

2008

Argentina Facing International Claims over Foreign Investments

Mercedes Ales

Leonardo Granato

Carlos Nahuel Oddone

Recommended Citation

Mercedes Ales et al., *Argentina Facing International Claims over Foreign Investments*, 14 LAW & BUS. REV. AM. 481 (2008)

<https://scholar.smu.edu/lbra/vol14/iss3/3>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Law and Business Review of the Americas by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

ARGENTINA FACING INTERNATIONAL CLAIMS OVER FOREIGN INVESTMENTS

Mercedes Ales, Leonardo Granato** and Carlos Nahuel Oddone****

ABSTRACT

ARGENTINA unilaterally adjusted the rules of foreign investment by abandoning the convertibility regime which devalued the Argentine peso and caused subsequent pesification of the Argentine economy. This caused a number of foreign investors to bring claims against Argentina in front of the International Centre for Settlement of Investment Disputes (ICSID).

I. INTRODUCTION

Following the convertibility regime's abandonment in 2002 (that had pegged the Argentine currency to the U.S. dollar), thirty-two foreign investors' claims were brought before the International Centre for Settlement of Investment Disputes (ICSID) against Argentina, with the total amount claimed towering above twenty billion dollars. Simultaneously, four claims were brought before the United Nations' ad hoc courts and four others before the International Chamber of Commerce's (ICC) International Court of Arbitration.

This issue is of particular importance to the Argentine government, as well as to the country's population at large, because it impacts various aspects of general economic and institutional development. Here we present some points pertaining to the economic, social, and legal background against which these disputes and their origins should be confronted.

With the abandonment of the convertibility regime of the national currency, the Argentine peso was devaluated and Argentina entered into a process known as *pesification* of the economy. This required the compulsory conversion of all obligations acquired in foreign currency to Argen-

* Degree in Law, Universidad Austral, Argentina. PhD Candidate, Universidad de Sevilla, Spain. Diploma de Estudios Avanzados, Universidad de Oviedo, Spain. Contact: mercedes.ales@gmail.com

** Degree in Law, Universidad de Belgrano, Argentina. MSc. in Economic Integration Law, Universidad del Salvador, Argentina and l'Université Paris 1 Panthéon – Sorbonne, France. Contact: granato.leonardo@gmail.com

*** Degree in International Relations, Universidad Nacional del Centro de la Provincia de Buenos Aires, Argentina. MSc. in Economic Integration Law, Universidad del Salvador, Argentina and Université Paris Panthéon – Sorbonne, France. MSc. in Global and Regional Economic Integration, Universidad Internacional de Andalucía, Spain. Contact: oddone.nahuel@gmail.com

tine pesos, the freezing of tariffs, and made it impossible for companies to adjust their services' prices to changing values of the U.S. dollar or Euro. In some cases this amounted to losses that could escalate up to 30 percent of investors' finances. Argentina's unilateral adjustments to certain rules of the game 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 to the remedies offered by a series of international legal instruments called Bilateral Treaties for the Reciprocal Promotion and Protection of Investments (BITs). It is important to understand the significance of these agreements in order to understand what is happening in Argentina today and its current situation before the ICSID.

BITs are legal instruments that are signed by states and governed in accordance with public international law. The objectives of BITs are to establish clear and precise rules that promote investments between the two signatories of the treaty, and to protect the foreign investors in one state who invest in the other contracting state in the event of non-compliance with 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 to increase the communities' prosperity. Particular attention is paid to stimulating private economic initiatives and the flow of private capital, as well as maintaining a stable framework for investments with fair and equal treatment of investors.

To date, the Argentine Republic has signed more than fifty BITs. A significant number of these were signed in the 1990s with the large majority taking effect between 1992 and 1995.¹ 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.

II. OBJECTIVES AND REASONS FOR SIGNING BITS

From the point of view of a country that exports capital (a developed country), the relevance of such an instrument lies in the fact that it grants their nation's investors reliable protection by means of a legally binding and enforceable agreement with the state receiving capital, the host state, so that the latter cannot alter its legislation arbitrarily to the detriment of the foreign investors.² By signing these agreements, states that receive

1. Ymaz Videla & Esteban M., *Protección de Inversiones Extranjeras. Tratados Bilaterales. Sus efectos en las Contrataciones Administrativas*, La Ley [L.L.] 4-8 (1999) (Arg.).

2. José Augusto Fontoura Costa, *Protecao e promocao do investimento estrangeiro Mercosul - uma ferramenta para a implementação de um bom clima de investimentos?* [Protection and Promotion of Foreign Investment in MERCOSUR—a Tool to the Implementation of a Good Investment Climate?] 49 (2) *Revista Brasileira de Política Internacional* [Rev. Bras. Polit. Int'l] 60, 64 (2006) (Brazil)

foreign capital (developing countries) aim to develop legitimate and productive investment. In return, a developing country promises to grant foreign investors specific treatment and assures that its legal framework will remain unchanged throughout the duration of the investment.

Because of the array of elements that contribute to a country or region's attractiveness to foreign investors, governments develop various strategies to attract foreign capital. Signing and promoting BITs is one of these key strategies. Some authors have classified this effort to provide a more stable and reliable legal and juridical framework as a policy effort to reduce the costs of government opportunism by limiting the capacity to break settled agreements in order to achieve political profits.³ This effort is carried out on a triple basis: the self-assumed compromise by the state to act according to the agreed rules; the decision to set out clear guidelines and definitions concerning the behaviour of the involved parties; and the agreement to delegate in third parties (namely international arbitrators) the authority to interpret and apply the terms of the BIT.

The framework of a BIT is normally structured with two main purposes. On one hand it protects foreign investors by fulfilling the need for certainty and foreseeability (the renowned legal security) concerning domestic regulations that govern investments. On the other hand it consecrates the international arbitration system, allowing it to resolve any dispute that may arise in the course of the enterprise. International arbitration consists of granting the individual investor the possibility of bringing a claim before an international court or tribunal. The court or tribunal is independent of the judicial structure of any party involved in the dispute, including the state receiving the investment, and the state accused of breaking the agreement.⁴

In this context, any violation of the terms in the treaty by the contracting parties will be considered a violation of the rules of international law, which stipulates that agreements are made to be fulfilled. There are negative consequences for a state that fails to fulfil its obligations before the international community.⁵ In particular, when the measures taken by the contracting state affect the investments made in accordance with the

(quoting Dunning, noting four main reasons that attract foreign investment in a certain country: the search for resources (commodities and cheap but efficient labor); search for new markets (formerly closed because of restrictions on free trade); search for efficiency (vertical and horizontal integration of production chains); and search for key assets (long term goals to be served by merging of new alliances with existing investors in the host country).

3. *Id.*, at 65.

4. Guido S. Tawil, *Los Tratados de Promoción y Protección Recíproca de Inversiones. La responsabilidad del Estado y el arbitraje internacional*, La Ley [L.L.] (2000-D-1106) (Arg.).

5. Hortensia Gutiérrez Posse, *Acuerdos para promoción de inversiones extranjeras. Sistemas de solución de controversias*, in *Los Convenios para la Promoción y Protección Recíproca de Inversiones*, INSTITUTO DE DERECHO INTERNACIONAL Y DE LA NAVEGACIÓN, ACADEMIA NACIONAL DE DERECHO Y CIENCIAS SOCIALES, Buenos Aires, 9 (1993) (Arg.).

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

III. GENERAL CONTENT OF BITS

BITs signed by different countries worldwide contain similar mutual provisions because they adhere to a standard model that the Organization for Economic Cooperation and Development (OECD) recommended in 1962.

The agreements signed by Argentina contain two important clauses: national treatment and most favored nation treatment. According to the first clause, every contracting state is obliged to grant foreign investors the same treatment as that accorded to its own nationals. National treatment can be interpreted as formal equality between foreign and domestic investments. But real and important differences between the development levels of countries should not be overlooked because the actual implementation of national treatment may require more than formal equality. The clause may limit its applicability to the establishment of foreign investment in the host country, or it may extend to periods before and after the establishment of the foreign investment. Under the most favored nation clause,⁶ each state party is obliged to accord investors of another contracting state treatment which is just as favorable as that granted to its own investors or to investors of any third country.⁷ In other words, the host country must extend to investors from diverse countries the same or no less favorable treatment than it grants to investors from any other foreign country. Like national treatment, most favored nation treatment can be extended to pre-entry conditions or limited to those affecting post-entry establishment. Both rules can be accepted in certain circumstances and according to specific matters agreed to beforehand.

Countries that refuse to grant national treatment to foreign investors act on a fear that granting national treatment to others would be detrimental to certain areas of their economy. This choice is the most respectful of host country discretion but the least used. Most countries opt for one of the various degrees of self-compromise. Many countries have decided to grant post-establishment national treatment, preserving the right to treat domestic and foreign investors differently at their point of entry, or accepting certain key factors of the country's economy from the national treatment clause. Other nations choose to apply the national treatment standard to pre-establishment as well, applying a very limited

6. Alicia M. Perugini, *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*, INSTITUTO DE DERECHO INTERNACIONAL Y DE LA NAVEGACIÓN, ACADEMIA NACIONAL DE DERECHO Y CIENCIAS SOCIALES, Buenos Aires, 47 (1993) (Arg.).

7. United Nations Centre on Transnational Corporations, *Bilateral Investment Treaties* at 39, U.N. Doc. ST/CTC/65 (1988).

discretion by the host country regarding foreign investors' moment of entry.

On the contrary, most favored nation treatment does not, in practice, offer a wide range of possibilities for its implementation. Because this standard is normally adopted within a national policy of attracting foreign investors, few reasonable arguments justify better treatment of some foreign investors to the detriment of other foreign investors based solely on their nationality. Such a course of action does not advance an open door policy to attract the flow of capital.

Within MERCOSUR, the trend has been to reconcile a combination of national treatment and most favored nation treatment with a negative list of exceptions and state control. Using the latter approach in relation to non-member states, and the former for MERCOSUR (Southern Common Market) eradicated investors.⁸

In addition, BITs outline a regime for the direct expropriation of investments. These instruments acknowledge the contracting state's 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 as long as due compensation is paid. Expropriation has been a historical concern for all foreign investors who operate within the territory and jurisdiction of a host country and are thus subject to its legislative and administrative control. This concern requires a study by the investor of the political risks involved, a shift in government or in ideologies, or a sudden economic or financial change in the overall panorama which may alter the national policy towards foreign investment and the taking of property. Therefore, most BITs allow countries to expropriate on a non-discriminatory basis, for a public purpose, and against the payment of compensation.⁹

Expropriation, particularly indirect expropriation, is a much debated issue. This becomes obvious when we consider that the first BITs were signed during the 1960s, a decade marked by the decolonization process, the implementation of import protectionist policies, and the assertion of national sovereignty over natural resources in most developing countries.

Most agreements extend expropriation provisions to the ambiguous concept of measures which are equivalent or similar to expropriation. These provisions do not define expropriation, nationalization, or an effect equivalent to expropriation. The introduction of such a broad concept creates a disadvantageous position for the host state, limiting its capacity to act in cases of emergency with regulatory agencies.¹⁰ A very broad

8. United Nations Conference on Trade and Development (UNCTAD), New York-Geneva, 2000, *Bilateral Investment Treaties 1959-1999* (UNCTAD/ITE/IIA/2) at 93.

9. UNCTAD, New York-Geneva, 2007, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, (UNCTAD/ITE/IIT/2006/5) at 44 [hereinafter *Trends in Investment Rulemaking*].

10. Pedro Da Motta Veiga, *The International Regime on Investments: A Problematic Status Quo, an Uncertain Future*, Cátedra Internacional OMC-IR, Barcelona,

and over-comprehensive concept of indirect expropriation could imply that a country's routine regulatory acts fall within it.¹¹ In reality, many host states are developing countries in which frequent situations of economic and social unrest need to be faced with governmental measures to prevent the dissolution of the state.¹² Even if it were agreed that these provisions should be applicable only when a state's actions substantially affect the value of an investment, a broad array of regulatory actions could have this effect.

There is no settled definition or standard defining what measures amount to indirect expropriation, as court precedents are scarce and contractual definitions are vague. Nevertheless, tribunals, both national and international, assume jurisdiction to review the treatment of foreign investors by a host state and assess whether there has been any form of compensable expropriation.¹³

BITs can be classified into three groups in relation to their treatment of indirect expropriation. The first group contains no provision at all, leaving it to a dispute settlement tribunal to eventually decide whether the investor can invoke protection in the case of an indirect expropriation. A second group includes protection from both types of expropriation. A third category aims to provide implicit guidance regarding the level of interference required. Furthermore, regarding conditions required for lawful expropriation, most BITs concluded since 1995 include a reference that the host state is to respect due process (understood as the affected party's right to an audience and an impartial hearing to review the case and its merits) and a provision for compensation in a freely convertible currency with the possibility of applicable interest.¹⁴

Another provision usually contained in BITs refers to war and civil disturbance, which includes exceptional situations where an investor's assets are harmed due to the outbreak of international hostilities or a state of national emergency, such as a revolution, revolt, insurrection, or riot. In these instances, the provisions require that the host country provide non-discriminatory treatment to foreign investors, granting them the same rights and compensation that a domestic investor would obtain under similar circumstances. Even though this situation is different than an expropriation, the dividing line between expropriation and civil disturbance, which requires a government to take emergency measures that affect investors' freedom of contract, can be hard to draw.

Spain (Jan. 29-30, 2007) in International Seminar: The New Agenda for International Trade Relations as the Doha Round Draws to an End at 19.

11. *Trends in Investment Rulemaking*, *supra* note 9, at 58.

12. See Howard Mann & Konrad von Moltke, *NAFTA's Chapter 11 and the Environment*, International Institute for Sustainable Development (IISD), 1999 (working paper). In respect to public good and regulatory measures.

13. Veiga, *supra* note 10 (citing Luke Eric Peterson, *Bilateral Investment Treaties and Development Policy-Making*, IISD, Nov., 2004).

14. *Trends in Investment Rulemaking*, *supra* note 9, at 45-52.

Provisions outlining the process for resolving investment disputes comprise the most important piece of any agreement. Investment disputes may involve investors from both states, one state and an investor from another state, or two states that are parties to the treaty. These disputes are addressed in different ways according to the actors involved. Disputes between private individuals or corporations are normally settled within the internal judicial system of the state that has jurisdiction. Disputes between one private party and a signatory state, usually acting as a host state, are settled by third-party dispute settlement mechanisms such as consultation, negotiation, and arbitration.¹⁵

This last process authorizes a foreign investor to submit a dispute to an international court of arbitration for decision. In some cases, this requires the exhaustion of certain preliminary proceedings which may include bringing the claim before the national courts of the non-compliant state. A foreign investor harmed by a measure adopted by the country that received the investment can submit the dispute to the local courts of the alleged offending state, ICSID arbitration, arbitration of the ICC International Court of Arbitration, or an ad hoc court established in accordance with the rules of the United Nations Commission on International Trade Law (UNCITRAL). Enforcement is carried out in accordance with the principles and rules set forth in the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which was signed in New York in 1958. This offers the possibility of a quick, neutral, and unbiased resolution of disputes that is removed from political interference. According to the terms laid down in BITs signed by Argentina, the awards granted by the corresponding courts of arbitration are definitive and binding for the parties involved.

IV. FOREIGN INVESTMENTS, GLOBALIZATION AND THE LAW

Financial globalization is a fundamental characteristic of the current state of international economic relations. In this sense, the free movement of capital across national borders (two billion dollars per day are in circulation¹⁶) forms part of the framework of the modern world's economy. The past fifty years have seen major changes in the regulation of the treatment of the foreign investor. These changes link directly to the internal economic, legal, social, and political factors of a country, which directly determine the regime a state provides to regulate its foreign investments.

The development and momentum of foreign investments played key roles in the current globalization process, particularly in the 1990s. espe-

15. Pierre Sauvé, *Trade and Investment Rules: Latin American Perspectives*, Comisión Económica para América Latina y el Caribe (UN-CEPAL), DIVISION OF INTERNATIONAL TRADE AND INVESTMENT, 2006, at 27 (Chile).

16. Benjamín Hopenhayn & Alejandro Vanoli, *La globalización financiera: Génesis, auge, crisis y reformas* FONDO DE CULTURA ECONÓMICA, at 16 (2002) (Arg.).

cially because of their impact on the development of national and regional economies. In this globalized world, the law ceases to be an exclusive legal concept pertaining to each state and becomes a common regulatory law of activities that, traditionally, was under a 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, displacing the traditional diplomatic methods of resolving disputes between states. In this context, BITs were developed in order to consolidate a general regulating model that is uniform in its treatment. This was achieved by institutionalising a series of laws and guarantees for the foreign investor, obliging a state receiving capital to respect such laws. By transcending the legal system of each particular state and adhering to international arbitration methods, these agreements aim at positioning both parties on the same level, and to a certain extent obviating the sovereignty of the state.

BITs are one of the most important instruments for the international protection of foreign investments. The first BIT was signed in 1959 and the number of these instruments has increased dramatically since then, especially during the 1990s. By the end of 1999, the number of BITs reached 1,857, the majority of which were signed between developed countries and developing nations.¹⁷ Due to the increase in the number of BITs during the 1990s, today an overwhelming half of investment flows from developed countries to developing countries consist of trade and financial agreements reached under BIT provisions.¹⁸ The majority of these agreements are bilateral, which marks a difference in trends between the early to mid-1990s and the last years of that decade through the beginning of 2000.

V. ARGENTINEAN LEGAL FRAMEWORK

Even though BITs have existed since the late 1950s, it was not until the 1980s that Latin American countries began signing these international agreements.¹⁹ Out of all the MERCOSUR countries, the Republic of Argentina, in the 1990s, 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. In 1989, for the first time, Argentina accepted offers to negotiate agreements for the reciprocal promotion and protection of investments. On May 22, 1990, it reached its first agreement with Italy and thereafter the number of treaties it signed continued to increase until 2000.

17. UNCTAD, Investment Instruments Online: Bilateral Investment Treaty Database (2007) <http://www.unctadxi.org/templates/DocSearch.aspx?id=779>

18. Veiga, *supra* note 10, at 5.

19. See Costa, *supra* note 2, at 74; see also *Bilateral Investment Treaties 1959-1999*, *supra* note 8, at 2.

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 providing foreign investors with greater access to the Argentine economy of goods and services.²⁰ Even today, after the 2001 default, Argentina continues to sign BITs in accordance with the latest trend in this field: the signing of BITs between developing countries, particularly Latin American nations. The signing of BITs by developing countries is set against a background of capital flow in which the financial and economic gap between both parties is comparatively reduced. Thus the actual possibility of compliance with the obligations assumed in the treaty is higher than when the gap is broader, as is the case with many BITs signed by developing and developed countries. Nevertheless, this new wave of BITs is embraced by Argentina which signed BITs with other Latin American countries that are not members of MERCOSUR, such as Bolivia, Chile, Cuba, Ecuador, Mexico, Peru, and Venezuela.

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.

VI. CLAIMS AGAINST ARGENTINA

At the end of 2001, economic indicators of great importance reached catastrophic proportions. The GDP fell more than ten percent in relation to the previous year.²¹ The economy went through a recession beginning in early 1998, and the country suffered from unprecedented levels of deflation, unemployment, and poverty. Unemployment during that time reached twenty-five percent, and approximately half of the Argentine population was living in extreme levels of poverty.²² The basic services of health and social security were on the brink of collapse.

It seemed impossible to avoid Public Emergency Law 25.561/02 sanctions as a necessary and opportune measure to combat the social and economic crisis facing the country.²³ The state of emergency allowed the government to orchestrate a package of social containment measures that made it possible to maintain the essential operating services which preserved internal peace and the very existence of the Argentine State. In

20. 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 investment policy deployed by Argentina since the beginning of 1990 generated some sort of imbalance in relation to the rest of the MERCOSUR countries, as much from a constitutional and integrationist viewpoint as from the number of treaties signed and the acceptance of international arbitration.

21. Veiga, *supra* note 10, at 5.

22. Fountoura Costa, *supra* note 2, at 74 and UNCTAD *supra* note 8, at 2.

23. Carlos Nahuel Oddone, *Mercados Emergentes y Crisis Financiera Internacional*, Eumed.net (2004), <http://www.eumed.net/cursecon/libreria/2004/cno/index.htm>.

equal sense, the prorogation of the state of emergency facilitated the process of economic recovery and served as a take-off platform for important social and economic indicators, allowing Argentina to slowly emerge out of the crisis.

The modification of the convertibility regime and the later pesification of the Argentine economy made it necessary to review and renegotiate contracts for public service provisions, with the object of recomposing the structure of prices and yields. The Argentinean government maintains that the economic emergency regulations of 2001 and 2003 were necessary to cope with a situation of extreme civil unrest and that they equally affected nationals and foreigners and were thus non-discriminatory. The government further maintains that no foreign investor was deprived of his/her property, and that in resolving its differences with the state, no foreign company was deprived of its right to access the courts or its right to due process.

At present, claims against Argentina are being brought before ICSID by more than thirty foreign investors. The main allegations that sustain such claims are: (a) the suspension and subsequent repeal of tariff adjustments based on price indices that 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 emerged that the largest number of claims are expected to find legitimacy based on the 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 has suffered in recent years.

VII. NEW PERSPECTIVES

It is clear that the outcome of the current situation regarding pending claims is far from being resolved. The final solution is likely to be one of political compromise between investors, investor's countries, and Argentina. This solution will most likely compel the future signing of new BITs in which new rules of the game will be set and a renewal of expectations and goals will be formulated. The new government that took office December 10, 2007 has shown a more friendly approach to foreign investors and a more open willingness to listen to foreign claims.

In the likely event of a future renegotiation, by means of signing new agreements, it would be advisable to approach the issue of mutual compromise with a view towards the principle of flexibility.²⁴ Those in charge of striking an agreement should bear in mind the overall situation of the Argentine economy through the last three decades. While most BITs between Argentina and foreign investors from developed countries were reached during the 1990s, a period of economic and financial growth for Argentina, the previously unstable economic background that dominated

24. UNCTAD, *International Investment Agreements: Flexibility For Development*, New York-Geneva 2000 (UNCTAD/TE/IIT/18) at 2.

most of the 1980s should not have been overlooked. Had the experience of the 1990s been taken into account together with that of the 1980s, a more comprehensive and realistic approach to the framework of mutual expectations and obligations might have been achieved and may have helped to prevent the unfortunate outcome of the current decade.

The principle of flexibility is based on the goal of achieving overall global development for developed and developing countries.²⁵ But mostly, it denotes the capacity of a legal instrument to serve and be adapted to various uses in order to maximize its effectiveness. It has a decisive influence on the elaboration and the overall structure of international investment agreements, and it encompasses aspects such as granting lower levels of obligations for developing countries, asymmetrically phased implementation timetables, best endeavour commitments, exceptions from commitments in certain areas, flexibility in the application of and adherence to disciplines under set circumstances, and technical assistance and training.²⁶ International practice is increasingly taking into account the particular situation of each country in order to tailor agreements that would allow realistic goals both for the investor country, which can gain an added degree of security knowing the real prospects of its investment, and the host country that can count on realistically implementing its obligations and offering added security and trustworthiness to the investor.

Any international investment agreement, BITs included, by its very nature reduces the autonomy of the participating countries.²⁷ Considering that the parties involved include governments that must look out for the general well being of their nation, and that must face the real demands of their particular national situation, it is essential that these agreements recognize the important differences in the characteristics of the parties involved, especially those regarding economic asymmetries and levels of development (not only economic but social, political, and cultural) between countries. Otherwise, agreements that are signed against a background of formal symmetry obscuring an underlying asymmetry often run the risk of becoming virtually ineffective and of little or no use to every party involved.

VIII. CONCLUSION

Both national and foreign investors clearly saw themselves harmed by the changes introduced in economic regulations laid down by Argentina's national government in 2001 and 2003. Privatized companies rendering public services that registered their claims with ICSID are demanding

25. *Id.* at 2-3.

26. *Id.* at 18-24. Flexibility can be present in Esther, the substantive provisions reflecting development concerns and an overall balance of rights and obligations; in the application stage of the Agreement; and the possibility of subsequent partial or extensive revisions of terms.

27. *Id.* at 6.

prompt, adequate, and effective compensation from the Argentinean Republic claiming that the measures adopted by the government have caused them considerable harm and losses, an effect similar to indirect expropriation. The government has responded that these companies continue to render their services with all their assets and invoices and receive tariffs and rates in a normal and regular manner. Because a large majority of these companies took credit from foreign banks at a time when the convertibility regime prevailed in Argentina, such contracts with the banks were governed by foreign laws. This made it very difficult for these companies to fulfil their obligations, especially because adjusting set tariffs was prohibited.

Concerning the problem at hand, Argentina's strategy is to present these measures as necessary and inevitable means of addressing the extraordinary crisis in which the country was submerged by the end of 2001. 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 contract renegotiation is the most viable measure that could benefit both parties to the dispute, privatized companies and the national government. Without a doubt, once again, the Argentines' quality of life depends on a matter that still seems to be unresolved.

Bibliography:

-Chudnovsky, Daniel and López, Andrés, "Las políticas de promoción de inversiones extranjeras en el MERCOSUR" in Chudnovsky, Daniel and Fanelli, José María (eds.), *El desafío de integrarse para crecer. Balance y perspectivas del MERCOSUR en su primera década*, Buenos Aires, Siglo XXI Editores, 2001.

-Da Motta Veiga, P., "The international regime on investments: a problematic status quo, an uncertain future", in *International Seminar: the New Agenda for International Trade Relations as the Doha Round draws to an end*, Cátedra Internacional OMC-IR, Barcelona, January 29th and 30th, 2007

-Dolzer, Rudolf and Stevens, Margaret, *Bilateral Investment Treaties*, London, M. Nihjoff Publishers, 1995.

-Fontoura Costa, José A., "Protection and Promotion of foreign investment in MERCOSUR—a tool to the implementation of a good investment climate?", *Rev. Bras. Polit. Inter*, 49 (2): 60-77 (2006).

-Granato, Leonardo, "Protección del Inversor Extranjero y Arbitraje Internacional en los Tratados Bilaterales de Inversión" in *Las Tesinas de Belgrano*, Nro. 185, Departamento de Investigación de la Universidad de Belgrano, Buenos Aires, junio de 2005.

-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.

-Hopenhayn, Benjamín and Vanoli, Alejandro, *La globalización financiera. Génesis, auge, crisis y reformas*, Buenos Aires, Fondo de Cultura Económica, 2002.

-Pabello, Santiago, "La protección de las empresas privatizadas prestadoras de servicios públicos bajo los Tratados Bilaterales de Inversión" in *La Ley*, sección Doctrina, Vol. 2003-E, Buenos Aires, La Ley, 2003.

-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.

-Rosatti, Horacio D., "Los Tratados Bilaterales de Inversión. El arbitraje internacional obligatorio y el sistema constitucional argentino", in *La Ley*, sección Doctrina, Vol. 2003-F, Buenos Aires, La Ley, 2003.

-Sacerdoti, Giorgio, "Bilateral Treaties and Multilateral Instruments on Investment Protection" en *Recueil des Cours de l'Académie de Droit International de La Haye* (RCADI), Vol. 269, 1997.

-Sauvé, Pierre, "Trade and Investment Rules: Latin American Perspectives", UN CEPAL, Division of International Trade and Investment, Santiago de Chile, 2006

-Stanley, Leonardo, "Acuerdos bilaterales de inversión y demandas ante tribunales internacionales: la experiencia argentina reciente" in *Revista de la CEPAL*, Santiago de Chile, CEPAL, octubre de 2004.

-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, 2000.

-United Nations Centre on Transnational Corporations, *Bilateral Investment Treaties*, New York, United Nations, 1988.

-United Nations Conference on Trade and Development, *Most favoured nation treatment*, New York - Geneva, United Nations, 1999.

-United Nations Conference on Trade and Development, *National treatment*, New York - Geneva, United Nations, 1999.

-United Nations Conference on Trade and Development, *Bilateral Investment Treaties 1959-1999*, New York- Geneva, 2000.

-United Nations Conference on Trade and Development, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, New York-Geneva, (UNCTAD/ITE/IIT/2006/5), 2007.

-Ymaz Videla, Esteban M., *Protección de Inversiones Extranjeras. Tratados Bilaterales. Sus efectos en las Contrataciones Administrativas*, Buenos Aires, La Ley, 1999.

WORLD WIDE WEB AND INTERNET:

-Freshfields Bruckhaus Deringer, "Azurix allowed to bring expropriation claim against Argentina", Public International Law News, January - February 2004, <http://www.freshfields.com/en.asp>, accessed 5 december 2006.

-Freshfields Bruckhaus Deringer, "Government regulation held to be in breach of BIT", Public International Law News, September - October 2003, <http://www.freshfields.com/en.asp>, accessed 5 december 2006.

-Freshfields Bruckhaus Deringer, "Key decisions on investor - state arbitrations", Public International Law News, September - October 2003, <http://www.freshfields.com/en.asp>, accessed 5 december 2006.

-Granato, Leonardo and Oddone, Carlos Nahuel, "La protección del inversor extranjero y el arbitraje internacional en la Argentina" in *Observatorio de la Economía Latinoamericana*, Grupo de Investigación EUMED.NET de la Universidad de Málaga, Nro. 52, noviembre de 2005, <http://www.eumed.net/ceursecon/ecolat/ar/>, accessed 5 december 2006.

-Herz, Mariana, "Régimen Argentino de Promoción y Protección de Inversiones en los albores del nuevo milenio: de los Tratados Bilaterales, MERCOSUR mediante, al ALCA y la OMC" in *Revista Electrónica de Estudios Internacionales*, Nro. 7, 2003, accessed [www.reei.org/reei7/M.Herz\(reei7\).pdf](http://www.reei.org/reei7/M.Herz(reei7).pdf), accessed 5 december 2006.

-Oddone, Carlos Nahuel, *Mercados Emergentes y Crisis Financiera Internacional*, editado por Eumed•net; accesible a texto completo en <http://www.eumed.net/cursecon/librería>, accessed 5 december 2006.