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Investment Treaties in Times of Crisis: Balancing National Interests and the Rule of Law

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How should tribunals apply investment treaties to measures adopted during times of crisis? Recognizing crisis as the point at which foreign investors become most vulnerable (and therefore require the most protection), should tribunals guard against any temptation to dilute the rigor of external discipline? Conversely, recognizing crisis as the point at which states can lay their strongest claims to autonomy, should tribunals moderate the demands of international governance by exercising deference in the application of treaty norms, the assessment of defenses, or the formulation of remedies?

In recent years, tribunals and publicists have addressed the effects of crisis on state responsibility in the context of Argentina's gas sector cases. While differing fundamentally in their conclusions, tribunals have emphasized the customary international law doctrine of necessity and analogous treaty provisions as tools for probing the relationship between power and principle during hard times. Scholarship reflects a predictably similar orientation. However, for the reasons stated below, the doctrine of necessity represents a poor tool for balancing national interests and the rule of law during periods of turmoil. In fact, one can strike that balance more readily in the process of defining rights and formulating remedies.

Turning to the cases and recent scholarship, one may illustrate how the emphasis on necessity drives analysis towards unpalatable extremes. Thus, according to the Enron tribunal, the Sempra tribunal, and Professor José Alvarez, states may invoke necessity only to pursue the sole means required to safeguard their "very existence" or "independence" from grave and imminent peril. To cast doubt on this proposition, one may cite the Nuclear Weapons case, in which the International Court of Justice held open the possibility that states could lawfully use nuclear weapons in extreme cases of self-defense involving their very survival. From my perspective, it seems unlikely that the threshold for modifying gas transport licenses and the justification for nuclear exchange should lie on similar planes.

By contrast, the LG&E tribunal and Professor William Burke-White would have us believe that the collapse of the national currency and the rapid succession of five presidential administrations threatened essential interests and, thus, supported pleas of necessity under international law. To cast doubt that proposition, one may observe that necessity could also justify uncompensated takings, arbitrary arrest, or long-term detention without process in remote or, possibly, secret locations. From my perspective, it seems unlikely that fear, hardship and instability should become the recognized gateways for descent into otherwise lawless behavior. If anything, Argentina's

Dirty War and later wars against security threats reinforce the need for vigilance against legal opinions and the application of doctrine in ways that reflect an eagerness to travel that terrible path.

Taken together, these two examples suggest that the doctrine of necessity does not provide a calibrated tool for assessing national interests. To the contrary, it functions like a doomsday button; difficult to engage, but filled with the potential to unleash terrible force. Building on this analogy, one may observe that states keep a variety of weapons to defend their national interests. While the heaviest weapons provide assurance against the worst case, lighter ones perform most of the work even during crises and, thus, become more useful in advancing national interests for the vast run of cases. Likewise, investment treaty tribunals possess a variety of tools to accommodate the national interests of host states. Knowledge of that inventory can help to avoid the high costs of overreliance on necessity while still affording states room to maneuver during crisis and other moments of national importance.

Turning to that inventory, one may draw distinctions among tools designed to permit derogation, to define rights, and to formulate remedies. With respect to derogation, one must start with the customary doctrine of necessity, which suspends the rule of law when absolutely required for self-preservation. In other words, during the last throes of starvation or the panicked swim to a lifeboat, one returns to a state of nature in which ends justify means, and one does what it takes to survive. However, the pursuit of survival imposes profound costs on the legal process by undermining the general transition from a power-based to a rules-based system of international relations, by undermining the goal of investment treaties to elevate principle over expedience even in hard times, and by undermining the obligation of tribunals to resolve controversies according to law. Given the specificity of the national interest in self-preservation and the potential systemic costs, one must start from the presumption that necessity operates like most doomsday buttons: available in theory but practically beyond reach even in periods of crisis and turmoil.

Moving from custom to treaty, it remains possible that states may wish to preserve more leeway for derogation, especially when undertaking new obligations on matters of secondary importance likely to collide with strong national interests during times of crisis. For example, Professor Alvarez explains that the U.S.-Argentina BIT includes an article on non-precluded measures designed to immunize the exercise of executive powers during emergencies like Iran’s seizure of 52 American hostages in 1979, which (though serious) threatened neither the existence nor the independence of the United States. While the explicit consent to such provisions signals acceptance of systemic costs in exchange for discretion, one must recall that investment treaties aim to provide meaningful safeguards even during hard times. Under these circumstances, one may still regard treaty-based derogations as exceptional tools that address a somewhat broader range of national interests, but whose application requires both caution and strict adherence to the exigencies of the situation.

Turning to the definition of rights, we find a lighter but more useful tool for balancing interests, including the national interests of host states. Just as the interests of neighbors play an important role in defining the limits of my property rights, so do the national interests of host states play an important role in defining the limits of rights granted to foreign investors. Thus, some recent treaties and awards expressly recognize that expropriation generally excludes nondiscriminatory regulations designed to protect public welfare objectives, including public health, safety and the environment. Likewise, as recognized in National Grid PLC v. Argentina, one should accept that the requirements of fairness and equity can shift to accommodate a range of steps that host states might reasonably take during national emergencies, unless of course a state notoriously prone to emergency (like Argentina) has adopted stabilization measures specifically designed to protect foreign investors against the inevitable cycles of turmoil.

To round out discussion, tribunals may finally consider the respondents’ interests when

formulating remedies. For example, in Prosecutor v. Erdemovic, an ethnic Croat serving with Serbian forces first objected and, then, personally killed 70 civilians during the Srebrenica massacre after superiors made clear that his alternative was to join the victims in their dark fate. While refusing to accept that they excused liability, the International Criminal Tribunal for the Former Yugoslavia considered the circumstances when imposing a sentence of only ten years, about the same awarded to a Croatian military police commander for tacitly encouraging a single rape during interrogation. Likewise, even where national interests do not rise to the level of necessity and cannot tip the balance in the definition of norms, investment treaty tribunals should still consider the circumstances in deciding if host states bear sole responsibility for the economic losses of foreign investors. As demonstrated by the Argentine gas sector cases, tribunals can pay due regard to the interests of host states by awarding compensation only for unlawful management, and not for inevitable losses caused by the proper management, of national emergencies.

In closing, as Professor Andrea Bjorklund observes, the question remains one of risk allocation and determining who should bear the burden in situations of economic crisis. While she correctly states that the answer "is likely to differ from treaty to treaty, and . . . from case to case," I would submit that the answer also depends on the tools that one selects for conducting the inquiry.

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This entry was posted on Thursday, June 4th, 2009 at 4:04 pm and is filed under Arbitration Awards, Arbitration Proceedings, Commercial Arbitration, International Courts, International Legal Theory and Teaching, Investment Arbitration, Legal Practice, Public Policy
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