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State of Necessity, a three-star Michelin standard in Investment Arbitration

Fabricio Fortese · Thursday, November 10th, 2011

At the time the General Assembly of the United Nations was deciding to include in the agenda of its fifty-sixth [1] session the text of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (The Draft) adopted by the International Law Commission (ILC), the Argentine Republic was reaching the peak of the most devastating crisis of its history.

Argentina's crisis was so extreme that by the end of 2001 and in a term of ten days, there was a succession of five Presidents. A radical set of emergency measures were adopted, amongst which the government restricted bank withdrawals; prohibited fund transfers abroad; abrogated its Convertibility Law; liquidated the value of foreign investments by (i) eliminating the right to calculate public services' tariffs in US dollars and (ii) prohibiting the increases on tariffs. All this was followed by the declaration of the public debt's default (domestic and international). There were riots throughout the territory of the country, chaos and deaths.

The magnitude of the whole situation was so serious that for the first time the United Nations General Assembly decided to suspend the payment of Argentina's membership.

Although Argentina had entered into numerous Bilateral International Treaties (BITs) in previous decades, when responding to the crisis the Argentine administrations seemed to have disregarded their international obligations and took in Machiavelli's teachings:

(…) it is necessary for a prince wishing to hold his own to know how to do wrong, and to make use of it or not according to necessity (…) he [The Prince] need not make himself uneasy at incurring a reproach for those vices without which the state can only be saved with difficulty, for if everything is considered carefully, it will be found that something which looks like virtue, if followed, would be his ruin; whilst something else, which looks like vice, yet followed brings him security and prosperity. [2]

As it is already well known, these emergency measures adopted by Argentina amounted to breaches of international obligations that triggered a record number of claims by investors before the International Centre for the Settlement of Investment Disputes (ICSID) and also under UNCITRAL rules like never before against one single State.

It was in the framework of these claims that the "state of necessity" plea based on an economic crisis received a well-grounded consideration by different tribunals and annulment committees.

Although the decisions rendered have been divergent, the grounds given by the different tribunals have inevitably embraced the study and interpretation of specific provisions in BITs and in Article 25 of the International Law Commission's Draft Articles on Responsibility of States for International Wrongful Acts.

It is undoubted that in investment arbitration, as in commercial arbitration, tribunals have consistently paid great attention to treaty language and facts. In investor-state arbitrations tribunals have also undisputedly stressed the importance of (i) a stable legal framework, (ii) they have given weight to legitimate and reasonable expectations of the investors and (iii) have borne in mind the portion of risk an investor assumes when making the decision to invest in a particular country.

Nonetheless it is also absolute certain that the different awards involving the Argentine Republic post 2001-meltdown have not taken a uniform direction. There are tribunals that have decided rejecting the necessity defense, others accepting it with temporary effects and there are also decisions from annulment committees that have annulled previous awards.

To illustrate this it is worth to consider at least a few cases before the ICSID. In this sense, the tribunals in CMS, Enron, Sempra, Metalpar, Suez, Total and Impregilo [3)] have rejected the state of necessity as pled by Argentina, but it was accepted by the tribunals in LG&E and Continental Casualty. There are further decisions also dealing with the interpretation and relationship between necessity under customary international law and bilateral treaties, including the annulment decisions in CMS, Sempra and Enron.

Despite the fact that the literature in the "Necessity" defense is rich and varied, in light of all these cases against Argentina no scholar would hesitate to say that there is no rule of law that directs the interpretation and resolution of this issue. This lack of uniformity calls for the study not only of the parties intrinsic intentions as plainly expressed in their treaties (BITs) but also requires to thoroughly delve into the context in which such an exception to the state's responsibility can be granted.

Although there is no such *stare decisis* in international arbitration, it cannot be denied that previous decisions are studied and become a persuasive opinion on other tribunals. Standards are followed and new standards emerge.

Cases against Argentina are doing and will keep doing school in this field, so it is interesting and imperative to further the study of the precedents that these cases are setting in investment arbitration. If a rule of law is to emerge regarding the application of the "state of necessity" defense in the international community, it is essential to reach a consistent line of thought in this matter. It appears to be, consequently, a crucial responsibility that rests on those who are shaping up a "jurisprudence" in investment arbitration.

The study and understanding of the rationale in all the decisions reached by arbitral tribunals dealing with the necessity defense based on the Argentine Republic's economic crisis seems to be a good start point. This will help the development of predicted awards in this respect and thus a consistent rule of law in investment arbitration. Ultimately, it would help to establish a specific customary international law.

If the 2001 Argentine's economic crisis was the ground for numerous investment disputes, it can be expected other similar cases to arise out of the 2009 global credit crunch, the current Eurozone

turmoil or other regional or local slide downs. It would not be rare then to see the necessity defense being repeatedly invoked in the near future.

References

?1 Resolution A/RES/56/83 – 12 Dec. 2001 GA/9998

?2 Niccolo Machiavelli, The Prince, Chapter XV, Concerning things for which men, and especially Princes, are praised or blamed.

?3 CMS Gas Transmission Company v. Argentine Republic, ICSID Case ARB/01/8; Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case ARB/01/3; Sempra Energy International v. Argentine Republic, ICSID Case ARB/02/16; Metalpar S.A. and Buen Aire S.A. v. Argentine Republic, ICSID Case ARB/03/5; Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic, ICSID Case ARB/03/17 and Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A, ICSID Case ARB/03/19; Total S.A. .v Argentine Republic, ICSID Case ARB/04/1; Impregilo S.p.A. v. Argentine Republic, ICSID Case ARB/08/14

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