

# Argentina facing international claims over foreign investments

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## **Abstract**

With the abandonment of the convertibility regime that brought about the devaluation of the peso and the subsequent *pesification* of its economy (2001/2002), Argentina made unilateral adjustments to certain “rules of the game”. This resulted in a number of foreign investors bringing up claims against Argentina before the International Centre for Settlement of Investment Disputes (ICSID).

**Keywords:** Foreign investments - International claims - Argentina - Bilateral Treaties for the Reciprocal Promotion and Protection of Investments (BIT) - International Centre for Settlement of Investment Disputes (ICSID).

## **Introduction**

Following the abandonment of the convertibility regime in 2002, the number of foreign investors’ claims brought before International Centre for Settlement of Investment Disputes (ICSID) against our country totalled thirty two, with the total amount claimed is towering above twenty billion dollars. Simultaneously, four claims were brought before the United Nations’ ad hoc courts and four others before the ICC International Court of Arbitration<sup>3</sup>.

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<sup>3</sup> *Procuración del Tesoro de la Nación*, [http://www.ptn.gov.ar/sectorinternacionales/juicios\\_internacionales.htm](http://www.ptn.gov.ar/sectorinternacionales/juicios_internacionales.htm), accessed 5 november 2006.

This issue is of particularly importance not only for the Argentine Government but also for the population at large for it has repercussions in various aspects of the economic and institutional development of the country. Here we intend to present some points pertaining to the economical, social and legal background against which these disputes and their origins should be confronted.

With the abandonment of the convertibility regime (that had pegged the Argentina currency to the USA dollar) thus devaluating the peso and the country entered into a process known as "*pesification* of the economy", which implied the compulsory conversion of all obligations acquired in foreign currency to Argentine pesos as well as the freezing of tariffs and the impossibility for companies to adjust the prices of their services to the new value of the USA dollar or the Euro. In some cases this amounted to losses that could escalate up to a thirty per cent in the finances of investors. The unilateral adjustments to certain "rules of the game" made by our country severely affected a large number of national and international investors who trusted and backed Argentina, even in times of crisis.

In a context like this, foreign investors look towards the remedies offered by a series of international legal instruments called Bilateral Treaties for the Reciprocal Promotion and Protection of Investments (BIT). In order to be able to understand what is happening in our country today and its current situation before the ICSID, it is important to explain the significance of these agreements.

These legal instruments are signed by States and governed in accordance with Public International Law. Their objective is to establish clear and precise rules to promote investments between both Countries signing the treaty and to protect the foreign investors of one of the States when they invest in the other Contracting State in the event of any non compliance with the terms of the investment. Pursuant to what is set forth in their Preambles, the aim of these treaties generally consists of promoting greater cooperation between the contracting parties. The ultimate goal is to achieve economic development for both countries and an increase in the communities' prosperity. Particular attention is paid to stimulating private economic initiative and the flow of private capital, as well to the maintenance of a stable framework for investments together with a fair and equal treatment of investors.

To date, the Argentine Republic has signed more than fifty BITs<sup>4</sup>. A significant number of these were signed in the 1990's with the large majority coming into effect

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<sup>4</sup> *Subsecretaría de Comercio y Gestión Comercial*, <http://www.comercio.gov.ar/dnpce/dnpce-articulos.html>, accessed 13 november 2006.

between 1992 and 1995<sup>5</sup>. Some of the most noteworthy agreements are those signed with Great Britain, Italy, Spain, France, Canada, Germany, the United States, Austria, the Netherlands, China and Russia, amongst others.

### **Objectives and reasons for signing BITs**

From the point of view of countries that export capital (developed countries) the relevance of such instruments lies in the fact that they grant their national investors reliable protection by means of a legally binding and enforceable agreement with the State receiving the capital, so that the latter cannot alter its legislation arbitrarily to the detriment of the foreign investor. For their part, by signing these agreements, the States receiving the foreign capital (developing countries) aim to promote the development of legitimate and productive investment and in return promise to grant foreign investor a specific treatment and make sure that throughout the duration of the investment the legal rules that constitute its legal framework remain unchanged.

The structure of a BIT is normally structured on a double basis: on the one hand, **the** protection of the foreign investor and the need to accord him/her certainty and foreseeability (the renowned "legal security") as regards the regulations according to which s/he invests and, on the other hand, the consecration of an the international arbitration system to resolve any dispute that may arise in the course of the enterprise. International arbitration consists of granting the individual investor the possibility to bring before an international court or tribunal that does not belong to the judicial structure of any of parties involved in the dispute, the State receiving the investment and which is being accused of breaking the agreement<sup>6</sup>.

In this context, any violation by the contracting parties of the terms laid down in the treaty will be considered a violation of the rules of International Law, which stipulate that agreements are made to be fulfilled, thus having negative consequences for the State that has failed to fulfil its obligations before the international community<sup>7</sup>. In particular when the measures taken by the contracting State affect the investments

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<sup>5</sup> Ymaz Videla, Esteban M., *Protección de Inversiones Extranjeras. Tratados Bilaterales. Sus efectos en las Contrataciones Administrativas*, Buenos Aires, La Ley, 1999, pp. 4-8.

<sup>6</sup> Tawil, Guido S., "Los Tratados de Promoción y Protección Recíproca de Inversiones. La responsabilidad del Estado y el arbitraje internacional" in *La Ley*, sección Doctrina, Vol. 2000-D, Buenos Aires, La Ley, p. 1106.

<sup>7</sup> Gutiérrez Posse, Hortensia, "Acuerdos para promoción de inversiones extranjeras. Sistemas de solución de controversias" in *Los Convenios para la Promoción y Protección Recíproca de Inversiones*, Buenos Aires, Instituto de Derecho Internacional y de la Navegación, Academia Nacional de Derecho y Ciencias Sociales, 1993, p. 9.

made in accordance with the legal safeguards and warranties ensured in the BIT and this amounts to a direct or indirect expropriation of the investor's patrimony.

### **General content of BITs**

BITs signed by different countries worldwide contain similar mutual provisions, since they adhere to a standard model that the Organisation for Economic Cooperation and Development (OECD) recommended to its member States in 1962.

The agreements signed by our country contain the clauses: "national treatment" and "most favoured Nation". According to the first clause, every Contracting State is obliged to grant foreign investors the same treatment as that accorded to its own nationals. As regards the rule, "most favoured Nation"<sup>8</sup>, when facing identical or similar situations, each State party is obliged to accord investors in another Contracting State treatment which is just as favourable as that granted to its own investors or to investors of any third country<sup>9</sup>.

Also, these instruments outline a regime for the direct expropriation of investments acknowledging the Contracting States' right to take investments made in their country, as long as this process fulfils a series of requirements strictly listed in the terms of the applicable BIT and after payment of due compensation.

The most important point is that all the treaties contain a process for resolving disputes over investments caused between individual investors of one of the Contracting States and the other Contracting State receiving these investments.

This process authorises the foreign investor to submit the dispute to the decision of an international court of arbitration. In some cases this requires the exhaustion certain preliminary proceedings which may include the need to bring the claim before the national courts of the non compliant State. The foreign investor that considers him/herself harmed by a measure adopted by the country receiving the investment has the possibility of opting to submit the dispute to the local courts of the alleged State offender, or to the arbitration of the ICSID, or to the arbitration of the ICC International Court of Arbitration, or to an ad hoc court established in accordance with the rules of the United Nations Commission on International Trade Law (UNCITRAL).

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<sup>8</sup> Perugini, Alicia M., "La definición de las personas físicas y la cláusula de la Nación más favorecida en los Convenios Bilaterales de Promoción y Protección de las Inversiones" in *Los Convenios para la Promoción y Protección Recíproca de Inversiones*, Buenos Aires, Instituto de Derecho Internacional y de la Navegación, Academia Nacional de Derecho y Ciencias Sociales, 1993, p. 47.

<sup>9</sup> United Nations Centre on Transnational Corporations, *Bilateral Investment Treaties*, New York, United Nations, 1988, p. 39.

According to the terms laid down in the BITs signed by Argentina, the awards granted by the corresponding courts of arbitration are definitive and obligatory for the parties.

### **Foreign Investments, globalisation and law**

Financial globalisation is a fundamental characteristic of the current state of international economic relations. In this sense, the free movement of capital across the world's national borders (it is calculated that 2 billion dollars per day are in circulation<sup>10</sup>) forms part of the framework of the modern world economy.

The development and momentum of foreign investments have been considered as two of the most important phenomena of the current globalisation process, in particular due to their significant increase in the 90s and their impact on the development of national and regional economies.

The past 50 years have seen major changes in the regulation of the treatment of the foreign investor. These changes have a direct link to the internal economic, legal, social and political factors in the different countries, and which directly determine the typical regime that each State will provide to regulate foreign investments.

In this globalised world, the Law ceases to be an exclusive legal concept pertaining to each State and becomes a common regulatory Law of activities that, traditionally, were under the State's sovereign authority. Likewise, it has acquired an instrumental nature by becoming a means to resolve conflicts between States and nationals of other States, thus displacing the traditional diplomatic methods of resolving disputes between States. In this context, BITs were the means of consolidating a general regulating model and granting a certain uniformity in the treatment by means of institutionalising a series of laws and guarantees for the foreign investor, thus obliging the State receiving the capital to respect such laws. By transcending the legal system of each particular State and adhering to international arbitration methods, these agreements aimed at positioning both parties on a same level, thus obviating to a certain extent the Sovereignty of the State.

### **Argentinean legal framework**

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<sup>10</sup> Hopenhayn, Benjamín and Vanoli, Alejandro, *La globalización financiera. Génesis, auge, crisis y reformas*, Buenos Aires, Fondo de Cultura Económica, 2002, p. 16.

Out of all the MERCOSUR countries, the Republic of Argentina had, in the course of the 90s, made the most progress in terms of protecting the foreign investor. It has signed a much greater number of bilateral agreements with capital-exporting countries than any other MERCOSUR nation. Furthermore, it has firmly accepted international arbitration practice<sup>11</sup>.

In 1989, for the first time, Argentina accepted offers to negotiate agreements for the reciprocal promotion and protection of investments. On 22 May 1990, it reached its first agreement with Italy and thereafter the number of treaties signed continued to increase until 2000.

This practice was accompanied by a new foreign investments law (21.383/93 and Dec. 1853/93) and by an economic policy that, at that time, aimed mainly at achieving greater access of foreign investments to the Argentine economy of goods and services.

In our constitutional system, following the 1994 reform, international agreements went on to be hierarchically superior to national laws, thus compelling our country to abide internally with the obligations assumed in these treaties.

### **Claims against Argentina**

At the end of 2001 the economic indicators of greater importance reached catastrophic proportions. The GIP fell in more of the 10% in relation to the previous year. The economy crossed a process of recession initiated at the beginning of the year 1998; in addition to this, to the deflation of prices, the dramatic increase of unemployment, and poverty gradually reached situations of unpublished gravity. Unemployment arrived at 25%, and approximately half of the Argentine population was living in extreme levels of poverty. The basic services of health and social security were on the brink of collapse.

It seemed impossible to avoid the sanction of Public Emergency Law 25.561/02 as a necessary and opportune measurement in order to create extraordinary tools to

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<sup>11</sup> In the 1990s, MERCOSUR became a major receiver of capital, especially in Brazil and Argentina. This type of undertaking cannot develop if there is a lack of adequate financing. In this sense, promoting and protecting foreign investors is linked to the conditions that the integration process must create to guarantee the development of investment at a regional level. The investments policy deployed by Argentina since the beginning of 1990 generated some sort of imbalance in relation to the rest of MERCOSUR's countries, as much from a constitutional and integrationist viewpoint as from the number of treaties signed and the acceptance of international arbitration.

face the social and economic crisis<sup>12</sup>. Under those circumstances, the “state of emergency” allowed to orchestrate a package of measures of social containment, making it possible to maintain the essential services operative, preserving internal peace and protecting the very existence of the Argentine State. In equal sense, the prorogation of the state of emergency facilitated to lay the foundations of the economic recovery and served as take off platform of the social and economic indicators, thus allowing the slow process of emerging out of the crisis.

The modification of the convertibility regime and the later *pesification* of the Argentine economy caused the necessity to review and to renegotiate contracts for the provision of public services, with the object of recomposing the structure of prices and yields.

The Argentinean Government maintains that the 2001/2003 economic emergency regulations equally affected nationals and foreigners and were non-discriminatory, that no foreign investor was deprived of his/her property, and that as for resolving its differences with the National State, no foreign company was deprived of its right to access the courts or saw its right to due process tampered with.

At present, claims against Argentina are being brought before ICSID by more than 30 foreign investors. The main allegations that sustain the claims are: a) the suspension and subsequent repeal of tariff adjustments based on price indices such as they were provided for in contracts for the provision of public services, b) the elimination of dollar tariffs, and c) restrictions on foreign transfers.

Following written submissions, it emerges that the largest number of claims are expecting to find a base of legitimacy in harm caused by general measures adopted by the Republic of Argentina as a result of the most severe economic and social crisis that the country had suffered in recent years.

## **Conclusion**

Both national and foreign investors clearly saw themselves harmed by the changes introduced in economic regulations laid down by the National Government in 2001/2003.

Privatised companies rendering public services that registered their claims with ICSID are demanding prompt, adequate and effective compensation from the Argentinean Republic as they think that the measures adopted by the Government

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<sup>12</sup> Oddone, Carlos Nahuel, *Mercados Emergentes y Crisis Financiera Internacional*, editado por Eumed.net; accesible a texto completo en [html://www.eumed.net/coursecon/libreria/](http://www.eumed.net/coursecon/libreria/)

have an effect similar to expropriation (technically called 'indirect expropriation'), having caused them considerable harm and losses.

In response to this the Government replied that these companies continue to render their services and with all their assets and invoice and receive tariffs and rates in a normal and regular manner.

The large majority of these companies took credit from foreign banks at a time when the convertibility regime prevailed in our country. Such contracts with the banks were governed by foreign laws, which made it very difficult for these companies to fulfil their obligations seeing as the adjustment of set tariffs had been prohibited.

It is fair to acknowledge that such "policing" measures were ordered by the National Government in a true state of emergency and necessity- a matter that is extremely relevant when deciding whether or not the Argentinean State has committed indirect expropriation and whether harm suffered by the investors is worthy of compensation.

It is likely that in the medium term, the renegotiation of contracts would be the most viable measure to bear in mind for privatised companies and the National Government in order to reach, in this way, an agreement that is beneficial to both parties. Without doubt, once again, the Argentines' quality of life depends on a matter that would still seem to be unresolved.

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