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# ICSID ARBITRATION AND BITS CHALLENGED BY THE ARGENTINE GOVERNMENT

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## Summary

**The clear possibility of Argentina losing in the majority of the current more than thirty arbitration cases filed before ICSID has moved the Government to build a two tier strategy of defense. One line of action is being developed at the local Federal Supreme Court level by a decision in a local case that has broadened the possibility of judicial review of arbitral awards. Another at political level by challenging the validity of the BIT arbitration clauses and of ICSID jurisdiction in the media and by introducing legislation changing the legal framework for privatized concessions of public services prohibiting in the future the submission of disputes under contracts to foreign jurisdiction.**

## Introduction

The economic crisis of 2001 threw the country into chaos and Argentina defaulted in the payment of its foreign debt. Bank deposits and all credit/obligations denominated in foreign currency under local law were converted into pesos. Public services' tariffs were frozen. These measures have had serious implications not only for investors awarded with concession contracts but also for all investors that trusted in an economic stability and a legal framework that was later substantially changed. Many of these investments were made under the umbrella of Bilateral Investment Treaties (BITs) which provided arbitration as the valid mechanism to solve any arising dispute.

As a result of all of the above and the delay of the successive governments in finding a solution to allow investors to minimize the effects of the *pesification*, many of them brought their claims against Argentine Federal and Provincial Governments before the International Centre for Settlement of Investment Disputes (ICSID). In some cases arbitration claims were filed to improve the standing of the companies in future renegotiations of their contracts.

Many of the cases before ICSID involve companies in charge of concessions of public services that were privatized during the nineties. Investment returns were tied up to a tariff that now has been substantially reduced by the devaluation and the Government has prohibited any adjustments even in pesos. Others involve investors that trusted a legal framework that promises that their investments were guaranteed in dollars at a rate of one local peso to one dollar.

## ICSID Cases

The following is a list of all the cases filed with the ICSID taking into account the different activities involved:

- **Water:** (1) Compañía de Aguas del Aconquija S.A. and Vivendi Universal; (2) Azurix Corp.; (3) Saur International; (4) Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A., and Interaguas Servicios Integrales de Agua S.A.; (5) Aguas Cordobesas S.A., Suez, and Sociedad General de Aguas de Barcelona; (6) Aguas Argentinas S.A., Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A.

- **Gas:** (7) Enron Corporation and Ponderosa Assets L.P.; (8) CMS Gas Transmission Company; (9) LG&E Energy Corporation, LG&E Capital Corporation and LG&E International Inc.; (10) Sempra Energy International; (11) Camuzzi International S.A.; (12) Gas Natural SDG S.A.; (13) Total S.A.;
- **Oil:** (14) Pioneer Natural Resources Company, Pioneer Natural Resources (Argentina) S.A. and Pioneer Natural Resources (Tierra del Fuego) S.A.; (15) Pan American Energy LLC and BP Argentina Exploration Company; (16) El Paso Energy International Company; (17) BP America Production Company and others; (18) Wintershall Aktiengesellschaft; (19) Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A.
- **Electricity:** (20) AES Corporation; (21) Camuzzi International S.A.; (22) Enersis S.A.; (23) Electricidad Argentina S.A. and EDF International S.A.; (24) EDF International S.A., SAUR International S.A., and León Participaciones Argentinas S.A.;
- **Information Services:** (25) Siemens A. G.; (26) Unisys Corporation;
- **Motor vehicle enterprise:** (27) Metalpar S.A. and Buen Aire S.A.
- **Telecommunications:** (28) Telefónica S.A.; (29) France Telecom S.A.
- **Leasing:** (30) CIT Group Inc.;
- **Insurance:** (31) Continental Casualty Company.

A relevant fact is that the above cases involve companies from the main investor countries in the world: France, Spain, USA, UK, Italy and Germany. The list is impressive and shows the global impact of the challenges ahead for Argentina: *how to forcefully rebut the charges without affecting future new investments.*

### **Government Strategy**

The Argentine government faced with the possibility of losing most of the cases has launched a campaign against the validity of the BIT provisions and of the finality of an award rendered under the International Center for Settlement of Investment Disputes. In this effort it has threatened to investigate the concessions as to the level of compliance by the privatized companies with the investments agreed upon in the contracts. Apparently the strength of this position is based on the assumption that the majority of these companies did not comply with the contractual conditions of the concession. The objective: to force the companies to withdraw the claim under arbitration if they want to renegotiate their contracts.

But the strategy goes beyond these efforts. Argentina is also presenting a series of arguments at the arbitration cases under BIT provisions and is also launching a direct attack against their validity and enforceability of the award when the case involves concessions of public services.

### **Federal Supreme Court position**

Recently, after the Government succeeded in changing the composition of the Supreme Court, this one has sustained coincidentally with the position of the Administration that when matters of public policy are involved, local Courts may review the reasonability, fairness and constitutionality of an award.

In a recent court decision ("Jose Cartellone Construcciones vs. Hidroelectrica Norpatagonica S.A.") the Federal Supreme Court of Argentina decided that local courts could review an arbitral award even when the parties involved have specifically agreed to waive the right of appeal.

The case's holding rules that the Supreme Court has the right to review arbitral awards if "*unconstitutional*", "*unreasonable*" or "*illegal*", even when the parties involved have specifically agreed to waive the right to appeal.

This decision reaffirms the Supreme Court's role of "*guardian*" of the Constitution and of *public policy*, even in those cases that have been previously submitted to arbitrators and where judicial review has not been admitted by the parties. The question was whether the parties can decide on matters of public policy.

This Supreme Court's sentence overturns a prior Commercial Court of Appeals' decision rejecting a nullity appeal against the arbitral award, on the ground that the waiver of judicial review cannot be effective as long as the arbitrator's decision breaches the *public policy* of the country (whether through an *unconstitutional, unreasonable or illegal* award).

Contrary to that argument, the Court of Appeals had considered Respondent's arguments to be aimed at reviewing the fairness or equity of the award; both issues are not capable of having being analyzed through a nullity appeal.

The award required the respondent (a former state hydroelectric company) to pay the claimant (a State contractor) an amount for the adjustment of a credit and the application of legal interest rates.

The interpretation of the Supreme Court as to whether the facts under dispute involve a matter of "public policy" is relevant due to the fact that most of the cases before ICSID challenges the right of the Argentine government to devalue its currency under investment protection treaties (a matter of public policy in the position of the Government). In order to support the decision, the Supreme Court also invoked a Civil Code's provision (Art. 872) through which "*rights granted with aim at public policy cannot be waived*". With this argument, the Court rejected the possibility of any parties' agreement that may limit review over matters of *public policy*. The question arising at this point is whether an award resolving (even wrongfully) on interests rates jeopardizes the *Argentine public policy*. This always appears as a very complex issue in arbitration, especially when attempting enforcement.

The Supreme Court, by considering an ordinary issue (a disagreement over interest rates) in breach of *Argentine public policy* is opening a wide door to quash potential arbitral awards related to the "pesification" or to issues like "changing the formula to adjust tariffs agreed in the privatization contracts" . Such a broad interpretation of the issues (through which almost every decision could be considered in violation of public policy) is contrary to a proper interpretation of international treaties.

### **Argentine Government legal arguments**

Argentine prosecutor has also argued in a hearing under ICSID arbitration in Paris (CMS Gas Transmission Company vs. Republica Argentina) mainly that:

- a) Bilateral treaties do not supersede the National Constitution and therefore a company can not invoke such treaty to avoid trying the case in Argentina before local courts and violate the right of defense in court of the Argentine State.
- b) A company that is engaged in the rendering of public services can not impose a limitation on the sovereign right of the government to change its economic policy or the tariffs


The prosecutor has also conducted a public campaign advocating the re-adoption of the Calvo and Drago doctrines and attacking the BITs, the arbitration clauses and ICSID as a principle. He has stated that Argentina should never again compromise the result of a contractual dispute to a system of the characteristics of ICSID, which is not an institution by itself.

In conjunction with these efforts the Government has sent a draft of a bill to Congress establishing a new legal framework to the concession of public services. The concession contracts would be subject to local law and courts, eliminating the possibility of submitting any disputes to outside sources.

## **Conclusion**

The future does not look promising for BITs or for ICSID development. Developed countries enthusiastically supported open markets and privatization during the nineties in the belief that private investments will flow and improve the standard of living of their people. In implementing the legal framework necessary to attract foreign investments they entered into BITs and agreed to submit any controversy to foreign arbitration.

When confronting a crisis like in the case of Argentina in 2001, private parties in many cases rushed to file their arbitral demands to better position themselves for negotiations. It has not caused the desired effect. Much to the contrary Governments has reacted negatively and ICSID runs now the risk of becoming politically "out of fashion". The number of cases filed has produced a backlash for the future. Countries are now less willing to accept submitting themselves to arbitration and foreign jurisdiction.

			
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