



Dispute settlement clauses in Argentinian PPP contracts and their interaction with the dispute settlement articles included in Bilateral Investment Treaties signed by Argentina. The “fork on the road” clause.

Olivera Pino Juan Ignacio

Master Lectures of Commercial Law at University of Groningen, Buenos Aires, Argentina

Abstract

The following lines will try to explain, in first place, how the Argentine Republic is implementing the Public-private partnership contract scheme to develop infrastructure, and which is the dispute settlement system provided in the legislation as well as in the first Argentine's PPP experience. Also, to briefly assay to what extent a contractor company and its shareholders can claim as investors in order to find jurisdiction before the ICSID tribunals. Finally, how the government have drafted the dispute settlement clauses in the PPP contracts, regarding BITs signed by Argentine, by including a “fork on the road” clause.

Keywords: Public-Private Partnerships (PPP); International Center of Settlement of Investment Disputes (ICSID); Fork on the road clauses.

Introduction

Inadequate or lack of infrastructure has become a worldwide issue in states agenda, particularly in developing countries. Many countries simply are not investing sufficient funds to provide the infrastructure needed -or they are not creating the required context for receiving investments-, and also they carry “...poor planning and coordination, weak analysis underpinning project selection, pursuit of political gain, and corruption, mean that the limited resources are often spent on the wrong projects”^[1].

As a developing country, is a need for the Argentine Republic to develop infrastructure in different economic sectors and geographical zones in order to improve the quality of life of their citizens. New job opportunities, the exploitation of natural resources, the exportation of national products, the provision of better services, the creation of new industries and the growth of the existing ones, among others, are some of the consequences expected from the infrastructure development process.

While trying to accomplish this goals by receiving foreign investments, the country signed lots of BIT's^[2] with several countries during the privatization process in the 90's. Unfortunately, Argentine default on its debt in 2001 and as a consequence it became one of the most sued countries under BIT's. This scenario left the country with a lack of investments and financing (both national and international), and therefore, infrastructure projects were executed through the scheme of public work (fully paid by the state), and some others through concessions fully or partially paid by users and the state^[3].

In 2016, a new scheme of public contracts was enforced giving rise to a new way to develop infrastructure in Argentine, the Public-Private Partnerships (“PPP”), which allows to finance the projects by private parties.

This is important because, under the right circumstances, PPP contracts can pull together extra sources of funding and financing infrastructure for projects. Moreover, by subjecting assumptions to the market test of attracting private finance, PPP contracts can also improve the project selection by having a better forecast of the resources to be allocated^[4].

During 2018, the firsts PPP bidding process took place, and the firsts PPP contracts were signed, for the construction, operation and maintenance of roads and highways along many Argentinian provinces. Among the tender winners, there were national and international companies (formed by its national and international shareholders), some of which are nationals from states signers of BITs in which the Argentine Republic is party^[5].

One of the controversial issue with this companies -and its shareholders- is related to the dispute settlement system, because while the PPP contracts have their own system to settle conflicts between the parties, the shareholders -or even the companies- can also be regarded as investors through the definitions of the BITs, and thus, they might be allow to sue Argentine under the jurisdictions rules stated in the correspondent BIT (that most of the times involves an arbitration proceeding before the ICSID^[6]). Hence, some questions arise from this problematic: (I) Are the PPP contract dispute settlement clauses enough to avoid investors claims based on BITs? (ii) How does this clauses protect the state

1 See: World Bank Group; “Public-private Partnerships Reference Guide Version 2.0”; 2014; p. 31. Available at: <https://ppp.worldbank.org/public-private-partnership/library/public-private-partnerships-reference-guide-version-20>

2 BIT stands for “Bilateral Investment Treaty”.

3 See: KOCH, E.; “PPP's in Argentina and Latin America: Overview”; The Guide to Infrastructure and Energy Investment 2nd Ed.; Latin Lawyer; 2017; p. 2.

4 See. World Bank Group: “Public Private Partnership”; p. 31.

5 There are shareholders from Spain, Italy, China and Portugal.

6 ICSID stands for “International Center of Settlement of Investment Disputes”. It was created by a World Bank sponsored convention “The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States” that came into force during the year 1966.

in case of a dispute under the ICSID?; (iii) Are those jurisdiction clauses enough to exclude jurisdiction of the ICSID?

The following lines will try to explain, in first place, how the Argentine Republic is implementing the Public-private partnership contract scheme to develop infrastructure, and which is the dispute settlement system provided in the legislation as well as in the first Argentine's PPP experience. Also, to briefly assay to what extent a contractor company and its shareholders can claim as investors in order to find jurisdiction before the ICSID tribunals. Finally, how the government have drafted the dispute settlement clauses in the PPP contracts, regarding BITs signed by Argentine, by including a "fork on the road" clause.

2. Public Private Partnership contracts.

Before briefly analyze the scheme of the Public Private Partnership contracts ("PPP Contracts") in the Argentine Republic, it is necessary to define what is a PPP Contract and make some remarks about where it comes from.

Although the development of PPP Contracts has a long history^[7], the expansion of the concept as we know it today started in 1992, when the UK introduced the Private Finance Initiative^[8].

The Public-Private Partnerships Reference Guide, sponsored by the World Bank in 2014, had give a broad concept to be applied both to new or existing PPP infrastructure and services contracts: "A long-term contract between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility, and remuneration is linked to performance."^[9]

As there might be a confusion between privatization and the PPP scheme, it is important to note a clear difference between these two forms of private sector engagement. On one hand, "...privatization involves the permanent transfer to the private sector of a previously publicly-owned asset and the responsibility for delivering a service to the end user"^[10]. However, "...a PPP

necessarily involves a continuing role for the public sector as a "partner" in an ongoing relationship with the private sector"^[11].

Additionally, there's a difference between the traditional public procurement and the PPP scheme.

On one side, there is the traditional public procurement in which the public sector procures the construction of the infrastructure from the private sector contractors, while the operation and

maintenance of the infrastructure is performed by other public or private parties. The funds in this cases come out of public debt or from the national budget.

On the other, there is the PPP approach which consists in the private sector financing and building the infrastructure, that can actually be compared to a form of leasing rather than to a purchase of infrastructure.

Countries with relatively long PPP histories have found that PPPs manage construction better than traditional procurement, with projects coming in on time and on budget more often (typically attributed to the incentives created by the PPP structure)^[12]. Finally, the longer-term investment perspective under PPP contracts can also help to ensure adequate maintenance keeps assets in a serviceable conditions^[13].

In a typical PPP scheme, the government signs a long-term contract with a private consortium to supply a service to the government and the private consortium designs, builds, and runs the physical assets required for the delivery of the service for a determinate period of time. This contrasts with traditional public sector provision where the government builds or purchases physical assets, retains ownership and uses public sector employees or a private contractor to deliver the require^[14].

Furthermore, as Koch refers "...the scope of a PPP Contract is quite broad since it can include one or more activities related to design, construction, expansion, improvement, maintenance, supply of goods and equipment, exploitation or operation and financing"^[15] Also, as it was mentioned in the introduction, the PPP contracts have a wide scope of application because it takes in many fields of: infrastructure (roads, bridges, railways, etc.), housing, activities and services (health, education, electricity supply, water supply, etc.), productive investment, applied research or technological innovation^[16].

2.1. The first PPP Contract experience in Argentine.

After the enactment of the PPP Contract Act in 2016^[17], and the regulatory decree in 2017^[18], the Argentinian Government through the *Dirección Nacional de Vialidad*^[19], launched the first tender for PPP projects regarding the building, operation and maintenance of roads and highways across many provinces of the Argentine Republic. Once the bidding process ended, six consortiums -constituted by private companies^[20] were allocated

7 During the 80's the governments of developed countries, were concerned about public debt and therefore, they started to build up a new model of public contract in which the private investments in infrastructure could be encouraged.

8 Private Finance Initiatives ("PFI") is a way of creating public-private partnerships. See. ALLEN, G.; "The Private Finance Initiative (PFI)"; Research Paper of the House of Commons Library; UK; 2003.

9 See: World Bank Group; "Public-Private Partnerships..."; p. 14.

10 See: APMG International; "The APMG Public-Private Partnership (PPP) Certification Guide"; Chapter 1: "PPP introduction and Overview". Available at: <https://ppp-certification.com/ppp-certification-guide/ppp-introduction-and-overview>

11 See: APMG International; "The APMG Public-Private Partnership (PPP)..."

12 See. ALBALATE, Daniel; "The Privatization and Nationalization of European Roads. Success and Failures in Public-Private Partnerships"; Ed. Edward Elgar; 2014; p. 206.

13 See: World Bank Group; "Public-Private Partnerships..."; p. 31.

14 See. Paul A.; "Public and Private Sector Discount Rates in Public-Private Partnerships"; The Economic Journal, Vol. 113, No. 486, Conference Papers; 2003; p. C62 – C68.

15 See. KOCH; p. 6.

16 See. KOCH; p. 6.

17 Ley N° 27.328, "Contratos de Participación Público-Privada". Available at: <http://servicios.infoleg.gob.ar/infolegInternet/anexos/265000-269999/268322/norma.htm>

18 Decreto N° 118/17; Reglamentación Ley N° 27.328. Available at: <http://servicios.infoleg.gob.ar/infolegInternet/anexos/270000-274999/271968/norma.htm>

19 National Highway Bureau inside the Ministry of Transport.

20 This private partner is the contractual counterparty of the "public party" and will usually be a project company that may also be named as a Special Purpose Vehicle (SPV), such as a company constituted specifically for the purpose of signing the contract and managing the project. See. APMG International; "The APMG Public-Private Partnership (PPP) Certification Guide"; Chapter 1: "PPP

with six PPP projects, and consequently the first six PPP contracts were signed.

The PPP Contract Act and its regulatory decree, include articles related to the dispute settlement. In this sense, both article 9 (w) of the PPP Contract Act and article 9 of the decree, establishes that disputes related to technical, interpretative and patrimonial issues may be assigned to a technical board. Likewise, if parties do not come to an agreement -or if the disputes are directly related to the extinguish, suspension or annulment of the PPP Contract-, an arbitration proceeding may take place through the incorporation of an arbitral clause in the PPP Contract-according to article 9, 25 and 26 of the PPP Contract Act-. Moreover, the above mentioned regulatory decree, also establishes in its article 9 that in the event where the parties of the PPP Contract do not agree on the constitution of a technical panel or an arbitration tribunal, the applicable law to the disputes would be Argentine domestic law, specifically the Administrative Proceeding Act.

Meanwhile, the six PPP Contracts for the roads and highways projects, have included a multi-step dispute settlement system in their chapter XXVII^[21]. According to this chapter, in first place, parties shall come to a solution through friendly negotiations; then, if parties did not come to a settlement, a technical panel must decide over the dispute observing the composition, proceeding and rules included in the PPP Contracts and its annex; finally, any claim or dispute arising from the PPP Contract shall be deemed by an ad-hoc tribunal according of the composition, seat, proceeding and rules provided in the PPP Contract.

Nevertheless, the PPP Contracts have also included a clause regarding the resignation of the contracting company's shareholders -and the contracting companies themselves- to claim under a BIT for a dispute that can be subject of an arbitration under the ad-hoc tribunal proposed in the PPP Contract. This will be the matter of discussion in section 4 of this paper, after analyzing the investors claims and how the ICSID tribunals have found jurisdiction.

3. Investor claims and the ICSID jurisdiction.

Since Argentine had ratified "The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States"^[22], most of the BITs signed afterwards by the state, have

introduction and Overview". Available at: <https://ppp-certification.com/ppp-certification-guide/ppp-introduction-and-overview>

21 PPP Contracts for Roads and Highways can be found at:

<https://ppp.vialidad.gob.ar/contratosfirmados/>

22 Available at:

https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf

23 ICSID is the only institution designed with the special characteristics of international investment disputes in mind, and its rules are drafted to balance the interests of investors and States. Moreover, dispute settlement at ICSID is efficient and cost-effective, and therefore accessible to a broad range of investors, including many small and medium-sized enterprises. See ICSID; "Introducing ICSID. The global leader in international investment dispute settlement". Available at: <http://icsid.worldbank.org>

24 See BOTTINI G; "El cumplimiento de los laudos del CIADI y el derecho internacional"; Ed. Thomson Reuters; 2005; p. 3.

25 The ICSID Convention include provisions for revision, interpretation and annulment of awards, but this remedies take place within the scope of the ICSID

included articles of dispute settlement that gives jurisdiction to ICSID tribunals^[23].

Before focusing on the ICSID jurisdiction, I find important to highlight a fundamental aspect of the ICSID dispute settlement system. In this sense, articles 53 and 54 of the above mentioned convention, establish that the awards of the ICSID tribunals are binding for the member states -and nationals of a member state-, and therefore, it is an obligation for the parties to recognize the award within national borders^[24] After the award is released, there's not an appealing process^[25], so it becomes an international obligation, which must be fulfill in order to avoid international liability. This is relevant regarding the access to international investments and financing, because it shows the level of credibility of Argentine -as a "borrower"- to potential investors, that arise from the accomplish -or not- of its commitments.

Due to that reason, the fact that the ICSID have jurisdiction or not over a dispute between investors and a state, is of a colossal magnitude. For the ICSID tribunals to find jurisdiction, there are three requirements to be meet for the ICSID to have jurisdiction: (i) There has to be an investor of a member state and a member state that have received the investment - *jurisdictio ratione personae*-; (ii) there has to be an investment -*jurisdictio ratione materiae*-; (iii) parties shall give consent to the ICSID jurisdiction -*jurisdictio voluntatis*-.

Article 25 of the ICSID convention requires the consent of the parties to submit to the ICSID. If a BIT, in which the ICSID jurisdiction is agreed, was signed by the state of the investor and the state that have receive the investment, the consent of that last state is presumed and the investor just need to give his consent in writing or by filling a claim before the ICSID^[26].

As the same as with the consent, the article requires the existence of a dispute between a state party and a national of another state party, arising directly out of an investment^[27], for the tribunal to have jurisdiction. Moreover, the tribunals have said in several decisions that shareholdings are included in the "investment" definition of Article 25 (1), even if such shareholding are indirect -held through other companies- and non-controlling^[28].

This said, it is important to point out that, many claims^[29] against Argentine before the ICSID were the so called "indirect" claims, that are defined as claims in which shareholders request

tribunals, and the requisites needed to obtain an annulment -for instance- are too narrow.

26 Conference: CAIVANO; "ICSID arbitral jurisdiction. II International Seminar of Arbitration"; Perú; 2015. <https://www.youtube.com/watch?v=G4xvoiyecSs> (Spanish audio).

27 See Cont'l Cas. Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Decision on Jurisdiction, para. 74 (Feb. 22, 2006).

28 See CMS Gas Transmission Co. v. Republic of Argentina, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 7 ICSID Rep. 494, paras. 51-52 (July 17, 2003).

29 See: CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8; Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12; Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8; Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3; LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1; Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16; Camuzzi International S.A. v. The Argentine Republic, ICSID Case No. ARB/03/2.

compensation for damages resulting from a violation of the company's rights in which they hold shares^[30].

On the other hand, there were cases against Argentine under ICSID tribunals initiated on the basis of a BIT, where shareholders had also invoked rights directly granted to them. When the claim involves measures affecting shareholders rights, commonly found in BITs (e.g. fair and equitable treatment), there is no doubt that the shareholder is exercising a "direct" claim.

In this regard, part of the doctrine discuss if indirect claims fall within the scope of ICSID jurisdiction, because it might be inadmissible under general international law -or even the ICSID Convention- for shareholders to claim for the damages suffered by the company in which they hold shares^[31].

However, ICSID jurisprudence have admitted indirect claims despite of some inconsistencies in the awards (e.g. some tribunals consider that shareholders are not really exercising indirect claims because they are invoking their own rights, while some accept the indirect nature of the claim and regard it as admissible under the ICSID system)^[32].

Therefore, this line of interpretation of the ICSID tribunals, might encourage the shareholders of the PPP contractor companies - mentioned in section 2.1.- to file claims against Argentine as investors, and not respecting the arbitration clauses established in the PPP Contracts that were meant to solve the disputes between the parties.

4. The situation of the dispute settlement provisions included in the PPP contracts and its relationship with the bits signed by the argentine republic. The fork on the road clause in the PPP contracts.

As it was mentioned in section 2, the companies that are part of the PPP contracts have agreed on a multiple-step dispute settlement system to solve the conflicts related to the PPP contract, being the most important instance the composition of an *ad-hoc* arbitration tribunal with its own rules and proceedings.

Nevertheless, the Argentine Republic have signed BITs with the states in where the companies – and its shareholders- have their seat or domicile (treaties in which the dispute settlement was appointed to the ICSID).

The foreign shareholders of the contractor companies -and potentially even the contractors themselves- could qualify as foreign "investors" protected by one of the many bilateral investment treaties signed by Argentine. The BITs contain standards of protection with respect to foreign investments (fundamentally "fair and equitable treatment" and protection against "expropriation") and provide for a specialized forum to resolve claims resulting from non-compliance with such standards, ad hoc arbitral tribunals under ICSID.

Consequently, the claimants could choose between settling their

disputes through a "commercial" arbitration mechanism provided in the PPP Contracts or through an investment arbitration before the ICSID.

This means that a fact or measure taken by the State (e.g. an early termination of the contract) could trigger a claim by the contractor for contractual breach under the PPP Contract arbitration clause, and a separate claim by foreign shareholders for breach of a right guaranteed by a BIT, under the investment arbitration mechanism provided in the treaty.

When considering the inclusion of a jurisdiction clause in the PPP Contracts, I share the opinion with Bottini who believes that the jurisdiction of investment arbitration cannot be excluded by the solely presence of the jurisdiction clause in the PPP Contracts.

Furthermore, as it was mentioned in section 2.1 *in fine*, the PPP contracts have included a "fork on the road" clause, obliging the companies or its shareholder to choose one of the two ways to settle their dispute. A "fork on the road" provision in a treaty or a contract, seeks to confine the foreign investor to only one remedy, when there is more than one procedure possible^[33].

Notwithstanding, the causes of the claims may be different, therefore, in the contract-based arbitration the disputes are a result from contractual breaches, but in an investment treaty-based arbitration the disputes are a result of violations of the rights and duties established in the BITs - treatment standards, expropriation or other rights under the treaty such as the repatriation of profits^[34].

In the case *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentina*^[35], where the companies had subscribed a concession contract with the argentinian province of Tucuman, a dispute settlement clause was included given jurisdiction to the Administrative Courts of Tucuman Province. Despite of that contractual provision, the companies initiated a procedure before an ICSID tribunal. In that occasion, the tribunal made a distinction between contractual claims and treaty claims, saying that the claims before the ICSID tribunal were not based in the concession contract, but in the Argentine-French BIT provisions. Nevertheless, Sonarajah warns that there could be cases where a contractual based claim and a treaty based claim may overlap. The author, with good judgment, gives examples like the overlapping regarding expropriation that can be consider as both, a breach of the contract and a breach of a treaty as well; or the overlapping regarding a fair and equitable treatment standard^[36] For this kind of situations, and in order to avoid the overlapping of claims before different tribunals, the contracts can include exclusive dispute-settlement clauses and even waiver mechanisms among other methods of remedy. But the conflict still remains given that there could still be a treaty arbitration, and it has give birth to different opinions.

30 See BOTTINI G.; "Indirect Claims Under the ICSID Convention"; p.565; 29 U. Pa. J. Int'l L. 563 (2008). Available at: <https://scholarship.law.upenn.edu/jil/vol29/iss3/2>

31 See. BOTTINI, G; p. 638.

32 See. BOTTINI, G; p. 638.

33 See. SONARAJAH, M; "The International Law On Foreign Investment"; 3rd Ed; Cambridge University Press; 2010; p. 320.

34 See. SONARAJAH; p. 321.

35 See. *Compañía de Aguas del Aconquija SA and Vivendi Universal v. The Argentine Republic*; ICSID Case No. ARB/97/3.

36 See. SONARAJAH; p. 321.

Part of the doctrine holds that the treaty exist independently of the investor's will and its rights and duties cannot be waived. But the truth is that if the treaty is mind to protect investors from the difficulties that he might be facing by litigating before foreign domestic courts, as long as the right to a private arbitration proceeding is guaranteed, it is possible to waived the right to claim before an investment treaty tribunal by accepting an exclusive arbitration clause.

Additionally, the "fork on the road" clause of the PPP Contracts includes an obligation for the contractor that has to be meet if he wants to initiate a contractual arbitration proceeding. That obligation consists in presenting a resignation of the majority shareholders to claim under a BIT for the same facts o measures that the contractor is claiming. Not only that obligation, but also the contractor has the duty to get into an indemnity agreement for the potential claims that the minority shareholders may initiate. Still it is interesting to consider that, by implementing this kind of clause, the PPP contracts have included an election for the contractor company, but it does not mean that there is a waiver to the BIT's jurisdictions.

5. Conclusion

Over the last decades Argentine have been struggling to develop the so needed infrastructure, and in order to do that is important for the country to receive foreign investments.

Since the PPP Contract Act was enforced, a new contractual framework and a new hope for the projects finance were born.

One of the main issues that the argentinian government had to deal with, in the first bidding process for highways and roads under this new contract squeme, was the dispute settlement system. In order to attract investments, all, the PPP Contract Act, its regulatory decree, the bidding documents, and also the PPP Contracts have incorporated the possibility of a private dispute settlement mechanism between the parties.

The problem is that the Argentine Republic had signed lots of BIT's with countries of which the contractor companies and its shareholders are nationals, and this could bring trouble of double lawsuits for the same causes under different tribunals. On one hand, contractual-based claims as being a party of a contract, and in the other hand, investment-based claims as being an investor in relation to the BIT. Then, the way out of this situation was found in the inclusion of a "fork on the road" clause in the dispute settlement chapter of the PPP Contracts, which is aimed to lead the claimants to choose one proceeding when there is more than one proceeding available.

This doesn't mean that the ICSID jurisdiction given by the BITs is totally excluded, but it obligates the contractor -as well at its majority shareholders- to waive on claiming for the same facts or measures under the BIT proceeding, in order to claim before the *ad hoc* tribunal provided on the PPP contract. Furthermore, the contractor has to sign an indemnity agreement in case of any minority shareholder claims under the BITs jurisdiction.

I share the opinion with the doctrine that believes that, as long as there is a private arbitration procedure guaranteed by a contract, there is no need for a double dispute settlement mechanism, and the "fork on the road" clause shall always apply and has to be taking into consideration for the tribunals in order to avoid "lis pendens" conflicts.

To wrap up, ICSID jurisdiction is not excluded by the "fork on the road" clause of the PPP contracts, meaning that the contractors -or even its shareholders- can still claim under the BITs as investors but by doing so, they are resigning their right to claim under the contractual arbitration for the same causes (and vice versa).

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