

Argentina's experience with self judging clauses: Impact on future treaty negotiations

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Provisions applicable to situations of emergency in BITs concluded by Argentina

Argentina-United Kingdom BIT (1990)

Article 4

Compensation for Losses

Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot or resulting from arbitrary action by the authorities in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State. Resulting payments shall be freely transferable.

Argentina-US BIT (1991)

Article IV(3)

3. Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such losses.

Argentina-US BIT (1991)

Article XI

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.

United States interpretation on self judging clauses contained in BITs

Letter of Submittal - BIT between the United States and Armenia (1992)

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.

United States 1992 BIT Model

Commentary, Article X

A Party's essential security interests include actions taken in times of war or national emergency, as well as other actions bear in 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.

United States BITs practice

US-Mozambique BIT (1998)

Article XVI

1. This Treaty shall not preclude a Party from applying measures that 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.

[...]

US-Bahrain BIT (1999)

Article 14

1. This 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.

[...]

United States' position

Letter of Submittal from the Secretary of State,
April 24, 2000, annexed to US-Bahrain BIT

[...] [It] 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.

US-Uruguay BIT (2005)

Article 12

Investment and Environment

[...]

2. Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

United States' position

[...] notwithstanding the decision of the ICJ in the Nicaragua case, the position of the U.S. Government is that the essential security language in our FCN treaties and Bilateral Investment Treaties is self-judging, i.e., only the party itself is competent to determine what is in its own essential security interests.

Letter sent by the Department of State,
15 September 2006

(quoted in *Sempra v. Argentina*, Award, 28/09/2007, para. 382)

Argentina's position concerning Article XI of Argentina-US BIT

The Argentine Republic's *bona fide* invocation of Article XI of the BIT should be sufficient for the Tribunal to dismiss the claims made by the Claimant under such BIT, as both parties to the Treaty accorded that each State had the exclusive right to decide whether its own measures were covered by such Article.

UNCTAD, Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking, New York and Geneva, 2007, p. 85

This clause provides the contracting parties with discretion to determine whether a particular measure is in fact necessary in order to comply with obligations concerning the maintenance or restoration of international peace or security, or to protect a contracting party's essential security interests. Such a "self judging" provision has important legal consequences, since it would impede a neutral body — such as an international arbitration tribunal — from making its own independent assessment of whether the measure taken by the host country authorities was actually necessary or not.

Practice of other States

Japan-Republic of Korea BIT (2002)

Article 16

1. Notwithstanding any other provisions in this Agreement other than the provisions of Article 11, each Contracting Party may:

- (a) take any measure which it considers necessary for the protection of its essential security interests;
 - (i) taken in time of war, or armed conflict, or other emergency in that Contracting Party or in international relations; or
 - (ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons;
- (b) take any measure in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security;
- (c) [...] or
- (d) take any measure necessary for the maintenance of public order. The public order exceptions may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

[...]

Japan-Vietnam BIT (2003)

Article 15

1. Notwithstanding any other provisions in this Agreement other than the provisions of Article 10, each Contracting Party may:

- (a) take any measure which it considers necessary for the protection of its essential security interests [...]
- (b) take any measure in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security;
[...] or
- (d) take any measure necessary for the maintenance of public order. The public order exceptions may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

[...]

2004 Model of Canadian BIT

Article 10 General Exceptions

[...]

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

[...]

Canada-Peru BIT (2006)

Article 10 General Exceptions

[...]

4. 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 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.

[...]

Canada-Czech Republic BIT (amended 2009)

Article IX General Exceptions

[...]

5. Nothing in this Agreement shall be construed:

(a) to require any Contracting 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 Contracting 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 non-proliferation of nuclear weapons or other nuclear explosive devices;
or

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

[...]

2007 Model of Norway BIT

Article [26] Security Exceptions

Nothing in this Agreement shall be construed:

- i. to require any Party to furnish any information, the disclosure of which it considers contrary to its essential security interests; or
- ii. to prevent any Party from taking any action which it considers necessary for the protection of its essential security interests:
 - (a) relating to investment in defence and security sector[s];
 - (b) relating to fissionable and fusionable materials or the materials from which they are derived;
 - (c) taken in time of war or other emergency in international relations; or
- iii. to prevent any Party from taking any action in pursuance of its obligations for the maintenance of international peace and security, including under the United Nations Charter.

Mexico-Sweden BIT (2000)

Article 18 **Exclusions**

The dispute settlement provisions of this Section shall not apply to the resolutions adopted by a Contracting Party which, in accordance with its legislation, and for national security reasons, prohibit or restrict the acquisition by investors of the other Contracting Party of an investment in the territory of the former Contracting Party, owned or controlled by its nationals.

2003 Model of Indian BIT

Article 12

Applicable Laws

(1) Except as otherwise provided in this Agreement, all investment shall be governed by the laws in force in the territory of the Contracting Party in which such investments are made.

(2) Notwithstanding paragraph (1) of this Article nothing in this Agreement precludes the host Contracting Party from taking action for the protection of its essential security interests or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non discriminatory basis.