



Crisis, Emergency Measures and the Failure of the ISDS System: The Case of Argentina*

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1. Introduction

The investor-state dispute settlement (ISDS) system became the object of increasing criticism during the last years. Inconsistent decisions, poorly reasoned awards, lack of transparency, parallel proceedings, serious doubts about arbitrator's impartiality and the sheer size of the compensations sought by investors and awarded by arbitration tribunals are just some examples of the flaws that have been pointed out by the detractors of the system.¹ The dozens of cases that were initiated against Argentina as a result of the outburst of one of its worst economic and financial crises in late 2001 became an often-quoted sad illustration of many of these shortcomings of the ISDS system.

Apart from the tragic consequences entailed by the economic and political crisis which was faced by Argentina, in particular in 2001/2002, which included a fall in GDP per capita of 50 percent, an unemployment rate of over 20 percent, a poverty rate of 50 percent, strikes, demonstrations, violent clashes with the police, dozens of civil casualties and a succession of 5 presidents in 10 days, Argentina received a flood of claims from foreign investors that were filed under different ISDS mechanisms and, in particular, before the International Centre for Settlement of Investment Disputes (ICSID). Indeed, in the period 2003-2007, claims against Argentina represented a quarter of all the cases initiated within the framework of the ICSID Convention.

These claims before international arbitral tribunals challenged the changes to the economic rules that Argentina had implemented to contain the effects of perhaps the worst economic cycle of its history. The estimates carried out at that time –widely quoted by academics and the local and international media– calculated that, if all the claims filed by foreign investors were fully addressed, Argentina would have to face compensations for around 80 billion dollars, a figure which is equal to 13 percent of Argentina's GDP for 2013 (at current prices).

Though Argentina's experience captured for some time the attention of a bunch of authors who brought up the poor response of the ISDS system to the exceptional circumstances that surrounded the case (Waibel, 2007; Burke-White, 2008; Kasenetz, 2009; El-Hage, 2012), to my

knowledge no study has so far made a systematic and comprehensive assessment of the final outcome of this story. How successful were the investors that filed cases against Argentina? How large was the bill that Argentina had to pay at the end of the day? How did the ISDS system work when faced with dozens of cases based on quite similar facts, arguments and counter-arguments? These are some of the questions that this paper seeks to address.

To that end, the brief will present a brief but comprehensive account of the most important aspects of the Argentine experience before investment arbitral tribunals in the period 2001-2014. Given the restrictions of space in this publication, this brief will focus on three main characteristics that, in the author's opinion, make the Argentinian case particularly interesting both for the implications they may have on the ISDS system and for the experience of other developing countries which may undergo a similar situation. First, we will have a look at the extraordinary situation that triggered the flood of claims against Argentina – one of the worst political and economic crises of its history – and the sheer size of the compensations that, at least potentially speaking, this country would have had to face if all those claims had been successful. Second, we will present a general overview of the current status of all the cases initiated against Argentina, as well as some figures and other elements that will help to assess Argentina's performance in dealing with these cases. Third, we will analyze the difficulties encountered by the ISDS system to tackle the particular circumstances of the Argentinian case. Lastly, we make some final comments.

2. Crisis, emergency measures and multi-million claims

Since 1991, Argentina has embarked on an economic deregulation and liberalization program. Among other issues, this program included the convertibility of the Argentine peso and the creation of a currency board to maintain the parity between the peso and the United States dollar, by limiting the local money supply to the amount of Argentina's foreign exchange reserves.

This economic and pro-market program was accompanied by a strong emphasis on the attraction of foreign investment that, among other aspects, resulted in the conclu-

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sion of 58 Bilateral Investment Treaties (hereinafter, BITs) –55 of which came into effect. It also included a mass privatization process of public companies that, at that time, represented an important part of the domestic economy. The legal framework within which privatizations were carried out, as well as the concession contracts of the different public services, included a series of guarantees and benefits for the licensee foreign companies, namely, tariffs calculated in US dollars and converted into pesos at the time of billing, adjustment of tariffs in accordance with the US wholesale inflation, and stabilization mechanisms.

Due to various reasons which go beyond the scope of this study, but which have been thoroughly analyzed by a great number of authors² and –to a greater or lesser extent– by all arbitral tribunals summoned to decide on the cases against Argentina³, this market-oriented model reached its limits in the late 1990s. Despite the financial juggling of the Government in office at that time to deal with its debt maturity payments, which included a series of increases in its Stand-By Agreement line of credit with the International Monetary Fund (IMF) and an extensive renegotiation of its debt, known as “mega-swap”, and to its desperate efforts to give signs of “credibility” and fiscal discipline, for example, through the adoption of the so-called “Zero-Deficit Law”, tax increases, labor market flexibility, and the so-called “Intangibility Law”⁴, by the end of the year 2001 the situation became unsustainable.

As a result, the Government took a series of emergency measures aimed at avoiding foreign currency drain, which included the imposition of limits to foreign currency transfers abroad and to money withdrawals from local banks (“corralito”). The unpopularity of these measures reinforced the discontent accumulated over years of recession and increasing unemployment, poverty and inequality, thus causing strikes, protests and mass demonstrations, which resulted in the death of dozens of people and the resignation of the then president, Fernando de la Rúa.

After a period of unusual political instability, which involved a succession of resignations and appointments of 5 presidents in a period of 10 days and which lasted until May 2003 (when a new elected president took office), the regulatory framework for the economy and, particularly, that for the public services privatized over the 1990s were reformed. Among the measures adopted by the different successive governments to try to offset, or at least mitigate, the most serious consequences of the dramatic economic downturn, the following are particularly relevant for this study: (i) the imposition of a “Corralito” & “corralón”, i.e. a temporary bank freeze and rescheduling of term deposits; (ii) the termination of peso convertibility and its pegging to the US dollar at the fixed exchange rate of 1:1 (1 US\$ = 4 AR\$); (iii) a default on and the unilateral rescheduling of governmental debt; (iv) the termination of right of licensees of public utilities to adjust tariffs according to US PPI; (v) the “pesification” of tariffs at a rate of AR\$ 1 for each

US\$, as well as the “pesification” of all contracts denominated in dollars and subject to Argentine law; and (vi) restrictions to transfer funds abroad.

This package of emergency laws implied a considerable change in the conditions under which foreign investors and, in particular, public services providers had to run their business in Argentina. As a consequence, many of them decided to resort to the investor-state dispute settlement mechanisms embodied in the dozens of bilateral investment treaties (BITs) that Argentina had signed in the 1990s.

The results did not wait long to appear. As can be seen in Figure 1 in the next page, the number of cases filed against Argentina has soared from 2001 onwards. In total, in the period 2001-2012, exactly 50 cases were filed against Argentina, 36 out of which have complete public information available. Twenty seven (75%) out of the latter⁵ were exclusively or mainly oriented to question the package of measures adopted by Argentina to mitigate the economic effects of the crisis of 2001/2.⁶

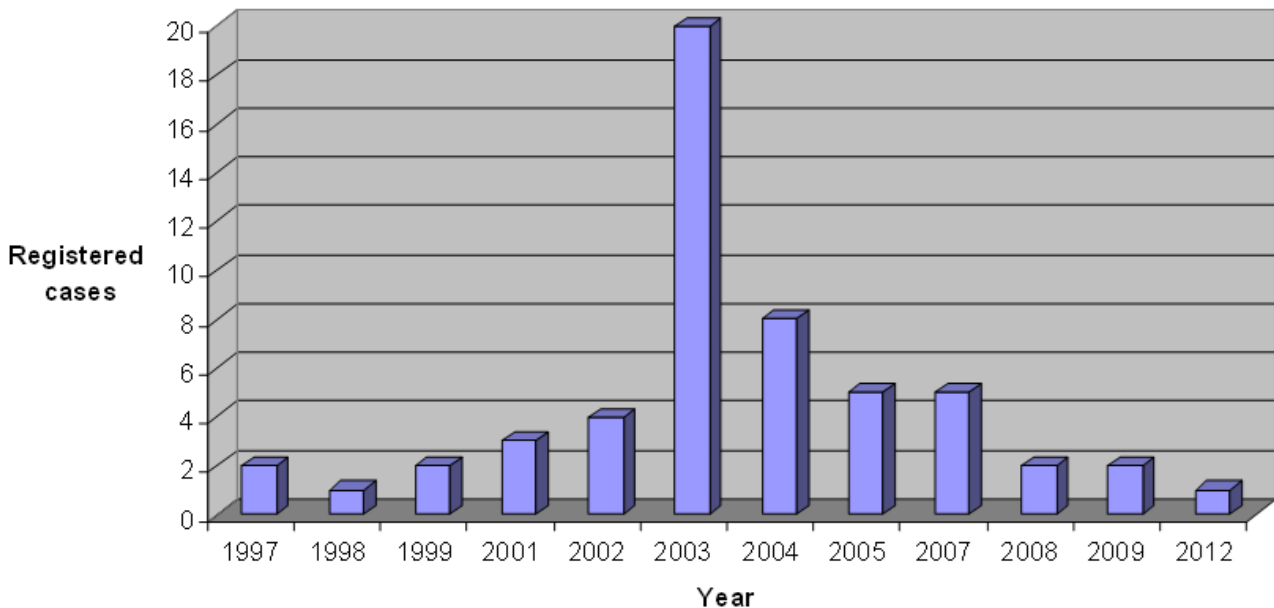
3. Is the bark worse than the bite? Argentina’s performance before investment arbitration tribunals

As pointed out above, a striking characteristic of the Argentinian experience is the amount of requests for compensations made by the companies that sued Argentina to redress the damages purportedly caused to their investments as a result of the alleged failure of Argentina to fulfill its international obligations under the BITs. According to estimates made when the peak of cases following the crisis was reached, if all investors who sued Argentina had obtained 100 percent of their claims, the total amount that the country should have had to bear would have been at around 80 billion dollars (Burke-White, 2008; Wong, 2005).⁷

This sum would have been practically impossible to pay, even if Argentina had not been undergoing a period of acute economic crisis. To give a clearer idea of the relative importance of such a sum, this figure represented approximately 13 percent of Argentina’s GDP for 2013 (calculated at current prices), a little less than 10 times the federal education budget for the same year, the double of all funds allocated by the country to the payment of retirement and pension benefits during 2013, and an amount similar to the entirety of the public-sector foreign debt that Argentina defaulted on during the late 2001 economic collapse.

The extraordinary sum of the “invoice” that Argentina should have to pay in case of losing all these cases does not relate so much to the amount of the compensations requested in each of these cases but to the sum of all of them. Although none of the claims against Argentina involved extraordinary sums of money, at least not if compared to other cases filed under the same system, such as the Occidental case against Ecuador or, the most recent case, Exxon against Venezuela, the peculiarity of this case is that, as most cases stemmed from the same package of

Figure 1 - Cases registered against Argentina under ICSID & UNCITRAL rules (1997-2012)



***Compiled by the author.**

measures taken as from 2001, Argentina amassed an impressive number of cases in a very short period of time.

Although Argentina's response to this flood of cases was varied and it is still early to give out definite figures, it is already possible to conclude that, in general, arbitration tribunals were prone to render awards in favor of investors. Figure 2 in the next page shows the case status at the time of concluding this brief of the 27 cases initiated by foreign investors as a result of the package of emergency economic measures adopted by Argentina following the crisis of 2001/2.

As can be observed, almost 45 percent of the cases have received a condemnatory award⁸, although most of these cases could still be reversed by annulment proceedings, whereas only 15 percent of the arbitration proceedings ended up with a final decision completely in favor of Argentina.⁹ The remaining 30 percent are mostly cases which resulted in an agreement between the parties or which were altogether suspended.¹⁰ Only three of the proceedings (11%) are still awaiting an award on the merits.¹¹ In this respect, it is worth mentioning that two of these three cases¹² correspond to proceedings that already had an award favorable to the claimant, but which were annulled in its entirety and, therefore, reinitiated.

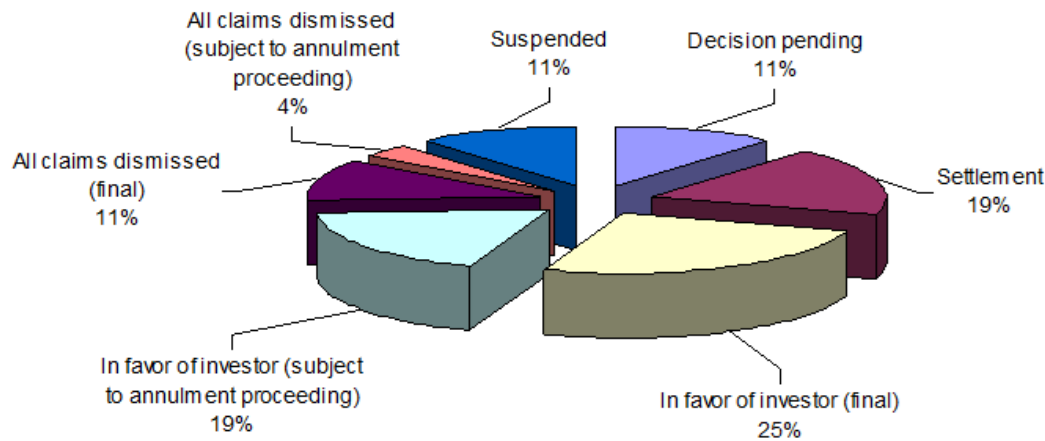
This initial approach –eminently negative– to Argentina's performance before the arbitration tribunals called upon to decide on the legality of its package of post-crisis measures markedly contrasts, however, with the total amount of compensations Argentina was ulti-

mately requested to pay. So far, in only 15 of the 55 cases historically initiated against Argentina a compensation for a total amount of 1.4 billion dollars (interest and cost free) was fixed.¹³ Two of these decisions, *Sempra* and *Enron*, which involved compensations for 235 million dollars, were fully annulled and, thus, the proceedings were reinitiated. Furthermore, other three cases –*EDF International*, *LG&E* and *SAUR*, whose combined awarded compensations amounted to 233 million dollars– are still under review by ICSID Annulment Committees, which means that they could eventually be rendered null and void. All in all, of the 80 billion dollars of the possible amount of compensations calculated when the peak of cases against Argentina was reached following the crisis, Argentina has so far received final rulings involving the payment of 900 million dollars.¹⁴

Another interesting fact revealed by the Argentinian experience is that the total amount of ISDS cases filed in response to the package of post-crisis measures which resulted in a condemnatory award were based on the Fair and Equitable Treatment (FET).¹⁵ This should come as no surprise: as a consequence of the overly broad interpretations given to the FET by arbitration tribunals¹⁶, the FET standard became a natural avenue to channel the claims filed by investors which, in general, revolved around the "investment climate" and the "legitimate expectations" created by the investment-friendly regime during the 1990s, and around the change in the rules of the game which took place after the crisis of 2001/2.

Yet, without doubt, the aspect of the Argentinian experience which stood out the most was the inability of the

**Figure 2 - Current status of cases filed against Argentina
(challenges of post-crisis measures only)**



*Compiled by the author.

ISDS system to properly address a circumstance that Argentina put forward by way of defense in all the cases: the background of economic and political crash that affected Argentina in those days, which largely accounts for its post-crisis package of economic measures. The following section will focus on this final aspect of the Argentine experience before ISDS mechanisms.

4. The (erratic) reluctance of the ISDS system to sustain Argentina's plea of necessity

As mentioned above, almost half of the arbitral proceedings initiated against Argentina as a result of the post-crisis measures concluded in awards that, for one reason or another, rejected the possibility that the extreme circumstances in which the measures in question were adopted constituted a sufficient cause for excluding Argentina's liability. The lack of coherence among the decisions on this point was probably one of the aspects of the Argentine case which most attracted the attention of the specialized literature (Waibel, 2007; Reinisch, 2007; Burke-White, 2008; Kasenetz, 2009; El-Hage, 2012) and which most contributed to make the case gain visibility in the international debates on the flaws of the ISDS system.

As a matter of fact, the peculiar characteristics of the Argentinian case make it particularly interesting to test the "institutional quality" of the ISDS system and, especially, its ability to deliver coherent decisions. As pointed out in the previous sections, a great amount of the cases submitted against Argentina sought to question

the same regulations passed by the Argentine government –the package of post-crisis measures– on the basis of identical or very similar legal arguments and grounds, mainly the Fair and Equitable Treatment standard. What is even more important for the purposes of this study is that Argentina presented a series of defenses that were virtually identical in all of these cases, including the plea of the state of necessity and/or of non-prohibited measures. In this context, the decisions that were taken then and those that are being taken at present by the arbitration tribunals summoned to address these cases constitute a kind of quasi-laboratory experiment that allows for a study of the levels of consistency in the "outputs" delivered by the ISDS system for very similar –and, in many instances, practically identical– "inputs". It will be shown in the next paragraphs that the results of this experiment were far from promising.

In general, Argentina adopted a two-pronged legal strategy. First, it denied that any of its actions amounted to a violation of the substantive standards of BITs (indirect expropriation, FET, umbrella clause, etc.), *inter alia*, because those standards do not impede states to take regulatory measures in order to face a serious economic crisis. Second, it argued that, even in the case that it was found to have infringed any of these obligations, its actions should be justified due to the extreme context in which they had been carried out. This latter line of argument was typically based on three provisions: (i) the standard clause found in BITs obliging host states to treat investors in a non-discriminatory way in case they are

compensated for by the losses they suffer owing to war, armed conflicts or other situations of “national emergency”; (ii) the “non-precluded measures” clause found in the BITs concluded with the United States; and (iii) the customary rule of “state of necessity”.

Argentina’s line of argument based on non-discriminatory compensations in cases of emergency was rejected by all the arbitral tribunals called upon to decide on it.¹⁷ In contrast, the arbitral decisions on the defense arguments based on the other two grounds mentioned above were much less consistent. Table 1 included below intends to schematically present the differences existing in the 14 arbitral awards issued so

far that referred to the arguments put forward by Argentina on the basis of the aforementioned two lines of argument.

The column headed “non-precluded measures” refers to a clause existing in only some BITs, among them those signed by Argentina and the United States, whose Article XI sets forth that the application of the Treaty “shall not preclude the application (...) of measures necessary for the maintenance of public order (...) or the protection of its own essential security interests”. The varied interpretations adopted by the arbitration tribunals on different aspects of this Article are of paramount importance, since they were crucial for the total or partial exemption of Ar-

Table 1 – Decisions on Argentina’s defenses under Article XI of US/Argentina BIT and the state of necessity of general customary law

Claimant	Award Date	BIT	Non Precluded Measures			Customary State of Necessity		
			NPM custom ≠	Necessity	Compensation	Essential interest threatened?	“only means”?	State contribution
CMS	12/05/2005	US	NO	Restrictive	YES	NO	NO	YES
LG&E	03/10/2006	US	YES	“good faith”	NO	YES	YES	NO
Enron	22/05/2007	US	NO	Judicial economy	YES	NO	NO	YES
Sempra	28/09/2007	US	NO	Judicial economy	YES	NO	NO	YES
Continental	05/09/2008	US	YES	GATT XX	NO	Judicial Economy	Judicial Economy	Judicial Economy
El Paso	31/10/2011	US	YES?	“not restrictive”	YES?	Judicial Economy	Judicial Economy	YES
BG ¹⁸	24/12/2007	UK	N/A	N/A	N/A	N/A	N/A	N/A
National Grid	03/11/2008	UK	N/A	N/A	N/A	Judicial Economy	Judicial Economy	YES
Suez, SGAB & InterAgua	30/07/2010	France/Spain	N/A	N/A	N/A	YES	NO	YES
Suez, SGAB & Vivendi	30/07/2010	France/Spain	N/A	N/A	N/A	YES	NO	YES
Anglian Water Group	30/07/2010	UK	N/A	N/A	N/A	YES	NO	YES
Total	27/12/2010	France	N/A	N/A	N/A	NO	NO	Judicial Economy
Impregilo	21/06/2011	Italy	N/A	N/A	N/A	YES	Judicial Economy	YES
EDF, SAUR & León	11/06/2012	France	N/A	N/A	N/A	NO	NO	YES

gentina from paying the compensations ordered in the only two opportunities in which this type of defense was accepted: LG&E and Continental.

As Table 1 reveals, six of the tribunals summoned to interpret the “non-precluded measures” clause in the cases against Argentina have so far diverged in three major aspects of interpretation^{19,20}: i) the interaction of this clause with the international customary state of necessity; ii) the standard of interpretation used for the “necessity test”; and iii) the persistence or not of the duty to compensate even in those cases in which the clause is applicable.

The first of these aspects refers to different stances with respect to the relationship existing between Article XI and the customary state of necessity. Whereas some tribunals (CMS, Enron, Sempra and, to a lesser extent, El Paso) considered that international customary law should inform the interpretation of Article XI, others (LG&E, Continental) considered that they are two totally different legal concepts, and that one should not be confused with the other. This difference in criteria seemed to have settled with the decision adopted by the Annulment Committees of the CMS and Sempra cases. Among other aspects, both Committees vehemently pointed out that Article XI and the customary state of necessity are totally distinct and independent defenses, and thus should be treated separately.²¹ However, most recently, the arbitration tribunal called upon to decide on the El Paso case seems to have included once again aspects of the customary state of necessity in its interpretation of Article XI of the Argentine-US BIT.²² To add to the confusion, this controversial approach was subsequently confirmed by an Annulment Committee.²³

A final aspect in which the arbitral tribunals summoned to interpret Article XI have followed clearly different criteria is the standard used to determine the “necessity” of the measures adopted. In fact, the test used in CMS, Sempra and Enron was much more restrictive than that used in the decisions taken in LG&E, Continental and –at least on paper– in El Paso.²⁴ Additionally, as a result of the different interpretations on the relationship between the aforementioned article and the customary state of necessity, the tribunals adopted different views on whether the duty to compensate the investor persisted even in those cases in which all the conditions for the application of Article XI were fulfilled.

The third and last defense argument used by Argentina to exclude its liability for the implementation of the package of post-crisis measures was based on the allegation that those measures had been taken in the context of state of necessity, one of the circumstances that exclude the wrongfulness of the acts of a State within the framework of general international law, as reflected in Art. 25 of the International Law Commission (ILC) Articles on State Responsibility.

All the tribunals which examined this defense reject-

ed it, but, as can be observed in Table 1, they arrived at this conclusion through different ways of reasoning. In spite of these differences, in all the cases the arbitrators put themselves in a situation in which –with a greater or lesser declared deference towards Argentina’s sovereign powers to decide its own policies– they had to analyze, ponder and even criticize the economic measures implemented by the country to tackle the crisis and, in some cases, the economic policy followed by the country over long periods prior to the crisis.

Thus, for example, most decisions on this aspect of Argentina’s defense were taken exclusively or concurrently based on the fact that, to some extent, Argentina has contributed to the outburst of the crisis. In order to come to this conclusion, the arbitrators interpreted that the applicable standard would not require Argentina to have “caused” or “created” the crisis. Rather, it would be enough if Argentina’s contribution to it has been “sufficiently substantial and not merely incidental or peripheral”.²⁵ In this context, they determined that the Argentinian crisis resulted from a combination of both exogenous and endogenous causes, and included, among the latter, Government actions and omissions which would have allegedly had a “substantial” impact on the origins and development of the crisis, such as “excessive public spending”, “inefficient tax collection”, “delays in responding to the early signs of the crisis”, “insufficient efforts at developing an export market, and internal political disension” and “problems inhibiting effective policy making”.²⁶ Given that the conditions specified in Article 25 for the application of the state of necessity are cumulative, the sole determination that Argentina had contributed to the outbreak of the crisis was sufficient for these tribunals to reject this defense altogether. Moreover, the findings of the arbitrators on these complex macroeconomic matters were usually based on no more than one or two paragraphs of analysis.

Another common argument used by the arbitration tribunals to support their rejection of the state of necessity defense was the determination that the measures adopted by Argentina were not the “only available means” to avoid the crisis. In this case, the arbitrators found themselves again in the uncomfortable situation of assessing the pertinence of the hypothetical economic measures that could have achieved the same result as those adopted by Argentina, without affecting the interests of foreign investors. Thus, the tribunals referred, for example, to the possibility of “dollarization of the economy”, “granting of subsidies to affected population”, “restructuring of its debt”, and “devaluation without pesification”.²⁷

Without doubt, the fact that a tribunal composed by three arbitrators –typically, international legal experts specialized in investment protection law– should base a key part of their awards on an ex-post or counterfactual assessment of the economic policy implemented by a sovereign State over decades shows the difficulties faced by the ISDS system to deal with an absolutely exceptional case like that of Argentina. Moreover, it may result, as rightly pointed out by the Enron Annulment Committee

decision, in the complete substitution of the arbitral tribunal judgment for the opinion of “expert witnesses” called upon to counsel the arbitrators.²⁸

5. Some final considerations

Due to a series of particular –and, perhaps, unique– circumstances, since 2001 Argentina has become one of the main users of the ISDS system. In fact, in spite of having a very small share in global foreign investment, in the period 2002-2007 Argentina was the object of a quarter of all the cases initiated within the framework of the ICSID Convention.

This flood of cases responded mainly to the changes that took place within the regulatory framework for international investments –particularly in sectors related to the provision of public services– as a result of the implementation of a package of measures aimed at tackling one of the worst economic crises of Argentina’s history. Some studies which have attempted to calculate the total amounts involved in those claims estimated that, if Argentina lost all these cases, it should have to pay compensations for up to 80 billion dollars.

Over 12 years after the first case questioning Argentina’s package of post-crisis measures was filed, this study intended to provide an assessment of the Argentinian experience.

The first salient conclusion resulting from the data presented in this brief is that the ISDS system had a very low capacity to adapt to totally exceptional circumstances for which it did not seem to have been designed. Despite the efforts of the Argentinian attorneys to show that the measures implemented in the post-crisis period were adopted in an emergency context, being so exceptional as to justify any breach of the substantial clauses of the BITs, few tribunals were prepared to sustain this defense.

This notwithstanding, and having most of these cases already been dealt with, the upcoming scenario for Argentina seems much less drastic than that forecasted when the peak of cases was reached. While they represent a heavy burden for a developing country like Argentina, so far the compensations actually paid amount to a small portion of the above-mentioned initially estimated sum.

The Argentinian case also represents a worrisome example of the failure of the ISDS system to ensure coherence and soundness in its decisions. As pointed out above, although the dozens of cases submitted against Argentina addressed exactly the same package of measures (the post-crisis emergency laws) and they had to assess very similar arguments of the different claimants and a practically identical series of defenses put forward by the Argentinian Government, the conclusions at which they arrived have shown striking differences among them. Additionally, some of the decisions have been subject to strong criticism and/or declared null and void by annulment committees.

Finally, the experience of Argentina shows the difficulties that arbitration tribunals might encounter when trying to scrutinize the economic policy choices made by governments. On top of the sensitiveness of examining sovereign decisions of States, arbitrators might find themselves in the awkward situation of deciding on highly technical matters they are clearly ill-equipped to assess.

The case of Argentina thus represents a sad example of the urgent need to reconsider and reform the ISDS system. Yet, the lessons to be drawn from this experience do not seem to lead to clear conclusions as to which direction should be followed. On the one hand, the system has proved to be extremely inflexible, which prevented it from addressing the exceptional peculiarities of the Argentinian case. On the other hand, however, the wide margin of discretion available for the arbitral tribunals resulted in the adoption of inherently poor decisions, and with high levels of incoherence among them.

End notes:

¹ See e.g. Van Harten (2005; 2010); Franck (2005); Waibel, Kaushal, Chung and Balchin (2010); Bernasconi-Osterwalder, Johnson and Marshall (2010); Corporate Europe Observatory (2012); Rosert (2014).

² See e.g. Arriazu (2003); Costa, Kicillof and Nahón (2004); Daimler and Frenkel (2003); O’Connell (2002); Roubini and Setser (2004); Teunissen and Akkerman (2003).

³ A quite complete and detailed account of the facts preceding and following the crisis can be found, for instance, in *Continental Casualty Company vs. The Argentine Republic*, Award, 5 September 2008, ICSID, Case No. ARB/03/9, paras. 100-128.

⁴ This law set forth that “the Government would not alter terms of deposits in the banking system”.

⁵ These 27 cases are: *AES Corporation*, ICSID, Case ARB/02/17; *Aguas Cordobesas S.A., Suez, and Sociedad General de Aguas de Barcelona S.A.*, ICSID, Case ARB/03/18; *Anglian Water Group (AWG) PLC v. Argentina*, UNCITRAL; *BG Group Plc v. Argentina*, UNCITRAL; *BP America Production Company and others*, ICSID, Case ARB/04/8; *Camuzzi International S.A.*, ICSID, Case ARB/03/2; *Camuzzi International S.A.*, ICSID, Case ARB/03/7; *CMS Gas Transmission Company*, ICSID, Case ARB/01/8; *Continental Casualty Company*, ICSID, Case ARB/03/9; *Daimler Financial Services AG*, ICSID, Case ARB/05/1; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A.*, ICSID, Case ARB/03/23; *El Paso Energy International Company*, ICSID, Case ARB/03/15; *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P.*, ICSID, Case ARB/01/3; *Gas Natural SDG, S.A.*, ICSID, Case ARB/03/10; *ICS Inspection and Control Services Limited (United Kingdom) v. The Argentine Republic*, UNCITRAL; *Impregilo S.p.A.*, ICSID, Case ARB/07/17; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc.*, ICSID, Case ARB/02/01; *Metalpar S.A. and Buen Aire S.A.*, ICSID, Case ARB/03/5; *National Grid v. Argentina*, UNCITRAL; *Pan American Energy LLC and BP Argentina Exploration Company*, ICSID, Case ARB/03/13; *Sempra Energy International*, ICSID, Case ARB/02/16; *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A.*, ICSID, Case ARB/03/17; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A.*, ICSID, Case ARB/03/19; *Telefónica S.A.*, ICSID, Case ARB/03/20; *Total S.A.*, ICSID, Case ARB/04/1; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa*, ICSID, Case AR-

B/07/26; and Wintershall Aktiengesellschaft, ICSID, Case ARB/04/14.

⁶Twenty-three of these cases were filed under the ICSID, and the other four, under UNCITRAL rules. Within the remaining 25% of the cases, three of them dealt with claims filed by bondholders who challenged the debt restructurings carried out by Argentina in 2005 and 2010. Thus, these cases might also be considered as intimately related to the post-crisis tools implemented by Argentina after the 2001/2 crisis.

⁷More conservative estimates, also quoted by Burke-White (2008), calculated that Argentina's liabilities amounted to 8 billion.

⁸These cases are: Anglian Water Group (AWG) PLC v. Argentina, UNCITRAL; BG Group Plc v. Argentina, UNCITRAL; CMS Gas Transmission Company, ICSID, Case ARB/01/8; Continental Casualty Company, ICSID, Case ARB/03/9; EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A., ICSID, Case ARB/03/23; El Paso Energy International Company, ICSID, Case ARB/03/15; Impregilo S.p.A., ICSID, Case ARB/07/17; LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc., ICSID, Case ARB/02/01; National Grid v. Argentina, UNCITRAL; Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A., 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.

⁹These cases are: ICS Inspection and Control Services Limited (United Kingdom) v. The Argentine Republic, UNCITRAL; Daimler Financial Services AG, ICSID, Case ARB/05/1; Metalpar S.A. and Buen Aire S.A., ICSID, Case ARB/03/5; and Wintershall Aktiengesellschaft, ICSID, Case ARB/04/14.

¹⁰These cases are: AES Corporation, ICSID, Case ARB/02/17; Aguas Cordobesas S.A., Suez, and Sociedad General de Aguas de Barcelona S.A., ICSID, Case ARB/03/18; BP America Production Company and others, ICSID, Case ARB/04/8; Camuzzi International S.A., ICSID, Case ARB/03/2; Camuzzi International S.A., ICSID, Case ARB/03/7; Gas Natural SDG, S.A., ICSID, Case ARB/03/10; Pan American Energy LLC and BP Argentina Exploration Company, ICSID, Case ARB/03/13; and Telefónica S.A., ICSID, Case ARB/03/20.

¹¹These cases are: Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P., ICSID, Case ARB/01/3; Sempra Energy International, ICSID, Case ARB/02/16; and Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa, ICSID, Case ARB/07/26.

¹²Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P., ICSID, Case ARB/01/3 and Sempra Energy International, ICSID, Case ARB/02/16.

¹³These cases are: Azurix Corp., ICSID, Case ARB/01/12; BG Group Plc v. Argentina, UNCITRAL; CMS Gas Transmission Company, ICSID, Case ARB/01/8; Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A., ICSID, Case ARB/97/3; Continental Casualty Company, ICSID, Case ARB/03/9; EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A., ICSID, Case ARB/03/23; El Paso Energy International Company, ICSID, Case ARB/03/15; Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P., ICSID, Case ARB/01/3; Impregilo S.p.A., ICSID, Case ARB/07/17; LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc., ICSID, Case ARB/02/01; National Grid v. Argentina, UNCITRAL; SAUR International, ICSID, Case ARB/04/4; Sempra Energy International, ICSID, Case ARB/02/16; and Siemens A.G., ICSID, Case ARB/02/8. It is worth highlighting that of these 1.4 billion dollars, 507 million correspond to three

cases - Azurix, Aguas del Aconquija and Siemens - which were not related with the package of measures adopted by Argentina as a result of the crisis.

¹⁴In October 2013, Argentina decided to pay the compensations fixed by five of these awards, namely, CMS, Continental, Vivendi, Azurix and National Grid (see Ministry of Economy Resolution N° 598/2013, available at: <http://www.infoleg.gob.ar/infolegInternet/anexos/220000-224999/221161/norma.htm> (last visited 29 November 2014)).

¹⁵In a minority of these cases, the tribunals also found violations of other standards, in particular, of the so-called "umbrella clause" and other standards that usually accompany the FET.

¹⁶See e.g. Metalclad Corporation v. The United Mexican States, Award, 30 August 2000, ICSID, Case No. ARB(AF)/97/1; Técnicas Medioambientales TECMED S.A. v. The United Mexican States, Award, 29 May 2003, ICSID, Case No. ARB(AF)/00/2; El Paso Energy International Company v. The Argentine Republic, Award, 31 October 2011, ICSID, Case No. ARB/03/15.

¹⁷Following CMS, all the awards issued so far against Argentina as a result of the implementation of the package of post-crisis measures have ruled out the possibility that this type of clause could be invoked to render lawful a measure that would otherwise result in the violation of some of the relevant standards provided for under the BITs. In taking such a decision, the arbitrators have stressed that this clause does not refer to the legality or illegality of the measures, but rather to the characteristics of the eventual compensations a host State decides to offer to the investors affected by measures adopted in times of war, armed conflict, revolution, or other types of "national emergency".

¹⁸Although the customary defence of state of necessity was also invoked by Argentina in this case, the Tribunal rejected it without entering in any analysis of the different elements set forth in Article 25 of the ILC Articles on State Responsibility (See BG Group Plc v. Argentina, Award, UNCITRAL, para. 407.).

¹⁹The treaties concluded by Argentina with Germany and the Belgian-Luxembourg Economic Union (BLEU) also contain clauses similar to Article XI of the Argentine-US BIT, but no case filed under those treaties relating to Argentine post-crisis measures has reached the merits phase yet. This explains why of the 14 arbitral awards reviewed only six refer to the analysis of this clause.

²⁰It is worth highlighting that there are at least two aspects that concentrated much of the discussion on the cases analyzed, and in which the decisions of the tribunals were totally consistent. First, all the awards rejected the idea that Article XI should be "self-judging" (that is, not subject to judicial review). Second, all tribunals considered that nothing can prevent the said article from being applied to a context of acute economic crisis.

²¹CMS Gas Transmission Company v. Argentine Republic, Annulment Proceeding, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, ICSID, Case No. ARB/01/8, paras. 124-5, 130-2.

²²El Paso Energy International Company v. The Argentine Republic, Award, ICSID, Case No. ARB/03/15, paras. 613-615, 624 and 665.

²³El Paso Energy International Company v. The Argentine Republic, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, ICSID, Case No. ARB/03/15, paras. 203, 247-248.

²⁴In Enron and Sempra the determination of the test was rather "implicit", since both awards equalled the necessity test under Article XI to that set forward by Article 25 of the ILC Articles on State Responsibility, which requires that the act that seeks to be justified be the "only way" for the State to safeguard an essential interest against a grave and imminent peril.

²⁵See e.g. CMS Gas Transmission Company, Award, ICSID, Case ARB/01/8, para. 328.

²⁶See e.g. Suez, Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales del Agua S.A., Decision on Liability, ICSID, Case No. ARB/03/17, para. 242; Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A., Decision on Liability, ICSID, Case No. ARB/03/19, para. 264.

²⁷See e.g. CMS Gas Transmission Company, Award, ICSID, Case ARB/01/8, para. 323; Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P., Award, ICSID, Case ARB/01/3, para. 300.

²⁸Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P., Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, ICSID, Case ARB/01/3, para. 377 and 393.

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