Trends in redefining international investment protection

REPSOL PERSPECTIVE

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Rethinking International Investment Law:
An Investor’s Perspective – Repsol/YPF in Argentina

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AGENDA

1. FDI: Main Driver of Economic Growth
2. BITs: Relevant Features
3. Investor - State Dispute Settlement
4. EU Investment Policy after the Lisbon Treaty
5. Repsol Vision on the EU Investment Policy
FDI: Main driver of economic growth

In 2012 FDI flows reached approx. $1.6 trillion. FDI flows are expected to increase moderately reaching $1.8 trillion and $1.9 trillion in 2013 and 2014 respectively.

In 2011 World FDI inflows reached $1.52 trillion with the developed economies accounting for 49.1%. East and Southeast Asia accounted for 22.00% and Latin America and the Caribbean 14.2%.

FDI inflows to LAC increased by 16% to $217 billion driven mainly by higher flows to South America (up to 34%).

<table>
<thead>
<tr>
<th>Region</th>
<th>FDI inflows</th>
<th>FDI outflows</th>
</tr>
</thead>
<tbody>
<tr>
<td>World</td>
<td>1,197.8</td>
<td>1,309.0</td>
</tr>
<tr>
<td>Developed economies</td>
<td>606.2</td>
<td>618.6</td>
</tr>
<tr>
<td>Developing economies</td>
<td>519.2</td>
<td>616.7</td>
</tr>
<tr>
<td>Africa</td>
<td>52.6</td>
<td>43.1</td>
</tr>
<tr>
<td>East and South-East Asia</td>
<td>206.6</td>
<td>294.1</td>
</tr>
<tr>
<td>South Asia</td>
<td>42.4</td>
<td>31.7</td>
</tr>
<tr>
<td>West Asia</td>
<td>66.3</td>
<td>58.2</td>
</tr>
<tr>
<td>Latin America and the Caribbean</td>
<td>149.4</td>
<td>187.4</td>
</tr>
<tr>
<td>Transition economies</td>
<td>72.4</td>
<td>73.8</td>
</tr>
</tbody>
</table>

Source: UNCTAD
including nationalization. Regulatory policies in extractive industries, introducing new entry barriers and more regulation become manifested primarily in regional. Regional policy trend: More State.

(14%) UK (4%), Spain investors are: Netherlands (21%). Spain region over 40% of the total in 2011. Main Europe is still the main origin of FDI for the region. Its natural riches, the increase of investments in the region, and investments predominately in services and manufacturing. In general terms, the FDI in South America.

1. LAC - one of the most promising regions...
II. BITs: Relevant features

The BIT between the Kingdom of Spain and the Argentine Republic was signed in 1991.

BIT is a binding agreement between 2 states in which each assumes obligations with respect to investments made in its country by other's investors.

THE MAIN PROVISIONS OF A BIT ARE:

- **National Treatment**
  - Foreign investors receive no less favourable treatment, than nationals

- **Most Favoured Nation Treatment**
  - Investors treated as favourably with the host State, as any other third party

- **Fair and Equitable Treatment**
  - Stable and predictable legal framework

- **Protection for Investors**
  - Adequate and effective compensation in case of expropriation

These main Provisions in the BITs are aimed to guarantee a stable and predictable Investment climate promoting FDI.
II. The confiscation of YPF: Breach of the key BIT provisions

a) Expropriation is discriminatory. The YPF Expropriation Law is directed only towards Repsol. No other oil and gas company in Argentina has been affected. No other shareholder of YPF has been affected.

b) Expropriation requires a payment or judicial allocation before the State takes hold of the expropriated asset. No adequate and effective compensation has been paid to Repsol. As a fact Repsol has not received any compensation at all.

c) Instead of assuring the hydrocarbons sovereignty of the country, the expropriation seems to have been designed to wrongfully and unfairly “punish” Repsol.

d) Argentina effectively took control over both companies, with the consecutive loss of rights and physical expulsion of Repsol.
III. Investor-State Dispute Settlement


2012: There were 50 new arbitration cases registered. 67% basis of consent in BITs. 12% Investment law of the Host state. 13% Investment contract between the Investor and the Host State.

Known Investor-State treaty based disputes 1987-2011

Source: UNCTAD
III. International Centre for the Settlement of Investment Disputes (ICSID)

1965: Convention on the Settlement of Investment Disputes, promoted by and signed under the auspices of the World Bank, is a milestone in the move towards the establishment of an international legal framework protecting and promoting FDI. Convention set up the International Centre for the Settlement of Investment Disputes (ICSID), providing for the first time an international and highly delocalized institutional machinery for the settlement of disputes arising out of investments.

Despite the worldwide acceptance of the ICSID, several States in American hemisphere continue to be distant from ICSID: Canada, Cuba, Mexico, Brazil, Russia, India are not among the 158 Members of the ICSID Convention.

Bolivia, Ecuador and Venezuela withdraw from the ICSID Convention in recent years. The scepticism over ICSID should be dispelled through the international reinforcement of this institution.

Since the 1965 ICSID convention, Argentina has been the country appearing in most cases as a Respondent, 49 cases including some which have been settled or discontinued, followed by Venezuela with 36 cases, Egypt with 17 cases and Ecuador with 12 cases. Argentina has 26 pending cases in ICSID, more than any other country. So far, it has refused to pay any of the tribunal's judgements.
IV. EU investment policy after the Lisbon Treaty

EU states are the main users of BITs globally, with a total number of about 1200 BITs already concluded.

Investment presents itself as a new frontier for the common commercial policy.

FIRST STEPS TO A EUROPEAN INVESTMENT POLICY

The Lisbon Treaty’s attribution of EU exclusive competence on FDI integrates FDI into the common commercial policy.

The EU investment platform vis-à-vis third countries could be gradually enriched with investment protection standards for all EU investors establishing its presence in these countries.
EU-wide investment negotiations.

The Lisbon Treaty of 2007 empowers the EU to negotiate BITs with countries, not immediately scheduled for the elimination of double taxation, for the protection of EU investments. This negotiation replaces the BITs that were previously in force and the agreements that were in force until they are restructured to comply with the new EU investment agreements. It also confirms that the Lisbon Treaty allows the maintenance of investment agreements between third countries and bilateral and multilateral agreements such as the EU-Mercosur Agreement.

The integration of investment into the Common Commercial Policy arising in trade.

Towards a Comprehensive European International Investment Policy.
V. Repsol vision on the EU investment policy

- The EU Investment treaty approach should build on the BIT policy and practice of EU member States.

- The current ICSID arbitration procedure needs to find additional enforcement measures in order to enable the completion and payment of arbitral awards.

- There is a need to improve enforceability of arbitration awards: additional measures should be considered (ex: US Trade Act).

- Coordinated position of EU member States (European Commission) in IFIs and other multilateral organisations.

- A strongly coordinated position (with the majority of votes of the Member States) in the main IFIs voting against financing development projects in States that have refused to pay awards issued under the ICSID rules and outstanding claims with the Paris Club.

- The EU should seek to establish alliances and agreements with the US and other countries with similar perspective in order to strengthen the rule of Law and the mechanisms of Investment protection.