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What if Spain sued Argentina on behalf of Repsol?

Luke Eric Peterson (Investment Arbitration Reporter) · Wednesday, May 16th, 2012

This week, Spanish energy firm Repsol put Argentina on notice of an arbitration claim under the Spain-Argentina bilateral investment treaty. The development comes as no surprise, as Repsol had been threatening for some weeks to take such a course if Argentina persisted in nationalizing the bulk of Repsol's 57% stake in the Argentine firm YPF.

But am I the only person who was wondering whether Spain might step forward to sue Argentina on behalf of Repsol?

To be sure, a state-to-state claim would swim against the tide of conventional wisdom. After all, modern Bilateral Investment Treaties contain investor-to-state arbitration clauses precisely so that investors can fight their *own* legal battles.

However, in recent years, at least one European government has exercised diplomatic protection on behalf of its nationals by invoking the state-to-state arbitration provisions of a bilateral investment treaty. The recently-documented decision by Italy to sue Cuba on behalf of 16 putative investors has illustrated the potential utility of the oft-neglected state-to-state arbitration mechanism found in many BITs.

Several aspects of the Repsol-Argentina controversy make it an intriguing candidate for state-to-state arbitration.

Spain is likely to be dragged in at *some* stage anyway

In the days after the announcement of Argentina's nationalization plans, Spain was swift to announce that it would take retaliatory action against Argentine imports. Even if Spain stays its hand for now – and lets the European Commission handle any trade retaliation – the Spanish government is likely to be dragged into the Repsol-Argentina dispute down the road.

Unless Argentina alters it present strategy of not paying final arbitral awards voluntarily, any foreign investor that pursues investor-state arbitration will inevitably turn back to its home state for political and legal muscle during the enforcement and collection phase. Just as the United States and France have been dragged into disputes after their respective investors have failed to collect on final arbitral awards against Argentina, Spain would likely be asked by Repsol to help play the role of collections agent.

If it is inevitable that Spain will get dragged into the dispute during the enforcement end-game,

then authorities might have fewer illusions about the supposed "depoliticization" offered by investor-state arbitration. If Spain can look forward to wrestling with Argentina over the enforcement of an arbitral award, perhaps Spanish government lawyers might like to have a hand in the running of the case that gives rise to that award.

A more active Spanish role does not have a huge diplomatic downside

Greater involvement by Spain in the arbitration with Argentina would not necessarily come at the expense of diplomatic relations between the two countries. Increasingly frayed diplomatic relations between Spain and Argentina in recent years mean that Spain is unlikely to play an effective role as facilitator or honest-broker *vis a vis* Spanish investors and Argentina.

Spanish Foreign Minister José Manuel García-Margallo admitted as much in a recent interview with *The Wall Street Journa*l, where he conceded that Spain had expended considerable diplomatic energy – ultimately in vain – to heading off the nationalization of Repsol.

A source familiar with the resolution of earlier ICSID disputes between Spanish companies and Argentina tells me that the warmer relations between Spain and Argentina in previous years were instrumental in getting several investment disputes – like those involving Gas Natural and Telefonica – resolved without needing to arbitrate them fully.

With Spain bereft of any hope of playing such a facilitative role this time around – and less encumbered by the need to safeguard its good political relations – perhaps the Spanish authorities would have fewer qualms about stepping forward and playing a more central role in any arbitration with Argentina.

Nothing to lose, but what is to be gained?

While Spain might have less to lose, what would be gained by bringing a state-to-state claim?

Perhaps most obvious is that Spain – at a time when it is itself facing arbitral claims from disgruntled foreign investors – might have an interest in playing a more hands-on role in the arbitral processes through which concrete meaning is given to the terms of Spanish investment treaties.

Equally, if Spain were to climb into the driver's seat, the European Union might be keen to do some "backseat driving". As is well known, the E.U. has taken over the competence to negotiate investment agreements on behalf of E.U. member-states with non-E.U. member-states, and the Brussels-based European Commission would certainly expect to work closely with Spain on any claim against Argentina.

Given the E.C.'s extensive experience in active claims-management on behalf of E.U. trading interests in the World Trade Organization, I suspect that Brussels might not find a claim by Spain to be so unusual or off-putting. Indeed, managing such a case might provide a further opportunity for Brussels to place its own stamp on the development and evolution of investment law. For some time now, Brussels has been reduced to the role of a peeping tom, seeking to peer into closed investor-to-state proceedings, and to make its views heard (sometimes over the objections of the parties involved.)

The question of speed

Another factor which Spain might consider in deciding whether to bring an arbitration claim against Argentina could be the speed with which a state-to-state arbitration *might* play out. It remains to be seen whether a state-to-state proceeding could offer a faster alternative to the clearly glacial pace of many investor-to-state claims against Argentina.

In some cases, it seems that state-to-state arbitration would be markedly swifter.

Under the U.S.-Ecuador BIT, such claims must be resolved in a mere 6 months after the constitution of a tribunal. Such a timetable – if applicable in real life – would be a massive improvement on the time it takes to resolve investor-state claims.

Unfortunately for Spain, the Spain-Argentina BIT does *not* contain the type of extreme fast-track process prescribed in certain outlier treaties like the U.S.-Ecuador BIT. However, even without such a treaty-imposed deadline, it strikes me that state-to-state arbitration *could* be faster than investor-to-state proceedings in some instances.

To be fair, any head-start conferred on state-claimants by the Spain-Argentina treaty – which allows for claims to be filed a mere 6 months, rather than (an arguable*) 24 months after notification for investor-claimants – would be offset by the requirement for the exhaustion of domestic remedies that applies in diplomatic protection contexts. I'm not sure if the exhaustion requirement might be applied flexibly in this case, but there is certainly a possibility that domestic remedies could be protracted. If Repsol were obliged to spend years in the Argentine courts, then it might take Spain longer to get to the arbitral starting line than if Repsol proceeded in its own name.

It would remain to be seen whether the actual arbitration process would be faster or slower in a state-to-state context than in an investor-state one. However, until we see a few test-cases brought by states – and can measure their overall pace – I remain open-minded as to whether state-to-state claims could be arbitrated more swiftly than investor-state claims.

In the coming months, we'll see if Spain decides to interpose itself into the legal phase of the Repsol controversy. Probably, it won't.

However, the precedent set by the recent Italy-Cuba BIT arbitration – coupled with the recent tendency of home-states to get dragged into investor-state cases anyway during the enforcement end-game – should be enough to open the eyes of home-states to the long-overlooked prospect of bringing state-to-state arbitration claims under bilateral investment treaties.

(Note that views will differ as to whether Repsol could, in light of recent arbitral developments, expect to use an MFN clause in order to steer around a treaty requirement of 18 months of local litigation prior to international arbitration.)*

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