SECTION IV A: THE PROTECTION OF FOREIGN INVESTMENT

General Reporter | **Wen Hua Shan**

National Reporters | **Rafael M. Manóvil**
Osvaldo J. Marzorati

QUESTIONNAIRE:

1. Framework and hierarchy of foreign investment laws and treaties

a) The legal framework governing foreign investment

Argentina is a Republic that is federally structured in theory. However, it remains highly centralized on account of the President's over-encompassing role, simultaneously acting as Head of the Armed forces, Head of the Administration, and President of the country, as well as his abuse of certain constitutional powers vested

exclusively in the Executive's control.[1]

The country is composed of 23 political jurisdictions, denominated Provinces, and the Autonomous City of Buenos Aires (the Federal Capital). The Provinces are divided into regional bodies, called Municipalities. Each Province has its own Constitution, Parliament, and Judiciary, including its own Provincial Supreme Court. Each Province's Constitution delegates certain powers to the federal government, while expressly retaining all other powers.

Powers not expressly vested in the Federal Government are retained by the Provinces. Some of the government and Provinces' respective powers overlap. For instance, the federal Government and the Provinces share powers concerning environmental matters. Some of this power is even shared with municipal authorities. The federal Government and the Provinces also share powers concerning other matters, such as the promotion of investments, which may be encouraged by the Federal Government, as well as by the Provinces.

There is a Federal Supreme Court. This is the final authoritative body to resolve jurisdictional matters among the Provinces, and it is the last authority to interpret the Federal Constitution. Each Province has its own Supreme Court, mirroring the juridical structure set forth in the Federal Constitution.

All substantial legislation, including Civil, Commercial, Labour, Mining, Penal, Aeronautical, Consumer, and other forms of legislation, are embodied in uniform Codes. The provinces cannot pass legislation concerning these Codes, Bankruptcy laws, the minting of coins, and the printing of money. However, they do have jurisdiction to entertain lawsuits in such federal matters if the persons or matters at issue are located or occurred in each Province

[1] Federal Constitution, Article 99.1 and 12 of the 1994 Constitution declare that the President is Head of the Administration, Head of the Armed Forces and Supreme Leader of the Nation and the Government.

(Argentine Constitution article 75 (12) and 126).[2]

There is no *Court de Cassation*, as in France, for substantive legislation. For this reason, different jurisdictions may have varying interpretations of the Codes. For historical reasons, however, jurisdictions tend to follow the case law of the Courts located in the Capital City, Buenos Aires, with the following caveat: The Supreme Court's decisions are limited to the specific cases for which they are issued. That is to say, a decision in one case does not legally bind all other cases. For example, when the Court declares a law unconstitutional, the law is not unconstitutional for the citizens at large, but only for that particular case. The parliament is not obliged to repeal the law and adjust it to the Supreme Court's ruling unless the Government elects to file an amendment to the legislation.

b) The relationship between international treaties and domestic laws

As a result of such political and juridical organization, the Federal government is entitled to sign Treaties with foreign Nations. Once these are ratified by the Federal Congress, they become the law of the land, provided that the subject matter of the Treaty is one that has been vested in the Federal Government[3] and is not inconsistent with the principles of public law set forth in the Constitution (Article 27).

The Argentine Constitution expressly states under article 75 (22) that a Treaty overrules a law, since a Treaty is a norm superior to the law entered into with a Foreign Nation. Hence, treaties prevail over internal laws. By the same token, from a purely internal viewpoint, no treaty with a Foreign Nation can overrule provisions of the Federal Constitution, particularly the Bill of Rights contained

[2] The end result of this provision is that the Civil Code may receive in some matters different interpretation from the Provincial Courts and, absent a federal issue, such a decision may be different from the Courts sitting in Buenos Aires.

[3] Argentine Constitution text amended in 1994 provides that the Treaties have a hierarchy superior to the laws of Congress. (Art. 75, par 22).

in the first part of the current Argentine Constitution. (1994)

The Federal Constitution gives prevalence to Human Rights Treaties over domestic legislation, but again, no covenant in any such Treaty can overrule or conflict with any disposition of the Bill of Rights contained in the first part of the Constitution.

Further, Argentina permits the Federal Government to sign integration treaties with other countries, such as the Mercosur treaties, or bilateral treaties or regional treaties, such as the Aladi or the Montevideo Treaties in Private International Law. The government also may sign other multilateral Treaties, such as the Vienna Convention on the Law of Treaties, or the Vienna Convention on International Sales.[4]

Argentina has ratified the Washington Convention that created ICSID.[5] It has also ratified the New York Convention on Acknowledgement and Enforcement of Arbitration Awards[6] and the Panamá Convention of 1975 on International Commercial Arbitration.[7]

c) The hierarchy among norms of different sources in the Argentine Nation

The hierarchy of norms under the Federal Constitution may be summarized as follows: the Constitution, the so-called integration treaties and Human rights treaties, all other commercial treaties, and the laws approved by Congress. The Constitution gives prevalence in the constitutional hierarchy to integration Treaties and human rights treaties over the remaining treaties. In addition, Supreme Court precedents have held that any treaty cannot be repealed by

[4] They can also approve under par 24, art 75 treaties of integration that delegate competences and jurisdiction on Supranational Organizations, which also have a hierarchy superior to the laws.

[5] Argentina signed the ICSID convention in 1991 and ratified it on October 19, 1994.

[6] Law 23.619.-1988 Earlier Argentina approved the Montevideo Convention on recognition of foreign judgements and awards., Law 22921-83.

[7] Law 24322, June 17, 1994.

subsequent legislation.[8]

Regarding the hierarchy of domestic legislation, the laws of public order cannot be set aside or revoked by the free will of the parties, and no contractual right can be invoked against a law of public order or any moral principle.[9]

Since Argentina's adoption of the Vienna Treaty on International Treaties[10] and its incorporation into the Argentine constitution, there has been an ongoing debate as to whether Argentina has adopted the monist theory, instead of the dualist theory, in international law. A distinguished constitutional writer has suggested that Argentina is basically a monist society, with certain features of dualism, since many principles of international law are subject to the principles established and the rights granted in the Argentine Constitution.[11]

All of Argentina's inhabitants are equal before the law and eligible for employment, without any other condition than his or her own knowledge or merit. Such equality is the basis of taxation and of public duties. The right to property and due process are inviolable rights. No inhabitant can be deprived of his or her property without a judgment based on law. All of these rights are granted to the

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[8] Fibraca Constructora, *ED* 156.161; Haglin, *ED* 158.130; Ekmedian vs. Sofovich, *ED* 148-354; Café La Virginia, *ED* 160-246. Argentine authors pointed out that the Court accepted the theory of monism under international law, DALLA VIA, Alberto, *ED* 154.182.

[9] Article 21 of the Argentine prior Civil Code.

[10] Law 19685 dated October 3, 1972; published on January 11, 1973 approved the Vienna Convention on treaties of 1969. It has been the subject of academic discussion whether monism under our laws prevails over dualism. Vanossi and Dallavia "Régimen Internacional de los Tratados". Chapter XV are of the view that the primacy of international law over internal law is conditioned in some cases and rejected in others. Said authors recall that the source of the constitutional amendment of 1994 is not the U.S. Constitution but the Constitution of Italy and Spain, which provide that when a Treaty modifies an internal provision of the Constitution, the States must make an amendment to their Constitutions before the international obligation becomes mandatory.

[11] VANOSSI, DALLA VIA, (See note) points out the existence of article 27 of the Argentine Constitution, which basically is dualist and not monist.

inhabitants of the Argentine Nation, subject to the laws that regulate its exercise. Although a foreigner is not an inhabitant,[12] Article 20 of the Constitution declares that, within the territory of the Nation, foreigners enjoy the same civil rights as Argentine citizens. This includes the right to work in the country's industry or commerce, to own, purchase, and sell immovables, to freely practice his or her religion, to navigate the country's river and coastline, to marry, and to create legally valid wills. No foreigner can be forced to become an Argentine citizen. Finally, all foreigners have free and open access to local courts.[13]

Foreigners do not enjoy the same political rights belonging to citizens. Also, the government cannot require foreigners to enlist in the Armed Forces. Despite such distinctions, foreigners do enjoy the same civil right as a citizen to not be expropriated without a declaration by Congress finding that such expropriation is in the public interest. Such a right is subject to the laws that regulate its exercise.

The laws that regulate some of the expressed rights are not as broad as other standards used in international law by other countries. An example of this is seen in the matter of expropriation, which requires a prior declaration of public interest and a judgment justifying the taking of the property. However, in Argentina there is no such thing as prompt, adequate and just compensation. The Government can take possession of property upon a declaration by law of public interest. Upon such a taking, the Government deposits the "objective value," and not the market value thereof. A Court

[12] Articles 16, (All habitants equal before the law), 17 (The property is inviolable and no inhabitant of the Nation can be deprived of his property except by virtue of a judgment based on the law), and 18(No inhabitant can be punished without a prior judgment based on a law existing before the crime was perpetrated nor condemned by special commissions) form part of the Bill of Rights) and article 28 of the Constitution declares that the principles, guaranties, and rights recognized in the precedent articles may not be altered by the laws that regulate their exercise.

[13] US citizens have been authorized to conduct a case "in forma pauperis", Spinelli v. Maraini N, Inc. National Civil / Chamber of Appeals, Oct. 4, 1954 JA – 1955 -I 1954 free of any expense or court tax.

then determines, based on expert appraisals, the value to be paid at the end of the process, after determining whether the appraised value represents an objective value of the property. Such a declaration takes approximately two to three years. However, the law prevents the Court from considering any lost profits in the interim (Article 10 of law 21, 499).[14]

When Argentina signs a BIT with another country, or when it signs a treaty to afford protection to foreign investments, it assumes an international obligation to treat both the investment and the investor according to certain standards contained in such treaties. BITS typically provide that investors shall receive fair and equitable treatment, enjoy complete protection and security, and in no event will investors receive less favourable treatment than that required under international law.

The point is that local standards defining broad constitutional principles are subject to laws that regulate their exercise. Such laws cannot alter the principles as established and interpreted by local courts. At the same time, such laws do not necessarily reflect principles contained in treaties or standards of international law as interpreted by an International Tribunal, to which a treaty may refer expressly or impliedly. Which standard prevails if a treaty establishes that expropriation shall be followed by prompt, adequate and just compensation? Should a tribunal abide by the standard established by international precedents or the standard contained in the law of the land, which pre-existed any such treaties, and which has been declared constitutional on various occasions under article 17 of the Constitution?[15] Although an international court may

[14] Objective value is established by a Government Assessment Body which has always been far of the market value. Article 22, law 21,499. "The law recites that once the Government has deposited the amount of such objective value, which is the valuation carried by the Administrative Court, the Judge shall surrender possession of the Property to the Government", and "in case of immovables all lease agreements then in effect are terminated" (without any compensation). Article 26.

[15] Article 17 establishes that expropriation of private property requires that Congress declare and indemnify a public interest by a law prior to the taking. The law that implemented expropriations at the federal level requires that in order to take

establish that such procedure does not meet an international standard, in the absence of a treaty, it is the law of the land that will apply to nationals and foreigners.

This is the core argument of current debates between the Argentine Government and foreign investors under ICSID procedures in Washington, D.C., or under UNCITRAL arbitrations that stem from BITS executed between foreign investors and the Argentine Government under the umbrella of the 1965 Washington Treaty.

The point is that under some awards, investors believe that the BIT requires Argentina to honour and ensure the minimum standard of protection that foreigners enjoy under international law. So far, there has not been a Metalclad case as in the Mexican NAFTA Arbitration.[16] Instead, in one case, which required Argentina to pay US$ 180 M. (CMS), the panel found that Argentina infringed the requirement of fair and equitable treatment as interpreted by the Arbitration Tribunal. The court distinguished between the obligations of investors under a BIT, which are subject to international law, and those regulations affecting the investor subsidiary and under which the investment was carried out, which were subject to Argentine regulations. The Argentine Government, however, takes the opposite position. The Government's position is that, because all foreigners are granted the same rights as citizens, they are equal under the law, without any reciprocity. Therefore, foreigners, inhabitants, and citizens have the same rights - no more and no less. If a law grants foreigners rights that are in excess of those granted to citizens, it infringes the Constitution, regardless of

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possession of an asset, the Government shall deposit the asset's fiscal value while a Court of Appraisals establishes its value in an ordinary process. Those are the steps to be followed to obtain compensation under Argentine Law. A case-by-case analysis may arise to determine if such procedure is consistent with international law, as determined by an international tribunal- It is fair to state that the objective value is not deemed to be the market value of the asset at a given time.

[16] Metalclad vs Mexico. In this NAFTA case, the Arbitration Panel found that Mexico implemented measures tantamount to expropriation and ordered Mexico to pay damages.

what international law may prescribe.[17]

A Court in Argentina conceivably will not condemn the Argentine Government for denying foreigners more rights than those granted to locals or inhabitants, since an opposite decision by the Government would be considered an infringement of the Argentine Constitution. At this point, a political decision must be made and theoretical monism will yield to practical dualism. A judge sworn in under our Constitution conceivably will ignore the difference between international obligations, which are also State obligations, if he or she must infringe the Constitution in order to give foreigners more rights than those given to inhabitants. Although this is generally how the system works, this does not mean that the Government automatically will dishonour an international obligation. The Government may choose to honour it and be held politically responsible internally for such a decision, or ignore the international obligation and be held externally responsible for the decision.[18]

Thus far, the Supreme Court of Argentina has not been confronted with this particular issue as of yet, or it has avoided taking a definitive position on the matter. As of date, there is no case addressing the question of whether a treaty is in conformity with the provisions of Article 27 of the Constitution. The sole precedent of the Court concerning a State owned company is that arbitration awards can be set aside and reviewed by the Courts on the basis of illegality in the proceedings or the issuance of an unreasonable award. This decision is to the dismay of many practitioners, because it means that the Court can delve into the merits of a case. Should such precedent[19] be used for international arbitration, it threatens the

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[17] VANOSSI - DALLA VIA, *Régimen Constitucional de los Tratados*, Ch.15.

[18] Vanossi points out that the judge first will have to analyze whether the Treaty is in accordance with Article 27 of the Constitution, since according to this article treaties must be in conformity with the principles as Public Law of the Constitution.

[19] Cartellone vs. Hidronor. Fallos 306.2172 In this case, the Supreme Court reversed its previous position, which held that an arbitration clause prevented the Courts from hearing extraordinary appeals, and on certiorari declared the opposite. The Court held that it was possible for the Courts to review an award from an administrative

collapse of the entire system of arbitration as constructed by ICSID in Argentina, since under the limited revision of award enforcement, the Supreme Court could now review the merits of the case, and if it finds that an award was unreasonable or unconstitutional, it may set it aside. This case will be examined subsequently in this report.

In short, when article 27 of the Vienna Treaty on International Treaties declares that treaty obligations cannot be derogated by internal norms, is it assuming that such legislation encompasses the Constitution, or is it assuming that a country will not sign a treaty that offends its own Constitution? International precedents have held that once a country signs a treaty, it cannot invoke its own legislation to frustrate international commitments[20] as, for instance, when interpreting consent to ICSID jurisdiction under article 26 of the Washington Treaty.[21] A distinguished Argentine constitutionalist thinks otherwise.[22]

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mandatory court with competence of Public Works, and it declared the partial nullity of the award, establishing the doctrine that awards may be reviewed on grounds of illegality , unconstitutionality and unreasonability. While the first two grounds appear justified in such case, the possibility of discussing the merits of a case on grounds of unreasonability is a setback for the development of arbitration in the Argentine Republic, al least in internal arbitrations. Doctrine has criticized the decision. See Juan Bosch, "Apuntes sobre el control judicial del arbitraje (a propósito de la sentecia Cartellone c. Hidronor)", (2004), *ED*, 209-693.

[20] In the annulment of proceeding between Cía. Aguas del Aconquija and Vivendi Universal as the Argentine Republic, it was held that "the characterization of an Act of State as internationally wrongful is governed by international law." (Par 95 of the decision to the extension of the internal characterization of said Act). A treaty cause of action is not the same as a contractual cause of action; it requires a clear showing of conduct which is, under the circumstances, contrary to the treaty standard. "A dispute arising out of a contract may give rise to a claim under a bilateral treaty". Siemens vs. Argentina, Eight objection. Consideration of the tribunal, par 180. ICSID Case No. ARB/02/8.

[21] Southern Pacific Properties (Middle East SPP vs The Arab Republic of Egypt).

[22] Bidart Campos. Treaty of Argentine Constitutional Law, p. 105, who is of the view that a federal state like Argentina with a rigid Constitution cannot give priority to treaties over the Argentine Constitution and should declare them unconstitutional, taking international responsibility except under article 46 of the Treaty of Vienna, under which a State can request the nullity of a Treaty if the violation of the internal order is manifest and affects a norm of substantial relevance.

Perhaps because of these irreconcilable principles no foreigner has attempted to directly enforce the alleged breach of a minimum international standard contained in an investment treaty, the enjoyment of which the foreigner is entitled to under international law in Argentina. Instead, foreigners aggrieved by an infringement of their rights have attempted to secure ICSID awards, believing that Argentina will honour the award under the ICSID mechanism. But if, as often happens these days under treaty arbitration, such an international standard is awarded abroad and confirmed after an application for an annulment, but the Argentine government does not automatically honour the award, the only remaining option for the foreigner is to enforce such an award elsewhere against Argentine assets, a proposition that has proven quite elusive since, as of the present, no attachable assets owned by Argentina have surfaced abroad.[23]

If attachable assets do not exist abroad, the award must be enforced in Argentina, where the assets exist. However, no Argentine court will enforce an award against the Federal Government, even if the validity of the award could be established, because any judgment against the Government is declaratory in nature only, and no judge can compel the Government to pay an award by attaching or seizing its property. Under present regulations, there is an administrative procedure involving government agencies ending in the Government's petition to the Argentine Parliament to include the amount of the judgment in the current or subsequent year's budget. Payment will follow when the budget is approved, and public funds will be allocated for that purpose. Such a procedure would have the effect of giving the Government time to delay payment of its obligations towards citizens and inhabitants alike, such as pensioners, retired workers, and local contractors, and to obtain bonds to cancel its recognized credits.

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[23] Recently on September 2, 2009 the ICSID *ad-hoc* Panel refused to grant an annulment application submitted by Argentina and imposed upon Argentina the costs of the proceedings before ICSID. Azurix Corp. vs. Argentine Republic ICSID. ARB. 01.12.

This is the normal means of payment of judgments against the State in Argentina. The Government is assumed to be solvent, although the presumption is that it does not have enough liquidity to honour its debts. It is very customary, for instance, for the government to pay Argentine pensioners and retired people through bonds by the Government; local contractors are accustomed to being paid by bonds on a medium or long term basis; and even lawyers who win in cases against the Government must collect their fees through bonds to be paid by future governments.

In short, the Government refinances adverse judgments against the State, as decided by local Courts, in different outlined cases. It is a routine procedure grounded in the principle that under the Argentine Constitution, foreigners do not have the privilege to receive payment from the government if citizens alike do not enjoy such a privilege.[24]

Even if this proposition may be assumed to locally remedy Argentina's breach of its treaty obligations, there is an increasing viewpoint that the satisfaction of an international obligation forcing the conversion of a liquid sum of money into a non-liquid credit may not meet the purposes of ICSID norms. However, it should be noted that there is no International Court with powers to enforce an international obligation, except through diplomatic action in view of the failure of the Government to honour the final award of an ICSID arbitration Tribunal convened to resolve a petition to set aside such obligation. At the end of the day, it is the international community's isolation of countries that fail to fulfill their international obligations that serves as an enforcement mechanism and as an effective means to induce the payment of international obligations.

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[24] An important factual consideration should be pointed out. The enforcement of foreign judgments or foreign awards in Argentina attracts a Court tax equivalent to 3% of the amount of that award. Hence, an US 180 M award must pay a court tax of US$ 5,400,000 upfront, unless the plaintiff can establish he or she does not have the resources to pay such tax. A precedent in such regard was established under the 1854 Treaty of Friendship, Commerce and Navigation relieving an American citizen from isolated having to pay the Court tax on the basis of a lack of financial resources.*(See note12)* However, this is only one precedent.

The purpose of ICSID was to deliver a final award, equivalent to a court's final judgement, creating an international obligation that the State is forced to honour, or to bring an annulment action instead. ICSID was intended to provide a different method: instead of applying to the domestic Courts of the Country in which the award was to be enforced, ICSID procedures required an aggrieved party to bring an annulment application against the ICSID award. An *ad hoc* panel, appointed under ICSID procedures, then reviewed the application. No further remedies are allowed under ICSID.

To the extent that adverse judgements are paid through the ICSD mechanism, which only permits appeals through the prescribed ICSID system, and the investor consents to honour the awards, ICSID will survive. If a government is not in a position to honour and pay the awards, the secondary effect of ICSID awards is to speed up the refinancing of public debt in default, which is a limited, but significant, success under international law.

However, this secondary objective has no direct connection with the enforcement of any international standard protecting investors or foreign investors under ICSID procedures, except to note that the final collection of any adverse award through refinancing or its collection through sovereign debt may be due more to discreet diplomatic pressures or veiled suggestions than any other legal theory. At the end of the day, the very problem that the Washington Treaty intended to prevent, avoiding recourse to diplomatic pressures, resurfaces. For this reason, the Treaty permits the use of such diplomatic pressures when a State fails to comply with the provisions of Article 27 thereof.

d) Availability of information related to legislation

i) Argentina publishes all laws in the Official Gazette, and they are available on the Congress' website. The same applies to the regulation of Executive decrees, other than reserved decrees, such as those concerning the purchase of special equipment for the Armed Forces, or those that

are deemed as reserved to the Executive, due to their confidential nature.

ii) In addition, all congressional debates, either at the House or the Senate level, are published, and the public at large may access them. All Bills submitted to Congress are also publicly released, and there are private agencies that distribute them, in addition to the Congress Press.

e) Transparency

Administrative decisions and judicial decisions normally are published and receive widespread attention and commentary. However, not all Administrative decisions are published or listed in a web site. Supreme Court decisions are all published and can be searched in the library of the Supreme Court. Most of them, particularly those that settle new precedents or interpretations, are published in the Supreme Court's website through a summary.

In the system of privatized public services, no change of tariffs or other substantial changes can be implemented by the Controlling Bodies without a public hearing on the matter. During such a public hearing, any non-governmental organization and the public at large can participate together with authorities to discuss any amendment to the system of tariffs or any procedures that may affect consumers. Similar hearings are required whenever there are important changes in federal environmental matters affecting regulated industries. General tax regulations have a special procedure of internal revision if taxpayers contest proposed general regulations. The effect is to suspend the proposed regulation until it has been reconsidered or the observations rejected. Since most public services have been privatized and are presently owned by foreign investors, this system works to alert the public and the investors of new regulations that may adversely affect their interests.

The Government many times announces policies to pass legislation or to regulate some specific sections through new

regulations which are subject to comment through the media.

2. General standards of treatment of foreign investment - investors

The general standards of treatment of foreign investors or investments in Argentina were born under treaties signed after the Declaration of Independence from Spain. These standards were established in treaties with the United Kingdom (England), France or Germany, and particularly with that of the United States, shortly after Argentina adopted its first Federal Constitution in 1853.

These treaties belong to the Friendship, Navigation and Commerce treaties of first generation, as they are termed by the British Foreign Office. They establish that treatment of foreign subjects will be equal to that afforded to natives (locals are mentioned as natives), and that commerce privileges should not be less than those granted to any other nation concerning navigation and commerce, or the most favoured nation clause (MFN). Although most countries have practical experience regarding the scope of this clause, countries typically construe the clause's meaning very narrowly. This is probably because the language of the treaties permits the use of the clause only in specific cases and circumstances.[25]

These treaties also establish the right of foreign subjects to own property and pursue legitimate businesses through the free navigation of commercial waterways and routes. However, this principle is conditioned to the same extent as that granted to any foreign nation, or the ships or cargoes of any other foreign nation or State may be permitted to come[26] and have free and open access to the Courts of Justice for the presentation of their rights.

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[25] See GOLDSCHMIDT – RODRÍGUEZ-NOVAS - Parker School of Comparative Law, *Bilateral Studies,* New York (1966), page 14.

[26] See Treaty with the United States dated December 1854, clauses vii) and ix).

These treaties establish the right to trade all merchandise of lawful commerce in their business, and to enjoy complete protection and security in the practice of their business, subject to the general laws and usages of the respective member countries to the treaty. A member country to the treaty cannot impose a higher duty on another country's products in excess of that contemplated for similar products from another country, in order to unfairly favour another country.

Article V of the 1854 treaty with the United States serves as an example of the application of the standard of national protection, which provides that higher duties or charges on account of tonnage, harbour dues, pilotage, or salvage may not be imposed in the ports of the contracting countries other than those payable in the same ports on its own vessels.

Regarding personal liberties, the citizens of both countries to the treaty shall reciprocally enjoy the same privileges, liberties and rights as native citizens.[27]

Comparing the treaty signed by the United States in 1853, and ratified by the two countries in 1854, with the then newly approved Constitution of the Argentine Nation it becomes evident that all the provisions of the treaty regarding the rights of foreigners are set forth in article 20 of the Constitution.

If there is any doubt concerning the rights of citizens as compared to those of natives, the last article of the treaty conclusively establishes that:

a) the citizens of either country that reside in the territory of the other shall enjoy full governmental protection to ensure the security of their houses, persons and properties;

b) such citizens shall not be disturbed, harassed, or bothered

[27] The Consul has powers to act as testamentary Executor on behalf of the heirs of the decedent, including the right to administer and to govern the judicial liquidation of the estate.

in any manner on account of their religious belief or in the proper exercise of their particular worship, whether in their own churches or chapels, both of which they shall have the liberty to build and maintain in a convenient forum, subject to approval by the local government; and

c) liberty also shall be granted to the citizens of either of the contracting States to bury those who may die in the territories of the other, in burial places of their own choosing, which, in the same manner, may be freely established and maintained.

However, there is a strong difference between the treaty and the Constitution.

In cases of commerce, navigation, and use of waterways, whether during times of peace or warfare, the treaty provides that the rights of U.S. vessels or U.S. citizens may not be less than those granted to a third nation. However, as concerns taxes or charges for the use of ports, the loading and unloading of ships, or the acquiring and disposing of property by sale, donation, will or personal freedom, they shall enjoy the same full and complete protection of their persons and property as native citizens.

Although U.S. citizens shall enjoy in their houses, persons, and properties full governmental protection, the Government is not prevented from clarifying this principle by adding, "such as natives do," or any other expression. This principle eventually may require interpretation because the treaty is still in force.[28]

Further, the treaty is very casuistic regarding freedom of religion. It appears to regulate the freedom of religion by mandating that certain practices are not to be disturbed, inhibited or interfered

[28] The Friendship, Navigation and Commerce Treaty entered into effect in December, 1854. In 1992, Argentina entered into a new treaty with the U.S., a typical BIT. However, article 7 of the attached Protocol of the new treaty maintains in force any provision of the old treaty which was not expressly superseded on conflicts with the provisions of the new treaty.

with, including the right to bury citizens in burial places of their own choosing. This right exemplifies the degree of detail set forth in the treaty concerning the practice of religion. It seems that the treaty details those rights that should be included as part of local law and which subsequently were implemented in municipal provisions permitting burial places for people of different religions and nationalities. For instance, British, German, Jewish and Arab communities in Argentina have different burial places with their own regulations.

Under Argentine law, foreigners enjoy the same rights as natives, including the same right to navigate internal rivers subject to local regulations. However, it is fair to state that the Argentine Republic does not give foreigners greater rights than those enjoyed by its citizens.[29] An exception to that norm is the established existence under Argentine regulation of the right to repatriate an investment and remit its profits to any foreigner who makes an eligible investment under Argentine foreign investment laws, to be discussed subsequently.

The next discussion topic concerns whether the BITS that Argentina signed with foreign nations under the umbrella of the Washington Treaty of 1965 extended the rights of foreigners to rights or behaviours not contemplated by the Argentine Constitution.[30]

The treaty with the U.S. will now be considered[31] as one of the

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[29] There are court cases requiring foreigners to deposit bonds to sue in court, but any non-residing person has to fulfil the same obligation. However, there are precedents granting to foreigners the right to carry out a litigation "in forma pauperis", when they show proof that they cannot finance the cost of litigation, avoiding the incurrence of court fees. See *Bilateral Studies in American Argentine International Law,* GOLDSCHMIDT - RODRIGUEZ NOVAS, Page 8.

[30] Videndi annulment established the doctrine that the breach of a BIT is a question of international law, and the existence of a Concession Contract cannot change the characterization of a conduct as internationally unlawful under a Treaty.

[31] In the CMS case the Court required Argentina to pay to CMS the amount of US$ 180.M and, after reviewing a set aside action, a new Arbitration Tribunal confirmed such decision. ICSID Case No.ARB/01/8.

treaties contemplating the MFN clause concerning fair and equitable treatment and constant protection and security. The existence of such minimum international standards has been the subject of many decisions in this respect.

In addition, Argentina has enacted a Foreign Investment Law, law 21382 of 1976, the last revision of which was made in 1993 and published in an updated text under decree 1853/93.

Said law establishes that foreign investors who invest funds in the country in any of the forms set forth in article 3 of the law regarding the promotion of economic activities or the improvement or enlargement of existing investments, shall enjoy the same rights and obligations that the Constitution and laws grant to national investments, subject to this law and to those laws related to special or promotional regimes.

The law defines "investment of foreign capital" as any contribution made by foreign investors as applied to economic activities done in the country or the purchase of existing companies in Argentina. "Foreign investors" are defined as: any individual or legal entity domiciled outside of Argentina, the owner of a foreign investment, and the local companies owned by a foreign investor with a participation of foreign capital in excess of 49% of a local company's capital, or which directly or indirectly have the necessary rights to prevail in shareholder or partner meetings. "Domicile" is defined as the place in which a person resides with his or her family and in which he or she permanently does business with the intention of remaining in such a place, and for commercial companies, it is defined as the location of its headquarters. The BIT with the United States contemplates many other activities that are not deemed as foreign investment under the law and, therefore, the law shall be deemed modified in such respect (see Section a (i) (ii) (iii) (iv) and (v) of the 1992 treaty, ratified by law 24124, which considerably expands the notion of foreign investment, particularly section (v) providing that "any right granted by law or by contract and whatever licenses and permits granted pursuant to law").

Foreign investment can be effected through: a) foreign currency introduced in the country, b) capital goods, spare parts and accessories or profits, c) in capital in local currency belonging to foreign investors, to the extent that such currency may be remitted abroad, d) by capitalization of credits in foreign currency of free convertibility, or immaterial rights, as defined in specific legislation, or e) under other forms of contribution contemplated in special or promotional regimes.

Foreign investors may transfer abroad the net and liquid profits originated in their investments and may repatriate their capital. Although this provision has been restricted in times of foreign currency shortages, it has not been forbidden. The numerous regulations concerning foreign investments were established for foreign individuals and companies registered in Argentina. The Central Bank has been permitted to authorize the remittances of foreign currency abroad. Currently, any remittance in excess of US$ 2,000,000 per month is to be authorized by the Central Bank.

Local companies belonging to foreign investors may turn to local financing for aid, similar to local companies belonging to local investors.

Transitory investments of foreign capital are not contemplated under this law.

A special article was established declaring that contracts and other legal obligations between local companies and their controlling foreign investor may be regarded as complete and entered into by independent parties when their commitments and conditions are aligned with the market's standard practices concerning independent parties.

The law is short and precise, since it refers to the Constitution concerning the rights of foreign investors, including the right of its local subsidiaries to have access to local credit to the same extent as local companies do. Further, it grants to registered owners of a foreign investment the right to send their profits and capital

abroad.[32] There is nothing else under Argentine law addressing this issue other than "National Treatment" for foreigners, and it is fair to state that since 1853 foreigners have enjoyed the same rights of citizens in times of peace. Despite this, Argentine legislation does not address such treaty standards as fair and equitable treatment, even though Argentina has a generous Constitution insofar as foreigners' rights and obligations are concerned.

Although Argentina has established a broad fair and equitable provision, there is no exact counterpart under the U.S. Treaty. However, if fair and equitable is interpreted as falling within the prohibition against discrimination, then the ensemble of different rights set forth in the Argentine Constitution since its enactment in 1853 are tantamount to more than fair and equitable treatment, without overlooking the fact that any infringement of the rights contemplated under Article 20 of the Argentine Constitution is illegal and should be redressed.

The BITS with other countries have been interpreted to validate a minimum international standard based on the interpretation of facts, and not on the interpretation of rights as granted by Argentina to foreigners, since the question of whether a country has observed fair and equitable treatment of foreigners depends on factual findings. This same process applies to determining whether the government has infringed those constitutional rights contained in Articles 17, 18, 19, 20 of the Argentine Constitution and related articles to foreign investors.[33]

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[32] The right to send the dividends and repatriate its investment is not a constitutional right of natural citizens, which only enjoy such rights as those permitted under current Central Bank regulations in force at the time of the remittance.

[33] Author's note. A debate as to whether the Argentine Constitution grants fair and equitable treatment as compared to the rights granted to foreigners in the absence of any treaty is futile. Argentine law does not discriminate against foreigners. Rather, it encourages the entry of European immigrants and forbids the Government from passing any law that may restrict or tax the entry of foreigners whose purpose is to teach sciences or arts, improve industries, or work on the land. (Article 25 of the Constitution). Hence, the debate does not focus on points of law, but rather on whether, under a certain set of facts, the government's actions infringe upon foreigners' established rights.

3. Admission /entry requirements

Argentina places no restrictions or quotas on the entry of foreign investment or foreign investors, including their personnel.

As to the approval of specific conditions, these conditions have been listed in the foreign investment regime mentioned in the preceding paragraph with the following practical additions:

- The foreign investment must specify the amount of capital to be invested as equity, distinguishing from that which is made in the country for the purpose of loans. The latter historically does not qualify as foreign investment unless it is capitalized in the local subsidiary or in any other company in exchange for equity. There are corporate rules that penalize undercapitalized companies in cases of bankruptcy.
- In some cases, particularly in privatization contexts, the Government has included performance requirements, such as a specific capital investment requirement or a required amount of capital to launch a communication satellite, build an earth tracking station, and maintain an orbit for Argentina.
- Certain investments have been selective as to the type of industry and its specific location, particularly in mining, forestry, and the automobile industry.

In the case of specific industries, there have been greater performance requirements because they have specific benefits, including export commitments in mining or the automobile industry. Normally, depending on the type of industry, a government Secretary deals with each type of industry and sets forth its specific requirements, including the authorization to transport machinery free of customs duties.

Since the enactment of a new antitrust legislation in 1999, merger control has been applied to the acquisition of control over

one or more companies, going concerns or assets from which an independent turnover can be identified, by means of a merger, the transfer of a going concern, the acquisition of property or any share rights -when such acquisition gives the acquirer control or substantial influence over the enterprise- and any act or agreement which transfers to a person or economic group a decisive influence on the passing of resolutions related to the ordinary or extraordinary management of an enterprise. Such transactions will be subject to merger control if the enterprise/s involved in the transaction (acquirer and target companies -or merging parties- but not seller) have a turnover in excess of AR$ 200 million in Argentina (approximately Euro 37 million), unless a special exemption applies. As a conclusion to the review process, competition authorities may: (a) approve the transaction without undertakings; (b) impose conditions (i.e. by requiring divestment of assets or an entire division of products to maintain competition); or (c) prohibit the transaction.

In a few specific cases, the Government has encouraged foreign investors to collaborate with local ones in areas such as the privatization of existing concessions, offshore drilling, gas concessions, etc., or there has been a policy to retake former privatized companies in distress, such as the Post Office, the Satellite Communication, the National Airline, the Provision of Water and Sewage, and the radio electric space, among others.

In general, no law restricts the entry of foreign investment or investors in any type of industry that is not regarded as being in the national interest, although no law qualifies what, in effect, constitutes a "national interest."

4. Investment Contracts

There are no investment contracts denominated as such in Argentina. Private parties, if they have the authorization of the Government, simply invest under the laws of Argentina and the BITS, which serve to protect their investment as between Argentina

and the country to which the national investor or the company controlling the investment is organized and has its headquarters. Such a country is deemed a contracting party.

The privatization carried on in the nineties by former Governments was mostly done through public bids, without Government involvement, and through joint ventures, organized in Consortiae, which would bid individually, and the successful bidder would organize a vehicle whereby all joint venture parties could participate as shareholders. Contracts for joint exploration of natural resources are popular in the oil industry, whereupon an operator is designated and the partners remain in the joint venture (which is not legislated in Argentina except in the format of an UTE)[34] and leave or enter the joint venture through farm-in and farm out agreements.

There have been remarkably few BOT projects. Most of the projects involving the Government were awarded to foreign partners organized in joint ventures with the specific investment obligations of others to buy obsolete energy plants at a low cost and subsequently turn them into state of the art fire and gas energy generating plants. Most of the contracts awarded privately were turnkey projects.

All contracts with the government made by Argentine Companies controlled by foreign investors were subject to Argentine internal laws and to Argentine courts. No international tribunals were accepted, except in a few specific instances or through arbitration. No combination of laws was permitted. This was a condition of participation in the privatization bids.

However, foreign investors managed to obtain ICSID arbitration jurisdiction for the parent companies of investing subsidiaries organized in Argentina that participated in the vehicle corporation, which was awarded by Government concession rights or public companies in full ownership or operation rights. This created a double standard because local subsidiaries could sue the

[34] UTE is a form of registered joint venture that has been introduced in Argentina as result of the enactment of Law 22,903.

Government under Argentine jurisdiction, but its shareholders could sue the Government under ICSID procedures, since the rights of investors were protected under the BITS, not under internal regulations contemplated in the Bid specifications.

5. Performance requirements

As mentioned above, there was no local employment requirement, local content requirement, or any trade balancing requirement, since the Argentine Foreign Investment Law did not contain any of these safeguards. Regarding technology requirements, foreign companies required themselves to have state of the art capabilities, normally implemented through technology agreements, and these have been awarded a tax treatment far more favourable than the application of income tax to non-residents, the latter of which is a flat 30% deducted at the time when the beneficiary's account is credited. However, in the automobile industry, there are performance requirements for foreign investors. Under the treaty with the United States for the protection of the investments, such performance requirements cannot be increased (Article 9 of the Protocol attached to the New Treaty).

In certain cases, performance requirements were introduced as a condition of performance, not of admission. In other words, the project required the investment of certain amounts of foreign currency, the entry of which was guaranteed by the parent company, as well as other performance requirements. However, once such obligations were effectively performed, the foreign investor's obligation disappeared. For example, in the oil industry, an investment to secure exploration rights became associated with the right to exploit findings of commercial oil if the exploration lines of investments were carried out.[35]

[35] In many instances, the privatization laws contained the obligation that 10% of the capital of the vehicle was to be delivered free of charge to the workers. In some cases, the State reserved also for itself a minority position in the equity of the vehicle.

Occasionally, in the provincial level, there has been as a condition to the enjoyment of certain benefits (postponing of payment of the VAT tax, or reduction of income tax, or release of local contributions), some performance requirements related to the hiring of local labour from the area in which the investment was located and the investment of funds in the developing of certain products for export (San Luis Province, San Juan Province).

As concerns foreign personnel, Argentina does not contemplate exclusions. However, Argentina has had a mandate for years prohibiting the passage of laws that forbid the entry of European immigrants, the latter of which was declared discriminatory in 1994.[36]

Employment of foreign workers corresponds with standard immigration regulations. Expatriates may work in foreign-owned businesses as long as they hold a valid resident permit. In recent years, a growing number of workers from neighbouring countries have entered the Argentine work force. Most are inexperienced or semi-experienced, and many of them work in the country illegally. The unions have protested against the entry of illegal immigrants and against those whom provide work for such illegal immigrants. However, in the suburbs there are large groups of undocumented immigrants, including Bolivians, Paraguayans, and Peruvians, and most recently, Africans.

For those who legally hold a job position, Argentina provides a system under which, to the extent that scientists, professionals, or technicians work for no more than two years under contract, they may apply for an exemption from most employer social contributions. Such exemptions considerably reduce payroll costs.[37]

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[36] However, article 25 of the 1994 Constitution emphatically declares that Congress shall encourage investments of European origin and shall not make laws forbidding immigrants that may apply for working in their commerce, industry or profession.

[37] The Constitution also permits that foreigners, after two years of residence, may apply for Argentine nationality, but such a period may be reduced if they provide valuable service to the Nation (Section 20 of the Argentine Constitution).

6. Tax regime and incentives

a) Brief general introduction of the tax regime (in particular whether foreign investors enjoy complete national treatment on tax matters or there are special tax regime(s) for foreign investors and their companies).

Argentina has established several regulations in order to promote foreign investment both in treaty law and domestic law. These regulations include different investment protection agreements. Each regulation provides certain guarantees and together they aim to provide foreign investors with adequate protection for their local interests.

Foreign investors who make capital investments in Argentina for the promotion of economic activities or for the extension or improvement of existing activities, have the same rights and obligations under the Federal Constitution and local legislation as domestic investors. Likewise, foreign investors face the same tax liabilities than domestic investors.

The main tax considerations are the following.

Federal level

Income tax

This is a tax levied on taxable income derived by resident companies and foreign companies' permanent establishments in Argentina during the relevant tax period at a flat rate of 35%. A worldwide taxation system applies in Argentina with an ordinary foreign tax credit as a unilateral method to avoid double taxation. Accordingly, non-resident companies are taxed only on income from Argentine sources.

As a general rule, the distribution of dividends is not subject to withholding tax. However, the Income Tax Law provides that if a local company pays dividends or distributes profits in cash or in kind to its shareholders in excess of the amount of its taxable income

as accumulated at the end of the previous fiscal year, such excess is subject to a withholding tax at the rate of 35% (the so-called equalization tax). This equalization tax, if applicable, may be reduced if a tax treaty is applied.

According to the Income Tax Law, capital gains by non-residents derived from the sale of shares in Argentine companies are exempt from income tax in Argentina.

Value added tax (VAT)

This is a tax levied on taxable supplies of goods and services in Argentina as well as imports of goods and services into the country. Exports of goods and services are zero rated. The general rate is 21%. There is a reduced rate of 10.5% and an increased rate of 27% for certain cases (*e.g.*, supplies of energy, gas and telecommunications).

In computing VAT liability, input VAT may be credited against output VAT, so that only the value added to the taxpayer's supplies is taxed. Even though this tax primarily entails a financial burden, in certain cases, it may mean an economic cost.

Minimum deemed income tax (MDIT)

This is a tax levied on the value at the end of each tax period of the assets located in Argentina or abroad, held by companies domiciled in Argentina as well as permanent establishments of non-residents in Argentina, at a 1% rate. This tax is payable in advance of income tax in case such income tax is higher than the minimum deemed income tax. In case the minimum deemed income tax of a given year is higher than the income tax of that year, the excess may be carried forward for the following ten tax periods and be used as a credit towards the income tax liability exceeding the minimum income tax of following years. Taxpayers with assets in Argentina, the aggregate value of which shall not exceed AR$ 200,000, are exempt from MDIT.

Personal assets tax

This tax is levied on Argentine resident individuals and estates

located in Argentina with respect to their worldwide net wealth at the end of each calendar year exceeding AR$ 305,000. It is also levied on non-resident individuals and estates in relation to their net wealth located in Argentina at the end of each calendar year. Furthermore, non-resident legal entities and individuals are also subject to this tax with respect to shares held in Argentine companies. This tax is payable by the local issuer of the shares at a flat rate of 0.5% of the value of the participation. The local issuer is the one entitled to request payment from the non-resident or resident individual taxpayer.

Individuals domiciled in Argentina are subject to this tax on all their assets that exceed AR$ 305,500. The applicable tax rate varies from 0.5% to 1.25% depending on the amount of such assets. For non-Argentine residents, the applicable rate is 1.25%.

Tax on debits and credits in banking accounts

This is a tax levied at the general rate of 0.6% on each debit and credit occurred in bank accounts. Though the taxpayer is the holder of the account, the bank is the responsible for the payment of the tax. There are reduced rates and exemptions for certain cases (*e.g.*, credit on banks loans). The tax on debits in banking accounts may be computed, partially, as a credit for income tax and MDIT.

Provincial level

Stamp tax

This is a tax levied on the execution of acts and contracts in any Argentine jurisdiction other than the Province of La Rioja. It is payable in the jurisdiction in which the economic transaction is instrumented but it may also be applicable in the jurisdiction in which the economic transaction affects. The tax rate may vary from jurisdiction to jurisdiction but it is usually around 1/1.5% of the economic value of the transaction.

Turnover tax

This is a tax levied on the exercise of an economic activity on

a regular basis. The taxable base is turnover (*e.g.*, gross receipts). Relevant rates also depend on the jurisdiction and activity carried out. The average is 3%. Certain industrial activities may be exempted. This tax is applicable on a cumulative basis as no credit is available as it is in the VAT.

For activities carried out in more than one jurisdiction, there is a distribution system referred to as the Multilateral Agreement, which applies to everyone.

Municipal level

Even though the scope of municipal taxes is determined by each Provincial Constitution, in general, municipal taxing rights only encompass those taxes levied as a consequence of services granted by the relevant municipality. These taxes include: those applicable to the granting of permissions for starting an economic activity, taxes levied on security and health control of taxpayers' activities, taxes on the right to use public spaces and taxes on advertisements made in the municipality. Each municipality legislates its own tax system.

b) Special tax regimes for foreign investors (e.g., any tax reduction or exemption for foreign investment in general or for foreign investment in certain areas such as free trade zones, or in certain industries?)

At present, the following tax incentives are available to domestic and foreign investors. However, these incentives typically require foreign investors to have a presence –*i.e.*, to participate in domestic companies or register a branch– in Argentina:

Mining promotion regime

The incentives for mining promotion[38] may be granted either to individuals domiciled in Argentina and to legal entities organized

[38] Law No. 24196 and its regulations as laid down in Decree No. 2686/1993.

in Argentina or authorized to carry out activities in Argentina. These entities may be beneficially owned by foreign investors. In order to be eligible, the beneficiary must develop mining activities in Argentina, or create an establishment in Argentina for that purpose and be registered with the relevant entity.

Tax incentives are granted for the activities of prospecting, exploration, development, preparation, extraction, and processing of minerals subject to the Argentine Mining Code.

Financial investments

Stock corporations, cooperatives and civil associations, incorporated in Argentina or branches in Argentina by non-residents, may issue qualifying corporate bonds (*obligaciones negociables* or "ONs") denominated in either Argentine or foreign currency. Interests and gains from bonds, especially when they are derived by non-Argentine residents, may receive several tax benefits.[39]

Among others, interest on ONs and capital gains from sales, exchanges and other disposal of ONs derived by non-Argentine residents as well as resident individuals are exempted from income tax, even if the exemption involves a transfer of revenue to a foreign treasury. In addition, transactions involving ONs are exempted from VAT.

Personnel training-related expense credit

There is a tax credit on qualifying gifts or expenses incurred by any corporate or individual entrepreneur for the support of training institutions.[40] For large companies, tax credit may not exceed 0.8% of the annual payroll (8% for micro, small and medium-sized companies). Tax credit is granted, upon request, by the appointed government agency and it may be used to pay any federal tax (*e.g.* income tax, VAT). The expenses or gifts originated

[39] Law No. 23576 and its regulations as laid down in Decree No. 156/1989.

[40] Law No. 22317, Article 3 and its regulations as laid down in Decree No. 988/1981.

in this tax credit are not deductible from income tax. The tax credit may be assigned only once per year. The property acquired with the expenses attached to the tax credit is subject to certain limitations (*e.g.*, with respect to its transfer).

Tax credit on research and development projects

A tax credit is granted on qualifying expenses incurred by corporate or individual entrepreneurs on research and development projects.[41] Tax credit is granted, upon request, by the competent agency, *i.e.*, Agency of Science and Technology Promotion (*Agencia Nacional de Promoción Científica y Tecnológica*) and it may be offset against payable income tax up to a certain limit established by the regulations. The credit may not exceed 50% of the total amount of the submitted project.

Investment in capital assets and infrastructure projects

This regime is available to taxpayers that undertake an investment project on an industrial activity or execute an infrastructure project to be carried out between October 1, 2007 and September 30, 2010. Eligible persons must be registered with the relevant registries.

Tax benefits available under this regime consist of: (i) a return in advance of the VAT corresponding to capital assets or infrastructure works, or (ii) accelerated depreciation of such assets for Income Tax purposes.Both tax benefits are non cumulative. Therefore, beneficiaries must choose between one or another unless the production obtained through the investment project be exclusively addressed to the export market and/or the projects are "clean production projects" for environmental purposes.In addition, benefits are subject to certain annual limits.

Software industry regime

Software design, development and production are considered

[41] Law No. 23877, Article 9(b) and its regulations laid down in Decree No. 508/92. Also, Decree No. 270/1998 which regulates tax credit.

to be industrial activities for tax purposes, and for any other kind of benefits the Federal Government may provide for the industrial sector.[42]

This preferred regime is available to resident individuals and legal companies, incorporated in Argentina, who are primarily active in the software industry.

Biofuel industry

Law No. 26093 and its regulations as laid down in Decree No. 109/2007 establish a preferred regime for the biofuel industry, defining biofuel as bioethane, biodiesel and biogas produced with raw material from agriculture, agro-industrial and organic waste. All of these must comply with the quality standards established by the enforcement authority.

Free trade zones

At present, almost all Argentine provinces have established provincial promotion regimes granting tax benefits and incentives for different activities. Furthermore, the Provinces of Buenos Aires, Chubut, Córdoba, La Pampa, Mendoza, Misiones, Salta, San Luis and Tucumán have created free trade zones as explained below.

Free trade zones offer exporters the possibility to import the necessary equipment to build a "turnkey operation" within such zone free of customs duties, statistical fees and VAT. Furthermore, manufacturing exporters within the free trade zone enjoy the benefit of buying supplies and raw materials from third countries without having to pay duties.

By exporting through a free trade zone, companies not only are exempt from all export duties but also enjoy all other available incentives at the federal level. In addition, companies operating in a free trade zone may face lower production costs, due to the VAT exemption and lower internal taxes on utilities such as electricity,

[42] Law No. 25922 and its regulations as laid down in Decree No. 1594/2004 specify the most important incentives for the software industry.

gas, water and telecommunication.

Law No. 19640, regulated by several national Decrees, sets a Special Tax and Customs Regime *("Régimen Especial Fiscal y Aduanero")* applicable in the Province of Tierra del Fuego. This special regime exempts, within certain limits, individuals and legal entities carrying out activities or transactions in such jurisdiction from certain federal taxes levied on specific activities and/or transactions.[43]

In addition, Law No. 19640 sets a Special Customs' Area (*"Área aduanera especial"*) in the national territory of Isla Grande de la Tierra del Fuego, while a free trade zone is created in the national territory of Antártida and Islas del Atlántico Sur by such same law.

c) *Double taxation treaties (any tax treaties with other countries to avoid double taxation)*

d) *Briefly any other incentives/mechanisms to attract foreign investors (e.g., insurance/guarantee against political risks, loans, etc)*

Please see (b).

[43] Tax benefits comprise: (i) tax relief of income tax; (ii) exemption of VAT; (iii) tax relief of taxes on capital; (iv) exemption of stamp tax; (v) exemption of import duties and VAT for capital assets; (vi) additional reimbursement for exports and; (vii) exemption of import duties over raw materials.

Country Covered (1)	Taxes signature	Date of into force	Date of entry date	Effective
Australia	i	27.08.1999	31.12.1999	01/01/2000
Belgium	i/c	12.06.1996	22.07.1999	01.01.2000
Bolivia	i/c	30.10.1976	04.06.1979	01.01.1980
Brazil	i	17.05.1980	07.12.1982	01.01.1983
Canada	i/c	29.04.1993	30.12.1994	01.01.1995
Chile	i/c	13.11.1976	19.12.1985	01.01.1986
Denmark	i/c	12.12.1995	03.09.1997	01.01.1998
Finland	i/c	13.12.1994	05.12.1996	01.01.1997
France	i/c	04.04.1979	01.03.1981	01.01.1981
Germany	i/c	13.07.1978	25.11.1979	01.01.1976
Italy	i/c	15.11.1979	15.12.1983	01.01.1979
Norway	i/c	08.10.1997	30.12.2001	01.01.2002
Russia	i/c	10.10.2001		
Spain	i/c	21.07.1992	28.07.1994	01.01.1995
Sweden	i	31.05.1995	05.06.1997	01.01.1998
Switzerland (2)	i/c	23.04.1997	23.11.2000	01.01.2001
The Netherlands	i/c	27.12.1996	11.02.1998	01.01.1999
United Kingdom	i/c	03.01.1996	01.08.1997	01.01.1998

<1>Taxes covered: i = income tax; c = taxes on capital.

<2>This treaty is effective on a provisional basis as from 1 January 2001 according to exchange of notes.

7. Property rights, expropriation and compensation

a) General protection of property rights by foreign investors (national treatment or special treatment to foreign investors)

Under Argentine law, the right to private property belongs to all Argentine inhabitants, irrespective of their nationality. In fact, according to Article 14 of the Federal Constitution every citizen has the right to use, dispose of and rent his or her property and, pursuant to Article 17, no citizen can be deprived of his or her private property without a prior judicial judgment based on the applicable law. Expropriation is only admitted in the public interest and under the conditions provided by law.

The Federal Supreme Court has sustained that the term property, as used in Articles 14 and 17 of the Federal Constitution or in other statutory provisions, comprises all valuable interests that an individual can own other than his own person, life and freedom. Any right legally recognized as such, whether resulting from private relations or from administrative acts, is included in the constitutional concept of property; as a consequence, any holder can enforce his or her right against anyone impairing it, including the Government.[44]

Private property rights, as well as any other civil right, can be enjoyed by every inhabitant of the Argentine territory. Indeed, in Article 16, the Federal Constitution recognizes equality among its inhabitants. For instance, *"the Argentine Republic does not admit any blood or birth prerogatives: there are no personal privileges nor nobility titles. All its inhabitants are equal before the law and are admissible to any employment on the sole condition of their capacity. Equality is the basis of any tax or public burden."*

Specifically, regarding foreigners, the Federal Constitution grants them equal treatment in Article 20, which states that, *"Foreigners are vested, within the territory of the Nation, with all*

[44] Argentine Supreme Court, *Bourdieu*, (1925) Fallos 145:307.

the civil rights of a citizen; they can exercise in their industry, trade and profession and own, buy, and sell real property."

The broad declaration of equality contained in the Federal Constitution, as well as in the enunciation of the civil rights recognized to foreigners, reinforces their constitutional protection. This includes their assets and capital established in the country, even if the owners do not inhabit within the Argentine territory. It also extends to foreign legal entities.[45]

The Federal Supreme Court has construed that, regarding the exercise of civil rights, foreigners and nationals are considered to be on the same level. Therefore, any provision that discriminates between them is deemed *prima facie* contrary to Article 20 of the Federal Constitution.[46] This interpretation restricts the usage, in civil rights matters, of national origin as a selection criterion among inhabitants.[47] Thus, for the enjoyment of those rights, it is not required to obtain Argentine citizenship.[48]

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[45] See GELLI, María Angélica, *Constitución de la Nación Argentina*, Volume I, 4th Edition, (La Ley, Buenos Aires, 2008) 372-374; see also BIDART CAMPOS, Germán J, *Manual de la Constitución reformada*, Volume I (Ediar, Buenos Aires, 1998) 419.

[46] Argentine Supreme Court, *Repetto* (1988) Fallos 311:2272.

[47] GELLI, María Angélica, *Constitución de la Nación Argentina*, Volume I, 4th. Edition (La Ley, Buenos Aires, 2008) 375.

[48] Recently, the Argentine Supreme Court has rendered several judgments protecting the equality principle by resorting to a strict scrutiny applicable whenever the law imposes a classification based on nationality. In those cases, the law imposing the classification shall be presumed to be unconstitutional and, in order to destroy this presumption, the State's defense has the burden of proving that the aims pursued respond to a compelling government interest while the means chosen are the ones that least affect the right to an equal treatment. It is important to note that these cases refer to the equality in the access to a public or private employment. The Supreme Court has not addressed yet this issue in respect to property rights of foreign investors. Argentine Supreme Court, *Hooft* (2004) Fallos 327:5118. In that case, the Court struck down a provision of the Constitution of the Province of Buenos Aires which forbade those who acquired Argentine nationality by means other than birth or filial relationship to nationals to become judges on any Court of Appeals. See also *Gottschau* (2006) Fallos 329:2986 in which the Court struck down the provision that impaired foreigners from taking part in a selection process to choose a court's clerk. Strict scrutiny was recently

Specifically aiming at the protection of foreign investors, Argentina has enacted the Foreign Investments Law.[49] This law grants foreign investors who invest capital in the country in any of the forms stated in Article 3[50] the same rights and duties that the Federal Constitution and local laws grant domestic investors.[51]

Foreign investments undertaken in our territory are protected by more than 50 Bilateral Investment Treaties (BITs) signed by Argentina as a way of attracting foreign capital during the '90s. Among their usual provisions, some BITs include the "national treatment" and "most favored nation" clauses.[52]

Pursuant to the "national treatment" standard, each contracting state has to provide foreign and national investors with the same treatment. The equitable treatment includes non-discrimination, meaning that, as a minimum international pattern and protection of foreign property, the receiving state has the duty to prevent any discriminatory act against foreigners and nationals of specific countries.[53]

Under the "most favored nation clause," the granting state undertakes an obligation to grant the beneficiary State or the persons or things related to that state, no less favorable treatment than the

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confirmed in the case *Mantecón Valdés* (2008) Fallos 331:1715, whereby the Court held that the administrative rule that forbade foreigners from taking part in a selection process for a position at the Court's Library, is unconstitutional.

[49] Law No. 21382, enacted in 1976, adopted as Exhibit I to Decree No. 1853/1993 (O.G. 08/09/1993).

[50] Foreign investments may consist of: (i) freely convertible foreign currency; (ii) capital goods, their parts and accessories; (iii) profits or capital in local currency belonging to foreign investors, whenever these funds may be transferred abroad; (iv) capitalization of foreign credit in freely convertible foreign currency; (v) intangible assets, in accordance with specific laws; or (vi) any other type of investment contemplated in special or promotional systems.

[51] Law No. 21832 Article 1.

[52] Among other countries, these clauses are set forth in the BITs entered into by Argentina and France, Germany, Great Britain and Ireland and the United States.

[53] TAWIL, Guido S., 'Los tratados de protección y promoción recíproca de inversiones y el arbitraje internacional: el caso de argentina' (2005) *La Ley* 2000-D-1105.

one extended to a third state or to the persons or things in the same relation to that third state in similar cases.[54] This clause is related to the bilateral and commutative features of BITs[55] and it is aimed to "*maintain, at all times, fundamental equality without discrimination between the countries concerned.*" [56]

However, there are certain exceptions to the most favored nation clause: (i) the privileges given by a contracting state to investors of third countries as a consequence of association in the fields of free trade, customs agreements or other integration agreements such as MERCOSUR[57] and (ii) the privileges resulting from international tax agreements.[58] Following a broader criterion, exceptions to the most favored nation clause are admissible if the state needs to adopt measures connected with domestic or intentional security and/or public or moral order provided they are non-discriminatory.[59]

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[54] TAWIL, Guido S., 'Most Favoured Nation Clauses and Jurisdictional Clauses in Investment Treaty Arbitration', in BINDER, Christina; KRIENBAUM, Ursula; REINISCH, August and WITTICH, Stephan, *International Investment Law for the 21st Century. Essays in honour of Cristoph Schreuer,* 2009 Oxford Unviersity Press, Great Britain, 9-30, 10; see also ROSATTI, Horacio D., 'Los Tratados Bilaterales de Inversión, el Arbitraje Internacional Obligatorio y el Sistema Constitucional Argentino', (2003) *La Ley*, 2003-F, 1283; VERBIC, Francisco, 'El CIADI y la situación de la República Argentina ante sus tribunales' (2008) *JA* 2008-IV-1360, 6.

[55] GUALDE, Andrea, 'Las implicancias del arbitraje internacional en el Derecho Internacional y en el derecho interno de los Estados' (2004) *JA* 2004-II-1321.

[56] Case concerning rights of nationals of the United States of America vs. Morocco (France v. United States of America), judgment, 27 August 1952, ICJ Reports (1952) 176.

[57] Mercosur was created by the Asunción Treaty, signed on March 26, 1991 by Brasil, Argentina, Paraguay and Uruguay. Bolivia, Chile, Colombia, Ecuador, Perú and Venezuela are associated states.

[58] PANELO, Santiago, 'La protección de las empresas privatizadas prestadoras de servicios públicos bajo los Tratados Bilaterales de Inversión' (2003) *La Ley* 2003-E, 1482.

[59] CITARA, Rubén Miguel, 'El marco normativo de los tratados bilaterales de Inversión (T.B.I.) frente a la existencia de la jurisdicción contractual pactada' (2004) *La Ley* 2004 –A 1403.

b) Protection of intellectual property rights (IPRs) (such as patent, trademark, trade name, industrial design, computer program, etc.)

Intellectual property rights in Argentina are protected not only under specific regulation, but also under the Federal Constitution, which states that: "*every author or inventor is the exclusive owner of its work, invention or discovery, for the term provided under the law.*" In addition, Argentina is a party to the 1966 Paris Convention incorporating the Lisbon Agreement of 1958 and has also approved the Trade-Related Aspects of Intellectual Property Rights ("TRIPS") provisions of the General Agreement on Tariffs and Trade, among others.

Patents and utility models

Patents and utility models are regulated under Law No. 24481 and Decree No. 260/1996. Patents are defined as inventions that are new and involve inventive activity; and they are granted for a 20-year term as from the date of filing of the patent application before Argentina's National Patent Administration, an agency that operates under the "*Instituto Nacional de Propiedad Intelectual*" or "INPI". Utility models are "*any new arrangement or form obtained or incorporated in known tools, work instruments, utensils, devices or other objects that are used for practical work, insofar as they make for better performance of the operations for which they are intended.*" A certificate of a utility model is valid for a non-renewable term of ten years as from the date of application. A patent owner has the right to prevent unauthorized use of its patent by third parties.

A patent application may be filed by the inventor or his successors and/or representatives and may be requested under the name of an individual or legal person. Foreign applicants are required to establish a legal domicile in Argentina.

In the event of earlier applications in other countries, the date in which the first request is filed is recognized as a priority date,

provided that: (i) the application was made within a year prior to the Argentine application; (ii) the Argentine application is no broader than the foreign request (otherwise, the priority will be only partial); and (iii) the country where the first application was made grants reciprocity to Argentina in similar cases.

Both patents and utility models may be licensed or transferred in whole or in part. Transfers must be registered with the National Patent Administration to become effective *vis-à-vis* third parties.

Copyright

Specific copyright regulation may be found in Law No. 11723. In addition, Argentina has signed numerous copyright treaties.[60] The Copyright Law protects scientific, literary, artistic, and educational works. Copyright protection comprises the expression of ideas, procedures and methods of operation and mathematical concepts, not the ideas, proceedings, methods, or concepts themselves. In order to obtain copyright protection, the work must be expressed in a tangible and material form and only a minimum level of originality and novelty is required. The Copyright Law, as a general principle, grants authors the rights to their works for life and to their successors for 70 years from January 1st of the year following the author's death.

For a foreign work to be protected in Argentina: (i) the requirements under a treaty to which Argentina is a party must be met; or (ii) the author must have complied with the formalities required for the protection of the rights in the country where the work was published for the first time, provided that the author be a

[60] These include: (i) the 1967 Stockholm Convention establishing the World Intellectual Property Organization, approved by Law No. 22195 in 1980; (ii) the 1886 Berne Convention for the Protection of Literary and Artistic Works, approved by Law No. 25140 in 1999; (iii) the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, approved by Law No. 23921 in 1991; (iv) the 1996 WIPO Performances and Phonograms Treaty, approved by Law No. 25140 in 1999; and (v) the 1996 WIPO Copyright Treaty, approved by Law No. 25140.

national of a country where copyrights are recognized.

Under principles of "national treatment," Argentina grants foreign works the same protection as national works. Argentina accords the shorter of the Argentine term or that of the country where the work was copyrighted. Registration of foreign works in Argentina is not required. However, there are procedural and evidentiary advantages for registering foreign works with the Copyright Agency.

Trademark and trade names

Trademarks and trade names are regulated by Law No. 22362 which determines that, so as to obtain protection, trademarks must be registered before the INPI. Applicants must demonstrate that the trademark will be used to distinguish their product or service. Under the Trademark Law, a combination of words, numbers, drawings or any sign with the capacity of distinguishing a product or service can be registered as a trademark. Registration is valid for ten years, renewable as long as the trademark has been used within the preceding five years and no limitation is set on the transfer or license of the trademark.

Trademarks confer exclusivity upon the owner only with respect to the specific product or service for which they have been registered. This is generally known as the "specialty principle" which implies that the same trademark may be used by third parties to designate different products or services as long as they do not cause any kind of confusion.

Trade secrets

Trade secrets are regulated under Law No. 24.766 which protects the rights of persons who are legitimately in control of information, allowing them to impede its divulgation or acquisition by third parties. In order to be protected under the Trade Secrets Law, the information: (a) has to be secret; (b) must have a commercial value; and (c) must be subject to reasonable measures in

order to be kept undisclosed. Non-patentable technical knowledge, such as know-how, is an example of information protected as a trade secret.

Internet domain names

NIC (Network Information Center) is a public service - operating under the scope of the Ministry of Foreign Affairs- in charge of ".ar" Argentine Internet domain names. Registrations shall be made online at www.nic.ar on a first-come first-served basis. The applicant must complete a form with his/her personal information and declare under oath that the information submitted is accurate, that the application does not violate third party's rights and that the domain name is not being registered for illegal purposes. If any of these statements were to be false, NIC Argentina may reject application or revoke registration. Each applicant is allowed to register up to 200 domain names and the term of registration extends for one year which may be indefinitely renewed.

Industrial designs and models

The shape or appearance of an industrial product may be protected if registered pursuant Decree No. 6673/63. Said protection grants the owner of a model or design the exclusive right to prevent third parties from using the registered design or an imitation of this.

Registration may be granted for five years provided that there is no prior publication in Argentina or abroad. The term may be renewed for two equal periods as long as said extension is requested no later than six months prior to the expiration of the pertinent five-year term.

Once a design or a model registration has been filed abroad, the same design or model registration must be filed in Argentina within the following six months from the date of filing of the design application.

Data protection

The 1994 Amendment to the Argentine Constitution included the *habeas data* right action (recognition of the right to the appropriate protection of one's personal data).[61] The habeas data is a legal action which triggers a procedure aimed at guaranteeing certain personal constitutional rights (the right to honor, dignity as well as to personal and family privacy) that could be affected by the collection of data and information relating to individuals.

Local and foreign companies must comply with several provisions specifying how Argentine residents' personal data will be obtained, treated and transferred to third parties.

On November 2000, the Argentine Congress passed Law No. 25326.[62] This law sets a range of obligations aimed at protecting personal information recorded in data files, registers, databases or other technical means of personal data treatment.

According to the aforementioned law, "personal data" refers to any kind of information involving an identified or identifiable person -the term "person" encompassing both individuals and legal entities-, *i.e.*, any information which allows people to be identified.

Any breach of this Law entitles the Personal Data Protection Agency -dependent on the Ministry of Justice- to issue warnings, suspensions or fines as well as the closure or cancellation of the file, register or database concerned. These penalties shall be applied in addition to any liability for damages or criminal penalties arising from the breach.

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[61] Article 43, third paragraph, of the Argentine Constitution states that *"Any person can file this action to obtain access to any data referring to himself and the purpose thereof, registered in public records or data bases, or in private ones intended to supply information; and in case of false data or discriminatory data, to request the suppression, rectification, confidentiality or updating of said data. The secret nature of the source of journalist information shall not be impaired"*

[62] An English version of the Argentine Data Protection Law can be found at the following web address http://www.privacyinternational.org/countries/argentina/Argentine-dpa.html.

On June 30, 2003, the European Union issued the "Data Protection Adequacy Finding for Argentina". Argentina became the first Latin American country to receive the EU Data Protection Working Party's approval for its data protection framework. This finding indicates that data transferred between EU member states and Argentina shall not violate the EU Data Protection Directive.[63]

The National Database Registry is currently the enforcement authority of the Act. Any person who owns a database destined to give information to third parties or which exceeds personal use has to register said database in the mentioned registry. The registration of each database lasts for one year, and must be renewed yearly. According to provisions of the above-mentioned registry, databases' owners must comply with several security measures in order to avoid liability.

c) Right to expropriation or promise of non-expropriation (does the state declare its right to expropriation or generally promise not to expropriate foreign investment in domestic laws or international treaties? Any conditions attached to such right or promise?)

Under domestic law, the Argentine State has the right to expropriate provided it complies with the requirements set forth in Article 17 of the Federal Constitution: declaration of public interest by law and prior compensation.[64]

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[63] A full version of the Decision can be found at http://europa.eu.int/comm/internal_market/ privacy/ docs/ adequacy/ decision-c2003-1731/ decision¬Argentine_en.pdf.

[64] Article 17 of the Argentine Constitution: *"Property may not be violated, and no inhabitant of the Nation can be deprived of it except by virtue of a sentence based on law. Expropriation for reasons of public interest must be authorized by law and previously compensated. Only Congress levies the taxes mentioned in Section 4. No personal service can be requested except by virtue of a law or sentence based on law. Every author or inventor is the exclusive owner of his work, invention, or discovery for the term granted by law. The confiscation of property is hereby abolished forever from the Argentine Criminal Code..."*

As a result of the federal system adopted by the Federal Constitution, the Provinces are also empowered to establish their own expropriation systems. Nonetheless, each system must conform to the requirements set forth in the Federal Constitution. At federal level, Law No. 21499 regulates the expropriation process.[65]

Under international law, most BITs signed by Argentina forbid, as a general principle, both direct and indirect expropriation and only admit it in the exceptional cases that shall be explained below.

d) Definition of expropriation (in particular whether it includes indirect expropriation (creeping expropriation or measures equivalent/tantamount to expropriation) as well as direct expropriation; any further definition of indirect expropriation)

The Federal Supreme Court has defined expropriation as a unilateral manifestation of the State's will to acquire somebody's property only if fair compensation is previously granted, so as to restitute the amount of money allowing the owner to acquire a new good equivalent to the one expropriated.[66]

As a general rule, expropriation may affect any good, thing or right, whether private or in the public domain.[67] Along with the requirements that will be explained below, the Federal Supreme Court and scholars[68] have construed that:

(i) Expropriation proceedings are extraordinary and

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[65] Article 17 of the Argentine Constitution.

[66] Argentine Supreme Court, *Nación Argentina c. SA Las Palmas*, (1983) Fallos 305:1897.

[67] Law No. 21499, Article 4. Marienhoff, Miguel S., *Tratado de Derecho Administrativo*, Volume IV (Abeledo Perrot, Buenos Aires, 1973) 124; Borda, Guillermo A., *Tratado de Derecho Civil. Derechos reales*, Volume I (Abeledo Perrot, Buenos Aires, 1978) 351.

[68] MARIENHOFF, *Tratado de Derecho Administrativo*, Volume IV (Abeledo Perrot, Buenos Aires, 1973) 125-127.

exceptional.[69] The State may only resort to expropriation for public interest purposes and it cannot pursue any other purposes (such as speculative purposes).[70]

(ii) Expropriation is to be applied restrictively and if the objective sought may be attained through other means, those must be used.

(iii) Statutory provisions governing expropriation on the basis of Article 17 of the Federal Constitution are valid only insofar as they are reasonable and do not result in the impairment or disregard of property rights.[71]

Under Argentine law, there are two basic types of expropriation: (i) direct expropriation and (ii) indirect expropriation.

Direct expropriation is resorted to when the Government as guarantor of public interest needs certain property in order to satisfy a general and collective community interest and is, therefore, forced to take or use property owned by a person. The expropriation shall be conducted according to the proceedings regulated by said law.

Indirect or irregular expropriation takes place when (i) there is a law declaring the public interest of certain good and the State takes it without previous compensation; (ii) when the good declared to be of public interest by law cannot be disposed of in normal conditions and (iii) when the State imposes an unlawful restriction upon somebody's property. Scholars disagree on the need of a law declaring the public interest of a certain property in this last case. The law sets no provision on this matter, but the majority of scholars believe that, under the Argentine Constitution, the existence of such a law is an essential element of expropriation.[72] In all these cases,

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[69] Argentine Supreme Court, *Nación c. Ferrario* (1961) Fallos 251:246.

[70] Law No. 21499, Article 4. See also, Argentine Supreme Court, *Nación c. Ferrario* (1961) Fallos 251:246

[71] BORDA, Guillermo A., *Tratado de Derecho Civil. Derechos reales*, Volume I (Abeledo Perrot, Buenos Aires, 1978) 53.

[72] Among others, MARIENHOFF, Miguel S., *Tratado de Derecho Administrativo*, Volume IV (Abeledo Perrot, Buenos Aires, 1973) 354-351; VILLEGAS BASAVILBASO,

the affected owner can take the matter to court so that a judge may declare that his/her property has been indirectly expropriated.

The irregular expropriation under domestic law differs from indirect or creeping expropriation as understood in international law. Indeed, under international law, indirect expropriation deals with State measures which substantially deprive investors of their private property. These kinds of measures do not generally qualify as expropriation under Argentine domestic law. Rather, the deprived owner should seek compensation through the broader concept of State responsibility.

Indirect expropriation or measures equivalent to expropriation have not been univoquely defined. One of the criteria adopted by the ICSID Tribunal is the one explained in the "*CMS Gas Transmission Company v. Argentina*" case, in which the tribunal denied the existence of an expropriation because the investor still had full ownership and control of the investment.[73] The Tribunal considered that expropriation occurs when the investor looses control over the whole investment; thus, rejecting the concept of partial expropriation.[74]

Benjamín, *Derecho Administrativo*, Volume VI (Tipográfica Editora Argentina, Buenos Aires, 1956) 468. The Argentine Supreme Court has accepted that irregular expropriation proceeds without a law declaring the public utility of a certain property as long as there is another law declaring the public utility of another property that indirectly affects the first one. Argentine Supreme Court, *Sanabria* (1986) Fallos 308:1282.

[73] In fact, the tribunal stated that *"the Government of Argentina has convincingly argued that the list of issues to be taken into account for reaching a determination on substantial deprivation, as discussed in the case is not present in the instant dispute. In fact, the Respondent has explained, the investor is in control of the investment; the Government does not manage the day-to-day operations of the company; and the investor has full ownership and control of the investment. The Tribunal is persuaded that this is indeed the case in this dispute and holds therefore that the government of Argentina has not breached the standard of protection laid down in Article IV (1) of the Treaty"*. Case N° ARB/01/8, "CMS Gas Transmission Company v. Argentina", paragraphs 263/264.

[74] KRIEBAUM, Úrsula, "Partial Expropriation", February 2007, *The Journal of World Investment & Trade*, Volume 8 N° 1, 74.

e) Conditions of expropriation (such as public purposes/interest; legal procedure/due process; non-discrimination; compensation, as stipulated under international treaties and/or domestic law)

At a federal level, according to Law No. 21499, expropriation has to meet the following requirements:

a) *Declaration of assignment to public interest*: public utility or public interest *(utilidad pública)* refers to any end aimed to satisfy a general need or to further the interests of the largest number of persons.[75] As it constitutes the grounds for expropriation, it must be clear what exact property will be affected.[76] According to the Federal Constitution, such declaration must be made by law, whether by federal statute or a rule issued by provincial or municipal legislative entities and it is subject to judicial review.[77]

b) *Active party or expropriator*: at a federal level, the National State and any of its financially independent administrative bodies and state companies, provided they are expressly allowed by its respective laws, can act as expropriators.[78] Even individuals or entities can act as expropriators when they are expressly authorized by law or administrative acts based on law.

c) *Passive party or affected owner*: expropriation can affect any individual or entity, whether public or private.[79]

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[75] According to Law No. 21499, section 1 the public utility is the legal basis for expropriation and includes all the cases which aim to satisfy the common welfare, be it of spiritual or material nature. .

[76] Section 5, Law N° 21.499. MARIENHOFF, Miguel S., *Tratado de Derecho Administrativo*, Volume IV (Abeledo-Perrot, Buenos Aires, 1973) 177.

[77] Argentine Supreme Court, *Municipalidad de la Capital c/ Isabel A. Elortondo*, (1888) Fallos: 33:162. In this case the Court admitted that the "public utility" of the law that assigned someone's property to expropriation could be subject to judicial review.

[78] Law No. 21499, section 2,.

[79] Article 3 of Law No. 21499.

d) *Property subject to expropriation*: any property of financial or monetary value that is covered by the constitutional definition of property, whether of public or private domain.[80]

e) *Compensation*: it must be established by law.[81]

In line with domestic law, BITs only allow expropriation measures if they fulfill the following conditions: (i) they must be taken for public utility reasons; (ii) they must not be discriminatory; (iii) they must be taken along with the payment of a prompt, adequate and effective compensation and (iv) judicial review under due process should be possible.[82]

It is important to note that these same conditions apply to the cases of indirect or creeping expropriation; *i.e.*, the measures adopted by one of the Contracting States with respect to the investment made in its territory by investors of other contracting states that have effects similar to expropriation.[83]

f) Compensation for expropriation

a. Rules on the standards of compensation (such as full or just compensation; "adequate, prompt and effective compensation (Hull Formula)" or "appropriate compensation")

Argentine law follows the standard of full and just compensation payable prior to the act of taking[84].

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[80] Article 4 of Law No. 21499.

[81] MARIENHOFF, Miguel S., *Tratado de Derecho Administrativo*, Volume IV, (Abeledo-Perrot, Buenos Aires, 1973) 233. Argentine Supreme Court, *Nación c. Ferrario* (1961) Fallos 251:246.

[82] TAWIL, Guido S., 'Los tratados de protección y promoción recíproca de inversiones y el arbitraje internacional: el caso de argentina' (2000) *La Ley* 2000-D-1105.

[83] PANELO, Santiago, 'La protección de las empresas privatizadas prestadoras de servicios públicos bajo los Tratados Bilaterales de Inversión' (2003) *La Ley* 2003-E, 1482.

[84] Argentine Supreme Court, *Servicio Nacional de Parques Nacionales* (1955) Fallos 318:445.

The Federal Supreme Court has construed that full and just compensation is complied with when there is an equivalent relation among the value of the expropriated object and the compensation granted.[85] The object must be valued following the rules stated in Article 10 of Law No. 21499 as explained below, without contemplating *lucrum cessans*.

BITs executed by Argentina include a specific provision stating that expropriations are subject to payment of compensation. The scope of compensation established in those BITs –even those that do not explicitly provide for the Hull formula– is broader than the one prevailing under Argentine domestic law which, as explained above, excludes payment of lost profits.

b. Rules on the valuation methods for compensation (such as book value, discounted cash flow, going concern, replacement value, etc.)

Domestic law does not provide for a specific method of valuation of property subject to expropriation. As a general rule, the amount of compensation is fixed upon the parties' agreement. In these cases, judicial process is not necessary.[86] Article 13 of Law No. 21499 favors the kind of agreement allowing an increase of ten percent of the maximum estimated value for real property.[87]

Law No. 21499, Article 10, sets certain provisions regarding the extension of compensation. According to this law, it shall include the objective value of the property[88] and damages deriving

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[85] Argentine Supreme Court, *Provincia de Santa Fe c/ Nicchi, Carlos Aurelio* (1967) Fallos 268:112; *Secretaría de Desarrollo Social de la Presidencia de la Nación c. Ingenio y Refinería San Martín del Tabacal S.A. y Juntas de San Andrés S.A.* (2006) Fallos 329:1703. See *also Marienhoff, Miguel S., Tratado de Derecho Administrativo*, Volume IV (Abeledo Perrot, Buenos Aires, 1973) 267.

[86] EKMEKDJIÁN, Miguel Ángel, *Tratado de Derecho Constitucional*, Volume II (Depalma, Buenos Aires, 2000) 187.

[87] Law No. 21499, Article 13.

[88] The "objective value" has been defined as what the property is worth in the open market in the place and time of its expropriation (MARIENHOFF, Miguel S., *Tratado de Derecho Administrativo*, Volume IV (Abeledo-Perrot, Buenos Aires, 1973) 240.

from direct and immediate consequence of the expropriation. On the contrary, personal circumstances, affective values and hypothetical profits are not taken into account when determining the amount of the compensation. In addition, the law explicitly establishes that *lucrum cessans* is not included.

According to Law No. 21499, Article 12, payment of compensation must be made in cash. Any other means, such as public bonds, are only accepted if the passive party agrees to it.[89]

Pursuant to Article 15, if there is no agreement on the value of real property, the matter shall be decided by the courts. After analyzing the compensation set forth in Article 10, the courts shall require a report on the matter to the National Valuation Tribunal[90] which has to be rendered within 90 days from the request. Machines installed or adhered to real property being expropriated, are valued according to the parameters fixed for movable property.[91]

Under that scenario, each party will appoint an expert and the judge will appoint another one, unless it is agreed to appoint only one.[92]

According to Article 20 of Law No. 21499, the Judge shall calculate compensation according to the property's value at the time of the taking and, according to Article 22, the sum granted must take into account the rate of inflation until the actual payment takes place.

Under international law, BITs adopt different criteria regarding the valuation methods for compensation. Generally, the

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[89] Argentine Supreme Court, *Servicio Nacional de Parques Nacionales*, (1955) Fallos 318:445. It was held, in this case, that the regime which allowed payment in public bonds (Law No. 23982) was unconstitutional since a delay in the perception of the compensation is incompatible with the requirement of previous compensation of the affected person, and is contrary to Article 17 of the Argentine Constitution.

[90] The National Valuation Tribunal is regulated by Law No. 21626. According to Article 1 it is a financially independent administrative body which is part of the Secretary of Transport of the Minister for Economy.

[91] Law No. 21499, Article 15.

[92] Law No. 21499, Article 17.

amount of compensation corresponds to the real value/market value of the investments immediately before the expropriation measures were adopted or were publicly known, including interest incurred since the date of the expropriation.

Some other treaties provide that if that value cannot be promptly determined the compensation will be established according to the principles of valuation and equity commonly recognized, taking into account the invested capital, the depreciation, the repatriated capital, the replacement value, the movements of the cash flow and other relevant factors.[93]

8. Monetary Transfer

a) Transferable assets (such as profit, original investment, reinvestment, IPRs)

Argentina has a strict government control on foreign exchange transactions. The Executive Branch and the Central Bank have reinstated this control since early 2002 –which had been already applied before the 90's– and have regulated and restricted the acquisition of foreign currency by nationals and non-national residents and its inflows and outflows to and from Argentina. The Central Bank has recently tightened its control over foreign currency exchange transactions in an effort to mitigate the volatility of foreign currency exchange rates against the Argentine peso as a consequence of the current international financial crisis.

Generally, inflows and outflows in the form of profits, dividends, investments and reinvestments, payment of principal and interest, payment of other debt obligations and payment of services,

[93] An exception can be found in the BIT signed between Argentina and Italy, whereby in case the market value cannot be immediately verified, the compensation will be determined on the basis of the valuation of the constitutive and distinctive elements of the company, as well as the elements and results of the company's activities.

among others, are permitted subject to compliance with the conditions stated in foreign exchange regulations, as explained below.

b) Restrictions to transfer (general restrictions such as special formalities; or exceptional restrictions, e.g. in the case of balance of payments difficulty)

The Argentine foreign exchange control system is based on the principle that only transactions authorized to be made under foreign exchange regulations are permitted while any other transaction not expressly authorized by such regulations is forbidden.[94]

Foreign exchange regulations set forth, in broad terms, two types of restrictions:

(i) General restrictions which apply to all foreign currency transfers from and into Argentina , thus, all permitted foreign exchange transactions must be executed in accordance with them; and

(ii) Particular restrictions which refer to the different transactions authorized under foreign exchange regulations and their specific requirements.

The following are general restrictions:

(i) All funds transfers (including inflows and outflows) involved in foreign exchange transactions must be executed and settled through the Argentine single free exchange market where the parties to the transaction can freely agree upon the AR$/foreign currency exchange rate;

(ii) Foreign exchange transactions can only be made by banks

[94] Argentine exchange regulations do not set forth specific restrictions in case of a decrease in the national balance of payments, but the Government, in such cases, tends to tighten restrictions on foreign currency outflows and even create new restrictions limiting the number of authorized transactions.

and exchange entities authorized by the Central Bank to operate in foreign exchange; [95]

(iii) All inflows and outflows of funds into and out of the Argentine single free exchange market must be registered with the Central Bank; in practice, this requirement is fulfilled by the authorized foreign exchange entities; [96] and

(iv) All exchange transactions must be documented in an exchange contract to be executed with the relevant authorized foreign exchange entity in which the parties shall disclose the nature of the underlying transaction. The transaction pursuant to which the currencies are exchanged is known as its "concept". [97]

Regarding particular restrictions of the system, Argentine foreign exchange regulations set forth which transactions -inflows and outflows- can be carried out. Some of these transactions are expressly required to obtain prior authorization of the Central Bank. Argentine foreign exchange regulations permit the transferring abroad of dividends and profits, capital repatriation, payment of debts (principal and interest) and other financing, payment of services and payment of imports.

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[95] Communication "A" 3471 (2/8/02) of the Central Bank. According to the Exchange Entities Law No. 18924, the only entities entitled to execute foreign exchange transactions are those authorized by the BCRA to act as exchange traders, these are: (i) exchange houses, (ii) exchange agencies, and (iii) exchange offices. In addition, the Financial Entities Law No. 21526 expressly authorizes commercial and investment banks to operate in foreign exchange.

[96] Decree No. 616/05.

[97] Examples of transaction's concepts are payment of dividends, repatriation of capital, payment of services, payment of foreign debts, direct and portfolio investments, loan disbursements. Copies of the exchange contracts must be kept by the authorized entities and be made available to the Argentine Central Bank if required by it. The Central Bank is entitled to analyze the exchange contracts and to request information from authorized entities and its customers in order to verify whether the funds were in fact used in accordance with the concept disclosed there under. These exchange contracts are considered sworn statements.

These transfers are subject to the following particular restrictions or requirements:

(i) Payment of dividends and profits are permissible irrespective of the sums involved and do not require prior authorization of the Central Bank provided that such dividends and profits result from financial statements certified by external auditors.[98]

(ii) Repayment of financial debts owed to foreign creditors and payable abroad, regardless of the amount, is subject to prior compliance with the information regime established by the Central Bank[99] and to a minimum term (ranging from one to five years) during which the debt's principal amount cannot be repaid.

(iii) Repatriations by non-Argentine residents of "direct investments"[100] -corresponding to (a) the sale or liquidation of the investment, (b) a capital reduction of the local investment vehicle, or (c) the reimbursement of capital contributions to the investor-, are allowed without need of prior authorization of the Central Bank provided

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[98] Communication "A" 3859 of the Central Bank. According to Communication "A" 3722, profits and dividends can be transferred abroad up to the maximum monthly amount of USD 2 million; nevertheless, such limit has been exempted to non-financial entities according to Communication "A" 4822 (7/4/08) and the exemption has been extended until December 31, 2009 by Communication "A" 4955 (6/22/09).

[99] The regime demands reporting any foreign liabilities, including the issuance of notes by private financial and non-financial sectors.

[100] The Central Bank follows the concept of "direct investment" as stated in point 359 of the Fifth Edition of the International Monetary Fund's Balance of Payment Manual according to which: "*Direct investment is the category of international investment that reflects the objective of a resident entity one economy obtaining a lasting interest in an enterprise resident in another economy. (....) The lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise and a significant degree of influence by the investor on the management of the enterprise. Direct investment comprises not only the initial transaction establishing the relationship between the investor and the enterprise, but also all subsequent transactions between them and among affiliated enterprises, both incorporated and unincorporated*".

that the investment has complied with the minimum 356 day term and that the local investment vehicle does not control local financial entities.[101]

Capital repatriations are subject to a USD 2 million monthly cap when they result from the winding-up of a company and to a USD 500,000 monthly cap when they result from the liquidation of portfolio investments. Except for these exceptions, purchases of foreign currency by non-Argentine residents are subject to a monthly cap of USD 5,000[102] and the prior authorization of the Central Bank is required to acquire foreign currency in excess of the cap.

Regarding inflows of currency, as a general rule, all funds exchanged for local currency in the Argentine exchange market (including those disbursed under financial loans) may only be transferred abroad after 365 days as of the date such funds were translated into local currency and are subject to a 30% mandatory interest-free deposit on the inflow amount,[103] excepted, among others, inflows corresponding or affected to: (a) "direct investments", (b) financings granted by official multilateral and bilateral agencies, (c) repayment of foreign debts or financings (i.e. a restructuring transaction or an importation financing), (d) foreign financings with a minimum average life of two years, (e) exports financings, (f) foreign currency loans granted by local entities, and (g) purchase of public securities issued by the national government.

c) Currency and exchange rate (in which the currency transfer shall be realized: local currency or freely convertible currency? Is there more than one currency exchange market accessible to foreign investors? If so what are the markets?)

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[101] Communication "A" 4662 (5/11/07). Foreign exchange regulations set forth certain documental requirements related to the term of the investment in Argentina which must be complied with as well.

[102] According to Communication "A" 3661.

[103] Decree No. 616/05.

All foreign currency transfers into Argentina are translated into local currency in the Argentine single free exchange market. The exchange rate results from the free interaction between supply and demand of foreign currency.[104] Nevertheless, the foreign exchange rate in the single free exchange market is intervened by the Central Bank, which actively operates in the market trying to maintain a relatively steady USD exchange rate against the Argentine peso. The only authorized market in which foreign currency can be acquired is the single free exchange market as explained in answer to question (b) above.[105]

After obtaining local currency in exchange for foreign currency transferred into Argentina, foreign investors can access the single free exchange market to purchase any kind of foreign currency offered by authorized exchange entities up to the monthly cap indicated in answer to question (b) here above. This means that the operator will convert the foreign currency into local currency, then change it into the desired currency, and finally make the transfer. There are no Argentine pesos transfers abroad.

9. Dispute settlement

a) National jurisdiction

i. Access to domestic courts and tribunals

The federal court system is a three-tiered system comprising: (i) the Argentine Supreme Court of Justice, made up of seven justices appointed by the President of Argentina with the Senate's

[104] Decree No. 260/02.

[105] In Argentina, there are exchanges and over the counter markets which trade foreign currency and foreign currency exchange rates -spot and futures markets-, nevertheless, these markets transactions are settled in local currency.

consent,[106] (ii) the Federal Courts of Appeals, with seat throughout the national territory, acting as reviewing courts hearing appeals from the existing federal trial courts and, in exceptional cases –as prescribed by law- hearing direct appeals against decisions issued by certain administrative agencies, and (iii) several federal trial courts distributed throughout Argentina, hearing cases that are subject to federal jurisdiction based on the person or subject-matter involved or the locality of the lawsuit. Within the City of Buenos Aires, the Federal Court of Appeals is divided according to the subject matter of the lawsuits (such as civil and commercial, contentious-administrative, and criminal cases).

At this level, most claims must be filed before the first instance courts (district courts). The decisions adopted by these courts may be appealed before courts of appeal (circuit courts), which are also divided according to their subject matter and territorial jurisdiction. Federal court of appeals' decisions and rulings by provincial superior courts, involving a federal question, may be brought before the Argentine Supreme Court through an extraordinary appeal (restrictive review). Decisions directly or indirectly involving the Federal Government which exceed a certain amount may be appealed by the Argentine Supreme Court through an ordinary appeal (broad review).[107]

Costs and fees

The costs of proceedings before nationals courts are, mainly, the filing fee and the attorney's and other professional's fees (*i.e.*, expert fees). The general principle provides that the losing party shall bear all costs.[108]

Under Law No. 23898, a sum equal to 3% of the amount of

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[106] Article 99(4) of the Constitution provides as follows *"The President of the Republic shall have the following powers... 4.- to appoint the Justices of the Supreme Court with the Senate's consent upon the vote of two thirds of the members present at an ad hoc public session."* Decree N° 222/2003 regulates the procedure that the President should follow prior to the appointment of the Supreme Court's judges.

[107] Litigation and Dispute Resolution 2008, 1.2.

[108] Confr. Article 68 of the NCCPC.

the claim must be paid as filing fee in all monetary disputes.[109] The filing fee is designed as compensation for judicial services[110] and has been held valid by the Federal Supreme Court, which stated that it impairs neither the right to due process nor the private property safeguard.[111]

Law No. 21839 lays down the rules applicable to the determination of attorney's fees for proceedings instituted before Argentine courts, including federal courts. The law provides criteria[112] for assessing the fees and certain thresholds that the courts must contemplate in such connection.

Pursuant to Law No. 24432, only in extraordinary cases may the courts fix attorney's fees below the minimum amounts referred to in Law No. 21839, provided that application thereof would lead to

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[109] Confr. Article 68 of the NCCPC.

[109] Articles 1 and 2 of Law No. 23.898 provide as follows: *"All proceedings instituted before the Federal Courts of the Federal Districts and Federal Courts sitting in the Provinces shall be subject to the fees provided for in this Law, subject to any exception made herein or in any other legal provision."*.. *"Unless otherwise provided for herein or in any other legal rule, a three percent (3%) filing fee shall apply to all court proceedings which, irrespective of their nature, may be valued in money. Said fee shall be calculated on the value of the subject-matter of the fee payor's claim pursuant to the first paragraph of article 9 hereof, subject to the methods and exceptions herein set forth."*

[110] Following the enactment of Law No. 23.990, this fee has become a source of funds for judicial infrastructure development and improvement.

[111] Argentine Supreme Court, *"Ottonello Hermanos y Cía c. Provincia de Tucumán,"* Fallos: 201:557 (1945); *"Provincia de Tierra del Fuego, Antártida e Islas del Atlántico Sur c. Estado Nacional,"* Fallos 321:1888, (1998).

[112] Article 6 of Law No. 21.839 *"The following factors shall be considered in assessing the fees, without prejudice to such other elements as may better suit the particular circumstances of each claim or proceeding:*

a) amount of the claim or proceeding, where its value can be assessed in money;

b) nature of and complexity entailed by the claim or proceeding;

c) outcome of the case and connection between the professional work performed and the probability of effective satisfaction of the claim by the losing party;

d) merit of the professional services rendered, based on the quality, effectiveness and length of the work performed;

e) professional performance as regards the procedural speed principle;

f) legal, moral and economic significance of the case as regards subsequent cases, the client and the economic position of the parties."

an unreasonable lack of proportion between the significance of the work performed and the amount of the fees thus calculated. Under said conditions, any fees award that does not conform to the aforementioned legal provisions and bears no proportion to the monetary amount of the claim might be deemed arbitrary.[113] In addition to the aforementioned rates for determination of the fees payable to the attorneys taking part in the proceedings, the fees payable to the advocate, *i.e.*, the professional representing the client, must also be factored into the calculation. In practice, advocacy fees are set between 30% and 40% of attorney's fees.[114]

Irrespective of the fees payable to attorneys and advocates, the fees payable to any and all expert witnesses taking part in actions before the Argentine courts would also be subject to the rates in force for each profession.[115] The services of each court-appointed expert might generate costs equal to 5% of the amount of the claim.

ii. Special rules for resolving disputes involving foreign investors/investment before national courts and tribunals?

There are no special provisions regarding disputes involving foreign investors/investment before national courts and tribunals.[116]

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[113] This is so because the assessment of the actual value of professional fees is dependent on their proportion to the economic values at stake (confr. Fallos: 318:1610, *"SADE S.A.C.C.I.F.I.M.. c. Estado Nacional"*; likewise, see Buenos Aires Federal Court of Contentious-Administrative Appeals, panel II, 13/3/1997, *"De All, J. c. ENTel,"* published in *La Ley*, 1997-D, 706).

[114] Article 9 of Law No. 21.839 provides as follows: *"Advocacy fees shall range between thirty percent (30%) and forty percent (40%) of attorney's fees. Where the same person acts as attorney and advocate, the applicable fees shall be equal to the amounts that would have been assessed for separate attorneys and advocates."*

[115] In this case, as is also the case with attorney's fees, expert fees are based on an amount reflecting the economic value of the interests at stake; the rules governing the respective fee apply in all cases.

[116] Pursuant to Article 1 of Law No. 21382 on Foreign Investments, in Argentina the concept of foreign investors comprises any physical or juridical person domiciled outside Argentina, who is the owner of an investment of foreign capital, and the national corporations of foreign. Under Article 16 of Law No. 21382, foreign investors can organize themselves under any of the legal types provided for in the national

If a claim is filed before national courts and tribunals, it will be subject to the procedural rules applicable in the jurisdiction where it is filed, irrespective of the nationality of the claimant. Therefore, the same procedural rules apply to national investors than to foreign ones. The applicable material law will be determined by the private international rule of conflict of laws.

Domestic investment dispute adjudication is available through local courts or administrative procedures. However, many foreign investors prefer to rely on private or international arbitration when those options are available.[117]

Foreign investors protected under BITs can also claim damages before national courts. This is possible, since the treaties signed by the Argentine Republic are part of our domestic law and, therefore, they might be invoked before the tribunals having jurisdiction.[118]

As a general principle, if a foreign corporation is sued in Argentina, the service of process shall be made in the country where the corporation is registered.[119] The service of notice of a claim to a corporation registered in a foreign country shall be made in accordance with the rules of international law. However, the petition of nullity of said notice is subject to Argentine's procedural law.[120]

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legislation. A corporation in which a foreigner owns more than 49 % of its capital or has a number of votes sufficient to prevail in its assemblies is considered to be foreign.

[117] 2008 Investment Climate Statement – Argentina, prepared by the Office of Investment Affaires of the United States of America, available at: http://www.state.gov/e/eeb/ifd/2008/101776.htm

[118] GAMBIER, Beltrán, 'La Argentina y los inversores frente al CIADI' (2006) *La Ley* 2006-E p. 6.

[119] UZAL, María E., 'El emplazamiento en juicio de una sociedad extranjera' (1989) *RDCO* 1989-231, p. 3. Confr. Article 340 of the NCCPC, when the person to be summoned is not in the country where is being sued, the summon shall be made by rogatory letter or formal request to the judicial authority of the place of its location, irrespective of the provisions of the law which establishes an uniform proceeding for formal requests.

[120] MAURINO, Alberto L., 'Notificaciones procesales en materia de sociedades', (2002) *JA* 2002-IV-1019. Confr. *Calvo Gainza, Julio J. c. Corporación de Desarrollo de Tarija* (1996) 319:1250.

Notwithstanding, Article 122 of Law No. 19550 provides a special rule to summon a corporation legally incorporated in a foreign country:

a) If the claim was originated in an isolated act, the service of process shall be made to the representative that has intervened in the act or in the contract that was the source of the conflict.[121]

b) If the claim was originated in an act carried out in the country by an office, seat or any other kind of representation of the foreign corporation, the service of process shall be made to its representative.[122]

b) International arbitration

i. ICSID arbitration

1. ICSID Membership

Argentina signed the ICSID Convention on May 21, 991 and ratified it on October 19, 1994. The treaty entered into force on November 18, 1994.

Pursuant to the preamble of the CISID Convention *"no Contracting State shall by the mere fact of its* ratification, *acceptance or approval of this Convention and without its consent*

[121] It will not be included in this exception cases in which (i) an exchange of letters between attorneys is made in Argentina (ii) the representative of the foreign corporation is not in Argentina (iii) the representative, even if in Argentina at the time, had not a conclusive intervention in the origin of the dispute. In these cases, the service of process shall be made in the foreign country where the corporation is incorporated, UZAL María E., 'El emplazamiento en juicio de una sociedad extranjera' (1989) *RDCO* 1989-231 p 3.

[122] However, the acts or business shall be concluded by the office or representation itself in order to avoid a violation of the right of defense that will result from suing an office or representation for an unrelated claim. UZAL, María E., 'El emplazamiento en juicio de una sociedad extranjera' (1989) *RDCO* 1989-231, p. 3.

be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration." Argentina has entered into 57 BITs,[123] which usually set the ICSID jurisdiction. These treaties are the instruments whereby Argentina expressed consent to the ICSID jurisdiction.[124]

Between 1997 and 2005 foreign investors filed 39 lawsuits against Argentina. Argentina is nowadays the country with the greatest number of lawsuits at the ICSID, being followed by Mexico, Egypt, Ecuador and Romania. Whereas nine of the suits were introduced during the convertibility regime, the other thirties were initiated after 2002, during the devaluation period.[125] There were over 34 pending cases against Argentina before ICSID tribunals as of mid-March 2009, with total potential liabilities estimated by private sector analysts in the $15 billion range. Twelve of these pending ICSID cases were filed under the U.S. BIT.[126]

2. Any reservation to the ICSID Convention?

The Argentine Republic has made no reservations to the ICSID Convention.

ii. Other arbitration mechanisms (such as MIGA, UNCITRAL, ICC, etc)

Argentina prevails itself of other arbitration mechanisms in

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[123] Information available at: http://www.sice.oas.org/ctyindex/ARG/ARGBITs_s.asp

[124] ACOSTA, Juan F, BOSTIANCIC, María Carla, 'La situación de la República Argentina ante el CIADI', *Sup. Act.* 30/11/2006, 3, p. 1. GONZÁLEZ CAMPAÑA, Germán, 'Revisión judicial de los laudos del CIADI. Desde una perspectiva internacional' (2007) JA 2007-II-1226 – SJA 23/5/2007, p. 2.

[125] ACOSTA, Juan F, BOSTIANCIC, María Carla, 'La situación de la República Argentina ante el CIADI', *Sup. Act.* 30/11/2006, 3, p.1.

[126] 2009 Investment Climate Statement, Bureau of Economic, Energy and Business Affairs, United States of America, available at: http://www.state.gov/e/eeb/rls/othr/ics/2009/117861.htm

order to solve its disputes with foreign investors.

From the treaty signed on July 3, 1991 -between the Argentine Republic and the Republic of France- onwards, the scheme adopted by Argentina in most of the subsequent BITs, provides a period of time -generally six months- for an amiable composition to be reached.[127] Once that period expires, the foreign investor shall opt between filing its claim at the ICSID or at an *ad hoc* tribunal, generally under the UNCITRAL rules.[128] However, there are no relevant cases involving an *ad hoc* tribunal.[129]

In 1990, Argentina became a member of the MIGA *(Multilateral Investment Guarantee Agency).*[130] In February 2005, MIGA partially paid a claim to an investor in Argentina. Notwithstanding MIGA's determination that the claim was valid, the investor withdrew the claim for commercial reasons.[131]

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[127] In April 2003, the government of Argentina issued Decree 926/2003, which created two new agencies to carry out negotiations under bilateral investment treaties. One of the entities created was the "Amicable Negotiations Proceedings Body," which works under the Federal Treasury Attorney. It receives investor complaints, gathers information and carries out negotiations with foreign investors.

[128] TAWIL, Guido Santiago, 'Los tratados de Protección y Promoción Recíproca de Inversiones y el Arbitraje Internacional: el Caso de la Argentina' available at: http://www.bomchil.com/cas/articulos/2220-BIT.PDF, p. 8. The essential difference between arbitration at the ICSID and arbitration under UNCITRAL rules is the more rigueur existing at the ICSID to examine its own competence as well as the stronger authority arising from the decisions it adopts, which results from its nature of administered arbitration. On the contrary, an *ad hoc* arbitration under UNCITRAL rules constitutes a non-administered arbitration, as non pre-established arbitral institution takes part. TAWIL, Guido Santiago, 'Los tratados de Protección y Promoción Recíproca de Inversiones y el Arbitraje Internacional: el Caso de la Argentina' available at: http://www.bomchil.com/cas/articulos/2220-BIT.PDF, footnote 19, p. 8.

[129] PEYROU, Alejandro A., 'Los tratados bilaterales de protección y promoción de inversiones (tbi) y el CIADI' Available at: http://www.econ.uba.ar/planfenix/docnews/II/Acuerdos%20y %20regulaciones%20internacionales/Peyrou.pdf, p. 8.

[130] The convention of MIGA (Multilateral Investment Guarantee Agency) was signed in Seoul on October 12, 1985. The Argentine Republic adhered to it on November 28, 1990, by decree N° 1863/1990. The Convention of MIGA is in force in Argentina as from November 29, 1990.

[131] MIGA operational overview (2007) available at: http://www.miga.org/documents/07ar_Operation_Overview.pdf

In 2006, MIGA was actively seeking to solve three pending claims involving issues of expropriation between Argentina and the Kyrgyz Republic. At that time MIGA was also closely monitoring and actively working to resolve the problems of eight other disputes relating to investments guaranteed by the agency in Argentina, Guatemala, the Kyrgyz Republic, Mauritania, Nicaragua, Senegal, and Venezuela. Four of these involve issues related to expropriation; three involve breach of contract; and two involve transfer convertibility issues.[132]

iii. National control mechanism on international arbitration

1. Non ICSID arbitration (e.g. national court control on validity of arbitral agreements and awards and on the recognition and enforcement of awards)

Traditionally, under Argentine law, it has been considered that courts should refrain themselves from interfering in arbitration proceedings until an award has been rendered. In fact, arbitral awards are subject to the same remedies available against court judgments (*i.e.*, appeal).[133] The parties are free to waive them in advance, except for the right to request the award's clarification and annulment.[134]

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[132] MIGA operational overview, 2006, available at: http://www.miga.org/documents/06ar_Operation_Overview.pdf

[133] Confr. Article 758 of the NCCPC the same recourses admissible against judicial decisions are admissible against arbitral awards, with the exception of the recourses that were waived in the arbitration agreement. Exceptions to this principle are the awards rendered by amiable composers. Article 771 of the NCCPC states that these awards are not subject to recourse, except in cases where the award is rendered in disregard of time limits or when the award refers to matters not submitted to arbitration. In those cases, the only admissible recourse is the annulment, which shall be filed within five days from service of process.

[134] Confr. Article 760 of the NCCPC, if recourses to the arbitral award were renounced, they would be denied *ex officio*. The renouncement of recourses will not impair the admissibility of the recourse for clarification and annulment of the arbitral award.

The National Civil and Commercial Procedural Code provides for court remedies against arbitral awards, but it does not establish any action/motion to be filed during arbitration proceedings. Otherwise, the arbitral authority to conduct the proceedings would be severely impaired. However, recent court decisions have brought serious concerns regarding the autonomy of arbitration proceedings by departing from the non-intervention principle.

In fact, the broad doctrine set out by the Argentine Supreme Court on annulment of arbitral awards in the Cartellone case[135] –according to which courts can review an award on its merits and annul it if found unconstitutional, illegal or unreasonable– has been extended by certain local courts to any procedural decisions taken by arbitration panels. This has been the case in a BIT arbitration under UNCITRAL rules involving National Grid and the Argentine Republic[136] whereby the domestic court declared to have jurisdiction to revise an ICC's decision rejecting Argentina's challenge to the President of the Tribunal.

When not waived or conventionally regulated, the appeal must be filed in written to the arbitral tribunal, within five days from service of process and it will be adjudicated by the superior tribunal that should have intervened had the dispute not been submitted to arbitration.[137] The National Civil and Commercial Procedural Code provides that a party may seek for annulment of the award under the following grounds:[138]

(i) essential procedural flaw;

(ii) failure to render the award within the time limits;

(iii) failure to abide by the issues submitted to arbitration ruling *ultra petita*; and

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[135] Argentine Supreme Court '*José Cartellone Construcciones Civiles S.A. c. Hidroeléctrica Norpatagónica S.A. o Hidronor S.A* ' (2004) 327:1881.

[136] CNCAF, sala IV, '*Procuración del Tesoro c. Cámara de Comercio Internacional*' (2007) *La Ley* 2008-A, 48.

[137] Confr. Articles 759 and 763 of the NCCPC.

[138] Confr. Articless 760 and 761 of the NCCPC.

(iv) incompatible rulings.

The Judiciary is, thus, not empowered to review the merits of the award at the annulment stage. The purpose of this recourse is not to amend *in iudicando* mistakes but to annul arbitral awards for lack of legal requirements. The allowed control is only limited to declare the validity or nullity of the arbitral award.[139]

Final domestic judgments (not annulled or revoked through appeal proceedings) can be enforced through court enforcement proceedings set out in the National Civil and Commercial Procedural Code.

Foreign judgments should be first recognized by a court in order to be regarded as a local judgment prior to enforcement procedures, if applicable. If no treaty or convention is applicable, Article 519 *bis* in conjunction with Articles 517 *et seq.* of the National Civil and Commercial Procedural Code establish specific requirements for the recognition and enforcement of foreign arbitral awards. These are:

(i) the judgment, which must be final (that is, have *res judicata* effect) in the jurisdiction where rendered, must be issued by a competent court in accordance with the Argentine laws regarding conflicts of laws and jurisdiction and must have resulted from a personal action, or a *in rem* action with respect to personal property, as opposed to real property, which was transferred to the Argentine Republic during or after the prosecution of the foreign action;

(ii) the defendant against whom enforcement of the judgment is sought should have been personally served with the summons and, in accordance with due process of law, should have bee given an opportunity to defend itself against the foreign action;

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[139] CAIVANO, Roque J., 'La revisión de la validez de los laudos arbitrales ¿Irrenunciable o indisponible?' (2007) *JA* 2007-II-1248, p. 3.

(iii) the judgment has to be valid in the jurisdiction where rendered and its authenticity has to be established in accordance with the requirements of Argentine law;

(iv) the judgment cannot violate the principles of public policy of Argentine law;

(v) the judgment cannot be contrary to or incompatible with a prior or simultaneous judgment of an Argentine court; and

(vi) in respect of any document in a language other than Spanish (including, without limitation, the foreign judgment and other documents related thereto), a duly legalized translation by a sworn public translator into the Spanish language is submitted to the relevant court.

Moreover, as general requirements, the following conditions must be met:

a) The *prorrogation fori* in favor of arbitral courts having their seat outside the country should be valid under Article 1 of the National Civil and Commercial Procedural Code. This broadly means that it should refer to an international dispute concerning commercial matters.

b) The matters submitted to arbitration should be allowed to be subject of arbitration under Articles 737 of the National Civil and Commercial Procedural Code which does not allow arbitration on matters that cannot be the subject of compromise or settlement under Argentine law.[140]

[140] This article refers to Article 736 of the NCCPC, which expressly establishes that every matter between the parties, with the exception of those mentioned in Article 737, could be referred to the decision of arbitrators, before or after bringing the matter to the decision of the courts and irrespective of the stage in which the judicial proceeding is. The submission of a matter to the arbitrator's decision can be done in the contract or by an ulterior act. GRIGERA NAÓN, Horacio A, 'El arbitraje comercial internacional en la Argentina' (1986) 435 Pensamiento Económico, 79-86 p. 81 and GRIGERA NAÓN, Horacio A, 'Public Policy and international commercial arbitration: the argentine perspective' (1986) 3 Journal of International Arbitration, 7-27. This scholar considers

2. *ICSID arbitration (e.g., any control mechanism on domestic court decisions that may also apply to ICSID decisions?*

Article 26 of the ICSID Convention provides that *"consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy."* Consequently, it was construed that the ICSID proceedings prevent any form of judicial intervention or judicial control. The autonomy of the ICSID proceeding is considered to be its most distinguished feature.[141]

The solution provided in Articles 26 of the ICSID Convention was severely criticized by local scholars since they consider it to be unconstitutional. In fact, it was affirmed that it is not possible to presume that the Argentine Republic can waive in advanced the possibility of judicial control. Moreover, the system provided by the ICSID Convention was considered to be hermetic and auto referential and, therefore, contrary to Argentine juridical system since it prevents the interpretation and implementation of the treaty and extinguishes any kind of intervention of the judicial tribunals except for the possibility to enforce awards rendered in a foreign jurisdiction.[142]

However, the proposal to declare the ICSID Convention unconstitutional was highly criticized since said declaration would

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that Article 747 of the NCCPC refers to two different hypotheses: (a) public order matters (property rights, legal capacity, competition law, family law, and so on) and (b) matters in which the judicial authority of the Argentine Republic have exclusive jurisdiction (*i.e.* those related to the sovereign powers of the State as the attribution of citizenship). O'FARRELL, Jorge, 'Arbitraje Internacional, solución de futuro' (1192) LL 1992-C, 803, p. 5. This author regards as non arbitrable matters and, therefore, included in Article 737 CPCCN, certain issues of navigation law (Article 614, Law No. 20094); bankruptcy law and corporate matters that must be solved by the corporate bodies.

[141] GONZÁLEZ CAMPAÑA, Germán, 'Revisión judicial de los laudos del CIADI. Desde una perspectiva internacional' (2007) *JA* 2007-II-1226 – SJA 23/5/2007, 9.

[142] ROSATTI, Horacio D., 'Los tratados bilaterales de inversión, el arbitraje internacional obligatorio y el sistema constitucional argentino' (2003) *La Ley* 2003-F, 1283, 9/10.

have only domestic effects allowing the enforcement of the award in any other of the 155 countries members of the ICSID Convention, and the country would be left exposed to a report before the International Court of Justice,[143] with the probability of entailing the international responsibility of the Argentine Republic.[144]

The Argentine Government recognized that, in cases of violation of public order principles set forth in the National Constitution, local revision of the arbitral awards rendered in an ICSID proceeding would be an option.[145] For that reason, it was alleged that the BITs are superior in hierarchy than laws although they do not reach constitutional level.

This construction has been criticized on the grounds of Articles 27 of the Vienne Convention on Law of the Treaties, ratified by Argentina, which prevents a country to invoke its domestic law as a justification for the violation of a treaty. In fact, local revision is contrary to the ICSID Convention that was signed and ratified by Argentina.[146]

The possibility of local revision of arbitral awards was also alleged to be contradictory. In fact, the Argentine Republic has not reported the BITS at the time of its expiration. Therefore, it is

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[143] GONZÁLEZ CAMPAÑA, Germán, `Revisión judicial de los laudos del CIADI. Desde una perspectiva internacional' (2007) *JA* 2007-II-1226 – *SJA* 23/5/2007, 3.

[144] ACOSTA, Juan F, BOSTIANCIC, María Carla, `La situación de la República Argentina ante el CIADI' (2006) *Sup. Act.* 30/11/2006, 5/6. GONZÁLEZ CAMPAÑA, Germán, `Revisión judicial de los laudos del CIADI. Desde una perspectiva internacional ' (2007) *JA* 2007-II-1226 – *SJA* 23/5/2007, 4.

[145] FELDSTEIN DE CÁRDENAS, Sara y SCOTTI, Luciana, `Arbitraje internacional en material de inversiones extranjeras: alternativas para la República Argentina' elDial - DC749, 8. This is considered to be a strategy to reach an agreement with foreign investors that have initiated proceedings against the Argentine Republic. Saavedra, Cecilia, `Armando el rompecabezas: la estrategia argentina ante el CIADI' (2005) *La Ley* 2005-E,-1114. See also, ACOSTA, Juan F - BOSTIANCIC, María Carla, "La situación de la República Argentina ante el CIADI,", *Sup. Act.* 30/11/2006, page 5.

[146] FELDSTEIN DE CÁRDENAS, Sara y SCOTTI, Luciana, `Arbitraje internacional en material de inversiones extranjeras: alternativas para la República Argentina' elDial - DC749, 8. González Campaña, Germán, 'Revisión judicial de los laudos del CIADI. Desde una perspectiva internacional' (2007) *JA* 2007-II-1226 – *SJA* 23/5/2007,6.

Europe (60%), followed by North America (20%), South America (12%), and Central America (7%)[153]. From 2005 until the end of 2007, foreign direct investment in the country meant a positive sum of USD 20 billion. The flow of investments was a very important source of foreign funds, totaling 61% of the surplus of the overall exchanges of the country. [154]

e) Brief history of the development of foreign investment policies including current trend of development.

Domestic capital resources have never been sufficient throughout Argentine history to maximize the country's economic potential and sustainable long term development rates. The Government has, therefore, encouraged inflow of foreign investment while simultaneously trying to support domestic capital investment[155]

During the 19th century, Argentina offered a positive context for foreign investment and the development of the nation's transportation system and shipping facilities was financed with British capital. This system placed ownership of extensive properties in foreign businesses. On the contrary, the organization in 1922 of a national oil company -YPF- was one of the first important steps in implementing policies oriented towards emphasizing local investments in contrast to foreign contributions. This trend continued during the nationalization period of the 1940s, when railroads were purchased from foreign owners and numerous state-owned enterprises were established. These measures led to a substantial reduction of foreign investment.[156]

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[153] Publication by the Argentine Central Bank, 'Las inversiones directas en empresas residentes a fines del 2007' (December 2007), 2. This is the last report issued by Argentine Central Bank.

[154] Publication by the Argentine Central Bank, 'Las inversiones directas en empresas residentes a fines del 2007' (December 2007), 13.

[155] KPMG, "Investment in Argentina" (August 2008), chapter 2, 9.
<http://www.kpmg.com.ar/pdf/publicaciones/Investment_in_Argentina_2008.pdf> accessed 24 June 2009.

[156] Argentina – Foreign Investment, Encyclopedia of the Nations
<http://www.nationsencyclopedia.com/Americas/Argentina-FOREIGN-INVESTMENT.html> accessed 25 June 2009.

As a result of a law passed in 1958, designed to attract foreign capital, between 1959 and 1961 foreign companies invested over USD 387 million, of which more than half came from the United States.[157]

Between 1961 and 1966, direct foreign investment declined, with foreign business ownership frequently being a contested political issue. After the military coup in 1966, net capital inflow continued to grow through the late 1960s. In the 1970s, government policies toward investors underwent a significant reappraisal. According to a law enacted in 1973, foreign direct investment required specific congressional approval if foreign capital exceeded 50% of the total stock of a company. Profit remittances and capital repatriation were limited and new foreign investments were prohibited in several major industries, including national defense, banking, mass media, agriculture, forestry, and fishing. [158]

In December 1989, the government eliminated all restrictions on the movement of capital in and out of Argentina, adopting a single foreign exchange market. In 1993 the executive power enacted Decree No. 1853/93, approving the new updated text of the Foreign Investment Law. The three basic principles applying to foreign investors have been explained with the answer to the question regarding such law.

Argentina has signed a number of international bilateral agreements with capital exporting countries (USA, Italy, UK, Germany and France), by which foreign investments from these countries are granted favorable treatment. Argentina has also adhered to the Multilateral Investment Guarantee Agency (MIGA) agreement by which investments in Argentina have become eligible for insurance against political risks by this agency. MIGA is a

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[157] Argentina – Foreign Investment, Encyclopedia of the Nations <http://www.nationsencyclopedia.com/Americas/Argentina-FOREIGN-INVESTMENT.html> accessed 25 June 2009.

[158] Argentina – Foreign Investment, Encyclopedia of the Nations <http://www.nationsencyclopedia.com/Americas/Argentina-FOREIGN-INVESTMENT.html> accessed 25 June 2009

member of the World Bank Group. Argentina entered into fifty "bilateral treaties" in order to protect foreign investments and avoid double taxation. Argentina has not adhered to any "multilateral agreement" to promote investments. [159]

During the 90's capital inflows were strong and privatization generated a large source of income for the State. More than 60 state-owned enterprises were sold, mostly to foreign investors, raising about USD 10 billion in direct sales, not including cancelled debt and promised post-acquisition capital investments.

In 2001–02, the Argentine economy went through the worst implosion in its history, much of it connected with the Government's effort to attract foreign investment. In 2000, FDI inflow was at a near-record total of USD 10.41 billion but then plummeted to USD 2.16 billion in the global economic slowdown of 2001. After the abolition of the convertibility system in January 2002, FDI inflow fell to USD 2.14 billion[160]. Government efforts to stem capital flight and shore up investor confidence in 2001 were caught between popular protests and a hardening on IMF policy. After the succession of five presidents in two weeks in December 2001 (the third one carried out the default and the fifth one abandoned the convertibility system on January 7, 2002, allowing the Argentine peso to float), with widespread bankruptcies and debt repayments far outpacing new loans, the economy became even more dependent on foreign investments as a means of economic recovery. [161]

In recent years, Argentina has adopted certain measures that have impaired the use, management or enjoyment of foreign investments made in its territory. Some foreign investors affected by

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[159] KPMG, Investment in Argentina (August 2008), chapter 2, 9.
<http://www.kpmg.com.ar/pdf/publicaciones/Investment_in_Argentina_2008.pdf> accessed 24 June 2009

[160] *Instituto Nacional de Estadistica y Censos* (Argentine Institute of Statistics or "INDEC"), 'Estimación del balance de pagos'.

[161] Argentina – Foreign Investment, Encyclopedia of the Nations
<http://www.nationsencyclopedia.com/Americas/Argentina-FOREIGN-INVESTMENT.html> accessed 25 June 2009

said measures have invoked the applicable BTIs framework in search of protection. Accordingly, they have brought their investment disputes before international arbitration tribunals, either under UNCITRAL Arbitration Rules, or, more frequently, before the International Center for Settlement of Investment Disputes (ICSID).

f) Governmental authorities involved in a foreign investment regulation, including the authorization and post-authorization stages.

As explained when answering previous questions, rights and principles protecting and regulating foreign investment in Argentina are not contained in a single law or regulation. In this sense, and due to our constitutional system, there is not a single governmental authority responsible for the enactment and implementation of foreign investment rules and principles.

The Executive Branch is responsible for designing and fixing the country's internal and external economic policy. Nevertheless, there are many matters, reserved exclusively by the Argentine Constitution to the decisions by Congress or by the executive Branch and Congress (*e.g.*, the approval of international treaties).[162] Therefore, although the Executive Branch decides the economic policy, in some cases its implementation is reserved to Congress, requiring the relevant particular activity to be regulated by law.[163]

The delegation in the Executive Branch of the legislative power of Congress is, in principle, expressly forbidden in the Argentine Constitution[164] and exceptionally permitted in times of "public emergency." In exercise of such exceptional remedy, the power to regulate many matters, including foreign investment and foreign exchange rules, have been delegated to the Executive Branch

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[162] This is based on the principle of the separation of powers.

[163] SANTIAGO, Alfonso - THURY CONRNEJO, Valentín, *Tratado sobre la Delegación Legislativa: Régimen Constitucional antes, durante y después de la Reforma Constitucional* (Universidad Austral - Ábaco de Rodolfo Depalma, Buenos Aires 2003) 101-102.

[164] Article 76.

during periods of profound political, economic, and social crisis. In fact, almost all current foreign exchange regulations contained in various decrees of the Executive Branch and the framework elaborated by the Argentine Central Bank have been passed on the basis of the last legislative authorization granted after the 2001-2002 crisis (and afterwards, many times renewed by Congress).

On the other hand, no particular authorization or act of the Government is required in order to permit foreign investments in Argentina, except for any foreign exchange transaction not contemplated in the relevant regulations as explained in question 8 hereinabove. Settlement of the investment in Argentina requires certain permits only depending on the particular vehicle chosen to carry on the investment; i.e., permanent activities by local corporations or companies require to be registered with the relevant corporate local registries and tax authorities.[165]

The Argentine Central Bank was created in 1935 by Law No. 12155 and later became a technically independent agency of the Executive Branch in accordance with its by-laws.[166] In theory, the Central Bank should not be subordinated to any administrative body.[167] Nevertheless, the Argentine Central Bank has in practice usually followed and directed foreign exchange regulations in line with the economics policies imposed by the Executive Power.

[165] As explained in answer to question 8.

[166] Law No. 24114, enacted in 1992 as amended and supplemented.

[167] Cf. Responsabilidad del Banco Central por la actividad financiera (n 38). Article 3 of the Central Bank's by-laws state that: *"It is a primary and fundamental mission of the Central Bank of the Republic Argentina to preserve the value of the currency. In the formulation and execution of the monetary and financial politics the Bank will not be subject to orders, indications or instructions of the Executive Power."* (free translation)