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Argentina's New Foreign Investment Regime: Key Considerations

Nahila Cortes (BakerHostetler) · Saturday, December 28th, 2024

Argentina's new administration is aiming to attract foreign capital to boost the economy of the country with a new liberal and investor-friendly regime. On July 8, 2024, the Argentinean Congress approved the law No. 27,742 titled "Bases and Starting Points for the Freedom of Argentine People" (the "Law"). As discussed in prior posts, this is a multifaceted law which restructures the public sector, liberalizes markets, amends central energy, labor and administrative laws, authorizes the privatization of several state-owned entities, and allows the renegotiation of some public infrastructure projects.

A central pillar of the Law is the creation of a new investment regime ("Regime" or "RIGI") that encourages large-scale project development by protecting investors from specific Argentine economic risks and ensuring regulatory stability, legal certainty, and predictability.

This initiative has been acclaimed by the private sector. Mining and oil gas companies have already announced investments in new projects, and others are considering adherence to the Regime to expand their existing operations. Considering this context, the purpose of this post is to explore some general aspects of the Regime and, particularly, the dispute resolution mechanism that presents novel legal issues.

General Aspects of the Regime

The Regime is set by the Law and its Regulatory Decree No. 749/2024 (the "Decree"). The Regime applies to the owners of a large investment through a special purpose vehicle ("SPV") in the following sectors: forestry, tourism, infrastructure, mining, technology, steel, energy, and oil and gas. An SPV can take the form of a corporation, sole proprietorship and limited liability company, a branch of a foreign entity, a dedicated branch (as defined in the Law), transitory union, and other associative contract.

In general, the SPV's minimum investment in computable assets shall be US$200,000,000. However, the floor is higher in certain enumerated sectors. For oil and gas, the minimum investment for transportation and storage is US$300,000,000; and US$600,000,000 for offshore projects and gas for export. Moreover, if the project qualifies as Long-Term Strategic Export project, the minimum investment is US$2 billion. A project qualifies as such if it can position

Argentina as a long-term supplier in a global market where the country lacks presence, involve investments in successive stages with a minimum investment per phase in computable asset of US$1 billion, and a total minimum investment of US$2 billion with at least 20% met in the first two years of the project.

The Regime offers significant tax and customs benefits, along with foreign exchange incentives. The State expressly commits to ensuring: (i) free disposition of all produced commodities (*e.g.*, oil, minerals, etc.), (ii) no obligation to sell products domestically, (iii) no export restrictions, (iv) protection against asset confiscation, (v) the State's commitment to assist investors in repealing any confiscatory act from any national, local or foreign authority, (vi) uninterrupted operation of the project, (vii) the right to pay dividends, and (viii) unrestricted access to justice and any available legal remedy for the defense and protection of the SPV's right (*see* Art. 200 of the Law).

Moreover, the SPV will benefit from 30-year regulatory stability concerning their projects' tax, customs, and foreign exchange incentives (Art. 201 of the Law). This provision seems intended to function as a stabilization clause; whereby the investor is protected from regulatory changes and if violated, the investor may be entitled to compensation.

Although Argentina has previously passed sector-specific investment laws granting "fiscal stability", the Regime offers stronger investor protections and tackles practical issues that have hindered past projects. *First*, any new taxes established after the project's approval under the Regime, as well as any increases to existing taxes, will not apply to the SPV. *Second*, the SPV is entitled to benefit from any future elimination or reduction of taxes. *Third*, the SPV may reject any claim from the Argentinean tax authority for amounts exceeding the corresponding payable tax. Even if the SPV pays the imposed tax, it will be entitled to use the excess payment as a tax credit (Art. 202 of the Law).

Dispute Resolution Provisions

Chapter X of the Law and the Decree establishes a dispute resolution mechanism, whereby the State consents to arbitration through national legislation. Certain procedural and substantive aspects of the proceedings are particularly noteworthy.

First, Article 221 of the Law provides that any dispute arising out of or related to the investment regime between the *Federal government and the SPV*, including but not limited to the execution, application, scope, or interpretation of the Regime and related laws, or with the use, termination, and/or performance of rights, benefits, and incentives obtained by the SPV (including, but not limited to its existence, application and scope) shall first be attempted to be settled by amicable consultations and negotiations.

If the dispute is not settled in 60 days, the *SPV* (as well as its partners or foreign shareholders) shall submit the dispute to arbitration, at the option of the SPV, in accordance with the following rules: (i) PCA Arbitration Rules 2012 ("PCA"), (ii) the International Chamber of Commerce Arbitration Rules ("ICC") (with the exception of the Expedited Procedure Rules), or (iii) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 ("ICSID Convention"), or, as the case may be, the ICSID Arbitration Additional Facility Rules.

Unless the dispute is brought under the ICSID Convention, the seat of arbitration shall be

established outside Argentina and in a country that is a party to the New York Convention (Art. 221 of the Law).

Second, Argentinean law shall be the applicable law to the dispute (Art. 131 of the Decree).

Third, a dispute is defined as any controversy between the SPV and the Federal government related to the Regime *or* the use, termination, benefits, or incentives obtained by the SPV (and by extension its partners, shareholders, or parties to the associative contracts) (Art. 124 of the Decree).

- **Consent of the State**

As in any arbitration, consent is an indispensable element for the tribunal's jurisdiction. For context, there are three primary instruments of consent in practice: (i) a contract between the State and the investor that contains an arbitration clause, (ii) national legislation wherein the State provides a standing offer of consent to arbitration that is only perfected when the investor accepts the offer in writing while the legislation is in force, and (iii) an investment treaty between the host State and the State of investor's nationality or incorporation.

In this case, the State has provided its consent to arbitration through the Law and the SPV is required to express in writing that the SPV and its partners or shareholders will submit any disputes, arising out of or related to the Regime, through the mechanism provided in Article 221 of the Law (Art. 228 of the Decree).

But the Law seems to preserve the SPV parent company's or ultimate beneficial shareholder's, right to invoke an investment treaty. Notably, the Law states that the SVP shall have access to any legal remedy available to protect its rights. Moreover, Article 135 of the Decree, which attempts to regulate the consolidation of claims, acknowledges that foreign investors may bring claims related to the Regime under an investment treaty. Therefore, a foreign investor, such as an indirect holding company, seems to possess the flexibility of choosing to pursue a claim under a different instrument, such as an investment treaty, provided that the jurisdictional requirements are met.

- **Characteristics of the Regime**

If a dispute arises, the investor should contemplate its litigation strategy and if viable, decide whether to pursue a claim under Chapter X of the Law or an investment treaty. Below are some aspects of the Regime that may be considered, some of which may be subject to interpretation issues.

The applicable law to the dispute. The applicable law to a dispute is shaped by different sources such as constitutive instruments, institutional arbitration rules, and the *lex arbitri* (i.e. the procedural law governing the arbitration process) and will determine, among other matters, the content of the national or international obligations. When jurisdiction is based on a treaty or domestic legislation, these instruments may contain a clause setting out the applicable law, and the investor, by taking up the offer of consent, accepts the choice of law clause contained in the national legislation or the treaty, becoming a choice of law agreed by the parties.

If a claim is brought under Chapter X of the Regime, Argentinean law will apply (*see* Art. 131 of the Decree), and it could be construed that an agreement between the parties on the applicable law exists. However, if jurisdiction is based on an investment treaty—and depending on the language of the instrument—a tribunal could foreseeably apply both Argentinean law and applicable rules of international law (*see, e.g.*, *BG Group v. Argentina*, ¶¶ 89-103*; National Grid v Argentina*, ¶¶ 81-90).

Definition of investment. According to Chapter X, there is a protected investment only after the government approves both the investor's application and the investment plan.

The nature of disputes under Chapter X. Article 221 of the Law establishes a dispute resolution mechanism between the Federal Government and the SPV. If Chapter X is the basis of consent, disputes related to the Regime between the SVP and a provincial government (*e.g* permits, municipal taxes, etc.), according to a strict textual reading of Chapter X, arguably may not be submitted to international arbitration without express consent from the Province. However, if the basis of consent is an investment treaty, a claim could be brought against the Federal State for acts or omissions of a subdivision since, under international law, those measures are attributable to the State (*see Vivendi v. Argentina*, ¶ 49)

Procedural aspects. Chapter X stipulates (i) a mandatory cooling-off period of 60 days, (ii) a choice of arbitration under the PCA, ICC Arbitration Rules, ICSID or ICSID Additional Facility Rules; however, if rights of the SVP's shareholders are invoked, PCA is excluded, (iii) the application of the "American Rule" on allocating costs and fees, which requires each party to pay their own legal fees, and (iv) a party's obligation to disclose any third-party funder involved in the dispute (*see* Arts. 130, 132 of the Decree).

The RIGI Panel as an alternative dispute resolution mechanism. The Decree creates the RIGI Panel as an alternative dispute resolution mechanism. If the SVP opts for this mechanism, the panel will resolve disputes submitted under Article 221 of the Law. The panel will consist of three professionals specialized in the following areas: engineering, economics, and law, who shall be selected by mutual agreement of the parties from a list authorized by the enforcement authority. As stipulated in the Decree, interpretative and enforceability issues may arise with this feature.

The Regime provides for the consolidation of claims. If there is more than one arbitration initiated under the Law related to the same dispute and the same SVP, the State can consolidate the proceedings with the first one initiated. Similarly, if one or more claims are initiated invoking the Law and one or more claims are initiated under a bilateral investment treaty ("BIT) where Argentina is a party, and which are related to the Regime and to the same dispute, the claims will be consolidated with the first one initiated. If this is not possible, the claims concerning the foreign partners or shareholders submitted under the Law, shall be discontinued for the benefit of the foreign partners or shareholders that initiated a claim a under a BIT (*see* Article 135 of the Decree).

Counterclaims brought by the State. In investor-state arbitration, the host state is nearly always the respondent since investment treaties usually grant access to international arbitration to investors and bar States from bringing counterclaims. However, Article 130 of the Decree provides that the State is entitled to file a counterclaim.

Emergency arbitration. It has been extensively discussed whether emergency arbitration is suitable for investor-state disputes, especially if there has been no express consent of the State to

such proceedings. Article 130 of the Decree attempts to restrict the use of emergency proceedings, specifically providing that Argentina must expressly consent in writing to resolve any dispute through abbreviated proceedings, emergency arbitration, or their equivalents.

Concluding Remarks

The Regime aims to create a favorable environment for large-scale projects in various sectors, intending to position Argentina as a competitive destination for global investment. Key appealing elements for investors include tax benefits, foreign exchange provisions, customs provisions, and the dispute resolution mechanism.

In terms of the dispute resolution mechanism, the Regime is novel. Interpretative issues related to the applicable law, definition of investment, the RIGI Panel's authority, consolidation of proceedings, among others may arise. Investors should thus evaluate the characteristics of this mechanism before investing under the Regime and bringing a claim to protect its rights.

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