ARE LEGAL FAMILIES DETERMINANT OF INVESTORS' PROTECTION FROM GOVERNMENT MISTREATMENT?

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INTRODUCTION

In 2004, the World Bank published a report that compared countries from the point of view of protecting investor rights depending on the origin of their legal systems.[1] For this purpose, it classified countries into five

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legal families: those whose legal origin was considered to be French (61 countries), English (41), German (18), Nordic (5), or socialist (10).

Within countries of French legal origin, the report included in Europe, apart from France, Belgium, Spain, Greece, Portugal, the Netherlands, Italy, and, in other continents, all Latin American countries, those countries of Africa and Asia that had been French colonies or protectorates, and other countries from the North of Africa and the Middle East, such as Egypt, Turkey, and Jordan. Within those classified as having English legal origin, the report included all the countries of the Commonwealth and other former British colonies and protectorates, the United States and Israel. Apart from the obvious cases of Germany, Austria, and Switzerland, and countries of German legal origin included Japan, Korea, and Taiwan. Countries that had been behind the Iron Curtain but whose legal systems had German legal origins, such as the Czech Republic, Hungary, and Poland, were also included in the German family. Russia and the former republics that had been part of the URSS were the main countries of the socialist group.

In this comparison, the Report analyzed situations that would be characterized in Continental Europe as private law relationships, such as the rights of shareholders and creditors and the hiring and dismissal of employees, as well as others that implied some government or court participation, such as the steps necessary to start or close a business and the enforcement of contracts. The latter topic took into account the efficiency of the judicial system, the rule of law, corruption, the risk of expropriation by the State, and the likelihood of contract repudiation by the government. A final section was devoted to the quality and extensiveness of regulations.

The Report reached a polemic conclusion: countries with common law origins were more favorable for doing business and protected the rights of investors better than those with French legal origins, with German and Scandinavian systems somewhere in the middle.

The Report was authored by distinguished academics with the participation of many contributors and referees but, as could have been expected, provoked strong criticisms among French jurists, who described

[1] THE WORLD BANK, DOING BUSINESS IN 2004 UNDERSTANDING REGULATION (2004) [hereinafter the Report]. The Report followed previously published papers, with similar conclusions, Rafael La Porta, Florencio Lopez-De-Silanes, Andrei Shleifer & Robert W. Vishny, *Law and Finance*, 5661 NBER WORKING PAPER SERIES 1 (1996); Rafael La Porta, Florencio Lopez-De-Silanes, Andrei Shleifer & Robert W. Vishny, *Which Countries Give Investors the Best Protection?*, Public Policy for the Private Sector, Apr. 1997; Rafael La Porta, Florencio Lopez-De-Silanes, Andrei Shleifer & Robert W. Vishny, *Legal Determinants of External Finance*, 5879 NBER WORKING PAPER SERIES 1 (1997).

it as biased to show the superiority of common law systems, and oversimplified.[2]

Was the criticism justified? Since the Report mostly dwelt on subjects that are not within the specialty of this author, no opinion is advanced in that regard. However, a similar inquiry can be carried out in a different field, i.e., concerning the relationships among foreign investors and their respective host States, the latter classified depending on their legal origins. Would the same conclusion be appropriate?

The reason for choosing this field is that a specific data bank exists: the statistics carried by the United Nations Conference on Trade and Development ("UNCTAD") that compute the claims lodged by investors suing under the different international treaties protecting investors (international investments agreements or "IIAs"), of which the greatest part takes the form of bilateral investment treaties ("BITs") and, more recently, of investment chapters included in preferential trade agreements ("PTAs").[3]

Also, the same influence of French law exists, within its family of nations, in public law as well as in private law areas, to the extent that its administrative law can be considered an important "exportation product" for France.[4]

The proposed field of study presents important differences with the subjects covered by the Report since, in the latter, the involvement of the different governments was partial or non-existent in most cases and thus, to a great extent, more neutral from a political standpoint than the relations between a foreign investor and its host State. Also, the analysis itself cannot but be imperfect as it does not consider the proportion of claims against a given country over the total number of investments in that country protected by IIAs. Moreover, BITs are generally executed between First World nations and countries with emerging economies, where the flow of investments is mostly in one direction. Since the 2018 *Achmea* decision, intra-EU IIA protection has been declared incompatible with EU law.[5]

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[2] *See* Benedicte Fuvarque-Cosson, *Development of Comparative Law in France*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW, 35, 60-62, (Mathias Reimann and Reinhard Zimmermann, eds. 2006).

[3] *See* UNCTAD's Investment Policy Hub Investments Agreement Navigation [hereinafter UNCTAD Statistics] (Jan. 16, 2024) https://investmentpolicy.unctad.org/international-investment-agreements; *see also* Roberto Echandi, *Bilateral Investment Treaties and Investment Provisions in Preferential Trade Agreements*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS 3 (Katia Yannaca-Small ed., 2d ed.,2018).

[4] Yves Gaudemet, *L'exportation du droit administratif français. Brèves remarques en forme de paradoxe*, *in* MÉLANGES PHILIPPE ARDANT (1999), at 431; *see also* Didier Truchet, *Le rayonnement de la jurisprudence administrative en France*, Revue Juridique de l'Océan Indien, 165 (2005); L. NEVILLE BROWN & J.F. GARNER, FRENCH ADMINISTRATIVE LAW, 160-71 (3d ed. 1983).

[5] ECJ, *Slovak Republic v. Achmea*, Case C-284/16 (2018).

Nevertheless, despite these imperfections, the analysis of UNCTAD Statistics shows interesting results.

France does not tend to provoke investment disputes, but some developing countries that have adopted the French legal model often do. While the conclusions offered here are tentative, a focus on how administrative law doctrines function in France compared with how doctrines of French origin function in less economically developed countries, indicates that France has in place rules and institutions that act as countervailing factors to avoid the problems that some of those doctrines might otherwise provoke. In contrast, a country like Argentina, which uses an imperfect transplant of the original French model, has not incorporated those countervailing factors. Hence, the model becomes defective from the point of view of protecting investors' rights. There are indications that the same has occurred in a variety of developing countries that have received transplants of the French administrative law model.

This paper will show, first, the results of applying the classification of countries according to their legal origins proposed in the Report, to UNCTAD arbitration statistics, and will also comment on the appropriateness of such classification. Second, it will then analyze whether some of those results can be partially explained either by certain rules of French law or, instead, by the distortions those rules have suffered when transplanted abroad. For the reasons explained below, this analysis will be limited to a comparison between French and Argentine laws. Examples of similar situations arising in other countries placed within the French legal family will show that the problem may be more general. Because of the nature of this paper, conclusions will be in the form of suggestions for further studies.

I. WHAT UNCTAD STATISTICS ARBITRATIONS SHOW

In this section, the classification of countries depending on the origins of their legal systems will be applied to the statistics of arbitration claims brought by dissatisfied investors, who invoke the protection granted by investment treaties, against their host States. This exercise will show that countries with French legal origins have been subject to a higher number of claims than common law countries and thus supports – prima facie – the conclusions of the Report. However, a different conclusion may be reached by casting a closer look at the classification itself.

At present, more than 3,000 international investment treaties are in force, of which 2,220 are BITs.[6] They generally guarantee investors fair and equitable treatment by the host State and allow disputes between the foreign investor and the host country to be decided by arbitration under the auspices of different institutions and mechanisms: the International Centre for Settlement of Investment Disputes (ICSID), the Ad Hoc Dispute Settlement under UNCITRAL Arbitration Rules, the International Court of Arbitration of the International Chamber of Commerce (ICC) and the Stockholm Chamber of Commerce.[7]

UNCTAD Statistics show that up to the end of 2021, 1190 investment claims had been lodged, most of them under the ICSID framework, of which 809 had concluded, either due to the awards having been issued or because of abandonment of the claim or settlement of the dispute.[8]

As of the end of 2021, of the total 1190 investment arbitration claims reported in the UNCTAD Statistics, around 600 (depending on how certain countries of Africa and Asia are classified) had been brought against countries with French legal origins, but only 168 against common law countries.[9] This shows a rate of about ten arbitrations per country for the former and only four for the latter (although this latter average shows a somewhat distorted picture because half of such arbitrations were brought against only three of the common law countries: the United States, Canada, and India).

This finding would seem to coincide with the Report's conclusions concerning protecting investors in mostly private law situations. However, a deeper analysis shows that a more nuanced conclusion is appropriate. This is because almost two-thirds of the 600 claims brought against countries of French legal origin were lodged against Spanish-speaking countries, which means that an area where less than 10% of the world population lives has sparked about one-third of all investment arbitrations.[10]

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[6] *See* UNCTAD Statistics, *supra* note 3; *see also* Stephan W. Schill & Marc Jacob, *Trends in International Investment Agreements, 2010-2011: The Increasing Complexity of International Investment Law*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2011-2012, (Karl Sauvant ed., 2013).

[7] *See* Ucheora Onwuamaegbu, *International Investment Dispute Settlement Mechanisms*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS 3, *supra* note 3.

[8] *See* UNCTAD Statistics, *supra* note 3, at 57, 75.

[9] Similar results are reported for 2022: of a total of 46 new investment arbitrations started, 25 were brought against countries with French legal origins, including 16 arbitrations versus Spanish-speaking countries, while only 3 to 5 (depending on how certain Asian countries are classified) against common law countries. *See* UNCTAD Statistics, *supra* note 3.

[10] "Spanish speaking" and not "Latin American," because Brazil, the largest Latin American nation, is a late arrival to the BITs system and by the end of 2021 no arbitration claims had been lodged against it. Also, 55 claims had been registered against Spain but none against Portugal. In the case of Spain most of the claims arise from a common cause: a change in the conditions offered to investors in renewable energy under the Energy Charter Treaty. *See*, e.g. *AES Solar and Others (PV Investors) v. Spain*, Permanent Court of Arbitration Case No. 2012-14, award dated

The UNCTAD Statistics also show that countries with socialist legal origins have a higher number of arbitrations per country than those with French legal roots. If one includes within the German law family those countries that were formerly behind the Iron Curtain (e.g., Poland, Hungary, and the Czech Republic), then this group would also surpass the French group in arbitrations per country.

There seems, then, that certain political features such as the tradition – or lack of it– of respect for individual rights weigh equally or more on the treatment of private investors than the origins of that legal system. Such origins, therefore, could only act as a concurrent but not as a principal or single cause.

But what then to make of the fact that half of the arbitration claims brought against common law countries were lodged against only three of those countries: Canada, India, and the United States, thus allocating to these countries a higher number of claims than the average for the French legal origin countries?[11]

Legal origins do not seem, therefore, to constitute the exclusive rod by which to measure arbitration claims as evidence of the host state's different treatment of foreign investments.

Disputes among foreign investors and host countries can arise for many reasons, such as ambitious new regulatory schemes, changes of government that lead the incoming administration to challenge decisions of the former authorities (particularly if accusations of corruption are raised or widely differing ideologies between successive administrations exist), an unsophisticated civil serviced that takes unpremeditated decisions which are later disowned, economic problems that force a country to renege on former promises, and opportunistic official decisions that seek to benefit from a change in the rules once the investor has completed its investment but has not yet recovered it. These features have appeared in many of the reported international investment disputes.

Thus, legal origins may be, at most, a concurrent factor but not the only cause of the different treatment granted by host states to foreign investors.

Feb. 28, 2020; *Opera Fund v. Spain*, ICSID case No. ARB/15/36, award dated Sept. 6, 2019; Millan Requena Casanova, "Los arbitrajes de inversiones contra España por los recortes a las energías renovables: ¿cambio de tendencia en la saga de arbitrajes o fin de etapa tras la sentencia Achmea?", Rev. Aranzadi de Derecho Ambiental N° 42/2019, parte Doctrina.

[11] Arbitrations with the United States and Canada as respondents have been brought mostly under the North American Free Trade Area Agreement (NAFTA). The main thrust of these arbitrations, especially of those against Canada, has been to challenge new regulations. *See* Charles H. Brower II, *Against Imperial Arbitration: The Brilliance of Canada's New Model Investment Treat*y, 17 FIU L. REV. 1 (2023).

However, if one considers only countries with French legal origins, an interesting feature is shown by these statistics: if we exclude Spanish-speaking countries, France, together with those countries that were under direct French control either as colonies or protectorates, register about the same average of arbitrations under BITs as common law countries. France scores very well on most indicators, as recognized in the Report.[12] On the contrary, another country with a high number of arbitrations that was included as having French legal origins in the Report but was never (except for a very brief period) under French domination, is Egypt (46 arbitrations), which in at least one case defended its position (without success) using French legal theories.[13]

In one aspect in which the Report and the present analysis overlap, namely that of the risk of contract repudiation by the government, the Report also shows a better average score for common law countries (7.41 out of the best score of 10) than for French law countries (6.32). However, the average score of the latter almost coincides with that of common law countries when one excludes Spanish-speaking countries (7.2).[14]

These very preliminary findings suggest that countries where it can be assumed that French public law is strictly applied or was correctly taught do not have a high record of mistreatment of investors. Such a record seems to exist in those countries where French public law was imported and taught by local scholars but never applied by French public officers or tribunals.

Given this record of controversies and the broad international influence of French administrative law, two queries arise: Do some French legal doctrines allow abuses of government power against private investors, and second, can the case be—additionally or alternatively—of an erroneous transplant of those doctrines?

The queries raised will be analyzed with respect to Argentina, the country in which the author has taught and practiced law, not only to reduce the risk of incorrect comparisons but also due to the following reasons discussed below.

First, Argentina is a good example of a country adopting French administrative law doctrines, mainly through the work of leading scholars, a feature common to many Latin American countries.[15]

Also, since the 1990's, Argentina has executed more than 50 BITs.[16] By the end of 2021, it was the country that had the highest number of

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[12] The Report, p. 21 ("France is a top performer among French origin countries").

[13] UNCTAD Statistics, *supra* note 3. *See* section IV below.

[14] *See* Table 7 of the 1996 paper cited in note 1, above.

[15] *See* Hector A. Mairal, *The need for comparative administrative law studies in Latin America*, 5 Comparative Law Review 1 (2016).

[16] By 2016, Argentina had entered into, and ratified, 56 BITs. *See* C. Sommer, *Laudos arbitrales del CIADI*, 22-23 (2016) (showing full list as well as the laws that ratified those treaties); *see* UNCTAD Statistics, *supra* note 3, for similar figures: by the end of 2022 Argentina

investment arbitration claims brought against it: 62. Among countries that have been repeatedly sued under an investment treaty, Argentina has one of the worst records of successes: it has won only 20% of the 27 cases that had reached an award by the end of 2021, compared with 40% for Venezuela, 50% for Mexico, 60% for Ecuador and 75% for Peru.[17]

Finally (and this may explain the country's bad track record in investment arbitrations), most of the claims successfully brought against Argentina were based on contracts whose clauses the Government had disregarded invoking its sovereign powers, and not merely on the defeat of expectations of the subsistence of favorable regulatory regimes. The latter ground for investors' claims has prompted the greatest criticism of the dispute settlement mechanisms of the IIAs and of the decisions of "imperial arbitrators" who are accused of not respecting the regulatory powers of sovereign countries.[18]

Argentina may thus be a good case to analyze whether French law has had any influence on the high number of arbitration claims brought against the country.

II. THE PECULIARITIES OF FRENCH ADMINISTRATIVE LAW

To answer this question, it is necessary to explain very briefly some peculiarities of French law that differentiate it from Anglo-Saxon systems.

In England, there has been a tradition of invoking the assistance of the courts of law to curb the abuses of public officers from early times. Records of English judicial decisions curbing the power of the authorities exist from the early 1600s.[19]

The evolution in France was very different to the point that the edict of Saint Germain-en-Laye, a royal decree issued in 1641, established the principle that the function of the courts of law was to settle conflicts among individuals but not to enable individuals to challenge the decisions of royal officers before such courts.[20]

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had signed 61 treaties (of which 49 remained in force) and 19 other treaties with investment provisions (of which 12 remained in force).

[17] The impact on those averages of settlements and of awards rejecting arbitral jurisdiction, and thus not deciding on the merits, has not been taken into account. Argentina has been successful in obtaining awards that reduced significantly the amounts claimed. *Id.*

[18] *See* Brower, *supra* note 11.

[19] Bagg's case of 1615 is cited as an early case (*see* S.A. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 515 (3d ed. 1973).

[20] *See* FRANÇOIS BURDEAU, HISTOIRE DU DROIT ADMINISTRATIF 34 (1995); S. SOLEIL, *Administration, justice, justice administrative avant 1789. Retour sur trente ans de recherches*, *in*

This background, plus the historical resistance of the regional Parliaments (institutions that also acted as local courts of law) against the legislation that the Kings wished to introduce, explain the laws that date from the French Revolution of 1789, which continue in force today, that forbid the judicial courts from interfering with the functions of the administration.[21] The solution found to avoid depriving private citizens of all legal remedies against the government was to place the tribunals that have to pass on the legal controversies in which the administration is involved within the same administration, and to make the judgment issued by those courts final and not appealable before the judicial courts, a system that remains currently in place in France.[22]

That is why, in France, the judicial courts are seen to render a public service that the State provides to its citizens and not to constitute a third power that can control the other two, so much so that some French constitutional law authors talk of the existence on only two powers in France: the legislative and the executive.[23]

This also explains why Section 64 of the French Constitution of 1958, in force today, provides that the President of the Republic guarantees the independence of the judiciary. He is given that role because neither he nor his officers are subject—in respect to the validity of their decisions— to those judges.

The second peculiarity of French administrative law is its greater scope compared to Anglo-Saxon administrative law.

Practically all Western countries have a special law to regulate the exercise of power by the public administration. This need for a special law arises from an important difference between administrative law and the law governing private parties' relations. While in the latter, the imposition of duties or prohibitions requires, in principle, the consent of the party thus bound, the administration may—when the law so authorizes—impose unilaterally obligations on private citizens. This unilateral power, which, in principle, does not exist in private law, requires special rules both to determine the requirements and limits that its exercise must respect, as well

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REGARDS SUR L'HISTOIRE DE LA JUSTICE ADMINISTRATIVE 5-6 (Gregorie Bigot & Marc Bouvet, dirs., 2006).

[21] *See* FRANCOIS LUCHAIRE, GERARD CONAC & XAVIER PRÉTOT, LA CONSTITUTION DE LA RÉPUBLIQUE FRANÇAISE 1495-1509 (2009).

[22] *See* MARCEL WALINE, TRAITÉ ÉLÉMENTAIRE DE DROIT ADMINISTRATIF, 21-33 (9th ed. 1963) for the historical evolution; BROWN & GARNER, *supra* note 4, at 27-40.

[23] LUCHAIRE ET AL., *supra* note 21, at 1488. A recent work recognizes this feature of the French system while showing the more recent development of the judicial power in Continental Europe (LOUIS FAVOREAU, PATRICK GAIA, RICHARD GHEVONTIAN, JEAN-LOUIS MESTRE, OTTO PFERSMANN, ANDRE. ROUX & GUY SCOFFONI, DROIT CONSTITUTIONNEL, 413-16 (18th ed. 2016). *But see* B. PLESSIX, DROIT ADMINISTRATIF GÉNÉRAL, 335-38 (2d ed. 2018) (arguing that the judicial power has existed in France since the 1789 Revolution since personal freedom has always been protected by the judicial courts).

as to structure a system that protects the private individual against possible abuses of that power. Therefore, the legal systems of Western countries present important similarities in this aspect.

The French system and those that follow its model diverge from the Anglo-Saxon system in respect of the relations that arise between the administration and private parties in similar situations than those that may exist among private parties, i.e., in contractual and tort situations. This allowed the early development, in French law, of State liability in tort, long in advance of the similar development in common law systems. But the contractual area is even more relevant for our analysis. In it, the contrast is clear: while Anglo-Saxon law starts from a position of equality of the contracting parties, in certain contracts, French law recognizes to the administration a position of supremacy *vis a vis* its private counterparty, evidenced in a series of prerogatives which cannot be waived.[24] These prerogatives allow the administration—even if it is not specifically provided in the contract—to interpret it and even to modify and terminate it unilaterally for reasons of public convenience. The contractor cannot suspend performance by claiming the Government's default (i.e., allege the *exceptio non adimpleti contractus*). Also, the contractor must obey all decisions taken by the government as a contracting counterparty and, if it considers any such decision unwarranted by the contract, can only claim compensation unless the contract is of long duration and involves important investments, in which case it can challenge the decision to terminate the contract before the administrative tribunal.[25]

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[24] The main French text on the subject remains that of A. DE LAUBADÈRE, TRAITÉ DES CONTRATS ADMINISTRATIFS, 2d ed. with F. MODERNE and P. DELVOLVÉ (1983-84) (hereinafter DE LAUBADÈRE ET AL.); more modern but shorter works are CHARLES-ANDRE DUBREUIL, DROIT DES CONTRATS ADMINISTRATIFS (2d ed. 2022); L. RICHER, DROIT DES CONTRATS ADMINISTRATIFS (12th ed. with F. Lichère, 2021); C. GUETTIER, DROIT DES CONTRATS ADMINISTRATIFS (2004). Recent general works that treat this subject are PLESSIX, *supra* note 23; 2 PASCALE GONOD, FABRICE MELLERAY and PHILLIPPE YOLKA, TRAITÉ DE DROIT ADMINISTRATIF (2011). A comparative law analysis is provided in Hector A. Mairal, *Government Contracts Under Argentine Law: A Comparative Law Overview*, 26 FORDHAM INTERNATIONAL JOURNAL 1716 (2003). In recent years the doctrine of the administrative contract and the true scope of the exorbitant powers of the administration have been re-examined. *See* DUBREUIL, *supra*, at 232-52; 2 GONOD et al, *supra*, at 255-63. On the changes of the concept of administrative contract resulting from the influence of the rules of the European Union *see* MATHIAS AMILHAT, *La notion de contrat administratif – L'influence du droit de la Union Européenne* (2014).

[25] The decision of the *Conseil d'État* in *Commune de Béziers II* (2011 Recueil Lebon 117) has expanded to other contracts the possibility of challenging termination. *See* DUBREUIL, *supra* note 24, at 481-88. In 2016 a reform introduced in art. 1195 of the French Civil Code rules analogous to those of the doctrine of imprévision.

It is fair to say that there are special doctrines (that traditionally did not exist in French private law) applicable to those same contracts that protect the private contractor against administrative decisions that make the performance of the contract more onerous and also against unforeseeable economic changes that seriously affect the economy of the contract: the doctrines of the *fait du prince* and *imprévision*, respectively.[26]

The body of law governing administrative contracts in France has only recently been embodied in legislation.[27] Until then, it had been developed by the administrative tribunals in a way that resembled the work of common law courts, a work that will continue given the generality of the rules provided in the CCP.

The indirect result of these theories is the dilution of the obligatory nature of the contract, whether in favor of the administration or of the private party, as compared to the stricter respect of the *pacta sunt servanda* principle observed in the common law. This was experienced by English contractors who worked in the tunnel under the English Channel who began distrusting French administrative law but ended up invoking it in their favor because, given the interest of both Governments in having the tunnel completed, they found their requests considered in a favorable political environment.[28]

Additionally, in France, the State –through enterprises controlled by it– operates the main public utilities and is ever-present in daily reality. While the typical Anglo-Saxon trusts the market but not the State, the general attitude in France is exactly the opposite.[29]

These features—administrative tribunals and not judicial courts to judge the administration, supremacy of the administration *vis a vis* its contractors, and strong presence of the State—could lead to the conclusion that the legal protection of private investors against the government is weak in France. However, such a conclusion would be wrong. This is so for reasons that are not only legal but also institutional and even cultural.

In the first place, administrative tribunals—at the head of which is the *Conseil d'État*—although including among their members' public officers who have performed administrative offices in the past—are independent of

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[26] *See* BROWN & GARNER, *supra* note 4, at 125-131; RICHER, *supra* note 24, at 283-87, 302-05.

[27] It is mainly contained in the *Code de la Commande Publique*, *Ordonnance* 2018-1074 (hereinafter CCP).

[28] Statement made by the Chairman of the Company that built the tunnel in his speech at the opening ceremony of the International Bar Association Meeting in Paris, 1995.

[29] Alain Peyrefitte provides an eloquent description of this contrast in his book *Le mal français* (1976).

the so-called "active" or operative administration and enjoy high prestige.[30] This does not negate that the power of the administrative tribunals to create the rules that apply to cases that involve the administration and to adopt such rules as the circumstances change gives them a higher degree of discretion than that enjoyed by judicial courts who–apart from being separated from both parties of the controversy and thus fully impartial—are subject to the laws that govern private contracts, whether these laws are civil and commercial codes or, in Anglo Saxon countries, constitute common law protected from change by the doctrine of *stare decisis*.[31]

While being part of the administration and having such great power to make the law that they apply, creates a risk in case of lack of independence of the court, no major criticism of the French administrative courts in this regard appears in legal literature.[32]

Two factors further counterbalance this risk. First, the expertise that the judges of the administrative tribunals have in the exercise of administrative functions, gives them a good insight into the sincerity of the motives of general interest alleged by public officers to justify their conduct and thus allow them to control such motives to a degree arguably higher than that possible for a judicial court,[33] and to include in such analysis the value of the credibility of State contracts.

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[30] The independence of the administrative tribunals vis a vis the Executive and Parliament has been declared "a fundamental principle recognized by the laws of the Republic" by the Constitutional Council (decision of July 22, 1980).

[31] Even if restricted by recent legislation, the *Conseil d'État* retains a high degree of discretion in the shaping of administrative law rules, as shown by the following words from one of its members that define which administrative acts can be considered to create vested rights and thus become irrevocable after a short period (translation by the author): "an act creates vested rights if, on the one hand, someone has an advantage to keep it in force and, on the other (the *Conseil d'État*) considers that it can recognize to said act a stability that limits the possibility of the administration to challenge it, it being understood that (the *Conseil d'État*) has a broad discretion to determine – with respect to each type of act … in which case should the autonomy of the administration or the stability of individual situations prevail" (*See* ZÉHINA AIT-EL-KADI, ET AL. CODE DES RELATIONS ENTRE LE PUBLIC ET L'ADMINISTRATION, ANNOTÉ ET COMMENTÉ, DALLOZ 179-80 (2022), at, where it is said that these words remain true today). Thus, police authorizations, i.e. authorizations to conduct certain activities, do not create vested rights according to the jurisprudence of the *Conseil d'État*. PLESSIX, *supra* note 23, at 801.

[32] French legal writers have defended the *Conseil d'État* against criticisms of its lack of impartiality coming from tribunals of the European Union: *see* B. Pacteau, *La justice administrative française désormais en règle avec la Convention européenne des droits de l'homme?, in* REVUE FRANÇAISE DE DROIT ADMINISTRATIF (RFDA) 885 (2009). *See however* RICHER, *supra* note 24, at 666-67 (criticizing decisions on contract controversies that are "difficult to justify" and present an "unfortunate image" of the administrative jurisdiction).

[33] *See* DIDIER TRUCHET, LES FONCTIONS DE LA NOTION D'INTÉRÊT GÉNÉRAL DANS LA JURISPRUDENCE DU CONSEIL D'ÉTAT 171-73, 218-19 (Librairie Generale de Droit et de Jurisprudence ed.,1977); 2 DE LAUBADÈRE ET AL., *supra* note 24, at 666-67 (showing control of

Also, an important rule developed by the administrative tribunals is that—unless otherwise provided in the contract—when the administration exercises its special powers as a contracting party, such as amending or terminating unilaterally the contract for reasons of public convenience, it must compensate the contractor for all the damages it has suffered including loss of profits.[34] For this reason, says a leading author, termination of long-term agreements for reasons of convenience is very rare due to the high cost to the public Treasury that would be involved as a consequence.[35]

Additionally, cultural and institutional factors contribute to making the French system of controlling the legality of administrative action very effective. Senior government officers are recruited as a rule among the country's intellectual elite, which has been educated in establishments of great prestige such as the *École National de d'Administration* (replaced today by the National Institute of Public Service).[36] The French state is solvent and the principle of the unity of the State (that prevents a given administration from ignoring the commitments assumed by the previous one) does not seem to have ever been challenged.

Also, France belongs to the European Union. It is a party to the European Convention of Human Rights that, *inter alia*, guarantees not only to individuals but also to corporations, effective judicial protection emanating from an impartial court.[37] Several decisions of the courts of the Union have induced the adjustment of certain aspects of the French administrative court system that were considered to violate such guarantee, such as the inordinate duration of the trial before administrative tribunals (now significantly shortened), and the intervention in the process of an

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the existence of the reasons invoked by the administration but not of its importance); DUBREUIL, *supra* note 24, at 475-77 (showing control of the reasons of general interest that justify termination of the contract); RICHER & LICHÈRE, *supra* note 24, at 256-57 (discussing whether financial considerations constitute a legitimate reason to terminate the contract); *see generally* PETER CANE, ADMINISTRATIVE TRIBUNALS AND ADJUDICATION 86-90, 200-07 (Oxford and Portland ed., 2009) (describing expertise of French administrative tribunals and the tension it creates with their independence, and the comparison between review of administrative decisions in France and some common law jurisdictions) *see also* Peter Cane, *Judicial Review and Merits Review: Comparing Administrative Adjudication by Courts and Tribunals in* COMPARATIVE ADMINISTRATIVE LAW, 426 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010).

[34] 2 DE LAUBADÈRE ET AL., *supra* note 24, at 407-08, 669.

[35] *Id.* at 737.

[36] CANE, *supra* note 33, at 100.

[37] *See* EUR. CONSULT. ASS., *Convention for the Protection of Human Rights and Fundamental Freedoms and Protocol* (1950) (referencing articles 6(1) and 13 of the convention as well as articles ratified in 1952); JACQUES ROBERT & HENRI OBERDORFF, LIBERTÉS FONDAMENTALES ET DROITS DE L'HOMME: TEXTES FRANÇAIS ET INTERNATIONAUX 27 (LGDJ ed., 1999); JEAN WALINE, DROIT ADMINISTRATIVE 296-99 (Dalloz ed., 2014).

officer (formerly called *commissaire du gouvernement* and now *rapporteur*) without allowing the private party to opine on her report.[38]

The duration of the lawsuit is of special importance given the rule that allows the administration to decide on the construction of the contract as well as on its termination for reasons of public convenience or default of the contractor. As already explained, these decisions must—as a rule—be obeyed by the contractor but can generate a right of compensation for the contractor and, in some cases, may be annulled by the administrative tribunal. Therefore, a relatively quick decision may provide an opportune remedy to the contractor, while if the contractor must endure a very lengthy trial to determine the legality of the administrative decision, the remedy may finally have limited practical effects.

Traditionally, in France, controversies involving administrative contracts could not be submitted to arbitration, but this approach has changed in recent years.[39]

As can be seen, the French system presents features that make it risky to protect investors' rights in systems that lack the remedies and safeguards, both legal and institutional and cultural, that exist in France.

The questions that should be asked, then, are: first, if in the countries that have received the French juridical model this reception has been faithful and complete and, second, if these countries have been able to replicate the cultural and institutional features that in France put a limit to, and allow a remedy for, the State prerogatives.

III. A COMPARISON WITH RELEVANT ARGENTINE LEGAL RULES

The Argentine case may serve as a good test to seek answers to these queries.

Argentina is an example of the transplant of French administrative law in an imperfect way. This transplant could not have been imperfect given that Argentina's constitutional system is modeled after that of the United States with three separate powers neatly defined.[40] This means that

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[38] *See generally* Kress v. France, 6 Eur. Ct. H.R. at 41 (2001) (referencing as main case in support); Sacilor Lormines v. France, 8 Eur. Ct. H.R. at 163 (2006) (referencing as main case in support).

[39] *See* DUBREUIL, *supra* note 24, at 441-45.

[40] That the Argentine Constitution was following the U.S. model was stated by several members of the Constitutional Convention that produced the 1853 Constitution which, with several amendments, is still in force today. *See* RICARDO RAMIREZ CALVO & MANUEL JOSÉ GARCÍA-MANSILLA, LAS FUENTES DE LA CONSTITUCIÓN NACIONAL – LOS PRINCIPIOS FUNDAMENTALES DEL DERECHO PÚBLICO ARGENTINO (LexisNexis Argentina S.A. ed., 2006).

Argentina cannot have administrative tribunals in the French sense, i.e., administrative tribunals with general jurisdiction, the decisions of which are final and not subject to review by the judicial courts.

Argentine judicial courts have the same constitutional guarantees of independence as those provided in the United States Constitution, to the extent that the relevant sections of the Argentine Constitution that structure its judicial power are a translation of the relevant sections of the American Charter.[41] The Argentine Supreme Court has a long tradition of supporting its decisions with quotations of precedents of the United States Supreme Court.[42]

Despite the absence of administrative tribunals in the French sense, Argentine administrative law adopted many doctrines from French administrative law, such as those of the *service public* and the administrative contract. This was due to the high influence that French culture, in general, has exercised in Argentina since the nineteenth century, and to the fact that up to the beginning of the twentieth century the administrative law of the United States was not yet fully developed.[43] Thus, our authors, eager to import what was considered best in more advanced countries, followed U.S. constitutional law precedents and authors, and French – and to a lesser extent Italian and Spanish – administrative law literature.[44]

Thus, the first question is: Can there be a true transplant of French administrative law without one of its fundamental features? Specifically, that of a separate jurisdictional system? And more importantly, should the administration enjoy special prerogatives in its contractual relations without being subject to the closer scrutiny made possible by the intervention of administrative tribunals?[45]

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[41] *Compare* U.S. CONST. art. III *with* Art. 108, 110, 116-19, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

[42] *See* Jonathan M. Miller, *The Authority of a Foreign Talisman: a Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite's Leap of Faith*, 46 THE AM. UNIV. LAW REV. 1483 (1997); Alberto F. Garay, *A Doctrine of Precedent in the Making: The Case of the Argentine Supreme Court's Case Law*, 25 SW. J. OF INT'L LAW 258 (2019).

[43] *See* RICHARD J. PIERCE JR., ADMINISTRATIVE LAW TREATISE 10 (2010) (stating that "Until recently [U.S.] administrative law in the nineteenth century was inaccessible to researchers").

[44] Rafael Bielsa, the author of the first comprehensive treatise of Argentine administrative law, recognized the U.S. model of the Argentine Constitution but explained from its first pages the system of remedies developed by the Counseil d'Etat and considered U.S. administrative law "relatively limited" contrasting it with the "innumberable works" of great value on U.S. constitutional law. *See* RAFAEL BIELSA, 1 DERECHO ADMINISTRATIVO at 1-12, 19 (5th ed. 1955); *see also* Mairal, *supra* note 15.

[45] *See* TRUCHET, *supra* note 33, at 171-73, 218-19; 2 DE LAUBADÈRE ET AL., *supra* note 24 (showing control of the existence of the reasons invoked by the administration but not of its importance); DUBREUIL, *supra* note 24, at 475-77 (showing control of the reasons of general interest that justify termination of the contract); RICHER & LICHÈRE, *supra* note 24, at 256-57

Apart from this, the imperfection of the transplant also results from the exaggeration of the French rules that grant special powers to the administration (even as a contracting party) and from the lack of full application of the rules that limit such power or compensate for the consequences of its exercise.[46]

For example, the definition of an administrative contract, i.e., a contract in which the government enjoys special prerogatives which place it in a position of supremacy vis a vis the private contractor, is broader in Argentina than in France.

According to the precedents of the *Conseil d'État*, and simplifying a very complex subject, an administrative contract is one that is entered into by a public entity and presents any of the following features:

> (i) is so defined expressly by the law; (ii) involves the operation of a public service or is closely connected to such operation; (iii) includes clauses that grant to the administration special powers (prerogatives) over the contractor (the so called "exorbitant clauses"); or (iv) is subject to a special legal regime that provides for the existence of such powers.[47]

In France, the first category has been greatly expanded by a 2001 law that includes within the definition of administrative contracts all contracts of works or the supply of goods and services,[48] so much so that it is now argued that some of these contracts, even if falling under that definition, should not be governed by the rules that generally apply to the performance of all administrative contracts. Such is the case of insurance contracts, which are included in the 2001 law but, arguably, should not be subject to the power of the administration to change them unilaterally for reasons of public convenience.[49]

(discussing whether financial considerations constitute a legitimate reason to terminate the contract); *see generally* CANE, supra note 33, 86-90, 200-07 (describing expertise of French administrative tribunals and the tension it creates with their independence, and the comparison between review of administrative decisions in France and some common law jurisdictions); CANE, *supra* note 33, at 426. On the debate concerning the possibility of legal transplants, *see* ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2nd ed.,1993); Pierre Leggrand, *The Impossibility of Legal Transplants*, 4 MAASTRICHT J. OF EUR. COMPAR. LAW 111 (1997).

[46] *See generally* Hector A. Mairal, *De la peligrosidad o inutilidad de una teoria general del contrato administrative*, *in* 180 El DERECHO 773 (1999).

[47] RICHER & LICHÈRE, *supra* note 24, at 89-120; GONOD ET AL., *supra* note 24, at 229-37.

[48] Loi 2001-1168 du 11 du 11 décembre 2001 portant mesures urgentes de réformes à caractère économique et financier [Law 2001-1168 of December 11, 2001 relating to urgent reform measures of an economic and financial nature], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Dec. 12, 2001, p. 19703, 19705.

[49] *See* FRÉDÉRIC ALLAIRE, LES MARCHÉS PUBLICS D'ASSURANCE : CONTRIBUTION À LA THÉORIE DE LA FORMATION DES CONTRATS, 258-62 (2007) (criticizing the application of the administrative power of unilateral amendment to insurance contracts).

Even if the French definition of an administrative contract would seem very broad to a common law practitioner, the Argentine definition is still broader. The Argentine Supreme Court has defined an administrative contract as one in which the contractor fulfills a "public purpose."[50] It is not difficult to see that this definition allows any government contract to be considered an administrative contract because it should have a public purpose unless it has been entered for improper reasons. Moreover, while in France, the rule appears to be that contracts entered into by public entities are presumed to be private law agreements unless the features that give it an administrative character exist, in Argentina, the administrative nature of contracts executed by public entities is presumed.[51] In practice, contracts with the Argentine Government are seldom private law contracts, and even those negotiated under private law rules are often characterized as administrative by its lawyers once a controversy in their respect arises, in order to invoke the prerogatives that this category recognizes in favor of the government party.

Secondly, the French rule that allows the administration to alter the contract for reasons of public convenience is limited to changes in its performance required by supervening reasons that are required in the general interest.[52] Thus, as a rule, financial clauses are considered excluded from this power.[53] Even those authors who argue that the administration can reduce the rates contractually agreed with the utility operator (a position

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[50] Corte Suprema de Justicia de la Nación (National Supreme Court of Justice, Argentina (hereinafter "CSJN"), Organizacion Coordinadora Argentina c. Secretaria de Inteligencia del Estado de la Presidencia de la Nación [1996-E] La Ley 76. Definitions put forward by administrative law writers are similarly broad. *See* 3-A MIGUEL S. MARIENHOFF, TRATADO DE DERECHO ADMINISTRATVITO, 3rd. ed. (1983) 34; JUAN CARLOS CASSAGNE, 2 CURSO DE DERECHO ADMINISTRATVITO, 12th ed., 2018, 379.

[51] For France, *see* DUBREUIL, supra note 24, at 69. For Argentina, *see* Decree No. 1023, Aug. 13, 2001, [LXI-D] A.D.L.A. 4144, (hereinafter the "Government Contracts Regulation" or "GCR"), art. 1 (Arg.). *See also* RODOLFO CARLOS BARRA, CONTRATO DE OBRA PUBLICA, 37-47 (Editorial Abaco de Rodolfo Depalma, 1984) (arguing that government contracts can never be subject to private law and that even in common law regimes the contracting officer has powers similar to those resulting from the administrative contract doctrine). But the imprecise notion of what constitutes an administrative contract and the generalization of the government prerogatives to all contracts that may qualify as such does not exist in common law systems.

[52] 2 DE LAUBADÈRE ET AL., *supra* note 24, at 406-07; *see* GONOD ET AL., *supra* note 24, at 229-37 (showing that power to amend the contract unilaterally has been significantly curtailed by European Union directives that seek to avoid the indirect violation of the rules protecting the equality among bidders for government contracts); *see also* GUETTIER, *supra* note 24, at 339. The matter is now governed by the CCP, secs. 2194 and 3135 both of the law and of the implementing regulation, for acquisitions and concessions respectively. These rules do not seem to change the previous jurisprudence of the *Conseil d'État*.

[53] HÉLÈNE HOEPFFNER, LA MODIFICATION DU CONTRAT ADMINISTRATIF, 187, 191 (L.G.D.J. ed., 2009) (interpreting the arrêt Union des Transports Urbains et Régionaux [1983 Recueil Lebon 33] as allowing changes in the financial conditions that result from changes in performance, provided the economic balance of the contract is respected); *see also* GONOD ET AL., *supra* note 24, at 248; PLESSIX, *supra* note 23, at 1266.

never accepted by the *Conseil d'État* according to a leading authority)[54] add that this power does not hurt the operator because the administration should then pay compensation for such reduction.[55] In Argentina, while the authors use similar examples of unilateral contract modifications, the rule is expressed in such general terms that would empower the government party to amend any contractual clause (even financial ones) if it believes it necessary for reasons of public interest.[56] The 2001 Government Contracts Regulation provides such a general rule.[57] Also, Argentina has repeatedly argued that utility rates, even when rules for their determination are included in the contract documents, have a regulatory and not a contractual nature and thus must always be fixed by the Government in the exercise of its discretionary powers,[58] ignoring French precedents and opinions that negate such power or recognize it subject to the payment of an indemnity to the operator.[59]

Argentina has defended its position in investment arbitration with the principle that the rates charged by the operator should always be "fair and reasonable," regardless of what the contract says.[60] However, in the practical application of the principle, it has ignored the strictures of French administrative law, according to which the rates should cover all the following items: operation costs, depreciation, interest, and a "reasonable

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[54] 2 DE LAUBADÈRE ET AL., *supra* note 24, at 667-71.

[55] *See* RICHER & LICHÈRE, *supra* note 24, at 268-69.

[56] 3-A MARIENHOFF, *supra* note 50, at 399-403.

[57] Decree No. 1023, Aug. 13, 2001, [LXI-D] A.D.L.A. 4144, art. 12 (Arg.).

[58] Int'l. Ctr. for Settlement of Inv. Disp. [ICSID] Washington, D.C., *In proceeding between CMS Gas Transmission Company (Claimant) and The Argentine Republic (Respondent)*, at 28, 39-40, Case No. ARB/01/8, (May 12, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0184.pdf.

[59] *See* 2 DE LAUBADÈRE ET AL., *supra* note 24, at 435-36 (showing that in France, rates payable by users are considered to have a regulatory nature but without this opening the door to unilateral modifications by the administration); RICHER & LICHÈRE, *supra* note 24, at 268-69 (allowing changes provided the operator is compensated). Even after the enactment of the CCP this issue is not clearly regulated.

[60] *See* Int'l. Ctr. for Settlement of Inv. Disp. [ICSID] Washington, D.C., *Certificate EDF International S.A., SAUR International S.A. and Leon Participations Argentinas S.A. v. Argentine Republic*, at 77, Case No. ARB/03/23, (June 11, 2012), https://www.italaw.com/sites/default/files/case-documents/ita1069.pdf; Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 18/08/2016, "Centro de estudios para la promociaon de la igualdad y la solidaridad y otros c/ Ministerio de energia y mineria s/amparo colectivo," 339 Fallos 1077 (Arg.) (showing Supreme Court admitted that tariffs need not compensate the costs of the operator since the government had other instruments to regulate utility rates such as subsidies).

profit" for the operator, and that the government should compensate deviations from the contract.[61]

Third, and most importantly, the remedies for the contractor are more limited in Argentina than in France. In both countries, the private contractor cannot suspend its performance or terminate the contract on the basis of the government's default of its contractual duties, but it must sue to obtain such a result while remaining bound to continue performing.[62] However, in France, when the administration exercises its power to amend or terminate the agreement unilaterally for reasons of public convenience, the contractor is entitled to full compensation, including loss of profits.[63] In Argentina, the Government's Contract Regulation does not allow loss of profits in similar circumstances.[64]

This last difference effectively grants government contracting officers a significant power over contractors, whose profits may be curtailed almost at will. In a public works or supply contract, the rule is noxious but not fatal, as typically the private contractor collects its compensation as the work or supply is performed, and there is a limited (relative to the size of the contract) initial investment. The situation is very different when the main investment must be made at the beginning of the venture and compensation is to be collected during the long life of the agreement, such as a concession to build a highway and recover the investment through tolls; not many investors may be willing to advance funds on such a weak contractual basis.[65]

The exaggerations go beyond the field of government contracts. Argentina's Administrative Procedure Law provides that the rules on unilateral administrative decisions also apply to government contracts and that all such decisions – even if they grant rights to individuals — can be terminated for reasons of public convenience.[66] While compensation for the

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[61] *See* JEAN-FRANCOIS LACHAUME ET AL., DROIT DES SERVICES PUBLICS 440-41 (LexisNexis ed., 2018); CHARLES F. PHILLIPS, JR., THE REGULATION OF PUBLIC UTILITIES: THEORY AND PRACTICE (3d ed. 1993) (demonstrating by example that in most French law books the treatment of utility rates is limited to the enunciation of a few general principles, while the detailed analysis found in the U.S. is a subject considered to pertain to the "science of administration").

[62] *See* 2 DE LAUBADÈRE ET AL., *supra* note 24, at 654; 3-A MARIENHOFF, *supra* note 50, at 376-85, 588-89 (Argentina); GONOD ET AL., *supra* note 24, at 258 (showing that is it now permitted in France to include in the contract the contractor's right to suspend performance).

[63] 2 DE LAUBADÈRE ET AL., *supra* note 24, at 667-71.

[64] So provides sec. 12 of decree 1023. This rule does not apply to contracts entered before the issuance of the GCR in 2001. *See* Decree No. 1023, Aug. 13, 2001, [LXI-D] A.D.L.A. 4144, art. 37 (Arg.).

[65] *See* Decree No. 1299, Dec. 29, 2000, [LXI-A] A.D.L.A. 222, art. 19 (Arg.); Law No. 27328, Nov. 16, 2016, [LX] A.D.L.A. 222, art. 9-11 (Arg.) (explaining that recent efforts of the Argentine Government to promote private investment in infrastructure projects established special regimes that excluded the main rules of the administrative contract doctrine).

[66] Decree-law No. 19549, Apr. 3, 1972, [XXXII-B] A.D.L.A. 1752, art. 7, 18 (Arg.) [hereinafter APL] (the rule applying to contracts the regime of unilateral decisions has now been

damages caused to the holder of the terminated right is required, such compensation, according to leading Argentine jurists, does not include loss of profits.[67] A rule that has recently been included in the law that governs State tort liability may now be invoked in support of this position: no loss of profits can be awarded when the government's lawful action causes the prejudice.[68] So, the argument goes, if the government, as a contracting party, can terminate a contract for reasons of public convenience, such a measure should be considered lawful. Thus, compensation for the damages caused to the contractor should not include loss of profits.

Moreover, the administration may revoke its prior decisions when it considers them "absolutely void."[69] This rule also applies to decisions that create rights when the beneficiary knew the nullity, an easy allegation also applies to decisions that create rights when the beneficiary knew of the nullity, an easy allegation given the principle that ignorance of the law is no defense.[70] This power of revocation was not subject to any statute of limitations, but now a 10-year term applies.[71]

The contrast with French law on this point is stark. In France, administrative individual decisions that grant rights cannot be terminated, with or without retrospective effect,[72] unless they are illegal. This power can only be exercised within four months from the date when the decision was issued,[73] a limit that does not apply in case of fraud.[74]

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repealed: *see* APL art. 7 as amended by law 27,742). At this point, a common law practitioner may question the logic of subjecting unilateral acts and different types of contracts to the same rules, but excessive generalizations are a feature of reasoning and legal drafting in civil law countries. *See* Garay, *supra* note 42, at 288-91, for a discussion on the idea prevalent in Continental Europe that "legal reasoning is about general rules."

[67] JULIO RODOLFO COMADIRA & LAURA MONTI, PROCEDIMIENTOS ADMINISTRATIVOS: LEY NACIONAL DE 1 PROCEDIMIENTOS ADMINISTRATIVOS ANOTADA Y COMENTADA 390-96 (2002). Compensation for loss of profits is now required: *see* APL, *supra* note 66, art. 17, as amended by law 27,742.

[68] Law No. 26944, Aug. 7, 2014, [LXI-D] A.D.L.A. 4144, art. 5 (Arg.).

[69] APL, *supra* note 66, art. 17. Article 14 of the APL lists the defects that result in "absolute nullity." *Id.* art. 14. These include some broad reasons such as "non-conformance to law" and "serious violation of applicable procedures." *Id.*

[70] Fraud (and not mere knowledge) is now required to justify revocation. *See* APL, art. 17 as amended by law 27,742.

[71] *See* COMADIRA & MONTI, *supra* note 67, at 371-72; APL, *supra* note 66, art. 22 as amended by law 27,742.

[72] *See* Code des Relations entre le Public et l'Administration [Code of Relations between the Public and the Administration] art. L240-1 (Fr.) (explaining that in French law, termination with retrospective effect is call revocation and without it abrogation).

[73] See *Ternon*, 2001 Recueil Lebon 497. This rule is now included in the CRPA, art. 242-1. The prior rule, established in the arret Dame Cachet (1922 Recueil Lebon 790) set a two month limit from the date of notice of the decision.

Procedural differences also exist between the two legal systems. In both countries, a government's individual decision (i.e., not a regulation) must be challenged within a very short period (two months in France and fifteen days in Argentina) to avoid becoming final as a judgment and thus considered lawful and not subject to subsequent legal challenge by the affected party.[75] However, in France, the lack of such a timely challenge – as a rule – does not bar a subsequent action for damages based on the illegality of the decision.[76] The opposite rule applies in Argentina, where after fifteen days without an administrative challenge, the decision (even if rendered in a contractual context) becomes final, is considered lawful, and thus cannot give rise to a damages award based on its illegality.[77]

The need for legal certainty has been invoked in Argentina to justify the short term which applies to challenges of administrative decisions by private parties.[78] However, the fifteen-day term does not apply to challenges brought by the government against its own prior decisions, and if the decision is considered absolutely void, there was no statute of limitations for such a challenge.[79] This shows that in Argentina, the principle of legal

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[74] Code des Relations entre le Public et l'Administration [Code of Relations between the Public and the Administration] art. L241-2 (Fr.).

[75] *See* Code de la Justice Administrative [Code of Administrative Justice] art. R421-1 (discussing France); *See* APL, *supra* note 66, art. 23 (discussing Argentina) and its implementing regulation approved by Decree No. 1759, Apr. 3, 1972, [LXI-A] A.D.L.A. 222, art. 89-90 (as amended) (the 15-day term has now been extended to 30 days. *See* APL art. 23 as amended by law 27,742; and its implementing regulation, art. 90 as amended by decree 695 of 2024). In France, the challenge of regulations is subject to the same two-month limit – in this case from the date of publication – but the defense of the illegality of the regulation is perpetual. *See* REMI ROUQUETTE, PETIT TRAITE DU PROCES ADMINISTRATIF 596 (2020).

[76] *See* BERNARD PACTEAU, TRAITÉ DE CONTENTIEUX ADMINISTRATIVE 223 (2008); ROUQUETTE, *supra* note 75, at 595.

[77] *See* Corte Suprema de Justicia de la Nacion [CSJN] [National Supreme Court of Justice], 5/4/1995, "Gypobras S.A. c. Nacion Argentina (Ministerio de Educacion y Justicia)," 318 Fallos 441 (Arg.); Corte Suprema de Justicia de la Nacion [CSJN] [National Supreme Court of Justice]. 20/8/1996, "Alcántara de Díaz Colodrero c. Banco de la Nación Argentina," 319 Fallos 1476 (Arg.); Camara Federal de Apelaciones [CFed.] [Federal Courts of Appeals], 24/4/1986, "Petracca e Hijos S.A. et al v. Estado Nacional," La Ley [L.L.] (1986-D-10) (Arg.). Rules on contractual disputes have now been amended. *See* APL, *supra* note 66, art. 23 as amended by law 27,742.

[78] *See* Corte Suprema de Justicia de la Nacion [CSJN] [National Supreme Court of Justice], 26/10/1993, "Fernando Horacio Serra y Otros c. Municipalidad de la Ciudad de Buenos Aires," 316 Fallos 2454 (Arg.); Gypobras, *supra* note 77.

[79] *See* Corte Suprema de Justicia de la Nacion [CSJN] [National Supreme Court of Justice], 24/11/1937, "Sociedad Anónima Empresa Constructora F.H. Schmidt c. Provincia de Mendoza," 179 Fallos 249 (Arg.); Corte Suprema de Justicia de la Nacion [CSJN] [National Supreme Court of Justice], 27/6/1941, "S.A. Ganadera 'Los Lagos' v. Nacion Argentina," 190 Fallos 142 (Arg.). *See also* Camara de Apelaciones en lo Civil y Comercial Federal [CApel.CC] [Federal Court of Appeals in Administrative Matters], sala 3, 3/7/1997, "Maruba SCA c. Estado Nacional Ministerio de Economia y Obras y Servicios Publicos s. Medidas Cautelares," La Ley [L.L.] (1998-A-151) (Arg.). *But see*, APL, *supra* note 66, art. 22 as amended by law 27,742; APL, *supra* note 66, art. 23 as amended by law 27,742.

certainty plays only in favor of the government not in favor of private individuals, as in France.

Resorting to the Argentine federal judicial system involves a significant delay in reaching final judgment compared to the current situation in France, as well as important costs and contingencies that do not exist in France.[80]

In Argentina, six years has been calculated as the average duration of a lawsuit up to the judgment of the lower court.[81] Since—as a rule—two successive appeals can be lodged until reaching a final decision from the Supreme Court, ten years can be considered the normal duration of a full lawsuit, but fifteen and twenty-year durations are common. In addition, collection of the sums awarded by a judgment against the government can take up to three years from the date when the judgement has become final.[82]

In contrast, currently one year is the time generally required in France to reach the judgement of the lower administrative tribunal, and one to two more years to exhaust appeals against it.[83]

Finally, like most Latin American countries, Argentina is a party to the 1969 American Convention of Human Rights (also called *Pact of San Jose de Costa Rica*), an instrument that includes rules on judicial protection

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[80] A court tax of 3% of the economic amount of the controversy (whether expressly stated or merely implied) must be paid by plaintiff at the outset of the litigation before the Argentine federal courts. *See* Law No. 23898, Oct. 23, 1990, [L-D] A.D.L.A. 3751, art. 2 (Arg.). This amount may be huge (there is no ceiling) and it is lost if the claim is defeated for any reason (e.g., as premature) and a new court tax must be paid when the subsequent claim is filed. Also, if the claim is defeated, as a rule, loser must pay the legal fees of counsel for the winner, which are calculated as a percentage of the amount involved and may exceed 20% of such amount. *See* CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. PROC. CIV. Y COM.] [CIVIL AND COMMERCIAL PROCEDURE CODE] art. 68 (Arg.); Law No. 27423, Nov. 30, 2017, [LX-A] A.D.L.A. 2018, art. 21 (Arg.). In contrast, in France there was a court tax of 35 euros, now eliminated, and no other major expenses exist unless the claim is found abusive by the court in which case it may impose a penalty of up to 10,000 euros. *See* ROUQUETTE, *supra* note 75, at 991-93.

[81] Horacio D. Rosatti, *Los tratados bilaterales de inversión, el arbitraje obligatorio y el sistema constitucional argentino* [Bilateral Investment Treaties, Mandatory Arbitration, and the Argentine Constitutional System], 2003-F La Ley [L.L.] 1283, n.28 (Arg.).

[82] See Law No. 11672, Sept. 9, 2005, [LXV-E] A.D.L.A. 694 (Arg.) *restated by* Decree No. 1110, Sept. 9, 2005, [LXV-E] A.D.L.A. 4651, art. 132 (Arg.) setting the rules on the time required to comply with budget requirement.

[83] *See* Jean-Marc Sauvé, *Le juge administratif face au défi de l'efficacité* [*The Administrative Judge Facing the Challenge of Efficiency*], 12 REVUE FRANÇAISE DE DROIT ADMINISTRATIF [R.F.D.A.] 613-16 (2012) (Fr.). However, complaints about delays continue. *See* ROUQUETTE, *supra* note 75, at 301-02; *see also* Jean Massot, *The Power and Duties of the French Administrative Judge, in* COMPARATIVE ADMINISTRATIVE LAW 420-21 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010).

similar to those of the European Convention of Human Rights.[84] However, unlike Europe, which extended the Convention's coverage to corporations and other legal entities by means of a 1952 Addenda, no such extension has been agreed by Latin American countries, so, according to the Interamerican Court of Human Rights, the American Convention only protects the rights of human beings.[85]

When one looks at "law in practice," the difference with French law is even more marked. French administrative law rules are sometimes presented with a degree of generality that would surprise a common law practitioner.[86] However, the application of those general rules seems to be more prudent in France than in Argentina.

This happens mainly because, even without distortion, the same rule can have very different consequences depending on the political and economic context and on the financial situation of the government. Thus, the rule that the contractor must continue performing even if the administration is in arrears in its payments, subjects such contractor to severe financial stress when the government is perennially insolvent. The French rule that sets a four-month limit for the government to revoke its own decisions, except in cases of fraud,[87] would not constitute an effective limit on such revocations in a political scenario where blanket accusations of fraud are customarily thrown at the previous administration when there is a change of regime.

Also, a freeze of utility rates in the context of double-digit inflation (as it happened in Argentina in the years after 2002), effectively implies their drastic reduction in a matter of months. Thus, if the remedy is an ordinary action that lasts ten to twenty years (the matter being considered too complex for a summary procedure), the operator will be bankrupt before court succor arrives. Particularly, being forced to obey contractual changes and other decisions of the government party during the performance of the

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[84] *See* Organization of American States, American Convention on Human Rights, art. 8, 25, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 144. This convention was approved in Argentina by law 23,054 of 1984 and incorporated as part of the Constitution in the 1994 Reform. *See* Art. 75, ¶ 22 CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

[85] *See* Herrera Ulloa v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No.12367 (July 2, 2004); Usón Ramírez v. Venezuela, Preliminary Objects, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 36 (Nov. 20, 2009); *see* Corte Suprema de Justicia de la Nacion [CSJN] [National Supreme Court of Justice], 12/11/2019, "Aceitera General Deheza S.A. c. Estado Nacional," 342 Fallos 2051 (Arg.) (applying the Convention rules to a corporation). The opinion of legal writers on the matter is divided: Bidart Campos was in favor of such application while Pinto is against it. *See* GERMÁN J. BIDART CAMPOS, TEORÍA GENERAL DE LOS DERECHOS HUMANOS 41 (1989); MÓNICA PINTO, TEMAS DE DERECHOS HUMANOS 13 (2009).

[86] *See* the decision of the *Conseil d'État* in *Union des Transports* (*supra* note 53), stating that the power of unilateral modification applies to all administrative contracts although the case involved bus lines concessions.

[87] *See supra* notes 73-74 and accompanying text.

contract, and then having to wait ten to twenty years for a judicial remedy (which may well exclude loss of profits) places private concessionaries in a fragile legal situation while, at the same time, providing the government with the opportunity of being popular with the voters (who obviously prefer cheap utility rates) at the expense of the operators.

The Argentine Government always invokes the special rules of administrative law in its controversies. Some of these rules, such as time limitations, are applied strictly by the courts, while others have been tempered. Such is the case of the obligation to continue performance despite the government's default, which, in the majority opinion, ends when such default makes it "reasonably impossible" for the contractor to continue performing.[88] However, this is a difficult defense for the contractor to invoke as it cannot know how much financial stress the court will consider necessary to exonerate it.[89] Also, the constitutionality of excluding loss of profits has been challenged,[90] but no firm rule yet exists in this regard.

Experience shows that mistreatment of investors is a consequence not only of the substantive legal rules but also of the lack of effective and timely procedural remedies before the local courts.[91] The situation improves when international arbitration is possible, and thus, foreign investors frequently resort to the remedies provided by BITs.

Argentine defenses based on Argentine administrative law doctrines based on French law have been mostly rejected or ignored by international arbitration tribunals that have been asked by foreign investors to enforce BITs.[92]

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[88] *See* 3-A MARIENHOFF, *supra* note 50, at 373, 385; MIGUEL ANGEL BERÇAITZ, TEORÍA GENERAL DE LOS CONTRATOS ADMINISTRATIVOS 370-75 (2d ed. 1980).

[89] *See* Corte Suprema de Justicia de la Nacion [CSJN] [National Supreme Court of Justice], 2/3/1993, "Cinplast I.A.P.S.A. v. E.N.Tel.," 316 Fallos 212 (Arg.) (rejecting the suspension decided by the contractor).

[90] *See* 1 CASSAGNE, *supra* note 50, at 511-16.

[91] *See* Hector A. Mairal, The Silence of the Argentine Courts (unpublished paper) (on file with the N.Y.U. Inst. for Int'l L. and Just.).

[92] Argentina has also invoked the defense of a state of emergency against many of the investment claims brought against it, successfully in some cases. *See* Sommer, *supra* note 16, at 72-81. But the inordinate extension of the 2002 declaration of emergency (16 years) could not but weaken such defense: the emergency declared by Law 25,561 of January 6, 2002, that terminated the convertibility or "currency board" regime that had been in force since 1991, was to last until December 10, 2003. This was extended successively by laws 25,820, 25,972, 26,077, 26,204, 26,339, 26,456, 26,563, 26,729, 26,896, and 27,200 until Dec. 31, 2017, when the regime finally expired. Moreover, the Executive justified one of last extensions that it was then proposing to Congress not on the internal situation of Argentina (which was described as prosperous) but on the international situation at the time (described as troubled) that required that the Argentine Executive have emergency powers to deal with it (see the message that the Executive sent to Congress in 2013 introducing a bill to extend the emergency until December 31, 2015, that

Thus, in *Azurix,* the defendant argued that under the doctrine of the administrative contract, the concessionaire was not allowed to suspend performance or to terminate the contract by itself, claiming the default of the government party, but had to request such termination to the court.[93] Hence, the termination declared by the concessionaire implied an abandonment of the concession and, thus, a default of the concessionaire. The tribunal admitted that the text of the concession contract provided for different rules in case of default of the Government or of the concessionaire, but applied the *exceptio non adimpleti contractus* (i.e., the concessionaire's defense of non-performance by grantor) in order to effectively reject the Government's argument as contrary to the fair and equitable treatment standard of the relevant BIT.[94] In other cases, the tribunal found that French doctrines allowed compensation being payable to the concessionaire,[95] or found no difference between the applicable Argentine rules and those of international law.[96] In *Total,* loss of profits was awarded to the claimant due to the respondent's refusal to honor export licenses previously granted.[97] In *Webuild*, the tribunal rejected to follow the

became law 26,896). Thus, in *BG Group PLC v. Argentina* the tribunal noted that the emergency declared in 2002 was still in effect five years afterwards. *See* BG Group PLC v. Republic of Argentina, UNCITRAL, Award, para. 151 (Dec. 24, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0081.pdf. In *Hochtief v. Argentina* the tribunal held that, for purposes of that arbitration, the emergency should be considered to have ended by May 2003. *See* Hochtief AG v. Argentine Republic, ICSID Case No. ARB/07/31, Decision on Liability, para. 294-95 (Dec. 29, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw4101.pdf. In *Webuild v. Argentina*, continuance of the emergency was also rejected. *See* Salini Impregilo S.P.A. v. Argentine Republic, ICSID Case No. ARB/15/39, Decision on Jurisdiction and Admissibility, para. 354 (Feb. 23, 2018), https://www.italaw.com/sites/default/files/case-documents/italaw9546.pdf.

[93] *See* Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, para. 253, 260 (July 14, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0061.pdf.

[94] *Id.* at 260. *Azurix v. Argentina* involved, *inter alia*, the quality of the water supplied by the concessionaire. However, the tribunal found that grantor was the party mostly responsible for this problem. *See id.* at para. 143-44. It also found that "the tariff regime was politized because of concerns with forthcoming elections or because the concession was awarded by the previous government." *Id.* at para. 375. In the annulment proceedings Argentina challenged the award for having applied the *exceptio* in the context of an administrative contract and thus in violation of Argentine law but the annulment tribunal rejected this argument holding that the award had taken into account the *exceptio* to evaluate the conduct of the grantor under international law principles. *See* Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic (Sept. 1, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0065.pdf.

[95] *See* CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, para. 221-26, 244-46 (May 12, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0184.pdf.

[96] National Grid P.L.C. v. República Argentina, UNCITRAL, Award, para. 88 (Nov. 3, 2008); BG Group PLC v. Argentina, UNCITRAL, Award, para. 96 (Dec. 24, 2007).

[97] Total v. Argentina, ICSID Case No. ARB/04/1, Liability Decision, para. 460 (Dec. 27, 2010).

argument of respondent's expert witness that the administrative nature of the contract influenced its construction to the extent of disapplying the private law rule that waivers are not presumed.[98]

Generally, while the awards in Argentine arbitration cases sometimes mention the Respondent's administrative law arguments, they seldom apply those arguments. Instead, they often prefer to base the decision on a detailed reading of the applicable legal rules and contract clauses and on international law principles. This can partially be explained by the frequent presence of arbitrators from common law jurisdictions, who are not familiar with French legal doctrines.

The Argentine government has also invoked the allegation of the administrative nature of the contract to challenge the validity of arbitration clauses agreed upon with its counterparty, on the grounds that the public policy ("*orden público*") issues involved in an administrative contract are not arbitrable. Broad definitions of what constitutes an administrative contract and which issues should be considered in public policy create added uncertainty on the extent of such prohibitions.[99] The Argentine Supreme Court has accepted the arbitrability of administrative contracts when arbitration has been authorized by law and the issues involved do not concern public policy or the government's sovereign attributes or public power.[100] Arbitration tribunals have also rejected the Argentine government's position on this issue.[101]

IV. IS THE ARGENTINE SITUATION JUST DESCRIBED MORE GENERAL?

Argentina is arguably an extreme case. However, similar instances of the exaggeration of French administrative law rules can be found in other

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[98] Salini Impregilo S.P.A. v. Argentine Republic, ICSID Case No. ARB/15/39, Decision on Jurisdiction and Admissibility, para. 196, 203 (Feb. 23, 2018), https://www.italaw.com/sites/default/files/case-documents/italaw9546.pdf.

[99] *See* E. Silva Romero, "The Dialectic of International Arbitration Involving State Parties," 15(2) ICC IC Arb. Bull. 79 (2004) for a discussion on the use of the administrative contract doctrine by governments in order to escape arbitration.

[100] Corte Suprema de Justicia de la Nacion [CSJN] [National Supreme Court of Justice], 1920, "Pagano v. Gobierno de la Nación," 133 Fallos 61 (Arg.); Corte Suprema de Justicia de la Nacion [CSJN] [National Supreme Court of Justice], 1935, "Puerto de Rosario S.A. v. Gobierno Nacional," 173 Fallos 221 (Arg.); Corte Suprema de Justicia de la Nacion [CSJN] [National Supreme Court of Justice], "Compañía Ítalo Argentina de Electricidad v. Nación," 178 Fallos 293 (Arg.); Corte Suprema de Justicia de la Nacion [CSJN] [National Supreme Court of Justice], "Procuración del Tesoro Nacional," 341 Fallos 1485 (Arg.).

[101] CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, para. 119-121 (May 12, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0184.pdf.

countries. Thus, in Bolivia and Venezuela, the government appears to enjoy the prerogatives mentioned above in all its contracts, not only those classified as "administrative."[102] In this respect, Chile appears to be at the other end of the spectrum.[103]

A study conducted by this author on the reception of the French administrative contract doctrine by international investment tribunals revealed that while several countries had invoked the doctrine within the French legal family, it had not generally proven effective as a defense for the host state.[104]

The invocation served the same purposes for which Argentina resorted to the doctrine, i.e., to justify unilateral termination or amendments to the contract by the government, or the reduction of the rights of the private contractor, and also to negate the possibility of submitting the controversy to arbitration due to the public policy considerations that an administrative contract involves.

An Egyptian case is an interesting example of the first situation. Egyptian authorities had signed a contract with an investor granting it a concession to build a hotel near the Pyramids. Because of political opposition to the contract due to the proposed location of the hotel, the administration unilaterally decided to move it some miles from the original site. In the arbitration brought by the dissatisfied investor, the host country argued that under the French theory of administrative contracts, the government was entitled to change the contract unilaterally. Now, French precedents that apply the theory and thus recognize such governmental power generally involve changed circumstances that require adjusting the concessioned service to satisfy new public needs,[105] a situation arguably different from the one that arose in the Egyptian case. It is unclear, therefore, whether the doctrine would have been applied in France. In that case, the tribunal rejected the application of the doctrine as a defense on the grounds that the change was too important to justify, and compensation was awarded to the investor.[106]

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[102] *See* J. M. SERRATE PAZ, V.R. HERNÁNDEZ MENDIBLE, J.R. ARAUJO-JUÁREZ, A. CANÓNICO SARABIA, M.R. PERNÍA REYES AND M.A. TORREALBA SÁNCHEZ, LA CONTRATACIÓN PÚBLICA EN AMÉRICA LATINA, 148, 661 (J.L. BENAVIDES and P. MORENO CRUZ, eds. 2016) (reporting Bolivian and Venezuelan government contract laws).

[103] Ley de Concesiones de Obras Públicas, as restated by Decree 900 of 1996 and as amended by Law 20410 of 2010, art. 28 ter. (setting rules on public works concessions under which Chile has built and extended highway network, rules that after the end of the construction, does not allow termination for reasons of public interest if it is not specifically provided in the agreement).

[104] *See* H.A. Mairal, *The Doctrine of the Administrative Contract in International Investment Arbitration*, in LIBER AMICORUM DEDICATED TO PROF. DON WALLACE JR. (2014).

[105] GUETTIER, *supra* note 24, at 339.

[106] International Centre for Settlement of Investment Disputes [ICSID] May 20, 1992, SOUTHERN PACIFIC PROPERTIES (MIDDLE EAST) LTD. V. ARAB REPUBLIC OF EGYPT, Case No. ARB/84/3, Award.

In several arbitration claims against South American countries, the respondent alleged the administrative nature of the contract as a defense. Thus, in *AUCOVEN*, the arbitration tribunal refused to admit the defendant's argument that, in the context of an administrative contract, plaintiff contractor could not terminate the contract directly but had to ask the tribunal's permission to do so.[107] In another Venezuelan case, the respondent state sought to expand the definition of an administrative contract, arguing that in order to so qualify, the public purpose could be merely indirect.[108]

In a case involving Ecuador, the issue of the relevance of the administrative nature of the contract was discussed at length, with respondent arguing unsuccessfully that such nature prevented claimant from invoking the *exceptio non adimpleti contractus* and that respondent's power of unilateral amendment reached the economic terms of the contract.[109]

The non-arbitrability of the controversy due to the administrative nature of the contract has been raised in several countries.[110] Law review articles have commented this situation.[111]

It is also interesting to observe cases in which the administrative nature of the agreement was alleged by claimant but rejected by the respondent State.[112] The reasons for such positions do not clearly arise from the award. It may be that the investor was invoking the above mentioned rules in favor of the contractor that do not exist in private law contracts,[113] or to sustain the allegation that the challenged measures had been the result of the use by the government of its sovereign prerogatives under the administrative

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[107] International Centre for Settlement of Investment Disputes [ICSID] Sept. 23, 2003, AUTOPISTA CONCESIONADA DE VENEZUELA, C.A. ("AUCOVEN") V. REPÚBLICA BOLIVARIANA DE VENEZUELA, Case No. ARB/00/5, Award, para. 216-27.

[108] International Centre for Settlement of Investment Disputes [ICSID] Jan. 16, 2013, VANESSA VENTURES V. VENEZUELA, Case No. ARB(AF)/04/6, Award, para. 156.

[109] International Centre for Settlement of Investment Disputes [ICSID] Sept. 12, 2014, ECUADOR V. PERENCO, ICSID Case No. ARB/08/6, Award.

[110] *See* R. WAKED JABER, LE CONTRAT ADMINISTRATIF INTERNATIONAL (2013) at 407-41 (discussing French and Lebanese law).

[111] J. CABRERA, D. FIGUEROA & H. WÖSS, *The Administrative Contract Non-Arbitrability, and the Recognition and Execution of Awards Annulled in the Country of Origin: The Case of Commisa v. Pemex*, 2015 Arbitration International 1; E. Silva Romero, *ICC Arbitration and State Contracts* (2002) 13:1 ICC IC Arb. Bull, para. 26; *see also* Silva Romero, *supra* note 99.

[112] Huntington Ingalls v. Venezuela, UNCITRAL Case, Award, Feb. 19, 2008, para. 180-183.

[113] *See* BROWN & GARNER, *supra* note 4, at 125-13; RICHER, *supra* note 24, at 283-87, 302-05.

contract doctrine and thus "acts of State" that qualify as treaty violations instead of mere contract breaches that do not.[114]

Respondent States have also invoked their power to revoke prior decisions, without any reference to the time limit to which that power is subject to in French administrative law. Thus, in *Quiborax v. Bolivia*, the defendant argued that revocation was justified in view of the fraud committed by the beneficiaries of the prior decision.[115] In *Gold Reserve Inc. v. Venezuela*, the respondent alleged that, as a rule, decisions conferring rights are revocable by the administration. The expert witness for the claimant admitted that power when the act to be revoked was absolutely void but subjected it to the respect of due process principles at the administrative stage.[116]

As can be seen, examples exist of the invocation of French administrative law doctrines in countries other than Argentina, sometimes in excess of the limits within which they are applied in France or seeking results that would not be admitted there.

A different concurrent factor contributing to the abundance of arbitration claims against Spanish-speaking countries exists. Many of those claims arise from the alleged infringement of the investor's mining rights by the host State. This happens because mining law principles inherited from Spain grant the State the original ownership of mines, and thus private mining rights depend on concessions from the government. In contrast, in certain common law countries, the government's involvement in the ownership of mines is not as intense. Thus, in the United States, mineral rights may belong to the owner of the surface land or, as it happened with many sales of federal lands to private parties in the Western part of the country, mineral rights were not separated and reserved by the seller.[117]

In Spanish-speaking America, there is therefore some overlapping between mining and administrative law. Thus, in Ecuador,, the granting of

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[114] *See* S.A. ALEXANDROV, *Breach of Treaty Claims and Breach of Contract Claims: When can an International Tribunal Exercise Jurisdiction?*, in ARBITRATION UNDER INVESTMENT AGREEMENTS, *supra* note 3, at 370; C. SCHREUER, *Investment Treaty Arbitration and Jurisdiction over Contract Claims – the Vivendi I Case Considered*, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION, 281 (T. Weiler, ed. 2005) (regarding the difference between both types of breaches).

[115] International Centre for Settlement of Investment Disputes [ICSID] Sept. 16, 2015, Quiborax v. Bolivia, Case No. ARB/06/2, Award, (finding evidence of fraud).

[116] International Centre for Settlement of Investment Disputes [ICSID] Sept. 22, 2014, GOLD RESERVE INC. V. VENEZUELA, Case No. ARB(AF)/09/1, Award, para. 370-73.

[117] *See* N.J. CAMPBELL, JR., PRINCIPLES OF MINERAL OWNERSHIP IN THE CIVIL LAW AND COMMON LAW SYSTEMS, (paper delivered at the Deep South Section of the American Bar Association meeting of New Orleans, 1955); C. SIAC, MINING LAW: BRIDGING THE GAP BETWEEN COMMON LAW AND CIVIL LAW SYSTEMS, (paper presented at the Centre for Petroleum and Mineral Law and Policy, University of Dundee, 1999).

mining rights by the State to a private party is an administrative act,[118] and several arbitration cases concerning the region involved the revocation of concessions by the State.[119]

The correction of administrative law rules, for example, to prevent the revocation of allegedly unlawful acts after a reasonable time has elapsed and thus protect legal certainty, could significantly reduce future litigation.

CONCLUSION

The matters covered in this paper would require a comprehensive comparison of French administrative law with the laws of Argentina and other countries with French legal origins, both as those laws exist in the books and as they are applied in practice, a study that exceeds the scope of this work. Conclusions are therefore limited to suggesting the existence of a possible problem and the need for further studies.

A. With respect to Argentina

Awards issued in investment arbitrations brought against Argentina show that it has often alleged administrative law doctrines that exaggerate their original French sources or ignore the countervailing factors that would have come into play in France.

However, having been involved in several of the investment controversies that arose in Argentina during the last 25 years, I would conclude that the government measures that prejudiced investors were prompted by macroeconomic and political considerations and that no prior analysis of the applicable legal rules preceded them. Once the controversies arose, counsel for government, in fulfilling their professional duties, invoked the rules imported from French administrative law as defenses against the claims of the investors. The resulting international arbitrations have produced many awards, mostly contrary to Argentina, without those defenses being admitted.

In this author's opinion, French administrative law rules cannot serve as valid arguments to justify the oppression of investors. Unless the contract expressly provides otherwise, both French as well as international law

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[118] *See* J. LARREA SAVINOVICH AND C. ZUMMARRAGA, THE LEGAL NATURE OF MINING RIGHTS IN ECUADOR (Lexology 2020).

[119] *See* International Centre for Settlement of Investment Disputes [ICSID] Sept. 16, 2015, Quiborax v. Bolivia, Case No. ARB/06/2 Award, (finding evidence of fraud); International Centre for Settlement of Investment Disputes [ICSID] Sept. 22, 2014, Gold Reserve Inc. v. Venezuela, Case No. ARB(AF)/09/1, Award, para. 370-73.

require full compensation for damages caused by the unilateral tampering with the rights emanating from a contract.[120] Arguably, under Argentine constitutional law, the same result should be reached.[121]

The lack of timely legal remedies in local courts has compounded the consequences of this abuse of comparative law. However, the Argentine Supreme Court has never validated the oppression of investors, whether based on the nature of the contracts or other administrative law doctrines.

Nevertheless, obstacles to access to justice, such as short statutes of limitations and the costs, contingencies, and delays of litigation,[122] serve as practical means to maintain a façade of rule of law while, in substance, depriving investors of their rights without compensation or retarding such compensation for decades. Thus, there is a frequent resort to international arbitration.

The distortion of French doctrines, while not successful as a defense in international arbitration, or even in local litigation, is nevertheless politically useful for the Government to clothe initially its decisions with a mantle of legality. At the same time, the delay in the issuance of remedies allows it to pass the financial consequences of those decisions to future administrations. The financial cost for the country that such practices involve is now becoming a matter of political debate in Argentina, and a more rational approach to these problems is now emerging.[123] A proper restatement of the French administrative law doctrines applied in Argentina would help such evolution.

B. More generally

It may be posited that French administrative law, unless faithfully transplanted and properly applied, creates opportunities and temptations for the mistreatment of investors in developing countries.[124] Particularly, by diluting the strength of the principle of *pacta sunt servanda* and the stability of administrative decisions conferring rights, it opens the door to violations of rights which then the infringing State – due to its perennial lack of financial resources – is tempted to refuse to compensate fully by resorting to a distorted view of French doctrines. Worse still, it may try to avoid all

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[120] *See* 2 DE LAUBADÈRE ET AL., *supra* note 24, accompanying text; Permanent Court of International Justice, 1928, *Factory at Chorzow* for international law; I. Marboe, *Compensation and Damages in Investment Treaty Arbitration*, in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS, *supra* note 3, at 679, 681.

[121] *See* 1 CASSAGNE, *supra* note 50, at 511-16.

[122] *See* Mairal, *supra* note 91; Mairal, *supra* note 104.

[123] *See supra* notes 67, 70, 71, 75, 77, 78, and 79 for specific examples of a more rational approach to the problems stated herein.

[124] *See, e.g.,* International Centre for Settlement of Investment Disputes [ICSID] April 4, 2016, CRISTALLEX V. VENEZUELA*,* Case No. ARB(AF)/11/2, Award, para. 408, 415, 666, 710.

compensation by claiming the original illegality of the contract or decision.[125]

The examples mentioned in this paper would tentatively show that if French administrative law plays a part in the mistreatment of investors by governments, it is mainly due to its distortion in the hands of those countries that claim to follow its steps and to the political benefits that governments obtain by invoking the doctrines thus distorted. Properly applied and enforced, that law should have avoided many of the controversies cited herein where the host State was forced to compensate the claimant investor.

The wide expansion of French administrative law abroad and these examples merit a deeper study of its distortion in the countries that imported said law, in the author's opinion.

It would be a welcomed step if French jurists help set the record straight with regard to the exposition and practical application of its legal doctrines by other countries and also to the institutional conditions that allow a proper balance between the State prerogatives and the rights of the individual to be kept. Such a movement would benefit those countries because the legal uncertainty derived, *inter alia*, from the abuse of French administrative law, affects the cost of doing business and reduces the flow of foreign investments to those countries.[126] Also, the track record of lost cases cannot but influence negatively–from the standpoint of the host State—the outcome of future arbitrations.

But the issue is of a more general nature. France has had a significant cultural influence in Latin America, far exceeding that of its legal system. Jorge Luis Borges once wrote that, apart from the Spanish language itself, France had more influence in Argentina than any other country.[127] If one wishes to find a connection between the legal controversies described in this paper and French culture, one could recall the saying that one of the main problems of Latin America is to have adopted the French idea of the strong presence of the State without having been able to create a civil

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[125] *See*, e.g., GOLD RESERVE INC. V. VENEZUELA, *supra* note 116, para. 593 (discussing Respondent's allegations of the "absolute nullity" of prior administrative decisions that were contrary to new public policies).

[126] Daniel Artana, a leading Argentine economist, stated in one of his conferences that, even when its Government debt was not in default, due to its track record Argentina was paying an interest surcharge of two percentage points over the rate that should apply according to its economic statistics. Given an aggregate (public and private) debt of 400 billion dollars, this would mean an annual surcharge of eight billion dollars which the country could save with more prudent policies.

[127] J.L. BORGES, PRÓLOGO DE PRÓLOGOS (1974).

service as efficient as the French. Only Latin America itself can solve this problem.