GETTING THE DEAL THROUGH

Investment Treaty Arbitration

in 20 jurisdictions worldwide

2014

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Argentina

Luis A Erize
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Background

1 What is the prevailing attitude towards foreign investment?

The best possible response is to evaluate the participation of foreign investment in the Argentine economy, which is higher than 60 per cent and is present in every sector: manufacturing, services, heavy industry, construction, pharmaceuticals, automotive industry, communications, banking, entertainment, energy, mining, etc. The timing for those investments, however, differs. During the 1990s, significant foreign direct investment (FDI) was made in the 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 last 20 years. Current foreign exchange and customs import permit restrictions have, however, added to a scenario already heavily affected by emergency regulations that were meant to be provisional but have been retained and strengthened for more than a decade. This has caused the flow of new FDI to be one of the lowest in Latin America, other than the reinvestment of profits where remittance has been contingent upon case-by-case permits, under policies which offer little guidance. On account of different degrees of state interference with specific activities, a large number of ICSID investment arbitration cases have been filed by private foreign investors calling on the provisions of the many (over 60) bilateral investment protection treaties entered into by Argentina in the early 1990s.

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

As expressed 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, activities that are subject to administrative contracts or concessions.

Direct state investment in economic activities is not representative of the influence of the state on the same, as the state has in many ways become distant from the original legal framework under which FDI was made, and has instead exercised its power to intervene. This can be seen in the case of YPF, a state-owned oil company, which was privatised under a process that generated much of the investment in its sector. The YPF takeover took place under a still undefined but proclaimed expropriation. State intervention can also be seen in the strict control of frozen, or limited increase of, tariffs and prices of energy and concession-granted public services; the re-directioning of supply, and rationing of demand, of energy for industrial purposes, etc.

FDI is thus currently the result of state-directed or state-orientated initiatives in infrastructure through earmarked funding (Law 26095 and regulations as per the same) through public levies, applied in public bids for new infrastructure. In the case of oil and 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, have yet to prove successful amidst the current, generalised stagnation of production of oil, gas and power. Thus, the market is fragmented with differential prices, which are, however, gradually showing that new rules will continue to be introduced in an attempt to lure new investment in a complex scenario of regulated activities.

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

It is difficult to provide figures, as foreign exchange rules and restrictions control trade and payments through individual permits. This is also true for profit remittance. One measure of the outflow of FDI is the gradual reduction of central bank reserves in foreign currencies. News reports refer to an acceleration of continuing outflow. Free market rules generally allow for an active market in which new investments replace mature ones, but this is rendered more difficult because any foreign investment contribution is transferred into local currency at the official exchange rate, which differs significantly from the implicit rate. The spread between the implicit foreign exchange rate and the official market exchange rate operates as a disincentive to FDI.

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 natural resources, or, in the case of mining, under the Mining Law Code and Law 24196 on mining that 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

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state-owned entity created to be a new state agent in the oil and gas market. ENARSA shares 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. CAMMESA is 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 natural gas from ENARSA to supply independent thermal power producers. The amounts are partially repaid by the supply price, therefore incurring recurrent economic deficits periodically assumed by the state.

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 new contract for exploration and exploitation of non-conventional hydrocarbon resources is being put in place, at a differential price which is said to require a US$1.2 billion investment over five years. The contract would be made by the private investor and YPF under the terms of new Decree 929/13, which allows crude oil exports to keep 20 per cent of the proceeds in foreign currency (the balance being subject to the general framework of sale of the foreign currency export proceeds into local currency at the official market exchange rate) for a 25 plus 10 years term, and, for natural gas, granting that its price will not be lower than a reference export price in case of restrictions imposed by the government. Other differences of treatment from the present regulated market terms applicable for existing concessions are generally added to make for a washed down version of the original terms, but this is limited to new investments exclusively.

Another contract under this framework is being announced, circumventing the otherwise applicable foreign exchange rate into local currency for the disbursement of the investment, through the subscription by the investor of public bonds earmarked for such energy investments, under still undefined rules.

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

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. In most, if not all, of them it 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 for suspension of BIT's investor's guarantees. It has also made use of the ICSID Rules' annulment procedures.

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.

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, 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.

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.

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 investment (particularly with respect to transfer of technology and intercompany financing) apart from the specific restrictions that may apply for specific sectors. Foreign exchange restrictions are of paramount importance in order to have a clear picture of the inflow and outflow of the investment and its proceeds. 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.

Although there are several government agencies that are involved in the promotion of inbound foreign investment, the specific investment

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agencies are established at provincial government level, such as the Investment Promotion Department of the Province of Buenos Aires, which exists for informational purposes only.

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 the 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 them.

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 might 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. There are others 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.

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 the first arbitration claim 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.

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 amount of times when it has challenged arbitrators, filed jurisdictional defences (rarely successfully) 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).

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, having appointed as authority to be served notice of such enforcement request a tribunal, itself within the judiciary, which the

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Update and trends

The state has been successful up to now in delaying or avoiding voluntary compliance with ICSID awards. This continues to have an impact on new investment decisions and on financing, posing some questions for the future when Argentina's circumstances and economic environment starts to change. In the past years, Argentina has restructured its sovereign debt with a substantial reduction in stated value, and experimented with trade surplus based on the sizeable international price increase of Argentine commodities. Both these factors are now lessening, and economic policies, including those that will not be sustainable (energy prices subsidised through ever increasing energy imports by the state) will require the state to reconsider its prior stance to obtain international financing and foreign investments.

On 10 October 2013 the state settled five ICSID arbitration cases by tendering sovereign bonds to the claimants, for an amount equal to the principal and interest due, less a discount, and with a further commitment from the claimants to purchase, for an amount equal to a fraction of the settlement mentioned above, other sovereign bonds, the proceeds of which will be applied to specific purposes (hydrocarbons and infrastructure).

state designated and so gave notice to ICSID that it is the venue where the proceedings would be initiated. Under article 26 of the ICSID Convention, the state has waived any recourse other than the one available under the ICSID Rules, having waived its immunity to jurisdiction.

The state has recently settled five ICSID cases. See 'Update and trends'.

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*, 7.3.07CNACAF, panel IV) to order the stay of the arbitration procedure (*National Grid Tranco plc v Argentine Republic*) through a preliminary order.

In *Entidad Binacional Yacyretá v Eriday et al*, case 26.444/04, 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 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 trend setter *Fibraca*).

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