FOCO
Foro Ciudadano de Participación por la Justicia y los Derechos Humanos

The Bilateral Investment Treaties and the cases at ICSID:

The Argentine experience at the beginning of the XXI century

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Ricardo Ortíz*

1. Foreign investment and bilateral investment treaties

Until the seventies, foreign investment of companies aimed at covering the demand of the receiving market and that of the neighboring countries. It was the era of "industrialization by import substitution" in Latin America, where the determinants of investment were related to the characteristics of the internal markets (especially regarding the size and the tariff-protection) and the location of the head office. The eighties and nineties presented growth and the establishment of a new investment mode: that of the subsidiaries which adopt the development of a part of the production process, by integrating it into a centralized strategy where the different components of this process result in the assembly of a final product, elaborated on a global scale. It is no longer about an exchange of goods (in the classic sense), but of components which circulate and are used in the production of goods within a company. The international circulation of these components impel the transnational companies to search for possibilities to overcome tariff-barriers and in this way progress towards government policies of economic opening and liberalization of foreign investment.

As a consequence of this process foreign direct investment (FDI) flows rose impressively, which led governments to incorporate this variable into their economic growth policies. This in turn generated a fierce competition to attract international investment as a source of financing. At the same time neoliberal ideology was strongly pushed in the countries of the center and in those of the periphery, which in many cases led to unilateral policies of liberalizing investment regimes and financial liberalization.

While the importance of these investment flows grew, the necessity to establish internationally accepted rules on this matter became evident. A series of international (bilateral, regional and multilateral) instruments were created, which directly or indirectly incorporated investment-related issues.

Among theses instruments the Bilateral Investment Treaties (BITs) should be highlighted, which according to UNCTAD-numbers totaled 2.265 until 2003. On the multilateral level two conventions of the World Trade Organization (WTO) have to

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be mentioned: The General Agreement on Trade in Services (GATS) and the Treaty on Trade-related Investment Measures (TRIMS).

In May of 1995 the Organization for Economic Cooperation and Development – OECD - launched the negotiations of one of the most important initiatives, which aimed at the harmonizing of rules related to investment operations: The Multilateral Agreement on Investment – MAI. The objectives of MAI were to reach a broad framework for international investment with high standards for the liberalization of investment and investment protection regimes and to establish effective dispute-solution mechanisms.

The MAI also tried to reflect the fact that more and more countries which are not members of the OECD are becoming important players regarding foreign investment- as importers and exporters of capital. Therefore the Agreement was going to be open to non-member countries that were interested in joining a common regime of investment rules and were in condition to comply with legally binding liberalization standards and the capacity to implement them effectively.

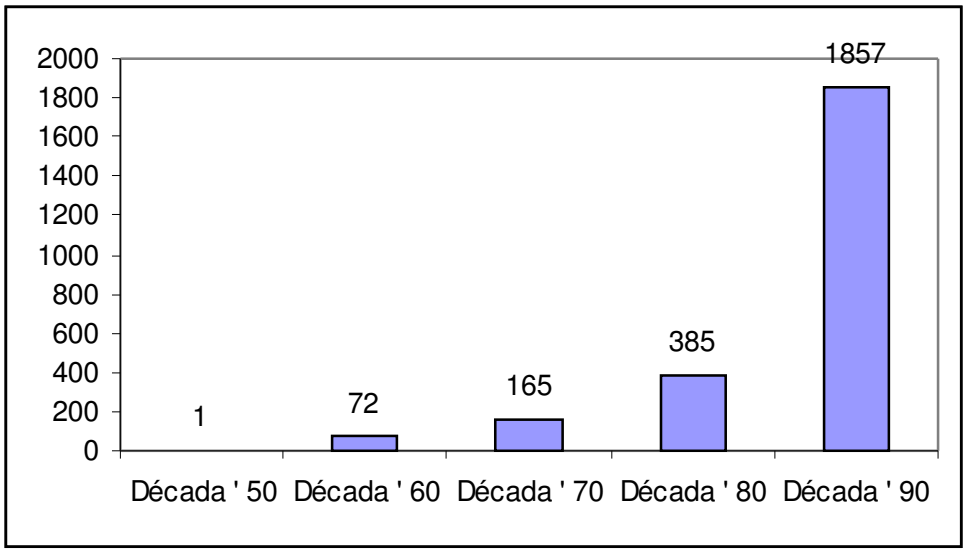
In December of 1998, however, after almost three years of intense discussions the death certificate for MAI was issued within the OECD. The following reasons for the failure can be mentioned: The broad definition of "investment"; the long lists of exceptions brought forward by the negotiators; the pressure by part of labor and environmental non-governmental organizations (NGOs); the performance requirements; the French pressure for cultural exception; the different positions regarding investment incentives; the dispute settlement schemes; and the proposal of a regional clause presented by the European Union (EU). This failure evidences the difficulties and contradictions that the globalization and transnationalization process of the global economy confronts in its intent to jump the profound divergences of interests at national-state level[1].

Due to the difficulties displayed at a multilateral discussion level, it was the bilateral agreements which permitted progressing in the standardization and

[1] Pierre Bordieu referring to the Multilateral Investment Agreement accurately said: "...this kind of utopia of a world free of all governmental restrictions and alone at the mercy of investors permits us to get an idea of the 'globalized' world which the conservative international of CEOs and managers of the industrial and financial corporations of all countries aspire to enforce with the help of a political, diplomatic and military power of an imperial state reduced to the function of maintaining internal and external order" (Own translation of the following original text: " ….esa especie de utopía de un mundo desembarazado de todas las restricciones estatales y entregado al solo arbitrio de los inversores permite hacerse una idea del mundo realmente `globalizado´ que la internacional conservadora de los directivos y ejecutivos de las multinacionales industriales y financieras de todos los países aspiran a imponer apoyándose en el poder político, diplomático y militar de un Estado imperial reducido a funciones de mantenimiento del orden interior y exterior") (Bourdieu, 2002).

improvement of market access conditions for foreign investment in national states' economies. In this sense the BITs became an increasingly important instrument for the protection of foreign investment. Even if the first agreements were implemented in the 1960s – the first one dates from 1959 – the growth of this instrument was boosted in the 1990s, alongside with the growth of FDI, and by 2003 had 176 countries involved.

Figure 1:
Number of BITs signed worldwide, 1959-1999



Source: Own elaboration based on UNCTAD (2000).

Its main characteristics haven't changed over the years. The most important clauses refer to the definition and dimension of the term "foreign investment" (including portfolio investment and direct investment, tangible and intangible assets, among others); National Treatment and Most Favored Nation Treatment, Fair and Equitable Treatment; guarantees and compensations in case of expropriations and compensations for civil wars and revolutions, guarantees for the free transfer of profits, funds and repatriation of capital; and dispute settlement mechanisms. Other issues, which have become part of some agreements during the last years, are performance requirements, free contracting, entry and exit of foreign personnel; arbitration mechanisms and general exceptions. It is especially notable that Argentina is one of the twenty nations with the most BITs in force, equaling Spain and Sweden (54 treaties each) and exceeding the United States (39).

2. BITs in South America

In Latin America Bilateral Investment Treaties were started to be used at end of the eighties. The majority was signed during the nineties (the highest number of them with the countries of Western Europe).

Table 1:
Number of Bilateral Investment Treaties, by region, up to 2002

Region	Number of BITs	Number of countries	Average number of BITs per country
Developed countries	1170	26	45
Developing countries	1745	150	12
Africa	533	53	10
Latin America and the Caribbean	413	40	10
Asia-Pacific	1003	57	18
Central and Eastern Europe	716	19	38

Source: UNCTAD, BIT-database

In South America the annual average of net FDI-inflows between 1990 and 1995 was of US$ 10.684 million, growing to US$ 53,174 million annually between 1996 and 2000. At the beginning of the XXI century FDI-inflows averaged US$ 30,878 million between 2001 and 2004 (CEPAL, 2005). Capital was mainly attracted by the implementation of structural reforms, particularly the privatization of large state firms in the energy and the basic services sectors, the access to new markets (the impact of trade or tariff alliances –like the case of MERCOSUR – was important), the liberalization of capital movements and the possibility to gain access to many natural resources (most importantly: gas, oil and minerals). In this context the MERCOSUR received 69% of average annual regional investment between 1996 and 2000 and 59% in 2004 (CEPAL, 2005).

At the same time the Southern Cone countries also showed interest in guaranteeing foreign investment through bilateral treaties, although the patterns of socio-economic relations within each country severely limited the possibility to implement what government elites had established (see Table 2).

Table 2:
South America: Bilateral Investment Treaties signed and in force up to June 2005

Region/Country	***BITs signed***	***BITs in force***
MERCOSUR		
Argentina	*58*	*54*
Brazil	*14*	*0*
Paraguay	*24*	*19*
Uruguay	*28*	*21*
Andean Community		
Bolivia	*22*	*18*
Colombia	*6*	*0*
Ecuador	*28*	*21*
Peru	*29*	*26*
Venezuela	*25*	*21*
Chile	*51*	*36*

Source: Own elaboration based on UNCTAD and Argentine Congress' numbers.

The panorama in the region is diverse. While within MERCOSUR the average number of treaties signed is 31, in the Andean Community it is 22; and strong fluctuations can be observed between the extreme positions characterized by the Argentine experience (almost 60 treaties signed of which more than 90% have been ratified) and that of Colombia and Brazil with a much smaller number of treaties signed and none ratified by the respective national legislatures. The cases of Colombia and Brazil show experiences of resistance by diverse political and social groups (parties, labor unions, employers' associations) against the intent to externalize the legal jurisdiction and to give up this aspect of sovereignty of national states.

Within MERCOSUR, the years between 1991 and 1995 reflect the strongest activity of Argentine businessmen aiming at the conclusion of investment treaties: 60% of the BITs signed by Argentina, 79% of the Brazilian and 58% of the Paraguayan BITs were accorded during these years. The case of Uruguay is different because it shows a more constant distribution over time: somewhat less than a third was signed in this period, while a similar percentage was signed before 1990 and another third between 1996 and 2000. Paraguay is the pioneer country in the region. It signed a treaty with Uruguay in 1976 (which however was never ratified), with France in November of 1978 (ratified in December of 1980) and with the United Kingdom in June of 1981 (ratified one decade later in April of 1992). In conclusion, for all countries that integrate the MERCOSUR, the nineties represented an explosion of treaties linked to foreign investment: 91% of the Argentine, 100% of the Brazilian, 88% of the Paraguayan and 64% of the Uruguayan BITs were signed between 1991 and 2000.

3. The MERCOSUR countries and the international arbitration courts

There are diverse international tribunals where disputes between national states and private investors are treated: The International Arbitration Court of the International Chamber of Commerce (which also treats disputes among privates), the United Nations Commission on International Trade Law (UNCITRAL) and the International Center for the Settlement of Investment Disputes (ICSID), of the World Bank.

The Arbitration Court of the International Chamber of Commerce is the oldest institution dedicated to resolving international trade related disputes of national states and transnational corporations. Even if some of the arbitrages of this International Court have been published, its functioning is not public and all information related to the parties concerned and the proceedings in course are not published for a general public.

UNCITRAL was established by the United Nations' General Assembly in 1966, in order to play an active role in the reduction or abolishment of obstacles for trade which derive from disparities between national laws that regulate international trade. It therefore promotes the progressive harmonization and unification of international trade law and the Commission converted itself to being the central juridical institution of the United Nations in this juridical area. The four MERCOSUR countries currently integrate the Commission, Paraguay with a mandate until 2010 and the rest until 2007.

Brazil is the only member of MERCOSUR which did not adhere to the "Convention on the Settlement of Investment Disputes between States and Nationals of Other States" (commonly referred to as the "ICSID Convention"), which was elaborated by initiative of the World Bank and which became effective in September of 1966[2]. Argentina signed the mentioned convention in may of 1991 and it came into force in November of 1994; Paraguay signed it in July of 1981, becoming effective in February of 1983 (again it was the first country of the region to sign); and Uruguay subscribed in May of 1992, becoming effective in September of 2000[3]. Worldwide 155 countries have signed the Convention and 143 have become contracting states after ratifying it.

[2] Brazil, however, recognizes certain foreign jurisdiction related to arbitration sentences, as since 1996 it is part of the "Interamerican Convention on International Trade Arbitration" (Panama Convention) of 1975. Also since 2002 it is part of the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (New York Convention) of 1958.

[3] With regards to the rest of the South American countries, the ICSID Convention came into force in February of 1986 in Ecuador; in October of 1991 in Chile; in September of 1993 in Peru; in June and July of 1995 in Venezuela and Bolivia respectively; and in August of 1997 in Colombia (even though, as we have previously mentioned, the latter does not have any BITs in force up to now).

Until the end of 2005 the ICSID tribunal had treated 202 cases, of which 103 were pending and not finalized while 99 cases had concluded, either with a judgment or with an extrajudicial agreement between the parties involved.

Except for the Eastern Republic of Uruguay all Cono Sur countries that have bilateral investment treaties in force and that have signed the ICSID Convention have been charged by this tribunal during the last years (see table 3).

Table 3:
South America: Number of charges at ICSID and sector of activity involved

Country	Finalized cases	Charges pending arbitration	Total cases	Sectors of activity
Argentina	5	38	43 *	Hydrocarbons, electricity, gas, harbors, water (see complete list in annex 2).
Bolivia	0	2	2	Mining, drinking water and sewage
Chile	0	3	3	Advertising services, construction, food industry
Ecuador	0	5	5	Hydrocarbons and electricity
Paraguay	1	0	1	Food industry
Peru	1	2	3	Mining (gold), food industry, electricity
Venezuela	3	2	5	Finance, mining (gold and copper), construction, highways

Note: The number of charges may differ from the number of pending cases because some charges were unified when they were initiated by different stock holders, but concern the same company and similar motives.
Source: Own elaboration based on World Bank data, National Treasury Administration and media information.

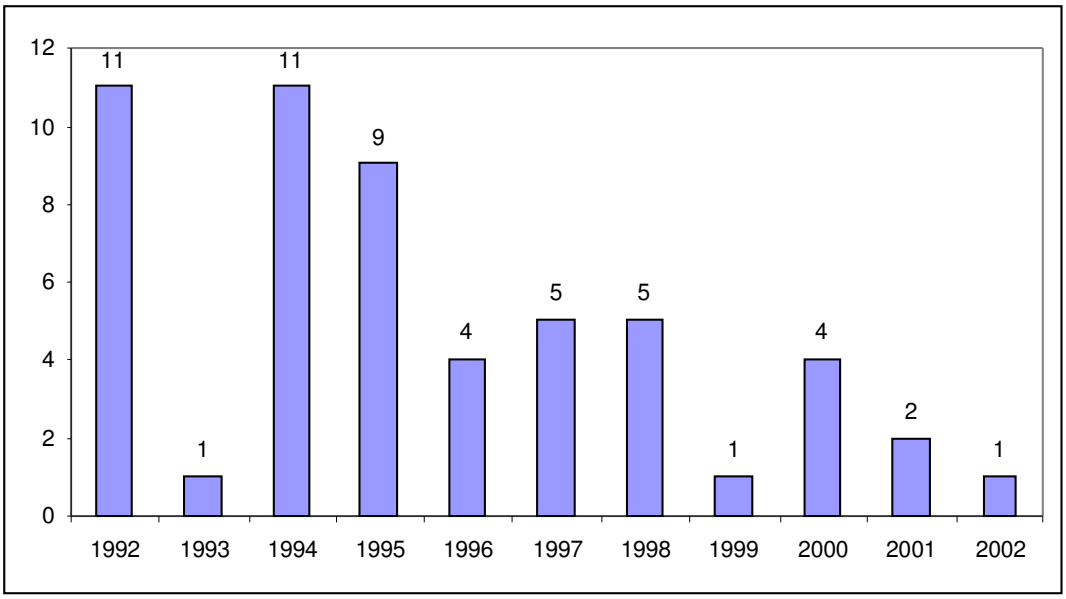
The accusations mainly correspond to sectors linked to natural resources like the exploitation of oil, gas and mining and food production; and also to the services sector like the generation of electricity and drinking water and sewage. This coincides with the fact that the areas where foreign investment concentrated on in the Southern Cone were those where public enterprises were privatized or the energy sector was deregulated.

Argentina is the country which confronts the largest number of accusations at ICSID, not only with respect to the region, but in the entire world. Far behind Argentina comes Mexico with 6 concluded disputes and 7 awaiting resolution; then there is Egypt with 5 finalized and 5 pending cases. This means that Argentina gathers more than 20% of the cases initiated at ICSID, and 70% of those from the Southern Cone.

4. Bilateral investment treaties, corporate strategies and Argentine economic policy

During the nineties Argentina opened its markets to foreign investment and at the same time began a fast process of signing and ratifying investment treaties. As already mentioned, Argentina is the American country with the highest number of signed BITs and more than 60% of the treaties signed by the Argentine government had been ratified four years afterwards[4].

Figure 2
Number of BITs ratified by the Argentine parliament, per year



Source: Own elaboration based on Argentine Congress' information.

It is important to note that during the first year of the ratification of the treaties almost all of them corresponded to OECD countries (10 out of 11 treaties). Among the nations involved were Spain, Italy, France, the USA, Great Britain and Germany, that is the group of most important foreign investors in Argentina during the nineties[5]. In this way a positive correlation between the presence of investors from the most developed nations and the search for guarantees to insert their companies into the local markets can be shown. Also most BITs with OECD countries were ratified between 1992 and 1995, the same years when the biggest public enterprises (gas, electricity, oil and water companies) were privatized. In this process of privatization the presence of foreign and especially European companies from the countries mentioned above was very important.

[4] A list of valid Argentine BITs is presented in annex 1.
[5] See Ortiz (2006).

The signing and ratification of agreements with other regions shows another time-related reference point. While the BITs with the most developed countries fall into the first years of “bilateral activism”, the number of treaties established with other Latin American and Caribbean countries rises between the middle and the end of the nineties. The treaties with other regions, like those corresponding to Asia and Oceania, and Central and Eastern Europe, register the highest frequency between 1994 and 1997, and between 1994 and 1998 respectively.

In summary, the distribution by region of the investment protection treaties signed by Argentina is the following: Western Europe and North America (excluding Mexico), 30%; Latin America and the Caribbean, 24%; Asia and Oceania, 20%; Central and Eastern Europe, 17%; and Africa, 9%.

It is possible to establish certain connections between the evolution of foreign investment, the strategies of transnational corporations and local business conglomerates and the economic policies applied during the nineties. This does not mean to sustain that the BITs are directly related with all of these dimensions. However it can be stated that they show a high level of functionality with respect to them.

In first place the participation of foreign investment in the privatization process of public companies should be mentioned, as this was the economic sector where the highest profits were made during the nineties. The acquisition of shares of the privatized companies by part of non-residents was materialized through foreign direct investment (FDI) as well as portfolio investment (PI). 67% of the funds raised by privatization between 1990 and 1999 were of foreign origin, which shows the high relevance of FDI in this process. Half of the sum earned through privatization was made by this modality[6]. On the other hand, during the first years of the privatization process, the FDI directed to the public sector amounted to more than 40% of total direct investment flows. Even if this percentage starts to fall in 1993, between 1990 and 1999 22% of IED flows are related to privatizations on a national or a province level. Regarding the countries of origin of the direct investment flows generated by the privatizations, 5 countries came up with around 90% of the total flows during the mentioned period: In order of importance: Spain, USA, Chile, France and Italy.

In second place another aspect of the privatization policy which has to be emphasized is the effect of the establishment of a new “business community” integrated by two social fractions that during the eighties had been contending for

[6] The participation of foreign capital in the privatizations was of US$ 16 billions (of which US$ 12 billion were FDI) over a total of almost US$ 24 billion which were raised between 1990 and 1999 through the sale of state enterprises (Ministerio de Economía y Producción, 2000).

the appropriation of the surplus of the entire Argentine economy and whose conflicts led to the hyperinflationary explosion of 1989 and 1990 (the local capital economic groups and the foreign creditors). Both groups were integrated in the design and implementation of the selling of state owned assets and furthermore incentives were made for the incorporation of transnational corporations. In this way the strong conflicts which had destabilized the Argentine economy in the preceding years were overcome.

This realignment of interests of the major representatives of the local economic power (which was more intense during the first years of the 1990s) strengthened its relative power regarding the rest of society. Consequently its capacity to influence the political power and the design of economic policy and of foreign investment also rose.

In third place, during the nineties and with special importance during the second half of this decade a large number of Argentine companies were transferred to foreign companies[7]. This aspect reinforces the fact that the FDI in Argentina was mainly directed at buying companies that already existed on the market, at the expense of new investment (Greenfield investment), which has a stronger impact in terms of modernizing the production plants, incrementing employment, technology transfer and capital formation. Generally speaking, Greenfield investment was associated to the existence of sectoral regimes or specific incentives (like the automobile, mining or forestry sector).

The sectors which were mostly affected by foreign buy-ups were the oil and gas, telecommunication, electricity, banking, financial services and food and beverages sectors. Considering the characteristics of these sectors it can be concluded that the strategy of transnational corporations in Argentina was mainly to buy assets that through regulation or concentration of production would guarantee the possibility to obtain high profits, due to either the characteristics of the concession contract and the privatization of public companies or due to the level of oligopolization of the sector.

In fourth place it is relevant to point out that other important actors of the Argentine economy (local capital economic groups) replicated this internationalization strategy – even though on a smaller scale than the transnational corporations. This can be observed more strongly on a South American level. Some of the companies which have moved in this direction can be found in the energy, pharmaceutical and food sectors. Among the energy companies major activities focused on taking advantage of the privatization policies in the oil and gas sectors of some South American nations (Peru, Ecuador and

[7] This implied that the market share of transnational companies regarding billing rose from 35% to more than 60% between 1990 and 1999 and to 67% in 2004 (Ortiz, 2006).

Bolivia are among the most important). Among the major players were the oil firm Perez Companc, Tecpetrol (of the Techint-group) and the Compañía General de Combustibles (of the Soldati-group); later on Pluspetrol (of the Spanish Repsol) and YPF (the formerly state-owned Argentine oil company). The first four firms, which had begun operations in the area of hydrocarbons that was opened to private participation in the beginning of the nineties, started to develop activities in the neighboring countries at the middle of the decade, and later on in other Latin American countries[8].

Other local capital companies have expanded in the region and have internationalized their production. This is part of a strategy that includes taking advantage of the opening of other economies as well as the necessity to overcome certain restrictions of the anchored currency imposed by the convertibility model. Effectively the fixing of the currency together with the heterogeneous and unequal opening led to an increase of costs (measured in foreign currency) which were not compensated by the measures usual to economies with floating exchange rates (i.e. the variation of the exchange rate and/or the raising of import-tariffs). This complicated situation led some big local capital companies to try to overcome this difficulty by transferring parts of their production processes to other countries in the region where costs would be lower than in Argentina. For this, obviously, financing capacities and the possibility to operate in Argentine oligopolic markets were needed, characteristics that were fulfilled by some big pharmaceutical companies (like e.g. Roemmers y Bagó) and some from the food sector (like Arcor and Bemberg). In this way, while during the first half of the nineties Arcor opened branches in Latin America, from the middle of decade on the other three started producing in other Southern and Central American countries[9].

All these diverse activities of internationalization of production occurred parallel to the process of signing the bilateral treaties between Argentina and the other countries of the region. While in 1994 only one BIT had been signed (with Chile) in 1995 the treaties with Venezuela, Ecuador and Bolivia were ratified, and in 1996 the one with Peru. Beginning in 1997 it was the turn of different Central American and Caribbean countries (Cuba, Panama, El Salvador, Costa Rica, Guatemala and Nicaragua).

[8] In the case of YPF its area of operations became even more international. It operates in different regions of the world, from the United States to Indonesia. This is also reflected in its volume of production, sales and profits: It is the Argentine company with the highest billing. Even though its characteristics differ from the other oil firms mentioned, YPF has also developed a strong oil production presence in other Latin American countries.

[9] Laboratorios Bagó, for example, has 18 subsidiaries in other Latin American countries like Bolivia, Brazil, Chile, Colombia, Costa Rica, El Salvador, Guatemala, Honduras and Mexico. The food group Arcor, besides from Argentina, operates in Brazil, Peru and Chile.

Several processes which coincide in time can be observed, among them the structural conditioning defined by economic policy, the strategies of transnational foreign-capital companies (and the experiences of the internationalization of production by part of the local capital enterprises) and the establishment of guarantees for investment through the BITs. At first, it can be seen that the BITs overlap with the wave of foreign investment in Argentina linked to the privatization of state assets, and from the middle of the decade on with the process of buying up local-capital companies by foreign ones. At a second glance, coincidences between internationalization strategies of some big Argentine companies and the BITs signed with countries of the region (which are the markets where local firms participate) can be found.

This means that a path of learning and copying from the big transnationals can be noted to a smaller extent in the strategies of local conglomerates, and in this aspect the investment guarantee contained in the BITS seems to play a role.

5. Main characteristics of the Bilateral Investment Treaties signed by Argentina

The Bilateral Investment Treaties signed by Argentina follow the common typology of international investment agreements. Therefore reference will be made to some general characteristics and to particularities or singularities which can be found in some cases.

a. Amplitude of the definition of investment and investor

The treaties reflect a very broad characterization of "investor" and "investment", which means protecting all kinds of assets, tangible or intangible, fixed assets or stocks. Also all kinds of rights are included (intellectual property, patents and brands, fabrication licenses); and even rights to realize economic or commercial activities based on a contract, i.e. the expectation to obtain future profits. In some cases (e.g. the BIT signed with Spain) it is specified that the definition of investment laid down in the treaty cannot be changed in the future.

b. National Treatment

According to this clause, foreign investors receive a similar treatment as the local investors. This means that any different treatment due to the origin of the investor can be considered as discriminatory and gives the foreign investor the possibility to take action at international tribunals due to the hypothetical losses he or she may have. In general *National Treatment* means that *"...every contracting party...will grant a treatment to investment realized by investors, profits and activities of the other contracting party that is not less favorable than that granted to its own investors or to investors of third countries*". This clause is generally part of all treaties, just as the *Just and Equitable Treatment* clause, a generic clause present in all BITs and the *Most Favored Nation* clause, which also appears in all agreements. The National Treatment clause (generally in the agreements with countries that integrate economic-, tariff- or free trade areas) contains an exception that impedes that this treatment is extended to third countries that integrate these areas (this is the case, e.g., in the BITs with Germany, France, Italy, the USA, Canada, Peru and others. In the BIT with the USA, the latter country "*reserves itself the right to establish or maintain exceptions to National Treatment in aviation, navigation, banking, insurance, energy, ownership and operation of radio and TV, public telecommunication services and telegraphic services and others; also regarding certain programs that involve guarantees, loans and government assurances.*" Argentina in turn, reserves itself the right to establish exceptions to National Treatment in real estate property in frontier regions, aviation, naval

industry, nuclear plants, uranium mining, insurances, mining[10] and fishing". Looking at the exceptions brought forward by each country, it seems clear, which one is the nation that grants more possibilities to foreign investment.

c. Most Favored Nation

This clause is applied jointly with the former one, and guarantees the investor the possibility to receive the conditions fixed by other treaties, that are most favorable to his/her interests. By this means the juridical bases of the agreements are universalized and the most favorable conditions are granted to the investor. Included are the definition of investment and investor, guarantees for the transfer and repatriation of capital and profits, dispute settlement systems and all other benefits that are directly related to an external investment. All treaties include this clause, which has a central importance for arguing corporate demands.

On the other hand, and in the same way as with the National Treatment clause, the treaty with the USA contains exceptions to the MFN-clause by part of the USA "regarding publicly-owned mining, maritime services and primary value brokerage of US titles". Argentina does not define exceptions to the Most Favored Nation treatment.

d. Protection of previous investment

The protection of investment in these treaties includes the investment realized before the entering into force of the treaties and thereby the favorable norms are extended to the entire foreign investment, independently of its realization date. This is stated, e.g., in the article 11 of the BIT with Italy, article 8 of the treaty with Germany and article 11 of the treaty with the Republic of Korea, in the article 12 of the treaty with Peru, etc. This retroactive clause only excludes claims or controversies which were initiated before the treaties entered into force (Germany, France, Korea) or which were initiated or finalized before its entering into force (Italy). In other cases, like e.g. the BITs with Latin American countries (Ecuador, Peru, El Salvador), no clarification is made with regards to previous investment.

e. Stabilization clauses

There are treaties that establish that if national legislation is modified with regards to the realized investment, then this modification does not affect the legislation that was valid at the moment when the treaty was signed. This means that investment conditions are guaranteed even if laws are changed, which shows

[10] Mining was excluded from the list of exceptions later on.

the relationship between the member state and the investor, clearly favoring the latter. The treaty with Panama, e.g., includes the prohibition to abolish or modify laws that affect investment, which could be considered an indirect expropriation of the investor. This on the other hand represents a privilege of the foreign investor with respect to the nationals, yet the latter are affected by legislative modifications.

In the same way, the treaty with the USA established that "laws and regulations which may be enacted will not affect the essence of the rights stated in the present treaty".

f. Performance requirements

Performance requirements are special conditions to regulate investment in one or various areas of economic activity. These requirements may include measures to promote national or regional development, like laws to buy national components, limits to profit transfers, protection of environment, employment promotion, corporate social responsibility and other activities of economic, social or cultural promotion.

The only BIT signed by Argentina that contains performance requirements is the one with the USA which contains special protections for the Argentine automobile industry. It states that "*Argentine government may maintain, but not extend performance requirements in the automobile sector; it will eliminate them in the 8 years after entering into force this treaty*." The requirement in this case is the incorporation of local input in the car parts. The non existence of these requirements or conditionings in the rest of the agreements means that the Argentine State abandons all instruments to promote local development.

g. Transfers

All treaties establish absolute freedom of transfers of sums related to an investment (profits, compensations, payments, capital contributions, loan redemptions, wages, or the result of the partial or total sale of an investment, etc.). It is stated that transfers have to be realized without delay and according to the valid exchange rate of the date of transfer realization[11].

[11] As an exception, the treaty signed with Italy establishes that "every contract party conserves the right, in case of exceptional balance of payment difficulties, to establish limits to transfers, in an equitable way, without discrimination and in conformity with its international obligations. The limit may not exceed, for each investor, a period of thirty six (36) months and will include the possibility for the investor to obtain a scaled transfer in various payments for periods not superior to eighteen (18) months".

h. Expropriations and compensations

Another aspect incorporated by all treaties is the guarantee in case of expropriations, which can only occur for reasons of public utility, in a non-discriminating way and by the payment of an adequate, effective and fast compensation. It is established explicitly that investment may not be nationalized, expropriated or subjected to any other action that implies these kinds of dispossession. As mentioned in the treaty with France "*the mentioned measures that might be adopted should lead to the payment of a fast and adequate compensation, whose sum, which is calculated on the basis of the real value of the realized investment, should be evaluated with regards to a normal economic situation prior to any threat of dispossession*". In the treaty with Italy it is even mentioned that the parties may not establish "any measure that restricts, for a determined or undetermined lapse of time, the right to property, possession, control or exploitation" of the investment of the other party. Furthermore the treaties include the right for foreign investors to be compensated for the losses resulting from armed conflict, revolution, turmoil, national emergency or natural disasters. In this case the investors will receive a treatment, regarding compensation or reparation, according to international law and not less favorable than national investors or investors from third countries.

I. Duration

In most cases investment protection agreements establish a duration of ten years from the moment of ratification and an automatic continuity afterwards, unless any of the parts renounces. In any case the treaties also state that investment continues protected even after the expiration of the contract for a period of ten or fifteen years.

j. Dispute Settlement

This aspect has a high relevance because the dispute settlement mechanism included in the investment treaties allows suing the receiving country at an international court. In this way a supranational entity is legitimized to defend the interests of the external investors with regards to government activities linked to investment. Even if in a first instance a national tribunal of the investment receiving country should be called upon, an international tribunal is designated if the local court does not decide within 18 months or if regardless of a verdict the controversy subsists between the parties. This gives the external investor the possibility to call upon international courts to sue national states for possible damages. This is a novelty introduced by investment treaties, as before external investors had no

legitimacy to enforce a claim and could only do so by diplomatic means or by actions of their countries of origin.

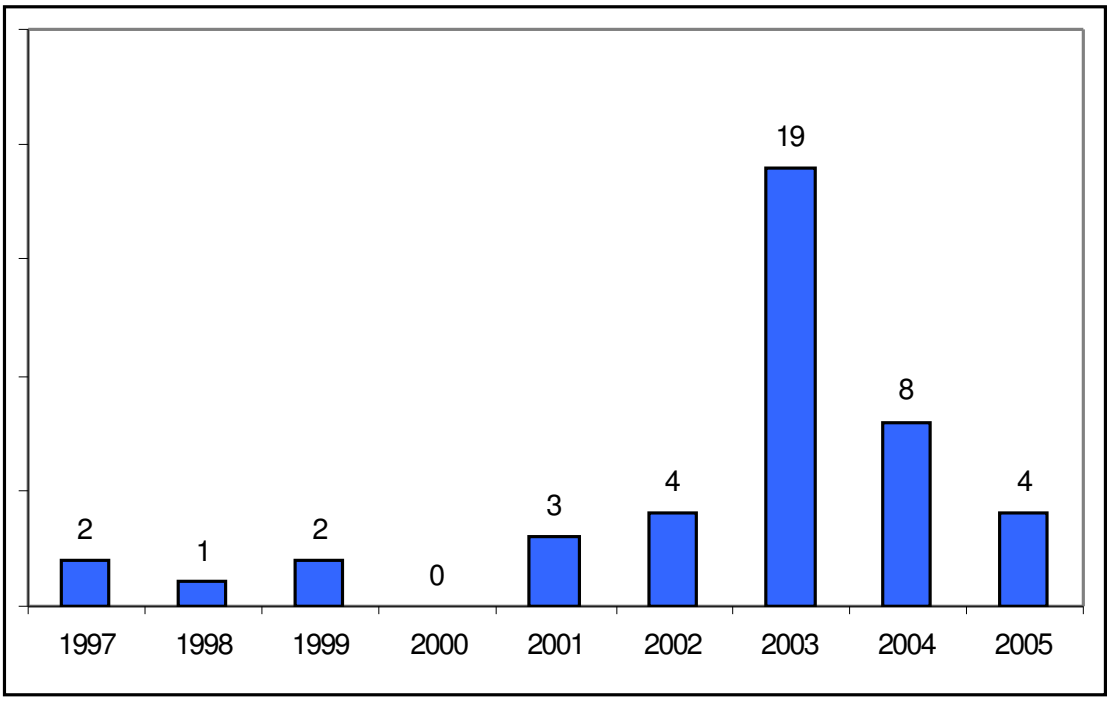
The international tribunals mentioned in the BITs are the ones established by the rules of the United Nations Commission on International Trade Law (UNCITRAL), or the arbitration procedure foreseen in the framework of the ICSID Convention. By accepting the subjection to a tribunal of the ICSID Convention, the country accepts international jurisdiction and given that its verdicts have executive character they can become unappealable (if it is considered that the international treaties have constitutional status and are above national legislation).

The election of the tribunal may even be explicitly subjected to the decision of the investor (this is the case in the BITs with Italy, France and Peru). In other cases the treaty does not explicitly mention the faculty of the investor, but there is the possibility to call upon the intervention of the international arbitration court (Spain, Germany).

6. The cases against Argentina at the ICSID

Between 1997 and the beginning of 2006 43 lawsuits against Argentina were initiated. Five of them have finalized and 38 are pending resolution (see figure 3).

Figure 3
ICSID: Cases initiated against Argentina 1997-2005



Source: Own elaboration based on information of World Bank and Argentine Treasury (Procuración del Tesoro de la Nación.

It is impossible to precisely determine the exact amount involved in the cases against Argentina; however there are estimates of US$ 13.000 regarding the ICSID cases and other US$ 2.500 for other international tribunals[12]. Some of the amounts for the ICSID cases are: Aguas del Aconquija, U$S 375 million; Enron Corporation U$S 286 million; CMS Gas Transmission Company, U$S 265 million; Azurix Corp. U$S 566 million; LG&E Energy Corp U$S 268 million; Metalpar, U$S

[12] There are four cases against Argentina at the UNCITRAL initiated by BG Group, Anglian Water Limited, Nacional Grid Transco PLC and United Utilities International Limited (UUIL), all of them stock holders of privatized companies. Another case initiated by Papel de Tucumán against the Argentine State is being led at the International Arbitration Court of the International Chamber of Commerce.

30 million; Siemens U$S 550 million; Telefónica, U$S 2.834 million; Pan American Energy y BP America, U$S 300 million; Pioneer, U$S 650 million [13].

The Argentine government in 2003 founded the "Arbitration Defense Assistance Unit (UNADAR) to organize the presentations at the lawsuits because even if many litigations involve the provincial governments, the National State is guarantor of the investment due to its signing of the bilateral treaty. UNADAR is presided by the head of the Central Bank (Procurador del Tesoro de la Nacion), further members are representatives of the ministries of external relations, economy and production and federal planning (the latter two ministries also are part of a Unit for the Renegotiation of contracts of privatized companies – UNIREN). In this entity also some strategies of the State are exposed and accorded to, for example, attend the detected problems due to the absence of a uniform and consistent criterion of ICSID to program the chronogram of expiration dates and hearings of the Argentine Republic; the presentation of specific cases; the answering-structure for paradigmatic cases; the search of extrajudicial agreements with the claimant companies, etc.[14]

The central argument of the National State is that the National Constitution forms the peak of the Argentine juridical pyramid and that international treaties are part of Argentine legislation, but are not above the Constitution. It is also argued that ICSID is judge and claimant at the same time in some cases, because one of the institutions that integrate the World Bank (the International Finance Corporation – IFC-) is minor stockholder of companies that have initiated disputes against Argentina[15]. At the same time the missing transparency and publicity is criticized while demanding that ICSID hearings be public and that the participation of non-governmental organizations be permitted. Also the internal structure of the arbitration panels is questioned, because the situation can arise that two different tribunals make different judgments on the same complaint presented by different stockholders of a company – one being positive and the other one negative. This would violate the principle of equality before law stated in the National Constitution, and the same would occur with regards to foreign and national investors, because

[13] Information on the cases led by ICSID is very scattered and practically without systematization. Therefore it has taken a long time to reveal, because many sources had to be consulted (national and international organizations, research centers and journalistic information) in order to form a data pool with some level of systematization. The complete list can be consulted in the annex2; the total value of US$ 13 billion is obtained by adding the amounts explicitly claimed. In the cases where the damage was not determined in the presentation of the claimants, the value of foreseen investment was taken.

[14] Procuración del Tesoro de la Nación, protocols of the meetings on December 5th of 2003, January 29th of 2004, March 24th of 2004 and April 21st of 2004. These documents can be found on the website of the Procuración (www.ptn.gov.ar).

[15] This is the case of Aguas Argentinas. Even if the IFC did not sue the country, other stockholders did so. Therefore ICSID has to deem of the interests of business partners of the World Bank, which means interfering in the valuation of their own stock.

the latter ones do not have the right to make legal claims against the state at international tribunals (foreign investors, however, can do so due to the BITs-provisions). This, on the other hand, contradicts the guidelines of the "Calvo-doctrine" which is based on the principles of national sovereignty, equality of national and foreign citizens and territorial jurisdiction. According to Calvo, one of the main exponents of international law, sovereign states have the right to be free of any kind of interference by other states. In the case of litigations they have the obligation to exhaust all legal instruments at local tribunals without asking for protection or diplomatic intervention by their country of origin.

The available information on these litigations will be presented below. Subsequently some paradigmatic cases will be analyzed, to illustrate the behavior of some of the companies that have taken legal action against Argentina and the central elements that have been considered to reach certain legal verdicts.

6.1 The finalized lawsuits

Five cases have been finalized by ICSID; all of them are related to economic sectors that were object of privatization during the first half of the 1990s. In 1997 Lanco International Inc. sued Argentina because the government declared as annulled the license for the exploitation of a harbor terminal in Buenos Aires, due to the non-compliance with the provisions made in the awarding of the contract by the concessionary; in October of 2000 Lanco desisted from the action. In 1998 the North American company Houston Industries Energy presented a lawsuit due to a dispute related to the concession for the provision of electricity in the Santiago del Estero province; ICSID emitted a verdict in August of 2001 which has not been published. In 1999 there where two cases, both related to the energy sector. The first of them was presented by the North American oil firm Mobil, by its local subsidiary which saw itself affected by new provincial taxes imposed by the province of Salta on its joint-venture for exploiting hydrocarbons (denominated "ingresos brutos" – gross earnings), taxes which where not considered when the investment was made. The second one was presented by the Chilean subsidiary of the Spanish ENDESA, also related to taxation aspects. In this case, it considered itself damaged by provincial taxes of the Neuquen province ("impuestos a los sellos" – stamp taxes) affecting its investment in the electricity sector. Both companies later on desisted from their actions: Mobil did so in July of 1999 and ENDESA in February of 2001 after reaching broad agreements with the government. In 2003 the North American Pioneer Natural Resources sued the State for the *pesification* of gas charges and the implementation of retentions on hydrocarbon exports; an extra-judicial agreement was reached in June of 2005 due to which the company desisted from the action: the negotiation included a new well head gas price and the discussion on electricity fees; gas price were raised by 18%

and electricity charges are accorded in April of 2006; in both cases a path of scaled price-lifts over time was fixed.

6.2 The ongoing cases

The major part of cases pending resolution was initiated after the devaluation which put an end to the Convertibility Plan that was valid in Argentina between April of 1991 and December of 2001. Effectively, 33 of the 38 claims are linked to different economic policy measures that modified some of the original conditions under which foreign investment was materialized, especially in the sector of companies subjected to privatization during the nineties.

The main measures questioned include:

a. The imposition of provincial taxes that were not planned originally, so that taxation stability clauses were modified (this is the case of Enron and CMS, natural gas transporters, that initiated complaints in 2001)[16];
b. The enactment of Law 25.561 (the «Economic Emergency Law») enacted by the Legislative Power that eliminates the fixation of the public services fees in dollars and its adjustment to the US consumer price index («pesification of charges»)[17]. This norm had been in force during big part of the 1990s and contravening explicit dispositions of the Convertibility Law (that impeded the adjustments of prices and charges) it had permitted the indexation of fees of the privatized public services, which led to enormous profits for these companies (estimated around US$ 9 billion). This had been possible because during large parts of these years the Argentine price index had increased with rates below the US price index. Also, the Economic Emergency Law fixed the freezing of charges for public services.
c. The application of petroleum export retentions imposed in 2002, because within the framework of the devaluation a transfer of extraordinary earnings towards the export sector (among them the oil companies) that were favored by an internal cost reduction measured in dollars.

Additionally to these three examples there is the rescission of concession contracts in the cases where an excessive non-compliance with the exploitation conditions of the privatized services (like in the cases of Lanco International – harbors-, or Azurix – water services) or excessive prices in the originally signed

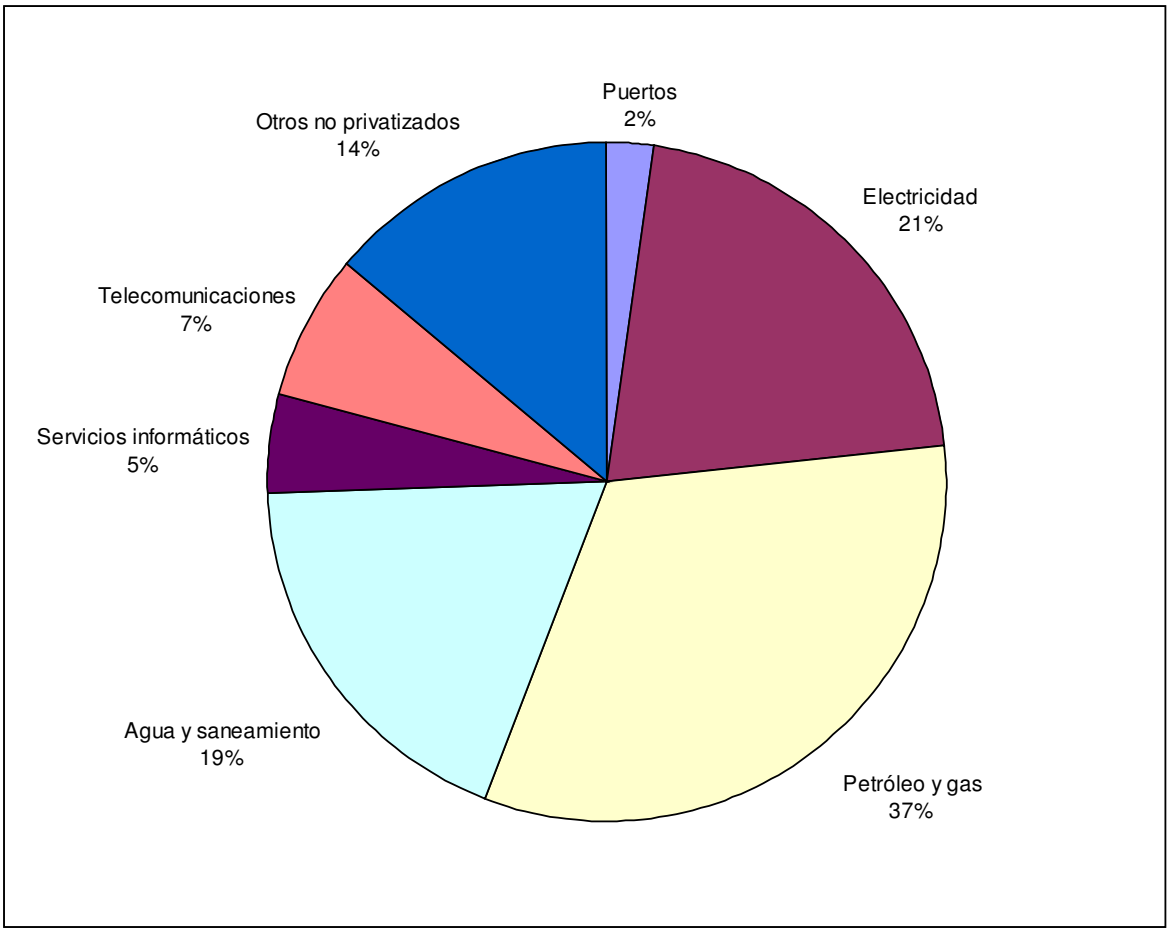
[16] These same companies in their presentation to ICSID also challenge the suspension of the dollarization of the charges decided by local tribunals in 2001.

[17] In 2001 the Argentine Justice had suspended the clause that fixed the adjustment of fees to the US price index. This served as a precedent for the respective article in the Ley de Emergency Económica (Economic Emergency Law) of 2002.

contracts were established (like in the case of Siemens and its contract to provide ID documents).

As the following figure shows, more than 80% of the cases initiated at ICSID are presented by companies related to sectors where public services have been privatized.

Figure 4:
Distribution of ICSID cases by sector of activity of the company



Source: Own elaboration based on World Bank data.

The cases also can be classified into the following four typologies, according to the reasons that originated the action at an international tribunal.

6.2.1 Rescission of contracts

This is the case of the companies Aguas de Aconquija (drinking water and wastewater management in the Tucumán province), Azurix (drinking water and wastewater management in the Buenos Aires province) and Siemens (supply of identity documents)[18].

The lawsuit of Aguas de Aconquija is the longest of those initiated against the State before ICSID, and has passed through diverse instances throughout these years. Even if originally the Tucumán provincial government had rescinded the concession, it is the National State, which due to the conditions of international treaties has to assume the case (the same occurs with other provincial concessions). The company's contract had been terminated due to diverse failures to fulfill contractual obligations related to service quality (the « drinking water » provided in the provincial capital was not apt for drinking) and due to dissent on diverse aspects of the contract which could not be resolved, like the method to measure water consumption, the level of consumer fees, the opportunity for and percentage of raising charges, the right of the company to pass on certain taxes to the clients, and others.

ICSID established in a verdict that none of the conditions of the investment treaty between Argentina and France had been violated, and that therefore the complaint should be directed to the courts of Tucumán.[19]. This decision, however, was subsequently revoked partially after the claimants had solicited an ICSID ad-hoc committee, and today the situation still has not been resolved[20]. The company that controlled the capital of Aguas de Aconquija was the French Vivendi Universal, one of the world's leading water and energy services providers.

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[18] Initially 5 contracts were rescinded by the State. In addition to the three cases mentioned there was the case of Lanco International, where the North American company desisted, and the case of Thales Spectrum (control of the Argentine radioelectric space), which was annulled in February of 2004 for having caused a damage of US$100 million to the State.

[19] *"En conclusión, el tribunal resuelve que los autos en este procedimiento no ofrecen una base fáctica para dictaminar que la República Argentina faltó a su deber de responder a la situación en Tucumán y a las solicitudes de las demandantes de conformidad con las obligaciones del gobierno argentino bajo el TBI"* (point 92 of the tribunal's verdict in case no. ARB/97/3, Cía. de Aguas del Aconquija S.A. & Compagnie Générale des Eaux against the Republic of Argentina. Own translation of the quote: "In conclusion, the tribunal resolves that the acts of disposal of this procedure do not offer a factual base to determine that the Republic of Argentina has not complied with its obligation to respond to the situation in Tucumán and to the requests of the demandants in conformity with the obligations of the Argentine government under the TBI."

[20] The ad-hoc committee resolved that the originating tribunal had transgressed its competence and had omitted to decide on the complaints of Aguas del Aconquija by act of the Tucumán province and therefore annulled the decision of the arbitration court. With regards to this, consult ICSID (2002) and (2003).

Another company of the same sector of activities is the North American Azurix, subsidiary of Enron Corporation, which in 2001 incurred in one of the most fraudulent bankruptcy of contemporary history. Azurix accused the provincial State of violating the investment treaty by having unilaterally rescinded the contract and, without mentioning its own non-compliances, further accused the Argentine State of presumably violating the binational investment treaty. In October of 2001 Azurix announced its pull-out of the business, which it materialized on March 2nd of 2002. The provincial State complained that it had abandoned the concession and demanded around 640 million pesos (approximately equivalent to US$ 215 million) for unpaid tenancy and investment plus reparation payments for damages caused to the province by deficiencies in the provision. That is, the company did not comply with the assumed commitments of concession tax (canon), and operation neither did the expected improvement of service provision quality take place[21]. When its parent company (ENRON) went broke, Azurix lost its financial assistance, ended up under insolvency administration and abandoned its contractual obligations.

In the case of Siemens, the company initiated a suit against the Argentine State alleging non-compliance with contractual obligations. The origin of this problem lies in the acceptance of an offer by part of the Argentine State for the provision of national identity cards and provision of computer technology for the border crossings. This offer was highly superior to the competing ones. The revision of the contract was conducted by the government succeeding the Menem administration (that had signed the contract) due to the presumed overpricing of the documents and the non-compliance with the time period fixed.

In the three mentioned cases the strategy of the Argentine Government consisted in questioning the jurisdiction of ICSID. Legal means were brought forward in order for the tribunal to first decide on this issue. In the reference litigation as well as in all other cases were Argentina challenged the ICSID jurisdiction, these motions were rejected and the cases were accepted[22].

[21] Azurix had taken over the sanitary services in July of 1999, after having offered US$ 438 million for the 30-year concession of 5 of the 6 regions into which the former Buenos Aires water company had been divided. A few months after that several inconveniences regarding the provision of services occurred in various provincial regions. In addition to the lack of water supply there were several cases of billing “errors” due to overcharging which later on had to be annulled. Various provincial cities were without water for several days. The most critical case occurred in the city of Bahía Blanca (with more than 250,000 inhabitants) which in 2000 during one month received water not-apt for drinking. The regulatory authority of the Buenos Aires province sanctioned this with a fine of $ 500,000 pesos (equivalent to the same amount in US dollars).

[22] See ICSID (2003a), (2003b), (2004a), (2004b), (2004c), (2005a), (2005b), and (2005c).

6.2.2 Taxation Stability

Some companies took legal action against the incorporation of new provincial taxes, alleging that in this way the principle of taxation stability, guaranteed by the concession contracts and respective treaties, was violated.

In this way, Enron Corporation and Ponderosa Assets, L.P., stockholders of Transportadora de Gas del Sur, claimed that some taxes imposed by certain Argentine provinces were illegal and represented an expropriation and a violation of the BIT signed by Argentina and the US. In Argentina, the Supreme Court of Justice determined that the imposition of these taxes was among the capacities of the provinces. The Argentine State sustained that the taxes where not confiscatory and that large part of the additional amounts claimed were the result of penalties and interests that could not be attributed to Argentina. Also it was argued that by exempting foreign investors from the payment of certain taxes would interfere with the Argentine free market conditions because local investors would not be able to take advantage of these exemptions. ICSID in this debate defined that it could not judge the capacity of the national or provincial governments to fix certain tax policies, but that it could establish if these capacities violated any of the investors rights accorded by an international treaty. Furthermore the tribunal argued that article XII of the Argentine-US investment treaty defines that: "*with regards to its taxation norms, the parts should make efforts to act with justice and equity with respect to the treatment of investment of nationals and companies of the other part.*"[23] Therefore it stated that Enron and Ponderosa had justified reasons to take legal action based on the BIT. Currently the merits of the claim are being discussed[24].

6.2.3. Pesification of fees and contracts

Several types of companies are part of the claim concerning pesification of fees and contracts established in US. dollars. Some initiated their suits before the devaluation, because in 2001 the Argentine tribunals resolved that the indexation of fees in dollars to the US consumer price index is inconsistent with the dispositions of the Convertibility Law. These are the cases of Enron (operator of Transportadora de Gas del Sur) and CMS Gas Transmission (operator of Transportadora de Gas

[23] Article XII of Law 24.124 (Treaty signed with the United States of America on the promotion and reciprocal protection of investment).

[24] At the middle of 2004 some press publications informed that the ICSID arbitration tribunal that analyzed the compensatory claim due to the freezing of charges and the stamp taxes brought forward by Enron, ordered the suspension of this claim for a lapse of 8 months, arguing that these issues were dealt with by the Contract Renegotiation Unit and the Court, respectively (Página 12 newspaper, 22/6/2004).

del Norte. Another important group of companies of the electricity and water sectors joined in 2002 and 2003: Camuzzi, Gas Natural, AES, Electricité de France, Endesa, Pan American Energy, El Paso Energy from the gas and electricity sector; Suez and Aguas de Barcelona from the water sector and Telefónica de España. In 2004 Total, BP America, Wintershall, Mobil (all oil firms) and Telecom, and in 2005 Cía. General de Electricidad (Chile) joined. All of them are operators of privatized public services or companies that operate in sectors linked to privatization and energetic deregulation.

Other companies, not linked to the privatized public services, that felt damaged by pesification and the economic measures taken in 2002 also took legal action. Among them are Metalpar (Chile) Continental Casualty (a North American insurance company linked to the CNA insurance group), Unisys Corporation (that filed a suit due to pesification with the Argentine Judicial Power) and RGA Reinsurance Co. (financial services related to the private pension system). Metalpar (producer of carriages for the public transport system) demands compensation from the State because its Argentine client (a private Argentine company) could not comply with its dollar-payments after devaluation. Metalpar alleges that the treaty between Argentina and Chile was violated by Argentine authorities' economic measures (the pesification and others) that were implemented to avoid the crisis. According to Metalpar this affected the assets of the company in its sale of vehicles on credit, which it considers an expropriation. For the Argentine State this is a dispute among privates (Metalpar and its Argentine client).

6.2.4. Application of export retentions and the freezing of charges

Similar cases have been presented by oil companies that question the retentions for oil exports applied by the Argentine government starting 2002. These cases are not directly related to the provision of public services, however, the oil exploitation concessions, which before the nineties were in state hands (through the formerly state-owned oil company YPF), played a prominent role within the process of deregulation. It can be argued that this category of cases is linked to the former because the involved firms have also included the complaint against pesification and the freezing of the gas prices into their lawsuits. The companies are Pioneer, Mobil and El Paso Energy; the French Total; Pan American Energy and BP America (both part of the Anglo-American conglomerate BP Amoco) and the German Wintershall. It is notable that despite of its importance on the oil and gas market Repsol-YPF has not participated in the lawsuits and their excellent relations with the Argentine government are well-known.

7 Analysis of paradigmatic cases

7.1 Camuzzi International

The stock company Camuzzi Argentina S.A. is a public services holding, subsidiary of Camuzzi International S.A., a foreign investment fund mainly constituted by private Italian capital. Its investment in Argentina consists of seven companies that operate in the sectors of natural gas provision, transport and distribution of electric energy, the provision of drinking water and wastewater management.

With regards to gas distribution, Camuzzi Argentina S.A. controls Camuzzi Gas Pampeana S.A. and Camuzzi Gas del Sur S.A.. Both companies together constitute the biggest Argentine gas distributor, covering 30% of the demand, approximately 1.3 million clients distributed over the provinces of Buenos Aires, La Pampa, Río Negro, Neuquén, Chubut, Santa Cruz and Tierra del Fuego. The area covers around 45% of the Argentine territory and comprises some of the richest agricultural regions of the country as well as important industrial and residential areas. Both companies (Gas Pampeana and Gas del Sur) hold a 35-year license for exclusive distribution of natural gas, which can be renewed for 10 more years.

In the energetic sector it controls EDEA S.A. (Empresa Distribuidora de Energía Atlántica S.A.) which owns the concession to distribute electric energy in the eastern region of the Buenos Aires province, covering around 40% of the provincial territory and directly serving almost 412,000 customers. Also, Camuzzi Argentina S.A. has shares of EdERSA (Empresa de Energía Río Negro S.A.) which distributes energy in the Rio Negro province and Transpa S.A. (Empresa de Transporte de Energía Eléctrica por Distribución Troncal de la Patagonia S.A.), the only energy transporter in Patagonia.

The claims of Camuzzi against the Argentine State are based on that the measures taken by the National State to confront the crisis of 2001 – pesification of charges and the suspension of the clause for the adjustment of fees according to the US consumer price index – affected the investments of the claimant and violated various dispositions of the BIT between Argentina and the Belgium-Luxembourg Economic Union. The Italian company seeks an arbitral sentence that declares that Argentina did not grant a just and equitable treatment to Camuzzi's investment; that investment did not receive the promised security and protection and having obstructed through unjustified and discriminatory measures the normal implementation of the investment; that Camuzzi received a less favorable treatment than stated by international law and that the measures had expropriatory character and that therefore Argentina should pay US$ 215 million in compensation

payments (only for the investment in the electricity sector). Camuzzi also invoked the «most favored nation»treatment citing dispositions of the BIT between Argentina and the USA.

In this way Camuzzi tries to impede the implementation of a 18-month waiting period in which the dispute would be subjected to Argentine jurisdiction (this is the provision of the treaty with the Belgium-Luxembourg Economic Union) and enjoy the most favorable nation treatment stated in the Argentina-USA BIT (there an arbitration proceeding can be invoked after a period of friendly negotiations without previously subjecting the dispute to Argentine tribunals); this was considered legitimate by ICSID[25].

In its other claim (regarding the gas companies) Camuzzi felt damaged by the imposition of certain provincial taxes as well as some situations related to the billing for services, labor restrictions and the transfer of taxation cost. In this case it seeks a compensation of approximately US$ 300 million.

The behavior of Camuzzi with regards to its gas-distribution operations have been very much questioned in Argentina. Only between January of 1998 and October of 2003 the regulatory authority (ENARGAS) sanctioned in almost 60 cases the companies Camuzzi Gas Pampeana and Camuzzi Gas del Sur due to non-compliance of dispositions of Law 24,076 (concerning privatization of gas distribution and transport services) as well as decrees that set Basic Rules for the Licensing of Gas Distribution. The sanctions were imposed particularly because the company in several occasions did not comply with the following obligations:

- To assure the free access, without discriminations, to the net of distribution and to implement extensions to the net and to provide services to third parties, which ask for it.
- To receive, transport and sell gas with the adequate diligence and without delays.
- To operate the net and to provide the service in a regular and continuous form, efficiently and diligently according to the industries' good practice.
- To provide the necessary conditions to maintain a permanent and adequate operation of the gas distribution facilities.
- To maintain the distribution-net in conditions which do not constitute any danger for the security of persons and goods of employees, customers and the general public.
- To establish adequate control and measuring systems to anticipate and plan the reparation and maintenance of the distribution-net.

[25] ICSID (2005c).

- To establish permanent services to receive notifications of gas escape and to publicly inform about the existence of these services and to attend the notifications as quickly as possible.
- To provide ENARGAS with the required information and to provide for adequate accounting according to the valid accounting norms and its regulations.
- To comply with the norms of the *Ley and the Decreto Reglamentario* (Regulatory Law and Decree) that may apply, with those regarding License, Charges and the Regulation of Service, with the dispositions of ENARGAS and the norms for the Transfer of Contract.

These sanctions imply monetary fines and regarding the context of all the committed offenses (which includes the refusal to provide future users with the public service, even if they had the technical possibility to do so) there would have been the possibility to withdraw the concession license from the Italian company. Despite of all this, the government is currently renegotiating the gas and electricity distribution licenses. In April of 2006 a first agreement was reached, which comprised a raise of charges for the transport of electricity. Camuzzi subsequently has suspended - but not withdrawn - one of its claims.

7.2. Suez

The French Suez owns the following water companies in Argentina: Aguas Argentinas, Aguas Cordobesas and Aguas Provinciales de Santa Fe. Their services cover an estimated 11 million people. The Suez group operates on an international level in the sectors of electric energy, gas and water services.

Aguas Argentinas has the drinking water provision and wastewater management concession for the city of Buenos Aires and 17 districts in its suburbs and surroundings (the “conurbano”), a region with a population of 8.6 million inhabitants. When the concession was given 42% of them was without sewage disposal and 30% without drinking water. In 1993 the service was given to a consortium headed by Lyonnaise des Eaux-Dumez (currently Suez), that offered a reduction of fees of 26.9% with respect to the basic charge. The assets were transferred without cost into private hands and the company promised to materialize investment of US$ 1,300 million and to connect more than 1,300,000 inhabitants to drinking water and one million to the sewage disposal system. The results were the following: Charges, which should not rise, were raised by around 45% between the beginning of the concession and May of 2001. At the end of the first five years, non-compliance in the inclusion of inhabitants into the service was an average 80%. Investment was only 37% of the agreed sum (which in practice meant a postponement in the construction of wastewater management installations

and the sewage net) which has led to a worse environmental equilibrium within the concession area, like the contamination of the riversides of the Rio de la Plata.

According to reports of the regulatory authority (Ente Tripartito de Obras y Servicios Sanitarios -ETOSS-) the non-compliance with contractual obligations means a deficit of around 800,000 inhabitants with respect to the assumed obligations regarding the provision of drinking water, more than one million regarding sewage disposal and around six million people regarding the primary water clarification. Furthermore, according to the information provided by the company, around 76% of profits were reinvested between 1993 and 2001. According to the economic regulatory authority, however, Aguas Argentinas had acquired a capital structure which had a higher level of debt, than the one stated in their offer, as well as higher than the admissible ones for companies of this type on an international level. In 1997 a renegotiation of the contract took place and the State himself accepted higher levels of indebtedness than the ones stated in the contract offer in order for the company to avoid a higher contribution of equity capital to cover the financial needs of the concession.

In addition, there have been proofs of over-billings materialized by Aguas Argentinas: At the beginnings of 2001, Argentine federal tribunals established that the company had realized illegitimate charges during the previous six years, affecting around 60,000 non-residential clients. The overbilled amount was calculated around 240 million pesos (at that time the same amount in US dollars).

These, however, were not the only non-compliances with the concession contract by part of Aguas Argentinas. In September of 2001 the regulatory authority sanctioned and fined the company for the wrong appliance of charges in their billing. The authority proved that Aguas Argentinas had charged a fee with regards to the cubic meter of water, which had been invalid since the first day of 1999, when a reduction of charges was applied. Furthermore, the concessionary intimidated clients that refused to pay the difference. The authority determined that Aguas Argentinas could not claim a difference which resulted from charges which were out of date. In this way the company was fined with 650,000 pesos (same sum in US$) for not applying the correct charges and for refusing to comply with the legally determined deposit sum. In 1996, Aguas Argentinas was sanctioned 38 times, receiving fines of 4.8 million pesos (same amount in US$). During the following year it was sanctioned 17 times[26].

After abandoning convertibility and during the renegotiation of the contracts with privatized companies the Ministry of Economics elaborated a document which

[26] False billing was not only practiced by Aguas Argentinas. In June of 2004, a court in the city of Cordoba sentenced the company Aguas Cordobesas to return illegitimately charged fees to fallow land and garage owners, which did not dispose of services individually.

stated that Aguas Argentinas did not suffer an operational deficit which would allow them to ask for an adjustment of charges, that it did not comply with investment and expansion plans for 2001 (the not invested sum is estimated at US$ 57,7 million, 50% of the total sum), that the foreseen investment in infrastructure also was not materialized and that charges rose between 54% and 65% since Aguas Argentinas took over the service[27].

Even though the non-compliances regarding extension of service and the irregularities regarding over-billing are evident, the Argentine government during 2004 partially renegotiated the concession contract with Aguas Argentinas. They reached an agreement which stated that there would not be any rises in charges until the end of that year, and the company promised to invest US$80 million in expansion of services. The investment would be financed partially through the entailment ("fideicomiso") imposed by the regulatory authority, which consisted of US$30 million that derived from two increases in charges of 3.9%, but which in that moment were not used accordingly. The rest of the money should stem from returns from operations of the concession[28]. The French company did not withdraw their legal action before ICSID and only accepted a suspension until the end of the year, while the administrative proceedings continued. The Argentine government in turn suspended the collection of almost US$50 million in fines which the regulatory authority had imposed on the company.

The ICSID case did not specify the amount by which the company felt damaged, but it is estimated that it could be around US$ 1.7 billion which represents the entire investment which Aguas Argentinas should have realized. The legal action was initiated by Suez, Aguas Argentinas, Vivendi Universal and Sociedad General de Aguas de Barcelona. The International Finance Corporation of the World Bank has a 5% share in Aguas Argentinas, which gives reason to question the role of ICSID which is judge and interested party at the same time. The essence of the claim centers in the freezing of charges and the economic measures imposed starting at the end of 2001 (the pesification of charges and the impossibility to adjust them to the US consumer price index, among others).

During 2004 a tribunal was designated for the case and in 2005 proceedings began with the issue of jurisdiction, where the parts could present their inputs. At the same time 5 non-governmental organizations (Asociación Civil por la Igualdad y la Justicia –ACIJ-, Centro de Estudios Legales y Sociales –CELS-, Centro para el Derecho Internacional Ambiental –CIEL-, Consumidores Libres and Unión de Usuarios y Consumidores) presented a petition for transparency and participation as *amicus curiae* to ICSID, arguing that the case involved issues of general public

[27] On the base of this report consumer associations asked for the cancellation of the contract of the company. This was not accepted by the government authorities.
[28] That means that almost 40% of investment is brought up by the clients of Aguas Argentinas.

interest and fundamental rights of residents. They solicited access to the hearings, the permission to present legal arguments as *amicus curiae* and the access to all documents of the case. The tribunal proceeded to consult the parties. While the Argentine government supported the petition of the NGOs, the claimants argued that the petition should be completely rejected. The tribunal finally decided not to allow access to hearings, to give the NGOs the possibility to solicit permission to make presentations as *amicus curiae* and to postpone the decision regarding access to information until the tribunal authorizes an NGO to present an *amicus curiae*-document[29]. That means that the quasi-secret character of the data (first of all, that of the companies) contained in the presentations of the parties was privileged.

Parallel to this the Kirchner administration tried to renegotiate the concession contract and charges in exchange for a withdrawal of the claim at ICSID by the company. As it was impossible for the government to reach an agreement with the Suez group, in order to prevent a crash of the concession it organized the entrance of new stockholders into Aguas Argentinas – once that Suez had announced to disengage from its assets in Argentina (including the three water companies - Córdoba, Santa Fe and Aguas Argentinas). The stockholders of Aguas Argentinas also took up different strategies: local investors decided to pull out of the claim before ICSID. The government, in turn, tried to get together interested parties in order for Suez not to give up the concession, but to sell its shares (for example to the investment fund Latam Assets and Fintech as well as to the local Eurnekian group). In the end, as a consequence of Suez' decision expressed in September of 2005 to abandon its business in Argentina - together with the lack of interest of other stockholders – the water companies of Buenos Aires and Santa Fé were renationalized while the water company of Córdoba continued to be operated by local associates[30]. To resolve the problem generated by missing maintenance and investment of Suez the Argentine government and the provinces decided that they should be financed by the users through raises in charges (in Cordoba), by the constitution of special funds with municipal contributions (Santa Fe) or by the creation of surcharges (Buenos Aires). Until today the government does not seem to intend to take legal action against Suez for contractual non-compliances (which also should have occurred several years ago)

[29] ICSID (2005d).

[30] The government rescinded the contract of Aguas Argentinas by means of the Decree 303/06, alleging “contractual non-compliances” and the existence of “extremely high levels of nitrate in the water” that the company delivered in the southern Buenos Aires region. Suez, in turn, held the Argentine government for responsible for finalizing the contract “due to the impossibility to reconstitute the economic and financial equilibrium of the concession” (Clarin newspaper 22/3/2006). In the case of Aguas Cordobesas, the local associates will continue operations: Grupo Roggio, Inversora Central and Banco Galicia each hold 16% of stocks. The provincial government of Cordoba recently announced, that it will not renationalize the company (Clarin newspaper, 8/4/2006).

with regards to the numerous complaints due to the proven bad quality of water in the Buenos Aires province.

7.3. CMS

CMS Gas Transmission Company is a minor stockholder of Transportadora de Gas del Norte (it owns 29.4% of stocks), that operates the northern half of the Argentine gas pipelines. It demanded a compensation of US$265 due to the impact of the devaluation and the pesification on their business, that had started out in a context of profits in dollars and an adjustment system of charges indexed to the US consumer price index. CMS alleged having suffered an indirect expropriation by part of the Argentine state which did not allow an adjustment of charges, and that it had received a discriminatory treatment. ICSID did not give way to these arguments (points 264 and 295 of the verdict), but conceded a point to CMS by admitting that devaluation had worsened the revenue of the company due to the non-adjustment of charges by the same proportion and that the government measures had not been taken due to a state of emergency that would permit to exclude the illegitimacy of the measures (point 331). ICSID sentenced Argentina to pay US$ 133.2 million.

The verdict also states that the resolution cannot be appealed to the Argentine Supreme Court of Justice. “The defendant has sustained that this arbitration might transgress or be in conflict with the Constitution of the Republic of Argentina. The Tribunal, however, does not consider this to be the case, taking into account the prominent role which the Argentine Constitution confers to these treaties "[31] (point 119). The sentence also sustains that the right to property – protected by the Constitution and the BITs – has the same level as the human rights treaties (point 121) and therefore – it is clear – is situated above the consumer rights.

The importance of this verdict is that it is the first one that treats the measures taken by the government from the end of 2001 on and that constitute the center of almost all claims accepted by ICSID after 2002. This precedent will allow the companies to negotiate with the government from a stronger standpoint variations in charges and new regulatory frameworks.

[31] ICSID (2005e).

8. Final Considerations

The Argentine structural transformations of the nineties were part of a broad deregulation of markets and the asymmetrical opening of the economy. In this way the participation of foreign investment in the privatization of public companies was induced, free capital movement was permitted without any limitations for the remittance of dividends, and the equation of foreign and local capital for all economic ends was reaffirmed. The broad liberalization covered the entire energetic, financial, trade and media sectors. At the same time Argentina implemented policies targeted at a fast reduction of tariffs (including imports of capital goods), even though a certain level of protection remained in the automobile and steel sectors.

This compound of measures brought about a realignment of the different local economic segments that benefited those that were protected from foreign competition (services in general and among those, the privatized companies) and to detriment of the industrial sector. Throughout the decade imports grew at a much higher rate than exports, producing a negative external trade balance.

Then the search for equilibrium of the balance of payment and the maintenance of convertibility resulted in a growing dependency of Argentina with regards to external capital flows (loans, direct and portfolio investment) (Ortiz, 2003). In this way, seen from the hegemonic standpoint, the “necessity” to liberalize the conditions for the in- and outflows of capital, for taking loans or to make deposits in foreign currency in the local banking system, was reassured. The incentives for investment were the high profit rates of the privatized public services, the entering of oligopolistic industrial markets or the high internal interest rates, which were much higher than the international rates.

Additionally the Central Bank guaranteed an exchange rate of one dollar per peso, in order to transfer profits abroad.

Within this logic, external investment played the role of the guarantor that partially sustained the convertibility equilibrium. Therefore very broad conditions had to be granted to investment for the influx, circulation, operation and outflow of capital. In this way, the bilateral investment protection treaties served as a legal base in order to crystallize the agreed conditions in the moment of contracting and to project them into the future. Therefore the liberalization of capital movement, the opening of the economy and the privatization of public enterprises are a compound of processes which were protected by the legal umbrella that the BITs gave to foreign investors.

Like it frequently happens, big crisis put into doubt the certainties and values which previously have not been discussed. The exit from convertibility, the context of political and economic crisis in which it took place and the social groups that conducted this process let the interpretation prevail that the "speculative and foreigner-centered" model entered into crisis and was substituted in 2002 by a model "of production and labor". This approach of the post-convertibility model, however, is highly debatable. Even if the economic policy led by the interim government of Eduardo Duhalde (2002-2003) and the current Kirchner administration has approached many things differently, the structural changes of the nineties (especially the privatizations, the opening of the economy, the regressive distribution of income and the segmentation of the labor market) have not been touched. These structural changes had been supported by the same political leaders, which today question them on a discursive level[32]

The consensus obtained around the "new model" was the basis which allowed to start delegitimizing some of the principles on behalf of which the BITs were signed. The most important ones are:

a. the hierarchic order between norms: The debate about the relationship between the National Constitution, the International Treaties and the Laws of Congress. From the viewpoint of foreign investors, international treaties are above internal laws and the latter therefore should be subjected to the former. This interpretation emanates from article 75, point 22 of the Argentine Constitution. This approach, however, collides with the principle that nobody can have an absolute right in the organization of the state, nor – as we will comment in the following – a right to legal immutability.

b. the stabilization clauses: the impossibility to modify the norms under which investment is established inverts the constitutional principle of modification of laws for reasons of general order. That means that the ruling principle is the prohibition to modify laws that are in force at the moment when the investment is made. This consequently means that the investors have the right to compensation for the effects of any legislative modification. This constitutes a privilege of foreign investors, because local investors are not entitled to this right.[33]

[32] The "new model" basically consists of the devaluation of currency which took place during the first months of 2002. This undoubtedly had positive effects for the Argentine industry, which benefited of the new barrier against foreign competition for locally produced goods. However, this phenomenon occurred in a context of a very weak industrial net, weakened by decades of de-industrializing policies (Schorr, 2005).

[33] The clearest example is Law 25.561 (Public Emergency Law), and its articles regarding the pesification of charges and the prohibition of their adjustment (almost all the post-crisis lawsuits mention this as the motive for their claim). The principle of prohibition to modify laws that are valid at the moment when the foreign investment is materialized permits a calculation of the compensation that takes into account the expected profits mentioned in the initial contract

c. the extension of national jurisdiction: based on the investment treaties, the Argentine State recognizes the pre-eminence of the decisions taken by international tribunals (like ICSID) over those of national courts. As ICSID also reserves itself certain competences (clarification, cancellation or revision of arbitration sentences) and as its decisions are obligatory for all parties and not revisable by local tribunals, the sentence of the international tribunal constitutes the definite dispute settlement entity.

These outlines are beginning to be questioned in the context of the ICSID cases against the Argentine State. The Argentine Central Bank for instance argues, regarding the issue of jurisdiction, that as international treaties are of lower hierarchy than the Constitution, it is possible that foreign verdicts are analyzed by local courts in order to guarantee the accordance with the Constitution. Even if jurisdiction is ceded for a determined lapse of time, there is always an ex-post control mechanism[34]. Currently it is considered that article 75 of the Constitution places some international treaties at an equal level to the Constitution, but it is those referring to human rights. In this case investment treaties have a higher hierarchy-level than national law, but below the Constitution.

Furthermore it is sustained, that international arbitration tribunals suffer severe defects like for example, the following:

a. they allow the integration of various arbitrations at the same time (or successively), but without relation among them. This could allow that different tribunals take different decisions with respect to the same cases (for example when different stockholders of a privatized company present separate claims before ICSID);

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conditions.

[34] In June of 2004 the Argentine Supreme Court of Justice ratified its competence to revise sentences emitted by arbitration tribunals. This occurred in the framework of the case of local construction company José Cartellone S.A., which was responsible for the construction of the hydroelectric power plant Piedra del Aguila between the middle of the eighties and 1991. As the dispute could not be resolved by administrative means, the parties agreed to undergo an unappealable arbitration proceeding. The final verdict established an adjustment of those payments, that were considered “disproportionate and unreasonable” by the Argentine Supreme Court; apart from other irregularities like calculating the adjustment already one month ahead as originally demanded by the company. In this way the Supreme Court revised a sentence even though both parties had waived their right to appeal. According to government officials, this power to revise could also extend to verdicts emitted by international tribunals like ICSID. A crucial aspect of the government strategy to counter the multi-million compensatory claims in fact consist of regaining local jurisdiction in order to distinguish an expropriation from a regulatory measure – like those taken by Argentina after the 2001 crisis - that does not entail compensation. That means measures that the State adopts in the exercise of its legitimate powers, like for example the pesification of contracts, and that do not constitute acts of expropriation.

b. the lack of transparency and openness to the public of the cases; the proceedings are not public and NGOs are not allowed to participate if all parties do not agree on this (like in the case of Aguas Argentinas). Also, the sentences emitted by ICSID are neither published by ICSID nor by the World Bank, except for a few cases.

c. initially the verdicts are unappealable and compliance is obligatory for all parties. However, the Argentine experience shows that a tribunal which is constitutes itself afterwards may revise the sentence previously emitted by another arbitration tribunal (the case of Aguas del Aconquija-Vivendi);

d. international arbitration tribunals only consider trade aspects, but do not integrate criteria that consider the political, economic and social aspects, that constitute the framework of the cases. Also, the non-compliances of the companies in the services sector in Argentina, like Aguas Argentinas, Aguas de Aconquija, Camuzzi or Siemens, are not considered.

e. international tribunals have a limited jurisdiction, because its competence is related to investment-disputes. But the concept of “investment” is not defined in the ICSID Convention. This gives flexibility to the arbitration tribunals, which can include construction contracts or service provision contracts under the definition of “investment”. This has even been admitted by the Secretary General of ICSID (Dañino Zapata, 2005). This means that almost every claim of a foreign stockholder against the State will be admitted by the tribunal.

All of these mentioned aspects give rise to the well-founded consideration, that ICSID has a very investment-friendly position, which leads to an unequal situation between national states and the efforts of transnational companies.

A new situation is created, that in the Argentine case has the consequence that companies with their claims at international tribunals no longer only seek monetary compensation for the supposedly suffered damages, but also implement a corporate strategy in order to fix higher charges and profits under the new circumstances created by devaluation. This means, to use the threat of the claims at ICSID as a negotiation arm. This strategy up to now has produced positive results for the companies: In several cases of renegotiation of contracts and concessions the companies have been able to evade sanctions that had been imposed due to non-compliances with respect to service provision and investment and have at the same time obtained the permission to apply higher charges (for example the companies that operate in the gas sector) and are debating reductions in their investment targets stated in the contracts.

Parallel to their legal action at international tribunals the involved companies are developing strong lobby work through their representatives in Argentina (the chambers of commerce, embassies, and high government officials in their countries of origin. These activities are common, but they have been especially intense during the last years, in the context of the convertibility crisis and its abandoning. Among the most prominent activities were:

a. The visit of former Spanish president Felipe Gonzalez to Argentina in 2002. Gonzalez strongly defended Spanish investment in Argentine territory and supported the aspirations of the companies to raise charges in the different sectors of involvement (oil, gas, electricity, water, telecommunications, banking)[35];
b. The presence of the French vice minister of foreign affairs in May of 2004, during the renegotiation of the contract of Aguas Argentinas (subsidiary of the French Suez) and during the beginning of negotiations with the electricity sector (were Electricité de France is involved). The French official linked the success of these negotiations to the favorable posture of France towards Argentina in the directorate of the IMF with regards to the discussion on the restructuring of the Argentine external debt[36]. Two years before, in August of 2002, the Argentine government had accepted a modification of Decree 1090, that impeded that privatized companies in Argentina initiated legal action due to contractual non-compliance while at the same time renegotiating its investment contracts. All of this as a simple consequence of a formal protest of France and a short visit of the French vice-minister of foreign affairs[37].

[35] The earnings of Spanish transnationals in Latina America (€ 41 billion in 2004) represent 5,2 % of the Spanish GDP and the profits of Repsol-YPF in Argentina represented almost 50% of its global returns in 2005 (Gabetta, 2006).

[36] "*It is decisive that all these technical problems first have to be treated politically and today it is clear that there is the will of politicians from both countries to resolve these technical problems"*, said the French vice-minister of foreign affairs, Renaud Muselier (interview by Página 12, 12/05/2004, own translation). This official expressed his support for the proposal to reduce the Argentine foreign debt under the following conditions: "*Argentina has a pragmatic, serious and realistic and divides the burden equally among its population, the natural resources and the necessity to treat the issue of foreign debt*".(La Nación, 12/5/2004, own translation). In order to dispel doubts about what was being exchanged, the Argentine president Kirchner thanked France for its support and solidarity at the different levels of negotiations with the IMF (La Nación, 12/5/2004).

[37] Decree 1090 established that the companies that took legal action against the State would be "automatically excluded from negotiations that the commission for the renegotiation of public services and construction contracts of the Ministry of Economy might bring forward with concessionaries". The modification of this decree means that the companies can continue negotiating with the State if they do not take legal action against Argentina (that means that privatized companies can make presentations alleging contractual non-compliance at an international tribunal and continue to negotiations. The condition is that these tribunals are not of judicial character.)

All the lobby work which is published in the media, as well as that, which occurs daily in the offices of officials, express the companies' will to establish the conditions for the renegotiations of contracts of the privatized public services and to preserve the excellent conditions for foreign investment in Argentina, guaranteed by the BITs.

The suspended or withdrawn lawsuits are the clearest basis for this argumentation. In first place, companies promise to suspend or not to initiate legal action in return for a renegotiation of concession contracts of the privatized public services. Secondly, once the renegotiation with the State has finished, and new charges and conditions have been fixed, the effective implementation of the agreements made will be the sign for desisting from legal action presented at the arbitration tribunals. This is currently happening in the cases of the gas transporters and with telecommunication and electric companies that have already defined new conditions for the provision of services and/or the raise of charges.

- Camuzzi: suspended its claims at ICSID and will withdraw it once a 27% adjustment of charges, agreed with the government in April of 2006, is put into practice and a general revision of charges is conducted. The agreement also contains a clause for the adjustment of charges if variation in costs exceeds 5%, which assures a future indexation of charges. (The other electricity companies have already agreed on a raise and the «trigger clause»). Camuzzi continues its legal action on behalf of the gas distributors Pampeana and Gas del Sur.
- Pioneer Natural Resources: desisted from legal action in the framework of negotiations with the government over gas charges during 2005. This subsequently led to an increase of gas prices of 18% by the government.
- AES: is stockholder of the distributor Edelap, EDEN and EDES and of the generating companies Alicurá and San Juan. Edelap achieved an increase of charges of 15% and the assurance that the Regulatory Authority for Electricity will analyze every six months the variations in prices that have impact on operative costs. If the variation of costs exceeds 5%, the authority will «redetermine» the charges. Furthermore, the companies can request an «extraordinary revision», when costs rise by more than 10%. AES suspended its legal actions at the beginning of 2006 (after reaching an agreement), but has not withdrawn the lawsuit.
- Endesa: is a stockholder of Edesur (a distributor of electricity), that reached an increase of charges of 15%, and subsequently suspended its case at ICSID. However it has not withdrawn it, until the regulatory frame is renegotiated and an overall revision of charges is realized in 2006.
- Electricité de France: holds stocks of Edenor (a distributor of electricity for the northern Buenos Aires and the surroundings), that reached a similar increase of charges than Endesa. It suspended its lawsuit in November of 2005 while

waiting for an overall renegotiation of charges and the signing of a new concession contract[38]. At the same time it reactivated another suit at ICSID against the government of the province of Mendoza and the national government due to pesification and the freezing of charges of the distributor of electricity of the Mendoza province (EDEMSA).

- Gas Natural SDG: is stockholder of Gas Natural BAN (that distributes gas in the north of greater Buenos Aires). It is the only gas company that accepted to suspend its claim at ICSID (during 2005) even before having obtained an increase of charges. As it is a subsidiary of the Spanish Repsol-YPF its scope of action is limited due to the strategies of Repsol and its relations with the Argentine government. Finally, in April of 2006 the Decree 385/06 allowed Gas Natural BAN to increase the surplus value of distribution by 25%, which means an increase of charges by approximately 15%. The agreement between the State and Gas Natural BAN implies that the stockholders of this companies should suspend (but not withdraw) their claims at judicial of arbitration tribunals (another stockholder, LG&E has presented a lawsuit demanding US$ 268 million); and the government in turn accepts the increase of charges to be retroactive to the first of November in the case of industrial consumption and to the 1st of January of 2006 in the case of residential clients. None of the stockholders has so far withdrawn its cases.
- Telefónica de Argentina: suspended its suit (the highest of all claims initiated against Argentina -U$S 2.834 billion-) after having reached an agreement with the government, that guarantees the continuity of the business, recognizes the property of the telecommunications-net and established that the license has no expiration date, which enormously valorizes the investment, because the duration of the license was not clear before. There is also a small increase in charges, and a dollarization of incoming international calls; these, however, are secondary aspects compared to the recognition of perpetuity of the license. Also negotiations will be reopened to establish a new regulatory frame. It has to be mentioned, that in the case of the telecommunication companies, only a part of the charges are regulated and the growth path of business is planned on the activities whose prices and charges are free (for example internet service provision, cable television, mobile phone services and other services linked to them). The lawsuit initiated by Telefónica followed the rhythm of negotiations with the government: in July of 2003 the arbitration tribunal was constituted, but one year afterwards both parties agreed to suspend the suit, because in May of 2004 a Letter of Understanding (Carta de Entendimiento) was signed, where the telephone companies promised to suspend legal action and not to modify charges until December 31st of that year. After that date, Telefónica took up the

[38] Electricité de France in June of 2005 had sold a majority of stocks of Edenor to the investment fund Dolphin, led by an Argentine businessman. It remains in charge of technical operations for five years and has kept 25% of stock.

suit again, which continued up to April of 2006. It still has not withdrawn the claim.

- ❖ Telecom: reached a similar agreement as Telefónica, and France Telecom suspended its lawsuit at ICSID for devaluation and freezing of charges, even though it was only a minor stock holder (2% of capital). It still has not made effective its withdrawal at ICSID.

Recapitulating, the cases initiated at the arbitration tribunals of ICSID constitute one more chain link of a broad compound of measures, which have the objective to pressure the State to improve business conditions for the large transnational corporations that operate in Argentina.

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Procuración del Tesoro de la Nación

Annex 1
List of Bilateral Investment Treaties signed by the Government and ratified by the National Congress

	Country	Law No.	Date of ratification
1	Germany	24.098	10/6/92
2	Switzerland	24.099	10/6/92
3	France	24.100	10/6/92
4	Polonia	24.101	10/6/92
5	Sweden	24.117	5/8/92
6	Spain	24.118	5/8/92
7	Italy	24.122	26/8/92
8	Belgium-Luxemburg	24.123	26/8/92
9	USA	24.124	26/8/92
10	Canada	24.125	26/8/92
11	Great Britain	24.184	4/11/92
12	Egypt	24.248	13/10/93
13	China	24.325	11/5/94
14	Austria	24.328	11/5/94
15	Hungaria	24.335	2/6/94
16	Turkey	24.340	9/6/94
17	Chile	24.342	9/6/94
18	Holland	24.352	28/7/94
19	Tunisia	24.394	9/11/94
20	Armenia	24.395	9/11/94
21	Senegal	24.396	9/11/94
22	Denmark	24.397	9/11/94
23	Bulgaria	24.401	9/11/94
24	Romania	24.456	8/2/95
25	Venezuela	24.457	7/3/95
26	Bolivia	24.458	8/2/95
27	Ecuador	24.459	8/2/95
28	Jamaica	24.549	13/9/95
29	Croatia	24.563	20/9/95
30	Portugal	24.593	15/11/95
31	Malaysia	24.613	7/11/95
32	Finnland	24.614	7/11/95
33	Peru	24.680	14/8/96
34	Ucrania	24.681	14/8/96
35	Korea	24.682	14/8/96
36	Australia	24.728	7/11/96
37	Cuba	24.770	19/2/97
38	Israel	24.771	19/2/97
39	Vietnam	24.778	19/2/97

	Country	Law No.	Date of ratification
40	Indonesia	24.814	23/4/97
41	Morroco	24.890	5/11/97
42	Panama	24.971	20/5/98
43	Mexico	24.972	20/5/98
44	Czech Republic	24.983	3/6/98
45	Lituania	24.984	3/6/98
46	El Salvador	25.023	23/9/98
47	Costa Rica	25.139	4/8/99
48	Guatemala	25.350	1/11/00
49	Nicaragua	25.351	1/11/00
50	South Africa	25.352	1/11/00
51	Russia	25.353	1/11/00
52	Thailand	25.532	27/11/01
53	India	25.540	27/11/01
54	Greece	25.695	28/11/02

Source: Own elaboration based on Argentine National Congress information.

ANNEX 2
List of cases against Argentina at ICSID
(up to March of 2006)

List of finalized cases

	Date of Registration at ICSID	Company	Country	Sector	Motive for the claim (as expressed by the company))	Cause of Finalization
1	14/10/1997	Lanco International, Inc	USA	Harbors	Rescission of contract	Withdrawal of the demandant (17/10/2000)
2	25/2/1998	Houston Industries Energy, Inc.	USA	Distribution of electricity	Conflict over the concession	Verdict 24/8/2001
3	9/4/1999	Mobil Argentina S.A.	USA	Oil (exploration and exploitatioin)	Taxation stability	Withdrawal of the demandant (21/7/1999)
4	12/7/1999	ENDESA	(Chile-Spain)	Generation of hydroelectri c energy	Taxation stability	Withdrawal of the demandant (8/2/2001)
5	5/6/2003	Pioneer Natural Resources (USA), Pioneer Natural Resources Argentina S.A. y Pioneer Natural Resources (Tierra del Fuego) S.A.	USA	Hydrocarbo ns and electricity	Pesification and implementation of export retentions (Amount: U$S 650 millon)	Extra-arbitral agreement (23/6/05)

Source: Own elaboration based on data of World Bank, Procuración del Tesoro de la Nación, Jefatura de Gabinete de Ministros, publications of the involved companies and press articles.

Listado de casos pendientes

	Date of Registration at ICSID	Company	Country	Sector	Motive for the claim (as expressed by the company))	Amount demanded (US$ million)
1	1/12/1997	Aguas del Aconquija y Vivendi Universal	France	Water	Rescission of contract	375
2	11/4/2001	Enron Corporation and Ponderosa Assets, L.P	USA	Transport of natural gas	Taxation stability (new taxes)	286
3	24/8/2001	CMS Gas Transmission Company	USA	Transport of natural gas	Suspension of adjustment to US consumer price index	265
4	23/10/2001	Azurix (Enron)	USA	Water	Recission / non-compliance with contract	566,4
5	31/1/2002	LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc	USA	Distribution of gas	Pesification of charges and suspension of adjustment to US consumer price index	268
6	17/7/2002	Siemens A.G.	Germany	Informatic services	Rescission of contract	550
7	6/12/2002	Sempra Energy International	USA	Distribution of gas	Pesification of charges	Undetermined (amount invested: 342)
8	19/12/2002	AES Corporation	USA	Generation and distribution of electricity	Pesification of charges	Undetermined (amount invested: 750)
9	27/2/2003	Camuzzi International S.A.	Italy	Distribution of gas	Pesification of charges and suspension of adjustment to US consumer price index	Undetermined (amount invested: 329)
10	19/3/2003	Enron Corporation and Ponderosa Assets, L.P	USA	Transport of natural gas	Suspension of adjustment to US consumer price index *(This lawsuit is added to the previous case intitiated by Enron)*	Undetermined

	Date of Registration at ICSID	Company	Country	Sector	Motive for the claim (as expressed by the company))	Amount demanded (US$ million)
11	7/4/2003	Metalpar S.A. y Buen Aire S.A.	Chile	Car parts	Pesification of debt	Undetermined (amount invested: 30)
12	23/4/2003	Camuzzi International S.A.	Italy	Distribution of electricity	Pesification of charges	215
13	22/5/2003	Continental Casualty Company	USA	Insurances	Pesification and restrictions to the remittance of currency	45
14	29/5/2003	Gas Natural SDG, S.A.	Spain	Distribution of gas	Pesification of charges and suspension of adjustment to US consumer price index	Undetermined
15	6/6/2003 (Pan American)	Pan American Energy LLC and BP Argentina Exploration Company	USA-Great Britain	Exploitation of hydrocarbons	Pesification and implementation of export retentions	300
16	12/62003	El Paso Energy International Company	USA	Exploitation of hydrocarbons and generation of electricity	Pesification and implementation of export retentions	Undetermined. (Amount invested: 390)
17	17/7/2003	Aguas Provinciales de Santa Fe, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua, S.A.	Spain - France	Water	Pesification of charges	Undetermined. (Amount invested: 310)
18	17/7/2003	Aguas Cordobesas, S.A., Suez, and Sociedad General de Aguas de Barcelona, S.A.	Spain - France	Water	Pesification of charges	Undetermined. (Amount invested: 120)

	Date of Registration at ICSID	Company	Country	Sector	Motive for the claim (as expressed by the company))	Amount demanded (US$ million)
19	17/7/2003	Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.	Spain - France	Water	Pesification of charges	Undetermined. (Amount invested: 1.700)
20	21/7/2003	Telefónica S.A.	Spain	Telecommunication	Pesification of charges and devaluation	2.834
21	22/7/2003	Enersis, S.A.	Chile	Distribution of electricity	Pesification and freezing of charges	1.800
22	12/82003	Electricidad Argentina S.A. and EDF International S.A.	France	Distribution of electricity	Pesification and freezing of charges	Undetermined
23	12/8/2003	EDF International S.A., SAUR International S.A. and Léon Participaciones Argentinas S.A.	France	Distribution of electricity in Mendoza	Pesificación y congelamiento de las tarifas	Indeterminado
24	15/102003	Unisys Corporation	USA	Information technology	Pesification / Breach of contract	Undetermined
25	23/10/2003	Aguas del Aconquija y Vivendi Universal	France	Water	Rescission of contract *(This is a new litigation after a partial annullment of the verdict favorable to Argentina of the case presented in 1997)*	375
23	8/12/2003	Azurix Corp.	USA	Water (Mendoza)	Pesification and freezing of charges	Undetermined (investment: 75)
27	22/1/2004	Total S.A.	France	Exploitation of gas and generation of electricity	Freezing of gas prices, suspension of adjustment of charges by the US	940

	Date of Registration at ICSID	Company	Country	Sector	Motive for the claim (as expressed by the company))	Amount demanded (US$ million)
					consumer price index, implementation of retentions and pesification	
28	27/1/2004	SAUR International	France	Water (Mendoza)	Pesification of charges	Undetermined
29	27/2/2004 (BP America)	Pan American Energy LLC y BP America Production Company	USA	Exploitation of hydrocarbons and generation of electricity	Freezing of gas prices, pesification of charges, implementation of retentions (*the claims of both companies were unified into one case)*	300
30	27/2/2004	CIT Group Inc.	Italy	Leasing	Pesification of contracts	18
31	15/7/2004	Wintershall Aktiengesellchaft	Germany	Gas and oil production	Pesification, retentions to exports and freezing of gas prices	Undetermined
32	5/8/2004	Mobil Exploration Development Inc. Suc. Argentina y Mobil Argentina S.A.	USA	Exploitation of gas	Pesification, export retentions, freezing of gas prices	Undetermined
33	26/8/2004	France Telecom	France	Telecommunication	Pesification of charges and devaluation	Undetermined
34	11/11/2004	RGA Reinsurance Company	USA	Financial services	Devaluation and pesification of contracts	Undetermined
35	14/1/2005	DaimlerChrysler	USA-Germany	Leasing and financial services	Devaluation and pesification of contracts	Undetermined
36	4/2/2005	Cía. General de Electricidad y CGE Argentina	Chile	Distribution of electricity	Pesification of charges	Undetermined
37	8/4/2005	TSA Spectrum de Argentina S.A.	Holland	Telecommunication	Breach of contract	Undetermined
3	23/6/2005	Asset	USA	Collection of	Breach of contract	Undetermined

	Date of Registration at ICSID	Company	Countr y	Sector	Motive for the claim (as expressed by the company))	Amount demanded (US$ million)
8		Recovery Trust		charges for the government of Mendoza	(not related to 2002 crisis)	

Source: Own elaboration based on data of World Bank, Procuración del Tesoro de la Nación, Jefatura de Gabinete de Ministros, publications of the involved companies and press articles.

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