Argentina

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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 and mining. 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 past 20 years. 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 in the past years 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. At present, FDI is 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 area, on account of its sizeable areas under concession in the Vaca Muerta and Los Molles shale formations. Argentina has been ranked by the Energy Information Administration 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. Even if the regulatory framework is far from settled (amid pinpoint extensions of prior, conventional, production areas concessions, and new regimes for incentives to new investors in a strictly controlled market), players such as Chevron, Exxon, Total, Shell, Pemex and Petronas are attracted to explore and develop such new formations.

In other sectors of the economy, however, the recession has hit activity, reducing by a third the output of the automotive industry, and causing a severe challenge to the stability of foreign currency reserves of the Central Bank on account of the worsening external trade, current account and fiscal deficits. This goes hand in hand with increasing difficulties for imports for the thinly integrated local industry. Financial inflows have been also severely hit, not only because of the above, but because of the harsh dispute at United States courts with Argentine Sovereign Bonds holdouts that rejected such debt restructuring, approved (with a substantial haircut) by a large majority, and 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 are not paid simultaneously.

The Argentine government has objected and is looking for alternative payment locations of such exchange bonds with local financial agents, however, this has been ruled in the United States to be in contempt of court. The prior (2013) settlement of five different ICSID awards and the restructuring of the Club de Paris debt by Argentina, purportedly enhancing the chances to return to international financial creditworthiness, has been set back by this dispute and its unpredictable outcome.

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

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, regarding 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.

The state has since 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 in the 1990s and 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 by law 26741, which was settled and paid in 2014 only after various ICSID and other claims by Repsol. State intervention can also be 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 the rationing of demand of energy for industrial purposes.

FDI is therefore 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, that approved the 2013 government budget) through public levies.

Such funds are applied in public bids to new infrastructure, but not without the courts' resistance. In the case of 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 supplies, have yet to prove successful amid the generalised stagnation of production of oil, gas and power, and a worsening energy trade deficit standing now at US$7 billion (energy imports reached US$13 billion for the past 12 months). The market therefore is fragmented with differential prices highly regulated and depressed.

New rules will continue to be introduced (with higher energy prices remunerating new investments under substantial governmental subsidies) in an attempt to lure new investment in a complex scenario of regulated activities. A new hydrocarbons upstream law is being discussed in parliament, whereby the nation is competing with the provinces - themselves holders of the eminent domain on such resources - for sharing the government take among a disputed provincial carry to be granted by new exploration and production private parties, corporate social responsibility burdens, canons and levies, and increasing royalties on the basis of provincial frameworks tailored to the needs and politics of each province in which the resources are found. The new legal framework will be born with a lack of transparency of the rules of the game in an energy crisis. Significant changes in such a legal framework will have to be expected in the future if the regulatory induced energy crisis in this resource-rich country is to be adequately solved.

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.

There have been reports of an acceleration of outflow as Central Bank reserves, as of September 2014, are lower than US$29 billion, similar to

three months of imports. Free-market rules generally allow for an active market in which new investments replace mature ones; however, this is rendered more difficult because any foreign investment contribution has to be transferred into a local currency at the official exchange rate, which differs significantly from the implicit rate (the exchange rate obtained by trading dollar-quoted bonds or ADRs).

The spread between the implicit foreign exchange rate and the official market exchange rate operates as a disincentive to FDI, and the gap is ever widening. The de facto rationing of import payments is affecting large projects already in the pipeline, and a symptom of this can be seen in the new upstream oil and gas law draft, whereby non-conventional exploration and exploitation would be entitled to a preference to access to foreign currency for paying imports related to such investments, and to obtain foreign currency for 20 per cent of their crude oil production output in case exports are restricted because of local supply deficits in the future.

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 is now subject to an imminent legislative change), or, in the case of mining, under the Mining Law Code and Law 24196 on mining that assures 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 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 now purchases imported LNG, re-gasified, and natural gas from ENARSA 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. 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 a US$1 billion investment over five years) and YPF under the terms of Decree 929/13, which allows crude oil producers to export up to 20 per cent of production and keep such 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 exports (up to the amounts invested). The contract is for 25 years (extensible to 35 years), plus another 10 years. The same applies for natural gas, granting that its price will not be lower than a reference export price in case restrictions are imposed by the government.

This flexibilisation of regulated market terms makes for a washed-down version of the original terms of the concessions granted in the 1990s. Decree 929's treatment, which will be replicated in the new Hydrocarbons Law, is limited to new investments exclusively, but adds the previously mentioned duration terms to existing players (or their new partners) in already productive fields, 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 controlled, showing 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).

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, although exercising all available defences, for example, mass claims such as the 2014 *Abaclat*-bond holdouts, with numerous procedural hurdles; the US Supreme Court award confirming the validity of the ICSID award in *BG Group Plc*; the *El Paso Energy International Corporation* 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 them the state has filed a defence of lack of jurisdiction and challenged arbitrators over investors' lack of standing to claim what Argentina called derivative damages, and invoking the national emergency defence arguing a suspension of BIT investor guarantees. It has also made use of the ICSID Rules' annulment procedures.

In *BG Group*, March 2014, the US Supreme Court reversed the judgment of the Court of Appeals and upheld the validity of an arbitral award to the benefit of the investor. 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 arbitration tribunal, which had not acted in excess of its powers by assessing the obstacles imposed by Argentina to access such domestic courts in an effective and timely way.

Other institutionalised arbitration systems are also in place, although basically state-to-state (in the framework of Mercosur, the common market association between southern cone Latin-American countries). 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 in 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 a defendant under the 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 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 are of paramount importance 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 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 in 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 Congress and the Senate's 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, 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.

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. 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.

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). In 2013, the decision in *Ambiente Ufficio SpA 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

Update and trends

Argentina is facing significant challenges to its ability to integrate its opportunities to reach new technologic frontiers for developing its natural resources (and its highly developed and diversified energy matrix and infrastructure), with a climate for investments that may allow stepping out of a regulatory, self-induced, recession.

A sustained, and increasing, inflationary process drives regulations to set price controls and foreign exchange restrictions to cope with foreign trade and capital balance shortcomings in a pre-election year. However, the driving force of its agricultural and related products capacity, which made for its astounding growth in the past decade, cannot be overlooked if an increase in overall productivity is considered as a common policy to overcome such difficulties.

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.

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 on 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 54 of the ICSID convention.

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 settled five ICSID cases. See 'Update & 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*). 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.

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