

1-1-1988

Argentina

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Recommended Citation

Argentina, 19 U. Miami Inter-Am. L. Rev. 509 (1988)

Available at: <http://repository.law.miami.edu/umialr/vol19/iss2/8>

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LEGAL MEMORANDA

ARGENTINA

The following is a review of recent legal and economic developments in Argentina.

I. CAPITALIZATION OF PROFITS FROM FOREIGN INVESTMENTS

Argentina is presently in the midst of a severe debt crisis. This crisis affects every sector of the economy, foreign investment being no exception.

On May 18, 1984, the Argentine government froze the ability of foreign investors to remit profits to their home countries. Decree 1506/84 flatly suspended "the right to transfer profits abroad." The same decree provided foreign investors with the right to receive U.S. dollar denominated bonds (BONEX). BONEX could be negotiated immediately in a foreign market at a discount. Decree 1506/84 left foreign businessmen with two options: re-invest profits in the same enterprise or accept BONEX for future use. Resolution No. 710, passed on August 25, 1987, however, opens a third door through which a foreign investor may transfer net gains. The Resolution allows profits to be transferred abroad, but only if equivalent funds are simultaneously reinvested in Argentina. Resolution 710, however, is but one small mechanism within a large debt-to-equity conversion system. Thus, to fully understand its function it is necessary to consider the debt conversion program in its entirety.

The debt conversion program now employed by Argentina is a \$2 billion, five year plan, whereby the government redeems public external debt at face value provided that: (1) the proceeds are invested during a number of years in certain eligible projects; and (2) additional funds in foreign currency, in an amount at least equal to the face value of the debt being redeemed, are brought in from abroad and invested in the same project. Resolution 710 focuses on

foreign investors who have some ownership in a successful Argentine business and are in the process of converting debt to equity. Theoretically, the international investor may collect profits from his Argentine enterprise, but only if the profits immediately return to Argentina as new money, in foreign currency, to supply the necessary additional funds for a specific debt-to-equity conversion program. This Resolution is of specific utility for only certain types of transactions. The use of Resolution 710 is further restricted by Resolution 6, of July 6, 1987, which limits the amount of reinvested profits to fifty percent or less of the additional funds.

Resolution 710 is not a dramatic change in current legislation; nevertheless, it is designed to provide two benefits. First, the Argentine economy should be stimulated by investment while the external deficit is reduced. Second, foreign investors will enjoy greater flexibility in a necessarily restrictive system.

II. CENTRAL BANK AS GUARANTOR

On June 11, 1987, a Federal Appellate Court of Argentina solidified and defined the legal responsibility of the Central Bank to act as guarantor of private certificates of deposit in the event that a financial institution goes bankrupt. In the case of *Oliver, Maria del Carmen y otro C. Orfina, Cia. Financiera, S.A. y otro*, (85.916-CNFed. Contencioso administrativo, sala IV, junio 1987), the defendant (a financial institution, hereinafter called "Orfina"), failed to make payment on certificates of deposit held by the plaintiff (a private investor, hereinafter called "Oliver"), causing Oliver to file suit. Orfina subsequently became insolvent, and the Central Bank was called into the matter as a third party guarantor. The lower court found in favor of Oliver and against the Central Bank.

The Appellate Court affirmed the decision of the lower court, raising the award given by the lower court due to a misinterpretation of procedural law. The final verdict against the Central Bank included the value of the certificates at the time of their maturity as well as an adjustment for inflation and a six percent rate of interest. The importance of this decision, rendered by a panel of three appellate jurists, is that the Central Bank is held to be a guarantor of the debt between Orfina and Oliver, although not a guarantor in the same sense as a surety that co-signs a contract between debtor and creditor. The Court explained that the

guaranty obligation assumed by the Central Bank is not derived

from the bank deposit contract; rather its source is the law. This obligation is placed on the Bank for the purpose of economic regulation, it is not to be treated as a personal guaranty or a concrete assurance in favor of a determined creditor; to the contrary, it is a general and undetermined responsibility that arises with the liquidation of a savings institution that adhered to the system.

The Central Bank's duty to act as guarantor in such cases springs from art. 56 of Law 21,526, as modified by art. 1 of Law 22,051 (Ada, XXXVII- A, 121; XXXIX-C, 2470). In its general form, this law gives the Central Bank two options on the insolvency of an authorized financial institution: (a) to make agreements with other financial institutions to take charge of the deposits up to the limit of the guaranty; or (b) to supply the funds from its own resources up to the limit of the guaranty. The Central Bank had been reluctant to fully comply with this law because of alleged errors on the part of the plaintiff in perfecting its interest. The Appellate Court did not find these errors significant enough to release the Central Bank from its obligations.

III. ARGENTINE OIL AND GAS DECREE 623/87

On April 23, 1987, the Argentine government handed down Decree No. 623/87, an important step toward fostering private participation in petroleum exploration and exploitation. Decree 623/87 provides private contractors with greater control and certainty in long-term relationships with the Argentine government.

Under the previous regulations, Yacimientos Petroliferos Fiscales (YPF — the Argentine state owned petroleum company) had the final word on whether a discovered oil field was worth exploiting. A private contractor would submit a proposal to extract oil which would either be approved or disapproved by YPF, leaving the contractor, who had expended large sums to locate the oil, in a precarious position. Decree 623/87 recognizes this problem and gives the contractor the sole power to declare commerciality. The new regulation states that "[I]n the event of hydrocarbon discoveries, the contractor company shall have a period of one (1) year — which may be extended when so justified by technical reasons — to evaluate and declare commerciality of the field discovered. . . ." Thus, the declaration gives the contractor the right to begin extracting petroleum. As in the original regulation, however, all ownership rights over the discovered oil remain with YPF.

Previously, YPF could pay the foreign currency portion of the due compensation with refined products or crude oil. This possibility has been eliminated under the new regulation, but the contractor still has the right to receive payment in crude oil when YPF is in arrears. Upon the contractor's request, the Enforcement Authority will order YPF to make payments in crude oil equivalent in value to the amount owed, plus interest.

Decree 623/87 limits YPF's option to participate in the profits and expenses of a project with the contracting party. In the past YPF had the option to participate within ninety days after the declaration of commerciality, and had a second ninety day option any time the conditions assumed at the time of the declaration changed. The new Decree eliminates this second option. Furthermore, YPF must exercise the first option within forty-five days of the demarcation approval given by the Enforcement Authority.

The price of natural gas is now within the explicit perimeters of fourteen to twenty-seven percent of the international price for oil. The Enforcement Authority will set the exact percentage before each call for bids. The times within which YPF must respond to the contractor with information and decisions are shortened. In many cases the response times have been cut in half. These new limits are designed to promote efficiency in the industry. The new procedures during the exploitation period are a good example of this new efficiency. Before Decree 623/87, a contractor would formulate a proposal for commercial viability, and YPF would then have ninety days to make a declaration of commerciality. If the declaration was made, the contractor could proceed to the exploitation phase, but had to submit all working and development programs to YPF. YPF had another 120 days to raise any objections, stalling the contractor once again. Now, the contractor makes the declaration of commerciality, giving it the right to proceed immediately with exploitation. The contractor includes in the declaration its proposed demarcation and development plans. YPF then has only forty-five days to approve or reject the proposed plans.

In sum, the original decree allowed a delay of 210 days by YPF once the contractor made the decision to begin pumping oil. Decree 623/87 permits YPF forty-five days to raise an objection before the contractor moves forward. Decree 623/87 shows the new trend in the Argentine oil and gas sector: the promotion of efficiency across the board, and the maximization of collaboration op-

portunities between YPF and private companies, both foreign and local.

IV. MISCELLANEOUS DECREES AND DECISIONS

Civil and Commercial Code

The proposed law for the unification of civil and commercial legislation is being discussed and has been approved by one of the legislative houses. This law would amend the Civil Code and annul the Commercial Code.

Opening of Bids

The opening of bids for the third international call for tenders of the Houston Plan took place at the central office of YPF on October 14, 1987. The bids were for the exploration of hydrocarbon in thirty areas totalling 233,757 square kilometers of which thirteen are in the North East basin, eight are in the Cuyana and Bolsones basins, seven are in the Neuquina basin and two are offshore in the Austral and Colorado Marina basins. Foreign companies presenting bids were the following: Trend, Santa Fe Energy, Chevron, Shell, Exxon, Pecten, Primary Fuels, Nomeco and Asamero.

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Buenos Aires, September 30, 1987

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Buenos Aires, October, 1987