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Are Repsol's Rights Under The Repsol-Argentina Settlement Agreement An 'Investment' Under the Argentina-Spain BIT?

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On February 27, 2014, Repsol S.A., Repsol Capital S.L. and Repsol Butano S.A. (collectively, 'Repsol'), entered into a settlement agreement with Argentina, whereby Argentina agreed to pay Repsol $5 billion in USD denominated bonds as compensation for the expropriation of Repsol's fifty-one percent shareholding in YPF S.A. and YPF Gas (the 'Settlement Agreement'). Under the terms of the settlement, Repsol agreed that upon closing, it would withdraw any and all claims against Argentina, YPF S.A. and YPF Gas, including but not limited to Repsol's pending ICSID arbitration against Argentina (currently suspended pursuant to the parties' agreement).

The question arises: What happens if Argentina breaches the Settlement Agreement? Clause 19 of the agreement provides that disputes arising out of the Settlement Agreement, as well as disputes regarding the interpretation and application of the Spain-Argentina BIT to the case, shall be exclusively resolved by arbitration under UNCITRAL Rules:

'Any litigation, controversy or claim between the PARTIES resulting from [the Settlement Agreement] or directly related to it […], as well as any litigation, controversy or claim regarding the interpretation and application to the case of the ARGENTINA-SPAIN BIT, shall be exclusively resolved by arbitration in accordance with UNCITRAL Rules, in effect on the date of execution of the AGREEMENT.' (free translation)

Clause 19 foresees two types of claims: contractual claims arising out of the Settlement Agreement itself, and treaty claims regarding the interpretation and application of the Spain-Argentina BIT. Whereas the parties have submitted contractual disputes exclusively to UNCITRAL arbitration, the question arises whether Repsol's rights to compensation under the Settlement Agreement and/or the public titles constitute 'investments' under the Spain-Argentina BIT.

Clause 8(2) of the Settlement Agreement says 'yes':

'The rights of REPSOL arising out of the AGREEMENT enjoy the protection of the ARGENTINA-SPAIN BIT. In particular, given that the COMPENSATION has the character of expropriatory indemnification, the rights of REPSOL arising out of the PUBLIC TITLES and/or the COMPENSATION constitute an 'Investment' in the terms of the ARGENTINA-SPAIN BIT.' (free translation)

Notwithstanding Clause 8(2), in order to bring a BIT claim against Argentina in connection with

the Settlement Agreement or the public titles, Repsol will have to show the existence of an 'investment' in accordance with the Argentina-Spain BIT. Article I(2) of the BIT sets forth a list of assets that *may* qualify as 'investments'. These include, without limitation, 'rights arising from any kind of contributions made for the purpose of creating economic value, including loans directly related to a specific investment, whether or not capitalized', 'movable and immovable property, as well as *in rem* rights such as mortgages, privileges, liens, pledges and similar rights', and 'rights to undertake economic and commercial activities conferred by law or by virtue of a contract, including concessions to search for, cultivate, extract or exploit natural resources.' (free translation)

Notably, the definition of 'investments' under the Argentina-Spain BIT does not include 'obligations, private or public titles or any other right to performances or services having economic value', as provided, for example, in the Argentina-Italy BIT. But irrespective of whether the assets at issue are enumerated or included within the definition of 'investments' in the Argentina-Spain BIT, there are a number of cases holding that the term 'investment' has an inherent meaning regardless of whether a dispute is brought to arbitration under the ICSID Convention, the ICSID Additional Facility Rules, or the UNCITRAL Rules. (See, e.g., Romak v. Uzbekistan, Nova Scotia Power v. Venezuela)

For instance, in GEA Group v. Ukraine, GEA Group initiated ICSID arbitration under the Germany-Ukraine BIT arguing, inter alia, that claims to performance under a settlement agreement entered into with a Ukrainian state-owned entity constituted an investment within the meaning of Article 1(1)(c) of the relevant BIT (listing as 'investments' 'claims to funds used to create material or immaterial values and claims to performances having such value'). While concluding that the underlying transaction that gave rise to the settlement did constitute an investment, the ICSID Tribunal—composed by Prof. Albert Jan van den Berg as President, Mr. Toby Landau QC and Prof. Brigitte Stern—found that the settlement agreement, as a legal act, was 'analytically distinct' from an investment in the Ukraine. The settlement agreement itself involved 'no contribution to, or relevant economic activity within, Ukraine such as to fall – itself – within the scope of Article 1(1) of the BIT or (if needed) Article 25 of the ICSID Convention.'

Following the reasoning of the GEA Group tribunal, Repsol's right to compensation under the Settlement Agreement would be 'analytically distinct' from its original investment in YPF, regardless of whether the agreed compensation has the character of 'expropriatory indemnification.' The same reasoning should apply to the public titles. It remains to be seen whether Argentina's stipulation that Repsol's rights arising out of the public titles and/or the agreed compensation constitute an 'investment' will be determinative, persuasive or irrelevant to the tribunal's jurisdiction under the BIT—*if* and *when* Repsol resorts to the dispute resolution provision of the Settlement Agreement.

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