INTERPRETATION OF (ALLEGEDLY) SELF-JUDGING CLAUSES IN BILATERAL INVESTMENT TREATIES

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I. Introduction

In five recent ICSID cases, Argentina has invoked necessity to justify certain emergencies measures – otherwise inconsistent with its international obligations stemming from the bilateral investment treaty (BIT) with the United States – adopted between 1999 and 2001 to tackle a grave economic crisis.1 One of the key issues raised in these cases has been the alleged self-judging character of Article XI of the treaty which reads:

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.2

The alleged self-judging character of Article XI deserves a close scrutiny as it has raised several interesting questions from the standpoint of interpretation of treaties in general and of investment treaties in particular. Additionally, in spite of a so far consistent case-law, the issue is likely to be discussed again in the numerous cases against Argentina that are currently pending before ICSID and UNCITRAL tribunals.

This essay examines the questions related to the alleged self-judging character of Article XI, bearing in mind the nature of bilateral investment treaties and of related arbitration3. It first describes how ICSID tribunals have dealt

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2 The treaty, which was signed on 14 November 1991 and entered into force on 20 October 1994, and is available at <www.unctadxi.org/templates/DocSearch_____779.aspx> (accessed on 1 May 2009).

II. Respondent’s Interpretation of Article XI of the BIT
United States – Argentina

In all five cases, Argentina argued that Article XI is a self-judging provision and therefore it is for the host State to determine in good faith whether essential security interests are at stake and what emergency measures are necessary. According to Argentina, this interpretation of Article XI is shared by both parties to the treaty and is firmly based on reciprocity. Tribunals cannot therefore depart from this interpretation. They must refrain from performing any substantial review of the host State’s conduct and limit themselves to determine whether the good faith principle has been respected.

In order to support the argument that the United States shares this interpretation of Article XI, Argentina maintained that since the Nicaragua decision – or after the conclusion of the BIT between the United States and Argentina – the United States have consistently treated clauses on emergency measures as self-judging.

The evidence offered by Argentina included in the first place the BITs concluded by the United States with Russia (1992) and Bahrain (1999) as well as

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5 CMS v. Argentina, supra note 1, paras 350; Enron v. Argentina, supra note 1, para. 335; Sempra v. Argentina, supra note 1, para. 379; Continental v. Argentina, supra note 1, para. 186.

6 LG&E v. Argentina, supra note 1, para. 209.


In the Protocol to the treaty, reproduced in ILM 31 (1992): 794, at 811, the parties confirmed their mutual understanding that whether a measure is undertaken by a Party to protect its essential security interests is self-judging. The treaty is not in force.

8 Available at <www.unctadxi.org/templates/DocSearch____779.aspx> (accessed on 1 May 2009). According to Article 14 (1), the treaty shall not preclude a Party from applying measures which it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.