POLITICAL RISK IN ARGENTINA

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I.- INTRODUCTION

I would like to thank the chairman of Committee H for the kind invitation to participate in this panel.

As an insurance practitioner I have been asked to deal with Political Risk Insurance in Argentina. Honestly, I must confess that it took me quite a long time to decide how to address this issue.

Insurance policies issued to cover political risks in Argentina are generally not governed by Argentine law and eventual disputes under the policies are not carried out in Argentina.

Consequently, my presentation is somehow restricted.

Nevertheless, I thought that it may be of interest to you to know what happened to the Argentine insurers (or the insurance companies authorized to operate in Argentina) during the severe crisis suffered by the Argentine economy.

I will start with a brief overview of the economic crisis and the actions of the Argentine Government to cope with it, I shall then analyze the problems faced by insurance companies, consider if, under Argentine law, the actions of the Argentine Government constitute any of the main two typical risks covered by the political risk insurance (i.e. transfer restrictions and expropriation), and finally, I shall briefly deal with the issue subrogation.

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1 Draft of paper for the presentation of the author in the IBA Conference (September, 2003).
Please be aware that issues related with transfer restrictions and expropriation are mainly topics for lawyers specialized in banking and constitutional law, which are not my fields of expertise. Thus I will give a general view on both issues.

II.- BRIEF OVERVIEW OF THE ARGENTINE ECONOMIC CRISIS

The economic crisis in Argentina, began in December 2001 and has not yet abated. It brought with it a run on the banks solved by a freeze of deposits, a devaluation that saw the local currency lose two thirds of its value, the default of the Government on its bonds, and the resignation of the Nation’s President and of his replacement within two weeks of each other. In order to deal with this crisis Congress enacted certain laws and the President issued several emergency decrees. Emergency Decrees, if issued in accordance with the requirements imposed by section 99, subsection 3, of the Argentine Constitution have the same force and effect as laws enacted by Congress.

Emergency legislation dealing with this particular crisis started with Decree 1570 issued on December 1, 2001. At that time, the peso was still pegged to the dollar at a one to one rate. This decree limited cash withdrawals from the financial system (USD 250/Ps. per week) and established a general prohibition to transfer funds abroad and to export foreign currencies without the prior authorization of the Argentine Central Bank.

Law 25.561 enacted by Congress (the Emergency Law) effective as from 6, January 2002, ended ten years of US dollar-peso parity. On January 10, 2002, the free market rate was 1.70 pesos per dollar. The peso continued to plummet to a low of 3.87 pesos per dollar on June 26, 2002, although it later recovered to 2.98 pesos per dollar. This rate has been relatively stable since then.

The Emergency Law also mandatory converted certain dollar debts as well as utilities rates at 1 to 1 rate. This mandatory conversion is called “pesification.”

In Smith, announced on February 1, 2002, the Supreme Court of Justice, decided that the restrictions imposed by Decree 1570 and its subsequent regulations were unconstitutional, since they caused a “deep and unjustified injury” to the property rights of depositors and

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2 The law created three basic categories of debts: (i) with financial institutions; (ii) between private parties other than financial institutions; and (iii) debts of the public administration.

(i) Debts with financial institutions: certain debts that originally were of less than USD 100,000 (i.e. mortgages for the purchase of a home, personal loans, pledge loans for the purchase of vehicles) were pesified at a US$ 1 to Peso 1 rate. The other loans were not pesified;

(ii) Debts with private parties other than financial institutions became payable at a US$1 to Peso 1 rate, but such payment represents only temporary partial payment made during a 180 day period during which the parties are required to renegotiate their agreement;

(iii) Agreements of the public administration, including rates for public service, could not be indexed and were pesified at a US$1 to Peso 1 rate. The executive branch was ordered to renegotiate the terms of the same.
investors. As in the United States, in Argentina the declaration of unconstitutionality has effects only for the particular case in which it was issued. The legislation declared unconstitutional remains in force. In addition, as opposed to the United States, there is no *stare decisis* in Argentina and, thus, inferior courts are not absolutely required to follow the decisions of the Supreme Court in subsequent cases.

As a consequence of such decision, the President issued Emergency Decree, 214 dated February 3, 2002, which provided for the pesification of all obligations denominated in foreign currency which were subject to Argentine law, including bank deposits. As a general rule, obligations were converted into pesos at a 1 dollar = 1 peso rate while bank deposits were converted at a 1 dollar = 1.40 pesos exchange rate.

Obligations of insurance companies pursuant to insurance contracts were pesified at a 1 to 1 exchange rate. However, the pesified amounts were declared subject to inflation adjustment pursuant to a certain index published by the Government (known as “CER”). In addition, if the values of the good or service resulting from the pesification and subsequent adjustment were higher or lower than the market value thereof at the date of payment, any of the parties could request an equitable readjustment of the price. If the parties do not reach an agreement, the courts were to settle the controversy.

Obligations denominated in foreign currency and not subject to Argentine law were not pesified nor, under a subsequent decree, obligations denominated in foreign currency owed by persons domiciled or resident abroad and payable with funds coming from outside Argentina, in favor of persons domiciled or resident in Argentina, even if subject to Argentine law.

On March 5, 2003, the Supreme Court of Justice declared the pesification of bank deposits unconstitutional. The case concerned a US$ 247 million deposit of the Province of San Luis in Banco de la Nación, a bank wholly owned by the Argentine Government. The lawsuit was brought by the Province of San Luis against Banco de la Nación, the Argentine Government and the Central Bank. The ruling was reached by a divided vote—five to three, the ninth Justice having abstained. Of the five votes constituting the majority, three Justices issued separate opinions. The Supreme Court did not decide on the constitutionality of the

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3 Banco de Galicia y Buenos Aires s/ Solicitud intervención urgente en autos: “Smith Carlos Antonio v. Poder Ejecutivo Nacional o Estado Nacional s/ sumarísimo, sentencia, B.32 XXXVIII, 01/02/02.”
4 Decree 704 of April 30, 2002.
5 The decision was based on four grounds:
(i) The pesification rule was an invalid exercise of a delegated power, since Emergency Law 25,561 that ended the convertibility system, only empowered the Executive to preserve the capital of the bank depositors and restructure the obligations in a manner compatible with the solvency of the financial system. This language does not include changing the currency of the deposits.
(ii) The pesification rule was not valid either as an Emergency Decree because the economic situation had not changed from the date when the Emergency Law was enacted (January 6, 2002) and the date when the pesification rule contained in section 2 of Decree 214 was issued (February 3, 2002). The fact that Congress was in session and enacting laws during this time, and that no new emergency had taken place, deprived the Executive from its emergency legislative powers.
pesification of obligations not related with the financial system (e.g. debts of insurance companies).

III.- IMPACT OF THE CRISIS ON ARGENTINE INSURANCE COMPANIES

1.- The regulatory framework

Insurance companies authorized to operate in Argentina are required to invest their reserves pursuant to an investment menu provided by law and regulated by the National Superintendency of Insurance. Until 2001, Argentine insurers were required to invest most or all of their reserves in Argentina.

From August 2001, they were allowed to invest up to 50% of their required reserves with respect to new insurance policies issued from that date onwards in certain foreign assets. However, this alternative was not available for the required reserves constituted prior to August, 2001.

In order to take advantage of this new possibility, some life insurers terminated certain existing large insurance contracts and issued new policies with the sums accumulated under the rescinded policies.

After January, 2002, all insurance contracts denominated in foreign currency executed in Argentina and subject to Argentine law, were pesified at a 1 to 1 rate, plus inflation adjustment.

Not only the assureds but also the insurers have suffered the restrictions imposed on the financial system, to the extent that some insurance companies have filed legal actions ("amparos") to protect their investments from the pesification.

Due to the emergency legislation, a large proportion of the bank deposits owned by insurers in order to fulfill their reserve requirements, were pesified. Other large proportion of the insurers' reserves were held in Government bonds which have thus been affected by the Government's default.

(iii) The pesification rule is a final and substantial (and thus unconstitutional) curtailment of the property rights of the depositors, as it deprives them of a substantial part of the value of their dollar deposits. This conclusion arises from the comparison between the rate of exchange of the dollar and the amount of pesos that would be payable according to the pesification rule. It therefore altered the essence of the property right of the depositors and thus exceeded the limits imposed by Supreme Court precedents on emergency legislation that restrict individual rights.

(iv) Previous law 25,466 of October 2002, which declared bank deposits intangible, created vested rights in favor of depositors which the Emergency Law tried to respect but which the pesification rule violated.

6 Section 35 of Law 20,091.
7 Resolution 21,523/92.
8 Resolution 29,211 of the National Superintendency of Insurance;
2.- The impact of the crisis on insurance and reinsurance contracts

a) Non-Life Insurance Contracts

In this type of contracts, the issues related with pesification were less relevant than in life insurance.

As a general rule a non-life insurance contract tends to compensate a loss or a damage. Pesification has little impact in cases in which the value of the asset to be replaced remained in pesos, particularly since the emergency regulations gave the parties the possibility to request an equitable readjustment of the price. For the readjustment of the price it should also be taken into account that the reserves made by insurers were also pesified. Thus, it would be unfair to force an insurer to repay a policy in dollars, while its reserves were pesified.

An insurer, required to indemnify a loss pursuant to an insurance contract which exceeds the value of the loss suffered by the assured, would be entitled to request a fair readjustment of the contract, in order to avoid an unfair enrichment of the counterparty. A simple example illustrates the point. Assume a house insured against the risk of fire in USD 100,000, which after the pesification is worth USD 50,000 (i.e. 150,000 pesos). If this house is completely destroyed by fire, it should be indemnified at such latter value, and not at USD100,000 (as stated in the original contract) or at 100,000 pesos (due to pesification).

The regulations have also considered the situation of imported assets. If this type of goods had to be replaced, their price would not be subject to the pesification. Very recently, in an arguable decision, the Commercial Court of Appeals of the City of Buenos Aires held in this sense with respect to a lost imported car.

b) Life Insurance Contracts

Life insurance contracts, instead, were seriously affected by the emergency rules. Specific decrees were issued to deal with them.

(i) Decree 905

Subject to certain restrictions, section 9 of Decree 905 provides that in life insurance contracts entered into before February 3, 2002, and denominated in foreign currency, insurers have the choice to satisfy their obligation to pay surrender values, total or partial withdrawals or loans taken out by the assured, by delivering dollar denominated bonds of the Argentine Government valued at par.

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9 Mainly, Decree 320 issued on February 15, 2002.
11 Decree 905 was issued on May 30, 2002.
The last paragraph of section 9 provides further that the right to deliver these bonds will not apply to those policies denominated in foreign currency where the policy has been expressly guaranteed to the policyholder by the insurer’s foreign home office with respect to the solvency of the local insurer. In these cases, the insurers’ obligations must be paid according to the terms originally agreed by the parties.

The issue arises on whether the last paragraph of Section 9 of Decree 905 is discriminatory against those Argentine insurers that had some or all of their policies guaranteed by their foreign controlling shareholder. In effect, policyholders may argue that those Argentine insurers should be excluded from the possibility of paying with Government bonds or from the pesification regime altogether.

Although the wording of the last paragraph of Section 9 is far from clear, I think that such a construction would be discriminatory because it would imply that some Argentine insurers would be treated differently from other Argentine insurers with no reasonable basis for such a distinction. The contingent guarantee offered by a foreign parent company should not be sufficient grounds to justify a different treatment. Even if by means of Decree 704 a policyholder may argue that the foreign parent company guaranteeing its Argentine subsidiary cannot make use of the benefits of the pesification regime because it is domiciled abroad, the guarantee remains an accessory of the principal obligation assumed by the Argentine insurer and thus, if the Argentine insurer’s obligation was pesified, the guarantor should not be obliged to pay more than the guaranteed obligation.

During the 1990s, Argentina executed many treaties for the protection of investments with different countries, including the USA, Britain, Germany, France, Italy, Spain, the Netherlands, Australia, Switzerland, and others. These treaties generally prohibit a party from discriminating against nationals of the other party. In the treaty with the USA, Argentina reserved the right to make or maintain limited exceptions to national treatment in certain sectors, including the insurance sector. However, Article II, Section 1 of the Treaty limits the scope of such exceptions so that “any future exception by either Party shall not apply to investments existing in that sector or matter at the time the exception becomes effective”. In addition, that same Section provides that “the treatment accorded pursuant to any exceptions shall, unless specified otherwise in the Protocol, be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country”.

Under the referred treaty provision, it may be argued that the exception contained in the last paragraph of section 9 of Decree 905, is discriminatory and thus constitutes a breach of said treaty which authorizes American shareholders of an Argentine insurer to file a claim against the Argentine Government for compensation. Under the U.S. Treaty, the claim may be brought, at claimant’s option, before an Argentine court or before the International Center for the Settlement of Investment Disputes (ICSID), based in Washington, D.C.

(ii) Decree 558\textsuperscript{12}

\textsuperscript{12} Decree 558 was issued on March 27, 2002.
Decree 558 (as regulated by the Insurance Superintendent) allows insurance companies to submit restructuring plans for the approval of the Superintendent. This rule is primarily addressed to life and retirement insurance companies. Most of these insurers have to re-negotiate their insurance contracts, originally denominated in US Dollars. Restructuring plans usually provide for the conversion of Dollars to Pesos at a fixed exchange rate or for waiting periods during which the assureds may not surrender their policies on pain of suffering a significant deduction. The Superintendent requires that these plans guarantee that the insured will be recognized a sum at least equal to what would result from applying the “pesification” rules (i.e., Peso 1 = US Dollar 1 adjusted by CER) to the sums in Dollars accumulated under their policies by 6 January 2002. The plans, once approved by the Superintendent, must be proposed to the assureds, who are entirely free to accept them or not.

The situation is much more complicated in the case of life insurance contracts executed in foreign currency (i.e. mainly in US dollars). In this case, both parties are obliged under the contract to pay in US dollars in spite that the majority of their savings and incomes have been affected by the economic crisis and the default of the Argentine Government.

c) Reinsurance

In principle, reinsurance may be equated to non-life insurance inasmuch as insurers may only claim from reinsurers a portion of whatever the insurers may have paid out.

It is contested how much reinsurers owe with respect to losses that had been paid by insurers before the Emergency Law entered into force (6 January 2002) but that had not been recovered from reinsurers by that date. In principle, pesification rules apply only to contracts agreed in a foreign currency and governed by Argentine law. Even in these cases, foreign debtors may not benefit from the pesification regime. Therefore, foreign reinsurers may find it difficult to argue that the sums that they owe were pesified.

Accordingly, if a settlement had been reached before 6 January 2002 between an insurer and a foreign reinsurer, the latter paying with funds originating outside Argentina, the reinsurer may not benefit from the pesification.

As for reinsurance premiums, it is necessary to distinguish between contracts governed by Argentine law from those governed by a foreign law. Under those governed by Argentine law, premiums have been pesified at a 1 to 1 rate and must be adjusted by CER. On the other hand, premiums in contracts governed by a foreign law have not been pesified. There are no restrictions to transfer funds outside Argentina to pay reinsurance premiums.

3.- Claims Filed by Assureds

Typically, in life insurance, retirement plans or annuities, insurers open an individual account for each assured and part of the premiums collected are reinvested in different types of funds. These investments are then credited to the individual accounts of each assured. The assured may request the cash surrender value at any time, usually subject to a
penalty. The value of the units of ownership will depend on the performance of the funds where the money was reinvested. With certain regulatory restrictions, insurers may invest in public or private bonds, common stock, fixed-term deposits, sight deposits, etc., either in Argentina or abroad.

As a consequence of the pesification, assureds with plans in US dollars have filed lawsuits against insurers—and in some cases against the Argentine Government as well. Plaintiffs generally seek to obtain their cash surrender value in US dollars. Holders of annuities seek their periodical payments to be made in dollars. Some plaintiffs go as far as seeking the reimbursement of the total amount of the net premiums paid to the insurer as if they were bank deposits.

Some lower courts have admitted these claims, or have ordered precautionary measures, based on some of the following grounds: (i) the currency agreed in the policies is one of the risks assumed by the insurer in the insurance contract, (ii) the emergency regime is designed only for the financial sector and insurance companies are not financial entities, (iii) sticking to the originally stipulated currency is not absolutely impossible from a legal standpoint (as it would be, for example, if the Argentine Government would have prohibited the purchase of the foreign currency involved), (iv) in cases where a foreign company or economic group guaranteed the solvency and contractual conditions of its Argentine subsidiary insurer, courts have excluded those insurers from the emergency regime. In most of these cases, the emergency regime was declared unconstitutional.

However, not only the losses but also the surrender values are paid with the insurers' reserves which, as mentioned before, have been severely affected by the crisis. In principle, the applicable regulation to these contracts would be section 8 of Decree 214, according to which any obligation to deliver a certain sum of money will be calculated at the exchange rate 1 peso per 1 US dollar or its equivalent in other foreign currency, plus inflation adjustment, subject to a possible readjustment as described previously.

Should the effect of the pesification on the insurer's reserves be disregarded and insurers forced to pay in US dollars, the rest of the assureds will suffer the consequences of the potential insolvency of the insurers.

Nevertheless, it is to expect that the Supreme Court will rule on these matters.
IV.- MAIN RISKS COVERED BY POLITICAL RISK INSURANCE

When evaluating the feasibility of a certain investment, investors are faced with a variety of risks that affect their expected returns. Besides the intrinsic risks involved in any investment, there are those that can be categorized as external risks, because they do not derive directly from the specific project but from external sources (i.e. interference by the host government). This is specially true in emerging markets, given their frequent economic and political instabilities.

Political risk insurance is a way to mitigate these uncertainties. Thus, it may be said that political risk coverage is offered for specific situations of governmental interference, namely “currency inconvertibility/non transfer” and expropriation.

Although the scope of coverage available in the market may vary according to the conditions offered by each insurer, it may be said that currency inconvertibility/non transfer and expropriation are standard.\textsuperscript{13}

I will briefly analyze if any of these risks occurred during the Argentine crisis.

1.- Currency Inconvertibility - Transfer Restrictions

Devaluation is usually not a covered risk.

Although the wording differs from policy to policy, broadly speaking it may be said that currency inconvertibility/non transfer means:

\begin{itemize}
\item[I) Any action or failure of the host country government that prevents the insured or the foreign enterprise or the borrower\textsuperscript{14} directly or indirectly from:
\item[(i)] Legally converting local currency into loan currency to make a scheduled payment;
\item[(ii)] Legally transferring outside of the host country the amount of loan currency which constitutes a scheduled payment; or
\item[II) Failure by the government of the host country to effect such conversion and/or transfer the funds on behalf of the borrower\textsuperscript{15} or the insured or the foreign enterprise.
\end{itemize}

\textsuperscript{13} War and violence and breach of contract are also typical risks covered under political risk insurance.
\textsuperscript{14} The borrower is the party that has received a loan from the insured and according to the loan agreement which is expressly mentioned in the insurance contract, is obliged to make scheduled payments to the insured.
\textsuperscript{15} In both cases provided that:
\item[(i)] The borrower can at the beginning of the policy period lawfully convert local currency into the loan currency and transfer it to the insured’s country; and
\item[(ii)] The borrower is unsuccessful in making the scheduled payment for the duration of the waiting period provided that the insured and the borrower have made all reasonable efforts to convert and/or transfer the currency through lawful channels; and
In both cases a waiting period of 180 days is stipulated. This means that in order to suffer a loss, the restriction should remain in force for 180 days since the date on which the insured event occurred (i.e. the day the restriction arises).

It may be queried whether the economic measures taken by the Argentine Government since December 2001 have prevented parties in Argentina from converting local currency or transferring loan currency abroad.

None of the measures taken by the Argentine Government to cope with the crisis prevented absolutely the possibility of buying foreign currency. Thus, it may be argued that no such insured event has occurred.

Decree 1570 (in force from 1, December 2001) and successive regulations have limited cross-border transfers. In general, individuals and companies that are Argentine residents have been allowed to buy foreign currency and to transfer it abroad if they are part of a cross-border transaction (a transaction performed between Argentine and non-Argentine residents), albeit in many cases subject to prior Central Bank approval.

Thus, transfers abroad made by the non-financial private sector, the financial sector and state-owned companies whose budgets are independent from the national budget, for payment of principal of financial loans, revenues and dividends, made within 90 calendar days after February 11, 2002, required prior approval from the Central Bank.

Communication “A” 3471 exempted from this requirement obligations of the private sector corresponding to: a) debts with international agencies; b) debts with banks that participate in the financing of investment projects co-financed by International Agencies; and c) debts with official credit agencies or guaranteed thereby.

In the case of insurance companies, payment of reinsurance premiums abroad required, in addition to the Central Bank’s authorization, the prior authorization of the National Superintendency of Insurance.

Thus, there are reasonable grounds to maintain that transfers of currency outside Argentina were not prohibited, but only subject to a prior authorization from the Government.

In addition, some legal means to transfer funds abroad without the prior authorization of the Central Bank were considered to be still available in the midst of the crisis. For example, individuals had the chance to acquire in pesos securities listed in Argentina and in foreign exchanges, export them, and sell them abroad for dollars. Of course, the volume of these transactions depended on the depth of the market of those securities and had a significant cost.

(iii) The first attempt to convert local currency for, or transfer a scheduled payment or part thereof was made on or within 90 days after the original due date of the scheduled payment and the scheduled payment was due for payment within the policy period.
In this way, the insured would have fulfilled its duty to minimize the loss, an obligation which constitutes a general principle of insurance law.

According to this principle, once a loss is suffered it is the duty of the assured to take such measures as may be reasonable for the purpose of averting or minimizing the loss.\(^1\)

According to Argentine law if the assured acting with willful misconduct or gross negligence breaches this duty the insurer is released from its obligation to indemnify the loss, to the extent of the reduction that would have resulted in the loss, had the insured complied with its obligation to minimize the damage.

2.- Expropriation\(^2\)

a) Expropriation under Standard Policies

Although the wording may differ from policy to policy, in “Private Borrower Insurance For Commercial Lenders”,\(^3\) the insured event constitutes:

\[\text{Any legislative, administrative or judicial act, including confiscation, expropriation, nationalization and deprivation by law, order, decree, regulation, etc, by the foreign government taken within the policy period by the Insured’s Government and/or the Foreign Government which:}\]

\[(a) \quad \text{Is the proximate cause of a scheduled payment default; or}\]

\[(b) \quad \text{Expressly deprives the insured of its rights as a creditor in respect of a Scheduled Payment, which is already in default, including rights against collateral security, and/or commercial guarantees of repayment provided to the insured under or in support of the Loan Agreement.}\]

In policies covering the investments made by a company in other countries the “Expropriation Insurance” includes the following insured event:

\[A) \text{ Expropriatory Act}\]

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\(^1\) Insurance Act Section 72. A similar principle governs under the English Marine Insurance Act, section 78 (4).

\(^2\) In some policies it is described as Adverse Government Action and within this concept expropriation is included.

\(^3\) This is a policy in which the insured has a loan agreement and the policy covers the scheduled payments that the borrower should made under such agreement;
A.1) Means an act or acts commencing within the policy period not limited to expropriation but including also confiscation, nationalization requisition and sequestration by law, order or administrative action of the government of the Host Country which:

a) Expressly and permanently deprives the insured of all or part of their shareholding in the Foreign Enterprise; or

b) Expressly and permanently deprives the Foreign Enterprise of the ownership, control or use of or possession of all part of its fixed and current assets; or

c) Expressly and selectively prevents or restricts all or part of the operation of the Foreign Enterprise; so as to

   (i) Cause the permanent and total cessation of all or part of the activities of the Foreign Enterprise; or

   (ii) Render the continued operation of the Foreign Enterprise by the insured Economically Unviable for the continuos period of 6 months.

d) Expressly or permanently deprives the Insured of inventory or equipment carried on its books which is located in the Host Country

A.2) The breach of a project agreement by the government of the host country or failure or refusal of a government of a host country to perform their obligations under a project agreement or the termination or cancellation of a project agreement by a government of a host country where it has no right to terminate, or cancel the said project agreement under the terms and conditions thereof.

PROVIDED ALWAYS that the breach, failure, refusal, termination or cancellation commences during the policy period and is a fundamental and continuing breach of the project agreement by the government of the host country, and

PROVIDED ALWAYS that an arbitration award or court judgment has been obtained against the government of the host country under the arbitration or dispute settlement provisions of the applicable project agreement, or under international law if there are no other provisions for dispute resolutions in the project agreement and such award or judgment is not honored within 90 days of the due date for payment of said award.¹⁹

¹⁹ Article 10 of MIGA guarantee covers “Breach of Contract”, which covers a loss due to the inability of the guarantee holder to enforce an award rendered in its favor against the host government, provided that:
(a) the award is for a specified monetary amount and has been rendered pursuant to breach of a material obligation of a project agreement or repudiation of such project agreement by the host government;
(b) the guarantee holder or the project enterprise has made reasonable efforts to exhaust available remedies to enforce the award against the host government for a period of 12 consecutive months from the date of the award; and
B) Selective Discrimination

Means the imposition of any, law, order or decree import/export restriction by the Government of the host country which is applied selectively against the foreign enterprise which

a) Expressly and selectively prevents or restricts the operation of a foreign enterprise; or

b) Legally prevents the insured from participating in the benefits of the foreign enterprise

Thereby rendering the continued operation of the Foreign Enterprise by the insured Economically Unviable for a continuous period of 6 months.

C) Forced Divestiture

Means the imposition of any, law, order or decree of the insured’s country that expressly

a) Requires the insured permanently to divest itself of all or part of its shareholding in the foreign enterprise; or

b) Prevents or restricts the operation of the foreign enterprise or use or possession of the assets of the foreign enterprise so as to cause the permanent and total cessation of their activities.

D) Forced Abandonment

Means the complete and necessary abandonment of the foreign enterprise for a continuous period of 6 months arising in circumstances beyond the control of the insured in consequence of the insured being required or advised by the government of the insured country.

b) Expropriation and Similar Cases under Argentine Law

In case the relevant court were to decide that Argentine law governs in order to determine if an action constitutes an expropriation, the Argentine Expropriation Law No. 21,499 would be applicable. This law defines expropriation as the transfer of the ownership of any good or asset to the State, whether National, Provincial or Municipal, or even to a private person. Pursuant to the Argentine Constitution, expropriation requires the prior declaration by law of public need and the payment of proper compensation by the Government.

(c) the refusal to enforce the award by the host government is arbitrary and/or discriminatory
There are cases that do not qualify as an expropriation in the typical sense, since the ownership of the goods or assets is not transferred to the State, but still constitute a deprivation of someone’s property or its value, which is subject to indemnification.

The responsibility of the State for the damages caused by its lawful activity are not specifically regulated under our legal system. However, in several precedents, our courts have held the State liable applying the principles of expropriation.20 This was the case in “Mario Elbio Canton v. Gobierno Nacional,”21 involving an international sale of goods that was affected by a subsequent decree of the Argentine Government that prohibited certain imports to help local industry.

The investment protection treaties that I mentioned before, also protect investments against expropriation and measures tantamount to expropriation. This language has been construed as protecting against “creeping expropriation”. According to foreign scholars, “creeping expropriation stands for all forms of unexpected changes in the institutional environment that gradually reduce the value of the investment [...] [T]hey can be either both economy-wide or they can be specific to the sector.”22

Following the above-mentioned precedents of our courts and the wording of the investment protection treaties, some of the emergency measures taken by the Government may be considered tantamount to expropriation.

However, in this particular case, our courts may be reluctant to award damages given the fact that the emergency measures had a negative impact on practically the whole society. Holding the State liable for those damages may completely preclude the Argentine Government from complying with its public ends.

The argument that the impact of the emergency measures fell upon almost the entire society may be confronted with the fact that not all the obligations denominated in foreign currency were pesified. Since those credits governed by foreign law were kept in their original currency, the negative impact of devaluation was especially suffered by the reduced number of debtors holding obligations governed by foreign law.


21 Fallos 301:403.

With particular reference to pesification, the Supreme Court, in the San Luis case, decided that the pesification of bank deposits is a final and substantial (and thus unconstitutional) curtailment of the property rights of the depositors, as it deprives them of a substantial part of the value of their dollar deposits. This conclusion arises from the comparison between the rate of exchange of the dollar and the amount of pesos that would be payable according to the pesification. It therefore altered the essence of the property right of the depositors and thus exceeded the limits imposed by Supreme Court precedents on emergency legislation that restrict individual rights. Justice Vázquez, in his concurring opinion, expressed that pesification constitutes an expropriation not declared by law and not properly indemnified.

The Supreme Court has not yet ruled in cases not involving bank deposits. These arguments could be applied to other cases of pesification, but a case by case examination is required.

V.- SUBROGATION

Subrogation is contemplated by the Argentine law (section 80 of the Insurance Act) and it is usually included in the general conditions of the insurance contracts.

In the event of any payment made under the policy, the insurers shall be subrogated to all of the insured’s rights of recovery against any person or organization, and it is the assured’s duty to take all necessary steps to secure such recovery rights against the liable third party.

In order for an insurer to be able to claim against a third party, the assured should have a course of action against such third party.

Consequently, subrogation only operates if the insured has an action to claim damages. This is an issue that has to be determined on a case by case basis. For example, if an insured is expropriated without proper compensation, and that governmental action triggers the coverage, the insurer will only have a claim against the host government if the assured had a claim against it.

Under Argentine law subrogation operates automatically and the insurer may sue in its own name. In other jurisdictions the nominal plaintiff must always be the assured, as the insurer has no locus standing to sue in its own name and the only possible claim is that of the assured. Subrogation affects the right to the fruits of the action and the control and conduct of the litigation but it creates no new cause of action. The insurer may however take an assignment of the assured’s cause of action, in which case it is vested in the insurer a right to sue the third party qua assignee.

Finally, it is arguable that an insurer may be subrogated in the rights of an insured under a bilateral investment protection treaty. These treaties grant rights to foreign investors in their capacity of foreign nationals. It may be argued that these rights may not be assigned. In

23 London Assurance Co. v. Sainsbury (1783) 3 Doug. 245.
these kind of cases, the insurer may request the insured to promote the actions under the treaty for the benefit of the insurer, who would in fact control the lawsuit.