Chapter 36

Emergency Clauses in Investment Treaties:
Four Versions

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I. Michael Reisman: His Magisterial Horizon

Michael Reisman’s standing as a towering intellectual figure among international lawyers essentially results from three different qualities. He commands a superb wealth of knowledge of international legal doctrine and practice, based on wide-ranging research and studies in most diverse areas and corners. This magisterial horizon is informed by his deep sense of order and policy that guides his sharp analytic skill. And his search for a compass (instead of a compilation of facts) is driven by intellectual roots that spread way beyond the realm of international law, indeed, beyond the realm of law. Together, these qualities of knowledge, of the sense for order, and of intellectual openness allow him to leave his imprint on the landscape of international legal doctrine, to influence legal practice, and to fascinate students from all over the world by his teaching.

Our paths have crossed in general ways in our work on international investment law, and it is therefore appropriate that I direct this contribution in his honor to a topic in this rapidly growing field of international law. In this area, as in others, he belongs to the foremost experts; with masterly publications in demanding style, his skills are sought internationally in all areas of international practice. His special contribution to the field is his overreaching perspective of the technicality of the subject matter, its broad links to general rules of international law, and the peculiarities of international investment practice. The status of emergency clauses in investment treaties lies at one of those intersections of investment law, of general international law, and of economics, which is characteristic of the field.

II. The Text of Article XI of the Argentina-U.S. BIT

We shall here focus specifically on Article XI of the bilateral investment treaty (BIT) between Argentina and the United States, against the background of recent diverse awards of international arbitral tribunals on their understanding and application. The text of Article XI, by now famous in investment circles, reads:

1 The author has served as an expert in a number of proceedings against Argentina.
This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, 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.

At first sight, an approach focusing on Article XI only may not allow for a broader judgment on emergency clauses generally, inasmuch as other BITs contain different clauses, many of them contain no clause at all, and the position of the United States itself has significantly evolved since the BIT with Argentina was concluded in 1991. However, discussion of the various approaches to the interpretation of Article XI of the BIT underlying the existing awards will necessarily touch upon policy perspectives that go beyond Article XI and throw some light on the broader questions of the nature, content, and suitability of emergency clauses generally in investment treaties. At least to a limited extent, Professor Reisman’s interest in order and policy can thus be captured in this contribution about the specific emergency clause in one particular treaty.

III. The “Ordinary Meaning” of the Terms

Article XI of the BIT is phrased in words to be understood in accordance with generally accepted rules of interpretation. Not surprisingly for a clause aiming broadly to address situations of an extraordinary character, often called emergency clauses, the provision is drafted so as to rely on terms such as “public order,” “the maintenance or restoration of international peace or security,” and the “protection of its own essential security interests.” Moreover, the assessment of “measures necessary” to safeguard these interests, as provided in the text also will call for interpretation and application in the light of the circumstances. For understandable reasons of flexibility, the BIT’s drafters stated a principle with a clear meaning but did not define the individual terms under consideration.²

Looking at the understanding and application of Article XI as a whole, its phrasing entails that the relevant terms have to be interpreted in accordance with the general rules of interpretation of treaties laid down in Article 31 of the Vienna Convention on the Law of Treaties (Vienna Convention).³

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² For other examples of similar, broadly phrased clauses, see Sempra Energy Int’l v. Argentine Republic, ICSID Case No. ARB/02/16, ¶ 375 (Sept. 28, 2007) (Award); Enron Creditors Recovery Co. v. Argentine Republic, ICSID Case No. ARB/01/3, ¶ 333 (May 22, 2007) (Award); and CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, ¶ 333 (May 12, 2005) (Award), reprinted in 44 I.L.M. 1205 (2005).