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The Consequences Of Market Intervention

Lucy Reed (International Council for Commercial Arbitration) · Thursday, March 11th, 2010 · Freshfields Bruckhaus Deringer

Following the flurry of arbitrations initiated by investors against Argentina based upon Argentine government actions during that country's 2001-2002 economic crisis, one might have expected the U.S. government's extensive market interventions during the 2008 global financial crisis to lead similarly to investor claims. The United States bailed out Fannie Mae and Freddie Mac, in the process acquiring the right to dilute significantly the companies' existing shares. It also provided large sums of capital to several U.S. banks and car manufacturers. But foreign investor claims have yet to materialize (at least not publicly). While a variety of factors may be at work, the absence of such claims raises some interesting questions, none with obvious answers.

It may be that the U.S. financial crisis is so factually distinct from the Argentine crisis that the comparison is not a fair one. Perhaps the Argentine government's clear promises regarding the applicable regulatory framework have no parallels in the U.S. context, rendering any fair and equitable treatment claim less viable.

Or perhaps the explanation is not based upon a factual or legal distinction, but rather it lies with pragmatic considerations. The United States remains the preeminent global economic superpower. In applying the fair and equitable treatment standard and determining the applicability of the necessity defense, would a panel of arbitrators use its discretion to give the United States more leeway than other states? Are investors simply afraid to upset their existing relationship with the U.S. government? Perhaps WTO dispute settlement (which actually involves a different standard for the necessity defense), not investor-state arbitration, is the appropriate forum where subsidy-related issues could be addressed at the state-to-state level – in which case the question would be out of investors' hands?

In a perfect world, international legal standards are applied evenly, irrespective of the identity of the respondent. Yet, much as U.S. federal judges make decisions fully aware of institutional limitations that may affect the implementation of those decisions by other branches of government, arbitrators make decisions in the global context of sophisticated actors participating in a complex, interconnected economy. While these are not questions that can be answered definitively, we can learn more about the role of international arbitration as it is applied to a variety of political and economic scenarios, including the global financial crisis. As first noted in this blog by Luke Eric Peterson (Whither the New Financial Crisis Claims?, February 5, 2009), we are still waiting for the initiation of financial crisis claims.

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