Investment Treaty Arbitration

Contributing editors
Stephen Jagusch QC and Epaminontas Triantafilou

2017

GETTING THE DEAL THROUGH

© Law Business Research 2016

GETTING THE DEAL THROUGH

Investment Treaty Arbitration 2017

Contributing editors

Stephen Jagusch QC and Epaminontas Triantafilou
Quinn Emanuel Urquhart & Sullivan LLP

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

© Law Business Research Ltd 2016
No photocopying without a CLA licence.
First published 2013
Fourth edition
ISSN 2053-8960

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer–client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between September and October 2016. Be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

© Law Business Research 2016

CONTENTS

© Law Business Research 2016

Argentina

Luis Alberto Erize
Abeledo Gottheil Abogados

Background

1 What is the prevailing attitude towards foreign investment?

At the end of 2015, a non-Peronist government was elected as a reaction to more than 10 years of the personalistic and rhetorically populistic 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, 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 (i) the remaining holdouts, dissatisfied with the huge haircut obtained with the sovereign debt restructuring, as well as (ii) 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.

This is only the beginning, however, as investors, now courted by the government, put their expectations on hold, to confirm that high inflation shows a declining path, the relative price imbalance (especially in energy) is curbed, and inflow of undeclared capital from Argentines held abroad has resulted from the one-shot offer of tax relief and amnesty.

As explained below, there are several programmes offering public bidding for foreign investment in non-traditional (renewables) energy and thermal energy to cope with an energy deficit; however, these are relieved by the reduction of imported energy prices (Argentina was self-sufficient, but lost this status through the above-mentioned decade-long policies, and should return to such status once restrictions are lifted and a sound energy policy assures long-range planning). 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 a new law being passed by the Congress to such effect.

The government is at present organising roadshows to explain its intentions to potential foreign investors, with an emphasis on the efforts made to ensure an investment climate radically different to past times, with a transparency drive shown by the choice of reputable key officers, pragmatism opposed to any ideology, 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 understands and makes public that a fine-tuning is necessary by means of coordinating 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; considering tax reforms to reduce the overall taxation ceiling and changing the taxation mix not to hinder competitivity; and trusting in a wholly free foreign exchange market, as a consequence of which inflows – with a minimum stay period (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, etc.

The chemicals and automotive sectors have confirmed their expansion plans as being focused more on the long term, since in the latter case a recovery of the automotive trade with Brazil will take some time, with such country having to resolve at present a series of institutional issues and a redefinition of its economic policies after the successful impeachment of its former president by Parliament and redress course in respect of the hydrocarbons sector policies.

During the 1990s, significant foreign direct investment (FDI) was made in the Argentine energy and infrastructure sectors (over 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 experimented 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 still very low in terms of percentage with respect to 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);
- 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

© Law Business Research 2016

of the sector and thus gradually eliminate government subsidies to consumers, for which purpose a return to basics is inescapable. The government has received both for thermal and renewable energy six times as many offers as submitted in the tenders, and though the limited size of the experiment will need to adjust to a general framework for a deregulated market, the thirst for power and natural gas to follow trends has to be attended to and an alignment with international, higher prices is to be expected. At the same time, the effect of the present depressed international prices on crude oil exports and local demand has been considered by a system of temporary subsidies which will, we believe, give way in the future to better and more flexible mechanisms for anti-cyclical policies to avoid stagnation of the sector.

FDI, which was 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 – is now taking a break, due to the still-to-be-defined framework, aside from the 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.

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 percentage of GDP is remarkably low), on account of redress of the external trade, and of the current account, while, however, still experiencing a significant fiscal deficit, subject to (i) opposite forces of tax rebates on exports, while (ii) general state expenses are being reduced.

The harsh disputes at US courts with Argentine sovereign bonds holdouts has come to an end: holdouts had rejected a debt restructuring, 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 of 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 (2013) settlement 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 (PAE and BG Group), as referred to below.

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

The same as previously mentioned: 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 throughout 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, that was seen in the strict control of frozen, or limited increase of, tariffs of public services concessions and interfered energy prices; the re-directioning of supply (suspending exports), and rationing of demand of energy for industrial purposes, etc, is now being reconsidered to return the initiative to the private sector.

FDI in natural gas midstream 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 of production of oil, gas and power, though the always increasing energy trade deficit has been now somewhat diminished at a US$5 billion level. (In 2000 the energy trade surplus was instead US$5 billion.)

Thus, the market is still fragmented with differential prices highly 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, is now out of steam.

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 of rules of the game 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) 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 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 (NCHEC) are necessary, which – plus 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 Instituto Argentino del Petróleo y del Gas (IAPG) issued in 2015 a report specifying that investments for shale gas transportation and distribution would by itself amount to US$40 billion.

If instead 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 NCHEC 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 NCH titles to third parties. The HCL 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 NCHEC and in case of export restrictions of such percentage.

The price assurance should have to reduce its eventual significance and burden for the federal budget if market prices were allowed to reach levels set for the by-now unsatisfied aggregate demand.

This is something the present Minister of Energy and Mining has 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.

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

© Law Business Research 2016

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: if term contracts could be entered into and honoured throughout time 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.

Unions in the oil and gas industry are very strong. Some conflicts kept the oilfields 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.

At the same time, due to the lack of incentives on conventional, existing hydrocarbon production, lay-offs and suspensions are applied, and unions are receiving the message that they are pushing too far. An agreement has to be recurrently reached on salary increases to cope with inflation.

As for mining, current international prices do not allow many expectations, with the exception of the active M&A transactions in lithium (as Argentina is one of the few countries having significant reserves of such a mineral).

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

The expected FDI is for the time being a meagre US$500 million, but substantial amounts are being committed in the following years. At the recent Foreign Investments Forum – a so-called 'mini Davos', attended by 1,900 business people – significant investments in the automotive, telecommunications, renewable energies, chemical and agriculture and agricultural transformation or related industries were announced, spreading in the following 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 is expecting a large inflow of foreign currency through a tax amnesty established for between August 2016 and March 2017, at lower costs for the early applicants, tacitly admitting that former policies were pushing local taxable subjects to invest abroad, circumventing the official foreign exchange market restrictions that did not allow it. The trend is reinforced on account of the world financial centres' commitment to giving up bank secrecy for tax authorities, with pre-established deadlines.

The government is simultaneously making a number of legal reforms (tax and tax policies, capital markets, public-private participation, securities in general, investment and hedge funds, antitrust), in order to receive this inflow into the country and give 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 as a disincentive to FDI, and the gap was ever widening, one of the factors which – coupled with the de facto rationing of import payments – was affecting large projects already in the pipeline. These causes for stalling 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 on 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 a legal stability (though this has been more flexible recently).

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, which had in their time granted free market rules to be 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 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 in recurrent economic deficits that are periodically assumed by the state, which makes ineffective attempts to pass through such cost to selected consumers.

The new (2016) programme for renewables sourced energy, Renovar, has again considered CAMMESA as the agency entering into long, 20- or 30-year energy supply 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 through these contracts or through direct contracts with power producers.

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

Compliance by the purchaser, CAMMESA, of 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), 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 undersupply, 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

© Law Business Research 2016

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 for a watered-down version of the original terms of concessions granted in the past. 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 which 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 standalone 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, Argentina had more than 50 bilateral investment treaties (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 to the contrary, 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 in February 2016 rejected the annulment request against the award that ruled in favour of Total. The same occurred in 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.

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 case-by-case above-mentioned settlements, to which the *El Paso* and the *BG Group* cases may be added, 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.

Five holders of collection rights arising from ICSID awards settled with Argentina under Resolution of the Ministry of Economy 598, of 8 October 2013. It was agreed 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 includes 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.

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 does not seem a supported policy anymore (2016).

The project for instituting PPP (a draft law is subject to review as of September 2016 by the legislative branch) 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 above described for renewable-sourced power may be subject to arbitration, either under the ICSID Convention (but not on the basis of its jurisdiction through a BIT) or under ICC rules.

6 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 as 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 are in place.

7 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.

© Law Business Research 2016

Regulation of inbound foreign investment

8 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.

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.

9 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 in order to have a clear picture of the inflow and outflow of the investment and its proceeds, have now (2016) been eliminated. Law 26360, which has been extended several times, has specific benefits for investment in capital goods and should also be considered.

10 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 has 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).

11 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

12 Does the state have a model BIT?

At the time of the signing of the BITs, no practice was in place for a model BIT to be considered, therefore each of the BITs has its own structure with the common grounds described above (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.

13 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.

14 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.

15 What substantive protections are typically available?

See question 5.

16 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.

17 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.

Investment arbitration history

18 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.

19 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 upright 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.

20 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.

© Law Business Research 2016

Update and trends

Argentina has reached the point where a deficit- and inflation-ridden country understands there is no reason to continue follow the policies that drove it to such a self-inflicted crisis. The significance of this is far-reaching, as at the end of 2015 elections proved that populistic rhetoric was being rejected even in the heart of the Peronist movement, weary of the severe loss of credibility caused by the Kirchner presidencies and administrations, now facing at court complex and ample corruption charges.

The effect of submitting to international arbitration and law, and of settling holdout cases, together with the freedom granted for foreign exchange transactions and access to international markets, is not to be diminished, as it entails a number of other consequences in the monetary, fiscal, capital markets, energy, industrial, trade and antitrust policies, which have to be compatible with it.

Such adjustments, or rather, return to the legal framework that had been altered mainly at the level of executive-driven regulations in contradiction with the former, have to be discussed with the provincial governors and political forces within the legislative branch. To develop consistent and stable trends and policies is less a symptom of frailty than of force, because such consent, once obtained, will not be easy to remove.

Argentina is yet to confirm that such consents and policies will be effective in developing investment, growth and stability with beneficial effects in curbing inflation, but the steps undertaken do call the attention of potential investors to assess whether monetary and fiscal discipline (lowering the current ceiling of taxation, generally) will be maintained and whether the receptive attitude for investments of every source will become consolidated in stable rules and institutions.

21 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

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

Yes.

23 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 with the same if also 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 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 has recently (2016) settled more cases than the five ICSID cases settled in 2013.

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 of which Argentina is a signor 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.

ABELEDO GOTTHEIL ABOGADOS
ERIZE - PINNEL - GALLO

Luis Alberto Erize **erize@abeledogottheil.com.ar**

Av. Eduardo Madero 1020, 5th floor
C1106ACX Buenos Aires
Argentina

Tel: +54 11 4516 1500
Fax: +54 11 4311 3560
www.abeledogottheil.com.ar

© Law Business Research 2016

24 If not, does the state appeal to its domestic courts 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 Tranco v Argentine Republic*) through a preliminary order. In *Entidad Binacional Yacyretá 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.

25 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, upholding the appeals court ruling in such sense.

© Law Business Research 2016

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Commercial Contracts
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com

Law Business Research
Investment Treaty Arbitration
ISSN 2053-8960

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

LACCA
LATIN AMERICAN CORPORATE COUNSEL ASSOCIATION
Official Partner of the Latin American Corporate Counsel Association

ABA Section of International Law
Your Gateway to International Practice
Strategic Research Sponsor of the ABA Section of International Law

© Law Business Research 2016