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## COMMERCIAL SPACE ACTIVITIES AND INVESTMENT PROTECTION IN ARGENTINA

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### ABSTRACT

During the '90s the Argentine Republic implemented a thorough State reform. This led to an economic opening and deregulation, which sought international insertion and attracting foreign investment.

Presidential Decree No. 2061/91 called for a national and international public bid for the supply, putting into orbit and operation of a satellite system. Presidential Decree No. 153/93 awarded the public bid to a Transitory Joint Venture (UTE). Section 1 stated that "Aero Spaciale SIN, ALCA TEL.....Unión Transitorias de Empresas (Transitory Joint Venture) shall be awarded the national and international public bid..."

During the same decade, Argentina signed several Bilateral Investment Treaties (BIT). It also became a member of the ICSID. After the financial and economic crisis that affected the country by the late 2001, Argentina has to face about forty lawsuits filed by private companies before the ICSID.

The purpose of this paper is to analyze if there exist any legal rules for the protection of foreign investors in Argentina, the hierarchy of investment treaties within the domestic legal system and whether there is any conflict between said treaties and the Argentine constitutional provisions.

This presentation intends to answer such questions.

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## INTRODUCTION

During the '90s the Argentine Republic implemented a thorough State reform. This led to an economic opening and deregulation, which sought international insertion and attracting foreign investment.

One of the areas in which Argentina intended to attract foreign investment were commercial space activities. Therefore both a national and international a public bid was opened for the supply, putting into orbit and operation of a Satellite System in the Fixed Satellite Service, at orbital positions of 80 and 85 degrees West. The bid was awarded to a company composed of investors from different countries.

In 2001, Argentina faced one of its worst economic and financial crisis and was forced to renegotiate many concession contracts. This caused several international lawsuits. Therefore, we intend to make a brief analysis of the situation that a company composed of foreign investment and engaged into space trade in the Argentine Republic may have to face.

The purpose of this paper is to analyze if there exist any legal rules for the protection of foreign investors in Argentina, the hierarchy of investment treaties within the domestic legal system and whether there is any conflict between said treaties and the Argentine constitutional provisions. In this regard, first, we will make reference to the administration that ruled the country during the 1990s and allowed the putting into orbit of the Nahuel A1 Satellite and the award of its orbital points to a private company. Then, we will outline the enacted legislation and discuss the concession contract, investment treaties and their position in the Argentine legal

hierarchy in greater detail. This analysis will enable us to answer all relevant questions.

## ARGENTINE STATE REFORM AND AWARD OF THE NAHUEL SYSTEM

By the early 90s, Argentina was amidst an economic crisis. The Washington Consensus was already into operation.

According to Joseph E. Stiglitz<sup>i</sup>, the Washington Consensus strived for the use of a series of tools (including macroeconomic stability, trade liberalization and privatizations) tending to achieve a relatively limited goal: economic growth.

In line with these ideas, the former President Carlos Menem implemented a new state policy.

Daniel García Delgado,<sup>ii</sup> an Argentine political analyst, states that the state reform that was implemented by the late '80s and early '90s relied on four reasons: "1) the ultimate crisis of the welfare State, 2) the logics of emergency due to the constraints passed by the former radical administration (hyperinflation, inability to rule the country and earlier end of office); 3) the growing influence of economic groups and international organizations that considered the welfare State inefficient and responsible for all problems (Washington Consensus), and lastly 4) President Menem's political style, more oriented towards power concentration and decision-making rather than agreement."

García Delgado states that the structural reform implemented during this stage involved "the stabilization of the exchange rate, the privatization of the main state-owned companies and the deregulation and opening of the economy

under the 'minimum' state intervention paradigm".<sup>iii</sup>

García Delgado quotes Mabel Twaites Rey, who affirms that the new definition of the operation of the state apparatus was the "second floor structure", where the direct exercise of actions is abandoned and attention is focused on planning and monitoring the implementation of public policies.<sup>iv</sup>

Within this political context, the following regulations were issued, which would enable the inflow of private capital and foreign investment, as well as the award of the Nahuel System by means of a bidding process:

Presidential Decree No. 174/89 on free satellite reception .

Presidential Decree No. 580/89, whereby several companies are authorized to operate, by means of installation and provision of voice and data transmission services through communication satellites with a view of profit in our country.

Presidential Decree No. 549/91, which entrusts the National Telecommunications Commission (CNT) with the drafting of the terms and conditions of the bid for the installation and start-up of a multipurpose national satellite.

Presidential Decree No. 2061/91, whereby a national and international public bid was opened in order to meet the purpose of the above referred to Decree Law. Section 1 states: "A national and international public bid is hereby opened for the supply, putting into orbit and operation of a Satellite System in the Fixed Satellite Service, at orbital positions of 80 and 85 degrees West

and Associated Frequency Bands reserved for the Argentine Administration in the International Telecommunications Union, and for the provision of satellite facilities within said system. The bid shall be subject to all terms, requirements and further provisions set forth in the Bid Specifications as approved by Section 2 below." This Section is entirely quoted in Section 2 of the Bid Specifications document.

According to Section 3 of the Bid Specifications, "The following regulations shall be applied to this public bid and the corresponding award, in compliance with Section 43 herein:

- a) National Telecommunications Law No. 19.798 and its regulations
- b) National Radio Broadcasting Law No. 22.285 and its regulations
- c) Presidential Decree No. 1185/90 as amended
- d) Presidential Decree No. 62/90 as amended.
- e) Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies from October 10th, 1967; Convention on International Liability for Damage Caused by Space Objects, from September 1st, 1972; Convention on Registration of Objects Launched into Outer Space from September 15<sup>th</sup>, 1976; and the international treaties signed by the Argentine Republic.
- f) Any legal provision or regulation applicable to this public bid.
- g) This Bids Specifications document.

The above mentioned requirements are not in order of priority."

Section. 6.a. of the Bid Specifications states that: "Companies duly incorporated or in the process of incorporation may take part in the bid. Furthermore, transitory joint ventures (UTEs) formed to that effect may also take part in the bid, provided that these are composed of duly incorporated companies."

Section 17 of Presidential Decree No. 2284/91, ratified by Law No. 24.307 on economic deregulation states:

*"The Consulting Technical Committee shall immediately study the application of the provisions of this Decree Law to all matters in connection with the following activities and markets:*

*c) radio and television frequencies;*

*d) mail service;*

*e) mobile telephony;"*

Law No. 23.697 on State Reform.

Presidential Decree No. 2709-2710-2711, from 1991, authorizing the National Telecommunications (CNT) to make satellite capacity reservations.

Presidential Decree No. 153/93, which awarded the public bid to a transitory joint venture (UTE). Section 1: "AERO SPACIALES S.N.I., ALCATEL ESPACE S.A., ALENIA SPAZIO Spa., DEUTSCHE AEROSPACE A., EMBRATEL S.A. UNIÓN TRANSITORIA DE EMPRESAS (UTE) [TRANSITORY JOINT VENTURE], shall be awarded the National and International Public Bid for the supply, putting into orbit and operation of a Satellite System in the fixed satellite service, at orbital positions of 80 and 85 degrees West, or in any other position resulting from coordination procedures and associated frequency bands, pursuant to the publications in advance made by the ARGENTINE REPUBLIC before the

International Telecommunications Union."

At present, Nahuelsat is a corporation operating under the name of Nahuelsat S.A.<sup>v</sup>

## THE NAHUEL SYSTEM AND THE INVESTMENT MADE

The first investment of USD 20 million arrived in December, 1993. Until 1995, the corporate capital had increased up to USD 100 million. Local shareholders such as the Banco Provincia group, Telecom Argentina, the Bemberg group and the Uruguayan Antel became members of the new company. Later, General Electric American Communications became a member, the shares of which represented 28.75% of the corporate capital. By including this company, the corporate capital of Nahuelsat was allocated between the European members (Daimler- Benz Aerospace, Aerospatale, Alenia Spazio) with a 31% share, and international nucleus with a 33.75% share (GE, Global Satellites IFC) and a regional group with a 32.35% share (Antel, Bisa, Banco Provincia group, Publicom from Telecom de Argentina).<sup>vi</sup>

The project's total cost was about USD 250 million, 180 million of which were used to build the satellite, its launching and insurance. Also, the investment to build the Benavidez Earth station should be added. The final investment amounted to USD 200 million plus USD 50 millions on account of interest accrued on the investment financing.<sup>vii</sup>

By 1997, the investment in USD millions was as follows: <sup>viii</sup>

- Bisa (Bemberg Group): 11.50

- Banco de la Provincia de Buenos Aires: 11.50
- Publicom S. A.(Telecom Argentina): 5.75
- Antel (Uruguay): 6.50
- GECAPITAL Global Satellites, Inc : 28.75
- IFC (World Bank Group): 5.00
- Daimler-Benz Aerospace: 11.00
- Aerospaciale: 10.00
- Alenia Spazio de 10.00

By 1997, the investment was made up of:

- Transitory system: USD 50 million
- Final system: USD 250 million
- Total: USD 300 million.

Now, the partners are:<sup>ix</sup>

- EADS (European Aeronautic, Defense and Space Company): 47,3 %
- SES Global: 28,75 %
- Finmeccanica: 11, 7 %
- Publicom S.A: 5, 75 %
- Antel: 6, 5 %

On Thursday January 30, 1997, at 7 p.m. the Nahuel A-1 Satellite was launched from Kuru (French Guyana) by means of the Ariane 4 rocket.<sup>x</sup>

Its main technical features are as follows:<sup>xi</sup>

- 18 active transponders of 54 Mhz each, support 6, Ku band.
- 55 watts TWT amplifiers.
- Three “spot” antennae to cover three areas:

1. Argentina, Chile, Uruguay, Bolivia and Paraguay.
  2. Brazil and
  3. Latin America
- End of life: 12 years.
  - Payload: 1790 kg
  - Height: 2,5 m
  - Dimensions (solar panels fully deployed): 22.4 m
  - Power: 3 Kw (end of life)
  - Precision pointing: 0.11 degrees
  - Orbital positions: 72 and 76 degrees West

#### **THE CONCESSION CONTRACT IN THE ARGENTINE LAW**

As it has been analyzed above, the Nahuel System was put into operation by means of a Concession Contract provided for by Presidential Decree N° 153/93 (this contract is governed by Administrative Law rules).

The status of these types of contracts and their hierarchy within domestic law is usually questioned in times of economic emergency such as that suffered by Argentina at the beginning of this decade. Wälde and Kolo state that this scenario reflects “the tension between the binding nature of the legal instrument of contract – meant to commit the parties for a long time whatever their changing position, relation and interests, and practical and commercial difficulties to being fully and specifically committed to certain obligations and courses of action when the reasons underlying the contract in the first place have changed drastically”<sup>xii</sup>

Roberto Dromi, former Minister of Public Works during Carlos Menem's administration, affirms that "administrative law finds its roots in Constitutional Law, and the legal pyramid of the administrative legal system is subject to the Constitution. Therefore, the acts of government agencies shall abide the *principle of legality*."<sup>xiii</sup>

## **BILATERAL INVESTMENT TREATIES AND THEIR HIERARCHY IN THE ARGENTINE LEGAL SYSTEM**

Since 1990, the Argentine Republic has signed more than fifty Bilateral Investment Treaties, for example, those entered into by and between Argentina and the United Kingdom, Italy (1990), the USA, Spain, France, Germany (1991), etc.<sup>xiv</sup>

As Raúl Vinuesa explained, "the proliferation of BITs was the direct consequence of new trends towards a market economy where foreign investment in developing countries was the master key to integrate those countries into fruitful global economy relationships. BITs are conceived as generating reciprocal rights and duties among state parties. Those state rights and duties concern the rights and duties of private investors of one country, in the territory of the other."<sup>xv</sup>

By the early 21st century, Argentina faced the greatest economic-financial crisis of all times. The last decade of the 20<sup>th</sup> century started with great expectations and excitement due to the structural reforms carried out by the administration in office. Ten years later,

Argentina has to face about forty lawsuits before the ICSID.<sup>xvi</sup>

In 1994, the Constitution of Argentina was amended. In order to analyze the legal hierarchy in this country, it is vital to understand the changes introduced by the amendment of Section 75, subsection 22 of the Constitution of Argentina.

According to this constitutional provision, "treaties and concordats have a higher hierarchy than laws." It further enumerates several treaties and declarations on Human Rights, such as The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Pact on Economic, Social and Cultural Rights; the International Pact on Civil and Political Rights and its empowering Protocol; the Convention on the Prevention and Punishment of Genocide; the Convention on the Rights of the Child; etc. This provision also states that these treaties, "in the full force of their provisions, have constitutional hierarchy."

The legal hierarchy would be as follows:

- The Constitution and Treaties on Human Rights with constitutional hierarchy;
- Integration Treaties and other international treaties;
- Federal and ordinary laws;
- Presidential Decrees and Decrees of Necessity and Urgency;
- Administrative Decisions;
- Administrative Regulations;
- General Principles of Law;
- Administrative case law, etc.

The Constitution is the supreme law of the nation. The treaties on human rights were given constitutional hierarchy by means of a special procedure provided for by the Constitution itself (Section 75, subsection 22). This Section also establishes that international treaties have a higher hierarchy than laws.

The 1994 amendment of the Argentine Constitution indicates that the treaties on Human Rights and other treaties have a higher hierarchy than laws. But an investment promotion and protection treaty occupies a lower rank on the legal pyramid of this country if compared to treaties on Human Rights.

Dromi points out that “the economic interests of users and consumers are protected by international treaties on Human Rights, including rates paid for public services, which should be fair and reasonable, as well as the efficiency and quality requirements that services must comply with in order to meet public needs.”<sup>xvii</sup> For instance, Argentine judges have considered gas and water supply services as minimum services necessary for the human environment. Their rulings were supported by the Universal

Declaration of Human Rights, the American Declaration of the Rights and Duties of Man, the International Pact on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child.<sup>xviii</sup>

## CONCLUDING REMARKS

The 1994 constitutional reform is quite clear in terms of legal hierarchy in Argentina. Treaties have a higher hierarchy than laws. Consequently, international treaties governing public concession contracts, such as investment protection treaties, have a higher rank than domestic laws, but they are below treaties on Human Right, which enjoy constitutional hierarchy. Should there be any conflict between these two kinds of treaties, the latter shall prevail.

The fact whether commercial space activities such as satellite telecommunications could be protected by a treaty on Human Rights with constitutional hierarchy would be worth analyzing, but that is a completely different issue...

<sup>i</sup> Stiglitz, Joseph E.: “Más Instrumentos y metas más amplias para el desarrollo. Hacia el Consenso Post- Washington” in: “Desarrollo Económico. Revista de Ciencias Sociales”. No. 151 Vol. 38. October-December 1998. Page 717.

<sup>ii</sup> García Delgado, Daniel: “Estado-nación y la globalización” Compañía Editora Espasa Calpe Argentina S. A. 1998. Page 48

<sup>iii</sup> *Ibid.*, Page 48

<sup>iv</sup> *Ibid.*, Page. 49

<sup>v</sup> Pursuant to the information gathered from <http://www.nahuelsat.com.ar>

<sup>vi</sup> Telecomunicaciones y Negocios Magazine. Year 7, No. 32, Published by Brain Storming SRL. Page 48 and others.

<sup>vii</sup> *Ibid.*, Page 48 and others.

<sup>viii</sup> Source: Nahuelsat: Regional Satellite System for the Americas. Institutional Paper. 1998.

<sup>ix</sup> [http://www.nahuelsat.com.ar/ingles/g\\_s/index.html](http://www.nahuelsat.com.ar/ingles/g_s/index.html) (22 September, 2005)

<sup>x</sup> Clarín, January 31, 1997. Page 28.

<sup>xi</sup> Nahuel. Regional Satellite System for the Americas, January 1997

<sup>xii</sup> Kolo, Abba and Wälde, Thomas: “Renegotiation and Contract Adaptation in International Investment Projects. Applicable Legal principles and Industry Practices” in The Journal of World Investment. Vol. 1 No. 1. July 2000. Page 6.

<sup>xiii</sup> Dromi, Roberto and others: “Renegociación de Contratos Públicos en Emergencia”. Ciudad Argentina. Buenos Aires/Madrid. 2003. Page 69

<sup>xiv</sup> See <http://www.unctad.org> and Cruchaga, Hernan: “Tratados Bilaterales de Protección de Inversión. Perspectivas de los Requerimientos ante la Situación de Emergencia” La Ley, Year

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LXVIII No. 209. Buenos Aires. October 29th, 2004.

<sup>xv</sup> Vinuesa, Raúl Emilio: "Bilateral Investment Treaties and the Settlement of Investment Disputes under ICSID: The Latin American Experience" in Law and Business Review of the Americas. Fall 2002. Page 504

<sup>xvi</sup> See Castillo Argañarás, Luis F. "Argentina before the ICSID" in Transnational Dispute Management. Vol. 4. Issue 1. October 2004. In <http://www.transnational-dispute-management.com>

<sup>xvii</sup> Dromi, Roberto and others: "Renegociación de Contratos Públicos en Emergencia". Ciudad Argentina. Buenos Aires/Madrid. 2003. Page 74

<sup>xviii</sup> Ibidem, Page 73