

Investment Treaty Arbitration

Contributing editors

Stephen Jagusch QC and Epaminontas Triantafylou



2018

GETTING THE
DEAL THROUGH

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Background

1 What is the prevailing attitude towards foreign investment?

Nearly two years have passed since a non-Peronist government was elected at the end of 2015 after more than 10 years of the personalistic and rhetorically populist regime of Mr Kirchner, first, and Mrs Kirchner, afterwards. There has been a significant change in the government's attitude towards foreign investment.

The past decade (in which Argentina was helped by an international commodity prices boost in the first half) experimented with a closed, regulated economy based on an ever-growing fiscal deficit fuelled by one of the highest inflation rates in the world, with capped or frozen prices for energy and utilities, over which subsidies were spent to make prices for energy consumption incredibly low.

Price and foreign trade controls (both on exports and imports) or discriminatory taxation were imposed during this time, with a foreign exchange ring-fenced by restricting access to the official foreign exchange market (and thus having an increasing gap with real foreign exchange rates).

International conflicts were caused by the government opposing the remaining holdouts, dissatisfied with the huge haircut obtained with the sovereign debt restructuring, as well as foreign investors claiming compensation through international investment arbitration for the creeping expropriation of their investments and sunk costs.

Warnings were given that such trends would be further aggravated, bending opposition and the judiciary, and thus causing the electoral defeat of the regime.

The new government understood that the alienation to the world economy caused by all of the above factors was the first issue to be addressed, and immediately freed foreign exchange of any controls, closing the gap with the real exchange rate, successfully avoiding outflows (assisted by high-yield local currency government bonds that captured local funding) and reaching a stable exchange rate in a free market.

In parallel, settlement with the holdouts was reached (with reduction of the past interest portion) at the New York court, as a move to restore credibility in sovereign debt, which proved successful as the government then raised significant funds at international markets to indirectly restructure the debt that was being cancelled with the holdouts.

Foreign trade has also been subject to significant change, with reductions of export restrictions and tax withholdings on the same (mainly agriculture and farming), thus inducing the reversion of the trend of investment decline in such sectors, the most competitive ones in Argentina.

The government has chosen to make a gradual transition from one of the highest inflations in the world while avoiding choking the welfare state benefits for the poor (30 per cent of the population). Thus, the 2016 inflation of circa 41 per cent was kept on hold to reach a current rhythm of less than 20 per cent a year while keeping strict monetary policies through local currency sovereign bonds and launching sovereign foreign currency debt issuances taking advantage of the significant reduction of the country risk factor, and successfully creeping out of recession to a current 3,5 per cent GNP growth as from now on, with a combination of renewed confidence in agriculture (major exporter) and special infrastructure programmes.

Credibility is linked with the subsistence of the government in power, and the primary elections (in Argentina, a test of the following

October mid-term elections) have proven to be successful to it, forecasting an increase of its share both in provincial governments and at the national legislative level. The general elections held thereafter have not only confirmed this trend, but have been a landslide majority for the government in most of the states and districts of Argentina.

In addition, the symbol of the old regime, Mrs Kirchner, ridden with criminal prosecutions on corruption charges, reached a tie (at the preliminary election) with the governmental candidate in the heart of the Peronist enclave, the third industrial ring of the greater Buenos Aires Areas, and loosening its grip on all other zones. The Peronist movement, split in three different branches, is distancing itself from Mrs Kirchner, and considering that some kind of negotiated path has to be reached with the government to keep Argentina moving.

Investors still put their expectations on hold, to confirm a declining path of the prior high inflation, and the stabilisation of a balance of energy prices emerging out of the suppressed or capped prior tariffs in the past. A substantial (equal to 20 per cent of GDP) registration of previously undeclared capital from Argentines held abroad has resulted from the one-shot offer of tax relief and amnesty.

As explained below, the government has launched programmes in several rounds offering public bidding for foreign investment in non-traditional (renewables) energy and thermal energy. The energy deficit has however experienced, in terms of foreign currency amounts, a relief due to the reduction of imported energy prices (Argentina was self-sufficient but lost this status through the above-mentioned decade-long policies of interference with the energy industry and politically regulated prices).

As for the making of a new open market of energy prices, there is still much to do, specially due to the difficulties brought by the decline in international energy prices while the reserves-rich Argentina is struggling to become cost-competitive; no clear paths are available to surpass the government's support of crude oil, incremental gas and non-traditional hydrocarbons exploitation, which is subject to a future squeeze to close the government's deficit gap.

Infrastructure programmes are also being set, shifting governmental resources to public works with the participation of the private sector, either through classic bidding or through public-private participation on the basis of the present regulation of a loose programme of public private partnership, which still has to prove itself efficient.

Potential foreign investors are hovering around with the confidence of a friendly investment climate, radically different to the past. Transparency has been bolstered with reputable key governmental officers, and a strong revival of the independence of the judiciary, that led to a huge number of corruption investigations by the courts *sua sponte*.

The government continues to coordinate fiscal, foreign exchange and monetary policies to curb inflation; reducing monetary expansion and gradually reducing interest rates on short-term notes issued by the government (though still using this instrument beyond their natural short cycle for reordering financial markets, feeding speculation that outlives a natural transition period for these policies). A delayed and much-expected tax reform is expected after the October mid-term election, to reduce the overall taxation ceiling and changing the taxation mix not to hinder competitiveness. One of the much-expected changes should be addressing inflation adjustment generally, or market appraisal of fixed assets, to avoid the continuing burden of income tax on nominal profits.

A wholly free foreign exchange market, as a consequence of which inflows and outflows, dividends, repatriation of capital, financial investments abroad, and export proceeds to be remitted to Argentina in a five-year limit, have been the subject of a lift of prior restrictions.

As explained previously, Argentina has a strong participation of foreign capital in the industrial sectors, which is higher than 60 per cent and is present in every sector: manufacturing, services, heavy industry, construction, pharmaceuticals, the automotive industry, communications, banking, entertainment, energy, mining and so on.

The automotive sector has confirmed expansion plans as the market has rebound, even if the automotive trade with Brazil suffers due to the latter's institutional crisis after the successful impeachment of its former president by parliament and partial spin-off of its major oil company Petrobras.

During the 1990s, significant foreign direct investment (FDI) was made in the Argentine energy and infrastructure sectors (more than US\$55 billion). The following decade witnessed significant investment in the mining sector under a special legal regime. Foreign investment in banking has increased in the past 20 years and, because of the current changes in trends, has experienced a boost in its business as new private companies' securities are being placed in the market, and the sovereign bonds market is also growing (though the size of fiduciary money aggregates is slowly increasing in terms of percentage of GDP).

The areas where there will be a recovery, because of the realignment of prices and markets as per the policies put in place, are those related to:

- the recovery of agriculture and farming, both in terms of input (equipment) and output (transformation of agricultural products), though at present hit with floods that are slowing its impetus;
- infrastructure, due to open bidding (free from past cronyism) for public works, advertised as the engine to overcome stagnation and reinitiate the economic cycle, and public-private participation projects; and
- energy, simply because of the strong commitment by the government to correct the relative prices, regulatory-induced, imbalance of the sector and thus gradually eliminate government subsidies to consumers, for which purpose a return to basics is inescapable. The government received at the end of 2016 six times as many offers, both for thermal and renewable energy, as submitted in the tenders, and the limited size of the experiment will need to adjust to a general framework for a deregulated market, that is still lacking.

A regulatory-induced gradual increase of the renewables share of the power generation matrix is anticipated to reach 8 per cent of the aggregate power supply by the end of 2017, now postponed (it is less than 3 per cent at present (excluding hydro)). This has been attended by successive rounds (round 1, later on extended by round 1.5, and round 2, by Res.MEM 275/17, for which 223 offers were received) of public bids for 20-year supply agreements, at a price subject to escalation, to attempt to reach such targets in the supply side. The large consumers (industry, etc) with a capacity demand above 300KW are forced to comply with the 8 per cent quota of renewables with respect to their own overall power demand.

But the regulation of the aggregate demand, by allowing some sort of competition with such power purchased by the government, with (a) the remaining renewables offers that may be installed for the industrial consumers, or (b) renewables energy autogenerated by the large consumers, is subject to an iron-fisted choice, once every five years, to decide if its 8 per cent renewables consumption quota will be filled; either through purchases from CAMMESA or through the combination of (a) and (b) above.

In order to give some flexibility, it was further admitted that the large consumer might avoid making such a choice, thus both consuming renewables' sourced energy from the CAMMESA's Joint Sales pool and from other renewables' sourced energy, but then facing incremental costs for power reserve and other charges. Thus a quota system segregating the captive renewables demand from the rest of the energy aggregate supply, and a forced choice between (i) government-backed supply (at median price of all the bids referred above) and (ii) the supply in (a) a supposedly free market, or (b) auto generation by large consumers themselves, seems to be a confusing method to assure the government, by making the large consumer's bet of opting out quite risky, that the already acquired future production by the government from the winning bidders will effectively face its captive demand.

In effect, the individual default of the yearly quota of renewables consumption by each large industrial consumer, and ensuing power consumption to match such deficit, from other sources than the renewables contracted out of the governmental offer mentioned in (i) above, will be heavily penalised.

The intermittency of renewables, which were allowed to bid with no capacity commitment, pretends to be solved by the government through offering capacity back-ups for the pass-through of such contracts to large consumers, at a price that will be the subject of separate bids, with unpredictable results.

The complexity of the system is compounded by the grid shortcomings, with a priority of dispatch adding to the uncertainty of making such choices on a mid-to-long term basis.

To boost investments while waiting for the yet-to-be implemented power open market, new bid rounds are called (Res SE 287/17) for power supplies from newly converted to combined natural gas-fired cycle turbines, or from cogenerators, to be dispatched through CAMMESA, the dispatch organ and exchange broker, created to be the state's mega trader in the regulated power market.

The present depressed international prices affect crude oil exports, and local demand has been supported by a system of temporary subsidies which by now should give way to better and more flexible mechanisms for anti-cyclical policies, in order to avoid stagnation of the sector.

In economic terms, paradoxically the state, which for many years capped domestic crude oil prices and taxed exports heavily, subsidises the domestic crude oil price in the last years of the cycle, acting in its effects as a compensation fund, with no institutional recognition of such role, however. Had this been explicit instead of being by chance the result of the drive of economic forces, it would have been a meaningful instrument of stabilisation of the hydrocarbons market prices and an incentive to invest.

In anticipation of such change scenarios for after the end of these subsidies, the merger of the telescoping companies controlled by Messrs Bulgheroni, and shared with BP and a major Chinese oil company (CNOOC) as partners, Panamerican Energy, Axion Energy (refinery and gasoline stations grid) and a holding company, Bidas, will give life to a mega company with full vertical integration across the whole oil and subproducts sectors, to face increased efficiency with expanded markets, beyond market sales of crude oil, and allowing the development of chemical manufacturing (solvents, fertilisers, plastics out of polypropylene and pesticides) thus going beyond energy fuels.

Dow Chemical has been looking for another integration path by means of adding upstream prospects to assure feedstock for its petrochemical plant in Bahía Blanca, in the province of Buenos Aires.

FDIs, which were active in the exploration and development of oil and gas fields, through direct contracts with the once again state-controlled YPF – the major company acting in such areas, on account of its sizeable areas under concession in the Vaca Muerta and Los Molles shale formations – are now taking a break, due to the still-to-be-defined framework, aside from the soon-to-end special programmes for price enhancement of incremental and non-traditional natural gas. Argentina has been ranked by EIA as the third-largest shale oil and gas resources holder in the world (with good prospects on the basis of abundant water resources and pipeline capacity), with players such as Chevron, Exxon, Total, Shell, Pemex and Petronas attracted to exploring and developing such new formations.

Resolution of the Minister of Energy 46/17 has extended the US\$7.5/MMBtu government's price support for non-conventional (tight or shale) gas to be continued in 2018, and with a declining path until 2021, guaranteeing such floor with respect to the median price of the aggregate natural gas (conventional or not) sales of the applicant.

The aim is to support investments by YPF as the dominant shale gas holder of title and, to a lesser extent, Total, Panamerican Energy, Wintershall, and also Shell, ExxonMobil and the new project by Tecpetrol, all in the Neuquén province basin. Tecpetrol has recently announced bold plans to expand its rig operations (and horizontal wells) to reach substantial investments and ensuring shale natural gas production increases in the years to come, based on the need to reduce the gas import gap, the extended concessions granted, and productivity curves assisted by cost reductions, trade swaps and other factors. Thirty-five-year extension of concessions is the latest trend, by converting concessions to non-conventional, mixed with conventional, ones (eg, CAPEX and others).

Paradoxically, if the natural gas (from any source) market were free from any remaining regulatory interference, it would reach an import parity price (at present hovering around US\$6/MMBtu for imported LNG regas sources), since Argentina is a net importer of up to 25 per cent of its aggregate gas consumption, thus freeing the government of the heavy burden of sustaining these programmes (as the price differential between the floor price and the domestic market price would be substantially reduced). A soft landing could thus be attempted, while freeing the government from the burden of having to pull the plug of the subsidies, in essence the flip side of controlled prices.

The government could then allocate its spare resources to support social demand as needed, and offer tax cuts to further enhance non-conventional gas production, if needs be, while opening a new market window for conventional gas investment projects.

Growth out of the present stagnation is expected, as foreign currency reserves of the central bank are now less prone to decline (foreign currency sovereign debt low percentage of GDP is raising, hopefully for a limited time horizon), on account of the redress of external trade, and of the current account rebalancing, while, however, still experiencing a significant fiscal deficit, subject to opposite forces of tax rebates on exports, while general state expenses are being gradually reduced.

The harsh disputes in US courts with Argentine sovereign bonds holdouts has come to an end. Holdouts had rejected a debt restructuring plan, approved (with a substantial haircut) by a large majority, and had obtained from such courts a string of decisions to enforce the award by means of preventing Argentina (and its financial agents) from paying such bonds (issued in exchange for the restructured ones, subject to New York's jurisdiction), if the holdouts were not paid simultaneously.

A settlement was reached with practically all of them as one of the first measures taken by the new government.

Prior settlement (2013) of five different ICSID awards and the restructuring of the Club de Paris debt by Argentina, purportedly enhancing the opportunity to return to international financial creditworthiness, which had been set back by this dispute, have now been followed by some other settlements with other ICSID claimants (El Paso and BG Group in 2016, and Total in a second wave, Res MF 112/17, ending an ICSID arbitration), as referred to below.

2 What are the main sectors for foreign investment in the state?

As discussed in question 1, foreign investment has been made in all significant sectors, but especially in the oil and gas industry, mining, heavy industry, infrastructure (including highways) and, to a lesser extent, construction. During the 1990s, privatisation and deregulation made for international bids in all these sectors, within the framework of oil and gas exploration permits and exploitation concessions, railway transport concessions and mining concessions, public water services, power and natural gas transportation and distribution, subject to administrative contracts or concessions.

YPF, originally a state-owned oil company, had been privatised in the 1990s in different stages, which generated much of the investment in its sector. In March 2012, the government took back control of YPF from Repsol under a proclaimed, but not promptly paid, expropriation of the control shares by Law 26741, expropriation that was settled and paid in 2014 only after various ICSID and other claims by Repsol.

The state intervention, which was seen in the strict control of frozen, or limited increase of, tariffs of public services concessions and interfered energy prices; the redirecting of supply (suspending exports), and rationing of energy demand for industrial purposes and so on, has now been reconsidered to return the initiative to the private sector, though through a difficult and painful unwinding process.

FDI in midstream natural gas was the result of state-directed or state-oriented initiatives in infrastructure through earmarked funding (Law 26095 and regulations as per the same, and article 43 of Law 26784, which approved the 2013 government budget) through public levies, and such funds were applied in public bids to new infrastructure, though not without resistance from the courts.

The oil, gas and power special state programmes to allow for a differential price for the additional energy produced, above the otherwise restricted tariffs and net back depressed prices applicable on existing energy supply, were only partially successful amid the current generalised stagnation in the production of oil, gas and power, through a now declining energy trade deficit at a US\$5 billion level. (In 2000, the energy trade surplus was US\$5 billion.)

Thus, the market is still fragmented, with differential prices regulated and depressed in the case of gas and power. Higher energy prices remunerating new investments under substantial governmental subsidies, a remedy used in an attempt to lure new investment in a complex scenario of regulated activities, has now run out of steam as explained above.

A new Hydrocarbons Upstream Law 27007 (NHCL) was passed in 2015, stating, on the sharing of the government take, the deletion of the formerly disputed provincial carry by new E&P private parties, putting a ceiling on corporate social responsibility burdens, canons and levies, and royalties for the provinces. The new legal framework was born with a lack of transparency in an energy crisis scenario. Significant changes in such legal framework will have to be expected in the future if the regulatory-induced energy crisis in this resources-rich country is to be adequately solved.

Any projection of economic growth of GDP (2 per cent per annum) in the long term provides for a growing gap with the gas production and, to a lesser extent, oil, if trends are not reversed. As from 2013, imported (LNG regas, imports from Bolivia) gas was up to 25 per cent of the aggregate consumption. To close such a gap in 15 years, more than 7,400 wells in non-conventional hydrocarbons exploitation concessions (NCHC) are necessary, which – including drilling and fracking sets – would amount to US\$60 billion up to 2030, and US\$10 billion per year after that. The investment in oil would be around the same amount to close the gap. The Argentine Oil and Gas Institute (IAPG) issued in 2015 a report specifying that investments for shale gas transportation and distribution would by themselves have to amount to US\$40 billion.

If no shale oil and gas is developed to close the gap, the accrued cost of imported energy would double in the same period.

The NHCL has introduced substantial changes that differentiate it considerably from the former law, in force since 1967, as it has:

- introduced concession rights rollover until depletion of the reservoir, by means of recurrent 10-year extensions, allowing for calculations until perpetuity;
- converted existing exploitation concessions (EC) into NCHC with a 35-year term (the access to exploration and exploitation is in the hands of current holders of titles, who are entitled to freely farm out their non-conventional hydrocarbons titles to third parties. The NHCL does request the assignees to be registered and qualified regarding solvency and technical capacity);
- affirmed the authority (jurisdiction) of the federal government for determining both the energy policy and the uniform legal framework for the sector; and
- made for the recovery for the concession holder of the classic rights for foreign exchange market access (which now is the rule, generally) and exports for a portion of the production and the price assurance for natural gas produced by NCHC in case of export restrictions of such percentage.

The price assurance for domestic crude oil and for non-conventional natural gas, now with a limited time horizon, should reduce its significance and burden for the federal budget, but this could only be feasible if market prices were allowed to reach levels set forth by now unsatisfied aggregate demand, in open market practices, as above explained, plus a strong accent on domestic costs reduction and non-choking taxation.

This is something the present Minister of Energy and Mining attempted by Resolution 28/16 and was prevented from enforcing by a Federal Supreme Court award on 16 August 2016, redirecting the ministry for a consultation under public hearings to discuss the general energy policy leading to such an increase. Once the public meeting was held and a smoother transition to increasing consumer tariffs was enacted, the closing of the gap of subsidised tariffs progressively gained pace, rebalancing utilities.

Many gas-predominant fields are at a mature stage in Argentina, and given the fact of the strong dependence of power generation on natural gas burning by thermal power generators – to which gas plus projects are meant to supply – and the growing consumption of gas resulting from LNG-liquefying plants and barges at higher prices than the median of the mainstream gas supply, shale gas could, as happened in the US, be the perfect substitute for expensive current alternatives at peak gas prices, as we have said before: if term contracts could be entered into and honoured with investors in shale gas exploitation, substituting the more expensive alternatives, the future of this development could be

assured, and current holders of title could assign their concession rights by farm-out agreements with the newcomers in a stable environment, instead of relying solely on the US\$7.50/MMBtu assurance by the government presently in force and due to end in 2021.

Unions in the oil and gas industry are very strong. Some conflicts kept the oil fields closed for some time in the past. Oil and gas workers are the best paid in the country. This creates conflicts with other unions whose workers want to be paid as much as those in the oil and gas industry. Only recently collective bargaining agreements have been reached to adjust terms to enable better competitiveness of the oil companies and reduce costs, to make for a soft landing when facing open market prices aligned with import parity levels (natural gas, of whatever source) and crude oil.

Due to the lack of incentives for conventional, existing hydrocarbon production, lay-offs and suspensions were and continue to be applied, and unions are receiving the message that they are pushing too far. Agreements are slowly being reached to raise competitiveness.

As for mining, current international prices do not allow many expectations – though new projects are considered in gold, silver and copper – with the exception of the active M&A transactions in lithium (as Argentina is one of the few countries having significant reserves of the mineral).

The reinstatement of the commitment granted by the Mining Stability Law, by means of eliminating the mineral export withholdings, revitalised many mining activities – extending the life of 14 metaliferous mineral mines and avoiding the closure of others – with a beneficiary effect both for the economic activity as well as the tax collection through the general taxation basis. A Federal Mining Agreement by the federal government with the provinces is intended to bring more transparency and stability of the overall state's take (limiting royalties to 3 per cent plus a 1 per cent contribution for an infrastructure fund with environmental responsibilities), boosting an expected US\$1,400 billion for 2017.

Argentina is part of the lithium triangle, with Bolivia and Chile sharing a common geology. Both in Salta and Jujuy provinces, dry salt flats, particularly rich in lithium salts, provide excellent opportunities for eventual processing of lithium batteries. Construction stages have been reached by some of the projects while exploration continues growing as production grows.

3 Is there a net inflow or outflow of foreign direct investment?

The expected FDI is gradually increasing with significant investments in the automotive, telecommunications, renewable energies, chemical and agriculture and agricultural transformation or related industries spreading in the coming years.

The Federal Central Bank's foreign currency reserves have not suffered because of the settlement with the holdouts since Argentina raised new debt to fill in the gap and more, and the commercial trade balance is stable, while less significant than it should be once the effects of the opening of the economy shall be seen.

The country achieved success through a tax amnesty between August 2016 and March 2017, at lower costs for early applicants, tacitly admitting that former policies were pushing local taxable subjects to invest abroad, circumventing the official foreign exchange market restrictions. The trend was reinforced on account of the world financial centres' commitment to giving up bank secrecy for tax authorities, with pre-established deadlines. A US\$117 billion aggregate amount was declared, and Argentina paid the tax amnesty cost, as well as taxes due.

The government is simultaneously making a number of legal reforms (tax and tax policies are expected by the end 2017, capital markets, public-private participation, securities in general, investment and hedge funds, antitrust), in order to receive this inflow into the country and create instruments for adequately handling such investments, which, if made in specific sectors (construction, energy, etc) receive additional advantages.

Argentina-based companies have not in the past had a strong tendency to invest abroad, apart from in the steel, oil and gas, and infrastructure sectors.

The spread between the implicit foreign exchange rate and the official market exchange rate operated in the past as a disincentive to FDI, and the gap was ever widening, one of the factors that – coupled with the de facto rationing of import payments – was affecting large projects already in the pipeline. These obstacles have been removed.

4 Describe domestic legislation governing investment agreements with the state or state-owned entities.

The state may enter into administrative contracts with investors under the classic contracts:

- for public works or for services;
- for concessions of works and public services; or
- for the use of public goods.

Each of these contracts or concessions may require investment commitments from the investor. The general principle of public bidding is mandatory unless exceptional emergency grounds allow otherwise.

Specific investments are subject to defined sets of rules, as is the case for hydrocarbons exploration and exploitation under the Hydrocarbons Law, which was amended significantly to confirm the authority of provincial states in the exploration and exploitation of such natural resources (and, as from 2015, subject to the legislative change brought by Law 27007).

In the case of mining, the rule under the Mining Law Code is Law 24196 on mining, which assures legal stability, now reconfirmed through the Federal Mining Agreement, as informed above.

Under such frameworks, most of the oil and gas upstream industry operates subject to strict regulations that were superimposed on the original exploitation concession terms, with free market rules being respected.

State-owned entities are not subject in principle to administrative law provisions, such as is the case with ENARSA, the state-owned entity created to be a new state agent in the oil and gas market. ENARSA shared with YPF the procurement and import of substantial and ever-increasing volumes of liquid natural gas (LNG) for regasification purposes to match the deficit of local gas production, and imports from Bolivia, also under contract with ENARSA, operating as a trader with pass-through prices for its purchase by the power exchange, CAMMESA, a mixed capital company created to provide a simple exchange, making aggregate power offer and demand match (allowing for seasonal compensation between spot prices and seasonal tariffs with a self-adjusting fund). Since the balance between both was broken in the past on account of frozen or depressed tariffs and their mismatch with power supply prices, CAMMESA purchases imported LNG, regasified, natural gas from CAMMESA to supply independent thermal power producers. The amounts are only partially repaid by the supply price, therefore incurring recurrent economic deficits that are periodically assumed by the state, which makes ineffective attempts to pass on such cost to selected consumers.

The 2016 programme for renewables sourced energy, Renovar, has again considered CAMMESA as the agency entering into 20-year power purchase agreements (PPAs) with the awardees of the bidding called under Law 27191 and Resolution MEyM 71/16.

The law sets forth an increasing mandatory mix of renewable power consumption, going from 8 per cent of the aggregate from all sources, in 2018, to 20 per cent in 2025. Large customers may cover their share of renewables consumption by purchasing from the 'joint sales' at the median price offered by CAMMESA, or through direct contracts with power producers, or their own generation.

CAMMESA will be the purchaser in the PPA, for further passing on of such supply to large customers and distributors (the law requires them to reach the mandatory mix of their power demand with renewable energy supply sources thereof specified, either through its own, or contracted, supply, or through these contracts).

Compliance by the purchaser, CAMMESA, with the renewables supply under the contract is assured by the sovereign through the payment for the energy supply, and for the anticipated termination compensation (set forth by Decree 882/16). This is also guaranteed by the World Bank (as per the Indicative Terms and Conditions of the World Bank's guarantees to such ends, in circular 1 relative to the Pliego) in case of default (including the case of foreign exchange restrictions in the future) by one or the other party (a call and a put price, based on the non-amortised part of the investment, such compensation subject to a discount if termination is called by the sovereign in case of the supplier's default). International arbitration jurisdiction – including ICSID – clauses may be agreed to with respect to any dispute related to the PPA.

Fuel supply contracts by state-controlled entities must be entered into with the state-controlled YPF (as model contracts issued under disposition 23/13 of the National Board of Contracting).

As for YPF, a contract for exploration and exploitation of non-conventional hydrocarbon resources made with Chevron has granted the latter a differential price. The contract, which remains confidential, is made by the private investor (with over US\$1 billion investment in five years) and YPF under the terms of Decree 929/13, which allows crude oil exports for 20 per cent of the production and to keep such export proceeds in foreign currency. Access to foreign currency is granted in case exports are curtailed in the future, due to local under-supply, for the same amounts that would have resulted from such export portion of the production (up to the amounts invested). The contract is for a 25-year term (extendable to 35 years), plus another extension of a 10-year term, and, for natural gas, granting that its price will not be lower than a reference export price in case restrictions are imposed by the government. Other differences in treatment from the present regulated market terms applicable for existing concessions are generally added to make a watered-down version of the original terms of concessions. The treatment of Decree 929, which is replicated in the new NHCL generally, was limited to new investments exclusively, but adds the above-mentioned duration terms to existing players (or their new partners) in already productive fields' concessions that had less time remaining, provided new formations are exploited or new non-conventional techniques are applied.

These are but some examples of the variety of contracts where one of the parties is state-owned or state-controlled, showing that the administrative law and the general framework for public procurement (under Law 24156 and its amendments, and Decree 1023/01 as amended) are only a part of the means to enter into contracts that have public interest overtones.

A series of bids for public works are called periodically, either stand-alone or in a more ample programme, such as the Plan Belgrano, for the development of infrastructure to link the north-east of Argentina with industrial centres and mainly to Buenos Aires, including an ambitious programme for railway development.

International legal obligations

5 Identify and give brief details of the bilateral or multilateral investment treaties to which the state is a party, also indicating whether they are in force.

By the early 1990s – but with BITs having been signed in early 2002, amidst Argentina's fierce economic crisis – Argentina had more than 50 BITs typically granting:

- fair and equitable treatment;
- treatment no less favourable than nationals;
- no expropriation unless for a public purpose and with prior compensation (fair, full or other terms may have been used by each of the BITs, which have a differing extent in international investment arbitration);
- most-favoured-nation treatment;
- fork-in-the-road provisions (allowing the option to file the same dispute under an arbitration claim, or with the local courts) or, conversely, access to international arbitration after a specified period when a local court claim has been submitted with no satisfactory results; and
- the commitment to respect state engagements (umbrella clauses, or similar engagements to grant the best local or BIT treatment, etc).

Argentina has been subject to the highest number of BIT claims at ICSID. It has submitted itself to the jurisdiction set forth under the relevant BIT and, through its provisions, to an ICSID Rules-appointed tribunal, though exercising all the available defences (involving in 2014 mass claims such as *Abaclat* – bond holdouts – with numerous procedural hurdles, now settled; the US Supreme Court award confirming the validity of the ICSID award in *BG Group*; the *El Paso Energy* annulment request rejection in September 2014; and the *Saur International* award on damages due to the investor, 22 May 2014). In most, if not all of these cases, the government has filed a defence of lack of jurisdiction, and articulated defences such as challenges to arbitrators, investors' lack of standing to claim what Argentina called derivative damages and national emergency defence arguing a suspension of BIT's investor's guarantees. It has also made use of the ICSID Rules' annulment procedures. In the case of *BG Group* (March 2014) the US Supreme Court, by reversing the judgment of the Court of Appeals, upheld the validity of an arbitral award to the benefit of the investor, as the prerequisite to

resort to domestic courts for a certain period of time before filing an arbitration request was deemed to be subject to the interpretation and judgment by the arbitral tribunal, which had not exceeded its powers by assessing the obstacles imposed by Argentina to access such domestic courts in an effective and timely way.

The cases *Pioneer Natural Resources Company, Pioneer Natural Resources (Argentina) and Pioneer Natural Resources (Tierra del Fuego) v Argentine Republic*, ICSID Case No. ARB/03/12; *Aguas Cordobesas, Suez, and Sociedad General de Aguas de Barcelona v Argentine Republic*, ICSID Case No. ARB/03/18; *France Telecom v Argentine Republic*, ICSID Case No. ARB/04/18; and *RGA Reinsurance Company v Argentine Republic*, ICSID Case No. ARB/04/20 are all settled.

Unisys Corporation v Argentine Republic, ICSID Case No. ARB/03/27 is pending.

In *Total v Argentine Republic*, the ad hoc committee rejected the annulment request against the award that ruled in favour of Total in February 2016. The same occurred on 5 February 2016 with *EDF International, SAUR International and León Participaciones Argentinas v Argentine Republic*, ICSID Case No. ARB/03/23.

A decision of 8 April 2016 in *Teinver, Transportes de Cercanías, and Autobuses Urbanos del Sur v Argentine Republic* (ICSID Case No. ARB/09/1) for provisional measures was rejected by the ICSID-appointed tribunal.

In mid-2015, Argentina submitted a petition with the United States District Court for the District of Columbia, United States, to vacate an arbitral award rendered against it and in favour of the respondent, AWG Group. The petition to vacate the arbitral award was denied (30 September 2016) and AWG's petition to confirm the award was granted.

It may be concluded that Argentina is reconsidering its attitude and traditional use of defences in a systematic way, though no official position has been made known, other than the above-mentioned settlements. We can add to these the *El Paso* and the *BG Group* cases, always at a discount, following the settlement for approximately US\$10 billion with the holdouts at a New York court, adding themselves to the previous list of 2013 regarding settlements by CMS Gas, Azurix, Vivendi and Continental Casualty, and an UNCITRAL award in favour of the UK's National Grid. In 2017, a settlement was reached with Total SA (Res.112/17) along the same guidelines of the others, as detailed below.

Five holders of collection rights arising from ICSID awards settled with Argentina under Resolution of the Ministry of Economy 598, of 8 October 2013, to which Total SA is added with Res.MF 112/17 of 17 July 2017. All settlements have been complied with in the way agreed. The provisions stated that newly issued sovereign bonds would be delivered to the claimants for a face value of less than 75 per cent of the principal plus interest of the aggregate of the claimants' entitlements under the awards. The settlement included in 2013 (later deleted on the second wave of them) the commitment by the claimants to invest, or cause other entities to invest on their behalf, in Argentine savings bonds for an amount of 10 per cent of their entitlements under the award. The parties have granted a reciprocal waiver of all claims, only with respect to the specific investment that was the subject of the arbitration that led to the award, the award itself, or any judicial, administrative or other action seeking the recognition and enforcement of the award.

New cases are filed, though at a very different level than before, such as *Metlife* (insurance), *Abertis* (highways) and *Salini Impregilo* (also highways) at the jurisdictional stage, while an annulment procedure with an ad hoc committee appointed by ICSID is under way.

A very interesting precedent has been a settlement reached by *Autopistas del Sol*, which waived its ICSID Rules arbitration in exchange for renegotiation of its concession terms (toll highway). It is an indication of the policy adopted, to avoid conflicts on foreign investments and reach settlements, steering away of the long-held confrontational attitude of the prior government to foreign investors

Other institutionalised arbitration systems are also in place, though basically state-to-state (in the framework of MERCOSUR, the common market association between southern cone Latin-American countries).

For a long time, the state has explored the creation of arbitration alternatives such as, for example, a special panel, or arbitrators tribunal, for disputes regarding public services; as well as the project of conducting an international arbitration within UNASUR, a regional group of Latin American states. This no longer seems a supported policy.

The Public-Private Participation law provides for UNCITRAL or ICC arbitration, since the terms of such kind of association are, according to such policymakers, of a private law nature, while the PPAs

resulting from the *Renovar* bidding for renewable-sourced power may be subject to arbitration, either under the ICSID Convention (but due to its inclusion as jurisdictional clause in the specific agreement, not on the basis of its jurisdiction called through a BIT) or under ICC rules.

6 If applicable, indicate whether the bilateral or multilateral investment treaties to which the state is a party extend to overseas territories.

Not applicable.

7 Has the state amended or entered into additional protocols affecting bilateral or multilateral investment treaties to which it is a party?

Argentina has signed a multilateral agreement setting forth a sort of common market of the Atlantic region, Mercosur, and this is subject to a number of updates.

Though not strictly related to investment promotion and protection, many treaties enhance judicial cooperation, which is the basis for trust in the rule of law.

As for treaties regarding judicial procedures and cooperation, in addition to the Hague Convention on Civil Procedures (Law 23502), on international Procedural Law of Montevideo (Law 22410), on foreign evidence production (Law 23481), on rogatory letters (Law 23503), on recognition and enforcement of arbitral awards (Law 23619), on judicial assistance and cooperation (Law 24107) and many others on a bilateral basis, including on a regional basis as Mercosur (Laws 24578/9), can be mentioned.

8 Has the state unilaterally terminated any bilateral or multilateral investment treaties to which it is a party?

Despite the fact that, from 2003 to 2015, Argentina held a confrontational attitude towards foreign investments in the energy and infrastructure areas, especially those made in the privatisation process, it has never terminated the many bilateral investment promotion and protection treaties signed in the early 1990s, nor terminated its participation in the ICSID Convention.

9 Has the state entered into multiple bilateral or multilateral investment treaties with overlapping membership?

Despite interest in developing associations with the South American countries leaning to the Pacific Ocean; reaching free trade agreement with the European Community; and being a party to the OECD, such efforts have not yet crystallised.

10 Is the state party to the ICSID Convention?

Argentina is a party to the ICSID Convention, ratified by Law 24353 in 1994, and is a defendant under such ICSID Rules, starting from 1997 with the filing of the *Vivendi* and *Lanco* cases. There are no indications that the state may be considering withdrawing from ICSID, and BITs include superseding guarantees for investment made while the BITs would have been in place.

11 Is the state a party to the UN Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention)?

Argentina is not a party to such convention, regarding public access to the information on investment arbitration.

12 Does the state have an investment treaty programme?

The state is entering into more traditional friendship and cooperation treaties, and avoiding the adoption of new BITs.

Regulation of inbound foreign investment

13 Does the state have a foreign investment promotion programme?

Industrial and regional promotional programmes have been applied in Argentina since the 1950s, and have been left to expire with no renewals due to their implied fiscal cost and the difficulties in their handling and control, shared between federal and provincial jurisdictions. Some sector programmes remain in place for remote areas or provinces. Tax rebates are related to specific capital investment projects under other

programmes, reducing custom duties or different taxes, but no specific programme is directed to foreign investment as such. Renewables programmes benefit from special tax incentives

Special tax reliefs are granted for non-conventional energy projects (tight gas and shale, oil and gas, renewables, etc) or for regions such as Tierra del Fuego, subject, however, to a revision of the scope of the promotion policies in the area.

14 Identify the domestic laws that apply to foreign investors and foreign investment, including any requirements of admission or registration of investments.

Law 21382 deregulated foreign investment in Argentina, but there are a number of tax regulations that are of significant importance for the planning of foreign investments (particularly with respect to transfer of technology and intercompany financing) apart from the specific restrictions that may apply for specific sectors. Foreign exchange restrictions, of paramount importance to have a clear picture of the inflow and outflow of the investment and its proceeds, were eliminated in 2016. Law 26360, which has been extended several times, has specific benefits for investment in capital goods and should also be considered.

15 Identify the state agency that regulates and promotes inbound foreign investment.

The new organisation of the Cabinet has provided for such a role to a new governmental agency, the Undersecretariat for Investment Development and Trade Promotion, but also the president had appointed a special and direct adviser for foreign investment, who has extended experience on the subject, instead of appointing a politician (as is the case for numerous appointments in other governmental agencies, making this a rarity in Argentine politics). He has since been appointed as Secretary of International Economic Relations, at the Ministry of Economy.

16 Identify the state agency that must be served with process in a dispute with a foreign investor.

The federal government should be served notice of an investment arbitration claim through the Attorney General's Office.

Investment treaty practice

17 Does the state have a model BIT?

At the time of signing BITs, no practice was in place for a model BIT to be considered, therefore each of the BITs has its own structure with some common ground (see question 5). While some contain fork-in-the-road clauses, others, such as the ones with Spain and Germany, choose prior submission to local courts of the investment dispute for a limited amount of time after which arbitration may follow. In some of these BITs, umbrella clauses or similar guarantees (the international commitment to grant the investor the best of either the local contracts and legal regime benefits, or the BIT ones) may be available.

18 Does the state have a central repository of treaty preparatory materials? Are such materials publicly available?

Public records of parliament's (the Congress and the Senate houses) debates exist (in parliamentary reports), but preparatory materials have not been made public.

19 What is the typical scope of coverage of investment treaties?

In some BITs, specific investments are excluded (for example, telecommunications), though they may be reintroduced by applying most-favoured-nation clauses to utilise other BITs that do allow them. BITs generally include broad definitions of the investor and of the investment, superseding the contentious issues of the *Barcelona Traction* case. National protection is extended to companies and affiliates incorporated in the signatory country, or to local subsidiaries, provided they are controlled by the former. The nature of the investment has been discussed in some cases, the last one being the *Abaclat* case, mentioned above, where the decision affirming the jurisdiction under the ICSID and BIT rules acknowledged that investments in the financial field were considered within the scope of the applicable BIT. The *Italian bond holders* collective case was settled (100 per cent of capital and half of such amount as interest) in February 2016, as with the rest of the holdouts.

20 What substantive protections are typically available?

See question 5.

21 What are the most commonly used dispute resolution options for investment disputes between foreign investors and your state?

BITs generally grant choices of different arbitration venues, including ICSID Rules and institutional arbitration, or UNCITRAL Rules. The UNCITRAL Rules remain the only choice in some cases (such as the UK), but the ICSID Additional Facility Rules may also be used.

22 Does the state have an established practice of requiring confidentiality in investment arbitration?

As acts of the state are supposed to be available for scrutiny by the public, there may be constitutional objections to the state requiring such confidentiality.

23 Does the state have an investment insurance agency or programme?

Law 23101 provides for the promotion of exports, though it is a regime ridden with difficulties in its application.

Investment arbitration history**24 How many known investment treaty arbitrations has the state been involved in?**

There have been a large number of ICSID claims (more than 50) against the Argentine state. The most recent claim was the one regarding the expropriation of YPF, which was settled. There have been other claims related to highway concession disputes, infrastructure, construction, most of the public water services concessions throughout the country, allocation of the radio spectrum, power generation and distribution, telecommunications, oil and gas upstream and gas transportation. See question 5.

25 Do the investment arbitrations involving the state usually concern specific industries or investment sectors?

The number of active cases filed against the state varies, depending on negotiations usually unrelated to the dispute itself. Sectors present in ICSID arbitration against Argentina are mainly oil and gas upstream, midstream and downstream; power generation; transportation and distribution; public water services concessions; telecommunications; informatics services; finance; and highway construction. In general, the cases concern industries that are concessionaires of public services and works or energy sectors, whose interests have suffered substantially by state intervention, by means of price controls or outright freezing for prolonged periods of time, substantial changes and breaches of guarantees or of legitimate expectations granted to the investors, and the declaration of a state of emergency (state of necessity). The state of necessity was recognised to be an admissible defence for a limited amount of time in one case, and in another case the tribunal's finding of the incidence of the defence of necessity was considered by the ad hoc committee to be a serious error in law, on account of the direct reference the tribunal had made to customary international law, instead of making a thorough analysis with regard to the relevant BIT provisions, which had a specific reference to the defence of necessity. In most of the other cases, the defence of necessity was rejected.

26 Does the state have a history of using default mechanisms for appointment of arbitral tribunals or does the state have a history of appointing specific arbitrators?

Only in one of the first arbitration claims under ICSID Rules did the state fail to initially appoint an arbitrator. Following that claim, they were appointed on a case-by-case basis. There is no single arbitrator consistently appointed by the state. To the best of our knowledge, the arbitrators appointed by the state in ICSID proceedings have not been subject to challenges on the basis of recurrent choice.

Update and trends

Investment treaty arbitration, applicable as per the relevant BIT, continues to represent an alternative, or ultimate, arena to discuss conflicts with the state, whenever the dispute qualifies for it, a narrow road described with eloquence in the award by the relevant ad hoc committee of the *Vivendi I* award's annulment. Argentina has consistently reduced its creditworthiness risk factor in these past two years, and this is related to compliance with international law, besides avoiding financial default of the sovereign debt.

Such compliance is of the essence to make for substantial investment capital inflows, and should be joined by strong institutions allowing predictability. These are necessary, but not sufficient, conditions, since the experience shows that the best treaty is no substitute for an investment and business climate whereby the markets are allowed to exist and develop, with the intervention by the state to the extent necessary to protect the same from unfair competition practices and from abuses of dominant position.

In that context, such transition path should be confirmed by economic figures (balanced budget or reduced deficit of national accounts, smart taxation, efficient system of incentives, only if they are in support of the growth they are expected to serve, while allowing the free forces of the market to define its optimum). As a consequence, for the time being we are seeing trends that attempt to reach such objectives but there is still much to do.

27 Does the state typically defend itself against investment claims? Give details of the state's internal counsel for investment disputes.

The state has always challenged treaty claims, as shown by the substantial number of times when it has challenged arbitrators, filed jurisdictional defences (rarely successful) and made annulment requests for an ad hoc committee appointed under ICSID Rules (and obtained a series of partial annulments, as well as a full annulment of award on one occasion). In 2013, the decision in *Ambiente Ufficio* and others affirmed jurisdiction by rejecting the argument that investment in sovereign bonds should not be considered as investments in the Argentine territory. The state of necessity defence has been made by Argentina in most cases, to suspend the protections granted by BITs. In some instances, awards have been annulled by ad hoc committees appointed under the same ICSID Rules for having disposed of such a defence by invoking international customary law. This is deemed to be a serious error in law, since the standard for such determination should result from a case-specific analysis of the treaty invoked, which may diverge from international law and its role as an excuse for an otherwise existing commitment, or a suspension of the same. This has been discussed at length in the *CMS* and *Sempra* cases.

Enforcement of awards against the state**28 Is the state party to any international agreements regarding enforcement, such as the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards?**

Yes.

29 Does the state usually comply voluntarily with investment treaty awards rendered against it?

Compliance is dealt with by article 53 of the ICSID Rules, and the state has not formally expressed it would not comply, though it has given indications that it considers itself to be complying by waiting for the investor to request enforcement as per article 54. In general, Argentina deems its commitment to comply with ICSID awards is limited to expediting the compliance procedure as much as the applicable (domestic) regulations allow, but only once claimants have notified the enforcement request to the authority designated under article 54(2), a tribunal itself, within the judiciary. Compliance is therefore subject to the investor resorting to forced execution through the domestic courts, collapsing in effect article 53 into article 54 of the ICSID Convention, a remedy instead reserved for enforcement in other jurisdictions in case of non-compliance by the host state. The Argentine government identified the National Appeals Court in Contentious Administrative Matters as the entity where such a request of enforcement should be filed. This is a court procedure for the enforcement of an award, as if it would be a domestic court award which enforcement is requested (that is to say, Argentina considers it is

entitled to subject compliance with ICSID awards to the same or substantially the same procedures that are applicable to compliance with final judgments of local courts against the state). The state in 2016 settled more cases than the five ICSID cases settled in 2013, and one in 2017.

But, on the other hand, Mr Horacio Rosatti, now appointed one of the two new members of the Federal Supreme Court, as a former State Attorney General in the first Kirchner presidency, though having resigned early, was in his time representing Argentina as a defendant in ICSID cases, as well as making public his opinion that the ICSID awards could be reviewed under a domestic judicial control of constitutionality, based on constitutional public order grounds.

Any such decision by Argentina in a specific case subject to the protection of international treaties to which Argentina is a signee would entail the international liability of Argentina, specially if such objection would mean a direct confrontation with the basic principles of the BITs regarding the protection of foreign investors in their own standing, including their participation in local subsidiaries or companies.

30 If not, does the state appeal to its domestic courts or the courts where the arbitration was seated against unfavourable awards?

In some cases, the state has challenged arbitrators and requested the local judiciary (*Procuración del Tesoro v ICC*) to order the stay of the arbitration procedure (*National Grid Transco v Argentine Republic*) through a preliminary order. In *Entidad Binacional Yacypetá v Eriday et al*, Federal District Court of Buenos Aires, 27 September 2004, a stay in the arbitral procedure was ordered by a lower court and further penalties imposed to enforce it while the terms of reference were scrutinised by the local judiciary.

Argentina has challenged in a US Court the arbitral award in *National Grid v Argentina*, but failed to obtain an annulment in the same case.

31 Give details of any domestic legal provisions that may hinder the enforcement of awards against the state within its territory.

The often-cited *Cartellone* case, which does not refer to international investment arbitration, opened the review of an arbitral award to the extent that it was found it could be labelled as breaching the public policy principles imbedded in the Federal Constitution. The Federal Supreme Court has, however, found on a number of occasions that international treaties in the legal structure of Argentina rank above the domestic laws, and has expressed the need to limit any controversy based on domestic laws which could be proved to be in breach of Argentina's international obligations (*Teyma Abengoa SA v Provincia de Salta s/inconstitucionalidad and IFC*, of 2002, staying provincial resolutions because there was an international investment arbitration case under way, besides the trendsetter *Fibraca*). However, an exequatur proceeding for enforcing a New York court award for the benefit of some bond holdouts was rejected by the domestic courts and upheld by the Argentine Federal Supreme Court. In *Claren Corporation v The National State*, article 517/518 CPCC exequatur, of 6 March 2014 (C 462.XLVII), the Argentine Federal Supreme Court rejected the enforcement request of a United States court ruling on sovereign bonds default on the grounds that emergency rules issued by the proper authorities as per the constitution's mandate for the restructuring of the same, are part of the public order of Argentine law, and therefore the exequatur was rejected, thereby upholding the appeals court ruling.

The current Civil and Commercial Law Code (CCC) has excluded its provisions on arbitration to be applied to arbitration cases where the state is one of the parties but, at present, a new legislation draft regarding international investment is being debated by the legislative, with the scope of correcting the far-reaching effects of some of the provisions of the CCC regarding annulment being available on account of the same being against domestic public order principles.

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