THE YALE LAW JOURNAL

COMMENT

The Casualty of Investor Protection in Times of Economic Crisis

On September 5, 2008, an international arbitral tribunal dismissed all but one of the claims brought by the Continental Casualty Company, a U.S. investor, against the government of Argentina.[1] The Chicago-based financial services provider sought to recover a loss of more than $45 million it claimed to have suffered as a result of Argentina's drastic regulatory measures taken during the state's 2001 financial crisis.[2] Continental asserted that its investment in Argentina was protected under the terms of the U.S.-Argentina bilateral investment treaty (BIT).[3] It argued that Argentina breached the treaty by failing to meet its obligations to provide U.S. investors with fair and equitable treatment and pay them compensation in light of its acts of expropriation.[4]

Argentina argued in its defense, and the tribunal agreed, that the state's severe economic catastrophe justified its execution of the sweeping Emergency Law, which, among other changes, abolished the dollar-peso convertibility and froze investor bank deposits.[5] The tribunal found no breach of the treaty on Continental's major claims, citing language that the treaty "[does] not preclude" the United States or Argentina from applying measures "necessary for the maintenance of public order . . . or the protection of its own essential

1. Cont'l Cas. Co. v. Argentine Republic, ICSID (W. Bank) Case No. ARB/03/9 (Sept. 5, 2008), *available at* http://ita.law.uvic.ca/documents/ContinentalCasualty Award.pdf.

2. *Id.* para. 19.

3. Now foundational elements of international investment law, bilateral investment treaties are agreements between two states designed to provide investors with recourse when the foreign state in which they invest harms or discriminates against their investment.

4. *Cont'l Cas.*, ICSID (W. Bank) Case No. ARB/03/9 para. 20.

5. *Id.* para. 63.

security interests."[6] Rather than applying principles from international *investment* law, the tribunal applied principles of international *trade* law in interpreting the treaty to reach its conclusion.

This Comment argues that *Continental Casualty Co. v. Argentine Republic* perverts the question of what constitutes a valid "state of necessity" defense in investment law by applying interpretations from trade law—as embodied in dispute resolution panel decisions by the World Trade Organization (WTO)—to dismiss Continental's claim. The Comment explains that the tribunal's decision is unfounded for three reasons. First, its reasoning departs from prescribed treaty interpretation methodology set out in the Vienna Convention on the Law of Treaties (VCLT)—the codified authority on treaty interpretation in international law. Second, while the language of the U.S.-Argentina BIT may be similar to language in trade texts, investment law and trade law have evolved separately from one another since that language was first used. Therefore, neither body of law is germane in interpreting the other. Third, the two bodies of law cannot be compared because they are distinct practice areas, each with its own purposes. Textual parallels they may share are not appropriate tools for interpretation. This Comment concludes by explaining how the *Continental Casualty* tribunal's reasoning opens the door to watered-down protection for investors abroad and could raise questions as to what rights foreign investors in the United States have in light of the United States's recent economic restructuring.[7]

I. ARGENTINA'S CRISIS AND SUBSEQUENT DEFENSE

Argentina's booming economic times and favorable regulatory climate in the mid-1990s led many foreign entrepreneurs to invest there, including Continental Casualty, which chose to invest in low-risk assets in Argentina through its acquisition of an Argentinean subsidiary in 1997.[8] These golden

6. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. XI, Nov. 14, 1991, S. TREATY DOC. NO. 103-2 (1993) [hereinafter BIT], *available at* http://www.state.gov/documents/organization/43475.pdf; *see Cont'l Cas.*, ICSID (W. Bank) Case No. ARB/03/9 para. 75.

7. In January 2009, Continental applied to have the tribunal's decision annulled, arguing that the tribunal "manifestly exceeded its powers" and the award "failed to state the reasons on which it is based." *Continental Casualty Moves To Annul Award Favourable to Argentina*, INVESTMENT TREATY NEWS, Jan. 16, 2009, http://www.investmenttreatynews.org/cms/news/archive/2009/01/16/continental-casualty-company-moves-to-annul-award-favourable-to-argentina.aspx.

8. *See Cont'l Cas.*, ICSID (W. Bank) Case No. ARB/03/9 para. 107.

years were short-lived, however. Starting in 1999, the government adopted a series of fiscal and regulatory measures to counteract increasing external macroeconomic pressures and internal social instability.[9] The government rapidly instituted policies that abolished the one-to-one exchange rate of the peso to the dollar and devalued the peso.[10]

When the value of its assets plummeted as a result, Continental initiated arbitration proceedings against Argentina at the International Centre for Settlement of Investment Disputes (ICSID),[11] as provided by the terms of the U.S.-Argentina investment treaty. It alleged that the effect of the measures taken by the state was equivalent to expropriation, depriving the company of two-thirds of its expected revenue.[12]

In response, Argentina argued that the measures it instituted were essential for the survival of the state.[13] It couched its argument in language found in Article XI of the BIT: "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order . . . or the protection of its own essential security interests . . . ."[14] According to Argentina, "The [economic] crisis became an emergency situation when it turned into an institutional, social and economic collapse of unprecedented seriousness and depth."[15] On this basis, Argentina argued, the Emergency Law and accompanying regulatory measures were necessary to establish public order and security and, therefore, comprised a defense against wrongdoing under the treaty.

Before *Continental Casualty,* ICSID tribunals had decided four cases brought by U.S. investors on the basis of alleged breaches of the U.S.-Argentina BIT.[16] Argentina advanced the same defense in each case, arguing

9. *See id.* para. 48.

10. For a description of the financial crisis, see Martin Feldstein, *Argentina's Fall: Lessons from the Latest Financial Crisis*, FOREIGN AFF., Mar./Apr. 2002, at 8.

11. ICSID is an international organization with over 140 member states created to provide structure and rules for the arbitration of international investment disputes between a government and an investor of a foreign state. International Centre for Settlement of Investment Disputes, http://icsid.worldbank.org (last visited Mar. 9, 2009).

12. *Cont'l Cas.*, ICSID (W. Bank) Case No. ARB/03/9 para. 19.

13. *Id.* para. 172.

14. BIT, *supra* note 6, art. XI.

15. *Cont'l Cas.*, ICSID (W. Bank) Case No. ARB/03/9 para. 53 (internal quotation marks omitted) (quoting Argentina's Counter-Memorial on the Merits para. 21, *Cont'l Cas.*, ICSID (W. Bank) Case No. ARB/03/9 (May 8, 2006)).

16. The four cases are *Sempra Energy International v. Argentine Republic*, ICSID (W. Bank) Case No. ARB/02/16 (Sept. 28, 2007); *Enron Corp. Ponderosa Assets, L.P. v. Argentine Republic*,

that it had not violated the terms of the BIT on a plain reading of the text of Article XI.[17] None of these four tribunals found Argentina's "state of necessity" defense to be sufficient to wholly defeat the investors' claims.[18] By contrast, the *Continental Casualty* tribunal found that Argentina's defense outweighed the company's expropriation claims. In discussing whether the state's measures were "necessary,"[19] the tribunal relied almost exclusively on international trade law, supplemented only by scholarly work in economics.[20] The absence of investment law analysis is alarming because it sets a dangerous precedent in the context of an already disparate body of law.

II. APPLES AND ORANGES: MISUSE OF THE LAW

The invocation of a "necessity" defense to justify a state's protective action in light of national security considerations is a concept familiar in both international trade law and international investment law. The General Agreement on Tariffs and Trade (GATT), which serves as the constitutive legal text for dispute resolution within the WTO trade regime, provides that "[n]othing in this Agreement shall be construed . . . *(b)* to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests."[21] The wording of this clause in the GATT is identical to the language of Article XI of the 1994 U.S.-Argentina

ICSID (W. Bank) Case No. ARB/01/3 (May 22, 2007); *LG&E Energy Corp. v. Argentine Republic*, ICSID (W. Bank) Case No. ARB/02/1 (Oct. 3, 2006); and *CMS Gas Transmission Co. v. Argentine Republic*, ICSID (W. Bank) Case No. ARB/01/8 (May 12, 2005). All of these tribunals' decisions are available at the ICSID website. *See supra* note 11. The outcomes of each are discussed more fully in Part III. When an investor brings a claim to ICSID against a state, the parties select an ICSID panel of arbitrators unique to that dispute; using different arbitrators, each with their own interpretation of the relevant law, each tribunal may reach a different outcome on very similar facts.

17. Argentina has also claimed that even if the BIT provision does not extinguish any liability on behalf of the state, customary international law on state necessity releases the state of any responsibility to compensate the investor. *See Cont'l Cas.*, ICSID (W. Bank) Case No. ARB/03/9 paras. 160-168 (referring to Article 25 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Jan. 28, 2002)). This Comment does not discuss that argument.

18. *See supra* note 16.

19. BIT, *supra* note 6, art. XI.

20. *Cont'l Cas.*, ICSID (W. Bank) Case No. ARB/03/9 paras. 192-199.

21. General Agreement on Tariffs and Trade art. XXI, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 188 [hereinafter GATT] (emphasis added).

BIT,[22] and similar language has been regularly replicated in investment agreements since the 1980s.[23]

Although a similar defense on the basis of necessity and national security has been used by states in both the trade and investment settings, the *Continental Casualty* tribunal was wrong to rely on an international trade law rationale, repeatedly citing to case law from the WTO, to resolve Continental's investment dispute.[24] The tribunal acknowledged its reliance explicitly:

> Since the text of Art. XI derives from the parallel model clause of the U.S. FCN treaties and these treaties in turn reflect the formulation of Art. XX of GATT 1947, the Tribunal finds it more appropriate to refer to the GATT and WTO case law which has extensively dealt with the concept and requirements of necessity in the context of economic measures derogating to the obligations contained in GATT, rather than to refer to the requirement of necessity under customary international law.[25]

A. Treaty Interpretation

When investigating a breach of a bilateral investment treaty alleged by a foreign investor, investment tribunals must interpret the language of the treaty. In all areas of international law, the VCLT serves as the comprehensive authority on treaty interpretation.[26] Article 31 refers the interpreter (in this case, an ICSID arbitrator) first to the "ordinary meaning" of the terms of the treaty "in their context and in the light of [the treaty's] object and purpose."[27]

22. As cited above, Article XI states in full, "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." BIT, *supra* note 6, art. XI.

23. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES 145 (2005).

24. The decision makes reference to WTO case law and materials informing its decision in eleven footnotes. *See Cont'l Cas.* ICSID (W. Bank) Case No. ARB/03/9 paras. 187-282 nn.281, 292, 293, 294, 295, 296, 299, 308, 343, 349, and 413.

25. *Id.* para. 192.

26. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VCLT]; *see* MALCOLM SHAW, INTERNATIONAL LAW 85 (4th ed. 2006).

27. The bounds of what constitutes context, object, and purpose are highly contested in the literature. For useful background, see MARCO SLOTBOOM, A COMPARISON OF WTO AND EC LAW 53-57 (2006). It should be noted that section 3(c) of Article 31 allows one to take into account, together with the context of the treaty, "any relevant rules of international law in

Article 32 provides that "[r]ecourse may be had to supplementary means of interpretation . . . in order to *confirm* the meaning resulting from the application of article 31,"[28] but even that provision limits supplementary resources to "the preparatory work of the treaty and the circumstances of its conclusion."[29] Thus, the *Continental Casualty* tribunal should have focused its attention on the BIT treaty language regarding national security; instead, it turned to the body of GATT/WTO law.

The similar language used in trade law permits WTO member states to take "action which [they] consider[] necessary for the protection of [their] essential security interests."[30] Though the United States and Argentina are both parties to the GATT, their understanding of the GATT article is not relevant for the purposes of interpreting the BIT according to the VCLT. Moreover, through the course of the more than forty years between the signing of the GATT and the drafting of the U.S.-Argentina BIT, the understandings of the terms in these contexts have evolved separately from one another as described in the next two Sections.

B. No Threshold of Commonality

By relying on WTO cases, the *Continental Casualty* tribunal treated trade law as a substitute for investment law; however, the object and purpose of investment law is distinct from that of trade law and should be treated as such for dispute resolution. Contrast, for example, the title of the U.S.-Argentina BIT ("Treaty . . . Concerning The Reciprocal Encouragement And Protection Of Investment")[31] with the title of the GATT ("The General Agreement on Tariffs and Trade").[32] The former focuses on investor protection while the latter emphasizes free trade. Turning to the preambles of each, the U.S.-Argentina BIT recognizes the importance of "stimulat[ing] the flow of private capital and the economic development of the Parties,"[33] while the GATT facilitates "reciprocal and mutually advantageous arrangements directed to the

the relations between the parties." VCLT, *supra* note 26, art. 31. In the case of Continental and Argentina, however, that would mean any "relevant" rules between the United States and Argentina. It is hard to imagine that this would trigger a reference to the provisions of the GATT – a multilateral treaty from another area of law.

28. VCLT, *supra* note 26, art. 32 (emphasis added).

29. *Id.*

30. GATT, *supra* note 21, art. XXI.

31. BIT, *supra* note 6.

32. GATT, *supra* note 21.

33. BIT, *supra* note 6, pmbl. recital 2.

substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce."[34] What is "necessary" to attain the GATT's broad-scale trade-related ends often differs from what is necessary for protecting individual investors under the BIT.[35] These themes represent larger differences in their purposes. For example, one purpose of international investment law is to induce investment by assuring investors that sunk-cost projects will be subject to special protection;[36] trade law is not at all concerned with compensating the investor.

Two substantive factors further exemplify these broader trends: the parties involved and the remedies available. First, the WTO is designed to address obligations between and among many states, to keep the playing field even in their trade policies toward one another.[37] By contrast, the international investment legal regime protects the relationship between a state and a private investor. Applying the WTO necessity doctrine by way of analogizing to WTO case law ignores this distinction in these two relationships. Second, regarding remedies, no damages are paid in trade law. When found to be in breach of the GATT by the WTO's Dispute Settlement Body, a state incurs restrictions on trade.[38] Investments, on the other hand, are governed by bilateral treaties requiring that compensation be paid to a private investor. These alternate remedies may incentivize states to act differently and consider that which is "necessary" in trade interactions to be altogether distinct from that which is "necessary" in the context of investment relationships. In other words, in

34. GATT, *supra* note 21, pmbl. recital 2.

35. *See, e.g.*, Cont'l Cas. Co. v. Argentine Republic, ICSID (W. Bank) Case No. ARB/03/9 para. 232 & n.349 (Sept. 5, 2008) (comparing the measures taken by Argentina during the crisis to the WTO Appellate Body's decision in Appellate Body Report, *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Apr. 5, 2001) [hereinafter *EC-Asbestos*]). The *EC-Asbestos* case defined "necessity" with respect to the implications that measures taken by the European Community would have on the flow of goods. *EC-Asbestos*, *supra*, para. 172. This was not a consideration in Argentina's rationalization for its emergency measures, nor does it have a clear parallel rationale that would apply to the investment context. *See* SLOTBOOM, *supra* note 27, at 249.

36. *See* Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 664-66, 680-81 & n.119 (1998).

37. Note also that the background of the GATT informs its interpretation of the terms; its "mantra" is that it is a "[m]ember-driven organization." Georges Abi-Saab, *The Appellate Body and Treaty Interpretation*, *in* THE WTO AT TEN 462 (Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes eds., 2006).

38. *See generally* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) (outlining the measures to be imposed on states found to be in violation of the GATT).

calculating whether to enact a particular regulatory measure that will have an impact on trade or investment, a state may be disinclined to carry out the measure in the trade context because it will itself incur potentially debilitating restrictions. It may be more inclined to carry it out in the investment context because it may dispose of measures related to investment with more ease by "paying" for its wrongdoing in basic cash terms, for example.

In sum, WTO law is inapposite for investment cases like *Continental Casualty* because it is intended to govern state-to-state relations in cases where trade policies affect the interests of many investors and the states themselves. Equally distinct are the processes and remedies by which arrangements under investment treaties are concluded. Beyond the word "necessary," these bodies of law have different contexts, and different objects and purposes.

C. Distinct Evolution

Although the language of the GATT appears similar to the language of the BIT, there are some critical differences in their texts and in their applications. The language of the GATT has been tested and interpreted in case law relevant to trade disputes;[39] as a result, the terms have taken on interpretive significance specific to that area of law. Likewise, the body of investment law interpreting the "state necessity" doctrine has adopted its own distinct conclusions.[40]

Trade law interprets the necessity doctrine using a consequentialist analysis, focusing its evaluation on the effects of the state measure on the system. For example, in the *Korea-Beef* case, cited by the *Continental Casualty* tribunal, the WTO's Appellate Body found that "[a] measure with a relatively slight impact upon imported products might more easily be considered as 'necessary' than a measure with intense . . . effects."[41] Reflecting the multilateral body's broader considerations, this decision represents a balancing method frequently adopted in the interpretation of trade law.[42] GATT/WTO case law has consistently permitted breaches of the GATT on the grounds that

39. Although there has been only one case that addressed this issue explicitly in the GATT world, there has been much discussion in other cases and in the scholarly community. *See* Negotiating Group on GATT Articles, *Note by the Secretariat* para. 2, MTN.GNG.NG7/W/16 (Aug. 18, 1987) [hereinafter Note by the Secretariat]; 1 PATRICK F.J. MACRORY, ARTHUR E. APPLETON & MICHAEL G. PLUMMER, THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 1572-78 (2005).

40. *See supra* notes 25-27 and accompanying text.

41. Appellate Body Report, *Korea-Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*, para. 163, WT/DS161/AB/R, WT/DS1G9/AB/R (Jan. 10, 2001).

42. PETROS C. MAVROIDIS, THE GENERAL AGREEMENT ON TARIFFS AND TRADE 193-94 (2005).

such actions may be "necessary" to divert a more debilitating violation that would undermine the legitimacy of the regime and state compliance.[43] On the other hand, investment tribunals have been reluctant to allow breaches under the "necessity" doctrine and instead focus on the whole situation facing the state in question.[44] Because a bilateral investment treaty is a product of two states and because a dispute arising under it implicates a single investor in an independently constituted tribunal, the ramifications in any given proceeding are limited to a specific situation. Attention to any concept of an investment regime is secondary.

Moreover, in trade law, the breached action may be one of many options a state could pursue, but one that violates the treaty. In other words, indispensability is not a critical factor in finding "necessity" within the practice of the GATT/WTO dispute resolution body.[45] By contrast, investment tribunals have defined "necessity" as applicable if the act "is the only way" for the state to safeguard an essential interest.[46]

Comparing these two approaches, it is clear that the specificity of the subject matter affects the relative weight attributed to textual and contextual principles in interpretation. Both the dispute resolution body of the GATT/WTO regime and the investment tribunals have developed the exercise of their judicial activity such that each is specific to its environment.[47] The interpretation of "necessity" and other relevant dimensions of security have evolved separately in the two bodies of law and cannot be compared.

III. FUTURE ECONOMIC CRISES AND REGULATORY ACTION

The question this Comment confronts is what law should govern in an international arbitration dispute. *Continental Casualty*'s convoluted approach is perplexing in light of the principles for treaty interpretation outlined in the widely applied VCLT. The decision circumvents legitimate methods of interpretation by importing principles from outside the realm of relevant sources. In so doing, it prompts troublesome prospects for the investment world.

43. *See, e.g.*, Appellate Body Report, *Brazil-Measures Affecting Imports of Retreaded Tyres*, para. 7.211, WT/DS332/R (June 12, 2007) [hereinafter *Brazil-Retreaded Tyres*].

44. *See supra* note 16 (citing cases discussing the conditions in Argentina).

45. *See Brazil-Retreaded Tyres*, *supra* note 43, para. 7.104.

46. CMS Gas Transmission Co. v. Argentine Republic, ICSID (W. Bank) Case No. ARB/01/8 para. 316 (May 12, 2005) (quoting Int'l Law Comm'n, *supra* note 17, at 80).

47. Abi-Saab, *supra* note 37, at 460-61.

First, *Continental Casualty* presents vast and serious implications for investors. The broad definition of "necessity" as derived from the GATT/WTO case law gives states wide-ranging latitude to abuse foreign investor relationships. Leaving Continental without viable recourse to recovery does not bode well for investors seeking to invest in developing states with unpredictable economic trajectories. The decision indicts the treaty by foreclosing a remedy for investors in states where unforeseen crisis ensues. This is counterproductive when the purpose of the treaty is to *encourage* investment in developing states.[48] Thus, the decision could have unforeseen consequences for these states and for international investment more generally, forcing prospective investors to reconsider their options.

Second, the decision raises questions about what defenses and supporting materials are "fair game" for investment dispute resolution. The disparate investment case law on the Argentinean crisis has left few clues for ICSID arbitrations going forward. At one level, it suggests merely a lack of uniformity that is, perhaps, endemic to private arbitration.[49] Alternatively, *Continental Casualty* may be considered an outlier. The only other ICSID decision to deny relief to an investor because of the U.S.-Argentina BIT "necessity" clause, *LG&E*, drew clear lines regarding how it considered that case to differ from previous Argentinean cases based on the same situation.[50] Coherent reasoning and consistency in the applicable jurisprudence is particularly significant for states in defining the scope of treatment by which they work with investors.[51] To treat *Continental Casualty*'s rationale as an acceptable line of argument opens the door to the importation of inapposite international legal principles that should not be transposed on the *lex specialis* of investment law. Such a trend would lead to disorder among a largely self-establishing form of law, which reinforces the previous point that investors would be discouraged from making low-risk investments.

48. *See* BIT, *supra* note 6.

49. *See generally* Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 FORDHAM INT'L L.J. 1014 (2007) (describing the growth in investment dispute resolution and the occasionally divergent norms that have emerged).

50. LG&E Energy Corp. v. Argentine Republic, ICSID (W. Bank) Case No. ARB/02/1 paras. 201-266 (Oct. 3, 2006).

51. Another interpretation would have allowed the tribunal to conclude that the necessity doctrine may protect the attribution of wrongfulness to the measure the state has taken, but still require it to compensate the investor for its loss—as in a typical expropriation situation.

CONCLUSION

It is difficult to predict how the pending cases against Argentina will be resolved,[52] but the Argentinean experience imparts lessons for international investment law more generally. At a time when the strength of the financial markets has been threatened in many states, the breadth and depth of the "necessity" doctrine and the scope of "national security" in international law is of critical importance. The ICSID tribunals have the power to redirect the burden for multimillion dollar losses as they determine the threshold for "necessary" measures in times when "security interests" are at stake. *Continental Casualty* muddles the doctrine and will have costly ramifications.

KATHLEEN CLAUSSEN

52. As of April 6, 2009, there were thirty-two cases pending against Argentina in ICSID. *See* International Centre for Settlement of Investment Disputes, List of Pending Cases, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending (last visited Apr. 6, 2009).