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Facing the Next BIT Negotiations: Argentina's Approach to the FET Standard

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Argentina recently entered into a new Bilateral Investment Treaty with Qatar. After 15 years of absence in this type of negotiations and several claims the country faced since the economic and financial crisis of 2001, Argentina sat again in the BIT negotiation table. This was a unique opportunity for Argentina to start from scratch, and especially set the terms to balance the State's right to regulate and the investors' expectations. In this context, this article seeks to understand to what extent Argentina's tumultuous investment arbitration past influenced the negotiation of this newly signed BIT (and future ones), in the sense of narrowing the investors' standing to assert claims against the State. Did Argentina negotiate terms to narrow the space for investors to initiate frivolous claims and use expansive interpretations of the BIT? On this post, I will focus on the negotiated FET standard, which has been a popular cause of action against Argentina in recent years.

On its face, the FET clause in the Argentina-Qatar BIT (the "BIT") shows a more restrictive approach than the ones in previous BITs entered by Argentina. Article 3.3 states that the "FET is to be interpreted and applied as the treatment provided to aliens in accordance with the principles of customary international law." Almost all the prior BITs signed by Argentina contained an unqualified (independent) FET clauses (such as the BIT Argentina-US or Argentina-Armenia), which opened the door to debate on whether the clause should be interpreted in the light of the minimum standard of treatment ("MST") under customary law, or in an autonomous way, on a case-by-case basis, by reference to general notions of fairness and equity. Depending on the position adopted, the legality of the State's regulatory actions affecting a foreign investment will have different standards of approval. In the first approach, the liability threshold for the State is set very high and requires the State conduct to be egregious, outrageous, shocking, or otherwise extraordinary (*Neer* case). Differently, the adoption of the second approach lets the arbitrators interpret the clause with a more lenient standard, which normally translates in the search for conduct that breaches basic notions of transparency, predictability, stability, and legitimate expectations, as well as arbitrary and discriminatory conduct, thus enabling the review of wide categories of governmental actions with a lower liability threshold.

The terms of this BIT seem to restrict potential FET claims. By linking the FET provision to the MST, the BIT sets a higher liability threshold for the States' actions affecting a foreign investment. Additionally, other provisions included in the BIT balance the State's regulatory power with the investor's expectations. For instance, (a) art. 4.4 denies the possibility to import through the MFN clause, FET and dispute settlement provisions accorded to investors of any third state under treaties

signed by a Contracting Party prior to the entry into force of the BIT; (b) art. 10 expressly recognizes the Contracting State's right to regulate; and (c) the preamble backs up this balance by stating that foreign investment should be consistent with the promotion of the economic development of the State, that it is the intention of the States to create and maintain favorable conditions for investment by investors of the other Contracting Party, and to encourage the sustainable development of the Contracting Parties.

Despite the above, this is not a final triumph of the State to avoid major claims under FET. Important issues surrounding the FET clause were not addressed; therefore, the text does not block potential claims that could even cast doubt on apparent negotiated balance. First, the standard on which the FET must be analyzed is not defined. There is still an ongoing discussion on whether the interpretation of the MST should be limited to the Neer and Robert Azinian cases (see also Glamis Gold and Genin), where it was held that the State's conduct should amount to egregious or outrageous conduct, or to an evolving customary law (see Waste Management).

Second, the lack of definition and the indeterminate content of the FET might bring serious issues, even if linked with MST. Arbitrators could opt for a broad interpretation to determine the content of the provision, enabling them to review FET claims based on different factors. Originally, the content of the FET was linked to denial of justice or extreme abuse of persons. The sources to determine the content of the MST relied on the pronouncement of mixed commissions that emphasized in these two factors. Afterwards, the concept evolved and arbitrators started to consider the investor's legitimate expectations within the analysis of FET and expanded the interpretation of the content. Nowadays, there are several factors that are likely to be analyzed to determine if there has been a breach of the FET. In Lemire v. Ukraine, the tribunal considered several factors such as whether the State failed to offer a stable and predictable framework; made specific representations to investors; denied due process to investors; did not provide transparency in the legal procedure or in State's actions of State; acted either in a way that evidenced abuse of power, coercion or other bad faith conduct; or in an arbitrary, discriminatory or inconsistent way.

Moreover, a broad interpretation on the content and factors to analyze under the FET umbrella diminishes the stringency of the MST (if we consider the MST from the *Neer* case viewpoint). The *Neer* case can be helpful to analyze a FET claim based on denial of justice, but the Neer's lens won't help much to analyze other factors, such as legitimate expectations, which is becoming a strong factor under which investors are relying. Consequently, there might be a tendency to make the MST more flexible under certain factors (e.g. legitimate expectations and transparency), thus reducing the threshold for the State's responsibility. In the effort to limit a broad interpretation and guide arbitrators to stick to the MST, some BITs such as US Model BIT or US-Uruguay BIT links the FET provision to MST and expressly includes "denial of justice" as an example of a breach of FET.

Finally, this BIT (as in most BITs) set forth neither the consequences of a breach of the FET nor the consequential provisions for reparation. Besides from the ILC Draft Articles on State Responsibility, there is nothing in relevant BITs that provides a mandate to the arbitrators to pronounce themselves about the degree of liability and the forms of reparation. Some arbitrators could link the breach of FET to the *Chorzow* standard of compensation (see *CMS*, *Azurix*). However, this reasoning is debatable because *Chorzow* is based on an illegal seizure of assets and the consequence of an expropriation, which is different from an FET's breach.

It is good news that Argentina is back on the negotiation field. From the State's perspective, the

wording of the BIT evidences a better approach to balance the State's right to regulate and investors' rights. However, and as in most BIT, there are still important topics related to the FET clause that remain to be a concern: the content of the MST, the lack of definition and content of the FET, and the absence of a link between the FET and the reparation provision. The wording of the BIT limiting a broad and expansive interpretation is certainly welcomed, but these concerns should be addressed. Otherwise, the apparent effect of a balanced wording between the State's right to regulate and the investor's right to have their investment protected could be diminished.

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