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Research Report

Challenging the invocation of national security interests in international arbitration and its implications for the rule of law

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Challenging the invocation of national security interests in international arbitration and its implications for the rule of law

by

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A state has the sovereign right to protect its national security interests. However, that right is not an unqualified right to act in a *carte blanche* manner. Against a backdrop of intensifying geopolitical tensions, it is becoming more imperative to consider the extent to which the increased invocation of “national security interests”—to justify the promulgation of legislation designed to bolster domestic economies, or to restrict, bar or forcibly order divestment of certain foreign investments—is reconcilable with a state’s obligations under international investment law. Depending on the applicable international investment agreement (IIA), a foreign investor may have avenues to challenge a state’s invocation of national security interests in an international arbitration setting.

First, a foreign investor may be able to challenge a decision arising from a national security investment review screening process. Of the countries that have a process for scrutinizing certain inbound foreign investments, only a few have attempted to carve out a decision arising from a national security review process from the ISDS mechanism in their IIAs. For example, the [Australia-Korea FTA](#) provides that a “decision by Australia with respect to whether or not to refuse, or impose orders or conditions on, an investment that is subject to review under Australia’s foreign investment policy shall not be subject” to the treaty’s ISDS mechanism. A state’s reliance on a national security review carve-out does not necessarily mean that *all* disputes related to a national security review decision cannot be arbitrated. In [Global Telecom v Canada](#), the tribunal held that it had jurisdiction to decide whether a particular decision falls within the scope of a carve-out. It

remains to be seen whether a dispute regarding the *process* leading up to a decision or relating to the compensability of *consequences* of the decision might also be justiciable.

Second, even though there is [a discernible trend of incorporating self-judging essential security interest \(ESI\) clauses into IIAs](#), a state's invocation of a self-judging ESI clause to defend a measure taken on national security grounds does not necessarily preclude such measure from being reviewed by an arbitral tribunal. In the recent case of [Angel Samuel Seda et al. v Colombia](#), the tribunal opined that, absent “clear and unequivocal language” to the contrary, arbitral tribunals maintain jurisdiction to undertake a “limited review” to determine whether the state had invoked the self-judging ESI clause in “good faith.” After finding that the state had invoked the clause in “good faith”, the tribunal concluded that the state's measures were “excluded from the scope of” the IIA, and that its “inquiry stops short of establishing [the] wrongfulness” of the state's action, “let alone awarding any compensation”. Yet, it is not particularly apparent why the tribunal came to this conclusion, given the absence of “clear and unequivocal language” in the underlying IIA mandating that *effect*.¹

Third, absent an applicable carve-out or exception clause, state measures taken in the name of national security can potentially amount to a breach of states' substantive obligations owed under the relevant IIAs. For example, in [PL Holdings S.A.R.L v. Republic of Poland](#), a forcible divestment order constituted an unlawful expropriation because it “represent[ed] serious interferences with a party's rights of ownership” by depriving the investor of the “right to dispose of the investment as [the investor] saw fit”. Moreover, even though the investor secured some value for its investment loss through the forced divestment process, that did not negate the state's responsibility—having breached its obligations under the relevant IIA—to compensate the investor for loss suffered.

Arbitral tribunals have historically struggled with reconciling traditional understandings of “national security interests” with an ever-expanding and ever-evolving conceptualization of “national security interests”,² where even “[economic interdependence itself is seen as a security risk](#)” today.³ In an increasingly heated geopolitical environment, the above underscores the critical gatekeeper role that arbitral tribunals play in reinforcing the fundamental bedrocks of international investment law. Tribunals should continue to insist that, absent “clear and unequivocal” language from states as to the intended scope, justiciability *and* effect of national and/or essential security carve-outs and exception clauses, such clauses should be narrowly interpreted.⁴ This will ensure that such clauses do not become “[escape clauses](#)” that afford states *carte blanche* rights to excuse themselves on the grounds of acting in the national security interest and/or to “[re-label](#)” and elevate *any* issue to that of an “essential security” issue. It should not be overlooked, for instance, that “essential security interests” constitutes a narrower concept than “[security interests](#)”, “[public interests](#)” or even “[societal needs](#)”. In turn, aside from adopting more precise IIA drafting with respect to such clauses, states could issue clarifications of intent through [joint interpretive statements](#). States also ought to more carefully consider whether increasingly haphazard

invocations of national security undermine the fundamental bedrocks of international investment law—or, perhaps more significantly, risk trampling on the principle of the international rule of law that is supposed to govern all states equally.

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¹ Other commentators who have noted the still-unsettled question regarding the effect of ESI clauses include [Pathirana and McLaughlin \(2020\)](#) and [Shelbaya \(2024\)](#).

² Compare, [Continental Casualty Company v. Argentine Republic](#), para 1; [Angel Samuel Seda et al., v. The Republic Colombia](#), para 765; [CMS Gas Transmission Company v. Argentine Republic](#), paras 153 and 355; [Sempra Energy International v Argentine Republic](#), para 348; [Enron Corporation et. al., v Argentine Republic](#), para 306.

³ See also, [Ma \(2019\)](#) noting that “worldwide protectionism is rising under the guise of national security.”

⁴ See also, [Moon \(2012\)](#) highlighting how a broad consequentialist approach to investment treaty interpretation runs contrary to the Vienna Convention, and arguing that the burden ought to fall on signatory states to establish any intended departure from ordinary usages of particular treaty terms.

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