

THE SILENCE OF THE ARGENTINE COURTS

“Is there any other point to which
you would wish to draw my attention?”
“To the curious incident of the dog in the night-time.”
“But the dog did nothing in the night-time.”
“That was the curious incident,” remarked Sherlock Holmes.
(A. Conan Doyle, The Adventure of Silver Blaze)

I. INTRODUCTION

As a result of the abandonment of the convertibility or monetary board system that took place in the first months of 2002,¹ Argentine legal institutions went through an upheaval that left few contracts then in force unaffected. It is estimated that more than 200,000 lawsuits were brought in all of Argentina by bank depositors who challenged the mandatory conversion into pesos of their dollar deposits at a lower-than-market exchange rate. Contracts in which no financial entity was a party also produced abundant litigation, as the private parties often could not agree among themselves a satisfactory renegotiation of the terms and conditions of the contract in light of the new economic circumstances, namely a devaluation that reduced by two thirds the dollar value of the currency and an inflation which in the year 2002 exceeded 50%, in which case they had to resort to the courts to solve the controversy.²

Contrasting with all this judicial activity, the Argentine courts were practically not called to intervene in the disputes that arose among the Government, and the public

¹ This was the result of law 25,561 of January 6, 2002 as amended (hereinafter the “Emergency Law”) and subsequent regulations issued by the Executive, the Central Bank and other Government agencies. These regulations were copious: during 2002 the Central Bank issued more than one thousand of them.

² Emergency Law, sec. 11.

utility operators and their shareholders, who were the parties most affected by the legal changes.

In the case of the utilities, these changes were major and involved (i) an abandonment of the dollar tariffs promised in the concession or license agreements; (ii) the mandatory conversion of the dollar amounts of those tariffs at the exchange rate prior to the devaluation (i.e. at a one dollar one peso rate); (iii) the prohibition to re-establish dollar rates; (iv) the imposition of new standards to calculate tariffs which introduced for the first time clear political objectives such as the redistribution of income; (v) the obligation to continue providing the services without any diminution of their quality; and (vi) the obligation to renegotiate the terms and conditions of the existing agreements.³

The renegotiation took a long time to get under way due to the cumbersome procedure put in place, and repeatedly amended, by the Government.⁴ It has not resulted in significant redress for the operators and their investors especially in the case of the main utilities that were privatized (electricity, water and gas distribution and gas transportation, comprising fourteen companies in all). Some contracts were terminated on grounds of default of the concessionaire,⁵ others were partially renegotiated but then the Government did not comply with the renegotiated contract,⁶ while in most other cases renegotiation did not produce any agreement. Tariff increases were granted in some cases but only to be allocated to trust funds which were to finance expansions of

³ Emergency Law, sections 8, 9 and 10.

⁴ See Decree 293/2002, A.D.L.A. [LXII-B] at 1644; Decree 370/2002 Official Gazette 27/02/2002; Resolution Ministry of Economy 20/2002, A.D.L.A. [LXII-B] at 1764; Decree 1090/2002 A.D.L.A. [LXII-C] at 2997; Resolution Ministry of Economy 308/2002 [LXII-D] at 4172 ; Resolution Ministry of Economy 576/2002 A.D.L.A. [LXII-E] at 5190; Resolution Ministry of Economy 180/2003, A.D.L.A. [LXIII-B] at 1564; Decree 311/2003, A.D.L.A. [LXIII-D] at 3853.

⁵ This happened with the postal service and the water system of Buenos Aires: Decree 1075/2003, B.O. 20/11/2003 and Decree 303/2006, A.D.L.A. [LXVI-B] at 1391, respectively.

⁶ This was the case of a gas distributor: See Decree 385/2006, B.O. 10/04/06.

the network to be built by contractors selected by the trustee and with little intervention of the concessionaire, thus introducing a totally new mechanism in the existing contracts.⁷ Some foreign investors have sold their shares at a fraction of the amount they had invested.⁸ Many of these utilities are technically insolvent and have had to restructure their financial obligations. None of this is surprising as several Government speakers have indicated that the new tariffs will not compensate sunk investments, whether financed by equity or loans. The damage has increased as the tariffs have remained practically frozen at their original peso level in spite of the high inflation rate accumulated since January 2002 which currently exceeds 100%, and although Argentina has had four years of record economic growth.

And yet throughout all this legal turmoil the Argentine courts have remained mostly silent. No injunctions have been granted by them in favor of the utilities. No decision of an Argentine court awarding damages or invalidating Government measures that hurt the utilities are recorded.

Of course, courts can only act at the request of an interested party, so the silence of the courts is a consequence of the attitude of the parties affected by the emergency measures. This paper will try to analyze the causes of such attitude.

No criticism of economic policies should be implied from this paper. Sovereign countries can change their economic policies as they wish and the current Argentine economic policies have been imposed by democratically elected authorities and,

⁷ See, e.g., Law 26,095, A.D.L.A. [LXVI-C] at 2390; Decree 1216/2006; Decree 180/2004; Resolution MPFIPyS 185/2004; Resolution SE 663/2004.

⁸ This has been the case of Electricité de France with its investment in Edenor, an electricity distributor in Buenos Aires.

moreover, seem to have the support of a great majority of the population. However, from a strictly legal point of view changes of economic policies cannot affect vested rights without due compensation.

II. THE CAUSES OF THE SILENCE

In a legal system that seeks to conform to rule of law principles, private parties injured by Government action will normally seek redress before the local courts. They may be dissuaded by different reasons: local laws may be felt not to grant sufficient protection, the courts may be considered to lack independence vis a vis the Government or be biased against certain private parties, access to the courts may be very costly, the time involved in obtaining effective redress may be too long, other alternatives of legal redress may be available. In Argentina most, but not all, of these factors came into play.

1. Substantive law

The changes introduced by the emergency reassures in the utility contracts have been defended on the basis of two main arguments: the emergency situation created by the end of the convertibility system, and the Government powers resulting from the theory of *contrat administratif* followed by Argentine authors and court precedents.

None of these arguments appears sufficient to eliminate the right of the utility operators/investors to be compensated for the damages suffered by the implementation of the emergency measures.

a) The defense of emergency

Argentina has a long history of restricting property rights claiming crisis or emergency situations, all the more surprising since in the XX Century it had no major wars or natural disasters of general impact. The practice has become more prevalent in the last two decades, when the Government resorted to it in numerous occasions. It has become standard practice for Congress to declare special emergencies, such as the housing emergency, the educational emergency or the pensions emergency.⁹ One commentator has written that the country lives in “continuous economic emergency”,¹⁰ others talk of a “perpetual emergency”.¹¹

The term is not an exaggeration: each Government that took office after the restoration of democracy in 1983 has declared its own emergency. President Alfonsín did it by a series of decrees issued in 1985 that changed the currency, reduced the prices payable to Government contractors and suspended the enforcement of judgments against the Government.¹² President Menem had three emergency laws passed in 1989 and 1990 allowing the renegotiation of contracts and the consolidation of public debt,¹³ and issued an emergency decree to convert bank deposits into Government bonds.¹⁴ President De la Rúa obtained from Congress, in October 2000, a law that declared the emergency of the Government’s finances and of its contracts.¹⁵ President Duhalde began his presidency with the still broader declaration of emergency made by the Emergency Law. The

⁹ See, e.g. Law 23,680, June 30, 1989, [XLIX-C] A.D.L.A. 2432, that declared the housing emergency.

¹⁰ J.C. CRIVELLI, LA EMERGENCIA ECONÓMICA PERMANENTE, Bs. As., 2001.

¹¹ N. Botana in LA NACIÓN, Oct. 7, 2004, at 21.

¹² Decrees 1096, June 14, 1985, [XLV-B] A.D.L.A. 1151 and 2196, Nov. 28, 1986, [XLVI-D] A.D.L.A. 4180.

¹³ Laws 23,696 and 23,697, Sept. 15, 1989, [XLIX-C] A.D.L.A. 2458; Law 23,982 [LI-C] A.D.L.A. 2898.

¹⁴ Decree 36, Jan. 3, 1990, [L-A] A.D.L.A. 58.

¹⁵ Law 25,344, [LX-E] A.D.L.A. 5547, sec. 2.

current Government obtained, since December 2003, successive extensions of the emergency, currently until the end of 2007.¹⁶

It is also fair to ask whether the Emergency Law is, in the case of public service companies, a measure sincerely attempting to overcome an emergency, or is really a major change of policy disguised as a temporary solution of an emergency. The prohibition of dollarized tariffs and of all tariff adjustment mechanisms provided by its section 8 has no time limit and thus, it has been said, “exceeds the emergency”.¹⁷ Moreover, the obvious political purposes to be sought in the renegotiation as described in section 9 of the Emergency Law show that these are long term goals that sacrifice the rights of the utility operators to social objectives. The authorization subsequently granted to the Executive by Congress to ignore in the renegotiation the limits set by the relevant regulatory frameworks, confirms the permanent nature of the new policy.¹⁸ The fact that the renegotiation required by the Emergency Law has not been accomplished five years after said law was enacted corroborates this conclusion.

The Supreme Court has a long standing jurisprudence on the constitutionality of Government decisions that curtail property rights during emergencies. The Court, however, has also been consistent on the limits imposed on such power. Of these limits, the following are relevant for the instant analysis: the measures cannot affect the

¹⁶ Laws 25,790 A.D.L.A. [LXIII-E] p. 4966; 25,820 B.O. 4/12/03; 25,972 A.D.L.A. [LXV-A] p. 41; 26,204 B.O. 20/12/06.

¹⁷ In this sense, A. J. Stratta, *El denominado derecho de la emergencia ha puesto al derecho en emergencia*, 197 E.D. 977 (2002).

¹⁸ Law 25,790, sec. 2.

substance of the right but can only delay or limit its exercise, they should not be discriminatory, and they cannot exceed the time of the emergency.¹⁹

The Supreme Court has also imposed limits on the power of the Administration to control utility tariffs. Thus, it has held that the determination of the tariffs by the Administration is to be done “in accordance with what is provided in the law or in the contract,”²⁰ adding that:

“If due to reasons of a political or other nature, the Government wishes, or considers itself bound to, maintain tariffs lower than the cost (operating expenses, maintenance, renewal and capital amortization), plus a fair and reasonable profit, it must indemnify. It is unheard of to think that it may carry out (such decision) at the cost of destroying the patrimony of the concessionaire company or even its profits.”²¹

Similarly, in a more recent case, the Supreme Court held that the reduction of the tariffs imposed by the Administration entitles the concessionaire to be compensated for the difference between the reduced rates and the tariffs that would yield a “reasonable profit” for the concessionaire.²²

It can be argued that these limits have been exceeded in the case under analysis. History will decide whether the measures taken to overcome the emergency were necessary or,

¹⁹ *Peralta v. Estado Nacional*, CSJN, 313 Fallos 1513 (1990); *Cassin, Jorge c. Provincia de Santa Cruz* CSJN 317 Fallos 1462 (1994); *Cacace, Josefa c. Municipalidad de Buenos Aires* CSJN L.L. 1996-B at 19 (1995).

²⁰ CSJN *Compañía de Tranvías Anglo Argentina v. Nación Argentina*, 262 Fallos 555, 569 (1965).

²¹ *Id.*

²² *Maruba v. Estado Nacional*, 321 Fallos 1784, 1789 (1998).

instead, compounded the problems seeking to establish a new policy of expensive dollars to protect local industry. One way or the other, the sacrifice imposed on the utilities has been significant and has gone beyond a mere suspension of the exercise of their property rights.

As to discrimination, suffice it to say that the utilities sector was the one worst treated by the emergency measures and their subsequent implementation. The banks obtained partial redress through the delivery of Government bonds.²³ Public works contracts (which in the Emergency Law had been put on the same footing than utility contracts) were authorized since mid 2002 to adjust their prices in line with inflation.²⁴ In addition, several measures of the Administration granted favorable treatment to certain public contracts with an international element allowing the concessionaires to keep their tariffs in dollars or pegged to the dollar: this happened with tolls for the use of the internal Argentine waterway for international transportation,²⁵ airport tariffs²⁶ and port charges.²⁷ Only the utilities have seen their tariffs practically frozen since the end of 2001.

This discrimination is exactly what Congress wanted. During the legislative discussion that led to the enactment of Law 25,561, representative Roggero, from the majority party, stated:

²³ Decree 905, May 31, 2002, [LXII-C] A.D.L.A. at 2956.

²⁴ Decree 1953/2002, A.D.L.A. [LXII-E] at 5136.

²⁵ Decree 576, April 4, 2002, [LXII-B] A.D.L.A. 1719, sec. 2.

²⁶ Decree 577, April 4, 2002, [LXII-B] A.D.L.A. 1719 (ratified by Decree 1910, Sept. 25, 2002, [LXII-E] A.D.L.A. 5130), sec. 2. This decree was recently validated by a court (*Aerolíneas Argentinas v. Estado Nacional – Decreto 577/02*, CNCont.Adm.Fed. (federal court of appeals in administrative matters) II, Sept. 25, 2007).

²⁷ Note 478 of the Undersecretary of Ports and Navigable Ways of June 11, 2002. This decision was suspended in a court action: *Asociación Imp. y Exp. de la R. Argentina v. Poder Ejecutivo*, CNCont.Adm.Fed. III, Oct. 19, 2002; but a similar claim was rejected in *Petroquímica Cuyo SAIC v. Poder Ejecutivo Nacional – Sec. de Puertos*, CNCont.Adm.Fed. II, May 10, 2004.

“This bill is trying to change history ... We are seeking that the winners of the concentrated economy... begin to pay something of the large amount that they took out of the country”.²⁸

Finally, the life of the measures taken with respect to the utilities has greatly exceeded the real emergency. It is true that Congress has successively extended the declaration of emergency until end of 2007,²⁹ but the real situation of the country belies such congressional declaration, what with Argentine prepaying in 2005 its nine billion dollars of IMF debt, having had four years of plus 8% growth, and devoting billions of dollars to the purchase of foreign currency to prevent the peso from revaluing vis a vis the dollar. The Supreme Court precedent of *Mango v. Traba*³⁰ in which it declared an emergency law no longer constitutional due to the disappearance of the emergency, is relevant in this context.

b) The defense based on the theory of the *contrat administratif*

The French theory of the *contrat administratif* has been adopted by Argentina with the zeal of the disciples.³¹ This theory recognizes the implied power of the Government to introduce unilateral changes to its contracts, and to terminate them, if it deems that

²⁸ See the words of Deputy Roggero and of other legislators in [2002-A] L.L. ANTECEDENTES PARLAMENTARIOS, 329, and 271-275.

²⁹ Law 25,790 A.D.L.A. [LXIII-E] at 4966; law 25,820 Official Gazette 4/12/03; law 25,972 A.D.L.A. [LXV-A] at 41; law 26,204 Official Gazette 20/12/06.

³⁰ CSJN, 144 Fallos 219 (1925).

³¹ See MIGUEL A. BERÇAITZ, *Teoría General de los Contratos Administrativos* (2d ed. 1980) at 246-247; RAFAEL BIELSA, 2 DERECHO ADMINISTRATIVO (5th ed. 1955) at 142-53; MIGUEL A. MARIENHOFF, 3-A *Tratado de Derecho Administrativo* (3rd. ed. 1982-1983) at 56-57; JUAN CARLOS CASSAGNE, *La sustantividad del Contrato Administrativo y sus principales consecuencias jurídicas*, 15-16 REVISTA DE DERECHO ADMINISTRATIVO (1994) at 143; HÉCTOR ESCOLA, 1 *Tratado Integral de los Contratos Administrativos* (1977) at 127-31. See also Héctor A. Mairal, *Government Contracts under Argentine Law: a Comparative Law Overview*, 26 Fordham International Law Journal 1716 (2003).

public interest so requires. However, even under this theory there is redress for the private contractor. The exercise of such power triggers a right of the contractor to be compensated for the resulting damages. These rules are uniformly accepted by leading Argentine authors³²

Also, the French theory of the *fait du prince* has been adopted by Argentine law under the name of “hecho del príncipe”. According to the main French author on the subject, *fait du prince* is any measure adopted by the contracting authority that affects the conditions of performance of the contract with prejudice to the contractor.³³ According to some authors, these measures can be laws passed by the legislator, such as a law imposing price controls, “because the Parliament is an organ of the State just as the executive authorities are.”³⁴ When these measures are general, the contractor is entitled to an indemnity when they affect an element of the contract that was considered essential for the parties when they executed the contract, in other words, when such element had been taken into account by the private contractor to enter into the contract.³⁵ When a State measure qualifies as *fait du prince*, the rule is that the contractor is due full compensation for the prejudice suffered as a consequence thereof.

The theory of *fait du prince* has been followed almost literally by Argentine authors. Thus Marienhoff considers that the theory applies when a general measure from any organ of the State (including also the legislative power) has a substantial and negative effect on the economics of the contract altering its “economic equation”.³⁶ This theory is

³² See MIGUEL S. MARIENHOFF, 3-A *Tratado de Derecho Administrativo* at 400 and 581; JUAN C. CASSAGNE, *El Contrato Administrativo* at 36, and ESCOLA *supra* note 31 at 391.

³³ ANDRÉ DE LAUBADÈRE ET AL, 2 *TRAITÉ DES CONTRATS ADMINISTRATIFS* (2nd ed., 1983-84) 517.

³⁴ *Id.*, at 526.

³⁵ *Id.*, at 536.

³⁶ 3-A MARIENHOFF, *supra* note 32, at 476-500.

based, in Argentine law, on the guarantees provided in Articles 16 and 17 of the Constitution that forbid the imposition of special charges on some individuals for the public convenience and require respect for private property.

c) Conclusion on substantive law

This summary explanation of Argentine substantive law shows, therefore, that it was not the lack of protection afforded under it that led utility operators and investors not to resort to the Argentine courts.

2. Lack of independence of the courts

A recent poll taken among Argentine lawyers showed that almost 90% of those questioned believed that the courts of the country lack independence vis a vis the political powers.³⁷

While this appreciation may be exaggerated, and in many cases unfair, there are objective facts that explain such a perception. Our Supreme Court went through eight overhauls: in 1947, 1955, 1966, 1973, 1976, 1983, 1989 and 2002/05. Most Presidents have thus been able to elect all or a majority of the Supreme Court members upon taking office or shortly thereafter.

The Council of the Magistrature is a body created in the 1994 constitutional reform that intervenes in the selection and removal of judges other than those of the Supreme Court,

³⁷ LA NACIÓN, October 21, 2005.

and whose composition must be determined by a law preserving a balance among the politicians, judges, lawyers and academics who are appointed to it.³⁸ This law has been recently amended to expand the numbers of the political appointees to the detriment of the other sectors, to the extent that at present seven out of the thirteen members of the Council, and four out of the seven members of the impeachment juries, are political appointees.³⁹

Nevertheless, the current composition of the Supreme Court should bring about a change of attitude, albeit perhaps too late for the controversies concerning the utilities. All its members are persons of high local and international professional reputation, and widely respected in the Argentine legal milieu.

3. Bias of the courts

The few recorded decisions concerning the utilities that have been issued since the enactment of the emergency legislation, have all been rendered against their position.

In one case,⁴⁰ the Federal Court of Appeals on Administrative Matters revoked a lower court injunction to suspend the effects of an Executive Decree that terminated a concession agreement, involving the operation of a railroad, with a company owned by local investors. The main argument of the Court of Appeals was that, given the reports on the operational defects of the railroad that could be read in the press, priority should

³⁸ Argentine Constitution, art. 114 and Law 24,937, Official Gazette, January 6, 1998.

³⁹ Law 26,080, Official Gazette February 27, 2006.

⁴⁰ Federal First Instance Court for Administrative Matters No. 3, June 30, 2004, *Transportes Metropolitanos General San Martín S.A. v. Estado Nacional*; CNCont.Adm.Fed. IV, *Transportes Metropolitanos General San Martín S.A. v. Estado Nacional*, September 16, 2004.

be given to the proper operation of the service over the property rights of the operator which could be defended subsequently in an ordinary lawsuit.

In other cases,⁴¹ the courts granted injunctions requested by the Ombudsman suspending the effects of interim tariff increases granted by the Government while the renegotiation process was starting, on the grounds that the Emergency Law required a full renegotiation and thus did not contemplate such interim tariff increases.

Another decision that might have influenced utility operators and investors negatively towards Argentine courts, was one adopted before the enactment of the Emergency Law. In 2000 a lower federal court granted an injunction suspending the application of an increase of the gas tariffs based on an U.S. inflation index.⁴² At the time, given the fixed relationship between the peso and the U.S. dollar and the dollar basis of the tariffs, some tariffs were pegged not to the local inflationary index but to the U.S. one, which traditionally had been much lower than the Argentine relevant index. However, in 1998/99 the situation reversed itself, and while Argentina had deflation, the U.S. had a small but still noticeable inflation. The Government negotiated a postponement of the rate increases for these years that was to end in 2000. However, arguing that it was unreasonable to increase the tariffs in such circumstance, the Ombudsman sought, and obtained, an injunction suspending the tariff increase that was about to become effective

⁴¹ Federal First Instance Court for Administrative Matters, No. 12, *Defensoría del Pueblo de la Ciudad de Buenos Aires v. Ministerio de Economía*, LL, 2003-C at 116; Federal First Instance Court for Administrative Matters No. 3, *Unión de Usuarios y Consumidores y otros v. Ministerio de Economía e Infraestructura*, LL, 2003-E at 295; Federal First Instance Court for Administrative Matters No. 7, *Defensor del Pueblo de la Nación v. Poder Ejecutivo Nacional*, LL, 2003-B at 796; Federal First Instance Court for Administrative Matters No. 1, *Defensoría del Pueblo de la Ciudad de Buenos Aires v. Poder Ejecutivo Nacional*, LL, 2003-A at 449. See also CACont.Adm.Fed. III, *Asociación de Generadores de Energía Eléctrica (AGEERA) c. E.N. – Secretaría de Energía*, March 2, 2004, rejecting an *amparo* that sought the proper implementation of the Electricity Law 24,065 in the setting of seasonal prices.

⁴² *Defensor del Pueblo de la Nación v. Estado Nacional*, Federal First Instance Court for Administrative Matters, No. 8, Aug. 18, 2000.

after the postponement ended in 2000. This decision was affirmed by a divided vote of the Federal Court of Appeals⁴³ and subsequently certiorari was denied by the Supreme Court,⁴⁴ thus leaving the suspension firm. In spite of the six years elapsed since then, the main lawsuit concerning the validity of the tariff increase system is still in its initial stages, but in the interim the measures taken in implementation of the Emergency Law have practically made the controversy moot. That a tariff increase of a few percentage points over local inflation be suspended on the basis of unreasonability, silencing that previous increases based on the U.S. inflation index had been lower than local inflation, surprised some foreign investors in the local utilities.

4. Cost of litigation

Filing a court action in Argentina against the federal Government requires the up-front payment of a court tax equal to 3% (three per cent) of the amount of the claim.⁴⁵ In declaratory actions, the claimant must estimate the amount of the controversy and pay the tax on such estimate.⁴⁶ Of late, it has become common for courts to require that plaintiffs who challenge the validity of Government decisions but do not seek damages, still must estimate the economic value of the claim. The Government may challenge the estimate and request the court to decide the amount on which the court tax should be calculated.⁴⁷

⁴³ CNCont. Adm. Fed. V, *Defensor del Pueblo de la Nación v. Estado Nacional*, October 5, 2001.

⁴⁴ Supreme Court, *Defensor del Pueblo de la Nación v. Estado Nacional –Ministerio de Economía- Decreto 669/00 y otro s/ ordinario* (dossier 23.232), May 24, 2005.

⁴⁵ Law No. 23,898, Official Gazette, October 23, 1990, art. 3.

⁴⁶ Law No. 23,898, art. 4, parag. (d).

⁴⁷ Law No. 23,898, art. 4, parag. (d).

This barrier to the access to justice is considered important by Government lawyers who deem an abuse of legal process to be able to sue a Government for millions of dollars paying only a fee of a few thousand dollars, as it happens in international arbitration cases.

The general rule on legal costs is that the loser must pay the legal costs of the winner.⁴⁸ This includes not only the court tax (if previously paid by the winner) but also the fees of the winner's counsel and of the experts appointed by the court.⁴⁹ All these fees are set by the court as a percentage of the amount of the controversy within the parameters set mainly by the law that governs the legal profession.⁵⁰ In the case of counsel, they can be set between 14% and 28% for lower court work in the aggregate for both counsel and barrister (*procurador*).⁵¹ Subsequent appellate work before the Court of Appeals and also before the Supreme Court is remunerated at 25% to 35% of the lower court fee for each appellate stage.⁵² However, total fees awarded for lower court work (comprehensive of counsel, *procurador* and court appointed experts) cannot exceed 25% of the amount of the judgment.⁵³

When the amount of the controversy is very high, the Supreme Court has ruled that the legal fee percentages should not be applied mathematically but some regard must be given to the value of the legal work carried out.⁵⁴ However, fee awards totaling millions of dollars are not unknown in Argentine legal practice. Thus, in *Provincia de Santa*

⁴⁸ Cód. PROC. CIV. y COM., art. 68.

⁴⁹ Cód. PROC. CIV. y COM., art. 77; Law No. 23,898, art. 10.

⁵⁰ In the City of Buenos Aires, the matter is governed by Law No. 21,839, July 14, 1978, [XXXVIII-C] A.D.L.A. 2412, as amended.

⁵¹ Law No. 21,839, arts. 7, 9.

⁵² Law No. 21,839, art. 14.

⁵³ Cód. Civ., art. 505, as amended by Law No. 24,432, January 5, 1995, [LV-A] A.D.L.A. 291, art. 1.

⁵⁴ Law No. 24,432, art. 13; *Provincia de Santa Cruz v. Estado Nacional*, CSJN 320 Fallos 495 (1997).

*Cruz*⁵⁵ the Supreme Court did not apply the legal percentages due to the high amount of the claim (about US\$ 600 million at the rate of exchange then in force) but set the fees, in the aggregate for counsel and experts, at an amount then equivalent to US\$ 20 million.

A waiver of legal costs can be requested by parties who can show that they lack the means to defray such costs.⁵⁶ This is an ancillary proceeding which can be contested by the counter-party in the litigation.⁵⁷ If the waiver is granted, no court tax need to be paid and no award of legal costs against the party who obtained the waiver may be imposed.⁵⁸ Normally, a decision on the admissibility of this benefit, including appeals, requires six months to one year. As a rule, this benefit is extended only to individuals. Exceptionally, companies which are insolvent or near insolvency may also obtain this benefit.⁵⁹

A party can bring a lawsuit claiming the benefit and thus avoiding payment of the court tax at the time of filing the claim.⁶⁰ However, if the court -either acting *ex officio* or at the request of the counterparty- rejects the benefit, the court tax must then be paid by plaintiff as the tax is considered accrued due to the filing of the court claim, and cannot be avoided by a subsequent abandonment of the action. The risk of payment of the litigation expenses can only be avoided if the plaintiff files its action after the benefit has been granted by the lower court and, if appealed, the granting of the benefit is affirmed by the Court of Appeals.

⁵⁵ CSJN, *Provincia de Santa Cruz v. Estado Nacional*, cited above.

⁵⁶ Cód. PROC. CIV. y COM., art. 78.

⁵⁷ Cód. PROC. CIV. y COM., art. 80.

⁵⁸ Cód. PROC. CIV. y COM., art. 84; Law No. 23,898, art. 13 (a).

⁵⁹ *Estructuras Tafí v. Provincia de Tucumán*. CSJN, JA 1997 I at 74 (1996); *Siempre SA. v. Y.P.F. SA.*, CNCont.Adm.Fed. III, March 4, 2003, Lexis Nexis N° 30012389; *To Talk SA. v. Miniphone SA*, Civil Court of Appeals, Chamber D, June 11, 2002, Lexis Nexis N° 30002844.

⁶⁰ Cód. PROC. CIV. y COM., art. 78.

To abandon (*i.e.* withdraw) an action without prejudice, thus preserving the rights invoked in the action, a plaintiff needs the consent of the defendant. Abandonment does not require defendant's consent only if done with prejudice, *i.e.* comprising both the action and the claimed rights.⁶¹

In either case, unless otherwise agreed with the defendant, if a party that brings a legal action withdraws it after having served notice thereof to defendant, it must pay all legal costs, including the court tax and the attorneys' fees of the other party. This means that the withdrawing party is treated as if it had lost the lawsuit, unless the withdrawal is based on changes of legislation or judicial precedents.⁶²

In case of withdrawal, the professional fees are to be determined by the judge at the already mentioned range of percentages of the amount of the dispute, provided that such amount shall not exceed 50% of the amount of the original claim.⁶³

5. Time of litigation

Litigation before the federal courts in administrative matters can last for ten or more years. This is the result of the legal rules that require exhaustion of administrative remedies, require important cases to go through three levels of courts, and end in an administrative and judicial procedure for the enforcement of the decision which can add two more years until payment is received by claimant. Moreover, in two occasions

⁶¹ Cód. PROC. CIV. y COM., arts. 304 and 305.

⁶² Cód. PROC. CIV. y COM., art. 73.

⁶³ Law No. 21,839, art. 20.

already laws were enacted providing for the payment of claims against the Government in 16 years bonds.⁶⁴

A former *Procurador del Tesoro* (national Attorney General) has written that the average time needed to obtain the decision of a lower court in a damage claim was six years.⁶⁵ However, official statistics for the years 2002, 2003 and 2004 show that the rate of decisions with respect to cases in process is approximately 10%, *i.e.* that about one in ten lawsuits in the court's docket is decided each year. This means that the average delay to decide a damage claim by a first instance court is slightly lengthier than ten years. Several more years for the two successive appeals (Court of Appeals and Supreme Court) should be added. It is not uncommon for a complicated case to take twenty years until it is finally decided by the Supreme Court.

In the case of *Tranvías* decided in 1965, which concerned a claim for damages arising from the failure by the Government to grant tariff increases to an urban transportation company, 19 years lapsed between the filing of the initial action and the Supreme Court's final judgment.⁶⁶ A more recent example can be found in the case initiated in year 2000 by the *Defensor del Pueblo* (the National Ombudsman) in which an injunction was issued against the application of the U.S. producer price index to adjust gas distribution tariffs, that is still in its initial stages after six years of litigation.⁶⁷

⁶⁴ Laws 23,982 of 1991, and 25,344 (Chapter V) of 2000.

⁶⁵ HORACIO D. ROSATTI, *Los tratados bilaterales de inversión, el arbitraje internacional obligatorio y el sistema constitucional argentino*, LL 2003-F at 1283, footnote 28.

⁶⁶ *Compañía de Tranvías Anglo Argentina v. Nación Argentina*, 262 FALLOS 555 (1965).

⁶⁷ *Defensor del Pueblo de la Nación v. Estado Nacional*, Dossier No. 23,232/00, Federal First Instance Court for Administrative Matters No. 8.

The problems arising from this delay in obtaining a court decision are compounded by certain rules of Argentine administrative law according to which all Government decisions are presumed valid and must be complied with unless and until set aside or suspended by an administrative or judicial decision.⁶⁸ Moreover, the private law defense that allows a party to refuse to comply with its contractual obligations on grounds of the default of the other party (*the exceptio non adimpleti contractus* allowed by art. 1201 of the Civil Code) is of very limited application with respect to Government contracts which fall under the definition of *contrat administratif*.⁶⁹

It is sometimes possible to obtain a court injunction suspending the enforcement of an administrative decision. This has happened in the past with respect to the unilateral termination of important Government contracts⁷⁰. However, recent precedents have not been favorable for the utility companies.⁷¹

6. Availability of other alternatives

During the Presidency of Carlos Menem, Argentina entered into many bilateral investment protection treaties.⁷² This was a political decision which did not respond to any request from the Argentine bar. These treaties generally guarantee foreign investors a fair and equitable treatment and protect them against expropriation and other State takings without compensation. They also grant foreign investors an option to sue the

⁶⁸ Law 19,549, as amended (Administrative Procedure Law), sec. 12.

⁶⁹ *Cinplast*, CSJN, [1993] 316 Fallos 212.

⁷⁰ CNCiv.Com.Fed., *Nación Argentina v. Pan American Oil Co.*, 4 J.A. 78 (1965).

⁷¹ See notes 26, 27, 40, 41 and 42 above.

⁷² All these treaties have been ratified by laws. Thus the treaty with USA was ratified by Law 24,124, Official Gazette September 25, 1992; with Italy by Law 24,122, Official Gazette September 25, 1992; with Spain by Law 24,118 Official Gazette September 15, 1992; with Sweden by Law 24,117; with France by Law 24,100, Official Gazette July 14, 1992; with Switzerland by Law 24,099, Official Gazette July 13, 1992, with Germany by Law 24,098, Official Gazette July 13, 1992.

host country either before the local courts or an international arbitration tribunal, such as the ones set under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID).

With respect to this remedy, the treaties fell into two main categories. Many treaties with European countries required the foreign investor to litigate before the courts of the host country with the option to pursue arbitration abroad if after 18 months the matter had not been settled by said courts to the satisfaction of the investor.⁷³ This rule was called the “soft Calvo” clause by Argentine international lawyers, as it conserved partially the requirement of the Calvo doctrine that matters concerning foreign investments should always be brought before the courts of the host country.⁷⁴ The treaty with the United States, instead, required the foreign investor to choose irrevocably at the outset whether to sue before the local courts or pursue foreign arbitration.⁷⁵

No special rules have been enacted by Argentina with respect to legal actions for violation of a bilateral investment treaty brought before the Argentine courts during a certain period of time as contemplated in the relevant treaty. Thus, no specific rules dispensing of the exhaustion of administrative remedies have been provided for controversies involving claims for violation of a bilateral investment treaty, nor has a special summary action been established for them. No limit exists as to the amount of the court tax or of other legal costs applicable for cases brought under a treaty, nor any exception to the rule that the abandoning party is treated as the losing party for purposes of the award of legal costs, has been established for cases in which the claimant

⁷³ *e.g.* treaties with Germany, Switzerland, Spain and Italy.

⁷⁴ ESTEBAN M. YMAZ VIDELA, *PROTECCIÓN DE INVERSIONES EXTRANJERAS – TRATADOS BILATERALES – SU EFECTO EN LAS CONTRATACIONES ADMINISTRATIVAS*, Ed. La Ley, 1999, at. 54

⁷⁵ Art. VII.

discontinues the legal action before the Argentine courts upon the expiration of a certain period specified in the relevant treaty, in order to pursue thereafter international arbitration.

Therefore, from the rules explained in section 4 above, it seems that those countries which adopted the first alternative did not evaluate local procedure rules, as abandoning the action after 18 months was a step fraught with serious consequences unless the consent of the host country for such abandonment was obtained, an unlikely scenario.

However, as many treaties incorporated the most favored nation clause,⁷⁶ investors suing under the European treaties have been able –generally successfully- to invoke the system of the U.S. treaty and thus by-pass the requirement to sue locally and wait 18 months to abandon the local litigation.

From the point of view of expenses, initiation of arbitration abroad is not subject to the court tax system that prevails before Argentine courts. While advances to cover the costs of the arbitration are required, in claims of hundreds of millions of dollars these advances are small compared to what a percentage tax of the amount would represent. Also, most awards do not force the losing side to pay the legal fees of the lawyers of the winner, and often divide, albeit unequally sometimes, the common costs of the arbitration among the parties.⁷⁷ Thus, while the cost of international counsel may be high, there is no risk that a party may be saddled with a bill for tens of millions of dollars for legal expenses of the other side as it has happened in some cases of Argentine litigation against the Government.

⁷⁶ See, e.g. art. 7 (1) of the treaty with Germany.

⁷⁷ See, e.g., the recent award in the case *Siemens A.G. vs. The Argentine Republic*, ICSID, February 6, 2007.

With respect to time, awards on the merits have taken sometimes approximately four to five years to be issued.⁷⁸ So far Argentina appears to have decided to appeal all awards as allowed by the applicable legislation,⁷⁹ and this can add about two more years to the time when the award can be enforced (assuming the appeal is rejected). Still, the total time is about half, if not less, what it would take to reach a final decision in Argentina. Although some Argentine representatives had stated initially that they would seek a review of the award before the Argentine courts, the current position of the authorities appears to be that the final award will be honored.

III. AN EVALUATION OF THE SITUATION

At the beginning of 2002 some investors in the utilities considered the possibility of suing in the Argentine courts. In our experience, what dissuaded them were the two factors of cost and delay. Afterwards, when some investors invoked the arbitration clauses of the treaties and were successful, that road appeared clear and everybody then followed it. By 2004 about 30 cases had been filed against Argentina at the ICSID, and other cases are believed to have been filed under UNCITRAL rules.⁸⁰

So far, foreign investors appear to have been right in their choice of these fora to settle their controversies with the Argentine Government. Claimants have so far been

⁷⁸ Four years in the case of CMS, five in the case of Siemens (this case was based on the termination of a Government contract that took place prior to the enactment of the Emergency Law).

⁷⁹ Art. 52 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, allow an appeal of nullity.

⁸⁰ See Esther Kentin, *Economic crisis and investment arbitration: the Argentine cases*, article for Hague Academy Centre of Studies, 2004. Some of these cases (Azurix and Siemens) concern controversies that arose prior to the enactment of the Emergency Law.

successful in all jurisdictional issues, and in the few decisions on the merits that have been announced.⁸¹

It is interesting to note that although the Argentine Government has criticized the widespread choice of this alternative, it has not yet denounced any of the bilateral investment treaties. Such action would not, of course, affect existing controversies, but would put on notice future foreign investors as to the loss of the protection brought about by the treaty.

If the Argentine Government were to honor promptly the damage awards, it could be argued that, in the long run, maintaining the treaties in force would benefit Argentina as it would reassure foreign investors on the existence of effective legal protection for their Argentine investments and thus expand the country's chances of attracting such investors.

It can be queried, however, whether Argentina would not benefit more from modernizing its court system, making it cheaper and quicker for big cases to be tried locally. At the very least, this would entitle local investors (who ironically are currently worse off than their foreign counterparts) to sue locally without running the risk of bearing extremely high court costs and having to wait decades for a final judgment. It would also assure that substantive Argentine law would always be applied, and that the decisions would be published and have precedent value in the country.

⁸¹ Damage awards so far known include those in favor of CMS (US\$ 133.2 millions), Azurix (US\$ 165.2 millions) and Siemens (US\$ 208.4 millions). In the claim of LG&E, the Tribunal found partially in favor of claimant but deferred the calculation of the damages to a later stage.

The ten or even twenty year delays involved in the Argentine court system mean, in practice, that the final judgment arrives at a time when the politicians who took the measures which are finally invalidated by the courts, have long left office. This favors both the courts as well as the politicians. The first, because they can decide independently of any political pressures, as the issues that may have been hotly debated when the decisions were taken have been forgotten, and so have those who took such decisions. The second, because the cost of redressing any damages caused by their decisions falls on a different administration and does not lead to any criticism of their past actions.

From the point of view of the State, however, these delays are harmful, in the long run, as they allow politicians to take what in effect are unlawful actions without suffering the consequences of their legal or contractual violations. The State, or better said its taxpayers, are then saddled with the cost of the damages finally awarded by the courts. The system favors demagogic decisions to terminate contracts allegedly unfavorable for the country (always entered into by the previous administration) invoking legal grounds which are often weak.⁸² These decisions can be thus depicted initially as defending the national interest at no cost to the taxpayers, but in the end result in the country having to pay important amounts of damages to the terminated contractors.

A shorter time span between the birth of the controversy and its final outcome, whether it be the result of arbitration or of a modernized court system and procedures, would act as a deterrent of these practices, as the final decision would be known while the officer who took the decision is still in office or shortly after he has left it. Shortening the time

⁸² Some past examples of this Argentine practice can be seen in Héctor A. Mairal, *Foreign Investments and Municipal Laws: The Argentine Experience*, 4 Connecticut J. of International Law 635 (1989).

needed to settle controversies would therefore bring about long term benefits for the State and its taxpayers.

IV. CONCLUSION

Argentine substantive law grants sufficient protection to foreign investors. However, its court system and procedures, coupled with the rules of Argentine administrative law, imply, in practice, a denial of justice. Advancing 3% of the amount of the claim, risking tens of millions of dollars in legal fees, and having to wait 20 years after the contract has been terminated for a final court decision, do not constitute an acceptable legal remedy in today's world.

During the 1990's, Argentine effectively tried to resort to the U.S. dollar as a substitute for national currency. By entering into the bilateral investment protection treaties, Argentina made international law and foreign arbitration applicable to its controversies with foreign investors. The first experience ended in disaster. The second is resisted by the Government and implies certain institutional disadvantages. Only when Argentine currency, Argentine law and Argentine courts operate at a level with those of more advanced nations, will the country offer private investors –national and foreign– a true friendly environment to channel their funds into the long term projects that Argentina needs.