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Fernando C. Aranovich

John Hewko

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Argentine Laws on Foreign Investments and the Transfer of Technology‡

This article analyzes the principal provisions of the various Argentine laws that regulate foreign investments made in Argentina and the transfer of technology to Argentina. In particular, it focuses on the Argentine Foreign Investments Law, Law 21.382 (the FIL) as amended by Law 22.208, and on the Transfer of Technology Law, Law 22.426 (the TTL).

I. Foreign Investment and Argentine Policy: Liberty, Encouragement, and Control

Since Argentine attitudes and policies towards foreign investment have varied significantly during the last 150 years, displaying a cyclical pattern that has oscillated between encouraging and discouraging the presence of foreign capital in the domestic economy, it may prove useful to analyze briefly the historical development of Argentine legislation in this area.

In 1860, when Argentina was finally able to organize itself as a Republic after many decades of internal turmoil following its independence from Spain, the climate for foreign investment was extremely favorable. Investment of foreign capital was unrestricted and actively encouraged, and foreign investors were guaranteed treatment similar to that enjoyed by

*LL.B., University of Buenos Aires, Argentina, 1973; M.C.L., Southern Methodist University, Dallas, Texas, 1982. Associate with Klein & Mairal, Buenos Aires, Argentina; Professor of Economics, University of Buenos Aires; former advisor to the Secretary for Economic Planning (1977-1981).

†J.D., Harvard University, 1985; M. Litt., Oxford University, 1981; A.B., Hamilton College, 1979. As of the writing of the article, Foreign Associate with Klein & Mairal, Buenos Aires; beginning in January 1987, Associate with Gibson, Dunn & Crutcher, Washington, D.C.

‡The Editorial Reviewer for this article is Nikki Hurst Gibson.

Argentine investors. The transfer of foreign capital was effected through: (1) the sale of gold, silver, or foreign currency for local currencies in the unrestricted Argentine exchange markets; and (2) the contribution of capital through the incorporation of goods, subject to a modest import duty. These free market policies continued during the second half of the nineteenth century with additional emphasis being placed on attracting foreign capital for investment in public utilities (railroads, ports, electricity, gas, telephones, etc.) by means of import duty exemptions, tax holidays, land grants, and profit guarantees. This active encouragement of foreign investment in public utilities lasted until the imposition of exchange controls in 1931, which resulted in stripping foreign investors of the ability to repatriate dividends or capital freely. This restrictive policy remained in force until 1934, when a free exchange market was again established.¹

In 1940 controls were reimposed on the transfer abroad of dividends on capital of Argentine-based companies with ties to enterprises located in belligerent nations outside the American continent. Additionally, and for the first time, the importation of liquid assets was made subject to the control of the Argentine Central Bank: such assets now had to be deposited with the Central Bank for ninety days without interest.²

The first comprehensive piece of legislation governing foreign investment was Law 14.222, passed in 1953. The law provided strict controls on the entry of foreign capital, defined the rights and the obligations of foreign investors, placed limits on the repatriation and transfer of earnings, and granted benefits such as exemptions from customs duties.³ Few investments were made under this law and, in 1955, the right to repatriate capital and profits was reestablished, although the importation of machinery remained subject to controls.

In 1958 Law 14.780⁴ instituted the principle of equality between the rights and obligations enjoyed by foreign and domestic capital, a principle that, in theory, is guaranteed by the Argentine Constitution.⁵ Under this law, foreign investments were eligible to receive customs and tax exemptions, subject to assent by the Executive Power. These exemptions were to be implemented through government decrees and were to serve as a means by which the Government could assign priority to particular economic areas. Finally, all investors were to be permitted to import funds through the foreign exchange markets and to import machinery by paying

1. R. ALEMANN, *CURSO DE POLÍTICA ECONÓMICA ARGENTINA* 177, 178 (1981).

2. *Id.* at 178.

3. Camerini, *Argentina as a Host Country for North American Investments*, 9 *INT'L LAW.* 407, 414-15 (1975).

4. Law of Dec. 22, 1958, A.D.L.A., XVIII-A at 314.

5. CONST. DE LA NACIÓN ARGENTINA arts. 16, 20.

the relevant import duties. This new law led to a number of important investments, especially in the petroleum and automobile industries.

Between 1964 and 1967 the controls on the transfer abroad of capital and earnings were reestablished, with the corresponding effect of significantly decreasing new foreign investment. In 1971, beginning with Law 19.151,⁶ foreign investments were subject to a successive number of restrictive legislative measures including institution of a foreign investments register, specification of areas in which foreign investment was prohibited or restricted, and establishment of strict requirements for the investment of risk capital by nonresidents. Despite the new regulatory elements, the law was still generally favorable, permitting remittances and capital repatriations.⁷ However, before the 1971 legislation was effectively applied, a new piece of legislation was enacted. The new statutory scheme to regulate foreign investments was modeled upon Decision 24 of the Cartagena Agreement, the foreign investment code promulgated by the Andean Common Market.⁸

The rules and requirement of Law 19.151 (1971) and especially those of Law 20.557⁹ proved so restrictive that in practice almost no investments were registered. To the contrary, in 1975 the requests to repatriate foreign capital amounted to more than 3 billion dollars.¹⁰

II. The Current Argentine Foreign Investments Law

The following is an analysis of the FIL, Law 21.382 as amended by Law 22.208.

A. BASIC SCHEME

As a general principle, the FIL states that foreign investors are to enjoy the same rights as local investors and need not associate with local inves-

6. Law of July 30, 1971, implemented by Decree 2400/72, 1971-B A.L.J.A. 991.

7. Studwell & Cabanellas, *The New Argentine Foreign Investment Law: An Analysis and Commentary*, 1 HASTINGS INT'L & COMP. L. REV. 39 (1977).

8. For a detailed analysis of the 1973 law, comparing its provisions to those of Decision 24, see Stebbings, *The Argentine Foreign Investment Law and Its Andean Common Market Inspiration*, 8-V J. TRANSNAT'L LAW 277, 282-86; the following articles by G. Cabanellas: *Derechos v. Facultades de Inversores Extranjeros bajo la Ley 20.557*, 107 LEGISLACIÓN ARGENTINA 90 (1975); *El Concepto de Inversiones Directas Reguladas por la Ley y Categorización de los Inversores bajo la Ley 20.557*, 3 DERECHO EMPRESARIO 46 (1975); *Restricciones y Obligaciones de los Inversores Extranjeros bajo la Ley 20.557*, 32 LA INFORMACIÓN 150 (1975); *Acerca de las Condiciones de Validez de las Radicaciones de Capitales Extranjeros*, 65 EL DERECHO 831 (1976).

9. Law of Nov. 29, 1973, implemented by Decree 413 (Feb. 5, 1974), 1973-B A.L.J.A. 1494.

10. R. ALEMANN, *supra* note 1, at 181.

tors. Additionally, the FIL provides a special scheme through which foreign investors are assured of being able to remit profits abroad and to repatriate capital.¹¹

The FIL provides for the submission of foreign investment proposals to the following two separate procedures: (a) an approval procedure; and (b) a registration procedure. With regard to the former, the FIL divides potential foreign investments into three categories: (a) those that may be effected without the need for prior governmental approval; (b) those that require the prior approval of the Executive Power; and (c) those that require the prior approval of the Undersecretary of Economy (the UE). As to the registration procedure, those investments that may be made without prior governmental approval are eligible for automatic registration with the Foreign Investments Registry. On the other hand, investments requiring the approval of the Executive Power or the UE must first obtain the corresponding approvals in order to be eligible for inclusion in the Foreign Investments Registry.

Under the FIL registration of a foreign investment with the Foreign Investments Registry is not mandatory. Illegality is encountered only upon failure to obtain the necessary approval for those investments requiring approval of the Executive Power or the UE. For example, very important investments or those in strategically sensitive economic sectors may not be made without the prior approval of the Executive Board and, if made without such approval, are void.¹² As a result, failure to register may never serve as a basis for nullifying a foreign investment, even in the case of an investment approved by the Executive Power or the UE. When exchange controls are in force (as is the present case), however, only registered foreign investors are allowed to purchase foreign currency at the official rate of exchange in order to remit profits abroad or repatriate their investments. The remittance of profits and the repatriation of capital by nonregistered investors is subject to the general foreign exchange and tax regulations and controls.

In addition, the FIL classifies local companies according to the degree of control exercised by foreign investors into: (a) a "domestic enterprise of foreign capital" and; (b) a "domestic enterprise of national capital." The only express distinction between them is that the foreign-controlled business may not seek medium or long-term credit.¹³

11. Basic to the new legislation is the concept that the most important rights of the foreign investor, the remittance of profits and repatriation of capital, may not be enjoyed during periods of exchange controls unless the investment is registered in accordance with the Law. Studwell & Cabanellas, *supra* note 7.

12. *Id.* at 41.

13. Law 21.382, art. 18, 1976-B A.L.J.A. at 894, 902.

B. ANALYSIS OF THE PROVISIONS OF THE FIL

1. Definitions

The following terms are specifically defined by the provisions of the FIL:

- (a) "Foreign investments" are defined as any capital contribution made by a foreign investor and applied to economic activities in Argentina. A foreign investment also includes the acquisition by a foreign investor of shares, capital quotas, or ongoing concerns owned by local investors.¹⁴
- (b) "Foreign investors" are defined as physical or juridical persons domiciled abroad.¹⁵ For purposes of the FIL, foreign-controlled local companies are also considered to be foreign investors.
- (c) Finally, the FIL defines local companies as foreign-controlled whenever foreign investors hold either more than 49 percent of the capital or a sufficient number of votes to prevail in a shareholders' meeting. Nationally controlled local companies, in turn, are considered to be those in which national investors hold at least 51 percent of the capital or a sufficient number of votes to prevail in a shareholders' meeting.¹⁶

2. Requirements to Qualify for Approval and Registration

In order to qualify for approval and registration, a foreign investment must comply with the following requirements:

(a) *The investor must be domiciled outside of Argentina*

Foreign citizenship will not cause an investor to be classified as a foreign investor, since only the investor's domicile is relevant for purposes of determining the existence of a foreign investor. Accordingly, if an Argentine citizen is domiciled abroad, he will be treated as a foreign investor, while a foreigner domiciled in Argentina will be treated as a local investor. Additionally, a local company controlled (as defined above) by physical or juridical persons domiciled abroad will be viewed as a foreign investor.¹⁷

(b) *The investment must consist of the kinds of properties contemplated by the FIL*

The possible types of investments under the FIL include the following: (i) freely convertible foreign currency; (ii) capital goods, spare parts, and accessories; (iii) profits or capital in Argentine currency belonging to foreign investors, provided that the requirements for their repatriation are

14. *Id.* arts. 1, 7, 1976-B A.L.J.A. at 899, 900.

15. *Id.* art. 2(2), 1976-B A.L.J.A. at 899.

16. *Id.* arts. 2(3), (4), 1976-B A.L.J.A. at 899.

17. *Id.* arts. 2(2), (5), 1976-B A.L.J.A. at 900.

met; (iv) capitalization of foreign credits in freely convertible foreign currency; (v) intangible assets, such as technology, as provided for in relevant legislation; and (vi) any other type of investment authorized by the UE (i.e., government bonds, Argentine currency, noncapital goods).¹⁸

(c) *The investment must be applied to an economic activity or involve the purchase of shares or quotas of an existing business*

Economic activities have been defined by section 1 of Decree 103/81 as all industrial, mining, farming, commercial, or financing activities and services or other activities connected with the production or exchange of goods and services.

(d) *The investment must contribute to the development of the national economy*

Under this requirement¹⁹ the investor's business and financial capabilities and technical background shall be taken into account as well as the amount of capital to be invested and the financing of the project. Additionally, the following factors, among others, will be considered in evaluating the economic effect of investment proposals: (i) the potential impact of the investment on the balance of payments; (ii) whether Argentine exports will be increased or whether imports will be reduced; (iii) whether financial ties to or distribution channels with foreign countries will be expanded or created; (iv) whether new technology will be used; (v) the extent to which national investors will be involved; (vi) the extent to which Argentine resident technicians and professionals will be utilized; and (vii) whether the project will contribute to a better use of the country's resources.

3. Categories of Foreign Investments

The FIL contemplates three categories of foreign investments:

(a) *Investments that require prior approval of the Executive Power (failure to obtain this approval may render the investment null and void)*

These investments include:

(i) Investments made in any of the following fields: defense and national security; postal, electricity, gas, and telecommunications public utilities; radio and television stations, newspapers, magazines, and publishing companies; energy; education and insurance companies, and financial entities (which include banks); petrochemical, mining, steel, and aluminum production.²⁰

18. *Id.* art. 3, 1976-B A.L.J.A. at 899.

19. *Id.* art 10 and decree 103/81 § 49, 1976-B A.L.J.A. at 900.

20. *Id.* art. 4(1), 1976 A.L.J.A. at 899.

- (ii) Investments resulting in the transformation of a nationally controlled local company that has a net worth exceeding U.S. \$10 million (or its equivalent in other currencies) into a foreign controlled local company in which the investment is performed by means of a capital contribution.²¹
- (iii) Investments involving the acquisition by foreign investors of capital participations owned by national investors provided such acquisitions result in the transformation of a nationally controlled local company that has a net worth exceeding U.S. \$10 million (or its equivalent in other currencies) into a foreign controlled local company. In such cases, the FIL provides that approval is only to be granted on an exceptional basis upon the showing of an obvious benefit to the national economy.²²
- (iv) Investments involving the acquisition by foreign investors of ongoing concerns owned by national investors, with a value exceeding U.S. \$10 million (or its equivalent in other currencies). These investments will also be approved only on an exceptional basis and will require evidence that the investment will benefit the national economy.²³
- (v) Investments in which the amount exceeds U.S. \$20 million (or its equivalent in other currencies).²⁴
- (vi) Situations where the investor is a foreign state or a foreign juridical person governed by public law.²⁵
- (vii) Investments in which special or promotional benefits of a national character, requiring a grant by the Executive Power, are applied for, and the granting of the same is a condition precedent to the performance of the investment.²⁶

Once these investments receive the corresponding approval from the Executive Power, they become eligible for inclusion in the Foreign Investments Registry.

(b) *Investments that may be automatically registered with the Foreign Investments Registry (i.e., without need of any prior approvals)*

These investments include:

21. *Id.* art. 4(2), 1976-B A.L.J.A. at 899. However, the approval of the Executive Power will not be required when the acquisition results from the judicial foreclosure of security interests given as collateral to foreign creditors or from foreclosures carried out within the scope of the Argentine Bankruptcy Law. Nevertheless, such acquisitions will require the approval of the Undersecretary of Economy.

22. *Id.* art. 4(2.b), 1976-B A.L.J.A. at 899.

23. *Id.* art. 4(3), 1976-B A.L.J.A. at 899.

24. *Id.* art. 4(4), 1976-B A.L.J.A. at 899.

25. *Id.* art. 4(d), A.D.L.A., XXXVI-C at 2074.

26. *Id.* art. 4(b), A.D.L.A., XXXVI-C at 2074.

- (i) Total or partial reinvestment of profits earned from previously registered investments, in the same company generating the profits; provided, however, the reinvestments do not transform the receiving company into a foreign controlled local company. In addition, the reinvestments must be utilized in the activities for which the original investment was approved or in which the receiving company was already engaged when the FIL or other previous foreign investment laws were enacted.²⁷
- (ii) New investments made by foreign investors already registered as investors in the receiving company, in freely convertible foreign currency to be utilized in the same activities for which the original investment was approved or in activities in which the receiving company was already engaged when the FIL or other previous foreign investments laws were enacted; provided, however, the new investments meet the following requirements:²⁸ (a) they do not annually exceed 30 percent of the foreign capital registered in the receiving entity and do not result in the transformation of said entity into a foreign controlled local company; (b) the receiving entity is a nationally controlled local company, and the investment is made by the foreign investor in the exercise of his preemptive right to subscribe new shares in order to retain an equal or lower holding in the receiving entity.
- (iii) New investments in freely convertible foreign currency which do not exceed U.S. \$5 million (or its equivalent in other currencies); provided, however, they do not result in transforming the receiving company into a foreign controlled local company or fall within one of the fields in which the approval of the Executive Power is required.²⁹

(c) *Investments that require the prior approval of the UE*

Any investments that do not fall within the scope of automatic registration (subparagraph (b) above) and do not require the prior approval of the Executive Power (subparagraph (a) above) require the prior approval of the UE if they are to enjoy the rights granted by the FIL.³⁰ Once this approval is obtained, the investment may be registered with the Foreign Investments Registry.

4. *Consequences of the Lack of Approval*

The failure to obtain the necessary approval in cases in which the FIL provides for the prior approval of an investment does not, in principle,

27. *Id.* art. 5(1), A.D.L.A., XXXVI-C at 2075.

28. *Id.* art. 5(2) and Decree 103/81 § 27, 1976-B A.L.J.A. at 900.

29. *Id.* art. 5(3) and Decree 103/81, para. 27, A.D.L.A., XL-B at 1025.

30. *Id.* art. 6, 1976-B A.L.J.A. at 900.

render the investment invalid. However, this approval is required in order to be able to register the investment subsequently with the Foreign Investments Registry. In the event a foreign investor fails to register the investment, the investor will lose the right to remit profits abroad arising from such an investment and to repatriate capital through the official exchange market *when exchange controls are in force*.³¹

Nevertheless, the lack of approval may render the investment null and void in a few cases. Such cases may be summarized as follows:

(a) All investments that require the approval of the Executive Power (see subparagraph B.3(a) above).

(b) The following investments that require the prior approval of the UE:

- (i) The acquisition by foreign investors of capital participations and of ongoing concerns from national investors in those cases in which the approval of the Executive Power is not required (i.e., in the case of acquisitions of participations, which do not result in transforming a nationally controlled local company into a foreign controlled local company, or if such transformation occurs, when the net worth of the company does not exceed U.S. \$10 million (or its equivalent in other currencies)). The acquisition of capital participations resulting from the foreclosure of security interests granted by the national investor in favor of a foreign creditor or which are carried out within the scope of the Argentine Bankruptcy Law, however, will not be null and void if performed without the approval of the UE, but will not entitle the foreign investor to remit profits abroad or repatriate capital in the event exchange controls are enacted.
- (ii) Investments that exceed U.S. \$5 million but are less than U.S. \$20 million (or their equivalent in other currencies).
- (iii) Capital contributions in freely convertible foreign currency that result in the transformation of a nationally controlled local company into a foreign controlled local company, when the net worth of said company is less than U.S. \$10 million (or its equivalent in other currencies).

Although the approval, when required, must be obtained prior to the investment,³² in cases of urgency it may be applied for after the investment is made. In such cases, the approval shall be granted whenever the corresponding authority determines that the investment is in the national interest. Normally, a request for authorization from the UE takes from

31. Studwell & Cabanellas, *supra* note 7, at 56.

32. Decree 103/81 § 43.

two to three months to be processed. More time is required in order to receive authorization from the Executive Power. The FIL states that the UE must approve or reject a proposed investment within 120 days of its being requested by the foreign investor.³³ When this period expires without a UE decision, Decree 103/81 provides that the foreign investor may request that a decision be reached within the next thirty days.³⁴

5. *Registration of the Investment*

The registration of foreign capital investments with the Foreign Investments Registry is not mandatory. However, the investment must be registered if it is to enjoy the benefits granted by the FIL to registered foreign investments. Therefore, while registration is a prerequisite of repatriation rights, failure to register is never grounds for the nullification of a foreign investment.³⁵

The procedure for registration is provided by sections 58 through 64 of Decree 103/81. These provisions state what information should be provided when registration is requested and determine the procedure for calculating the amounts to be registered. The registration procedure is independent of the governmental approvals procedure and is subject to separate formal requirements. In the event of an investment in freely convertible foreign currency, the amounts invested should be transferred into the country through an authorized bank or exchange broker and converted into Argentine currency. The investment will then be registered in the freely convertible foreign currency chosen by the foreign investor. When a currency other than that of the investor's nationality is chosen, approval by the UE is necessary.³⁶ The currency chosen cannot be modified without approval of the UE and future investments by the same investor in the same enterprise must be registered in the currency of the original investment.³⁷

6. *Investments in Local Companies Which Quote Their Shares in the Local Stock Exchanges*

Article 7 of the FIL governs the acquisition by foreign investors of capital participations of local companies that are quoted in the local stock exchanges and that belong to local investors. These acquisitions may be performed without the need for any approval, provided each of the following requirements is met: (i) the company in which the capital holdings

33. Law 21.382, art. 9, 1976-A A.L.J.A. 92.

34. Decree 103/81, art. 56.

35. Studwell & Cabanellas, *supra* note 7, at 60.

36. Decree 103/81, § 62.

37. *Id.*

have been purchased is not transformed, as a result of the acquisition, into a foreign controlled local company; (ii) as a result of the acquisitions, the capital holdings per foreign investor do not exceed U.S. \$2 million (or its equivalent in other currencies), or 2 percent of the capital of the company in which the participations have been purchased; and (iii) that all the participations purchased by foreign investors under article 7 of the FIL do not exceed 20 percent of the capital of the company in which said participations have been purchased, although the total foreign participation under other provisions of the FIL may exceed this percentage.

The acquisitions carried out under article 7 may not be registered. Thus, in the event of exchange controls, the foreign investors will not be entitled to repatriate the investment or to remit abroad the profits arising from the investment under the same conditions as those enjoyed by registered investors.

Article 7 of the FIL also states that acquisitions performed without complying with its provisions shall be null and void. The law does not state whether the nullity affects the whole of the investment or only that part that exceeds any of the limits imposed by article 7; however, a reasonable interpretation is that the nullity affects the whole of the investment.

Although the FIL does not specifically so state, it can be construed that a foreign investor who falls within the scope of article 7 may, nevertheless, apply for the approval and registration of his acquisitions under the remaining provisions of the FIL in order to benefit from the rights of registration and to be able to acquire capital participations in excess of the limits contemplated by article 7 of the FIL. Any considerations under article 7 are under the purview of the UE, which is the authority responsible for the application of this article.

7. Remittance of Profits and Repatriation of Capital

No ceiling is placed on the amount of profits a registered foreign investor may remit abroad. In certain cases, however, a surtax will be levied (see subparagraph B.10 below). Profit remittance and capital repatriation are subject to the following rules:

- (i) When exchange controls are not in force all foreign investors, whether registered or not, enjoy the right to profit remittance and capital repatriation.³⁸
- (ii) However, if exchange controls are imposed, only registered foreign investors may purchase foreign currency at the official exchange rate in order to remit profits or repatriate their invested capital. In

38. Law 21.382, art. 12, A.D.L.A., XXXVI-C at 2078.

such circumstances, remittance of profits and repatriation of capital by nonregistered investors are subject to the general foreign exchange and tax legislation.³⁹

- (iii) During foreign exchange shortages (which must be declared by the Executive Power), the Executive Power may suspend the preferential rights of registered foreign investors. In such a case, and only for purposes of remitting profits, registered foreign investors will be entitled to subscribe Argentine External Bonds (Bonex) at the official exchange rate. The Bonex are dollar denominated interest bearing titles issued by the Central Bank of Argentina and guaranteed by the Argentine Republic. These securities are freely exportable and may be sold abroad for U.S. dollars or other currencies.⁴⁰ Nonregistered foreign investors, in order to remit profits abroad or repatriate their capital, either under the circumstances contemplated in this subparagraph (ii) above or in this subparagraph, may purchase Bonex only in the secondary market.

When Bonex are subscribed at the official exchange rate, the price is determined by multiplying the face value by the official exchange rate; on the other hand, when Bonex are purchased in the secondary market, the price is calculated roughly by multiplying the dollar market value of the Bonex abroad by the "free" exchange rate. Therefore, the advantage of subscribing Bonex at the Central Bank over purchasing them in the secondary market will depend on the corresponding yield, which in turn will depend on the difference between the official and the free exchange rates and the secondary market value and the face value of the Bonex in U.S. dollars.

- (iv) Capital may be repatriated three years following the date when it enters Argentina, unless a longer term is imposed when the investment is approved. The right of repatriation extends to the full proceeds of the liquidation of the investment.⁴¹
- (v) Finally, foreign investors will not have the right to remit profits abroad and to repatriate capital when said investors or the local company controlled thereby are in default with respect to tax or social security obligations. Additionally, such rights are not available when a judicial or administrative decision has been issued stating that the investor or the local company is in violation of the provisions of any tax, social security, foreign exchange, customs,

39. *Id.* art. 14, 1976-A A.L.J.A. at 94.

40. *Id.*

41. *Id.* art. 13(1), 1976-A A.L.J.A. at 94.

or foreign investments law. The right to remit profits and repatriate investments will be recovered when the violation has been rectified.⁴²

8. *Use of Local Credit*

Under the FIL foreign controlled local companies are permitted to resort to local credit in conditions equal to those enjoyed by nationally controlled local companies.⁴³

9. *Transactions Between Affiliated Companies*

Transactions between parent and subsidiary corporations will be considered independent if made on an arm's length basis, with two exceptions:

- (i) Loans are subject to approval by the Central Bank based on the conditions of the loan or the level of indebtedness of the borrower. The Central Bank has thirty days in which to object to a loan transaction; if this term lapses without the Central Bank raising any objection, the loan in question is considered to be approved. In the case of loans objected to by the Central Bank, the funds will be treated as capital contributions and can qualify for registration as foreign investments, provided that all other requirements are met.⁴⁴
- (ii) Technology agreements are subject to the provisions of the TTL, which governs the transfer of foreign technology. The TTL requires prior governmental approval of agreements executed between affiliated companies.⁴⁵

10. *Taxes*

The remittance of profits arising from investments registered under the FIL are subject to an additional tax (the surtax), levied on the amount by which the profits (net of income tax) each year exceed 12 percent of the registered investment.⁴⁶ The rate of the surtax is as follows:

<i>Amount of remitted profits in relation to registered capital</i>	<i>Rate of Surtax on excess</i>
In excess of 12 percent and up to 15 percent of the registered capital	15 percent on the excess of the 12 percent of the registered capital

42. *Id.* art. 15, 1976-A A.L.J.A. at 94.

43. *Id.* art. 17, A.D.L.A., XXXVI-C at 2080.

44. *Id.* art. 20(1), A.D.L.A., XXXVI-C at 2080 as amended by Law 22.208, art. 14, A.D.L.A., XL-B at 1028.

45. *Id.* art. 20(2), A.D.L.A., XXXVI-C at 2080.

46. *Id.* art. 16, A.D.L.A., XXXVI-C at 2080.

Amount of remitted profits in relation to registered capital

In excess of 15 percent and up to 20 percent of the registered capital

In excess of 20 percent of the registered capital

Rate of Surtax on excess

20 percent on the excess of the 15 percent of the registered capital

25 percent on the excess of the 20 percent of the registered capital

If less than 12 percent is remitted abroad in any fiscal year, the difference between such 12 percent and the amount remitted may be carried forward for the following years and deducted from future excesses over that 12 percent during a five-year period. In other words, the FIL allows a five-year carry forward for the unused part of the 12 percent annual allowance. The same surtax and deductions are applicable when the investment is repatriated and the amount repatriated exceeds the registered amount plus the aforementioned 12 percent of the registered investment.

11. *Shares*

According to article 17 of the FIL, shares issued by local corporations that are held by registered foreign investors must be nominative. Law 23.299, enacted on October 31, 1985, broadened the scope by stipulating that all shares issued by local corporations must be nominative and nonendorsable.

12. *Acts Excluded from the Scope of the FIL*

Article 19 of the FIL states that temporary capital contributions for the performance of work, service, or similar contracts are not subject to the provisions of the FIL and, therefore, do not require prior approval or registration. However, with respect to these contributions, a foreign investor may choose to comply with the provisions of the FIL.

13. *Advantages and Disadvantages of Registering a Foreign Investment under the Present Conditions*

Since, at present, foreign exchange restrictions are in force in Argentina, only registered foreign investors may remit profits and repatriate capital through the official exchange market. However, as indicated in subparagraph B.7(iii) above, nonregistered investors, in order to remit funds abroad, may purchase Bonex in the secondary market, which in turn may be exported and converted into U.S. dollars.

To register an investment, the amount of the investment must be transferred to Argentina through the official exchange market. On the other hand, nonregistered investors are not required to transfer the amount of their investment through the aforementioned exchange market (e.g., the funds in foreign currency can be transferred into the country by purchasing Bonex and selling them for Argentine currency in the local secondary market). Therefore, under the present conditions and for the purpose of investing in Argentina, a nonregistered investor would obtain, for the foreign currency it plans to invest in the country, a larger amount of Argentine currency than a registered investor would obtain. This discrepancy results because the latter must transfer to Argentina the amount of the investment at the official rate of exchange, which is lower than the rate available through the purchase and subsequent sale of Bonex in the local secondary market. In addition, remittances and repatriation of capital made by nonregistered investors are not subject to the surtax mentioned in paragraph B.10 above, but are subject only to the general tax legislation for payments made abroad.

In view of the foregoing, the decision to register a foreign investment should be carefully analyzed. At present, the principal risk of not registering a foreign investment appears to be an eventual although unlikely imposition of restrictions on the transfer of funds abroad by means of the purchase of Bonex in the local secondary market and their export and conversion into U.S. dollars.

III. The Argentine Transfer of Technology Law

The following is a brief analysis of the provisions of the TTL.

A. ROYALTY-FREE AGREEMENTS

Agreements in which no consideration is present (e.g., royalty-free know-how and trademark licenses) are not subject to the TTL. These agreements can be freely entered into, even between a foreign parent corporation and its local subsidiary, and are not subject to any administrative approval or registration.⁴⁷

B. AGREEMENTS PROVIDING FOR PAYMENTS

All agreements in which technology is transferred in lieu of consideration are subject to the provisions of the TTL.⁴⁸ Under the TTL certain agreements are subject to approval by the National Institute for Industrial

47. Law 22.426, art 1, 1981-A A.L.J.A. 194.

48. *Id.*

Technology (Instituto Nacional de Tecnologia Industrial/INTI) (the Application Authority), while others are required to be filed with the Application Authority for information purposes only.

1. *Agreements among Affiliates*

License agreements that are subject to the TTL and executed between a foreign parent corporation, or a subsidiary thereof, and its local subsidiary require prior government approval.⁴⁹ These agreements will be approved if their terms are found to be in accordance with: (1) normal market practices between independent parties; and (2) if the consideration agreed upon is commensurate with the technology transferred.⁵⁰ According to the regulations, this latter condition will be presumed to have been met when the royalty does not exceed 5 percent of net sales.⁵¹

As a practical matter, however, the Application Authority usually approves only those agreements in which the royalties agreed upon by the parties do not exceed the relationship between total net sales of the consolidated group and research and development expenses, as shown in the balance sheets. In other words, if the total worldwide research and development expenditures of the consolidated group equal 3 percent of the group's worldwide net sales, then the Application Authority will usually only approve royalty payments of up to 3 percent of the local subsidiary's net sales. However, these agreements will not be approved if they provide for payment of consideration for a trademark license.⁵²

2. *Agreements among Independent Parties*

License agreements subject to the TTL and executed between independent parties must be filed with the Application Authority for information purposes only (i.e., they are not subject to discretionary governmental approval).⁵³

3. *Violations of the TTL*

Failure to file or to receive approval for a given agreement as provided for in the TTL bars the licensee from remitting royalty payments abroad to the licensor at the official exchange rate and from deducting the royalty payment as an expense for income tax purposes.⁵⁴

49. *Id.* art. 2, 1981-A A.L.J.A. at 195.

50. *Id.* art. 5, 1981-A A.L.J.A. at 195.

51. Implementing Decree 580/81, § 3.

52. Law 22.426, art. 5, 1981-A A.L.J.A. at 195.

53. *Id.* art. 3, 1981-A A.L.J.A. at 195.

54. *Id.* art. 9, 1981-A A.L.J.A. at 195.

C. TAX CONSIDERATIONS

For purposes of the following discussion, "Registered Agreements" are defined as agreements that have been approved or filed, as required by the TTL, while "Nonregistered Agreements" are defined as agreements that lack the required approval or filing.

1. *Registered Agreements*

Under the Argentine Income Tax Law royalty payments made pursuant to Registered Agreements are deductible by the licensee as business expenses. The royalty payments themselves are, nevertheless, subject to an effective 27 percent withholding tax when the agreements provide for the transfer of technical assistance or engineering or consulting services. The rate increases to 36 percent in all other cases.⁵⁵

2. *Nonregistered Agreements*

Nonregistered Agreements, although valid, are subject to different tax consequences from those applicable to Registered Agreements. Payments due to the licensor under Nonregistered Agreements are not deductible as an expense by the licensee and the amounts paid are taxed at a 45 percent withholding rate.⁵⁶

3. *Special Tax Imposed by the Foreign Investments Law*

If payments are made under a Nonregistered Agreement, these payments may also be subject to the surtax set forth by the FIL (article 16 of Law 21.382, as amended) to the extent that these royalties, alone or in connection with any paid dividends, exceed the annual allowance of 12 percent of the registered capital.

In such a case, the remittance of profits that each year exceeds 12 percent of the registered investment is subject to an additional tax. The rate of the surtax is as follows:

Amount of Remitted Profits

In excess of 12 percent and up to 15 percent of the registered capital

In excess of 15 percent and up to 20 percent of the registered capital

Rate of Surtax on Excess

15 percent on the excess of the 12 percent of the registered capital

20 percent on the excess of the 15 percent of the registered capital

55. Income Tax Law, as amended by Law 23.260, art. 86(a).

56. *Id.*

Amount of Remitted Profits

In excess of 20 percent of the registered capital

Rate of Surtax on Excess

25 percent on the excess of the 20 percent of the registered capital

If less than 12 percent is remitted abroad in any fiscal year, the difference between such 12 percent and the amount remitted may be carried forward to the following years and deducted from future excesses over that 12 percent during a five-year period.

IV. Conclusion

The Argentine laws on Foreign Investment and Transfer of Technology (Laws 21.308 and 22.617 respectively) reflect the important changes that have occurred with regard to Argentina's attitude to both subjects. These statutes attempt to: (1) provide for the necessary controls on dividends and royalties remitted abroad that can affect the Argentine balance of payments; (2) grant foreign businessmen the freedom to invest in almost any economic activity (with certain limitations); and (3) select the best technology available on the international market at a reasonable price.

These laws also create a stable and predictable legal structure within which the foreign investor receives sufficient guarantees to protect its rights while at the same time giving the Argentine Government broad discretion to approve or reject proposed investments or technology transfer agreements between affiliated companies. While an adequate legal framework is a necessary prerequisite to the attraction of foreign investments projects, however, only political and economic stability will ensure a constant flow of foreign investments.