

THE PROTECTION OF FOREIGN INVESTMENT IN ARGENTINA¹

LA PROTECCION DE LAS INVERSIONES EXTRANJERAS EN ARGENTINA

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ABSTRACT

The purpose of this paper is to make a brief analysis of the regulation of foreign investment in Argentina at national, regional (MERCOSUR) and international level. Special attention will be given to the Argentine expropriation regime.

Keywords: foreign investment, expropriation, mercosur.

RESUMEN

El objetivo de este artículo es analizar brevemente la regulación de las inversiones extranjeras en Argentina a nivel nacional, regional (MERCOSUR) e internacional. Se prestará atención al régimen de expropiaciones en Argentina

Palabras claves: inversiones extranjeras, expropiación, mercosur.

RESUMO

O objetivo deste trabalho é fazer uma breve análise da regulamentação dos investimentos estrangeiros na Argentina a nível internacional, nacional, regional (MERCOSUL). Será dada especial atenção ao regime de expropriação da Argentina.

Palavras chaves: investimento estrangeiro, expropriação, mercosul.

A INTRODUCTION

In the 1990s, Argentina was one of the countries that attracted most direct foreign investment (DFI). In 2012, DFI flowing into Latin America and the Caribbean hit a new record high of US\$ 174.546 billion. This is 5.7% above the level posted in 2011 and confirms a consistent uptrend that began in 2010 (ECLAC, 2012, p. 9).

FDI income in Argentina climbed 27% to US\$ 12.551 billion. While capital contributions decreased by 9%, to US\$ 3.708 billion, reinvested earnings reached US\$ 7.984 billion, more than double the figure for the previous year. A medium-term comparison shows that capital contributions were 7% higher than the average for 2007-2011 and reinvested earnings posted even sharper increases (ECLAC, 2012, p. 26).

In terms of foreign investment, the most striking news was the expropriation under Law No. 26,741, whereby the shares of the Spanish oil company REPSOL were declared of public interest and were subject to expropriation. In that context, the purpose of this paper is to make a brief analysis of the regulation of foreign investment in Argentina at national, regional (MERCOSUR) and international level. Special attention will be given to the Argentine expropriation regime.

B DOMESTIC LAW

In order to analyze the Argentine regime of investment protection, first, the general legislation governing this issue will be addressed, and later, the expropriation regime.

1 INTERNAL LEGISLATION ON INVESTMENT PROTECTION

The Argentine Constitution provides for equal treatment of Argentine citizens and foreigners (Section 20), thus safeguarding equal treatment between local and foreign investors. The Constitution also states that the Congress is empowered to provide for the imports of foreign capital (Section 75(18)). Furthermore, pursuant to Section 75(22), Treaties have a higher hierarchy than laws.

Law No. 21,382, as amended by Decree No. 1853/93² provides the legal framework by defining foreign capital investment as a) all capital contributions owned by foreign investors allocated to any business activities undertaken in the country, and b) the acquisition by a foreign investor of ownership interest in an existing local company (Section 2.1). Foreign investors are defined as any natural or legal person domiciled outside the Argentine Republic holding a foreign capital investment, and foreign owned domestic corporations investing in other domestic companies (Section 2.2). In addition, Section 3 of Decree No. 1853/93 provides that "the notion of foreign investor includes all Argentine natural and legal persons domiciled outside the Argentine territory."

Under this Law, "foreign investors may at any time remit abroad any liquid and realized profits derived from their investments, as well as repatriate their investment" (Section 5).

² Argentine Ministry of Economy and Public Finances. Legislative Information. <http://www.infoleg.gov.ar/infolegInternet/anexos/55000-59999/56254/texact.htm> (Query made on September 29, 2013).

This Law also governs the free choice of the business association structures provided by the applicable Argentine law (Section 6), as well as access to domestic credit facilities on an equal footing with locally-owned companies (Section 7).

Decree No. 1853/93 provides that "foreign investors may invest in the country with no need of prior approval and under the same conditions as investors domiciled in the country" (Section 2).³

According to Máximo Bomchil (1994, p. 732), the new revised text approved by Decree No. 1853/93 provided the foreign investment regime with "clarity, certainty and transparency".

Siseles (2004, p. 123) points out that the enactment of "national emergency legislation included several measures that, in one way or another, affected the agreements entered into by the public administration, either by national, provincial or municipal entities". In that sense, Section 1 of Law No. 25,344, passed on October 19, 2000, provided the following: "The economic financial condition of the Argentine Government, the provision of services and the performance of agreements entered into by the public sector as defined in Section 8 of Law No. 2414 are hereby declared in state of emergency, except for *Banco de la Nación Argentina* and *Banco de Inversión y Comercio Exterior*".

Section 2 of that Law provided the following:

The Executive is hereby empowered to terminate works, services, supply, consulting or any other kind of contracts that create obligations for the Government, that were entered into before December 10, 1999 by the public entities described in Section 1 hereof. The contracts entered into by virtue of the privatization processes authorized by Law No. 23,696 and whose consideration is governed by the regulatory frameworks defined by the applicable law are expressly excluded from the foregoing...

Section 1 of Law No. 25,561, passed on January 6, 2002, provided the following:

Pursuant to the provisions of Section 76 of the Argentine Constitution, the public emergency as regards social, economic, administrative, financial and exchange issues is hereby declared, the Executive being delegated the powers granted hereby until December 10, 2003, in accordance with the grounds specified below...

Under Section 9, the Executive is authorized to renegotiate the contracts entered into by the Public Administration by virtue of public law rules, including public works and utilities. As regards contracts for the supply of public utilities, the following criteria must be considered: 1) the impact of tariffs in competitiveness within the economy and as regards income distribution; 2) the quality of the services and investment plans that were provided in the relevant contract; 3) the users' interest and the access to services; 4) the safety of the systems involved; 5) the company's profitability.

The term specified in this rule was extended many times and, as stated by Siseles (2004, p. 123), "foreign shareholders of contracting companies that were affected by these measures commenced different proceedings before arbitration tribunals".

Pursuant to the provisions of Decree No. 1187/2010⁴, the National Agency for Investment Development, under the scope of the Ministry of Industry (Section 3), was dissolved and the powers of such entity were delegated to the Undersecretary of Investment Development under the scope of the Secretary of Trade and International Economic Relations of the Ministry of Foreign Affairs, International Trade and Religion (Section 5). The

³ <http://infoleg.mecon.gov.ar/infolegInternet/anexos/15000-19999/16477/norma.htm> (Query made on September 29, 2013).

⁴ Signed on August 19, 2010 and published in the Official Gazette on August 27, 2010, Page 1. Source: <http://infoleg.mecon.gov.ar/infolegInternet/anexos/170000-174999/171086/norma.htm>

form attached to Section 2 defines the purposes of the Undersecretary of Investment Development, as stated below:

1. To suggest strategies and policies for the development of local investment and to attract direct foreign investment.
2. To advise the Secretary as regards the design, proposal and implementation of tools to promote investment in the country and the international expansion of local companies.
3. To advise the Secretary as regards the external commercial strategies and policies that affects the investment climate.
4. To promote, both locally and abroad, the investment incentive strategies and policies.
5. To become the single authority for foreign investors.
6. To provide consultancy and information services on the legal framework and incentives to foreign investment.
7. To enable the management of foreign investment projects, in coordination with the relevant areas and providing the investor with direct assistance.
8. To promote, through foreign investment, innovation, research and technological breakthroughs and to foster competitiveness, quality and industrial design.
9. To participate in the design of external financial assistance for national projects in connection with territorial administrations and intermediaries.
10. To coordinate its actions with the different relevant agencies of the Public Administration.
11. To articulate the promotion of foreign investment with the provinces and municipalities, in an aim to achieving an equitable territorial distribution.
12. To advise the Secretary as regards the promotion of strategic alliances between local and foreign companies. In its whereas clause, the Decree provides "that the national strategy in terms of investment development is a decisive tool for the economic and trade negotiation abroad, the implementation of which is closely related to any other aspects of international relations, in articulation with all national activities entrusted to the different Ministries."

2 THE ARGENTINE EXPROPRIATION REGIME

Section 17 of the Argentine Constitution provides that "Property may not be violated, and no inhabitant of the Nation can be deprived of it except by virtue of a judgment based on law. Expropriation for reasons of public interest must be authorized by law and previously compensated".

The Argentine Supreme Court understands that the constitutional notion of property entails "all interests that any man may have beyond himself, his life and his freedom. Any rights acknowledged as such by the law, either originating in private law relationships or arising from administrative acts (private or public subjective rights), provided that the holder of such rights is entitled to commence court proceedings against anyone who intends to impair the enjoyment thereof, even the Government itself"⁵.

Nevertheless, there are certain exceptions to the inviolability of property rights safeguarded by the Argentine Constitution, such as expropriation, which dates back to French law and that was "enshrined in the French Declaration of the Right of Man and of the Citizen (Section 17)" (DALLA VÍA, 2011, p. 169).

Under the Argentine law, a declaration of public interest by a prior law and just compensation are required. According to Dalla Vía (2011, p. 169), these requirements "are part of the foundations of western constitutionalism that were included in our Constitution".

⁵ "Pedro Emilio Bourdieu v Municipalidad de la Capital" Supreme Court, December 16, 1925

Almost every government – from diverse political colors- has resorted to this notion in different periods, invoking the axiological ground of expropriation, the purposes of common good, a power to be exercised by and under the scope of the Government. (VITOLO, 2012, p. 1).

This author summarizes the Argentine expropriation regime as follows:

the legal regulation of this right is provided both in Section 17 of the Argentine Constitution as well as in Law No. 21,499 on Expropriations, in the provincial constitutions and laws in force in their jurisdictions, in Section 16 of the Mining Code, and in Sections 439, 1324(1), 2511, 2610, 2637 and 2861 of the Civil Code, among other regulations. (VITOLO, 2012, p.1).

Law No. 21,499 entered into force in January 1977.⁶ Its basic principles are:

- The public interest that serves as a legal ground for expropriation entails, in all cases, satisfying the common good, either materially or spiritually (Section 1). In that sense, the public interest of property must be declared by a statute.
- The Law must identify the "expropriating party" (Section 2).
- During a specific legal term, the expropriating party shall pay the price of expropriation.

A MERCOSUR

At present, there is no treaty that regulates foreign investment in MERCOSUR. The following treaties were adopted but never entered into force: 1) The Colonia Protocol for Reciprocal Promotion and Protection of Investment in MERCOSUR, signed in Colonia del Sacramento on January 17, 1994 (Decision No. 11/93 of the Common Market Council) and b) the Protocol on Promotion and Protection of Investments from Non-member States of MERCOSUR, signed in Buenos Aires on August 5, 1994 (Decision No. 11/94 of the Common Market Council).

In 2010, through Decision No. 30/10 of the Common Market Council, the "*Directrices para la Celebración de un Acuerdo de Inversiones en el MERCOSUR*" (Guidelines for Execution of an Investment Agreement in MERCOSUR) were approved. In that context, "the execution of an investment agreement in the MERCOSUR is a fundamental initiative for the development of the economies of the Member States". This rule superseded the Colonia and Buenos Aires Protocols. Furthermore, the Work Sub-group No. 12 "Investments" was requested a draft Agreement to be considered. The project must be based on the following guidelines: 1) the scope of application will be direct foreign investment in assets; 2) among the main obligations, rules as regards national treatment, transparency, domestic regulation and personnel must be established; 3) the scope of the disciplines in connection with protection in cases of expropriation must be specified; 4) the commitments methodology must be defined; 5) the way in which restrictions will be released must be listed; 6) a common classification of commitments must be agreed; 7) the dispute resolution method must be based on the State-by-State model, taking the Olivos Protocol as reference; 8) the conditions for the free transfer of capitals must be established.

In spite of this Decision, no progress was made and the bloc still lacks a legal regulation that protects foreign investments made among member countries and those that come from other non-member States.

⁶ Published in the Official Gazette on January 21, 1977

B INTERNATIONAL LAW

Mercedes Ales states that “in the Argentine constitutional system, following the 1994 reform, international agreements went on to be hierarchically superior to national laws, compelling Argentina to abide internally with the obligations assumed in these treaties” (ALES, 2008, p. 489).

It is worth emphasizing that Argentina has signed the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the "New York" Convention (1958)⁷, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965)⁸, the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy of the International Labour Organization (1977)⁹, and the Convention of the Multilateral Investment Guarantee Agency (1985)¹⁰.

The Argentine Republic has signed 58 BITs, 3 of which have not been ratified by Dominican Republic, Greece, New Zealand¹¹. The bilateral investment treaties in force were signed by: Algeria, Armenia, Australia, Austria, Belgium and Luxembourg, Bolivia, Bulgaria, Canada, Chile, China, Costa Rica, Croatia, Cuba, Czech Republic, Denmark, , Ecuador, Egypt, El Salvador, Finland, France, Germany, Guatemala, Hungary, India, Indonesia, Israel, Italy, Jamaica, Korea, Republic of, Lithuania, Malaysia, Mexico, Morocco, Netherlands, Nicaragua, Panama, Peru, Philippines, Poland, Portugal, Romania, Russian Federation, Senegal, South Africa, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukraine, United Kingdom, United States, Venezuela, Vietnam¹².

The domestic emergency regulations mentioned above gave rise to numerous proceedings against the Argentine Republic brought by foreign investors before the ICSID. Annex I lists the pending cases filed against Argentina before the ICSID and Annex II, the concluded cases.

C GENERAL CONCLUSIONS

In spite of the applicable Argentine laws on the protection of DFI, such as Decree No. 1853/93, the domestic legislation should be adapted to the international rules given that more than fifty bilateral treaties on investment promotion and protection are currently in force and in view of the fact that those treaties have a higher hierarchy than laws (Section 75(22) of the Argentine Constitution).

The Constitution safeguards equal treatment between nationals and foreigners as regards investments and private property rights. An exception to the latter is expropriation, which must be enforced according to law, for public interest purposes and that entails payment of a compensation.

Argentina has signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) as well as many bilateral investment treaties that resulted in the different proceedings against the country before the ICSID. Within the scope of MERCOSUR, there are no legal rules applicable to DFI, this being a pending issue for the bloc, since any relevant rules on this issue would provide foreign investors with legal certainty.

⁷ Signed by Argentina on August 26, 1958, in force since June 12, 1989

⁸ Adopted by the Governing Body of the International Labour Office at its 279th session (Geneva, November 2000)

⁹ Signed on September 30, 1996

¹⁰ Signed on September 30, 1996

¹¹ http://unctad.org/Sections/dite_pccb/docs/bits_argentina.pdf (10th October, 2013).

¹² Ibidem

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ANNEX I: PENDING CASES

**Source: International Centre for Settlement of Investment Disputes
(Last query made on October 13, 2013).**

CASE N°	CLAIMANT	SUBJECT MATTER
ARB/12/38	REPSOL, S.A. and REPSOL BUTANO, S.A.	Oil production enterprise
ARB/09/1	Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.	Air Transportation Services
ARB/08/9	Ambiente Ufficio S.p.A. and others	Debt instruments
ARB/07/31	HOCHTIEF Aktiengesellschaft	Highway system construction contract
ARB/07/26	Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa	Water services concession
ARB/07/17	Impregilo S.p.A.	Water services concession

ARB/07/5	Abaclat and others	Debt instruments
ARB/05/1	Daimler Financial Services AG	Leasing and financial services
ARB/04/16	Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A.	Gas production concessions
ARB/04/4	SAUR International	Water and sewer services concession agreement
ARB/04/1	Total S.A.	Gas production and distribution/power generation project
ARB/03/27	Unisys Corporation	Information storage and management project
ARB/03/23	EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A.	Electricity distribution enterprise
ARB/03/22	Electricidad Argentina S.A. and EDF International S.A.	Electricity distribution enterprise
ARB/03/21	Enersis S.A. and others	Electricity distribution enterprise
ARB/03/19	Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A	Water services concession
ARB/03/17	Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A.	Water services concession
ARB/03/15	El Paso Energy International Company	Hydrocarbon and electricity concessions
ARB/03/10	Gas Natural SDG, S.A	Gas supply and distribution enterprise
ARB/03/2	Camuzzi International S.A	Gas supply and distribution enterprise
ARB/02/17	AES Corporation	Electricity generation and distribution operations
ARB/02/16	Sempra Energy International	Gas supply and distribution enterprise
ARB/02/1	LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc.	Gas distribution enterprise
ARB/01/3	Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P.	Natural gas transportation company

ANNEX II: CONCLUDED CASES

Source: International Centre for Settlement of Investment Disputes
(Last query made on October 13, 2013).

CASE N°	CLAIMANT	SUBJECT MATTER
ARB/08/14	Impregilo S.p.A.	Highway construction concession
ARB/05/11	Asset Recovery Trust S.A.	Collection contract
ARB/05/5	TSA Spectrum de Argentina, S.A	Telecommunications concession

ARB/05/2	Compañía General de Electricidad S.A. and CGE Argentina S.A.	Electricity distribution concessions
ARB/04/20	RGA Reinsurance Company	Financial reinsurance services
ARB/04/18	France Telecom S.A	Telecommunications concession
ARB/04/14	Wintershall Aktiengesellschaft	Gas and oil production
ARB/04/9	CIT Group Inc.	Leasing enterprise
ARB/04/8	BP America Production Company and others	Hydrocarbon concession and electricity generation project
ARB/03/30	Azurix Corp.	Water and sewer services concession agreement
ARB/03/20	Telefónica S.A	Telecommunications enterprise
ARB/03/18	Aguas Cordobesas S.A., Suez, and Sociedad General de Aguas de Barcelona S.A.	Water services concession
ARB/03/13	Pan American Energy LLC and BP Argentina Exploration Company	Hydrocarbon and electricity concessions
ARB/03/12	Pioneer Natural Resources Company, Pioneer Natural Resources (Argentina) S.A. and Pioneer Natural Resources (Tierra del Fuego) S.A.	Hydrocarbon and electricity concessions
ARB/03/9	Continental Casualty Company	Insurance company
ARB/03/7	Camuzzi International S.A.	Electricity distribution and transportation enterprise
ARB/03/5	Metalpar S.A. and Buen Aire S.A	Motor vehicle enterprise
ARB/02/8	Siemens A.G	Informatic services contract
ARB/01/12	Azurix Corp.	Water and sewer services concession agreement
ARB/01/8	CMS Gas Transmission Company	Gas transmission enterprise
ARB/99/4	Empresa Nacional de Electricidad S.A.	Hydroelectric power concession
ARB/99/1	Mobil Argentina S.A.	Petroleum exploration and production venture
ARB/98/1	Houston Industries Energy, Inc. and others	Electricity distribution and sale concession
ARB/97/6	Lanco International, Inc.	Port terminal concession agreement
ARB/97/3	Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A.	Water and sewer services concession agreement