach agreement with its partners. Alternatively, the U.S. negotiators may have felt that including express, clear language would have invited abuse, and that muddying the waters might preserve an argument later that there are in fact constraints on the use of the exception. Or, perhaps, the U.S. negotiators might have been troubled by the problem of "backwards interpretation."[57] In other words, if the language clearly stated that the exception was self-judging, some may have understood this to mean by implication that previous U.S. BITs or FCNs that did *not* include express language were not self-judging. Burying the understanding in the negotiating history (if, in fact, there was any express negotiating history on this point) would remove this problem yet memorialize the understanding of the Parties in the event of any future dispute.

In any case, by 1998, the United States appears to have reconciled itself to the need to make the exception more explicit. Thus, the 1998 U.S. BIT with Mozambique[58] and the 1999 U.S. BIT with Bahrain[59] include the "it considers" language, thereby providing a clear textual argument that the provision is self-judging. Although the reason for the change is not entirely clear, the fact that the change came on the heels of the Helms-Burton dispute in the WTO may not have been mere coincidence.

This change to the text has potentially profound consequences. As noted, the "it considers" language appears in the GATT, but the language in that context is coupled with a narrow list of essential security objectives. Thus, one might attempt to assess a party's good faith by examining the party's actions in the context of those narrow objectives. Previous BITs, on the other hand, contained neither a narrow list of objectives, nor the "it considers" language. This raises the question of whether the exception was self-judging at all. The U.S. BITs with Mozambique and Bahrain, in turn, include the "it considers" language but exclude the narrow list. Thus, these two BITs make a very expansive "essential security" standard explicitly self-judging. As a result, any review of invocations of the exception, even a "good faith" review, becomes much more difficult to justify.

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57. This, in fact, seems to be exactly what happened in the *LG&E* arbitration, where the tribunal supported its view that the essential security exception in the U.S.-Argentina BIT was not self-judging by contrasting the language in the BIT to the language in the U.S.- Russia BIT. According to the Tribunal:

    > The provisions included in the international treaty are to be interpreted in conformity with the interpretation given and agreed upon by both parties at the time of its signature, unless both parties agreed to its modification. In that case, the date to be considered is November 1991. It is not until 1992, with the ratification of the Russia-U.S. BIT, that the United States begins to consider that the application of the essential security measures are self judging; both instruments post-date the bilateral treaty between the United States and the Argentine Republic and, in both cases, this change was explicitly clarified.

    LG&E, *supra* note 54, at ¶ 213 (Oct. 3, 2006).

58. Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Mozam., art. XIV, Dec. 1, 1998, 1998 T.I.A.S. 13065, *available at* http://www.state.gov/s/l/treaty/tias/1998/121190.htm. [hereinafter "U.S.-Mozambique BIT"].

59. U.S.-Bahrain BIT, *supra* note 51, at art. XIV.

E. THE NAFTA NEGOTIATING EXPERIENCE

The essential security exception in the NAFTA presents its own peculiar difficulties. Several years ago, the NAFTA Parties released the entire negotiating history of NAFTA Chapter 11, which deals with investment and incorporates traditional BIT protections, including investor-state dispute settlement.[60] As a result, it is now possible to trace the evolution of the Parties' consideration of the essential security exception over seven distinct phases of the negotiation. Based on the evolution of the language, it appears that the Parties did not agree that the exception was self-judging as a general matter and instead avoided taking a definitive position on the issue. At the same time, new language was introduced that expressly excluded any review by a dispute settlement panel when the exception was invoked specifically in response to challenges to investment screening measures.

1. Stage One

As indicated in the first working texts, each of the three NAFTA Parties came to the table with markedly divergent proposals.[61] Mexico's proposal was the simplest, stating only that "a Party may deny the application of the Chapter to investors of the other Parties for reasons of national security."[62] The U.S. offered the BIT language it was using at the time.[63] The language omitted the "it considers" phrase but included a "Note" simply stating: "This provision is self-judging."[64] While not clear from the text, presumably the Note was intended to serve as a "disappearing footnote"—*i.e.*, text that would express the parties' shared understanding of the provision but which would not appear in the final agreement. The Note would thus serve as *travaux préparatoires*.

60. For the released documents *see NAFTA Chapter 11 Trilateral Negotiating Draft Texts*, Office of the U.S. Trade Rep., *available at* http://www.ustr.gov/archive/Trade_Agreements/Regional/NAFTA/NAFTA_Chapter_11_Trilateral_Negtiating_Draft_Texts/Section_Index.html.

61. *Compare NAFTA Chapter 11 Trilateral Negotiating Draft Texts* (1991), Office of the U.S. Trade Rep., *available at* http://www.ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/NAFTA_Chapter_11_Trilateral_Negtiating_Draft_Texts/asset_upload_file680_5924.pdf [hereinafter "1991 NAFTA Negotiating Text"] with *NAFTA Chapter 11 Trilateral Negotiating Draft Texts: Final Georgetown Composite* (Jan. 16, 1992), Office of the U.S. Trade Rep., *available at* http://www.ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/NAFTA_Chapter_11_Trilateral_Negtiating_Draft_Texts/asset_upload_file57_5923.pdf [hereinafter "January 16, 1992 NAFTA Negotiating Text"].

62. January 16, 1992 NAFTA Negotiating Text, *supra* note 61, at Art. 2109.

63. The U.S. suggested the following language:

> Nothing in this Chapter shall preclude the application by a Party of measures necessary for the maintenance of public order, the fulfillment of its obligations under the United Nations Charter with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

Id. at Art. XX09.

64. *Id.*

Canada, in turn, offered a detailed, page-long text, roughly modeled on GATT Article XXI but with a few notable changes.[65] While the proposal included an "it determines" clause, it replaced the subparagraphs from GATT Article XXI with a longer but more precisely worded list, which excluded any reference to "emergencies in international relations." As a result, the list could be understood as substantially narrower than GATT Article XXI, and certainly narrower than the U.S. proposal. It also required publication in an official journal of any determination that a measure was "directly related and essential to" the items in the list, and, except in emergencies, required prior consultation with other Parties before the measure was taken.

2. Stage Two

In April 1992, Canada presented a more detailed text that now also included a provision requiring consultations if a Party believed that another Party's invocation of the exception constituted a "disguised restriction on trade or investment or otherwise nullifi[ed] or impair[ed] any benefit reasonably expected under this agreement."[66]

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65. Canada's suggested text was as follows:

National Security

1. Nothing in this Agreement shall be construed:

a) to prevent any Party from refusing to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests;

b) to prevent any Party from imposing any measure which it determines is directly related and essential to:

i) supplying a military establishment of a Party with arms, ammunition or implements of war, or enabling fulfillment of a critical defense contract of a Party;

ii) responding to a situation of armed conflict involving the Party taking the measure;

iii) implementing international agreements relating to the nonproliferation of nuclear, chemical or biological weapons, other nuclear explosive devices, or chemical or biological agents;

iv) responding to direct threats of disruption in the supply of nuclear materials for defense purposes.

(c) to prevent any Party from taking measures in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

2. Any determination made under paragraph 1(b) shall be published promptly in the official journal of that Party.

3. The Party refusing to furnish or allow access to any information under paragraph 1(a) or imposing any measure under paragraphs 1(b) or (c) shall ensure that such action constitutes the means that least infringes on the rights and reasonable expectations of the Parties under this Agreement and is no broader in scope or duration than necessary.

4. Except in cases of emergency, the Party proposing to take any measure under paragraphs 1(b) or (c) shall consult with the other Parties prior to taking such measure, and in any event shall consult upon request in accordance with the provisions of Part 6.

Id. at Art. 110.

66. *NAFTA Chapter 11 Trilateral Negotiating Draft Texts: Washington Composite (April 3, 1992)*, Office of the U.S. Trade Rep., *available at* http://www.ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/NAFTA_Chapter_11_Trilateral_Negtiating_Draft_Texts/asset_upload_file828_5919.pdf.

3. Stage Three

By May 1992, Mexico had withdrawn its suggestion and agreed to the basic U.S. text but also with the new Canadian language from April.[67]

4. Stage Four

By August 4, 1992, the Parties had disposed with all previous proposals and drafted an entirely new provision.[68] The text essentially reverted to the language of GATT article XXI, with a few exceptions.[69] Since the NAFTA was much broader than the GATT, the new language referred to essential security interests relating to "*transactions* in other goods, materials, *services and technology* undertaken directly or indirectly for the purpose of supplying a military or other security establishment."[70] The U.S. "Note" (discussed under "Stage One" above) indicating that the provision was self-judging disappeared, but the "it considers" language was now included. This text was virtually the same text that appeared in the final version.

The Parties' attention now shifted to a second, new provision. The new language stated that "[f]or greater clarity, any action a Party takes under Article ___ (national security) which restricts or prohibits acquisitions by investors or investments of another Party shall not be subject to [dispute settlement]." This new language was clearly designed to provide protection for investment screening mechanisms like CFIUS. The precise language of the proposal is noteworthy. The term "for greater clarity," is often used by negotiators to ensure that whatever follows is not intended as a substantive change to existing text, but merely an interpretation of such text. Thus, the wording of the new proposal was likely designed to appear as if it were merely

67. *NAFTA Chapter 11 Trilateral Negotiating Draft Texts: Chapultepec Composite (May 1, 1992)*, Office of the U.S. Trade Rep., *available at* http://www.ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/NAFTA_Chapter_11_Trilateral_Negtiating_Draft_Texts/asset_upload_file240_5917.pdf.

68. *NAFTA Chapter 11 Trilateral Negotiating Draft Texts: Draft Watergate Daily Update (Aug. 4, 1992)*, Office of the U.S. Trade Rep., *available at* http://www.ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/NAFTA_Chapter_11_Trilateral_Negtiating_Draft_Texts/asset_upload_file269_5908.pdf [hereinafter "NAFTA Draft Aug. 4, 1992"].

69. Art. 2113 reads:

1. Subject to Articles ____ (Energy) and ____ (Government Procurement), nothing in this Agreement shall be construed:
   a) to require any Party from refusing to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests;
   b) to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests:
      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) taken in time of war or other emergency in international relations; or
      iii) relating to the implementation of national policy or international agreements relating to the nonproliferation of nuclear weapons or other nuclear explosive devices; or
   c) to prevent any Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

70. *Id*. at Art. 2113(10)(b)(i) (emphasis added).

reaffirming what was already taken to be true, *i.e.*, that an action taken pursuant to the essential security exception would not be subject to dispute settlement.

5. Stage Five

By August 28, 1992, the term "for greater clarity" was changed to "for greater certainty," although there is no obvious substantive difference between the two formulations.[71] More importantly, however, the phrase was now bracketed and footnoted with an explanation that it was "under discussion." The nature of such discussions is not evident.

6. Stage Six

By September 1, 1992, the draft text included not only the "for greater certainty" language but also an alternative. The new proposal stated that:

> [W]ithout prejudice to the applicability or non-applicability of [the dispute settlement provisions] to other actions taken by a Party pursuant to [the essential security exception], a decision by a Party to prohibit or restrict the acquisition of an investment in its territory by an investor of another Party or its investment pursuant to [the essential security exception] shall not be subject to [dispute settlement].[72]

The new language was footnoted with the explanation "U.S. proposals to be discussed."

The change in wording is potentially significant. Under the new proposal, the carve-out from dispute settlement was no longer presented as a mere interpretive gloss. Quite to the contrary, the new provision would imply that the Parties were consciously deciding not to take a position on whether invocations of the essential security exception were carved-out from dispute settlement. Instead, they were stating that, regardless of whether a carve-out may exist in other circumstances, there is a carve-out for invocations of essential security specifically in the context of investment screening.

7. Stage Seven

By September 6, 1992, the Parties appear to have agreed to use the alternative "without prejudice" language, and this became the language that appears in article 1138 of the final text.[73]

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71. *NAFTA Chapter 11 Trilateral Negotiating Draft Texts: Draft Lawyers' Revision (Aug. 28, 1992)*, Office of the U.S. Trade Rep., *available at* http://www.ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/NAFTA_Chapter_11_Trilateral_Negtiating_Draft_Texts/asset_upload_file195_5910.pdf.
72. *NAFTA Chapter 11 Trilateral Negotiating Draft Texts: Draft Lawyers' Revision (Sept. 1, 1992)*, Office of the U.S. Trade Rep., *available at* http://www.ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/NAFTA_Chapter_11_Trilateral_Negtiating_Draft_Texts/asset_upload_file552_5901.pdf.
73. *NAFTA Chapter 11 Trilateral Negotiating Draft Texts: Draft Lawyers' Revision (Sept. 6, 1992)*, Office of the U.S. Trade Rep., *available at* http://www.ustr.gov/archive/assets/Trade_Agreements/Regional/

Despite the apparent disagreement among the Parties (or at least their failure to take a consensus decision on the matter), the Statement of Administrative Action that the President included with the final text transmitted to the Congress asserted that "[t]he national security exception is self-judging in nature, although each government would expect the provisions to be applied by the other in good faith."[74]

One should always be cautious in divining too much meaning from negotiating history. Nevertheless, in this case, the negotiating history would appear significant. First and most importantly, the United States wanted to make it clear, at least among the Parties, that the essential security exception was self-judging. Neither of the other two Parties expressly disagreed, at least in the written texts that have been released. In fact, at the midway point of the negotiation, Mexico agreed to the U.S. position. However, Canada's position is more elusive. There is no evidence from the negotiating record that it ever agreed to the U.S. negotiating "Note" (discussed under "Stage One" above) and offered several procedural suggestions as a means for safeguarding against abuse. Further, its initial proposal contained a relatively narrow list of essential security interests. From this documentary evidence, it appears that there was no explicit meeting of the minds that the exception was self-judging in all circumstances.

NAFTA/NAFTA_Chapter_11_Trilateral_Negtiating_Draft_Texts/asset_upload_file592_5895.pdf, at Art. 1137(a). In addition, the September 6, 1992, draft states as follows:

> 1. Subject to Articles 607 (Energy National Security Measures) and 1018 (Government Procurement Exceptions), nothing in this Agreement shall be construed;
>
> (a) to require any Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests;
>
> (b) to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests;
>
> (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) taken in time of war or other emergency in international relations; or
>
> (iii) relating to the implementation of national policies or international agreements respecting the nonproliferation of nuclear weapons or other nuclear explosive devices; or
>
> (c) to prevent any Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

NAFTA Article 1138(1) (Exclusions) states as follows:

> Without prejudice to the applicability or non-applicability of the dispute settlement provisions of this Section or of Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures) to other actions taken by a Party pursuant to Article 2102 (National Security), a decision by a Party to prohibit or restrict the acquisition of an investment in its territory by an investor of another Party, or its investment, pursuant to that Article shall not be subject to such provisions.

North American Free Trade Agreement, at Art. 1138(1), 32 I.L.M. 289, 604 (1993) [hereinafter "NAFTA"].

In addition, Canada's Department of Foreign Affairs and International Trade (DFAIT) presents all negotiating texts at www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/trilateral_neg.aspx.

74. *Message from the President of the United States Transmitting North American Free Trade Agreement, Texts of Agreement, Implementing Bill, Statement of Administrative Action and Requiring Supporting Statements*, H.R. Doc. No. 103-159, 103d Cong. (1st Sess. 1993) at 666.

The absence of explicit agreement does not, however, refute the U.S. interpretation of the exception. It simply means that it would be up to a tribunal to decide the matter for itself based on its understanding of the text and applying the interpretive rules of the Vienna Convention on the Law of Treaties.[75] Similarly, the inclusion of Article 1138(1) does not demonstrate one way or another whether the essential security exception is self-judging. Article 1131(1) may be evidence of disagreement among the Parties but does not prove anything more. It does, however, make the task of interpreting the scope of the essential security exception substantially more difficult.

One final question with respect to the NAFTA provisions is why the United States felt it needed the clarification in Article 1138 given that no such provision was included in FCN treaties, previous or subsequent BITs, or the GATT. In other words, why could it not continue as it had before, *i.e.*, asserting that the "it considers" language renders the provision entirely self-judging? Again, one can only speculate; however, I will offer a few possibilities. First, at the point the NAFTA was negotiated, the U.S. negotiators may have felt that they needed greater precision. After all, the U.S. investment screening mechanism, which is overseen by the CFIUS was only implemented a few years before, in 1988.[76] Of course, this does not answer the question as to why such a provision was not included in subsequent agreements.

Second, as noted, the essential security exception in NAFTA Article 2102 is potentially much narrower than the exception in other U.S. investment agreements in that it includes a specific list of essential security interests. Other U.S. investment agreements included no such list and, therefore, could be interpreted to allow a much broader range of discretion. If the United States viewed this as a problem with the NAFTA, however, then one might wonder whether the United States might also have grown somewhat uneasy in its view regarding the scope of GATT Article XXI, given that Article 2102 parallels the language in GATT Article XXI. This issue arises again in the context of the U.S.-Morocco FTA, discussed below.[77]

A hypothetical example illustrates why the U.S. negotiators may have been nervous. As will be seen later, CFIUS is charged with reviewing inbound investments into the United States for national security concerns. It is authorized under U.S. Federal law to enter into mitigation agreements with the parties to a transaction that may modify the terms of the transaction.[78] It may also recommend that the President block or suspend a transaction entirely,[79] or order divestment of an acquisition that has already

75. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

76. CFIUS was established by Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (May 9, 1975) [hereinafter "Exec. Order 11,858"].

77. *See* United States-Morocco Free Trade Agreement, with Annexes, Jan. 15, 2004, Pub. L. 108–302, 118 Stat. 1103 (2004), *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text [hereinafter "U.S.-Morocco FTA"].

78. Defense Production Act of 1950, as amended, 50 U.S.C. App. § 2170(1)(1)(a) [hereinafter "DPA"].

79. 31 C.F.R. § 800.506(b).

closed.[80] CFIUS may review acquisitions from any foreign country, including not only countries where the United States may be expected to show some special sensitivity (*e.g.*, China, Russia, or Venezuela), but also countries generally viewed as more aligned with the United States such as Canada, the United Kingdom, France, or Japan. For purposes of the hypothetical, assume that CFIUS reviews the acquisition of a U.S. telecom company by a Canadian company and that CFIUS decides to block the transaction because of concerns over the intentions of the particular investor and potential disruptions to the U.S. telecom sector.

In such a case, the United States might argue that the measure fell within one of the exceptions in Article 2102. For example, Article 2102 provides an exception for actions taken to address an emergency in international relations, although in the hypothetical described, it would be difficult for the United States to assert that such an emergency existed. Potentially, the United States could seek to fit its measure into one of the other boxes in Article 2102 such as subparagraph (i), which relates to measures taken with respect to transactions involving "goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment." The United States might assert, for example, that it was concerned that the Canadian security forces would infiltrate and disrupt the system. However, if the acquirer were a private entity, it would not always be obvious that a transaction is undertaken to "supply" such a security establishment. As a result, it might be difficult in any given case to fit CFIUS action within one of the categories enumerated in Article 2102.

Regardless of the U.S. motivation, the compromise text in Article 1138 has significant implications. It does not simply exclude investment screening from dispute settlement.[81] Rather, it excludes from dispute settlement invocations of Article 2102 as a justification for such screening. Thus, if a Party asserted that its decision to block an investment fell within Article 2102, a panel would not be permitted to second-guess the determination, even if that determination was in bad faith. As noted, this result is in line with the longstanding U.S. interpretation of the essential security exception, although it had not been articulated so clearly since the Connally reservation. In this sense, the NAFTA foreshadowed what was to come, as explained in the next section.

f. developments after 2001

The United States signed twelve BITs between 1995 and 2001. None of these treaties used the language from NAFTA and, as noted, only two used the "it considers" language.[82] After the terrorist attacks on September 11, 2001, the U.S. security outlook dramatically changed, and the public and government alike became much more deeply sensitized to the protection of national security. As it happened, around

80. DPA, *supra* note 78, at § 2170(d)(1).

81. The Parties clearly knew how to exclude screening mechanisms without having to resort to an essential security exception. In Annex 1138.2, for example, both Canada and Mexico took explicit reservations with respect to their investment screening mechanisms without any reference to essential security.

82. *See* U.S.-Mozambique BIT, *supra* note 58; and U.S.-Bahrain BIT, *supra* note 51.

this same time, the Bush Administration was laying out a new trade agenda. In 2001, the Doha round of WTO negotiations was launched. In 2002, the U.S. Congress passed Trade Promotion Authority (TPA), which established a "fast track" process that enabled the President to seek Congressional approval for trade agreements through an up-or-down vote.[83] Such authority was conventionally viewed as a practical prerequisite for negotiating a new round of trade agreements.

Throughout this period, the Administration, in consultation with Congress, was intensely engaged in drafting new text for the proposed FTAs. As part of this effort, the model U.S. provision on essential security was again reworked, combining the language used in the Mozambique and Bahrain BITs with the familiar provision from other agreements protecting the parties' right to withhold from disclosure sensitive national security information. The first agreements completed in this timeframe were the U.S.-Singapore and U.S.-Chile FTAs, both of which included the newly formulated essential security exception. The new text, as it appears in article 23.2 of the U.S.-Chile FTA, provided as follows:

> Article 23.2: Essential Security
>
> Nothing in this Agreement shall be construed:
>
> (a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or
>
> (b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations under the United Nations Charter with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

In addition, Article 10.20.3 of the U.S.-Chile FTA specifies that nothing in the investor-state arbitration procedures requires a respondent "to disclose confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law or to furnish or allow access to information that it may withhold in accordance with Article 23.2 (Essential Security) or Article 23.5 (Disclosure of Information)."[84]

The language that appears in Articles 23.2 and 10.20.3 of the U.S.-Chile FTA was carried over into subsequent U.S. FTAs and into the 2004 U.S. Model BIT.[85] For the first

83. Trade Promotion Authority (TPA) Act of 2002, 19 U.S.C. §§ 3803–3805 (2006).

84. United States-Chile Free Trade Agreement, Jun. 6, 2003, Pub. L. 108-77, 117 Stat. 909 (2003), *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text [hereinafter "U.S.-Chile FTA"].

85. *See*, *e.g.*, The Dominican Republic-Central America-United States Free Trade Agreement, Aug. 5, 2005. Pub. L. 109–54, 119 Stat. 474 (2005), at arts. 10.21.2 and 21.2, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text [hereinafter "CAFTA-DR"]; U.S.-Bahrain Free Trade Agreement, Jan. 11, 2006, Pub. L. 109-164, 119 Stat. 3581 (2006), at art. 20.2, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/

few years, the only notable deviation was Article 21.2 of the U.S.-Morocco FTA, which added the following provision after the boilerplate essential security provision:

> For greater certainty, measures that a Party considers necessary for the protection of its own essential security interests may include, *inter alia*, measures relating to the production of or 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.[86]

While this provision draws from parts of Article XXI of the GATT 1947, the list of essential security objectives in the Morocco text is clearly illustrative and not exclusive, perhaps signaling some discomfort with the GATT approach.

In any case, until 2006, the essential security provision attracted little attention. By that time, discussions regarding the relationship between foreign investment and national security took on a much higher profile. In 2003, Hutchison Telecommunications, a Hong Kong company, was forced to withdraw its participation in a bid for Global Crossing.[87] In 2005, concerns were raised about Lenovo's acquisition of IBM's laptop computer unit[88] and China National Offshore Oil Corporation's (CNOOC) proposed acquisition of Unocal.[89] Political concerns reached a fever pitch in 2006 over the acquisition of Peninsular and Oriental Steam Navigation (P&O) by Dubai Ports World (DPW).[90] While these events were occurring, the United States was continuing to negotiate FTAs and BITs with the essential security provision described above. The issue finally grabbed the attention of Congress in late 2006 during the debates over Congressional approval of the U.S.-Peru and U.S-Oman FTAs.[91]

The debate did not begin with the essential security exception *per se*, but rather with concerns over other provisions of the agreements dealing with "landside aspects of port activities," such as cargo handling and similar services. To understand the debate, it must be put in context. Both of the agreements contain an investment chapter that incorporates BIT-like commitments. Like other U.S. FTAs, they prohibit discrimination

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bahrain-fta/final-text [hereinafter "U.S.-Bahrain FTA"]; and 2004 U.S. Model Bilateral Investment Treaty, *available at* http://www.state.gov/documents/organization/117601.pdf [hereinafter "U.S. Model BIT"].

86. U.S.-Morocco FTA, *supra* note 77, at Art. 21.2.

87. Jonathan D. Glater, *Technology: Hong Kong Partner Quits Bid for Global Crossing*, N.Y. Times, May 1, 2003.

88. Susan Lemon, *Report: Lenovo-IBM Deal to Face Review*, IDG-News, Jan. 28, 2005.

89. *CNOOC Withdraws Its Bid for UNOCAL*, Asia Times, Aug. 4, 2005 [hereinafter "Asia Times"].

90. David E. Sanger, *Under Pressure, Dubai Company Drops Port Deal*, N.Y. Times, Mar. 10, 2006.

91. *See*, *e.g.*, United States-Peru Trade Promotion Agreement, Apr. 12, 2006, Pub. L. 110-138, 121 Stat. 1455 (2007), *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text [hereinafter "U.S.-Peru TPA"]; Agreement Between the Government of the United States of America and the Sultanate of Oman on the Establishment of a Free Trade Area, Annex II, U.S. Schedule 6, Sept. 26, 2006, Pub. L. 109-283, 120 Stat. 1202 (2006), *available at* http://www.ustr.gov/trade-agreements/free-trade agreements/oman-fta/final-text [hereinafter "U.S.-Oman FTA"].

against investors from the partner country on a "negative list" basis, meaning that investments in all economic sectors are covered except those that are specifically carved out as indicated in party-specific annexes to the agreement. The United States did not carve-out "landside aspects of port activities."[92] As a result, the agreements required the United States to provide nondiscriminatory treatment and market access to service suppliers from Oman or Peru with respect to the provision of such services.

While the inclusion of landside port activities in the Oman and Peru FTAs was hardly groundbreaking,[93] these particular agreements were presented to Congress relatively soon after the DPW controversy. As noted, in 2006, DPW acquired P&O, which, among other things, provided landside port services in various U.S. ports. Much to the dismay of some in Congress who felt that DPW's access to U.S. ports might threaten national security, CFIUS had not blocked the acquisition. The result was a political firestorm, and DPW eventually divested the acquired assets. When the Oman FTA came before the U.S. Congress, certain members recalled the controversy over the DPW acquisition and took issue with the inclusion of landside port activities. They argued that the FTA might constrain the U.S. Government from blocking the future entry into the market by foreign suppliers for national security reasons.

The Office of the U.S. Trade Representative (including this author) subsequently explained to Congress that the essential security exception in the FTAs[94] was self-judging and would allow the United States to take action through CFIUS or through other measures taken to protect national security.[95] Certain members of Congress remained concerned and raised three points: (1) a separate provision of the FTA expressly

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92. *See,* U.S.-Oman FTA, *supra* note 91, Annex II, U.S. Ch. 6.

93. *See, e.g.*, NAFTA, *supra* note 73, at Annex II-U-12; and U.S.-Morocco FTA, *supra* note 77, at Annex II.

94. The essential security provision in the U.S.-Oman FTA appears in article 21.2, and states as follows:

> Nothing in this Agreement shall be construed:
>
> (a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or
>
> (b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security or the protection of its own essential security interests.
>
> U.S.-Oman FTA, *supra* note 91, at Art. 21.2.

95. In response to Congressional concerns, USTR released a Fact Sheet which, among other things, explained as follows:

> Q: If the President were to block, condition, or require the unwinding of an investment by an Omani investor in order to protect the national security, would that be consistent with our obligations under the FTA?
>
> A: Yes. All of our trade agreements include an article on "essential security." Under that article, nothing in an agreement can prevent us from applying measures that we consider necessary for the protection of our essential security interests. This exception is self-judging. The validity of the defense turns on what the USG considers necessary to protect our essential security, not on a tribunal's assessment of our essential security. All the commitments we undertake in a trade agreement are subject to this overarching provision.
>
> Office of the U.S. Trade Representative, *Trade Facts: Free Trade Agreements and the Supply of Services at U.S. Ports* (2006), *available at* http://ustraderep.gov/assets/Document_Library/Fact_Sheets/2006/asset_upload_file655_9595.pdf.

identified certain matters that were outside the jurisdiction of dispute settlement panels, and invocations of the essential security provision were not on the list, (2) in the 1990s, a WTO panel had been constituted to review the Helms-Burton law, which in the view of the members of Congress proved that tribunals can take jurisdiction over such matters, and (3) if the provision were in fact self-judging, other countries could abuse the right to take such measures, which could in turn harm U.S. interests including U.S. agricultural exports.[96]

The first argument raised by the members of Congress was convoluted and their conclusion is contestable.[97] They were also clearly incorrect with respect to their second argument. The fact that a dispute settlement panel was convened in the Helms-Burton dispute says nothing about whether, in fact, such a panel would or could have found that it had the authority to review the U.S. invocation of GATT Article XXI. The third point raised by the members of Congress is, however, correct, and it was certainly possible that other countries could have abused the exception. As addressed in this chapter's earlier discussion regarding the Connally reservation, there is a longstanding tension between preserving the self-judging nature of the exception and maintaining appropriate safeguards to ensure that the provision is only invoked in good faith. Indeed, the United States has long understood the risks but nevertheless opted to support an interpretation that the provision is self-judging.

Over the ensuing months, members of the Congress continued to raise concerns with the Administration and sought further amendments to the model text. While the concerns arose in discussions about the U.S.-Oman FTA, no modifications to that agreement were made since the objections were raised too late in the process. However, the agreement with Peru and several other FTAs were pending Congressional approval,

96. *See* Letter from Charles Rangel, Benjamin Cardin, Sander Levin, and Xavier Beccerra to Susan Schwab (Sept. 14, 2006).

97. The letter cited Article 21.2(c) of the U.S.-Peru Trade Promotion Agreement (TPA), which allows the Parties to make "nonviolation nullification or impairment" claims with respect to obligations under specified chapters of the agreement. The provision then states that the Parties cannot make such a claim "with respect to a benefit under Chapter Eleven (Cross-Border Trade in Services) or Sixteen (Intellectual Property Rights) if the measure is subject to an exception under Article 22.1 (General Exceptions)." U.S.-Peru TPA, *supra* note 91, at Art. 21.2(c). Article 22.1 provides for exceptions for measures taken to protect human health, morality etc., but does not cover the essential security exception. On this basis, the members of Congress asserted, a Party could make a claim for non-violation nullification or impairment even if the responding Party invoked the essential security exception. *Id*. In the view of the author, Congress incorrectly assessed the exceptions. First, article 21.2(c) of the Peru FTA does not allow non-violation claims with respect to benefits expected to accrue under the investment chapter of the agreement. Consequently, a Party could not make a non-violation claim with respect to measures affecting investments in landside aspects of port activities. Second, Article 21.2 on its face only applies "[e]xcept as otherwise provided in this Agreement." On this basis, one might argue that the essential security exception in Article 22.2 is just such an exception, and that it carves out from the dispute settlement provisions any actions that a Party considers to be necessary to protect its essential security interests. Third, as a practical matter, the likelihood of a non-violation claim is extremely rare. As evidence, one might point to the experience under the GATT, which also allows non-violation claims. In that context, such claims have rarely been brought and even more rarely sustained. *See generally*, John H. Jackson, et al., Legal Problems of International Economic Relations—Cases, Materials and Texts on the International Regulation of Transnational Economic Relations, 290–91 (West, 3rd ed. 1994)

and members of Congress demanded that changes be made to the text of these and future agreements.

On May 10, 2008, the USTR and certain Democratic members of Congress reached a broader trade deal covering labor, environment and other matters, including the essential security exception. As part of the deal, USTR agreed to include a new footnote to the basic essential security provision stating as follows:

> For greater certainty, if a Party invokes [the essential security provision] in an arbitral proceeding initiated under [the investment chapter, *i.e.*, investor-state arbitration] or [the chapter dealing with dispute settlement between the Parties], the tribunal or panel hearing the matter shall find that the exception applies.[98]

The footnote uses the "for greater certainty" formulation, thereby implying that it merely clarifies but does not substantively change the meaning of the basic provision. As a result of these amendments, the text is now crystal clear that a tribunal cannot second-guess a Party's own determination (even a bad faith determination) as to whether a measure is taken to protect essential security and therefore falls within the exception.

G. SUMMARY OF THE CURRENT STATE-OF-PLAY OF THE ESSENTIAL SECURITY PROVISIONS IN U.S. TRADE AND INVESTMENT AGREEMENTS

The essential security provisions in U.S. trade and investment agreements can be grouped into the following categories:[99]

1. The GATT/WTO agreements;
2. Post-1945 FCNs, which contain an essential security exception with no "it considers" language, and refer to the specific types of essential security measures referenced in GATT Article XXI (b) and/or (c);[100]
3. BITs containing an essential security exception without "it considers" language and no express indication that the exception is self-judging even through a unilateral declaration;
4. BITs containing an essential security exception without "it considers" language, coupled with a unilateral U.S. declaration that the exception is self-judging;
5. BITs containing an essential security exception with "it considers" language or other formal agreement with treaty partner that the provision is self-judging;
6. The NAFTA;
7. Post-2001 agreements with the "it considers" language and provisions regarding confidential information; and

98. *See*, *e.g.*, U.S.-Peru TPA, *supra* note 91, at Art. 22.2.
99. The categories are summarized *infra* Annex 4.
100. Pre-1945 FCNs used a different text, which will not be addressed here.

8. Post-trade deal agreements containing the language from (7) and a footnote clarifying that the matter is not subject to dispute settlement.

As we have seen, the United States is of the view that there is no distinction between these categories and that, in all cases, the exception is self-judging and not subject to review by a dispute settlement panel. Clearly, however, that position is more sustainable with respect to certain of these agreements than to others.

Agreements in categories 2, 3, and 4 contain no express language indicating the exceptions are self-judging. As discussed above, the ICJ and at least four investor-state arbitration tribunals have found that, in the absence of the "it considers" language or other similar explicitly agreed language regarding the self-judging nature of the exception, invocations of the exception are reviewable. As a result, at least with respect to those agreements, countries invoking the exception run the risk that their actions may be reviewable.

Agreements in categories 1, 5, 6, and 7, by comparison, contain the "it considers" language, thereby providing a strong argument that the exceptions are self-judging. However, in the GATT/WTO context, as we have seen, the EC (now the European Union or "EU") and others were willing to challenge that interpretation in dispute settlement. Similarly, it appears that Canada may have challenged that view during the negotiation of the NAFTA. Finally, there may be some additional degree of exposure with respect to these agreements if a panel accepts the premise that "good faith" reviews are permissible. Thus, some degree of exposure remains even with respect to these agreements (at least outside the context of investment screening in the case of the NAFTA), although the matter is not clear and certainly one might argue that no review whatsoever is permissible.

Finally, agreements in category 8 and, in the context of investment screening, category 6, appear expressly to preclude even a good faith review.

As this history and summary indicates, the language of the essential security exception in U.S. agreements has evolved to move toward absolute clarity that the essential security exception is self-judging. Whether one believes that a self-judging exception is appropriate policy or not, one might question whether such clarity is in the best interest of the system. As noted above, while there is no real way to prove the matter one way or the other, it is possible that uncertainty has resulted in self-restraint. With the emergence of the text as it appears in the eighth category above (and with respect to the NAFTA in the context of investment screening), that uncertainty is removed. While experience under NAFTA has been promising, it remains to be seen whether, with respect to newer agreements, countries will exhibit the same self-restraint when invoking the exception.

H. IMPLICATIONS FOR CFIUS

This chapter has so far examined the language of the essential security provisions in U.S. trade and investment agreements in the abstract. It will now turn to the practical

question of how such exceptions might apply in a specific context, namely investment screening by CFIUS.

CFIUS was created by Executive Order 11,858 in 1975, primarily for data collection, monitoring, and analysis of inbound investment.[101] It was not until 1988—with the passage of the Exon-Florio Amendment to the Defense Production Act of 1950—that CFIUS was given broader authority to review "any merger, acquisition, or takeover, by or with a foreign person, of a person engaged in interstate commerce in the United States."[102] CFIUS used this authority to enter into "mitigation agreements" with the parties to a transaction to eliminate any potential security threat and was empowered to recommend that the President suspend or prohibit a pending acquisition, or order divestment of a completed acquisition. The President was authorized to take such action if there was credible evidence that the foreign interest exercising control over the acquired assets might take action that threatened to impair national security and there was no other law (apart from the International Emergency Economic Powers Act[103]) to address the problem.[104]

The Exon-Florio amendment was adopted in response to concerns over inbound Japanese investment, and in particular to the acquisition in 1987 of Fairchild Semiconductor Co. by Fujitsu.[105] Nevertheless, while born of controversy, for the next fifteen years or so CFIUS remained a relatively sleepy entity tucked away in the corners of the Federal Government. It was not until the higher profile acquisitions discussed above that CFIUS became once again a topic of heated political discussion. The result was a new law governing CFIUS, the Foreign Investment and National Security Act of 2007,[106] which was followed by a new amendment to Executive Order 11,858[107] and new regulations[108] The amendment to Executive Order 11,858 mandated certain internal CFIUS procedures and designated additional members of the Committee.[109]

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101. Exec. Order No. 11,858, *supra* note 76.

102. Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418, § 5021, 102 Stat. 1107 (1988) [hereinafter "Omnibus Trade Act"].

103. International Emergency Economic Powers Act, Pub. L. 95 95-223, 91 Stat. 1626 (1979) (codified at 50 U.S.C. §§ 1701–1707.).

104. Omnibus Trade Act, *supra* note 102.

105. *See* James Jackson, The Committee on Foreign Investment in the United States 4 (Congressional Research Service, Apr. 23, 2007).

106. Foreign Investment and National Security Act of 2007, Pub. L. 110-49, 121 Stat. 246 (2007) [hereinafter "FINSA"]. *See also* DPA, *supra* note 78.

107. Exec. Order No. 13,456, 73 Fed. Reg. 4677 (Jan. 25, 2008) *amending* Exec. Order No. 11,858, *supra* note 76 [hereinafter "Exec. Order 13,456"].

108. Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 73 Fed. Reg. 70,702 (November 21, 2008) [hereinafter "CFIUS Regulations 2008"].

109. CFIUS has nine permanent, voting members, including the Secretaries of the Departments of Treasury, Homeland Security, Commerce, Defense, State, and Energy, as well as the Attorney General, the Trade Representative, and the Director of the Office of Science and Technology Policy. *Ex officio* members include the Secretary of Labor and the Director of National Intelligence. The Director of the Office of Management and Budget, the Chair of the Council of Economic Advisers, the Assistant to the President for National Security Affairs, the Assistant to the President for Economic Policy, and the Assistant to the President for Homeland Security and Counterterrorism are official observers. *See* Exec Order 13,456, *supra* note 107.

Despite all of these changes, however, the basic authority and scope of CFIUS review was unchanged.

While these changes were occurring, the international community began to step up efforts to develop guidelines or best practices with respect to investment screening regimes. In large part, this effort was related to the emergence of sovereign wealth funds (SWFs). In recent years, the size of SWFs has grown markedly, and many have invested enormous sums of money in overseas markets. While recipient countries largely welcomed the investment, concerns arose about the security implications of large scale foreign government ownership in vital industries. The result was an effort by SWFs under the auspices of the International Monetary Fund to develop principles for ensuring that SWFs operate on a commercial basis, and a simultaneous effort by recipient countries in the Organization for Economic Cooperation and Development (OECD) to develop guidelines for investment screening mechanisms. In 2009, the OECD released its *Guidelines for Recipient Country Investment Policies Relating to National Security*,[110] and the International Working Group of Sovereign Wealth Funds released its guidelines on sovereign wealth funds, colloquially known as the Santiago Principles.[111] As explained below, the principles enumerated in both documents have to some degree been incorporated into CFIUS practice.

1. CFIUS Procedures and Practice

U.S. law does not require parties to report an acquisition to CFIUS.[112] Notifications are entirely voluntary.[113] However, if the parties do not report a transaction, CFIUS may at any time initiate a review.[114] Neither the law nor the regulations limit the scope of CFIUS reviews with respect to sectors or level of ownership interest.[115] The records of CFIUS proceedings are not public and actions taken and determinations made by the President are not subject to judicial review.[116]

CFIUS examinations (whether initiated through a voluntary notification or self-initiated by CFIUS) are divided into three stages: (1) an initial thirty-day review of the transaction by the CFIUS agencies, (2) if necessary, a forty-five day investigation, and (3) if the matter is sent to the President for decision, a fifteen-day period for the President to determine whether to block, suspend, or condition the acquisition. According to statistics released by the U.S. Treasury Department, from 2008–2010, CFIUS

110. Organization for Economic Cooperation and Development, Guidelines for Recipient Country Investment Policy Regarding National Security (2009) [hereinafter "OECD Guidelines"].

111. Int'l Working Grp. of Sovereign Wealth Funds, Generally Accepted Principles and Practices: "Santiago Principles" 3 (2008) [hereinafter "Santiago Principles"].

112. *See generally*, CFIUS Regulations 2008, *supra* note 108, at § 800.401.

113. *Id.*, at § 800.402.

114. DPA, *supra* note 78, at § 2170(b)(1)(D).

115. Purely passive investments of less than a 10% ownership share are excluded. CFIUS Regulations 2008, *supra* note 108, at § 800.302(b).

116. FINSA, *supra* note 106, at § 6. *See also* DPA, *supra* note 78, at § 2170(e) and (g).

received 313 notifications.[117] Twenty-nine notifications were withdrawn during the review stage. In ninety-three cases, CFIUS initiated a forty-five day investigation.[118] Thirteen notices were withdrawn during the investigation stage.[119] The President was not required to make decisions in any of these cases.[120]

For each notified transaction, the U.S. Director of National Intelligence is required to provide a report.[121] In addition, the new law put in place procedures requiring high level political involvement in CFIUS decisions. For example, after the completion of a review or investigation, Treasury and a designated "lead agency" must certify to Congress that there are no unresolved national security concerns.[122] Only high-level officials appointed by the President may sign such certifications. The certifications and reports are sent to members of the Congressional leadership.

Transactions notified to CFIUS cover a wide range of sectors. According to the Treasury Department, for the period 2008–2010, forty-one percent of notified transactions were in the manufacturing sector; thirty-two percent were in the information sector (covering, among other things, publishing, telecommunications, and certain financial services); eighteen percent related to mining, utilities or construction; and nine percent related to wholesale and retail trade.[123] There is no public information on which transactions notified in each sector were withdrawn subject to mitigation agreements, or resolved through some other action.

During this same period, approximately twenty-two percent of the transactions notified to CFIUS involved acquiring entities from U.S. BIT partners or from countries with which the United States has entered into FTAs with investment chapters.[124] Thirty-one percent were from countries with post-1945 FCN treaties with the United States.[125] Therefore, the question arises as to whether actions taken by CFIUS with

117. Comm. on Foreign Inv. in the United States, Annual Report to Congress (CY 2010, issued Dec. 2011), at 3 *available at* http://www.treasury.gov/resource-center/international/foreign-investment/Documents/2011%20CFIUS%20Annual%20Report%20FINAL%20PUBLIC.pdf [hereinafter "CFIUS Report"].

118. *Id.*

119. *Id.*

120. *Id.* One can debate how meaningful these numbers actually are. Notices may be withdrawn for many reasons, *e.g.*, CFIUS may request withdrawal to allow time to resolve a problem with the transaction, CFIUS may request withdrawal and advise the companies not to proceed if the problems are serious enough, or the transaction may fall apart for reasons that have little to do with CFIUS. Furthermore, even in cases that were not withdrawn, CFIUS may have required that the parties enter into a mitigation agreement.

121. FINSA, *supra* note 106, at § 2(b)(4); *See also* CFIUS Regulations 2008, *supra* note 108.

122. FINSA, *supra* note 106, at § 2(b)(3).

123. CFIUS Report, *supra* note 117 at 4.

124. This figure includes acquisition from Australia (15), Canada (24), Chile (1), Israel (24), Singapore (2), and Ukraine (2). *Id.*, at 18.

125. The number of transactions involving FCN partners were as follows: Belgium (1), France (25), Germany (6), Ireland (2), Israel (24), Italy (10), Japan (19), Luxembourg (1), Netherlands (8), Netherlands and France (1), Taiwan Province of China (1). *Id.*

respect to investments from these countries fall within the scope of the essential security exceptions in the applicable agreements

The question will be addressed in three parts. First, what claims a party might make to challenge a CFIUS action? Second, do CFIUS actions fall within the scope of the exception? Third, how might a tribunal approach the matter in situations where it might determine that the exception is not self-judging?

2. Potential Claims

While any potential claims would need to be examined based on particular factual circumstances, one can imagine at least three potential claims that might be made. First, U.S. investment agreements generally require *pre-establishment protection*, meaning that countries are obligated to extend nondiscriminatory access with respect to the establishment of an investment.[126] As a general matter, a country could not, for example, discriminate against investors from the treaty partner with respect to the granting of an investment license, the imposition of equity limitations, or requirements that otherwise block or restrict investments from the treaty partner. Consequently, if CFIUS prohibited or required modifications to an investment from a U.S. treaty partner, the investor might claim that such action was discriminatory and inconsistent with the treaty. Second, as noted, CFIUS has the authority to order divestment of an acquisition that has already been made. If such action were taken, an investor may assert a claim of expropriation. Third, an investor may assert that CFIUS actions were arbitrary and amounted to a denial of fair and equitable treatment.

Each of these claims would be subject to the essential security exception in the relevant treaty. While, in each of these cases, the United States may have a valid defense even without invoking the essential security exception, there may very well be cases for which invoking the exception may be the only way for the United States to avoid liability.

3. Whether CFIUS Actions Fall Within the Scope of the Exception

Putting aside for the moment the question of whether the various applicable essential security exceptions are subject to review, there is a threshold question of whether a given CFIUS action falls within the intended scope of the exceptions. In this regard, there are two questions that must be addressed: (1) whether the motivation for the CFIUS action was to protect "essential security," and (2) whether the action taken was "necessary."

With respect to the first question, as noted, CFIUS reviews are limited to examining the national security implications of foreign acquisitions of U.S. businesses.[127] CFIUS is not authorized to consider, for example, issues of economic security or broader

126. *See* U.S. Model BIT, *supra* note 85.
127. *See generally*, DPA, *supra* note 78.

issues of public interest.[128] Therefore, there is little question that the general authority for CFIUS action falls within the scope of the essential security exceptions in U.S. BITs and recent FTAs. However, as noted above, there may be some question as to whether CFIUS actions properly fall within the scope of the exceptions in FCN treaties and the GATT/WTO given the relatively narrow list of essential security objectives that appear in those agreements. As explained above, it will not always be apparent, for example, that an international emergency exists that would justify a restriction imposed by CFIUS, or that CFIUS actions were taken with respect to transactions involving assets for supplying a foreign security establishment. With respect to these agreements, therefore, it will not always be clear that CFIUS actions fall within the scope of the exceptions.

With respect to the second question, recent changes to the CFIUS process should help ensure that any action taken by CFIUS is "necessary." For example, the new law requires that any mitigation agreement be "risk based."[129] Under the amended Executive Order, an agency that believes that a mitigation agreement is necessary must provide to CFIUS a written statement explaining the perceived national security risk and why the proposed mitigation measures are reasonably necessary to address such risks.[130] Such statements are not public,[131] but the process, if it works properly, should help ensure an appropriate outcome. By forcing a clear articulation of the risks associated with any given transaction, it is much more likely that CFIUS will make a fair assessment of the situation and ensure that any actions are tailored to the circumstances of a given transaction.

To the extent CFIUS draws upon international best practices, the case for establishing that its actions are rooted in good faith assessments of national security will be stronger. To some degree at least, CFIUS seems to be doing this. For example, as noted, in 2008 the OECD issued the *Guidelines for Recipient Country Investment Policies Relating to National Security*. These *Guidelines* reaffirm that "essential security concerns are self-judging."[132] In addition, among other things, the OECD *Guidelines* urge recipient countries to publish their relevant laws and regulations, not discriminate among similarly situated investors, make decisions based on specific circumstances of individual transactions, protect commercially sensitive information, apply risk assessment techniques to ensure a clear relationship between national security and investment restrictions, focus investment restrictions on national security concerns, ensure a balance between national security expertise and an open investment policy, tailor restrictions to specific risks posed by individual transactions, use investment restrictions as a last resort, and ensure accountability to legislative authorities and high level involvement

128. *Id*.
129. FINSA, *supra* note 106, at § 5(1).
130. CFIUS Regulations 2008, *supra* note 108, at § 800.702.
131. *Id*.
132. OECD Guidelines, *supra* note 110, at 5.

in decision-making. The new CFIUS procedures comply with most of these guidelines (perhaps reflecting U.S. influence in the formation of the OECD *Guidelines*).[133]

Similarly, CFIUS appears to have drawn upon international standards in developing substantive review criteria, at least when it comes to reviews of acquisitions by foreign government controlled entities, including reviews of investments by SWFs. In a guidance document the Department of the Treasury stated that:

> [i]n reviewing foreign government controlled transactions, CFIUS considers, among all other relevant facts and circumstances, the extent to which the basic investment management policies of the investor require investment decisions to be based solely on commercial grounds; the degree to which, in practice, the investor's management and investment decisions are exercised independently from the controlling government, including whether governance structures are in place to ensure independence; the degree of transparency and disclosure of the purpose, investment objectives, institutional arrangements, and financial information of the investor; and the degree to which the investor complies with applicable regulatory and disclosure requirements of the countries in which they invest.[134]

These factors are in line with the Santiago Principles.[135] Applying such principles should help ensure that any actions CFIUS takes are necessary to protect U.S. national security.

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133. There is at least one exception. The OECD Guidelines note that "[t]he possibility for foreign investors to seek review of decisions to restrict foreign investments through administrative procedures or before judicial or administrative courts can enhance accountability." *Id.*, at 4.
However, CFIUS decisions are not subject to such review. DPA, *supra* note 78, at 2170(e).

134. Guidance Concerning the National Security Review Conducted by the Committee on Foreign Investment in the United States (Comm. on Foreign Inv. in the U.S. [CFIUS], U.S. Dep't of Treasury), 236 Fed. Reg. 74,567, 74,571 (Dec. 8, 2008).

135. Santiago Principles, *supra* note 111. The Santiago Principles are fairly detailed. However, the International Working Group (IWG) explained the underlying principles as follows:
> [I]t will be important to continue to demonstrate—to home and recipient countries, and the international financial markets—that the SWF [*i.e.*, Sovereign Wealth Fund] arrangements are properly set up and investments are made on an economic and financial basis. The generally accepted principles and practices (GAPP), therefore, is underpinned by the following guiding objectives for SWFs:
>
> i. To help maintain a stable global financial system and free flow of capital and investment;
> ii. To comply with all applicable regulatory and disclosure requirements in the countries in which they invest;
> iii. To invest on the basis of economic and financial risk and return related considerations; and
> iv. To have in place a transparent and sound governance structure that provides for adequate operational controls, risk management, and accountability.
>
> *Id.* at 4.
>
> The CFIUS guidance is also in line with principles agreed among the United States, Singapore and Abu Dhabi (and their SWFs, Government of Singapore Investment Corporation (GIC) and the Abu

Based on these developments, one could make a strong case that the CFIUS process is designed to produce outcomes that are tailored to address true national security risks. Of course, this does not answer the question of whether the actual application of that authority in any specific case falls within the appropriate scope of the exception. Certainly, there have been cases for which some have questioned whether CFIUS is acting within its jurisdictional limits. In some cases, the criticism is misplaced. Simply because a transaction is notified to CFIUS does not mean that CFIUS views it as a potential national security threat or that CFIUS will take any action. CFIUS cannot control which transactions are notified and must initiate a review for any notified transaction unless the transaction falls within very limited exceptions.[136] Thus, for example, while CFIUS has reviewed transactions involving textile mills and electronics and appliance stores (sectors with limited obvious national security sensitivities), CFIUS does not have the authority to turn them away. And while it does have the authority to take no action with respect to the transactions, there is no public record with respect to what actually transpired in those cases.

In other cases, the issues might be less clear cut. For example, while some believed that CNOOC's proposed acquisition of Unocal did not present a national security threat in the classic sense, others tried to make the argument that the transaction

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Dhabi Investment Authority (ADIA)). As explained in a press release from the Department of the Treasury these principles are as follows:

Policy Principles for Sovereign Wealth Funds (SWFs)

1. SWF investment decisions should be based solely on commercial grounds, rather than to advance, directly or indirectly, the geopolitical goals of the controlling government. SWFs should make this statement formally as part of their basic investment management policies.
2. Greater information disclosure by SWFs, in areas such as purpose, investment objectives, institutional arrangements, and financial information—particularly asset allocation, benchmarks, and rates of return over appropriate historical periods—can help reduce uncertainty in financial markets and build trust in recipient countries.
3. SWFs should have in place strong governance structures, internal controls, and operational and risk management systems.
4. SWFs and the private sector should compete fairly.
5. SWFs should respect host country rules by complying with all applicable regulatory and disclosure requirements of the countries in which they invest.

Policy Principles for Countries Receiving SWF Investment

1. Countries receiving SWF investment should not erect protectionist barriers to portfolio or foreign direct investment.
2. Recipient countries should ensure predictable investment frameworks. Inward investment rules should be publicly available, clearly articulated, predictable, and supported by strong and consistent rule of law.
3. Recipient countries should not discriminate among investors. Inward investment policies should treat like situated investors equally.
4. Recipient countries should respect investor decisions by being as unintrusive as possible, rather than seeking to direct SWF investment. Any restrictions imposed on investments for national security reasons should be proportional to genuine national security risks raised by the transaction.

Press Release, Treasury Reaches Agreement on Principles for Sovereign Wealth Fund Investment with Singapore and Abu Dhabi (Dep't of the Treasury, Mar. 20, 2008), *available at* http://www.treasury.gov/press-center/press-releases/Pages/hp881.aspx.

136. *See* CFIUS Regulations 2008, *supra* note 108, at § 800.503.

presented a threat to U.S. energy security.[137] In any event, the transaction terminated before CFIUS needed to render a decision.[138]

4. How a Tribunal Might Review the Matter

Under certain investment agreements (certainly those in categories 6 and 8, above), decisions by CFIUS would clearly not be subject to review by a dispute settlement panel. As noted, with respect to other treaties, some might argue that a review would be permissible, even if only for good faith. However, even in these circumstances, a claimant would face significant evidentiary problems in challenging a CFIUS action.

As the description of the CFIUS process makes clear, there are few external checks on CFIUS authority. Presidential actions are not subject to judicial review and the records of CFIUS deliberations are not public.[139] The lack of transparency in this process would make it difficult for a tribunal to make any assessment as to the motivation or basis for a particular CFIUS action. In fact, the information on which CFIUS relies is often classified and highly sensitive. It is likely that much of this information includes data collected on persons involved in the transactions and information collected through clandestine means. The United States would almost certainly not provide such information to an international tribunal and would likely assert that it was under no international obligation to do so (especially in cases where the relevant treaty expressly protects the information from disclosure). As a result, it is not clear that a tribunal would ever be in a position to assess whether a particular CFIUS action was permissible.

Conclusions

This chapter has examined two trends in international investment law. First, it examined the evolution of language in essential security exceptions in U.S. trade and investment agreements. As explained, over time the language has moved toward stark clarity as to the self-judging nature of the exception. One might reasonably be concerned whether such explicit language is an invitation to abuse. Second, the chapter examined how the essential security exception might apply with the respect to actions taken by CFIUS. With respect to this matter, it would appear that actions taken by CFIUS are unreviewable in most cases, at least as a practical matter and perhaps a legal matter. However, it would also appear that the United States has sought to design the process to help ensure that any measures taken are directed at true national security concerns.

137. *See, e.g.*, Steve Lohr, *Unocal Bid Denounced at Hearing*, N.Y. Times, July 14, 2005 (quoting former CIA director James Wollsey as stating during a hearing before the House Armed Services Committee that "This is a national security issue . . . China is pursuing a national strategy of domination of the energy markets and strategic dominance of the western Pacific." (citations omitted)).

138. *See* Asia Times, *supra* note 89.

139. DPA, *supra* note 78, at § 2170(e) and (g).

In other words, the process includes safeguards to help ensure a good faith outcome. These safeguards have drawn heavily on international best practices.

Herein may be one solution, or at least partial solution, to the problem that has plagued U.S. policy for decades, namely preserving the self-judging exception while seeking to ensure that it is only invoked in good faith. The elaboration of procedural checks and balances may go a long way to avoiding abuse of any essential security exception. The further development of international best practices in this area may be a useful and perhaps critical counterbalance to trends removing ever-growing areas of regulation from international review. Perhaps at some point they may even become enforceable, but in the meantime, one can only hope that countries remain committed to the process and faithfully implement those practices. Some may argue that this means very little, and that countries that would otherwise have acted fairly will do so, while others will simply follow the procedures as a pretense. That may be, but on the other hand, there seems to be little choice, at least when it comes to U.S. agreements and policy, where the prospects of abandoning the self-judging principle are negligible.

Six decades ago, in response to concerns that an essential security exception should not be too open-ended, the Chair of one of the negotiating committees for the GATT "suggested . . . that the spirit in which Members of the Organization would interpret these provisions was the only guarantee against abuse . . . ."[140] When it comes to U.S. trade and investment agreements, that sentiment remains true and is perhaps truer than ever. On the other hand, there remains hope that alternative options will emerge for providing greater precision and context in assessing a government's actions and keeping any measures it may adopt within the intended scope of the exception.

140. GATT Guide, *supra* note 27, at 600.

ANNEXES

ANNEX 1.
ESSENTIAL SECURITY PROVISIONS IN POST-1945 U.S. TREATIES OF FRIENDSHIP, COMMERCE, AND NAVIGATION AND SIMILAR TREATIES [141]

FCN Party	Relevant Provision	Date Signed
Taiwan, Province of China	Article XXVI (13) 1. Nothing in this Treaty shall be construed to prevent the adoption or enforcement of measures: (a) relating to the importation or exportation of gold or silver; (b) relating to the traffic in arms, ammunition, and implements of war, and, in exceptional circumstances, all other military supplies; (c) relating to the exportation of national treasures of historical, archaeological, or artistic value; (d) necessary in pursuance of obligations for the maintenance of international peace and security, or for the protection of the essential interests of the country in time of national emergency; or (e) imposing exchange restrictions in conformity with the Articles of Agreement of the International Monetary Fund, signed December 27,1945, [14] so long as the High Contracting Party imposing the restrictions is a member of the Fund, provided that neither High Contracting Party shall utilize its privileges under section 3 of Article VI or section 2 of Article XIV of such Agreement in such a manner as to impair any of the provisions of this Treaty.	1946
Yemen	Article V (2) The last clause shall continue to apply in respect of any advantages now or hereafter accorded by the United States of America or its territories or possessions to one another irrespective of any change in the political status of any such territories or possessions. Nothing in this Agreement shall prevent the adoption or enforcement by either Party within the area of its jurisdiction: of measures relating to the importation or exportation of gold or silver or the traffic in arms,	1946

141.All agreements are available at http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/index.asp.

FCN Party	Relevant Provision	Date Signed
	ammunition, and implements of war, and, in exceptional circumstances, all other military supplies; of measures necessary in pursuance of obligations for the maintenance of international peace and security or necessary for the protection of the essential interests of such Party in time of national emergency; or of statutes in relation to immigration and travel. Subject to the requirement that, under like circumstances and conditions, there shall be no arbitrary discrimination by either Party against the subjects, nationals, commerce or navigation of the other Party in favor of the subjects, nationals, commerce or navigation of any third country, the provisions of this Agreement shall not extend to prohibitions or restrictions: imposed on moral or humanitarian grounds; designed to protect human, animal, or plant life or health; relating to prison-made goods; or relating to the enforcement of police or revenue law.	
Federal Democratic Republic of Nepal/ Kingdom of Nepal	9. Nothing in this Agreement shall prevent the adoption or enforcement by either Party: (a) of measures relating to fissionable materials, to the importation or exportation of gold and silver, to the traffic in arms, ammunition and implements of war, or to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment; (b) of measures necessary in pursuance of obligations for the maintenance of international peace and security or necessary for the protection of the essential interests of such Party in time of national emergency; or (c) of statutes in relation to immigration.	1947
Italy	Article XXIV 1. Nothing in this Treaty shall be construed to prevent the adoption or enforcement by either High Contracting Party of measures: (a) relating to the importation or exportation of gold or silver; (b) relating to the exportation of objects the value of which derives primarily from their character as works of art, or as antiquities, of national interest or from their relationship to national history, and	1948

FCN Party	Relevant Provision	Date Signed
	which are not in general practice considered articles of commerce; (c) relating to fissionable materials, to materials which are the source of fissionable materials, or to radio-active materials which are by-products of fissionable materials; (d) relating to the production of and traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment; (e) necessary in pursuance of obligations for the maintenance of international peace and security, or necessary for the protection of the essential interests of such High Contracting Party in time of national emergency; or (f) imposing exchange restrictions, as a member of the International Monetary Fund, in conformity with the Articles of Agreement thereof signed at Washington December 27, 1945,[8] but without utilizing its privileges under Article VI, section 3, of that Agreement so as to impair any provision of this Treaty; provided that either High Contracting Party may, nevertheless, regulate capital transfers to the extent necessary to insure the importation of essential good or to effect a reasonable rate of increase in very low monetary reserves or to prevent its monetary reserves from falling to a very low level. If the International Monetary Fund should cease to function, or if either High Contracting Party should cease to be a member thereof, the two High Contracting Parties, upon the request of either High Contracting Party, shall consult together and may conclude such arrangements as are necessary to permit appropriate action in contingencies relating to international financial transactions comparable with those under which exceptional action had previously been permissible.	

FCN Party	Relevant Provision	Date Signed
Ireland	Article XX 1. The present Treaty shall not preclude the application of measures: Measures not precluded, etc. (a) regulating the importation and exportation of gold and silver; (b) relating to fissionable materials, to radio-active by-products of the utilization or processing thereof, and to materials that are the source of fissionable materials; (c) regulating the production of and traffic in arms, ammunition and implements of war, and traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment; (d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests; (e) necessary to fulfill the obligations of a Party as a neutral in time of war; (f) denying the advantages of the present Treaty, except with respect to recognition of juridical status and access to the courts, to any company in the ownership or direction of which nationals of any third country or countries have directly or indirectly a controlling interest.	1950
Denmark	Article 2(3). The provisions of the present article shall be subject to the right of either Party to apply measures that are necessary to maintain public order and necessary to protect the public health, morals and safety.	1951
Greece	Article XXIII 1. The present Treaty shall not preclude the application of measures: (a) regulating the importation or exportation of gold or silver; (b) relating to fissionable materials, to radioactive byproducts of the utilization or processingthereof, or to materials that are the source of fissionable materials;	1951

FCN Party	Relevant Provision	Date Signed
	(c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment; (d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests; (e) relating to the export of articles whose value arises primarily from their nature as works of art or antiques or from their relationship to the nation's history and which as a matter of general rule are not considered as items of trade; and (f) denying the advantages of the present Treaty to any company, even though it may not have the nationality of the other Party, as long as ownership or direction of the company is controlled by nationals or companies of a third country. However, the provisions of the present Treaty relating to the juridical status of foreign companies and their appearance in court, are exempted from the limiting provisions of the present subparagraph.	
Israel	Article XXI 1. The present Treaty shall not preclude the application of measures: (a) regulating the importation or exportation of gold or silver; (b) relating to fissionable materials, to radioactive byproducts of the utilization or processing thereof or to materials that are the source of fissionable materials, (c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment; (d) necessary to fulfill the obligations of a Party for the maintenance or restoration of	

FCN Party	Relevant Provision	Date Signed
	international peace and security, or necessary to protect its essential security interests; and (e) denying to any company in the ownership or direction of which nationals of any third country or countries have directly or indirectly a controlling interest, the advantages of the present Treaty, except with respect to recognition of juridical status and with respect to access to courts.	1951
Ethiopia	Article XVI 1. The present Treaty shall not preclude the application of measures: (a) regulating the importation or exportation of gold or silver; (b) relating to fissionable materials, the radioactive by-products thereof, or the sources thereof; (c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment; and (d) necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, necessary to protect its essential security interests.	1953
Japan	Article XXI 1. The present Treaty shall not preclude the application of measures: (a) regulating the importation or exportation of gold or silver; (b) relating to fissionable materials, to radioactive by-products of the utilization or processing thereof, or to materials that are the source of fissionable materials; (c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment;	

FCN Party	Relevant Provision	Date Signed
	(d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests; and (e) denying to any company in the ownership or direction of from which nationals of any third country or countries have directly or indirectly the controlling interest, the advantages of the present Treaty, except with respect to recognition of juridical status and with respect to access to courts of justice and to administrative tribunals and agencies.	1953
Germany	Article XXIV 1. The present Treaty shall not preclude the application by either Party of measures: (a) regulating the importation or exportation of gold, silver, platinum and the alloys thereof; (b) relating to fissionable materials, to radioactive by-products of the utilization or processing thereof, or to materials that are the source of fissionable materials; (c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment; (d) necessary to fulfill its obligations for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests; (e) denying to any company in the ownership or direction of which nationals of any third country or countries have directly or indirectly the controlling interest, the advantages of the present Treaty, except with respect to recognition of juridical status and with respect to access to courts; and (f) reserving rights and privileges with respect to its national fisheries and marine hunting, and the landing in its ports of fish or fish products or the catch or products of marine hunting taken on board the transporting vessel at sea.	1954

FCN Party	Relevant Provision	Date Signed
Republic of Korea	Article XXI 1. The present Treaty shall not preclude the application of measures: (a) regulating the importation or exportation of gold or silver; (b) relating to fissionable materials, to radioactive byproducts of the utilization or processing thereof, or to materials that are the source of fissionable materials; (c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment; (d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests; and (e) denying to any company in the ownership or direction of which nationals of any third country or countries have directly or indirectly the controlling interest, the advantages of the present Treaty, except with respect to recognition of juridical status and with respect to access to courts.	1956
Netherlands	Article XXII 1. The present Treaty shall not preclude the application of measures by either Party: (a) regulating the importation or exportation of gold or silver; (b) relating to fissionable materials, to radioactive by-products of the utilization or processing thereof, or to materials that are the source of fissionable materials; (c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment; (d) necessary to fulfill its obligations for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests;	1956

FCN Party	Relevant Provision	Date Signed
	(e) denying to any company in which nationals of any third country or countries enjoy directly or indirectly the controlling interest, the advantages of the present Treaty, except with respect to recognition of juridical status and with respect to access to courts; and (f) regarding its national fisheries and the landing of the products thereof.	
Sultanate of Muscat and Oman and Dependencies	Article XI 1. The present Treaty shall not preclude the application of Measures: (a) regulating the importation or exportation of gold or silver; (b) relating to fissionable materials, the radioactive byproducts thereof, or the sources thereof; (c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military (d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests; (e) denying to any company in the ownership or direction of which nationals of any third country or countries have directly or indirectly the controlling interest, the advantages of the present Treaty, except with respect to recognition of juridical status and with respect to access to courts of justice and to administrative tribunals and agencies; and (f) regarding its national fisheries and the landing of the products thereof.	1958
France	Article XII The provisions of the present Convention shall not preclude the application of measures: (a) regulating the importation and exportation of gold and silver;	

FCN Party	Relevant Provision	Date Signed
	(b) regarding fissionable materials, the radio-active by-products of the utilization or manufacture of such materials, or raw materials which are the source of fissionable materials; (c) regulating the manufacture of and traffic in arms, munitions and implements of war, as well as traffic in other materials carried on directly or indirectly for the purpose of supplying military establishments; (d) necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.	1959
Pakistan	Article XX 1. The present Treaty shall not preclude the application of measures: (a) regulating the importation or exportation of gold or silver; (b) relating to fissionable materials, to radioactive by-products of the utilization or processing thereof, or to materials that are the source of fissionable materials; (c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment; (d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests; and (e) denying to any company in the ownership or direction of which nationals of any third country or countries have directly or indirectly the controlling interest, the advantages of the present Treaty, except with respect to recognition of juridical status and with respect to access to courts.	1959

FCN Party	Relevant Provision	Date Signed
Luxembourg	Article XIV The present Treaty shall not preclude the application by either Contracting Party of measures: a) regulating time importation or exportation of gold and silver; b) relative to its national fisheries and to the products thereof; c) relating to fissionable materials, to radioactive byproducts of the utilization or processing thereof, or to materials that are the source of fissionable materials; d) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment; e) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests; f) for the protection of national treasures having an artistic, historical or archeological value; or g) denying to any company in the ownership or direction of which nationals of any third country or countries have directly or indirectly the controlling interest, the advantages of the present Treaty, except with respect to recognition of juridical status and with respect to access to courts.	1962
Belgium	Article XVI The present Treaty shall not preclude the application by either Contracting Party of measures: a) regulating the importation or exportation of gold or silver; b) relative to its national fisheries and to the products thereof; c) relating to fissionable materials, to radioactive byproducts of the utilization or processing thereof, or to materials that are the source of fissionable materials;	1963

FCN Party	Relevant Provision	Date Signed
	d) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment; e) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests; f) for the protection of national treasures having an artistic, historical or archeological value; or g) denying to any company in the ownership or direction of which nationals of any third country or countries have directly or indirectly the controlling interest, the advantages of the present Treaty, except with respect to recognition of juridical status and with respect to access to courts.	
Thailand	Article XIX 1. The present Treaty shall not preclude the application of measures: (a) regulating the importation or exportation of gold or silver; (b) relating, to fissionable materials, their radioactive by-products, or the sources thereof; (c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment; (d) regulating, on a non-discriminatory basis, military requisition of supplies and implements of war in time of emergency or in time of war; (e) necessary to fulfill the obligations of either Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests; or (f) denying to any company in the ownership or direction of which nationals of any third	1966

FCN Party	Relevant Provision	Date Signed
	country or countries have directly or indirectly the controlling interest, the advantages of the present Treaty, except with respect to recognition of juridical status and with respect to access to courts of justice and to administrative tribunals and agencies.	
Togolese Republic	Article XIII 1. The present Treaty shall not preclude the application of measures: (a) regulating the importation or exportation of gold or silver; (b) relating to fissionable materials, the radioactive by-products thereof, or the sources thereof; (c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment; (d) necessary to fulfill the obligations of a Party for maintenance or restoration of international peace and security, or necessary to protect its essential security interests; (e) denying to any company in the ownership or direction of which nationals of any third country or countries have directly or indirectly the controlling interest, the advantages of the present Treaty, except with respect to recognition of juridical status and with respect to access to courts of justice and to administrative tribunals and agencies; or (f) regarding its national fisheries and the landing of the products thereof.	1966

Source: Author compilation

ANNEX 2[142]

ESSENTIAL SECURITY PROVISIONS IN U.S. BILATERAL INVESTMENT AND SIMILAR TREATIES

BIT Party	Supplemental Instruments	BIT Provision	Date Signed
Panama	*Letter of Transmittal*: The model BIT also states that the treaty shall not derogate from any obligations that require more favorable treatment of investments and declares that the treaty shall not preclude measures necessary for public order or essential security interests. *Exchange of Notes*: "Paragraph I of Article X refers only to those domestic measures taken by either Party the object of which is to maintain public order, fulfill its obligations with respect to the maintenance or restoration of international peace and security or protect its own essential security interests." "It is understood that nothing in the provisions of this paragraph of Article X authorizes or has the intention of authorizing either Party to take such measures in the territory of the other."	Article X 1. This treaty shall not preclude the application by either Party of any and all measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace and security, or the production of its own essential security interests.	1982
Senegal	*Letter of Transmittal*: The model BIT also states that the treaty shall not derogate from any obligations that require more favorable treatment of investments and declares that the	Article X Measures not precluded by this treaty 1. Treaty shall not preclude the application by	1983

142. Agreements are supplemental instruments available at http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/index.asp; http://www.state.gov/e/eeb/ifd/c14408.htm.

BIT Party	Supplemental Instruments	BIT Provision	Date Signed
	treaty shall not preclude measures necessary for public order or essential security interests.	either Party of any and all measures necessary for the maintenance of public order and morals, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	
Democratic Republic of Congo	*Letter of Submittal*: The model BIT also states that the treaty shall not derogate from any obligations that require more favorable treatment of investments and declares that the treaty shall not preclude measures necessary for public order or essential security interests.	Article X 1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	1984
Morocco	*Letter of Submittal*: The model BIT also states that the treaty shall not derogate from any obligations that require more favorable treatment of investments and declares that the treaty shall not preclude measures necessary for public order or essential security interests.	Article IX 1. This Treaty shall not preclude the application by either Party in its territory of the domestic measures necessary for the maintenance of public order and morality or the protection of peace and international security or its own essential security interests.	1985
Turkey	*Letter of Submittal*: The model BIT also states that the treaty shall not derogate from any obligations that require more favorable treatment of investments and declares that the	Article X 1. This Treaty shall not preclude the application by either Party of measures necessary for the	1985

	treaty shall not preclude measures necessary for public order or essential security interests.	maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	
Bangladesh	*Letter of Submittal*: The model BIT also states that the treaty shall not derogate from any obligations that require more favorable treatment of investments and declares that the treaty shall not preclude measures necessary for public order or essential security interests.	Article X—Measures not precluded by this treaty 1. This Treaty shall not preclude the application by either Party of any and all measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	1986
Cameroon	*Letter of Submittal*: The model BIT also states that the treaty shall not derogate from any obligations that require more favorable treatment of investments and declares that the treaty shall not preclude measures necessary for public order or essential security interests.	Article X *Measures not precluded by this treaty* 1. This Treaty shall not preclude the application by either Party or any political subdivision thereof of any and all measures necessary in its territory for the maintenance of public order and morals, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	1986

BIT Party	Supplemental Instruments	BIT Provision	Date Signed
Egypt	*Letter of Submittal*: The model BIT also states that the treaty shall not derogate from any obligations that require more favorable treatment of investments and declares that the treaty shall not preclude measures necessary for public order or essential security interests.	Article X Measures not precluded by this treaty 1. This Treaty shall not preclude the application by either Party or any subdivision thereof of any and all measures necessary for the maintenance of public order and morals, the fulfillment of its existing international obligations, the protection of its own security interests, or such measures deemed appropriate by the Parties to fulfill future international obligations.	1986
Grenada	*Letter of Submittal*: The model BIT also states that the treaty shall not derogate from any obligations that require more favorable treatment of investments and declares that the treaty shall not preclude measures necessary for public order or essential security interests.	Article X 1. This Treaty shall not preclude the application by either Party of measures necessary in its jurisdiction for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	1986
People's Republic of the Congo	*Letter of Submittal*: The model BIT also states that the treaty shall not derogate from any obligations that require more favorable treatment of investments and declares that the	Article X Measures not precluded by this treaty 1. This Treaty shall not preclude the application	1990

	treaty shall not preclude measures necessary for public order or essential security interests.	by either Party of measures necessary in its territory for the maintenance of public order and morality, the fulfillment of its obligations with respect to the maintenance and restoration of international peace and security, or the, protection of its own essential security interests.	
Poland	*Letter of Submittal*: Also expressly reserved is a Party's right to take any measures that are necessary to protect public order or essential security interests.	Article XII 3. This Treaty shall, not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	1990
Tunisia	*Letter of Submittal*: As does the model BIT, the U.S.-Tunisia treaty does not derogate from any obligations that require more favorable treatment of investments and does not preclude measures necessary for public order or essential security interests.	Article X 1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	1990

BIT Party	Supplemental Instruments	BIT Provision	Date Signed
Argentina	Protocol: 6. The Parties understand that, with respect to rights reserved in Article XI of the Treaty, "obligations with respect to the maintenance or restoration of international peace or security" means obligations under the Charter of the United Nations.	Article XI This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.	1991
Czech Federal Republic		Article X 1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	1991
Slovak Federal Republic		Article X 1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	1991

Democratic Republic of Sri Lanka		Article X 1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international place or security, or the protection of its own essential security interests.	1991
Armenia	Letter of Submittal: ARTICLE X (MEASURES NOT PRECLUDED) The first paragraph of Article X reserves the right of a Party to take measures it regards as necessary for the maintenance of public order, the fulfillment of its international obligations with respect to international peace and security, or the protection of its own essential security interests. These provisions are common in international investment reservations. The maintenance of public order would include measures taken pursuant to a Party's police powers to ensure public health and safety. International obligations with respect to peace and security would include, for example, obligations arising out of Chapter VII of the United Nations Charter. Measures permitted by the provision on the protection of a Party's essential security interests would include security-related actions taken	Article X 1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	1992

BIT Party	Supplemental Instruments	BIT Provision	Date Signed
	in time of war or national emergency; actions 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.		
Bulgaria		Article X 1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	1992
Kazakhstan	Letter of Transmittal: ARTICLE X (MEASURES NOT PRECLUDED) The first paragraph of Article IX reserves the right of a Party to take measures it regards as necessary for the maintenance of public order, the fulfillment of its international obligations with respect to international peace and security, or measures which it regards as necessary for the protection of its own essential security interests. These provisions are common in international investment agreements.	Article X 1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	1992

	The maintenance of public order would include measures taken pursuant to a Party's police powers to ensure public health and safety. International obligations with respect to peace and security would include, for example, obligations arising out of Chapter VII of the United Nations Charter. Measures permitted by the provision on the protection of a Party's essential security interests would include security-related actions taken in time of war or national emergency; actions 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.		
Romania		Article X 1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	1992
Russia	Protocol: With respect to Article X, paragraph 1, the Parties confirm their mutual understanding that whether a measure is undertaken by a Party to protect its essential security interests is self-judging.	Article X 1. The treaty shall not preclude the application by either party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	1992

BIT Party	Supplemental Instruments	BIT Provision	Date Signed
Ecuador	Letter of Submittal: Article IX (Measures Not Precluded) The first paragraph of Article IX reserves the right of a Party to take measures for the maintenance of public order and the fulfillment of its international obligations with respect to international peace and security, as well as those measures it regards as necessary for the protection of its own essential security interests. These provisions are common in international investment agreements. The maintenance of public order would include measures taken pursuant to a Party's policy powers to ensure public health and safety. International obligations with respect to peace and security would include, for example, obligations for rising out of Chapter VII of the United National Charter. Measures permitted by the provision on the protection of a Party's essential security interests would include security-related actions taken in time of war or national emergency; actions not an 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.	Article IX 1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	1993
Kyrgyzstan	Letter of Submittal: Article X (Measures not precluded) The first paragraph of Article X reserves the right of a Party	Article X 1. This Treaty shall not preclude the application by either Party of measures necessary for the	1993

	to take measures as necessary for the maintenance of public order, the fulfillment of its international obligations with respect to international peace and security, or the protection of its own essential security interests. These provisions are common in international investment agreements. The maintenance of public order would include measures taken pursuant to a Party's police powers to ensure public health and safety. International obligations with respect to peace and security would include, for example, obligations arising out of Chapter VII of the United Nations Charter. Measures permitted by the provision on the protection of a Party's essential security interests would include security-related actions taken in time of war or national emergency; actions 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.	maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	
Moldova	Letter of Submittal: Article IX (Measures not precluded) The first paragraph of Article IX reserves the right of a Party to take measures it regards as necessary for the maintenance of public order, the fulfillment of its international obligations with respect to international peace and security, or the protection of its own essential security interests. These provisions are common in international investment agreements.	Article IX 1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	1993

BIT Party	Supplemental Instruments	BIT Provision	Date Signed
	The maintenance of public order would include measures taken pursuant to a Party's police powers to ensure public health and safety. International obligations with respect to peace and security would include, for example, obligations arising out of Chapter VII of the United Nations Charter. Measures permitted by the provision on the protection of a Party's essential security interests would include security-related actions taken in time of war or national emergency; actions 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.		
Estonia	Letter of Submittal: Article IX (Measures not precluded) Paragraph 1 of Article IX reserves the right of a Party to take measures for the maintenance of public order and the fulfillment of its obligations with respect to international peace and security, as well as those measures it regards as necessary for the protection of its own essential security interests. These provisions are common in international investment agreements.	Article IX 1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	1994

	The maintenance of public order would include measures taken pursuant to a Party's police powers to ensure public health and safety. International obligations with respect to peace and security would include, for example obligations arising out of Chapter VII of the United Nations Charter. Measures permitted by the provision on the protection of a Party's essential security interests would include security-related actions taken in time of war or national emergency; actions 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.		
Georgia	Letter of Submittal: Article XIV (Measures Not Precluded) The first paragraph of Article XIV reserves the right of a Party to take measures for the fulfillment of its international obligations with respect to international peace and security, as well as those measures it regards as necessary for the protection of its own essential security interests. International obligations with respect to peace and security would include, for example, obligations arising out of Chapter VII of the United Nations Charter. Measures permitted by the provision on the protection of a Party's essential security interests would include security-related actions taken in time of war or national emergency. Actions not arising from	Article XIV 1. This Treaty shall not preclude a Party from applying measures necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	1994

BIT Party	Supplemental Instruments	BIT Provision	Date Signed
	a state of war or national emergency must have a clear and direct relationship to the essential security interests of the Party involved. Measures to protect a Party's essential security interests are self-judging in nature, although each party would expect the provisions to be applied by the other in good faith. These provisions are common in international investment agreements.		
Jamaica	Letter of Submittal: Article X (Measures Not Precluded) The first paragraph of Article X reserves the right of a Party to take measures for the maintenance of public order, the fulfillment of its international obligations with respect to international peace and security, or those measures it regards as necessary for protection and security, or those measures it regards as necessary for the protection of its own essential security interests. These provisions are common in international investment agreements. The maintenance of public order would include measures taken pursuant to a Party's police powers to ensure public health and safety. International obligations with respect to peace and security would include, for example, obligations arising out of Chapter VII of the United Nations Charter. The	Article X 1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations under the Chapter of the United Nations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	1994

	Jamaica BIT differs from the prototype in its explicit reference to the U.N. Charter. Measures permitted by the provision on the protection of a Party's essential security interests would include security-related actions taken in time of war or national emergency, actions 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.		
Mongolia	Letter of Submittal: Article X (Measures not precluded) Paragraph 1 of Article X reserves the right of a Party to take measures for the maintenance of public order and the fulfillment of its obligations with respect to international peace and security, as well as those measures it regards as necessary for the protection of its own essential security interests. These provisions are common in international investment agreements. The maintenance of public order would include measures taken pursuant to a Party's police powers to ensure public health and safety. International obligations with respect to peace and security would include, for example, obligations arising out of Chapter VII of the United Nations Charter. Measures permitted by the provision on the protection of a Party's essential security interests would include security-related actions taken in time of war or national emergency; actions not arising from	Article X 1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	1994

BIT Party	Supplemental Instruments	BIT Provision	Date Signed
	a state of war or national emergency must have a clear and direct relationship to the essential security interest of the Party involved.		
Trinidad and Tobago	Letter of Submittal: Article XIV (Measures not precluded) The first paragraph of Article XIV reserves the right of a Party to take measures for the fulfillment of its international obligations with respect to international peace and security, as well as those measures it regards as necessary for the protection of its own essential security interests. International obligations with respect to peace and security would include, for example, obligations arising out of Chapter VII of the United Nations Charter. Measures permitted by the provision on the protection of a Party's essential security interests would include security-related actions taken in time of war or national emergency. Actions 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. Measures to protect a Party's essential security interests are self-judging in nature, although each Party would expect the provisions to be applied by the other in good faith. These provisions are common in international investment agreements.	Article XIV Measures not precluded by this treaty 1. This Treaty shall not preclude a Party from applying measures necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	1994

Ukraine	Letter of Submittal: Article IX (Measures not precluded) Paragraph 1 of Article IX reserves the right of a Party to take measures for the maintenance of public order and the fulfillment of its obligations with respect to international peace and security, as well as those measures it regards as necessary for the protection of its own essential security interests. These provisions are common in international investment agreements. The maintenance of public order would include measures taken pursuant to a Party's police powers to ensure public health and safety. International obligations with respect to peace and security would include, for example, obligations arising out of Chapter VII of the United Nations Charter. Measures permitted by the provision on the protection of a Party's essential security interests would include security-related actions taken in a time of war or national emergency; actions 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.	Article IX 1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	1994
Albania	Letter of Submittal: Article XIV (Measures not precluded) The first paragraph of Article XIV reserves the right of a Party to take measures for the fulfillment of its international obligations with respect to international peace and security,	Article XIV Measures not precluded by this treaty 1. This Treaty shall not preclude a Party from applying measures necessary for the fulfillment of its obligations with respect to the	1995

BIT Party	Supplemental Instruments	BIT Provision	Date Signed
	as well as those measures it regards as necessary for the protection of its own essential security interests. International obligations with respect to peace and security would include, for example, obligations arising out of Chapter VII of the United Nations Charter. Measures permitted by the provision on the protection of a Party's essential security interests would include security-related actions taken in time of war or national emergency. Actions not arising from a state of war or national emergency must have a dear and direct relationship to the essential security interest of the Party involved. Measures to protect a Party's essential security interests are self-judging in nature, although each Party would expect the provisions to be applied by the other in good faith. These provisions are common in international investment agreements.	maintenance or restoration of international peace or security, or the protection of its own essential security interests.	
Honduras	Letter of Submittal: Article XIV (Measures Not Precluded) The first paragraph of Article XIV reserves the right of a Party to take measures for the fulfillment of its international obligations with respect to maintenance or restoration of international peace or security, as well as those measures it regards as necessary for the protection of its own essential security interests.	Article XIV 1. This Treaty shall not preclude a Party from applying measures necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests	1995

	Under paragraph 3 of the Protocol to the Treaty, the parties expressed their understanding that international obligations with respect to maintenance or restoration of peace or security means obligations under the United Nations Charter. The pertinent portion of the Charter is Chapter VII "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression." Measures permitted by the provision on the protection of a Party's essential security interests would include security-related actions taken in time of war or national emergency. Actions not arising from a state of war or national emergency must have a clear and direct relationship to the essential security interests of the Party involved. Measures to protect a Party's essential security interests are self-judging in nature, although each Party would expect the provisions to be applied by the other in good faith. Describing protocol: As described under Article XIV, paragraph 3 states that, with respect to Article XIV, "obligations with respect to the maintenance or restoration of international peace or security" means obligations under the Charter of the United Nations. Paragraph 4 clarifies that nothing in Article XIV(1) authorizes either Party to take measures in the territory of the other Party with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.		

BIT Party	Supplemental Instruments	BIT Provision	Date Signed
	Protocol: 3. The Parties understand that, with respect to rights reserved in paragraph 1 of article XIV of the Treaty, "obligations with respect to the maintenance or restoration of international peace or security" means obligations under the Charter of the United Nations. 4. It is understood that nothing in paragraph 1 of Article XIV of the Treaty between the Government of the United States and the Government of Honduras Concerning the Encouragement and Reciprocal Protection of Investment, authorizes or has the intention of authorizing either Party to that Treaty to take measures in the territory of the other Party to fulfill its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.		
Latvia	Letter of Submittal: Article IX (Measures not precluded) Paragraph 1 of Article IX reserves the right of a Party to take measures for the maintenance of public order and the fulfillment of its obligations with respect to international peace and security, as well as those measures it regards as necessary for the protection of its own essential security interests.	Article IX 1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	1995

	These provisions are common in international investment agreements. The maintenance of public order would include measures taken pursuant to a Party's police powers to ensure public health and safety. International obligations with respect to peace and security would include, for example, obligations arising out of Chapter VII of the United Nations Charter. Measures permitted by the provision on the protection of a Party's essential security interests would include security-related actions taken in time of war or national emergency; actions not arising from a state of war or national emergency must have a clear and direct relationship to the essential national security interest of the Party involved.		
Croatia	Letter of Submittal: Article XV (Measures not precluded) The first paragraph of Article XV reserves the right of a Party to take measures for the fulfillment of its international obligations with respect to maintenance or restoration of international peace or security, as well as those measures it regards as necessary for the protection of its own essential security interests. International obligations with respect to maintenance or restoration of peace or security would include, for example, obligations arising out of Chapter VII of the United Nations	Article XV 1. This Treaty shall not preclude a Party from applying measures necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	1996

BIT Party	Supplemental Instruments	BIT Provision	Date Signed
	Charter. Measures permitted by the provision on the protection of a Party's essential security interests would include security-related actions taken in time of war or national emergency. Actions not arising from a state of war or national emergency must have a clear and direct relationship to the essential security interests of the Party involved. Measures to protect a Party's essential security interests are self-judging in nature, although each Party would expect the provisions to be applied by the other in good faith.		
Azerbaijan	Letter of Submittal: Article XIV (Measures not precluded) The first paragraph of Article XIV reserves the right of a Party to take measures for the fulfillment of its international obligations with respect to maintenance or restoration of international peace or security, as well as those measures it regards as necessary for the protection of its own essential security interests. International obligations with respect to maintenance or restoration of peace or security would include, for example, obligations arising out of Chapter VII of the United Nations Charter. Measures permitted by the provision on the protection of a Party's essential security interests would include security-related actions taken in time of war or national		

	emergency. Actions not arising from a state of war or national emergency must have a clear and direct relationship to the essential security interests of the Party involved. Measures to protect a Party's essential security interests are self-judging in nature, although each Party would expect the provisions to be applied by the other in good faith.	Article XIV 1. This Treaty shall not preclude a Party from applying measures necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	1997
Jordan	Letter of Submittal: Article XIV (Measures not precluded by the treaty) The first paragraph of Article XIV reserves the right of a Party to take measures for the fulfillment of its international obligations with respect to maintenance or restoration of international peace or security, as well as those measures it regards as necessary for the protection of its own essential security interests. International obligations with respect to maintenance or restoration of peace or security would include, for example, obligations arising out of Chapter VII of the United Nations Charter. Measures permitted by the provision on the protection of a Party's essential security interests would include security-related actions taken in time of war or national emergency. Actions not arising from a state of war or national emergency must have a clear and direct relationship to the essential security interests of the Party involved. Measures to	Article XIV Measures not precluded by this treaty 1. This Treaty shall not preclude a Contracting Party from applying measures necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	1997

BIT Party	Supplemental Instruments	BIT Provision	Date Signed
	protect a Party's essential security interests are self-judging in nature, although each Party would expect the provisions to be applied by the other in good faith.		
Bolivia	Letter of Submittal: Article XIV (Measures not precluded) The first paragraph of Article XIV reserves the right to a Party to take measures for the fulfillment of its international obligations with respect to maintenance or restoration of international peace or security, as well as those measures it regards as necessary for the protection of its own essential security interests. International obligations with respect to maintenance or restoration of peace or security would include, for example, obligations arising out of Chapter VII of the United Nations Charter. Measures permitted by the provision on the protection of a Party's essential security interests would include security-related actions taken, in time of war or national emergency. Actions not arising from a state of war or national emergency must have a clear and direct relationship to the essential security interests of the Party involved. Measures to protect a Party's essential security interests are self-judging in nature, although each Party would expect the provisions to be applied by the other in good faith.	Article XIV 1. This Treaty shall not preclude a Party from applying measures necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	1998

Lithuania	Letter of Submittal: Article IX (Measures not precluded) The first paragraph of Article IX reserves the right of a Party to take measures for the maintenance of public order and the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, as well as those measures it regards as necessary for the protection of its own essential security interests. The maintenance of public order would include measures taken pursuant to a Party's police powers to ensure public health and safety. International obligations with respect to maintenance or restoration of peace or security would include, for example, obligations arising out of Chapter VII of the United Nations Charter. Measures permitted by the provision the protection of a Party's essential security interests would include security-related actions taken in time of war of national emergency; actions not arising from a state of war or national emergency must have a clear and direct relationship to the essential security interests of the Party involved. Measures to protect a Party's essential security interests are self-judging in nature, although each Party would expect the provisions to be applied by the other in good faith.	Article IX 1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	1998
Mozambique	Letter of Submittal: Article XIV (Measures not precluded) The first paragraph of Article XIV reserves the right of a	Article XIV 1. This Treaty shall not preclude a Party from applying measures that it considers necessary	1998

BIT Party	Supplemental Instruments	BIT Provision	Date Signed
	Party to take measures for the fulfillment of its international obligations with respect to maintenance or restoration of international peace or security, as well as those measures it regards as necessary for the protection of its own essential security interests. International obligations with respect to maintenance or restoration of peace or security would include, for example, obligations arising out of Chapter VII of the United Nations Charter. Measures permitted by the provision on the protection of a Party's essential security interests would include security-related actions taken in time of war or national emergency. Actions not arising from a state of war or national emergency must have a clear and direct relationship to the essential security interests of the Party involved. Measures to protect a Party's essential security interests are self-judging in nature, although each Party would expect the provisions to be applied by the other in good faith.	for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	
Bahrain	Letter of Submittal: Article 14 (Measures not precluded) The first paragraph of article 14 reserves the right of a Party to take measures that it considers necessary for the fulfillment of its international obligations with respect to maintenance or restoration of international peace or security, as well as those	Article 14 1. This Treaty shall not preclude a Party from applying measures which it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of	1999

	measures it regards as necessary for the protection of its own essential security interests. International obligations with respect to maintenance or restoration of peace or security would include, for example, obligations arising out of Chapter VII of the United Nations Charter. Measures permitted by the provision on the protection of a Party's essential security interests would include security-related actions taken in time of war or national emergency. Actions not arising from a state of war or national emergency must have a clear and direct relationship to the essential security interests of the Party involved. This Treaty makes explicit the implicit understanding that measures to protect a Party's essential security interests are self-judging in nature, although each Party would expect the provisions to be applied by the other in good faith.	international peace or security, or the protection of its own essential security interests.	
Uruguay	Overview of the BIT accompanying documents transmitting agreement to U.S. Congress *Essential Security (Article 18)* Article 18 states that nothing in the Treaty may be construed to preclude a Party from applying measures that it considers necessary either to protect its own essential security interests or to fulfill its obligations with respect to the maintenance or restoration of international peace and security. The Treaty makes explicit the implicit understanding that measures to protect a Party's essential security interests are self-judging in	Article 18: Essential Security Nothing in this Treaty shall be construed: 1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or 2. to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of	2005

BIT Party	Supplemental Instruments	BIT Provision	Date Signed
	nature, although each Party would expect the provisions to be applied by the other in good faith. Article 18 also states that the Treaty does not require a Party to provide access to information if it determines that such disclosure would be contrary to its essential security interests	international peace or security, or the protection of its own essential security interests.	
Rwanda		Article 18: Essential Security Nothing in this Treaty shall be construed: 1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or 2. to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	2008

Source: Author compilation

ANNEX 3[143]

ESSENTIAL SECURITY PROVISIONS IN U.S. FREE TRADE AGREEMENTS WITH BIT-TYPE INVESTMENT PROTECTIONS

FTA Partner	Supplemental Instruments	Essential Security Exception	Date Signed
Canada and Mexico (NAFTA)	Statement of Administrative Action: The national security exception is self-judging in nature, although each government would expect the provisions to be applied by the other in good faith. Message from the President of the United States Transmitting North American Free Trade Agreement, Texts of Agreement, Implementing Bill, Statement of Administrative Action and Required Supporting Statements, House Document 103–159, Vol. 1, November 4, 1993, at page 666.	Article 1138: Exclusions 1. Without prejudice to the applicability or non-applicability of the dispute settlement provisions of this Section or of Chapter 20 (Institutional Arrangements and Dispute Settlement Procedures) to other actions taken by a Party pursuant to article 2102 (National Security), a decision by a Party to prohibit or restrict the acquisition of an investment in its territory by an investor of another Party, or its investment, pursuant to that article shall not be subject to such provisions. 2. The dispute settlement provisions of this Section and of Chapter 20 shall not apply to the matters referred to in Annex 1138.2 Article 2102: National security 1. Subject to Articles 607 (Energy-National Security Measures) and 1018 (Government Procurement Exceptions), nothing in this Agreement shall be construed: (a) to require any Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; (b) to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests	1993

143. Agreements available at http://www.ustr.gov/Trade_Agreements/Section_Index.html.

FTA Partner	Supplemental Instruments	Essential Security Exception	Date Signed
		(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) taken 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; or (c) to prevent any Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.	
Singapore		Article 21.2: Essential security Nothing in this Agreement shall be construed: (a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or (b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	2003
Chile	Summary of Agreement provided to the Congress (at page 21): *Essential Security*. Chapter 23	Article 23.2: Essential security Nothing in this Agreement shall be construed:	2003

	allows each Party to take actions it considers necessary to protect its essential security interests. (http://waysandmeans.house.gov/media/pdf/chile/hr2738chilesummary.pdf)	(a) to require a Party to furnish or allow access to any information the disclosure of which it Determines to be contrary to its essential security interests; or (b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations under the United Nations Charter with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	
Australia	Summary of Agreement provided to the Congress (at page 23): *Essential Security*. Chapter 22 allows each Party to take actions it considers necessary to protect its essential security interests. (http://waysandmeans.house.gov/media/pdf/australia/ustrsummary.pdf)	Article 22.2: Essential security Nothing in this Agreement shall be construed: (a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or (b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	2004
Morocco	Summary of Agreement provided to the Congress (at page 23): *Essential Security*. Chapter 21 allows each Party to take actions it considers necessary to protect its essential security interests. (http://waysandmeans.house.gov/media/pdf/morocco/moroccosummary.pdf)	Article 21.2: Essential security Nothing in this Agreement shall be construed: (a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or (b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security or the protection of its own essential security interests.	2004

FTA Partner	Supplemental Instruments	Essential Security Exception	Date Signed
		For greater certainty, measures that a Party considers necessary for the protection of its own essential security interests may include, *inter alia*, measures relating to the production of or 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.	
Bahrain	Summary of Agreement provided to the Congress (at page 20): *Essential Security*. Chapter 20 allows each Party to take actions it considers necessary to protect its essential security interests. (http://waysandmeans.house.gov/Media/pdf/109cong/HR4340SummaryofAgreement.pdf)	Article 20.2: Essential security Nothing in this Agreement shall be construed: (a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or (b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security or the protection of its own essential security interests.	2004
Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras,	Summary of Agreement provided to the Congress (at page 26): *Essential security*. Chapter 21 allows each Party to take actions it considers necessary to protect its essential security interests.	Article 21.2: Essential security Nothing in this Agreement shall be construed: (a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or	2004

Nicaragua (CAFTA-DR)	(http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/Transmittal/asset_upload_file888_7818.pdf)	(b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	
Oman		Article 21.2: Essential security Nothing in this Agreement shall be construed: (a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or (b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security or the protection of its own essential security interests.	2006
Peru		Article 22.2: Essential security Nothing in this Agreement shall be construed: (a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or (b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.[2] [2] For greater certainty, if a Party invokes Article 22.2 in an arbitral proceeding initiated under Chapter 10 (Investment) or Chapter 21 (Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies.	2006

FTA Partner	Supplemental Instruments	Essential Security Exception	Date Signed
Colombia		Article 22.2: Essential security Nothing in this Agreement shall be construed: (a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or (b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.[2] [2]For greater certainty, if a Party invokes Article 22.2 in an arbitral proceeding initiated under Chapter 10 (Investment) or Chapter 21 (Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies.	2006
Republic of Korea		Article 23.2: Essential security Nothing in this Agreement shall be construed: (a) require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or (b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security or the protection of its own essential security interests.[2] [2] For greater certainty, if a Party invokes Article 23.2 in an arbitral proceeding initiated under Chapter 11 (Investment) or Chapter 22 (Institutional Provisions and Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies.	2007

Panama		Article 21.2: Essential security Nothing in this Agreement shall be construed: (a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or (b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.[2] [2] For greater certainty, if a Party invokes Article 21.2 in an arbitral proceeding initiated under Chapter 10 (Investment) or Chapter 20 (Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies.	2007

Source: Author compilation.

ANNEX 4

U.S. INVESTMENT AGREEMENTS, CATEGORIZED BY TYPE OF ESSENTIAL SECURITY EXCEPTION

Type of Agreement	Countries	Factors In Determining Whether Self-Judging
GATT, TRIPS, GATS Essential security exceptions contain "it considers" language but coupled with narrow list of essential security objectives; provision regarding protection of confidential information.	153 members	Textual argument for asserting self-judging nature of exception, possibly subject to good faith review.
Post-1945 FCNs Contain essential security exception with no "it considers" language; refers to the specific types of essential security measures referenced in GATT article XXI (b) and/or (c).	Taiwan Yemen Nepal Italy Ireland Greece Israel Ethiopia Japan Germany Korea Netherlands Oman France Pakistan Luxembourg	No strictly textual argument that the exception is self-judging; must rely on *travaux préparatoires* or other principles of international law to demonstrate provision is self-judging.

	Belgium Thailand Togo	
BITs containing essential security exception without "it considers" language and no express indication that exception is self-judging even through a unilateral declaration.	Panama Senegal Congo (Kinshasa) Turkey Bangladesh Cameroon Egypt Grenada Congo (Brazzaville) Poland Tunisia Argentina Czech/Slovak Fed.Rep. Slovakia Sri Lanka Bulgaria Romania Morocco Kyrgyzstan	No strictly textual argument that the exception is self-judging; must rely on *travaux préparatoires* or other principles of international law to demonstrate provision is self-judging.
BITs containing essential security exception without "it considers" language, coupled with unilateral U.S. declaration that the exception is self-judging.	Armenia Kazakhstan Ecuador	No strictly textual argument that the exception is self-judging; must rely on *travaux préparatoires* or other principles of international law to demonstrate

Type of Agreement	Countries	Factors In Determining Whether Self-Judging
	Moldova Estonia Georgia Jamaica Mongolia Latvia Azerbaijan Croatia Jordan Bolivia Lithuania Ukraine Albania Trinidad & Tobago Honduras	provision is self-judging; unilateral declaration by the United States is useful but demonstrates the intent of only one party and not agreement between parties.
BITs containing essential security exception with "it considers" language or other formal agreement with treaty partner that the provision is self-judging.	Russia (agree in protocol that exception is self-judging; BIT never entered into force) Mozambique Bahrain	Strong textual basis for asserting the exception is self-judging, perhaps subject to "good faith" review.

NAFTA	Canada Mexico	Strong textual basis for asserting the exception is self-judging, though issue is clouded by negotiating history and express carve-out for investment screening; perhaps subject to "good faith" review outside context of investment screening; no review with respect to investment screening.
Post-2001 agreements with "it considers" language; provision regarding confidential information.	Uruguay BIT Rwanda BIT Chile FTA Singapore FTA Australia FTA Morocco FTA Oman FTA Bahrain FTA CAFTA-DR (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua)	Strong textual basis for asserting the exception is self-judging, perhaps subject to "good faith" review.
Post-"trade deal" agreements containing "it considers" language; provision regarding confidential information; and footnote clarifying that the matter is not subject to dispute settlement.	Colombia FTA Korea FTA Panama FTA Peru FTA	Exception is self-judging with no room for even a "good faith" review.

Source: Author compilation.