



### 3. Foreign Investment and International Aspects

#### **Foreign Direct Investment Act**

By Grant Thornton Argentina

**Argentine Foreign Investment Act - As codified September 8th, 1993 by Executive Order 1853**

#### *Article 1*

Foreign Investors who invest capital in the country, using any of the forms established in Article 3 for the promotion of economic activities or expansion or enhancement of existing ones will have the same rights and duties that the Constitution and the laws accord to domestic investors, subject to the terms of this law and special or promotional regimes.

#### *Article 2*

The following definitions will be used in this law:

**1 Foreign capital investment:**

- a all capital contributions belonging to foreign investors used in economic activities carried out within the country
- b the acquisition of all or part of the capital of an existing domestic company by foreign investors.

**2 Foreign investor:** all natural and legal persons domiciled outside the national territory; the holder of a foreign capital investment; and domestic companies of foreign capital as defined in the next section of this article, when investing in other domestic companies.

**3 Domestic company of foreign capital:** all companies domiciled within the territory of the Republic, in which natural or legal persons domiciled outside of the Republic directly or indirectly own more than 49% of the capital, or directly or indirectly control the number of votes necessary to prevail in stockholders or partners meetings.

**4 Domestic company of domestic capital:** all companies domiciled within the territory of the Republic, in which natural or legal persons also domiciled within the Republic directly or indirectly own less than 51% of the capital and directly or indirectly control the number of votes necessary to prevail in stockholders or partners meetings.

**5 Domicile:** as defined in detail in Articles 89 and 90 of the Civil Code.

*Article*

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Foreign investments can be in:

- 1 freely convertible foreign currency capital goods, their parts and accessories
- 2 earnings or capital in domestic currency belonging to foreign investors, whenever lawfully transferable abroad
- 3 capitalization of foreign credits in freely convertible foreign currency
- 4 intangible assets, in accordance with specific laws
- 5 other types of contributions established in special or promotional regimes.

*Article 4*

Regulations pursuant to this law will be issued by an administrative agency within the Ministry of Economy and Public Works and Services, with a rank not inferior to Undersecretariat which, acting as the Enforcement Authority, will establish its structure, functions and faculties.

*Article 5*

Foreign investors are entitled to remit abroad earnings realized as a result of their investments, as well as to repatriate their capital.

*Article 6*

Foreign investors are entitled to utilize any of the corporate structures recognized by national laws.

*Article 7*

Domestic companies of foreign capital may access the domestic credit market with the same rights and conditions as domestic companies of domestic capital.

*Article 8*

Temporary contributions of foreign capital made pursuant to contracts for the provision of goods, works, services or other activities are not subject to this law and will be governed by the terms of the respective contracts in accordance with applicable laws, notwithstanding which the owners of such contributions may choose to have their investment governed by the terms of this law.



#### *Article 9*

Legal Deeds entered into between a domestic company of foreign capital and the company that directly or indirectly controls it or another subsidiary of the latter will be considered, for all purposes, to have been reached between independent parties when their terms and conditions conform to normal market practices among independent entities.

#### *Article 10*

Prior laws relating to foreign investment and general rules issued pursuant to them are hereby repealed. This law will apply to all proceeding pending under the laws repealed hereby.

### **Executive Order 1853 of September 8, 1993, codifying the Foreign Investment Act of September 8, 1993**

#### *Article 1*

The codified text of the Foreign Investment Act as revised by the Economic and Administrative Reform Act is hereby approved as enclosed with this executive order.

#### *Article 2*

Foreign investors may invest in the country without prior approval, under the same conditions as investors domiciled within the country.

#### *Article 3*

The legal definition of foreign investor also includes Argentine natural or legal persons domiciled outside of national territory.

#### *Article 4*

Economic or productive activities include all industrial, mining, agricultural, commercial, financial, service, and other activities related to the production or exchange of goods and services.

#### *Article 5*

The right of foreign investors to repatriate their capital and to remit their capital and to remit their earnings abroad may be exercised at any time.



#### *Article 6*

Except for the legally required reserve, the portion of voluntarily or statutorily constituted reserves owned by foreign investors in a domestic company, or those resulting from reappraisals or accounting updates, will not be considered as reinvestments of foreign capital.

#### *Article 7*

The prior approval required by the Technology Transfer Act is hereby repealed.

#### *Article 8*

For purposes of the Technology Act, all legal deeds entered into between independent companies as well as those reached between a domestic company of foreign capital and the company that directly or indirectly controls it, or any other subsidiary of the latter, must register for information purposes with the National Institute for Industrial Technology.

#### *Article 9*

The Secretariat of Commerce and Investment within the Ministry of Economy and Public Works and Services will be the Enforcement Authority of this law.

#### *Article 10*

The duties of the Enforcement Authority will be:

- to gather statistical information on foreign investments
- to issue general interpretative rule and to take other actions necessary to enforce the Foreign Investment Act (as codified September 8, 1993) and the rules approved herein.

#### *Article 11*

Executive Order 1225 on foreign investment of November 14, 1989 is hereby repealed.

### **Where to invest in Argentina**

Argentina has outstanding natural and human resources. Due to these excellent conditions, Argentina offers investment opportunities in several economic areas. In this section we present some examples

#### *Software*

Argentina has been one of the most successful locations in South America in attracting software companies. Some of these companies are on the lookout to take advantage of these



opportunities created by the expanding e-business and telecommunications markets. Others are seeking to benefit from its world-class academic talent and R&D environment.

In this regard, Argentina has a strong educational system. It has 3,500 university students per 100.000 inhabitants, representing the highest rate when compared to any other Latin American Country. Argentina has approximately 1,4 million university students overall, with advanced programs in sciences including computer-related technologies.

Another important aspect is that the development of software is a skill-intensive activity and capital investments are not as high as in other IT industries.

#### Auto-parts

Argentina has an important automotive industry. Argentina's automotive exports and auto-parts are destined mainly for Mexico, Brazil and Chile. Bilateral Agreements have been created under the umbrella of MERCOSUR, which establishes that automakers in Argentina are allowed to import vehicles duty-free from Brazil (and vice-versa) as long as they have satisfied two requirements. First, at least 60% of a vehicle's assembly has to be produced in one of the four MERCOSUR countries; in practice, this means in Brazil or Argentina, since Paraguay does not manufacture vehicles and Uruguay has low production. Second, automotive trade between Brazil and Argentina has to be balanced. These agreements represent a significant incentive for foreign investments in this sector, not only for car manufactures but also for auto-parts markets.

#### Agricultural Machinery

Because agriculture is one of Argentina's main activities, there are many well established local firms active in the local manufacture of machinery and farm equipment. Joint-Ventures alliances with domestic manufacturers and licensing could also become an option for foreign investors.

Argentina is widely known for its abundance of natural resources, having a unique comparative advantage in relation to other countries.

#### Oil and gas

With more than 2.7 billion barrels of proven oil reserves, Argentine is a significant player in the Latin American oil market. It is to preview that strong investments will be made in the following years, in order to replace imports from abroad.

#### Arable lands

The continental territory of Argentina covers a surface close to 280 million hectares of which 25 million are arable land with wheat, rice, maize, barley and pastures for animal productions being the major crops produced.



This abundance of fertile land enables Argentina to be:

- The world's leading exporter and producer of sunflower oil.
- The 1st exporter and 3rd producer of soy oil in the world.
- The 2nd largest world producer of corn.
- The 3rd largest world producer of meat
- The 3rd largest world producer and exporter of lemon
- The 6th largest world producer of wine.

### Fishing

As a result of a considerable length of the Atlantic Coast (4,725 kilometers) and the great variety of fish that can be found within the fishing zone, Argentina is considered one of the best fishing areas in the world. The total capture volume goes beyond 1 million tons and about 80 % of it is exported.

### Mining

Argentina is the sixth country in the world in terms of mining resources. There are important mineral resources of gold, copper, zinc, lead, bentonite and clay among others. The total estimated area for mining exploitation is around 750,000 square kilometers, of which almost 70 % is still unexplored.

In order to attract investment in the mining sector, Argentina, through The Mining Investment Law (MIL) established a 30-year guarantee of fiscal stability for new projects and/or extension of existing projects. The tax treatment encourages risk investments by providing access to machinery and equipment at international prices, rapid recovery of capital invested through accelerated depreciations of capital goods, extraordinary deductions of explorations costs and the deductibility of new assets incorporated in the process.

Since the implementation of the MIL, more than USD 3,000 million have been invested. An unprecedented increase in production and exports occurred, as world-class deposits went into operation: Bajo La Alumbrera (copper-gold), Cerro Vanguardia (gold-silver), and Salar del Hombre Muerto (lithium) joined existing operations of Farallon Negro (gold, silver) and Aguilar Mine (silver, lead, zinc). Later on, Martha Mine (silver) also went into production.

Today, with excellent metal prices combined with competitive capabilities resulting from devaluation in 2002, Argentina witnesses the arrival of an impressive number of companies.



More than 60 foreign companies have interests in Argentina today. Most companies come from Canada, USA and Australia.

### Forestry

In March 1999, Argentina established the Law 25,080 on Investments in Cultivated Forests (LICF). The LICF constitutes an important step in Argentina's efforts to promote the protection of the environment and conservation of the soil by means of economic incentives to the private sectors. The implementation of this law is specially significant because Argentina has a surface of 20 million hectares suitable for forestation of which only 850,000 hectares –representing 4% of the total surface- are currently exploited. The annual forest growth in Argentina is 33m<sup>3</sup> per hectare for conifers and 43m<sup>3</sup> per hectare for eucalyptus, showing the country's comparative advantages in terms of forestry since the growth rates obtained surpass by far those of the rest of the world. Another important fact is that 90% of the forested land is located in the Mesopotamian region (Provinces of Misiones, Corrientes and Entre Ríos).

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## 3-1 The Foreign Trade Regime

By Marval, O Farrell & Mairal

### Mercosur

On 26 March 1991, Brazil, Argentina, Paraguay and Uruguay signed a treaty (the Mercosur Treaty) in Asunción, Paraguay, in order to create a single market between the four countries with a common external tariff. Mercosur represents a total population of approximately 200 million individuals, living in an area covering more than 12 million square kilometres.

The objectives of the Mercosur Treaty are:

- (i) the free transit of production goods, services, persons and capital between member states by eliminating customs duties and lifting non-tariff restrictions on the transit of goods, along with other measures with similar effects;
- (ii) the fixing of a common external tariff ("*Tarifa Externa Común*" or "TEC") and the adoption of a common trade policy with regard to non-member states;



(iii) the coordination of macroeconomic and sectorial policies of member states relating to foreign trade, agriculture, industry, taxes, the monetary system, monetary exchange rates, capital investments, customs, services, transport and communications and any other issues which may be agreed upon, in order to ensure free competition among member states.

To date, Mercosur has achieved a free trade zone with respect to most products. There are products, however, which are considered "sensitive" and consequently excluded, which are still subject to tariffs, which are being reduced each year (such as sugar, automobiles and capital assets).

#### Additional Mercosur Agreements

Chile and Venezuela have entered into complementary agreements for their partial or total integration into the Mercosur.

#### Customs Regulations

Argentina and the other three Mercosur member countries have adopted the International Classification of Goods and are parties to the World Trade Organisation ("WTO"). The WTO regulations on customs valuation, labelling, and fair trade practices (antidumping, safeguard measures, and countervailing duties, amongst others) are therefore applicable to Argentina.

Pursuant to Argentine customs regulations, most goods may be freely imported into Argentina, subject to the prior payment of duties.

No import duty is payable in the case of goods originating from a Mercosur member state. However, in order that the import of products from these member states may be exempted from customs duties, they must meet the requirements as to origin.

There are restrictions on the importation of certain goods, for example, quotas on the quantity of motor vehicles imported and a requirement that fresh food, chemicals, pharmaceutical goods, cosmetics and cleaning products be authorized by the relevant Argentine governmental authority before entering the country.

Since March 2002, the Argentine Government has resolved to impose duties on the exportation of goods. Resolution No. 11/2002 issued by the Ministry of Economy, published in the Official Gazette on 5 March, 2002, as amended, levies export duties on the exportation of all types of goods.

#### GATT / WTO



Argentina, by enacting Law No. 24,425, approved on 7 December 1994 the Final Minutes (“the Minutes”) which incorporated the items agreed in the Uruguay Round of Multilateral Trade Negotiations, and the Marrakech Agreement, both of which were held under the auspices of the WTO.

Law No. 24,425 introduced into the Argentine legal system the Agreements on Antidumping, Countervailing duties, and Safeguard Measures, in accordance with Section XIX of the GATT Agreement 1994.

#### *Antidumping Legislation*

Dumping occurs when a product is introduced into the Argentine market at a price (“the export price”) lower than its “comparable price”. For these purposes a “comparable price” is the price at which the product is sold in the course of normal business transactions in the exporting country’s internal market. The comparison between the “export price” and the “comparable price” must be made at the same stage in the distribution process, normally at the post-factory level.

In order to impose antidumping duties, it is necessary to prove both the existence of the dumping and injury to the “domestic industry” caused by the product supposedly being dumped. For the purposes of this law, the term “domestic industry” refers to domestic producers as a whole or to those whose collective output constitutes more than 50% of the total production of such product. Antidumping duties are only applied when dumping causes, or threatens to cause, material injury to a domestic industry, or material delay to the establishment of such an industry.

#### *Safeguard Measures*

Safeguard measures represent a tool that can be used in certain specific circumstances by a WTO member country as a means to provide the national industry with a "*protection period*" to enable it to attain greater competitiveness in international markets through a readjustment process. Since safeguard measures are not measures directed at counteracting unfair trade practices from a specific country, they are applied to all imports of a particular product, regardless of country of origin.

Since safeguard measures are not directed at a specific country, the application of such measures under the Safeguard Law is conditional upon compliance with certain requirements.

#### **International Treaties**



According to Article 75, § 22 of the Constitution, international treaties, upon approval by Congress and ratification by the Government, take precedence over federal and provincial laws.

Argentina is a party to many international treaties including several treaties approved by the Hague Conference on Private International Law, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention) and the United Nations Convention on Contracts for the International Sales of Goods of 1980.

### **Choice of Law and Jurisdiction**

#### Choice of Law

Argentine law generally permits parties to a contract to select the laws that will govern their agreements as long as there exists some connection to the system of law that is chosen. Further, the choice of foreign law will only be valid to the extent that it does not contravene Argentine international public policy (*orden público or order public*). Typical public policy laws include criminal, tax, labour and bankruptcy laws.

Rights associated with real estate (such as *in rem* rights), the ability to acquire real estate and the formal requirements with regard to legal acts connected with real estate are all governed exclusively by local laws. The same principles apply with respect to movable property permanently located in Argentina.

#### Choice of Jurisdiction

Argentine Courts have jurisdiction whenever (i) the defendant is domiciled in Argentina, (ii) the place for performance of any of the obligations is located in Argentina, or (iii) Argentine courts have been chosen as the applicable forum (subject to certain restrictions). Argentine courts are vested with exclusive jurisdiction to hear all insolvency proceedings relating to debtors domiciled in Argentina. With respect to debtors domiciled abroad, local courts have jurisdiction only to the extent that the debtor has assets in Argentina, in which case an insolvency proceeding will only cover such assets.

Argentine courts acknowledge that parties to a contract may choose a jurisdiction other than Argentina for the settlement of any disputes arising under a contract provided that there is a connection with such jurisdiction and the dispute relates to pecuniary rights.

Lastly, the Argentine Constitution guarantees non-Argentine citizens the same rights as Argentine citizens, including unlimited access to Argentine courts for the resolution of legal disputes, subject, however, to non-residents having to post a bond, if required.



## Enforcement of Foreign Judgements

If an international treaty for the enforcement of foreign judgements exists between a foreign country and Argentina, the rules of such treaty will prevail. In the absence of such a treaty, the National Code of Civil and Commercial Procedure (the "CPCC") will be applicable<sup>1</sup>.

### Requirements

Subject to certain requirements, which are set out in Article 517 of the CPCC, Argentine courts will enforce foreign judgements resolving disputes and determining the rights and obligations of the parties to an agreement. The requirements which a foreign judgement must meet in order to be recognized in Argentina without further discussion of its merits are as follows:

- The judgement must have been issued by a court considered competent by the Argentine conflict of laws principles regarding jurisdiction, have been final in the jurisdiction where it was rendered and resulted from a personal action or an *in rem* action concerning movable assets; if the judgement resulted from an *in rem* action, personal property in dispute must have been transferred to Argentina during or after the prosecution of the foreign action;
- The defendant against whom enforcement of the judgement is sought must have been duly served with a summons and, in accordance with due process of law, given an opportunity to defend itself against the foreign action;
- The judgement must have been valid in the jurisdiction where it was rendered and its authenticity established in accordance with the requirements of Argentine law;
- The judgement must not violate any principles of public policy of Argentine law;
- The judgement must not be in conflict with a prior or simultaneous judgement of an Argentine court; and
- Reciprocity is not required for an Argentine court to recognize a foreign judgement.

Argentine courts do not automatically acknowledge the foreign court's original jurisdiction over the matter. As indicated in (i) above, the competency of the jurisdiction of the foreign court that rendered the judgement is analyzed according to Argentine rules regarding jurisdiction.

### Procedures Relating to Enforcement

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<sup>1</sup> Until the issues raised by the new Charter for the Autonomous City of Buenos Aires have been resolved.



To enforce a foreign judgement in Argentina, a notarised copy of the decision must be filed with the Argentine court and the petitioner must file a statement evidencing that each of the conditions required by law has been fulfilled. In addition, all documents (which must be originals or notarized copies) submitted to the court must be authenticated by the Argentine consulate with jurisdiction over the country where the documents were issued. If the relevant country has ratified the 1961 The Hague Convention on the Abolition of Legalisation of Documents, the authentication by the Argentine consulate may be substituted by the Apostille provided for in the aforementioned Convention. All documents in a language other than Spanish must be translated into Spanish by a translator registered in Argentina to be admitted by a local court.

### Immunity

Certain assets are unavailable to satisfy judgements obtained or determined to be enforceable in Argentina.

### Arbitration

Foreign arbitral awards are recognized in Argentina but are subject to the same requirements applicable to the recognition of foreign judgements. If these requirements are met, an Argentine court will accept arbitral awards (either at law or in equity) rendered outside Argentina. Argentina also became a party in 1988 to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (The New York Convention) and is bound by its provisions.