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Argentina as a Host Country for North American Investments

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Introduction

In a rapidly developing world, the southern half of the American continent remains a vast source of both human and material wealth. During the last seventy-five years, North American business has become aware of the potential of the area and has endeavored to become involved advantageously in its development. This economic involvement (and in many instances virtual domination of local economies) has resulted in few, if any, beneficial effects on the economic, political, or social development of the national territories involved. The interests of many of the foreign enterprises were often short-sighted and directed at their current needs; there was little concern for a mechanism which would provide more adequately for their needs and at the same time contribute to the development of the nation-state involved. Foreign businessmen were concerned primarily with the rate of return of their investment, but seldom took the time to analyze the setting of that investment; they failed to realize that each Latin American country was a separate entity not only politically, but also culturally and historically. A business policy effective in one nation-state was not automatically effective in another.

As the Latin American countries slowly developed, foreign business concerns became increasingly aware of the existence of this separate character of the countries. Many of these host countries have asserted their national pride and cohesiveness by promulgating strict foreign investment regulations. Accordingly, many foreign businessmen have become concerned with the country of their investment and the attitude and history of the local inhabitants (many of whom will now take a more active participation in the economic life of their country). Foreign investors are now aware that "the investment of foreign capital in developing countries has three principal facts: economic, political and legal."[1]

The present paper deals with North American investment in Argentina. In the broad sense, of course, "foreign investment is any international capital

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[1]E. NWOGUGU, THE LEGAL PROBLEMS OF FOREIGN INVESTMENT IN DEVELOPING COUNTRIES (1965) 1.

movement; and capital movement can take place in a variety of forms; through the issue of new securities, largely bonds; through purchases and sales of outstanding securities, both stocks and bonds, on security exchanges; through a variety of short-term credit instruments and forms; and through direct investment."[2] Direct investment differs from other types of investment in that it includes in addition to capital movement an element of control, technology and management.[3]

Regardless of the current strict control over new foreign investment (regulations which follow the trend in Latin America towards the treatment of foreign investment), the geographical, historical, social and legal precedents of Argentina mark that country as a unique setting for foreign, and especially American investment.

Part I

Motives for Foreign Investment

Many businessmen believe that direct investment is stimulated not by profits but by the potential market; from markets a firm can estimate a market share, a volume of sales, and an earnings to shares ratio.[4] The very essence of foreign investment implies that in a world of free, or equal competition, it cannot thrive. If the business conditions and consequently the competitive conditions in a host country are the same as those in the capital exporting state, the foreign enterprise cannot successfully achieve its key purpose: the maximal return of profits. If all subjective and objective factors were relatively equal, the domestic business concern would undoubtedly achieve a greater profit return due to its knowledge of the relevant market and the association of its product with the national image.

Thus, in order for direct investment to become attractive to the potential investor, there must be several factors or combination of factors which will make a host country attractive. These factors, for an American company, may include production costs lower than in the United States due to favorable wage rates, raw material prices, or interest rates; or the opportunity to reduce transportation costs, distribution costs, inventory and servicing costs to the market for which the outputs are intended.[5]

Although businessmen often analyze the environment in relation to specific factors, they tend to treat separately the impact of these variants within the particular country and within the regional framework. The experience of host

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[2] KINDLEBERGER, AMERICAN BUSINESS ABROAD (1969) 1-2.
[3] *Ibid.*, at 2.
[4] *Supra* note 2 at 7.
[5] *Ibid.*, at 13.

countries with direct investment shows that the problems which result from the presence of foreign affiliates can seldom be classified as purely economic, political, social or legal.[6] Consequently, an effective analysis of the foreign investment regulations of a particular nation-state can only be carried forward after an understanding of contemporary attitudes towards foreign investment and the consequences of such investments in the host countries.

Advantages vs. Disadvantages to Host Country

Investment by a foreign business concern has been asserted to present several positive contributions to the host country. It is beyond doubt that almost all foreign direct investment provides some form of transfer of technology. In many cases this makes available certain important information which may not otherwise be available to the domestic community. This transfer of technology will usually result in a corresponding benefit in the form of training workers and the creation of indigenous skills in management, marketing and other business techniques.[7] This training is usually derived from direct local participation in the foreign investment; however, the foreign controlled business also has several important effects on the development of the business community not directly connected with the foreign enterprise:

> By training, hiring and promoting national managers, and by its "demonstration effect," it contributes to their growth in quantity and quality. Many of those managers may grow into future independent national entrepreneurs and may be capable of participating in or taking over the management of foreign subsidiaries when in the future they pass into majority national ownership. A stimulus is also given to national entrepreneurship by creation of new national investment opportunities through subcontracting for deliveries.[8]

The establishment of the enterprise can also contribute directly or indirectly to the creation of employment opportunities in the non-managerial labor class. Furthermore, it is possible (although not always the case) for the foreign business to contribute to the raising of domestic wages and to improve labor relations, thereby, as a consequence, improving trade relations.[9]

Another benefit to be derived from foreign investment in the host country may be the transformation of the market structure in the domestic scene, and an impetus to greater and healthier competition.[10] The impact of this benefit, however, is mitigated by the fact that many of the host countries are chosen

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[6] FOREIGN INVESTMENT: THE EXPERIENCE OF HOST COUNTRIES (I. Litvak, C. Maule eds. 1970) 3.
[7] PRIVATE FOREIGN INVESTMENT AND THE DEVELOPMENT WORLD (P. Ady ed. 1971) 59.
[8] Rosenstein-Rodan, *Multinational Investment in the Framework of Latin American Integration,* MULTINATIONAL INVESTMENTS, PUBLIC AND PRIVATE, IN THE ECONOMIC DEVELOPMENT AND INTEGRATION OF LATIN AMERICA (Inter-American Development Bank Round Table, 1968) 25.
[9] *Supra* note 7.
[10] *Ibid.*

particularly for the total or partial lack of national competition in that line of business.

One advantage of foreign investment which is usually applicable to most developing countries is that they help to establish contacts with overseas banks, with capital markets, with markets for production, and with sales organization.[11] The importance of these contacts to the present and subsequent development of a country needs no elaboration.

Another benefit of foreign investment to the host country and probably one of the most important as far as the local governments are concerned is the contribution by these enterprises to the treasuries of the host country. The tax revenues fill the savings and foreign exchange gaps existing in many capital importing nations.[12]

The advantages to the host countries which have been described above cannot be said to accrue to all host countries. Each particular state should be analyzed for the purpose of ascertaining at which point of development the country finds itself. Factors which may be advantageous at one point, may become disadvantageous as the country progresses. Thus, the importance of thoroughly analyzing a country before investing to determine which factors should be emphasized and which should be disregarded, if possible, is increased.

Foreign businessmen typically stress the benefits to be derived from their investment; however, capital importing states, particularly those in Latin America, have been increasingly stressing the detrimental effects of such investments within their territories. "The most common fear among developing countries to foreign investment is that the owners of the capital may dominate the local economy and consequently exert directly or indirectly, an undesirable political influence on the local scene."[13] Perhaps this fear is a direct consequence of the fact that the United States assumes it has the right to require parent companies to direct the operations of their subsidiaries in ways to conform to American purposes, while foreign governments deny the existence of such rights.[14]

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[11] *Ibid.*

[12] *Ibid.*

[13] S. K. Date-Bah, *The Legal Regime of Transnational Investment Agreements that Is Most Compatible with Both the Encouragement of Foreign Investors and the Achievement of the Legitimate National Goals of Host States,* 15 J.AF.L. 241 (1971).

[14] *Supra* note 2 at 5. In March of 1974, the Argentine government decided to sell cars to Cuba manufactured in Argentina by American controlled enterprises. The American parent companies, with the apparent support of the United States government, attempted to disallow the subsidiaries to sell the automobiles destined for Cuba based on American regulations prohibiting sale of United States products to Cuba; thus, there was an attempt to establish the extra-territorial effect of such legislation at the expense of the sovereignty of the Argentine Republic. *La Nación* (International Edition) April 1, 1974.

As indicated above, host countries resent the center of decision of foreign controlled enterprises being located outside the reach of their sovereign power. If foreign concerns compose a significant portion of the economic life of the country, and if major decisions as to business policy are made abroad, there can be an important restriction on the government's control over the economic policy and goals of the state.

The control of corporate decisions abroad can also have the effect of mitigating several of the possible benefits to be derived from such enterprises. If the main decisions about investment allocation of imports of equipment for the subsidiary, as well as allocation of its exports, are taken centrally at the parent's headquarters, local executives of the foreign subsidiary do not acquire sufficient experience or training.[15] Control of the subsidiary by a foreign based headquarters can also affect the fiscal policy and control of the host government. If the subsidiary does its corporate borrowing strictly from its parent corporation, then a governmental monetary policy can be avoided, the increase of local currency deposits is non-existent and the development of banking facilities is diminished. Furthermore, by having control abroad, the subsidiary can frustrate the goals of local tax revenues by adjusting transfer pricing practices and headquarters' costs allocation.[16]

Two major faults with foreign enterprises in the eyes of nationals is that foreign investors commonly exercise monopolistic or oligopolistic power and that foreign subsidiaries often refuse to sell their shares locally.[17] Since many states do not have strict statutory prohibitions against practices restricting the flow of free competition (either in the form of anti-trust laws or unfair trade practices laws), many foreign concerns take advantage of this and hinder existing or potential local competition. The fact that subsidiaries often refuse to sell their shares locally has two consequences: the subsidiaries do not contribute to the formation of a national capital market, and the subsidiaries remain a foreign element in the community—inspiring local antagonism.

Aside from the disadvantages which operate against foreign investment from the very beginning, there are the disadvantages which arise as states develop and have a decreasing need for the benefits supposedly derived from the investment. If a nation-state has achieved a certain degree of sophistication (either politically, economically, or socially) before the American investment is established, certain of the rationalized benefits do not occur. This is particularly true in a state such as Argentina, whose development prior to any serious American investment is discussed later. Two examples should suffice to demonstrate this point. As has been previously stated, foreign investment

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[15] *Supra* note 8 at 26.
[16] *Ibid.*
[17] *Ibid.*

tends to strengthen both the local entrepreneur class and local wages. However, Argentina for years has had one of the most developed, so far as economic and cultural sophistication is concerned, middle classes in the world; and for years was one of the world leaders in per capita income distributions. Another expected benefit to be derived from the foreign investment is that it will open up new capital markets for the country; again, this is not of crucial importance to Argentina since it already enjoyed an active capital market with Europe before any serious American investment was established. Thus in some states foreign investment confers few benefits but creates many problems.[18]

Recent Trends in Attitudes Toward Foreign Investment

Since the actual disadvantages of foreign investment appear to overshadow many of the rationalized benefits, many capital importing nations have been drastically changing their attitudes toward the reception of such foreign establishments. As was previously stated, a particular state's current action on this matter cannot be effectively analyzed in isolation from other contemporary attitudes. Just as the acts of one member state of the European Economic Community cannot be isolated from the Community or its effects on regional non-member states, so the acts of one Latin American state must be considered in light of the regional treatment of foreign investment. Six Latin American states have joined together to form the Andean Common Market (ANCOM).[19] The concern of the member states towards the current form of foreign investment was demonstrated by that organization's issuance of what has been termed a "foreign investment code."[20] One other country, Mexico, has with its program of "Mexicanization"[21] and its recent foreign investment law,[22] created severe restrictions and limitations on foreign investment. Argentina, which enacted a new foreign investment code on November 7, 1973, confronted and dealt similarly with many of the same problems.

Since the problems, the enacted solutions and the reasons for their enactment are comparable, they will be presented without specific reference to any particular country or to any particular foreign investment code. At the very outset, it must be realized that international law recognizes the right of every sovereign

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[18]A good analysis of the problems foreign investment can create in the host country and the problems foreign investors face as they attempt to divest is presented in: Hirschman, *How to Divest in Latin America, and Why,* ESSAYS IN INTERNATIONAL FINANCE, No. 76 Nov. 1969, Dept. of Economics, Princeton University.

[19]The current members of the Andean Common Market are: Bolivia, Chile, Colombia, Ecuador, Peru and Venezuela.

[20]Decision 24, Committee of the Cartagena Agreement (Dec. 1970).

[21]Bank of London and South America, *Company Formation in Mexico,* (1972) Sec. B, at 8.

[22]Law on the Promotion of Mexican Investment and the Regulation of Foreign Investment, *Diario Official,* March 9, 1973.

state to regulate activities within its national boundaries. There is also no prohibition in international law with regards to a different treatment of aliens within national territories. This treatment can take the form of discriminatory taxation against aliens residing or owning property within the host country,[23] or of strict control over all or part of the activities undertaken by the aliens.

One of the most important problems of capital importing nations is the lack of capital within their borders. Many of these states suffer constantly from balance of payment and foreign exchange problems. This lack of capital tends to disrupt their international trade and to limit their resources for international transactions. Consequently many states (some perhaps prematurely) try to restrict the inflow-outflow of foreign exchange from their country. The typical method of achieving these goals has been to regulate or restrict all corporate borrowing to local credit, and the imposition of limits on the remittance of profits and upon repatriation of capital upon liquidation. Customary international law recognizes the right of states to control all aspects of their currency and monetary reserves as an attribute of sovereignty. However, although legally within their competence to regulate such matters, states should be careful of exercising excessive control, since if the capital contributors are prevented from taking out their profits, further investment in that country may be discontinued; there is no way of getting around the fact that the value to the investor of the investment is the earning of profits and their remittance home.[24]

Since the location of the center of control of enterprises under its jurisdiction is so important to countries, many states have declared that effective control of such enterprises must be in national hands. In order to effectuate this plan, some have enacted statutes which make it mandatory that there be domestic participation in any commercial concern established under their laws. A schedule of desired percentages of participation and the legal and economic advantages and disadvantages of each percentage are often set out.

Although at first this requirement creates a negative reaction on the part of many businessmen, the partnership of foreign and local capital can result in an advantageous method of financing economic development. It is beneficial to the investee state because it affords a good opportunity for effectively training local manpower.[25] As far as the investor is concerned, a joint venture, especially if initiated as such, will reduce the cost of the joint supply of capital, management, technology and market access. Perhaps the most important characteristic of this business organization is that it will likely change the national attitude towards foreign investment and create a friendly climate of cooperation instead

[23] *Supra* note 1 at 9.
[24] *Ibid.* at 18-19.
[25] *Ibid.* at 12.

of the prevailing and growing antagonism to the wholly owned subsidiary.[26] This is particularly important to investors producing goods for local consumption, since the acceptability of the manufacturer will inevitably mean fuller acceptance of the product; thus, although the American investor's portion of the profits is reduced, since the overall profits may increase, the impact of the loss due to the partnership is drastically mitigated.

Although domestic participation can result in beneficial effects to the foreign investor, the host countries should be careful that they do not reduce the level of permissible foreign participation below an economically feasible proportion. It is important to induce foreign investors to retain a substantial participation in order to sustain their interest in the efficiency and profitability of the enterprise. As far as the investor is concerned, the impact of having to retain only a minority position after several years of operation is reduced by the fact that by that time the whole or the largest part of the investment will be amortized.[27]

Part II

Prior Foreign Investment: Productivity and Regulation

The first foreign investment in Argentina after its independence was a loan contracted by the government of Bernardino Rivadavia with a London banking firm in 1825. Since that date, foreign investments, until recently, have increased and have received a warm reception. The majority of the investments tended to be located near the urban center around Buenos Aires, rather than in the more nationalistic interior.[28]

The first type of direct investment in Argentina was also by the British, and it took the form of participation in the establishment of a railroad network.[29] British investment in Argentina increased faster than that of other states, and subsequently British capital and technology controlled most of the public utilities (particularly communication and banking). This foreign control of sensitive industries, and the accompanying disregard for the needs of the state in preference to high profit return, are important reasons for the strict restrictions currently found on foreign participation in these areas.[30]

North American investment in Argentina has until recently been primarily concerned with the mining and oil industries. United States capital controlled

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[26] *Supra* note 8 at 28.

[27] *Ibid.*

[28] C. Brignone, *Foreign Investment in Argentina,* FOREIGN INVESTMENT: THE EXPERIENCE OF HOST COUNTRIES (I. Litvak and C. Maule eds. 1970) 259.

[29] In 1866, President Juarez Celmán sold to the British the remaining Argentine participation in the railroad industry.

[30] An example of this disregard is the electrical industry controlled by the British: installation took place in the cities where investments were profitable, as opposed to the rural areas.

the extraction and processing of gold, silver, lead, zinc and tungsten.[31] Many foreign companies, however, realizing the potential market and productive power of the population, have entered into varied forms of manufacturing. Argentina during the period between 1960-1969, presented the highest profit return on American foreign investment as compared to the rest of Latin America and the world as a whole.[32] The tables in Appendix A present the relevant statistics on the profitability of American investment in Argentina.

Past governments of Argentina recognized the possible benefits to a country of varied and productive investments, and have accordingly shown liberal attitudes. However, with the growth of industrialization and the increase in the power of the middle class, economic nationalism also flourished. The first important governmental acts reflecting on the issue of foreign investment took place during the first administration of General Juan Perón. Perón's economic program strove for the economic independence of Argentina through the removal of foreign control over several vital industries, and restrictions on the activities of foreign capital in other areas of domestic industry. The government proceeded to nationalize (by purchase where possible) the Central Bank, and the telephone and railroad systems.[33] In order to provide an impetus to industry, the Perón administration in 1953 enacted Argentina's first law regulating foreign investment.

That law and the accompanying regulation bear a striking resemblance to one of the laws now in force regulating foreign investment. The 1953 law instituted a system for controlling the remittance of profits, repatriation of capital, exemption from customs duties and certain other special benefits. When the Perón administration left government, the law became inoperative, and subsequent legislation (in 1958) on this matter was enacted.[34] The 1958 statute regulating foreign investment contains several of the usual incentives found in codes enacted by capital importing states hoping to promote foreign investment. It remained operative until the enactment of new legislation on July 31, 1971,[35] which is one of two sets of legislative enactments currently applicable to foreign investment in Argentina.

Effect of Foreign Investment on Argentine Economy

Foreign investment has had several direct effects on the Argentine economy aside from the ones enumerated in the first part of this analysis. These effects

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[31]B. Marianetti, *Argentina: Realidad y Perspectivas* (Buenos Aires, 1964) c. IV.

[32]A. Ribas, The Effects of Foreign Investment on Argentina (Council of the Americas 1972) 1.

[33]R. Alexander, The Perón Era (1951) 154-158.

[34]*Supra* note 28 at 265.

[35]Ley 19,151 (July 30, 1971), Anales de la Legislación Argentina.

are discernible primarily on the national income, on the export trade, on balance of payments, and on the financial world.

The total United States investment in Argentina is estimated to be around $1.5 billion. One of the most important effects of foreign investment is its effect on the national income. The estimated contribution of United States affiliates to the Gross Domestic Products of Argentina was 3.5 percent of the total in 1966; furthermore, American manufacturing affiliates accounted for almost 10.1 percent of the total contributed to the GDP made by all manufacturing enterprises in Argentina.[36] The table in Appendix B shows the proportion of foreign and domestic investment expressed in terms of percentages of GDP.

A natural consequence of this large investment and participation in the economy is the effect on national employment. Although data are only available as to employment in the manufacturing and mining affiliates of United States companies, and only up to 1966, the total employment by these enterprises amounted to approximately 99,000 people, of whom 99.7 percent were Argentine nationals. In the manufacturing area, Argentine nationals constituted 94.2 percent of all the personnel with managerial responsibilities; and 98.9 percent of the technical and professional personnel. In the petroleum affiliates, Argentines represented 98.5 percent of the managerial personnel and 93.3 percent of the technical and professional employees.[37] If these statistics are adequate, then it may properly be said that these foreign concerns are developing the entrepreneurial class and the national income.

All new industry established in a country is bound to have effects on existing or supporting industries. This can take the form (as has been discussed previously) of supplies, transportation, or expanded markets, and other similar services (backward linkages), or they can take the form of new or expanded supplies for use as inputs by other companies (forward linkages). At present there are no available data as to the forward linkage effect, but the backward linkage total effect of United States affiliates in Argentina is approximately $832 million per year (data based on 1966).[38]

The effects of United States investment on Argentina's export trade has been substantial. Domestic factors in Argentina, such as inflation, adherence to the "dependency" theory, protectionism, and manipulation of exchange rates have inhibited exporting from Argentina. United States affiliates between 1965-1968 accounted for approximately 14.5 percent of the total exports from Argentina (about 214 million annually); the American manufacturing affiliates accounted for 13.9 percent of the total exports.[39] Furthermore, this large

[36] *Supra* note 32 at 5.
[37] *Ibid.* at 5-6.
[38] *Ibid.* at 7.
[39] *Ibid.* at 9.

contribution to the export trade by the manufacturing sectors has a positive impact on Argentina's balance of payments.

Part III

Current Foreign Investment Regulations

At the present time there are two laws regulating foreign investments in Argentina: Law 19,151 and Law 20,557. Law 19,151, remains of importance to foreign investments existing prior to the enactment of Law 20,557 since the latter gives these existing investments the option to register under the new law or to remain under the old law.

Law 19,151 and Decree 2400

Law 19,151 was enacted on July 30, 1971, and is regulated by Decree 2400 of April 27, 1972. This law was drafted with the hope of stimulating national industry, and recognized the contribution made by both foreign technology and foreign capital. However, the drafters of the law believed it necessary to arrive at some method of assuring that the investments and the subsequent remittance of profits and repatriation of capital should conform to the national interests. Also, the law attempts to stimulate the internal growth of Argentina by limitation on "foreign credit, and by the encouragement of foreign capital particularly in those sectors of the economy requiring intensive capital."[40]

Law 19,151 regulates foreign capital investments entering into new economic activities or in the application or improvement of existing investments (re-investment). Article 19 of the Decree establishes a Register of Foreign Investment, in which all investments approved must be inscribed, as also those authorized by previous promotional schemes and increases in capital imputable to such operations. Articles 2, 3, and 4 list the several factors which the government considered in its determination of whether to grant the registration or not. Registration and authorization by the executive were required in order for the investments to be eligible for the benefits provided under the present law. The deadline for the registration of existing investment was October 27, 1972.[41] These criteria will not be enumerated here, since they are no longer applicable to new foreign investment; and presumably all existing investments prior to the enactment of the new law were already registered. It is, however, interesting to note that among the factors to be considered (or investments to be given preference) are the possibility of national participation, and the area and economic sector where the investment is to be located.[42]

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[40]Ley 19,151, Anales de la Legislación Argentina.

[41]*Ibid.*

[42]These two criteria were to be the partial subject of two subsequent pieces of legislation: Ley 20,557 and Ley 20,560.

Law 19,151 provides that the investor may remit abroad all of the annual profit realized; however, Decree 2400 states that notwithstanding this, "the Applications Authority may agree with the proposers of investments, at the moment of considering their suggestions, a voluntary limit on the exercise of the rights that this Article confers, for determined periods. In such cases, the investor, at his option, will have the right, during the agreed period, to automatic re-investment of his profit in the same company, or to its accumulation in special reserve account . . ."[43] Profits which are not remitted abroad, and which are not subject to the special limitations described above, may be re-invested in the enterprise, invested in other areas or industrial sectors set out in the law (governmental approval, unless previously obtained during registration, is required for this investment of profits), or deposited with the National Development Bank.[44]

Repatriation of capital upon liquidation of the company or the sale of shares or quotas to investors domiciled or based in the country is limited to the value of the foreign exchange of the original capital, plus re-investment of profits and the proportion of profits not distributed by the company, and after taxes had been paid.

Article 12 of the Law establishes strict limitations on financial credit by foreign controlled enterprises. Local bank credit for foreign controlled enterprises is restricted to short-term credit and not in excess of 50 percent of the total registered capital and accumulated profits (this limitation, however does not apply to credit destined to finance export operations). Article 6 of the Decree elaborates on the applicability of the law. It states that the limitation on domestic bank credit will be applied exclusively to companies with a majority of foreign origin; the allotment of credit corresponding to the part of the capital that is national, is governed by the rules of the Central Bank. Furthermore, the Decree states:

> b. The concept of "short-term or development domestic bank credit" will apply only to operations requiring immediate working capital, excluding any other use, and loans will exceed the period of one year except when the nature of activities carried on by companies, and the fact that portfolios of commercial documents include credits for more than one year, require that a form of credit will be allowed, involving negotiations of the documents, to enable companies to continue operations.

A novel requirement established by the Law (and not elaborated upon in the Decree) is the requirement that a certain percentage of Argentine nationals be included in the work force of the foreign enterprise. Article 14 states that enterprises which contain foreign capital are required to employ Argentines in

[43]Decreto 2400 Art. 3, Anales de la Legislación Argentina.
[44]Ley 19,151 Art. 9, Anales de la Legislación Argentina.

at least 85 percent of all managerial positions. It is interesting to note that this requirement, unprecedented in Argentine history, by not specifying how large a foreign participation is required to bring the enterprise under the requirement, would place all enterprises with any foreign capital under the requirement.

The application of the law and the regulations is the responsibility of the government Secretariat for Planning and Action. Failure to comply with the rules of the Decree approving the investment, for reasons imputable to the investor, give rise to a loss of the rights conferred by Law 19,151 and elimination from the Register, without prejudice to the application of other sanctions that are applicable within the specific regulations for each investment.[45]

Law 20,557 and Decree 413

On August 2, 1973, the Chamber of Deputies of the Republic of Argentina passed a new foreign investment bill. The bill met with an unusual demonstration of nationalism: the entire Chamber of Deputies stood up and sang the national anthem after the crucial vote.[46] Although nationalistic tendencies had been rising, particularly in reference to the effects of foreign investment, this symbolic outburst was due, in part, to the acts of an American diplomatic officer. The United States Chargé d'affaires, Max Krebs, during July of 1973 met with the President of the Chamber of Deputies, and subsequently submitted written criticism of the proposed legislation, stating that the bill, if approved would tend to discourage new investment. Upon receiving the memorandum, the President of the Chamber of Deputies forwarded the document to the Finance Minister, who in turn made it available to the press. Nationalism was predictably aroused due to this American interference in Argentine domestic affairs, and one week later the Chamber of Deputies passed the bill almost without modifications.[47]

On November 7, 1973, the Law for Foreign Investments was approved by the Congress (Senate) of Argentina, and published in the Official Bulletin on December 6, 1973[48]; the Regulations implementing the law were issued February 22, 1974.[49] The new law, except as previously stated, supersedes all prior foreign investment laws. It governs direct investment of foreign capital (*i.e.*, transfer and investment of foreign currency, transfer and investment of capital assets and spare parts, capitalization of foreign loans, re-investment of freely remittable profits and investment of Argentine National Foreign Debt Loans); obligations to transfer funds abroad in respect of amortization of

[45]Decreto 2400, Art. 7, Anales de la Legislacion Argentina.
[46]*La Nacion*, August 3, 1973.
[47]*La Prensa*, August 1, 1973; *Washington Post*, August 8, 1973.
[48]Ley 20,557, Anales de la Legislación Argentina.
[49]Decreto 413, Anales de la Legislación Argentina.

capital or payment of interest; and obligations to transfer funds abroad arising from contracts or agreements entered into with creditors domiciled abroad (with the exception of contracts concerning the use of technology, transport and insurance).

All enterprises operating in Argentina will be classified under the following system:

a. companies of foreign capital. These are taken to be companies whose national capital is less than fifty-one percent (51%) of capital with powers of decision.
b. companies with joint participation of national and foreign capital. These are understood as being companies whose national capital, whether private or state-owned, is between fifty-one percent (51%) and eighty percent (80%) of the company's capital, hold legal powers of decision, and give proof of their technical, administrative, financial and commercial management being effectively governed by the national investors.
c. companies of national capital. These are taken to be companies in which national investors hold a participation of more than eighty percent (80%) of the company's capital and legal powers of decision, and give proof of their technical, administrative, financial and commercial management being under the effective government of the national investors.[50]

These classifications are important in ascertaining: a) if the investment will be permitted in the desired sector of the economy, b) if the investment application is to receive any preferential treatment, c) the local and foreign borrowing possibilities, and d) the type of approval necessary for the foreign investment.

The new law requires that foreign investors who desire to reap the benefits under it (repatriation of capital and remittance of profits), must apply and have their proposals approved in advance. The application must be filed with the executive branch. Article 5 of the law enumerates the requirements which must be met by the investors in order to receive the requisite approval. Authorizations for proposed projects will not be granted to applications in which limitations or restrictions on exports are imposed or where eventual judicial controversies will be removed from the jurisdiction of Argentine courts, or where foreign states or international entities are entitled to subrogate themselves to the rights of the foreign investors.

Although the law does not contain a fade out provision for existing investments, applications providing for a gradual increase in national participation are given priority. Investments in mixed or local companies are also given preference as long as the investors commit themselves "to a program for the transformation of the company into a company with national capital within a ten year period" pursuant to the following schedule: 20 percent of the company's capital should be under the ownership of local investors within the

[50]Ley 20,557, Article 2, Anales de la Legislación Argentina.

first five years, and the remaining equity should be sold in installments of not less than 16 percent per annum until the requisite 80 percent ownership by local investors is achieved. Priority will also be given to proposed investments which make a commitment either: a) to export a substantial portion of its turnover, b) to hire and train national unemployed manpower, c) to apply technology already created or to be developed in the country, d) to use raw materials and capital goods of national production, e) to contribute to geographical industrial decentralization, f) to deposit profits with national banking institutions, or, g) to reinvest profits within the country.

The law restricts foreign participation in certain key sectors of the economy. Foreign investment is not permitted in excess of 20 percent of the capital of the company if such a company is engaged in industries concerned with national defense and security; public services; insurance, banking and financial activities; advertising, radio and television broadcasting; newspapers, magazines, and other mass communication media; local marketing (except products of its own manufacture); activities reserved to governmental entities or to local companies; agriculture, stockbreeding and forestry activities (except those incorporating new forms of technology; and fishing (except when it contributes to the access of closed international markets).

Foreign investments which have been approved beforehand by the Argentine government are granted the right to repatriate capital and to remit profits. Repatriation of capital is permitted beginning five years from the date of approval; but the annual amount of such repatriation cannot exceed 20 percent of the total invested capital. In all cases, however, the continuity of the functioning of the company and the performance of its services must be guaranteed.

Foreign investors may remit profits abroad in the proportions established in the investment contract. However, remittances of profits may not exceed 12.5 percent of the investment, or four points over the rate of interest payable by a first class bank for 180 days' deposit, whichever is the highest. The transfer of profits may not be made with funds from external or internal credits, unless expressly authorized, and must be made with the company's own liquid funds. In addition, profit remittances cannot be made if there exist debts outstanding for taxes and pension funds. Annual profits in excess of the stated percentage and which cannot be re-invested as part of the registered foreign investment cannot be transferred abroad. It can, however, be used in the same company or invested in other local companies without the right to repatriate capital or to remit profits.

The law regulates both local and foreign borrowing. It provides that the Authority of Application is to establish at the time of authorization of each investment the maximum indebtedness the investment will be allowed to receive. Local borrowing, however, is limited to short term credit, and cannot exceed the total of the original investment plus any re-invested amount. Foreign

borrowing by any enterprise requires the prior authorization of the Central Bank; and the effective annual interest rate of the foreign credit may not exceed by more than two points the internal rate applicable to first class securities in force in the country of origin of the currency of credit.

One aspect of the law which is of particular interest to investors who commit themselves to transform the enterprises into national enterprises, or to investors receiving a minority participation in a proposed enterprise, is that the new legislation requires that effective control of enterprises must be in national hands in order to receive preferential treatment. All agreements between partners or shareholders executed in violation of the law, and especially those which tend to hide the ownership or control by a foreign investor are null and void and punishable as a crime. Any violation of the law may produce the permanent or temporary loss of the rights established therein (*i.e.*, repatriation and remittance rights).

All existing foreign investments are under an obligation to register. Investors have the option to agree upon whether their investments will be governed by the laws under which they were established, or by the new law. If the former option is chosen, each remittance of profits becomes subject to a new tax. This supplementary tax runs from 20 percent on remittances equal to less than 6 percent of the capital, to 40 percent on remittances in excess of 15 percent of capital; it is, of course, applicable only to remittances by foreign and mixed investments.[51] All new or future investment proposals are also under an obligation to register, and these investments have no choice but to be regulated by the new law.

Analysis of Law 20,557

The new law and accompanying regulations undoubtedly create problems for existing or potential investors in Argentina. Before commenting on these problems, it should be realized that this is not the first time that the Argentine government has restricted foreign investment: the law of 1953 regulating foreign investments also created many similar problems.[52]

The law restricts the remittance of profits to 12.5 percent. This in itself is not a severe restriction, and is in line with the past rates of return on total United States investments in Argentina (see table I of Appendix A). Problems arise, however, when an enterprise does not manage to produce a profit of at least 12.5 percent in one year, and produces profits in excess of 12.5 percent in a subsequent year (or vice versa). Since there is no provision for a carry forward of excess profit or loss, there is an indirect stress on companies to stabilize their profitability; this may have the negative effect of reducing ef-

[51] *Milder Law of Foreign Investment Passes Argentine Congress,* BUSINESS LATIN AMERICA (Nov. 14, 1973) 361.

[52] *Supra* note 28 at 265.

ficiency and removing the incentives for modernization. The law appears to operate on the assumption that few, if any, American investments receive a profit return on their investment of less than 12.5 percent.

As was stated previously, one of the most important requirements of the new law is that effective control of enterprises be in national hands in order to receive preferential treatment. This requirement, and the prohibition against shareholder and other such agreements, appears to eliminate the possibility of a foreign participant asserting minority shareholder rights in order to circumvent the law's motives.

There appear to be three practical alternatives for American investors already engaged in operations in Argentina. The first alternative is to register and come under the auspices of the new law. The second alternative is to remain under the application of the old investment law and consequently remit profits and pay the supplementary taxes. The third and final course of action available to the investor is to remain under the old law, but remit none of the profits (and thus not incur any supplementary taxes), and hope that the law is changed in the near future. This alternative, however, is financially risky (due to conversion and devaluation risks), and politically risky (due to the trend towards foreign investment restriction discussed before).

Licensing Agreements and Transfer of Technology

Law 20,557 provides that within sixty days after its enactment, the Executive Branch will submit to Congress a bill to regulate the amount of remittances to be made by national, mixed or foreign companies with respect to technological services, royalties and similar fees. But the legislation has not yet been enacted, and, consequently, all foreign assistance agreements remain under the existing law (Law 19,231).[53]

Existing legislation requires that all license and know-how agreements be registered with the Ministry of Industry, Commerce and Mining. This requirement encompasses all agreements under which benefits are to be remitted abroad from the licensing of trademarks, patents, designs, patterns, and the furnishing of technical assistance, including the training of manpower.

Part IV

Forms of Business Organization

Several forms of business organization are available to the foreign investor. The investor can choose to operate either through a registered branch of a foreign-constituted corporation, arrange for the licensing of an existing corporation, or establish a local business enterprise. The different forms of

[53]Ley 19,231 (9/10/71) and Decree 6187 (12/22/71), Anales de la Legislación Argentina.

local organization include the following: sociedad anónima (corporation), sociedad de responsabilidad limitada (limited liability company), sociedad en comandita (limited liability partnership), sociedad colectiva (partnership), and the sociedad accidental o en partipación (temporary association or joint venture).

Until recently, all commercial associations were subject to the rules set out in the Code of Commerce of Argentina and the supplementing legislation. However, on April 25, 1972, a new Commercial Companies Law (Sociedades Comerciales) was published.[54] This new law repeals Title III (which deals with commercial companies) and several supplementing laws.[55]

Constitutional Guarantees

Foreigners in Argentina are protected by several constitutional provisions. Article 14 of the Constitution guarantees that all inhabitants (including aliens) have the right to "work and practice any lawful industry; of navigating and trading; of petitioning the authorities; of entering in and remaining in, travelling through, and leaving Argentine territory; . . . of using and disposing of their property; of associating for useful purposes. . . ."[56] These rights and privileges, however, are subject to legal limitations based on the police power of the state and invoked either due to moral, cultural or security reasons.[57] The constitution further provides that "all its inhabitants are equal before the law, and admissible for employment without any other requisite than fitness. Equality is the basis of taxation and of the public burdens.[58]

Article 20 of the Constitution is perhaps the most important to aliens since it is the one provision exclusively dedicated to them. It states:

> ART. 20. Foreigners enjoy in the territory of the Nation all of the civil rights of a citizen; they may engage in their industry, commerce or profession; own real property, purchase it and alienate it; navigate the rivers and coasts; freely practice their religion; make wills and marry in accordance with the laws. They are not obliged to assume citizenship or to pay forced extraordinary taxes. They may obtain naturalization by residing two continuous years in the nation; but the authorities may shorten this term in favor of anyone so requesting, on asserting and proving services to the Republic.[59]

This article of the Constitution is of great importance not only because it establishes the substantive rights of aliens in Argentina, but in many respects is demonstrative of the traditional Argentine attitude towards aliens. The article was a direct result of the feeling during the constitutional convention

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[54]Ley 19,550 (4/25/72), Anales de la Legislacion Argentina.

[55]Sources from within Argentina indicate that at present an official commission is considering a revision of the new law.

[56]Constitución de la Republica Argentina, Art. 14.

[57]S. Lozada, *La Constitución Nacional Anotada*, (Buenos Aires, 1961) 33.

[58]Constitución de la Republica Argentina, Art. 16.

[59]Constitución de la Republica Argentina, Art. 20.

that the population of Argentina had to be increased, and an effective way to achieve this would be to state that the Constitution was "for all the men in the world who may want to inhabit the Argentine territory."[60] Although this particular article was directly applicable to foreigners, it is not the only provision safeguarding an alien's rights; the Constitution, and all its provisions, apply to all inhabitants within the nation.

Treaties between the United States and Argentina

There are several treaties between the United States and Argentina which are relevant and important to foreign investors. The first is the Treaty of Friendship, Commerce, and Navigation, signed on July 27, 1853 and which entered into force on December 20, 1854.[61] This treaty covers three major subjects: it is a formal establishment of friendly relations between the two states, it establishes the security to be accorded to commercial activities of the nationals of one contracting state in the other, and it guarantees freedom of navigation and free access to ports and internal waters of one state by vessels of the other.[62] The United States Department of State has declared that these treaties are necessary to afford

> American investors a proper measure of security against undue risks likely to plague their foreign operations. It has not been intended to shield the investors against the economic risks to which venture capital is subject but to reduce the special hazards to which overseas investment may be exposed by reason of unfavorable laws or judicial conditions.[63]

The second important agreement is the one providing for the guaranty of private investment. This agreement calls for a guaranty against losses resulting from inconvertibility in projects that have had the written approval of the government of Argentina.[64]

The third relevant treaty is the Agreement for relief from double taxation on earnings derived from the operation of ships and aircraft. It provides that United States companies, and national or residents of the United States, shall not be taxed on profits derived from the rendering of services related to these areas, as long as they are not residents of Argentina.[65] This is the only treaty providing relief from double taxation between the two states, so the American

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[60] *Supra* note 57 at 66.

[61] Treaty of Friendship, Commerce and Navigation, 10 Stat. 1005. TS 4, 5 Bevans 64.

[62] *Supra* note 2 at 120.

[63] Commercial Treaty Program of the United States, U.S. Dept. of State Publication 6565 (1958) 4.

[64] Guaranty of Private Investments, 12 U.S.T. 955, T.I.A.S. 4799, 411 U.N.T.S. 41 (signed on Dec. 22, 1959, entered into force provisionally Dec. 22, 1959, definitely May 5, 1961). Protocol supplementing the agreement of Dec. 22, 1959 (Art. 1 and 4(A)), signed on June 5, 1963; Art. 1 and 4(A) entered into force provisionally June 5, 1963.

[65] Agreement for Relief from Double Taxation of Earnings Derived from Operation of Ships and Aircraft, 1 U.S.T. 473, T.I.A.S. 2088, 89 U.N.T.S. 63 (entered into force July 20, 1950).

investor with residence in Argentina not engaged in the two exempted industries will have to resort to the tax credit device in order to receive any relief from his potential United States income tax.

Risk of Expropriation

In accordance with principles of state sovereignty, all private property is subject to a public taking whenever its existence and operation are not consistent with the prevailing public policy. International law recognizes the right of a state to interfere with property rights, but, "in accordance with the minimum standard of international law, applicable to foreign property, such property may be expropriated only in the public interest, without unjustifiable discrimination, and on payment of full or adequate, prompt and effective compensation."[66]

The Argentine Constitution states that "property is inviolable, and no inhabitant of the Nation can be deprived thereof except by virtue of a sentence founded on law. Expropriation for reasons of public utility must be authorized by law and previously compensated."[67] According to Argentine legal scholars, this provision was included in the Constitution to restrain the powers of the state, particularly since at the time of constitutional enactment, the state was not yet accustomed to limits on the exercise of its power.[68]

There are several aspects of this constitutional protection which deserve analysis. First, the Supreme Court of Argentina has stated that it applies in respect to both real and personal property.[69] Second, expropriation for public use must be by law enacted by Congress, and not by executive decree or municipal ordinance. Third, a public purpose implies that property cannot be expropriated from one person and delivered to another who is not a public entity. Fourth, the compensation must be prior to the expropriation, except in cases of extreme urgency. Fifth, it is the judiciary which has exclusive jurisdiction to determine the adequacy of the compensation; and if the person whose property has been expropriated does not accept the offer, there is recourse to a summary law suit. Sixth, until expropriation of the property actually occurs, the state cannot interfere with the right of ownership by dispositions which prohibit the use and disposal of property without compensation. Seventh, and last, the declaration of a need for public use must be based on a true and necessary expropriatory cause.[70]

There are several legislative enactments dealing with the issue of expropriation. These attempt to establish guidelines for compensation and valuation,

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[66]SCHWARZENBERGER, FOREIGN INVESTMENTS AND INTERNATIONAL LAW, 1969.
[67]Constitución de la Republica Argentina, Art. 17.
[68]*Supra* note 57 at 55.
[69]Horta v. Harquidequy, Fallos de la Corte Suprema, T. 157, p. 47.
[70]Bielsa, *Derecho Constitucional* (3rd ed. 1959) 370.

and to establish a procedure for settlement of claims. Also, in addition to the constitutional provisions and statutes, Article 2511 of the Civil Code provides for compensation not only for the expropriated property, but also for "direct damages resulting from the loss of the property."[71]

Enforcement of the Laws

The existence of numerous laws and regulations both protecting and restricting the foreign investor are of little value unless there is some method of ensuring their enforcement. To the investor, the existence of such a system is perhaps the most important factor in determining the situs of his proposed investment. An enforcement procedure is directly connected with the national concept of legality, and this attitude is not the product of one transient government or of one generation. The process is a long one and it is developed by a number of social, political and legal factors. A national concept of legality can provide an investor with an intangible guarantee against governmental interference, against popular self-action, against judicial bias, and can provide the necessary basis for reliability in transactions.

One of the most revealing signs of the existence of a concept of legality is the role of the judiciary and the legal profession in the domestic setting. An autonomous and trained judiciary, prompted by an aspiring legal profession, can assure the efficient operation of legislative intent as demonstrated by existing laws. In Argentina, the autonomy of the judiciary is established by the Constitution,[72] and is ardently maintained in practice. The character of the modern legal profession in Argentina can best be demonstrated by stating that Argentina remains one of the leading publishers of legal commentaries in the world, with an orderly and concise organizational system for the exposition of legal research and doctrine.

A second, and perhaps equally important signpost of a legal attitude, is the prevailing Argentine notion of the supremacy of the Constitution. This is due partly to the fact that the present Constitution has survived virtually unchanged for over one hundred and twenty years. To many Argentines, the Constitution represents the cornerstone of the state, and it is to be used in measuring the legality of governmental and private acts. Thus, Argentines sincerely believe in the existence of a regulatory legal norm beyond the reach of everyday circumstances and consequently providing for a certain degree of reliability.

Conclusion

In determining the situs of his proposed investment, an investor should

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[71]A detailed analysis of the issue of expropriation and related legislation is contained in: A. Gordillo, *Argentina,* EXPROPRIATION IN THE AMERICAS (A. Loewenfeld ed. 1971).

[72]Constitución de la Republica Argentina, Art. 95.

analyze all the relevant factors, and should not limit his inquiries to the purely legal aspects. The potential host country should not be analyzed separately from other countries in the region, nor should it be judged merely on current conditions. Recognition of existing regional trends and the varied precedents of the host country can be invaluable to the astute investor.

Argentina provides a unique setting for foreign investment. Considering the similar treatment which foreign investment is receiving in other Latin American countries, the current Argentine restrictions are neither novel nor unduly severe. The Argentine terrain provides a degree of variety which should facilitate any proposed project. The Argentine people, due to their traditional receptive attitude towards foreign investment, their demonstrated capacity to engage effectively in profitable enterprise, and their regionally unique concept of legality, should provide a competent partner in any proposed investment.

Appendix A

The Profitability of Foreign Investment

The four tables following show, respectively (1) Earnings of Total U.S. Direct Investments in Argentina (2) Earnings of U.S. Direct Investments in All Non-Manufacturing Enterprises (3) Earnings of U.S. Direct Investments in Manufacturing Enterprises in Argentina (4) Annual Rates of Return on U.S. Direct Investments in Manufacturing in Argentina, the Rest of Latin America and in the World as a Whole.

Table 1

Earnings of Total U.S. Direct Investments in Argentina
(values in millions of dollars)

	Investments End of Previous Year	Net Earnings		Rate of Return	Ratio of Remitted Earnings to Investment
		Total	Remitted		
1960	361	46	10	12.7%	2.8%
1961	472	86	34	18.2%	7.2%
1962	656	80	45	12.2%	6.9%
1963	799	52	57	6.5%	7.1%
1964	829	91	64	11.0%	7.7%
1965	882	133	50	15.1%	5.7%
1966	992	128	67	12.8%	6.8%
1967	1035	80	89	7.7%	8.6%
1968	1082	126	94	11.6%	8.7%
1969	1156	139	115	12.0%	9.9%
Full decade				12.0%	
1960-1964				12.1%	
1965-1969				11.8%	

Source: Periodic issues of *Survey of Current Business*.

Table 2

Earnings of U.S. Direct Investments in
All Non-Manufacturing Enterprises, Collectively, in Argentina
(values in millions of dollars)

	Investments End of Previous Year	Net Earnings		Rate of Return	Ratio of Remitted Earnings to Investments
		Total	Remitted		
1960	203	11	4	5.4%	2.0%
1961	259	38	20	14.7%	7.7%
1962	373	48	33	12.9%	8.8%
1963	395	37	37	9.4%	9.4%
1964	375	31	30	8.3%	8.0%
1965	382	49	29	12.8%	7.6%
1966	375	49	35	13.1%	9.3%
1967	379	53	42	14.0%	11.1%
1968	404	50	46	12.4%	11.4%
1969	426	48	47	11.3%	11.0%
Full decade				11.4%	
1960-1964				10.1%	
1965-1969				12.7%	

Source: Periodic issues of *Survey of Current Business*.

Table 3

Earnings of U.S. Direct Investments in
Manufacturing Enterprises in Argentina
(values in millions of dollars)

	Investments End of Previous Year	Net Earnings		Rate of Return	Ratio of Remitted Earnings to Investments
		Total	Remitted		
1960	158	35	6	22.2%	3.8%
1961	213	48	14	22.5%	6.6%
1962	283	32	12	11.3%	4.2%
1963	404	15	20	3.7%	5.0%
1964	454	60	34	13.2%	7.5%
1965	500	84	21	16.8%	4.2%
1966	617	79	32	12.8%	5.2%
1967	656	27	47	4.1%	7.2%
1968	678	76	48	11.2%	7.3%
1969	730	91	68	12.5%	9.3%
Full decade				13.0%	
1960-1964				14.6%	
1965-1969				11.5%	

Sources: Periodic issues of *Survey of Current Business*.

Table 4

Annual Rates of Return on U.S. Direct Investments in Manufacturing in Argentina, the Rest of Latin America and the World as a Whole, 1960-1969

	World As a Whole	Argentina	Rest of Latin America
1960	12.3%	22.2%	9.7%
1961	10.7%	22.5%	8.1%
1962	11.0%	11.3%	10.6%
1963	11.6%	3.7%	10.2%
1964	12.2%	13.2%	10.6%
1965	11.9%	16.8%	10.3%
1966	10.8%	12.8%	11.1%
1967	9.3%	4.1%	8.9%
1968	10.4%	11.2%	11.4%
1969	12.1%	11.5%	11.2%
Full decade	11.2%	13.0%	10.2%
1960-1964	11.6%	14.6%	9.8%
1965-1969	10.9%	11.5%	10.6%

Sources: *The Effects of United States and Other Foreign Investments in Latin America*, Table 33, and periodic issues of *Survey of Current Business*.

Appendix B

Domestic and Foreign Investment

Finally, it is interesting to compare Argentina's domestic and foreign investment during the period 1958-1969, both expressed in terms of percentages of GNP:

	Domestic Investment (% of GNP)	Foreign Investment (% of GNP)
1958-59	16.4	2.4
1960-62	19.1	3.7
1963-64	15.5	2.1
1965-69	19.2	1.2

Source: Effect of Foreign Investment on Argentina (Council of the Americas, July, 1972).