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Adjudging the Exceptional at International Law

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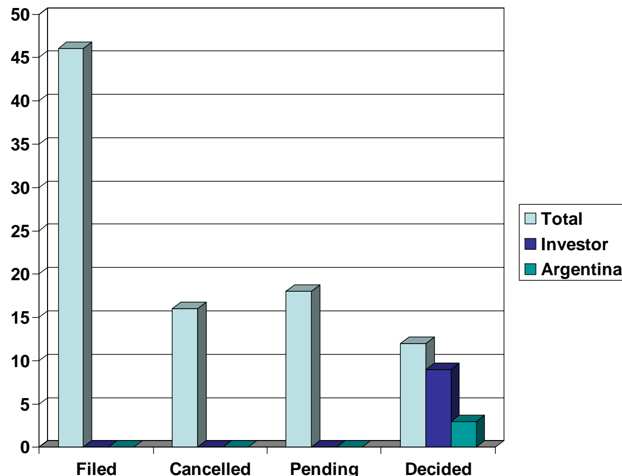
1. Introduction

This study examines the impact of international law on the ability of states to mitigate the effects of financial crisis. It focuses on the invocation of investment treaty disciplines in the aftermath of the 2001/2 Argentine financial crisis.

Argentina has attracted more litigation in the system of investment treaty arbitration than any other state. It has, with little success, sought to defend its emergency measures by relying on a state of necessity, under both subject treaties and at customary international law.

2. A dispute scorecard since 2001



3. What is the relationship between the treaty exception and customary plea of necessity?

My objective is to identify and evaluate the jurisprudential methods adopted by investor-state arbitral tribunals when interpreting a treaty exception authorizing emergency measures "necessary" for "public order" or "essential security interests". In particular, I am interested in the interpretative positions taken by arbitral tribunals on the relationship between this treaty exception and the stringent customary plea of necessity.

This has critical importance for pending cases involving Argentina as well as the potential invocation of this defence for current state emergency responses to the Global Financial Crisis.

4. The Operative Legal Standards

The Treaty Exception:
Article XI of the 1991 U.S- Argentine Bilateral Investment Treaty

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 and security, or the protection of its own essential security interests.

The Customary Plea of "Necessity": ILC Art. 25 on State Responsibility

1.Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an obligation of that State unless the act:

a) is the only way for the State to safeguard an essential interest against a grave and imminent peril;

and

b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2.In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

a) the international obligation in question excludes the possibility of invoking necessity;

or

b) the State has contributed to the situation of necessity

5. Results: Three distinct methodologies

Five arbitral tribunals have examined Argentina's invocation of the BIT exception with three distinct methodologies on its relationship with the customary plea of necessity:

1. Confluence: The treaty exception and stringent customary defence are one and the same.

- Precludes invocation: the dominant and most restrictive methodology (*CMS*, *Enron* and *Sempra* awards).
- Problematic: (i) ignores taxonomy between wrongfulness (primary treaty provisions) and responsibility (secondary customary norms); (ii) evidence of path dependence (*Enron* and *Sempra* awards); (iii) contrary to the historical evolution of the field.
- Motivations? (i) a simple desire for guidance by the adjudicators in applying an untested treaty norm; (ii) an assumption of a single and controlling *telos* of investor protection.

2. *Lex Specialis*: The treaty exception as a specific elaboration of the general customary norm.

- Raises the scope of priority accorded to the treaty defence (cf. *LG&E* award).
- If custom has residual operation (as per ICJ in *Oil Platforms*), the strict customary test of means-end scrutiny ("only way" in Art 25(1)(a)) may apply, leading to a type of method 1 redux.

3. **Separating Primary-Secondary Applications** (*Continental*)

- Treaty exception applied first as a primary legal standard.
- If breach, then adjudicator can assess the secondary plea of necessity to preclude the finding of a wrongful act.
- Advantages: (i) follows ILC taxonomy and ICJ's method in *Gabćíkovo;* (ii) gives distinct effect to both legal standards; (iii) enables an adjudicator to inject flexibility into the system (to ensure continued participation/loyalty of state parties).
- But opens up a host of difficult interpretative questions.

6. Future directions

Argentina is liable for hundreds of millions in dollar damages due to particular awards adopting the questionable methodology of confluence. This approach fails to test the precise relationship between the treaty defence and the customary plea of necessity.

Future adjudicators should elect between methods 2 (*Lex Specialis*) and 3 (Primary-Secondary Applications), with the latter offering the most convincing and coherent reading.

Method 3 raises, however, two fundamental interpretative choices for future cases. First, there is the identification and scope of "public order" and a state's "essential security interests". Adjudicators here can draw on useful guidance afforded by other norms at international law (including the WTO General Agreement on Trade in Services and emerging principles of human security in human rights law). Second, there is the question of whether the chosen means are "necessary" to achieve those purposes. This raises the closeness or fit between the state's chosen means and the permissible objectives under the treaty exception. On this critical question, I depart from the prevailing enthusiasm in the secondary literature on variants of proportionality review. A test of "reasonable less restrictive means" analysis is a more appropriate one given the systemic features of investor-state arbitration (and especially the absence of a full appellate mechanism).