
THE FOREIGN INVESTMENT REGULATION REVIEW

FOURTH EDITION

EDITOR
BRIAN A FACEY

LAW BUSINESS RESEARCH

THE FOREIGN INVESTMENT REGULATION REVIEW

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CONTENTS

| | |
|-------------------------|---|
| Editor's Preface |vii |
| | <i>Brian A Facey</i> |
| Chapter 1 | ARGENTINA..... 1 |
| | <i>Ricardo V Seeber</i> |
| Chapter 2 | BRAZIL 8 |
| | <i>Ricardo Russo, Leonardo Baptista Rodrigues Cruz and Luiz Felipe Fleury Vaz Guimarães</i> |
| Chapter 3 | CANADA 19 |
| | <i>Jason Gudofsky, Navin Joneja, Julie Soloway and Cassandra Brown</i> |
| Chapter 4 | CHINA..... 47 |
| | <i>Miao Qinghui (Catherine)</i> |
| Chapter 5 | DENMARK..... 60 |
| | <i>Michael Klöcker, Hans Madsen and Per Vestergaard Pedersen</i> |
| Chapter 6 | FRANCE 70 |
| | <i>Didier Théophile and Olivia Chriqui</i> |
| Chapter 7 | GERMANY 80 |
| | <i>Jan Bonhage and Vera Jungkind</i> |
| Chapter 8 | INDIA 97 |
| | <i>Shardul Shroff, Amit Kumar and Darshika Singh</i> |
| Chapter 9 | IRAN 113 |
| | <i>Ardesbir Atai</i> |

| | | |
|-------------------|---|-----|
| Chapter 10 | IRELAND..... | 127 |
| | <i>Pat English and Grace Murray</i> | |
| Chapter 11 | ITALY | 142 |
| | <i>Giuseppe Scassellati-Sforzolini and Francesco Iodice</i> | |
| Chapter 12 | JAPAN | 160 |
| | <i>Takafumi Uematsu</i> | |
| Chapter 13 | KOREA..... | 173 |
| | <i>Jaemin Jeon and Haneul Jung</i> | |
| Chapter 14 | MEXICO | 184 |
| | <i>Juan Francisco Torres Landa, Federico de Noriega and Pablo Corcuera Bain</i> | |
| Chapter 15 | PORTUGAL..... | 194 |
| | <i>Joaquim Caimoto Duarte, Verónica Martins Mendes, Miguel Stokes and Hélder Santos Correia</i> | |
| Chapter 16 | RUSSIA..... | 208 |
| | <i>Vassily Rudomino, Ruslana Karimova and Ksenia Tarkhova</i> | |
| Chapter 17 | SINGAPORE | 221 |
| | <i>Abdul Jabbar Bin Karam Din and Lee Xin Mei</i> | |
| Chapter 18 | SPAIN | 233 |
| | <i>Edurne Navarro and Alfonso Ventoso</i> | |
| Chapter 19 | UNITED KINGDOM..... | 246 |
| | <i>Alex Potter</i> | |
| Chapter 20 | UNITED STATES | 271 |
| | <i>Robert Schlossberg and Christine Laciak</i> | |

| | |
|-------------------|--|
| Chapter 21 | VIETNAM 289 <i>Nguyen Truc Hien and Kevin B Hawkins</i> |
| Appendix 1 | ABOUT THE AUTHORS..... 303 |
| Appendix 2 | CONTRIBUTING LAW FIRMS' CONTACT DETAILS.. 319 |

EDITOR'S PREFACE

I am pleased to present the fourth edition of *The Foreign Investment Regulation Review*. This year's edition features contributions from 46 authors from 21 countries. Our contributors provide important insight into the regulatory framework for foreign investment review in their respective countries, as well as an overview of current trends and developments in this field.

In 2015, global foreign investment increased to its highest level since the global economic crisis began in 2008. The primary factor in the global growth of foreign investment was the significant increase in cross-border mergers and acquisitions.

Within this context, foreign investment reviews will continue to present complex issues for businesses, regulatory authorities and legal counsel. Legal practitioners and companies seeking to do business internationally will benefit by familiarising themselves with the regulatory frameworks outlined in this treatise. Of particular importance, this edition provides readers with practical guidance to navigate investments in major jurisdictions by anticipating key timing and substantive issues. It also brings to the readers' attention key policy or 'soft' considerations when investing in a particular jurisdiction. We hope this edition will assist investors and businesses being acquired to better evaluate and manage the legal and political risks associated with investments that may be subject to foreign investment review, ultimately reducing transaction uncertainty and delay.

I would like to express my gratitude to each author and law firm involved in this project for the commitment of both their expertise and their time.

Please note that the views expressed in this book are those of the authors, and not those of their firms, any specific clients, the editor or the publisher.

Brian A Facey

Blake, Cassels & Graydon LLP

Toronto

September 2016

Chapter 1

ARGENTINA

*Ricardo V Seeber*¹

I INTRODUCTION

The introduction to last year's Argentina chapter provided a quick review of Argentine history, presenting the comings and goings of the country's political and economic behaviour.

Last year's description outlined the very different policies adopted by successive governments, although, surprisingly, they were of the same political party (Peronist). While it was no surprise to the people of Argentina, and although it is difficult to explain, it should be pointed out to people outside Argentina that President Menem's and President Kirchner's views of the economy and of the world were absolutely different.

However, 2015 was an electoral year and the results were most unexpected. Nobody had entertained the thought that the governing Peronist party might lose the elections, not only for President, but also for governor in some very important Argentine provinces.

The elections took place on 25 October 2015 and the most powerful opposition party won the elections for governor in the provinces of Buenos Aires and Córdoba. In the presidential elections, the two candidates who received the most votes were the Peronist and the opposition leader, Mr Macri, with the latter being finally elected as the new President of Argentina on 22 November 2015.

There were and continue to be high expectations that things would change in Argentina, and in some cases we have seen progress. The areas in which we are most impressed are those related to corruption and judgments by the courts: there is a long list of former governmental officers who are having to spend many days at court, not because they work there, but to provide explanations with respect to the funds that they were responsible for.

1 Ricardo V Seeber is a partner at Estudio Beccar Varela.

Argentina's foreign policy has also changed dramatically. The present government has restored relationships with the United States and with European countries; witness, for example, the payment to the 'holdout creditors' that enabled the return of Argentina to the financial markets.

Finally, in the domestic area, there have also been numerous modifications of the Civil and Commercial Codes, but it is too soon to make an evaluation of those changes.

II FOREIGN INVESTMENT REGIME

As already mentioned, Argentina has gone from one extreme to the other regarding foreign investment, and this process is reflected in the different regulations enacted. However, there have been no changes to the legislation in this area over the past year.

The first attempt to regulate foreign investment was the enactment of Decree 3347 of 1948 but with the purpose of helping public offices in the set-up of industries. Therefore, it can be said that up to 1953, when Law 14.222 was enacted, foreign investments were subject to Central Bank of Argentina (BCRA) regulations regarding the transfer of foreign currency into Argentina and remittance of dividends, or repatriation of capital.

Law 14.222 was the first legal document that regulated foreign investment. Although foreign and local investors and investment were considered equal, foreign companies could remit as dividends only the equivalent of 8 per cent of the registered capital.

In 1958, Law 14.780 replaced the above-mentioned law. (We can mention as precedents of the present regulation, Law 18.587 enacted in 1970, Law 19.151 enacted in 1971 and Law 20.557 enacted in 1973.)

Finally, in 1978, Law 21.382 came into force, which is the existing regulatory framework for foreign investments (FIL), although it has undergone some modification (Law 22.208).

The principal points of the legal regime are as follows:

- a* foreign investors are considered the same as local investors and receive the same treatment and protection (Article 1 FIL);
- b* 'foreign investors' are defined as all persons or legal entities incorporated outside Argentina and that are owners of an investment in the country. In a modification enacted in 1993, the FIL considers that a person born in Argentina but residing outside it is considered a foreign investor (Article 2, Section 2 FIL);
- c* 'foreign investment' is defined as any contribution made by a foreign investor, and is applied to economic activities performed within the country (Article 2, Section 1 FIL);
- d* foreign investments may consist in:
 - contribution through foreign currency;
 - contribution of assets, their spare parts and accessories;
 - dividends reinvested in the local company;
 - capitalisation of loans; or
 - any other manner accepted by the authorities (Article 3 FIL);
- e* foreign investors have the same rights to obtain loans from the Argentine financial system, which was not possible under prior legislation;
- f* foreign investors have the right to repatriate their investment and remit dividends. As above mentioned, at present that right is subject to BCRA approval for the purchase of foreign currency;

- g* the parent company and its subsidiary in Argentina may enter into any type of agreements (transfer of technology, loans), provided that those agreements are executed according to common market standards. This provision repeals a court decision (*Parke Davis*) in which even sales of raw material made by the parent company were to be considered as a capital contribution;
- h* no prior or post approval is required, unless such approval is required by special legislation. The original wording of the FIL distinguished between investments that did not require any kind of approval, those that could be approved by the Application Authority of the FIL and those that required a decree of the National Executive Power;
- i* Law 26.737 deals with purchases of farms by foreign investors, establishing limits and setting out the complicated procedure to be followed when a foreign investor wishes to purchase a farm (the National Executive Power has recently amended this law);
- j* Law 25.570, which deals with the media sector, states that foreign investors can own up to 30 per cent of the shares of a company that owns any type of media (TV, radio, newspapers, etc.);
- k* Law 17.285, which was enacted on 17 May 1967, deals with aeronautical matters. In Articles 97 to 112, there are provisions regarding the property of companies performing local flights. In this respect, companies operating local aeronautical services must be owned by Argentine citizens, residing in Argentina, and at least the majority plus one of the shares have to be in their possession. Additionally, it requires that the president of the board of directors of the company that performs local aeronautical services should be of Argentine nationality and residing in Argentina. Also, two-thirds of the members of the board of directors must be Argentine citizens; and
- l* financial institutions require prior approval of the BCRA.

III TYPICAL TRANSACTIONAL STRUCTURES

Before analysing in detail the different structures of a foreign investment, it is useful to know that, in addition to the FIL requirements, other Argentine legislation is involved.

This legislation arises from the Argentine Business Associations Law (BAL), which has specific rules for foreign investors.

A foreign investment is what the BAL calls a 'permanent investment', and therefore, companies wishing to invest in Argentina have to comply with the requirements of Sections 118 to 124 of the BAL.

The FIL states that foreign investors may opt for any of the corporate schemes provided for in the BAL.

Purely for reasons of clarity, we distinguish between a branch and a subsidiary.

In both cases, the foreign investor should register some documents before the corresponding Public Registry of Commerce (PRC) evidencing the intention of doing business in Argentina.

Registration before the PRC is essential and cannot be avoided. In the case of the setting-up of a branch, the documentation provided, once registered, enables the branch to do business.

The situation is more complicated when a foreign investor sets up a corporation, or acquires shares in an existing corporation in Argentina. When the foreign investor sets up its own subsidiary, with no local partners, the registration of the documents before the PRC is

a priority over any other legal action. To simplify the explanation of how the system works in this case, we will assume that 'Corporation X', incorporated in the state of Delaware, wishes to establish a subsidiary in Argentina; Corporation X should take the following steps.

Corporation X's corporate documents must be registered before the PRC, including, among other things, the following data:

- a* the decision of Corporation X to open a subsidiary in Argentina, which is shown by a decision of either the board of directors of the corporation or the person who has capacity to make that type of decision;
- b* the appointment of a legal representative who will represent the foreign investor before the PRC, and also Corporation X at the Argentine subsidiary's shareholders meetings;
- c* evidence that Corporation X was not incorporated in a tax haven, and that its principal business is performed outside Argentina; and
- d* all documents in languages other than Spanish require translation in Argentina by a certified public translator. Also, all documents are to be certified by a public notary and, where available, legalised by the Hague Apostille Convention.

We have mentioned only the most relevant documents needed to open a subsidiary in Argentina. The procedure, although seemingly complicated because of the quantity of documents to be provided, is not as complex as it may appear.

Once the documents are registered before the PRC, Corporation X is able to incorporate the Argentine subsidiary. To that effect, the following steps are to be taken:

- a* drafting of the subsidiary's by-laws;
- b* determination of the subsidiary's capital. In this case, at least 25 per cent is to be paid in, and the balance within a period of two years from the incorporation date;
- c* appointment of the members of the subsidiary's board of directors, whose number and term in office is stated in the by-laws. The appointment takes place at the same time as the drafting of the by-laws, but it is not a part of that document. Normally, term of directors is between one to three fiscal years.
- d* determination of the fiscal year. Normally, this date coincides with the parent company's fiscal year;
- e* a special point worthy of mention is that when the subsidiary's capital exceeds 10 million pesos, it is mandatory to appoint a syndic (an accountant or an Argentine lawyer who is obliged to attend all board meetings, and ensures that the company and the board of directors follow the law and the company's by-laws). According to the BAL, the syndic ensures the company complies with the law and the company's by-laws. The syndic participates in board meetings, but does not vote; and
- f* all shares are to be nominative.

Companies that quote their shares on the stock exchange have additional requirements, and their application authority is the Stock Exchange Commission.

For all other companies (i.e., those in which foreign investors participate), the application authority is the PRC.

The subsidiary's by-laws require registration before the PRC. Only when this registration is made, can one say that the local company has been incorporated.

An additional requirement is that the majority of the members of the subsidiary's board of directors are to be resident in Argentina. Note that the requirement is for residency and not nationality as in other areas, as explained above.

When explaining the applicable foreign investment regime in Argentina (see Section II, *supra*) we mentioned the different types of investments admitted by the FIL; such foreign investments may be made in the following ways.

Setting up a branch or a new corporation with the foreign investor as the major shareholder of the local company has already been described. A foreign investment may also take place through a purchase of shares. There are no special legal requirements, but some common practices in share purchase agreements (SPAs) should be mentioned.

Clearly, whether the foreign corporation acquires a majority of the shares or any other percentage, due diligence checks must take place. There are, of course, standard requirements, and local businessmen are aware of due diligence procedures.

At the same time, drafting of the SPA will take place, with special care taken in the sections that deal with the representations and warranties of the seller, and any threshold that may be agreed upon by the parties.

As already mentioned, to become a shareholder, it is necessary to register the corporate documents with the PRC. Once those documents have been registered, the closing may take place.

At closing, and when the SPA involves the entirety or the majority of the company's shares, the foreign investor appoints its own people to the board of directors, which necessitates the resignation of the existing directors. Normally, their performance is also evaluated at the same time, and both events take place at the local company's shareholders' meeting.

If for any reason the foreign company's documents are not registered with the PRC, the foreign shareholder cannot participate in the shareholders' meeting.

A second alternative is the purchase of assets, whether all or in part. In this case, the procedure is ruled by Law 11.860, which requires the fulfilment of the following:

- a* execution of a preliminary agreement between the purchaser and seller, indicating the assets to be transferred;
- b* publication of a notice in the Official Gazette and in a newspaper of the place where the assets are located, for five days;
- c* once the publication is made, then all the seller's creditors have a period of 20 days to claim payment of their credit or obtain a guarantee from the seller. For this purpose, the notice shall indicate the address where claims can be made, and it has to be duly notified to the seller;
- d* once the 20-day term has elapsed, the parties may execute the final agreement on the purchase of assets; and
- e* the final agreement is to be filed with the PRC to prevent any claim on the purchaser by creditors that did not claim payment of their credit or obtain a guarantee. If the registration is not made, both seller and purchaser are jointly liable for any credit, regardless of its time of origin.

IV REVIEW PROCEDURE

Expanding on the issues from Section II, first the definition of 'foreign investment' necessarily requires the existence of a 'foreign investor'. The following considerations will also apply to the review procedure:

- a* As only special regimes require prior approval, there are no thresholds, nor is there a formal or informal review of proposed investments. As foreign investments are channelled through the incorporation of local companies owned by foreign investors,

or a purchase of shares in an existing company, the prior registration of the foreign investor is necessary. Of course, if the foreign investor opts to set up its own subsidiary, the subsidiary is approved and registered by the PRC.

- b* Although not customary, if a foreign investor wishes to purchase assets or shares in a local company in a reorganisation process or insolvency, prior court approval is necessary.
- c* The ownership of a minority interest in a local company constitutes a special circumstance. In such cases, if the foreign investor wishes to have certain special rights in addition to those provided by the BAL, then a shareholders' agreement is a convenient solution.
- d* Rights granted to minority shareholders in the BAL should be analysed on a case-by-case basis. Normally, minority shareholders have, among other things, the right to request that the courts suspend the effects of certain decisions adopted by a shareholders' meeting, and to request information from the company's board of directors.
- e* Under the above-mentioned special regimes, the approval period for foreign investments is subject to its own administrative procedure.
- f* As special regimes for foreign investments are implemented by the legislator to protect national interests, or that an investment in a given area is of public interest, in the approval process there are no considerations with regard to such terms.
- g* As special foreign investment regimes require the approval of certain agencies, as mentioned, in an ideal scenario, if the foreign investor and investment meet the special requirements, there will be no grounds for a rejection of the application authority. However, as there is a final decision, there are always grounds for certain discretionary decisions.
- h* With respect to confidentiality of the information provided to public agencies, the general rule is that only the parties involved in the procedure have access to the file and no third party may have such access.

V FOREIGN INVESTOR PROTECTION

The FIL states very clearly that there is no difference between local and foreign investors, and that both are treated equally. At the same time, the Argentine Constitution makes no difference between local and foreign investors, and provides that they all have the same rights and the same protection of their ownership right. No assets (broadly defined) may be expropriated by the Argentine government without a prior declaration of 'public utility and payment of the corresponding price for those assets'.

Argentine courts may be included in discussions with respect to prices and payment terms, regardless of the origin of the investor.

In some cases, Argentina has executed bilateral treaties with other countries to protect investments made by foreign investors.

During the 1990s, the Argentine government privatised many state-owned companies and called for the intervention of ICSID to settle any disputes in cases of renationalisation, such as those that have taken place in recent years.

VI OTHER STRATEGIC CONSIDERATIONS

This section considers the approach foreign investors should take with the authorities and how to obtain the best results in any investment deal in Argentina.

As in any other country where decisions are made by governmental agencies, it is of utmost importance to have a good relationship with the authorities. In the past, the authorities were always available to meet foreign investors and listen to potential investment plans, and while this advice is still valid, in practice the attitude of the authorities has changed radically following the elections in 2015. That said, President Macri and other members of his cabinet do try to meet with potential investors in any country that they visit.

VII CURRENT DEVELOPMENTS

Although we expressed doubts about the future of our country in this chapter last year, we are now more optimistic. Nonetheless, it will take time for investor confidence (local and foreign) to recover, and also to create the economic environment that will permit those investments.

The Argentine Congress passed a law in 2016 whereby all Argentine citizens with monies outside Argentina not declared to the tax authorities will have the opportunity to rectify their status and, given the international environment regarding money laundering, accountants are recommending that their clients take advantage of this change to the regime.

Appendix 1

ABOUT THE AUTHORS

RICARDO V SEEBER

Estudio Beccar Varela

Ricardo V Seeber obtained his law degree from the University of Buenos Aires in 1978.

In 1980 he joined Estudio Beccar Varela, where he dealt with corporate matters, counselling local and foreign clients, and was in charge of the procedures related to the regulatory framework for foreign investments (FIL) and to the transfer-of-technology regime.

In 1984 he attended a six-week course at the Southwestern Legal Foundation in Dallas (now the Center for American and International Law) and worked as a foreign associate at the firm Paul, Weiss, Rifkind, Wharton & Garrison in New York until May 1985.

On returning to Estudio Beccar Varela, he was promoted to junior partner and in 1989 became a full partner in charge of the department dealing with corporations, foreign investments and transfer of technology.

Mr Seeber is a member of the Buenos Aires Bar Association (Colegio de Abogados de la Ciudad de Buenos Aires), a private institution, where he participates in the section dealing with commercial matters. He also is a member of the consulting department of the Argentine Chamber of Corporations.

Mr Seeber has published articles on corporate matters and has also participated in various conferences on the subject of corporations and related issues.

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