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The Argentine Foreign Investment Law and Its Andean Common Market Inspiration

Robert Y. Stebbings

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THE ARGENTINE FOREIGN INVESTMENT LAW AND ITS ANDEAN COMMON MARKET INSPIRATION

Robert Y. Stebbings

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SUMMARY

The new Argentine Foreign Investment Law and related measures affecting foreign capital are analyzed with particular reference to Decision 24 of the Andean Pact Commission, which served as an important source of inspiration to the Argentines. The study is divided as follows:

I. *INTRODUCTION* including discussion of the foreign economic presence in Argentina;

II. *ORIGINS* including discussion of the political milieu surrounding its adoption and a brief summary of the structure of the Argentine Foreign Investment Law;

III. Types of *FOREIGN CAPITAL* that may enter the country under the Argentine Foreign Investment Law and an analysis of key questions including the treatment of imported technology;

IV. *DEFINITIONS AND CLASSIFICATIONS* including the three-way company division based on percentage of foreign participation;

V. *INVESTMENT APPROVAL* by the Argentine Government;

VI. *REQUIREMENTS, PROHIBITIONS* and other factors to be weighed by the Argentine Government in the approval process including discussion of industrial and regional promotion plans, divesture or fade-out, prohibited sectors, investment in existing companies, state purchasing, and import-export controls affecting foreign investors;

VII. *CAPITAL REPATRIATION AND PROFIT REMITTANCES* including discussion of dollar denominated bonds and the nationalization of local profits;

VIII. Treatment of *EXISTING INVESTMENTS* with reference to their registration, the option to remain outside of the ambit of the new Argentine Foreign Investment Law, expropriation of existing interests and certain special measures affecting banking;

IX. Rules affecting *CREDIT, INTEREST,* stock market incentives and *TECHNOLOGY PAYMENTS* including discussion of parent-subsidiary relations and tax measures affecting the foreign investor; and

X. *CONCLUSION.*

THE ARGENTINE FOREIGN INVESTMENT LAW AND ITS ANDEAN COMMON MARKET INSPIRATION

*Robert Y. Stebbings**

I. Introduction

A. *Background*

Back in power after nearly twenty years of forced exile, the government of Juan Domingo Perón fulfilled one of its most popularly acclaimed promises. Following a prolonged emotion-charged journey through the first Congress since the dissolution of that body in 1966, Argentina's new Foreign Investment Law (the "Law") became effective in December 1973. Law No. 20.577 regulates foreign direct investments, foreign credits and contracts involving payments abroad.[1] Appearing almost simultaneously, Law No. 20.575 requires registration with the government of all persons or entities who carry out any activity related to Argentina on behalf of foreign interests.[2] The Foreign Investment Law was followed in February 1974 by a fundamental executive decree amplifying and interpreting the original statute.[3]

The Argentines were primarily inspired by the pioneering innovations of Decision 24, the foreign investment code approved by

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* Associated with Marcona Corporation, San Francisco. A.B., 1963, Stanford University; J.D., 1967, Columbia University; M.B.A., 1968, Columbia University. Member, New York Bar.

1. Law of Nov. 29, 1973 (No. 20.577), Concerning Foreign Investments (Argen.) [hereinafter cited as Investment Law]. The Investment Law has been published in English in 12 Int'l Legal Materials 1489 (1973). Unless otherwise indicated, however, all translations of the Investment Law and other texts are the responsibility of the author.

2. Law of Dec. 20, 1973 (No. 20.575), Concerning Registry of Agents and Representatives of Foreign Enterprises (Argen.); Decree of Feb. 5, 1974 (No. 414) (Argen.). These number far more than the Government or anyone else anticipated. Approximately 11,500 have registered rather than the estimated 1000 expected. *See* Buenos Aires Herald, June 23, 1974, at 10.

3. Decree of Feb. 5, 1974 (No. 413) (Argen.) [hereinafter cited as Investment Decree].

the Commission of the Cartagena Agreement in December 1970 for application in the Andean Pact countries.[4] The Argentine measures attempt to improve the Andean system and adapt it to a new environment. Many of the questions dealt with by the two political entities are considered vital by much of the capital-importing, non-industrial world and by investors from the developed countries as well. As a result, a study of the Argentine rules in relation to their Andean antecedents should transcend its geographical limitations. In the conclusion of an article examining the implications of Decision 24, Professor Covey T. Oliver prophetically observed that the "Mesozoic Era of direct foreign investment has ended. . . . The future belongs to the adaptables and their lawyers." Further, he concludes that: "Decision 24 will undoubtedly be influential in this evolution, just as 'Mexicanization' [to which United States capital has accommodated itself] was itself influential in the formulation of the Andean Code. Decision 24, therefore, deserves the thoughtful attention of all those who are willing to face the future, instead of the past. . . ."[5]

Andean integrationist spokesmen recognized that "capital is the scarce factor in the subregion for which reason foreign contributions are essential for the fulfillment of . . . our objectives."[6] Introducing the Draft Foreign Investment Law to Congress, the Argentine President recognized "the advantages which the contribution of foreign capital can bring."[7] Given the conviction that foreign investment has a role to play in the development process, it is hoped that this Article will prove useful to actual or potential foreign investors interested in Argentina.

Finally, the issues involved in regulating, controlling, stimulating or emasculating foreign investment, as the case may be, are

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4. Decision 24 of the Commission of the Cartagena Agreement (Andean Pact), Dec. 31, 1970, *as amended*, Decisions 37, 37a [hereinafter cited as Decision 24] *published in English in* 11 INT'L LEGAL MATERIALS 126 (1972).

5. Oliver, *The Andean Foreign Investment Code: A New Phase in the Quest for Normative Order as to Direct Foreign Investment*, 6 AM. J. INT'L L. 763, 784 (1972).

6. Decision 24, Introduction by the Junta of the Cartagena Agreement. (The Junta is the highest regional authority under the Cartagena Agreement.)

7. Address by President Hector J. Cámpora, Congressional Introduction, June 14, 1973, as published in the DIARIO DE SESIONES, [Camara de Diputados de la Nación] 563 (June 14, 1973) [hereinafter cited as Cámpora speech].

interesting for the place they occupy in the forefront of the fascinating dialogue between law and development. Many countries, not least those of the Andes and transandean Argentina, regard the foreign investment question as fundamental in a continuing struggle for independence from foreign domination *(dependencia)*. It is widely believed that a truly national development can not be initiated until the question of foreign economic domination is resolved. On the other hand, and as noted, foreign participation is usually accepted as necessary for the achievement of national goals of modernization and development and even, paradoxically, to end *dependencia* by providing resources more quickly than they can be mustered through internal savings. Both statutes under scrutiny in this Article attempt to balance the sometimes conflicting goals of national independence with the need for attracting and using—while also controlling—imported resources. For both statutes, considerably more time is needed to measure the results.

B. *The Dimensions of Foreign Investment in Argentina*

It is estimated that foreign citizens presently own or control between two and one-half and three billion dollars of the share capital of Argentine commercial enterprises.[8] Forty or fifty per cent of this foreign investment comes from the United States, the only country that provides reasonably good statistical data covering its investments in Argentina. The characteristics and behavior of this United States economic presence are probably analogous to those attributable to investments originating elsewhere. It is estimated that these United States investments generated average annual total profits of 6.4 per cent during the decade of the 1950's and averaged 12.0 per cent during the following decade. The annual percentages reportedly transferred abroad as profits by North American companies during these years ranged from 1.8 to 9.9 per cent and averaged 7.15 per cent during the 1960's. Between 1965

8. FUNDACION DE INVESTIGACIONES ECONÓMICAS LATINOAMERICANAS, LAS INVERSIONES EXTRANJERAS EN LA ARGENTINA 17 (Buenos Aires 1973) [hereinafter cited as FIEL study]. Unless otherwise noted, specific data in this section has been taken from the FIEL study at 17, 23, 24, 248, 252, 270 and 291. The author is responsible for the calculation of a number of the annual averages derived from this data.

and 1968 United States companies remitted profits averaging 75 million dollars annually.

According to Central Bank statistics, total profit transfers from 1966 through 1973 ranged from 47.8 to 179.0 million dollars with an annual average of 85.5 million dollars for the eight-year period. The 1973 figure was 79.8 million dollars. These and other Central Bank statistics include actual foreign exchange transfers as well as the sale of interest bearing, dollar denominated bonds or *bonos externos* which began in 1971.[9] Profits may also leave the country in the form of transfer price differentials resulting from the investor's imposition of artificial transfer prices for imported goods as well as in the form of interest and technology transfer payments. Debt amortization (excluding interest) for 1973 reportedly totalled 2,642.9 million dollars.[10] Interest payments to foreign lenders ranged from 141.7 to 343.3 million dollars from 1966 through 1973, averaging 202.33 million dollars. The trend has been linear and dramatic with the highest figure corresponding to 1973.[11]

9. Unless otherwise noted, these and other Central Bank statistics come from the Argentine Central Bank's Annual Reports, which were interpreted for the author and made available by Dr. Oraldo N. Fernandez, Head of the International Accounts Department. Annual profit transfers were as follows:

year	amount (million dollars)
1966	92.1
1967	55.8
1968	97.0
1969	179.0
1970	72.5
1971	47.8
1972	60.6
1973	79.8

Actually transfers are severely limited. Faced with a critical balance of payments situation, the Lanusse Government in 1971 established an imaginative scheme to delay the flow of foreign exchange from the national treasury through the sale of "dollar denominated external bonds" (*bonos externos*) which will be described later. Basically, the investor entitled to a transfer was permitted to purchase in pesos at the established exchange rate interest bearing bonds, which could then be discounted for foreign exchange on secondary markets in Argentina or abroad. Alternatively, the bonds could be held for semiannual amortization by the government over a five-year term.

10. ARGENTINE CENTRAL BANK, SUPLEMENTO DEL BOLETIN ESTADISTICO (No. 3, March 1973) published by the Central Bank and made available by Dr. Fernandez.

11. The Central Bank interest payment statistics are as follows:

Technology and certain other payments for this period ranged from 51.2 to 79.8 million dollars and averaged 66.54 million dollars. In 1973, 82.0 million dollars was reportedly transferred.[12] Total for-

year	amount (million dollars)
1966	141.7
1967	152.1
1968	145.3
1969	151.8
1970	179.2
1971	225.8
1972	279.7
1973	343.3

12. A Buenos Aires weekly newspaper misinterpreted a carefully worded study by the government's Instituto Nacional de Tecnologia Industrial (INTI) and reported that payments for imported technology were approximately $120 million during 1973. The correct Central Bank figure of $82 million, however, appears on a different page of the same newspaper. Commenting on its erroneously inflated statistic, the periodical expressed a conclusion, which was unusual in a period of intense concern for Argentina's economic independence: "the sum paid for royalties does not seem to be excessive. These payments . . . for technology compare very favorably with exports which in 1973 exceeded three billion dollars of which 725 million were for manufactured goods. . . . No one can say that the economic problems of a country with three billion dollars worth of exports flow from 120 million dollars in royalty payments. Nor that the payment of 120 million dollars for technology which allows the development of our industry is the symbol of our dependency." El Economista, June 21, 1974, at 5, 11.

Total exports, which include Argentina's traditional agricultural and meat sales, may be less relevant than exports by the manufacturing sector alone. Opinions may differ over whether payments for imported technology were low in relation to manufactured exports of $725 million. Opinions may also differ over whether the relation to exports is particularly significant (assuming an overall favorable balance of payments). The contribution of imported technology to the health, contentment and general standard of living of the country's inhabitants perhaps should be put in the balance. On the other hand, some Argentines argue forcefully that the contribution of imported technology has a negative net effect in stifling the development of national technological and cultural alternatives.

The INTI study cited by *El Economista* is based on individual company estimates in 1972 of technology transfers anticipated for 1973. As INTI economist Dr. Daniel Chudnovsky explained to the author, and as the study makes clear, the reporting companies tended to grossly inflate their estimates. *See* INSTITUTO NACIONAL DE TECNOLOGIA INDUSTRIAL (INTI), ESTUDIO DE LOS CONTRATOS DE LICENCIAS Y TRANSFERENCIA DE TECNOLOGIA CON EL EXTERIOR 9 (No. 25, Dec. 1973) [hereinafter cited as INTI study]. The author interviewed INTI officials and personnel during July 1974.

The Central Bank figures represent actual payments or external bond pur-

eign investment service payments for profits, interest and technology thus totalled approximately 505 million dollars in 1973.

New direct investment from all foreign sources, not including reinvested earnings, totalled an estimated 912 million dollars from the beginning of 1958 to the end of 1969. This represents an average annual increase of 76 million dollars over the period. The years of 1967, 1968 and 1969 showed net losses in foreign direct investment of seven, eight and eleven million dollars respectively although United States direct investment demonstrated an average annual increase of 58 million dollars during 1965-1968. The overall decline was partially the result of an outflow of Argentine capital as well as a reduction of foreign investment in the petroleum sector. The average annual increase from 1961 to 1969 was a mere 33.78 million dollars. According to the United States Department of Commerce, United States affiliates invested 170 million dollars in Argentina during 1973. A survey in December 1973 indicated spending plans for 1974 of 161 million dollars, a decrease of 5 per cent from the previous year.[13] This data obviously does not reflect the real growth in foreign economic influence since reinvested earnings are specifically excluded as are the distorting effects of local inflation.[14]

Although foreign investment represents only about six per cent of the estimated total capital stock of the country, it is disproportionately important because of its affinity for key or particularly dynamic sectors of the economy. A leading Argentine economist asserts that "economic power is principally concentrated in foreign enterprises and in state-owned enterprises."[15] For example, eleven of the 25 largest Argentine companies are subsidiaries of foreign corporations. Between 1961 and 1966 over half of the sales of the 50 largest companies in Argentina were realized by the subsidiaries of foreign corporations.[16] The automobile industry is entirely in

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chases, but unfortunately do not segregate technology from certain other payments such as film distribution rights and publishing royalties. The informal estimate of an INTI staff member puts the part attributable to technology for 1973 at $50 million of the Central Bank's $82 million.

13. Business Latin America, May 1, 1974, at 142.

14. Some of the effects of inflation on investment are described in Rosenn, *Expropriation, Inflation and Development*, 1972 WIS. L. REV. 845.

15. A. FERRER, LA ECONOMIA ARGENTINA 252 (1973), *available in English as* THE ARGENTINE ECONOMY (1967).

16. Vaitsos, *Foreign Investment Policies and Economic Development in Latin*

foreign hands; FIAT has the second highest net income of any enterprise in the country. Sixty per cent of the agricultural machinery sector is foreign as is 70 per cent of the pharmaceutical industry, virtually 100 per cent of the cosmetics industry and over 30 per cent of the electrical appliance industry. Foreign interests are also important in mining, petroleum and finance.[17]

America, 7 J. WORLD TRADE L. 619, 620 (1973) *citing* Ferrer, *El Capital Extranjero en la Economia Argentina*, 150 EL TRIMESTRE ECONÓMICO 313 (1971).

17. In addition to the exhaustive FIEL study referred to throughout this section, statistical and interpretative literature dealing with foreign investment in Argentina includes the reports of the following: the United Nations Economic Commission for Latin America (ECLA or CEPAL in Spanish), the Inter-American Development Bank, the United States Department of Commerce, and the Argentine Central Bank. *See also* C. ALEJANDRO, ESSAYS ON THE ECONOMIC HISTORY OF THE ARGENTINE REPUBLIC (1970); E. CIMILLO, ACUMULACION Y CENTRALIZACION DEL CAPITAL EN LA INDUSTRIA ARGENTINE (Editorial Tiempo Contemporaneo, Buenos Aires 1973); M. DIAMOND, EL VERDADERO ROL DE LA INVERSIONES EXTRANJERAS EN LOS PAISES SEMI-INDUSTRIALIZADOS (1972) (mimeographed study prepared for the Consejo Interamericano de Comercio y Producción (CICYP)); FERRER, *supra* note 15; G. O'DONNEL & D. LINCK, DEPENDENCIA Y AUTOMONIA (Amorrortu ed. Buenos Aires 1973); R. ORTIZ, HISTORIA ECONÓMICA DE LA ARGENTINE (Editorial Plus Ultra, Buenos Aires 1971).

A study, which has had considerable recent popular impact in Argentina, indicates that 56.95% of the 400 largest enterprises in Latin America are controlled by foreign capital. It does not indicate if the percentage refers to total sales, book value or some other characteristic of the 400 as a group or simply to the numerical total. It was published in Argentina in the monthly *Cuestionario*, May 1974, at 14, which credits prior publication to *Progreso*, a journal of economics published by *Vision*.

For general studies of economic development in the third world countries see A. HIRSCHMAN, THE STRATEGY OF ECONOMIC DEVELOPMENT (1958); H. MYINT, THE ECONOMICS OF THE DEVELOPING COUNTRIES (1964).

Additional material on *dependencia* would fill a relatively large library. Perhaps one of the most influential works in recent years, at least among Argentines, is F. CARDOSO & E. FALETTO, DEPENDENCIA Y DESARROLLO EN AMÉRICA LATINA (Siglo Veintiuno Editores, Mexico 1969). The following have also had impact: M. DIAMOND, DOCTRINAS ECONÓMICAS, DESARROLLO E INDEPENDENCIA (Editorial Paidos, Buenos Aires 1973); T. DOS SANTOS, LA CRISIS NORTEAMERICANA Y AMÉRICA LATINA (1972); T. DOS SANTOS, SOCIALISMO O FASCISMO: EL NUEVO CARÁCTER DE LA DEPENDENCIA Y EL DILEMA LATINOAMERICANO (1973); H. JAGUARIBE, LA DEPENDENCIA POLITICO-ECONÓMICA DE AMÉRICA LATINA, (Siglo Veintiuno Editores, Buenos Aires 1970). A concise, well-written article in English by a Chilean professor sets forth the major *dependencia* points of view. *See* Sunkel, *Big Business and Dependencia*, 50 FOR. AFF. 517 (1972). *See also* Sunkel, *Relaciones económicas entre Amèrica Latina y Estados Unidos—Comentarios al trabajo de Aníbal Pinto,*

II. ORIGINS OF THE NEW ARGENTINE FOREIGN INVESTMENT LAW

A. *Antecedent Legislation*

Consonant with its Andean inspiration, the Mexican codes[18] and emerging attitudes in much of the developing world,[19] the new Argentine foreign investment law is regulatory and restrictive in nature. Its previous codes have been basically promotional and

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22 ESTUDIOS INTERNACIONALES 32 (1973). Sunkel is commenting on the Chilean professor, Aníbal Pinto's article *Relaciones Económicas entre América Latina y Estados Unidos: Implicaciones y Perspectivas Políticas*, which appears in the same publication. *Id.* at 3. The views of Argentine businessmen toward foreign investment in their country and *dependencia* are the subject of Petras & Cook, *Argentina: Dependencia y Burguesia Industrial*, 10 REVISTA LATINOAMERICANA DE ECONÓMIA 19 (1972).

It is undoubtedly superfluous to mention the popularized European view of *dependencia, The American Challenge*, originally published as *Le Défi Américain* by Jean-Jacques Servan-Schreiber in 1967. *Dependencia* lurks in every corner. At least one local commentator feels that Argentina is entering into a relation of dependency with the Soviet Union as a result of the recent wave of trade and capital investment deals with the Eastern European countries. *See* Petersen, *Another Kind of Dependence*, Buenos Aires Herald, May 31, 1974, at 8.

18. The most recent Mexican measure regulating foreign investment is the Law to Promote Mexican Investment and Regulate Foreign Investment of February 16, 1973, published in the *Diario Oficial* on March 9, 1973. In relation to this legislation, see the presentation of José Campillo Sainz, Subsecretary of Industry of Mexico, to the Mexican Senate accompanying the executive draft of the code in 14 DERECHO DE LA INTEGRACION 328 (1973). *See also* Lacey & Sierra de la Garza, *Mexico—Are the Rules Really Changing?* 3 INT'L LAW. 560 (1973); Miranda, *Foreign Companies Investing and Doing Business in Mexico—Nationalization*, 30 BUS. LAW. 1217 (1973). For a recent general treatment of foreign investments in Mexico see B. SEPÚLVEDA & A. CHUMACERO, LA INVERSIÓN EXTRANJERA EN MEXICO (Fondo de Cultura, Mexico City 1973).

Derecho de la Integración published in Buenos Aires by the Instituto para la Integración de América Latina (INTAL) contains Latin American statutory foreign investment material. Previously published material is listed in a note in No. 13, July 1973 at 233, accompanying the text of the new Mexican code. Succeeding numbers contain additional items.

19. Even countries as developed as Canada and Australia are reconsidering their traditional open invitations to foreign capital and adopting policies of regulation and control. *See* Fogarty, *Australia y el Problema de las Inversiones Extranjeras*, 22 ESTUDIOS INTERNACIONALES 106 (1973); Glover, *Canada's Foreign Investment Review Act*, 29 BUS. LAW. 805 (1974); Jafarian & Bell, *Issues Raised by National Control of the Multi-national Corporation*, 8 COLUM. J. WORLD BUS. 7 (Winter 1973).

enacted to attract capital by offering preferential conditions to the foreigner willing to invest in the country. In fact, prior to 1953 Argentina did not have a coherent statute especially devoted to foreign investment.[20] Even the 1953 Statute, enacted during Perón's first regime from 1946 to 1955, was promotional in spite of the nationalism of his government. It did, at least, provide for percentage limitations on profit remittances and capital repatriations as does the new Law.[21]

With one exception, in addition to the earlier Peronist legislation, the previous foreign investment laws were applied on an optional basis. To benefit from the incentive schemes offered, the investor had to enter into a contract with the Government or register his investment under the law in force at the time. On the other

20. Until 1948 foreign direct investment was subject only to Central Bank financial regulation and to the provisions of bilateral payment agreements with a number of countries. In 1948, Decree 3347 made a first attempt at official supervision and control of foreign investments and created a government agency to aid and promote investment. Until 1953 the entry of investments in the form of foreign currency was subject only to Central Bank control. *See* FIEL study, *supra* note 8, at 232-33; F. HERRERO, ASPECTOS LEGALES DE LA PROMOCION INDUSTRIAL EN ARGENTINA 90 (1965).

21. Law of Aug. 26, 1953 (No. 14.222); Regulatory Decree of Oct. 10, 1953 (No. 19.111), *repealed by* Decree of Dec. 18, 1957 (No. 16.640). The President was empowered to waive—partially or entirely—import duties on capital goods forming part of an investment and, upon a declaration of national interest, to offer a range of incentives provided for in the earlier industrial promotion Decree of 1944 (No. 14.630). Investments had to be approved by the Executive Branch and their value registered in pesos. Remittances were permitted as fixed percentages of the registered value in pesos making foreign investors highly susceptible to local inflation, especially since capital repatriation could not begin for ten years. This law and, in particular, its regulatory decree supplemented the Andean Investment Code as inspiration for the present Peronist statute. Curiously, according to the records of the *Boletín Oficial*, this important decree never saw official publication. The author was allowed to photocopy the original eleven page typewritten document, signed by President Perón, at the Archivo General de la Nacion in Buenos Aires. The 1953 legislation and other Argentine measures preceding the most recent are described in the FIEL study, *supra* note 8, ch. XIV, at 232, and in A. ROFMAN & L. ROMERO, SISTEMA SOCIOECONOMICO Y ESTRUCTURA REGIONAL EN LA ARGENTINA, ch. 4.2, at 191 (Amorrortu Editores, Buenos Aires 1973). Among several interesting statistical tables, the latter lists the dollar amount of investments made in given years under several foreign investment or industrial promotion laws. *Id.* at 193. For studies of the Argentine economy see note 17 *supra*.

hand, however, he could invest in the country without submitting to the norms of any foreign investment law, although he was not excused from foreign exchange controls and transfer or withholding taxes among other things. Furthermore, the lack of a contract with the Government meant the lack of specific guarantees of the effect on the investor of future policy changes. Since Argentina has a good record of respecting its commitments, including those of previous governments, such contractual obligations are of real value. The other exception to the optional rule was the law enacted in 1971 under President Alejandro Lanusse and in effect until the present Law entered into force.[22] The two exceptions and the new Law all establish compulsory registration schemes as well as approval mechanisms and a regulatory authority under executive branch control.

The country was in such turmoil during the Lanusse government that his law was never effectively applied[23] although companies with foreign ownership were required to register with a special government authority and supply considerable data. According to members of this government authority, the data was collected, catalogued and preserved and will now be used in conjunction with material supplied under the new Law. Although the Lanusse law incorporated the registration and approval system, it did not limit remittances or capital repatriation and remained generally promotional in nature.[24] The present Law on the other hand expressly stipulates that "[i]n no case may foreign investors be awarded treatment more favorable than that granted national investors."[25]

This movement from promotion to restriction or control was

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22. Law of July 30, 1971 (No. 19.151), Concerning Foreign Investments [hereinafter cited as Lanusse Investment Law]; Decree 2400, April 27, 1972 [hereinafter cited as Lanusse Investment Decree].

23. A legal practitioner in Buenos Aires with experience in the foreign investment field indicated that other than requiring the submission of data, only once did any organ of government actually seek to apply the statute. In March 1973 the Central Bank reportedly attempted to require proof of prior registration under the law by applicants for the purchase of an impending issue of external dollar bonds necessary for profit and other transfers. Addresses by Dr. Bernardo Duggan, Centro de Estudios Comparados, Buenos Aires, May 23, 28, 1974.

24. In fact, transfers generally had to be effected by means of external dollar bonds described below and in note 9 *supra*.

25. Investment Law, art. 19.

fundamental in the 1970 adoption of the Andean Foreign Investment Code by the Commission of the Cartagena Agreement. Decision 24, which Latin Americans sometimes call the Common Regime (*Régimen Común*) is an effort to harmonize the treatment of foreign investments and foreign investors in the Andean Group countries—Colombia, Ecuador, Peru, Chile,[26] and Bolivia and most recently, Venezuela, which became a member of the Subregion on January 1, 1974.[27] Venezuela rapidly incorporated Decision 24 into its national legal system,[28] a process not unlike the conversion of the Uniform Commercial Code and other uniform codes into effective law in each state of the United States. In certain other countries, the incorporation process has been more difficult, particularly when interest groups have sought to block national adoption of the measures.[29]

Among the important reasons for creating a common investment code was the realization that the Andean nations were competing with each other to attract foreign investment and were, therefore, not obtaining development capital on the most favorable terms possible.[30] By presenting a common front to the outsider interested

26. In mid-July 1974 the military junta, which overthrew Chilean President Salvador Allende, issued a decree that essentially abrogates the most important provisions of Decision 24. Designed to attract new investment to the country, the measure is highly promotional. Approval and registration is still required but the government retains a free hand to permit whatever it sees fit. No maximum limits are set on transfers of earnings or capital repatriation, which are to be established individually in investment contracts. *Estatuto de la Inversión Extranjera, Decree Law 600,* El Mercurio (Santiago, Chile), July 13, 1974, at 26-27.

27. INTAL, Boletín de la Integración 74 (No. 98, Feb. 1974); LAFTA NEWSLETTER 4 (No. 22, Jan.-Feb. 1974). LAFTA (ALALC in Spanish) is the Latin American Free Trade Association headquarters in Montevideo, Uruguay.

28. Decrees 62 *and* 63, April 29, 1974 (Venez.) *published in* Gaceta Oficial, April 29, 1974.

29. *See* Vicuña, *La Incorporación del Ordenamiento Jurídico Subregional al Derecho Interno: Análisis de la Práctica Chilena,* 7 DERECHO DE LA INTEGRACIÓN 42 (1970); Vicuña, *Acuerdo de Cartangena: Su Constitucionalidad y de la Décisión 24 en Colombia,* (Court decisions and other documents), 10 DERECHO DE LA INTEGRACIÓN 155 (1972); Vicuña, *La Incorporación del Orgenamiento Juridico Subregional al Derecho Interno: Análisis de la Práctica y Jurisprudencia de Colombia,* 11 DERECHO DE LA INTERGRACIÓN 39 (1972). A current status rundown omitting the latest developments in Chile referred to in note 26 *supra* may be consulted in Business Latin America, July 3, 1974, at 212-13.

30. In the declaration that forms the introduction to Decision 24, the Commis-

in entering the area, the Andean nations might receive better terms and more effectively apply a system of controls. In promulgating Decision 24, the Commission provided that "[t]he treatment of foreign capital may not discriminate against national investors,"[31] so that discriminatory promotional systems within given countries would be eliminated. The Code, combined with the Andean sectorial system, which assigns member countries exclusive rights to develop certain industries, is designed to eliminate competition for new investments on a national as well as on a regional level. Accordingly, President Héctor Cámpora, Perón's caretaker Chief Executive from May 25, 1973, until July 13, 1973, recognized Andean inspiration in a speech presenting the Peronist Government's first draft investment law to the national Congress.[32]

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sion stated that "[t]he common regime must likewise tend to bolster the negotiating power of the Member Countries with Other Governments, enterprises which provide capital and technology and international organizations which deal with these matters." Decision 24, Declaration 9.

A member of the Andean Pact legal staff has explained that the principal concern of the drafters of the Cartagena Agreement itself was "to avoid an incentives race among the Member Countries in search of foreign investment which would make impossible the achievement of their objectives of balanced and harmonious development. It was presumed that an 'incentives auction' would only benefit the investor who could patiently await the result of the struggle and then opt for the offer which benefited him most even at the cost of the host country's interests." Guerrero, *El Règimen Común de Inversión. Extranjera en el Grupo Andiana*, 8 DERECHO DE LA INTEGRACIÓN 8, at 11 (1971). For essentially the same point also see Florez, *ANCOM, A Peruvian Viewpoint*, 6 COLUM. J. WORLD BUS. 36 (July-Aug. 1971) and Peña, *El Grupo Andino: Un Nuevo Enfogue de la Participación Internacional de los Paises en Desarrollo*, 22 ESTUDIOS INTERNACIONALES 44, 63, 66 (1973).

The factors that led to the drafting of Decision 24 are also discussed in J. GRUNWALD, M. WIONCZEK & M. CARNOY, LATIN AMERICAN ECONOMIC INTEGRATION AND U.S. POLICY (1972); Furnish, *The Andean Common Market's Common Regime for Foreign Investments*, 5 VAND. J. TRANSNAT'L L. 313 (1972) which in slightly revised form appears as *El Règimen Común del Grupo Andino para las Inversiones Extranjeras*, 14 DERECHO DE LA INTEGRACIÓN 85 (1973); Oliver, *supra* note 5; Perenzin, *Regulation of the Andean Investment Codes*, 4 LAWYER OF THE AMERICAS 15 (1972); Schliesser, *Restrictions on Foreign Investment in the Andean Common Market*, 5 INT'L LAW. 386 (1971); Valdez, *The Andean Foreign Investment Code: An Analysis*, 7 J. INT'L L. & ECON. 1 (1973).

31. Decision 24, Declaration 4 of the preamble drafted by the Commission of the Cartagena Agreement.

32. Cámpora speech, *supra* note 7, at 562.

He indicated that the principal characteristics of the bill were derived from the earlier Peronist law and from the Andean Code.

In light of these origins as well as international interest in the Andean Code, frequent reference will be made to its provisions in an effort to better understand and interpret the Argentine Law. Although the Code was occasionally used without adequate analysis or consideration of its new milieu, some fault undoubtedly lies in the charged political atmosphere that surrounded the Law's enactment. In any case, it is hoped that this analysis will not only serve an informational purpose for the potential or existing investor but that it will also have some value in future drafting efforts, in Argentina and elsewhere. For that reason, this Article is at times critical of the legislation's draftsmen for not making their intentions clear. An understanding of those intentions with their philosophical or political bases is fundamental here since no standard of application yet exists.

The philosophy of control rather than promotion of foreign investment is not entirely new to Argentina. Various sectorial and regional industrial promotion laws limit their benefits or, conversely, allow more benefits to those companies with a determined percentage of local ownership and local management. Some of these sectorial and regional statutes are more restrictive than the new Law and continue in effect. The existing technology law, which was enacted in 1971 to cover foreign patents, trademarks and know-how to be exploited in Argentina and which is soon to be replaced by a tougher new law, differentiates between local and foreign investors as do banking, securities, and tax legislation as well as the state purchase statute and a variety of other measures, not within the scope of this paper.

B. *Political Atmosphere Surrounding Passage of the Foreign Investment Law*

Since many of the policies espoused by the runner-up Radical Party were not unlike those of the Peronist coalition, Perón came to power in the 1973 elections with an impressive mandate for action. One of his most sympathetically received promises in a country where the word *dependencia* evokes a vigorous popular reaction, was to put Argentina back in control of her own economic destiny. In fact, in very short order not only was the foreign investment law drafted, but Argentines also saw legislation expropriat-

ing for resale to local interests seven banks that had been sold to foreigners since the 1966 military takeover as well as a law nationalizing all bank deposits and putting the Central Bank in absolute control of credit. These measures were accompanied by a series of industrial promotion laws affecting foreign investors and including a general industrial incentive law and decree and specific laws or decrees for steel, petrochemicals, minerals, forestry, paper and regional development. A bill governing foreign technology contributions is presently in Congress.

The Foreign Investment Law went beyond philosophical judgments, symbolic values and election promises. Enormously important interests, both Argentine and foreign, entered into the equation. The first draft was sent to Congress by President Cámpora on June 14, 1973, before Perón's election. It was subjected to a lengthy process of evolution in both houses and their committees and emerged from Congress on November 7, 1973, somewhat milder than its original form, partially as a result of Perón's personal intervention.

An incident shortly after the draft bill was presented to Congress provides insight into the political atmosphere, which surrounded the enactment of the legislation. The now famous Krebs affair began on July 23, 1973, when Max V. Krebs, head of the Commercial Section of the United States Embassy in Buenos Aires, sent Economy Minister José Ber Gelbard a three page memorandum criticizing the bill. Krebs insisted that the statute was unfairly prejudicial to foreign investors and opined that it would prove harmful to Argentina.[33] The administration seized the opportunity to castigate the Yankees for "an undue interference in the internal affairs of our country" and stopped just short of sending the unwitting Krebs home.[34] The latter insisted that his memorandum was

33. The United States Embassy in Buenos Aires supplied the author with the Spanish language version of the note. The entire incident was amply reported in the Argentine press. *See* La Nación, July 24, 28, 1973, Aug. 1-4, 6, 19, 21-23, 29-30, 1973.

34. Cronica (Buenos Aires), July 31, 1973. Krebs had a predecessor whose intervention in the internal affairs of Argentina was undeniably direct as well as improper. Any history of contemporary Argentina describes the role of the United States Ambassador Spruille Braden in the 1946 presidential election. It is said that Perón's victory that year may have been attributable to the Ambassador's meddling. An English historian tells us that Braden: "threw himself into the

sent in response to a request for the Embassy's position on the bill, a decidedly unpleasant doublecross if true. Nevertheless, the Embassy apologized and admitted that some of the language in the note was intemperate, caused by an overly hurried translation. The press had a field day with one paper demonstrating particular journalistic flair; *Cronica* suggested that the incident could lead to the breaking of diplomatic relations with the government of the *monopolios mascachicles*, the chewing gum monopolies. Basically, Krebs was used to further educate Argentines in Perón's third-way *Justicialist* doctrine, neither *Yanquis* nor *Rusos*. Thus, the Krebs incident was used to demonstrate to Argentines that their new Law would have teeth; otherwise, the United States would not have sought to interfere.

The Draft Law was prepared and the Krebs incident took place before Perón's corporal return to power. Perón reportedly intervened in order to temper the final Law.[35] After assuming the Presidency he and his successor Isabel Perón, have gradually drawn away from the more extreme leftist factions amongst his supporters and they from him.[36] This apparent swing does not mean that the old days of foreign dominated laissez-faire capitalism are on their way back but it and other events suggest that the foreign investor is welcome if he succeeds in reaching an accommodation. The new Law is flexible enough to enable the government to offer

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election as if he were campaigning for President Truman in Texas or California. In his enthusiasm he had produced a Blue Book setting forth all the sins of Perón and his friends in respect to their connections with the fascists and the Nazis. This Blue Book he circulated on a massive scale in Argentina. Perón's ripost was too easy. He circulated a Blue and White (the Argentine national colours) Book telling the Americans to mind their own business, decorating this message with some fancy variations on the anti-imperialist theme." H. FERNS, ARGENTINA, 183 (1969), *also available in Spanish translation. See also* M. SCENNA, BRADEN Y PERÓN 1 (Editorial Dorr Korrigan, Buenos Aires, 1974).

35. Among other allusions to Perón's intervention, see *La Ley del Candado*, El Economista, Nov. 2, 1973; La Nación, Nov. 8, 1973, at 1; La Prensa, Nov. 8, 1973; Business Latin America, June 28, 1973, at 201.

36. This was dramatized on May Day 1974 when Perón in response to heckling from Peronist youth groups during his speech in the Plaza de Mayo called them immature and stupid. The author was present and was astounded to witness the departure as a body of several tens of thousands of chanting youths. Ironically, many observers are convinced that the unrelenting pressure of these Peronist Youth groups during the years of military rule paved the way for Perón's return.

reasonable conditions to desirable investors. Consequently, new sources and slightly new types of investment may be attracted to the country. An Italian group is seeking to make an enormous investment in the petrochemical industry, and the Soviet bloc nations of Eastern Europe are in active negotiation with the Argentines over the establishment of a number of joint ventures. Thus, the current approach seems to spring from pragmatic realism and a continued interest in enticing fresh investment into the country.

In spite of the modifications introduced while the Law was in Congress, it retains many characteristics of its original source of inspiration. Fortunately, the Andean Investment Code is a worthy model although its offspring is the victim of several technical, drafting defects. These may be explained in various ways: first, the Andean model was accepted without adequate examination and comprehension of all of its provisions and their consequences. An example, discussed below, involves the expression *perdidas netas* or net losses, which the Law indicates are to be subtracted from the sum used to derive the foreign capital base of a firm. This expression has no specific or generally recognized meaning in Argentine jurisprudence or case law nor is its meaning entirely clear in all of the Andean countries. Congress has thrust an element of Andean uncertainty into the Argentine legal system. Another explanation lies in the political nature of the undertaking and the possibility that some legislators may not have acted in an entirely responsible manner. Living in the country and exposed to the media while the bill was in Congress, the author had the impression that many senators and representatives were more dedicated to airing anti-*dependencia* views than to producing outstanding legislation. Also, it must be remembered that Argentina had not had a functioning Congress since 1966. The quality of legislation was undoubtedly affected by the impossibility of forming highly competent technical, advisory and staff committees on an overnight basis in spite of the existence of many outstanding Argentine professionals. Good legislation is obviously dependent upon the quality of the supporting technical staff involved in producing it.

Part of the problem may reside in Peronist antipathy for the foreign investment legislation devised during the twenty years that Perón was prevented from returning to Argentina. A negative bias may have prevented an adequate analysis of this body of law in the construction of an "Argentine" approach. For instance, the vir-

tually untested 1971 Lanusse legislation may be appreciated for its clarity and brevity. President Cámpora in the speech (cited above) introducing the draft bill to Congress referred specifically only to the first Peronist foreign investment law of 1953 and to the Andean Code. The political milieu surrounding the enactment of this legislation guaranteed defects. Fortunately, the philosophical underpinnings of the Law are usually clear, and its defects are subject to correction.

C. *The Structure of the Foreign Investment Law*

The new Foreign Investment Law applies to direct investments of foreign capital in the country, credit obligations with foreign lenders and contracts or agreements of any kind that give rise to an obligation to make remittances abroad. Excepted from this last provision are contracts involving technology transfers, transportation and insurance. It is not clear whether contracts providing for the payment of imports are included under the Law. The Law does not cover imported technology as does the Andean Investment Code[37] but refers to it in isolated instances as well as in one very important instance;[38] the subject is currently provided for in a 1971 statute[39] while a new technology transfer law is presently being considered by Congress.

The basic system of the Andean Code is followed; companies are divided into three categories depending upon the percentage of capital contributed by what the Law defines as foreign or national investors. The category affects the treatment afforded the firm under the Law in a variety of ways, including the manner in which the initial investment must be approved and the economic sectors in which the company may participate. All existing and future foreign investment must be registered in an agency of the Ministry of Economy in order to transfer profits and repatriate capital. New investors must enter into a contract negotiated with an Authority

37. Decision 24, arts. 18-26.

38. Investment Law, art. 26(2).

39. Law of Sept. 10, 1971 (No. 19.231), Concerning Licensing Contracts and Technology Transfer (Argen.) [hereinafter cited as Lanusse Technology Law]; Decree of Dec. 22, 1971 (No. 6187) [hereinafter cited as Lanusse Technology Decree]; Resolution 119 of the Secretary of Industrial Development, Dec. 19, 1973.

established within the same Ministry for the regulation of foreign investments. The Law provides certain guidelines, exempts designated sectors and indicates maximum percentages, based on registered capital, which may be transferred abroad as profits or capital.

Investors with existing foreign investments may opt to subject their investments to the Law in which case an investment contract must be negotiated. Alternatively, they may choose to remain outside the control of the Law, except for certain designated provisions, and pay a special tax on profit and capital remittances. The Government apparently intends to assert that the right to remain outside the coverage of the Law is limited to enterprises that are a party to investment contracts entered into under previous statutes. The Law, moreover, provides for the possible expropriation of existing foreign investments in certain cases and opens up the possibility of fade-outs—the gradual transformation of an investment from foreign to local owners—for both existing and future entrants. In addition, access to local credit by foreign investors is restricted and foreign loans are regulated. Interest, royalty and other payments to foreign parents receive special attention. Although the regulatory Decree is often an interpretative aid, it is sometimes confusing and even contradictory.

III. Foreign Capital—Definitions and Doubts

A. *Categories of Foreign Capital*

The law applies to five forms of direct foreign capital investment—external credits, Argentine foreign debt securities, foreign currencies, capital goods and profits eligible for transfer abroad—which it describes in considerably more detail than do the comparable provisions of the Andean Foreign Investment Code. The Argentine Regulatory Decree enters into further, perhaps excessive, detail but shows an awareness of the practices of the multinational investor and of the consequences for the capital receiving country.[40]

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40. Investment Law, art. 1; Decision 24, art. 1. As Decision 24 matures, the problems of interpretation and lacunae assume increasing importance. Since these problems are not reserved exclusively for regional level decisions, questions of national practice are fundamental. *See* Casanova, *Anotaciones a la Aplicación*

Two of the five forms of capital investment in the Argentine Law are not specifically mentioned in the Andean Investment Code, probably because the draftsmen felt that doing so was unnecessary. Decision 24 would undoubtedly accord them foreign direct investment treatment by virtue of provisions for the investment of convertible foreign exchange or local currency, which may be transferred abroad. One of the two is the capitalization of external credits in foreign exchange or in Argentine pesos provided that the Authority determines that the use of the credits justifies such treatment. The other permits the contribution as capital of securities representing the Argentine foreign debt *(Titulos de la deuda externa nacional)* upon approval by the Authority on the basis of advice from the Central Bank taking into account the balance of payments situation and the particular case.[41] In addition to bonds or debentures sold abroad by the Government and government obligations under loan agreements, these securities presumably include the several hundred-million-dollar national debt in the form of External Dollar Bonds *(Bonos Externos)* sold by the Government since 1971 in lieu of foreign exchange. Both forms facilitate the investment in Argentina of foreign exchange, which would otherwise leave the country as debt amortization far more rapidly than the new Investment Law will permit its flight in the form of profits or as capital repatriation.

The three remaining types of foreign capital expressly covered by the Argentine Law conform to the Andean provision although Argentina provides considerably more descriptive detail. Listed below, these include foreign currencies, capital goods and profits eligible for transfer abroad. First, the Law allows foreign currencies to be invested in economic sectors and zones designated by the Executive Branch.[42] This does not require elaboration. Secondly,

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de la Decisión No. 24: El caso de Chile, 15 DERECHO DE LA INTEGRACIÓN 239 (Buenos Aires, 1974). On a regional level, the creation of an Andean Court of Justice is envisaged. For more information see other articles in 15 DERECHO DE LA INTEGRACIÓN.

The problems of harmonizing local views and increasing the effectiveness of Decision 24 have been the theme of Andean Group conferences. Argentina is, of course, saved from the additional problems and complications of the two-level interpretative and decision-making structures imposed by regional groupings.

41. Investment Law, arts. 1(a)(3), 1(a)(5).

42. Investment Law, arts. 1(a)(1), 5(a); Investment Decree, art. 23.

the Law covers foreign capital in the form of new capital goods and parts in the quantity judged indispensable by the Authority. These goods may not be alienated by the investor for any reason for a period determined in accordance with their nature.[43] The Decree abandons this case-by-case flexibility by prohibiting the alienation of imported capital goods for eight years after their entry into service except upon the express authorization of the Authority. Such approval may not be given unless replacement is necessary to maintain or reach an optimum technological level or unless market requirements dictate the discontinuance or reduction of production.[44] Basically the Decree indicates that, regardless of the expected life of the capital goods involved, the company must initially commit itself to keep them for a period of eight years. Obviously, predictable wear and technological obsolescence may, from the beginning, insure a far shorter life span. Presumably in such cases, the Authority will interpret the necessary replacement exception prospectively; allow the determination of a realistic limitation in the initial investment contract; and, thus, avoid an unnecessary bureaucratic encounter when the time later comes to seek this authorization.

The Decree expressly eliminates the possibility of a longer-term restriction in the case of goods with a more extended, predictable life-span. Perhaps this was done in the interest of reasonableness and smoother synchronization with the Law's rules for capital repatriation, which may begin after five years in stipulated percentages up to a maximum of twenty per cent of defined capital. Nevertheless, the fixing of such rigid limitations in the Decree reflects the unwillingness of the executive to trust such initial determinations to the bargaining process between the wily foreign investor and his own subaltern Authority; it probably reflects a justified fear of the persuasive powers of the foreign investor. A fixed limitation may be thought to eliminate the need for discussion on the point.

Further, the Decree defines capital goods as "all those elements entering into the productive process without being transformed or consumed and which do not constitute a part of the finished prod-

43. Investment Law, art. 1(a)(2).
44. Investment Decree, art. 28.

uct."[45] For example, the Decree's considerable detail on capital goods is a Third World reaction to the overstatement of capital investment by means of fraudulent or unfair transfer pricing practices, which inflate the basis on which dividend remittances and capital repatriation are computed. The head of the Legal Section of the Andean Common Market provides a list of extravagant examples in a recent article in which he cites instances of overpricing between foreign parents and their Andean subsidiaries of up to 3000 per cent. (Three thousand per cent is not a typographical error.)[46] This is a vice Argentines have set out to eliminate with a vengeance.

The Decree provides instructions for determining the lowest current export or local price in the country of origin for the same or similar goods and the lesser of these must be used. All of the above must be verified with a variety of certificates provided by appropriate chambers of commerce, local accountants and Argentine diplomatic representatives in the exporting country. The capitalizable value of these goods is computed FOB, but may include freight if paid in funds emanating from outside of Argentina.[47] To be capitalized as a foreign investment, however, capital goods must be new and must represent the most modern technology in existence. Furthermore, the importing firm must show that the goods are necessary and appropriate for the operation for which they are intended.[48]

Subjective considerations, the political reality of bureaucratic interpretation as well as national economic need and the "necessary and appropriate" part of the previously mentioned stipulations, probably save the provision from hazardous rigidity. To insist on the most modern technology in existence may be too categorical; a South American version of the "computers in Africa" theme. Argentina obviously does not want an obsolete or uncompetitive shoe company or automobile factory[49] but it also may not

45. Investment Decree, art. 1(b).

46. Saavedra, *El Rêgimen Comûn de Inversiones Extranjeras,* 14 DERECHO DE LA INTEGRACIÓN 261, 266-67 (Buenos Aires, 1973).

47. Investment Decree, arts. 3, 10.

48. Investment Decree, art. 9.

49. Kaiser Motors Co. and Willys Motors Inc. installed a plant in Santa Isabela, Province of Cordoba in 1954, under an agreement with Industrias Aeronáuticas y Mecánicas del Estado (IAME). Kaiser imported used equipment from

want or need the most sophisticated and, therefore, most expensive version available in the world. In the Argentine case, the same regulatory scheme that insists on the most modern technology offers priority status for investments that promise to absorb and train the unemployed.[50] An identical labor-capital factor relation does not prevail in all countries simultaneously; indeed Argentina may in some cases benefit by paying a bargain price for less sophisticated but labor intensive technology. Realistically, the provisions under fire put the investor on notice that the country will not accept unfair practices while reserving options for an alert Investment Authority by providing grounds for refusing any given proposal. Thus, before approving a new investment, the Authority must describe the capital goods and replacement parts proposed for importation to the Secretary of State for Industrial Development in the Ministry of Economy *(Secretaria de Estado de Desarrollo Industrial)*. This office will determine if satisfactory alternative goods are economically produced in Argentina and available for substitution.[51]

Thirdly, the Law encompasses foreign capital in the form of profits derived from foreign investments eligible under the Law for transfer abroad.[52] The problem of determining eligibility for transfer abroad will be dealt with in some detail in the section treating capital repatriation and profit remittances. The Authority may authorize the reinvestment of eligible profits in the same firm by simple resolution. This new investment will be subject to the conditions stipulated in the original investment contract or its modifications. However, the investment of these profits in another firm will require a new investment contract.[53]

More difficult problems concern profits that are eligible to leave the country yet are derived from foreign investments that were made before the existence of the new Law and in firms which have not opted to be under the Law. The Statute is unclear but the weight of opinion, including that of functionaries acting within the

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the United States with which to manufacture vehicles in Argentina. The contention that this equipment was obsolescent has never been proven.

50. Investment Law, art. 10(a).
51. Investment Decree, art. 46.
52. Investment Law, art. 1(a)(4).
53. Investment Law, art. 14, ¶ 1.

Authority and charged with administering the Law, indicates that authorization is necessary to reinvest in the same firm but that no investment contract is required. Should this indeed be the Authority's policy, the question will remain sufficiently open to permit a bureaucratic reversal at any time. The treatment would, thus, be the same as that applied to a firm that reinvests its eligible profits under its investment contract. In both cases a contract will not be required but authorization will be. Conversely, investing these profits in a different firm or activity would require a contract with all that it implies.[54]

The treatment accorded existing investments is of fundamental importance both because of its dollar dimensions and because these investors have the right to remain outside the ambit of the Law and pay a penalty tax on remittances. Significantly, most investors are postponing decision on this option question. Meanwhile, the Authority confirms that failure to obtain authorization for reinvestment will mean the loss of repatriation and profit transfer rights based on the amount reinvested regardless of whether or not the enterprise is subject to the Law.[55] If the Authority should require the negotiation of investment contracts for profit reinvestment by firms not under the Law, an anomalous situation will develop: these firms will find a part of their foreign capital investment subject to the Law and to an investment contract while another part would not be so subject. At the very least, this represents an additional accounting headache if not the means by which the government will be able to eventually force recourse to the option for the entire foreign investment.

An interesting interpretation by the Authority, and one favorable to the investor established in Argentina prior to the enactment of the Law, holds that for such firms no percentage limit of registered capital will apply in determining the profit amount eligible for reinvestment, as is the case for firms subject to the Law. The Authority can take this position because the Law does not qualify its principle that profits derived from foreign investments

54. Klein, *El Règimen Legal de la Radicacion de Capitales Extranjeros,* 1 DERECHO EMPRESARIAL 6, 15 (Buenos Aires, 1974). Duggan, *supra* note 23, expressed the same opinion and indicated the position of the Authority as revealed in several conversations with its members.

55. Investment Law, art. 14 (last ¶), art. 30.

and eligible for transfer abroad may be capitalized as an additional foreign investment.[56] Profit remittances from investments made prior to this Law are subject to a limitation and, thus, fall in their entirety within the strictures of the provision.

Another position of the Authority on this subject is likely to generate controversy; they insist that all reinvestments, that is, capitalizations of retained earnings, made by existing firms since December 15, 1973, when the Law became effective, for which previous authorization was not sought,[57] have lost the right to be computed as a base for profit and capital transfers. This is a strong stand since neither the Law nor the Decree provides much guidance for reinvestments made by previously existing firms. Furthermore, the Decree was not published until February 1974 and registration forms still had not been released in mid-July of the same year. Obviously, any firm planning henceforth to capitalize transferable earnings should as a minimum send a certified letter to the Authority indicating its intention and seeking authorization.

The Argentine treatment of profit reinvestment is in two respects more restrictive than that of Decision 24.[58] In defining profits eligible for transfer and, thus, eligible for reinvestment, Argentina establishes a percentage limitation based on the amount of previously authorized foreign capital invested. Profits exceeding the stipulated percentage become permanently Argentine capital without transfer rights.[59] The Andean Code also limits the percentage of profits eligible for transfer abroad but unlike Argentina poses no limit on the amount or percentage that may be reinvested and receive treatment as a foreign investment. Like Argentina, previous authorization and registration is required.[60] Although the second difference may seen insignificant, it involves a question of bureaucratic interference. The Andean measures permit member countries to allow the reinvestment of up to five per cent of profits in the same firm without previous authorization. The same right

56. Investment Law, art. 1(a)(5).
57. Investment Law, arts. 4, 14 require previous authorization of all investments.
58. Decision 24, arts. 12, 13.
59. Investment Law, art. 15.
60. Decision 24, arts. 1, 12, 37.

was incorporated in the Draft Argentine Law only to disappear in the enacted version.[61]

Apart from the five per cent allowance in the Andean Pact countries, both Codes are identical in requiring authorization and in leaving it within the discretionary authority of the appropriate body in the Andean countries to limit the permissible sum as it sees fit. The Argentines are more explicit in granting this power. Not only do they limit reinvestment to profits eligible for transfer abroad, but in another article the Authority is given the power to limit the amount reinvested to a percentage of profits.[62] A limitation as a percentage of profits rather than capital may have been unintentional since throughout the Law and Decree, percentage limitations are related to capital. The change may have been introduced to give the Authority a basis upon which to limit the reinvestment of profits of a firm, which has grown unwelcome in Argentina or whose expansion is considered undesirable for some reason. Limiting reinvestment possibilities to less than the amount eligible for transfer abroad presents an affected investor with the choice of sending his eligible earnings home or leaving them in the Argentine firm as national capital not included in its foreign capital base.

Reinvestments will be registered in the currency in which the original investment was registered or a similar currency.[63] Similar currency is presumably any currency freely convertible into the currency in which registration was effected. The conversion from earnings stated in pesos to the registration currency will be made at the closing selling exchange rate applicable at the date of authorization at the Banco de la Nacion Argentina, the government-owned commercial bank.[64] This rate and those specified for other purposes in the Law have remained fixed at just below ten pesos to the dollar since the end of 1971. This compares with a black or free market rate, which has ranged from slightly over the official rate to over fifteen pesos to the dollar. Special rates combined with

61. Decision 24, art. 13. Argentine Executive Draft Foreign Investment Law, art. 14, *introduced* June 14, 1973 [hereinafter cited as Draft Investment Law]; DIARIO DE SESIONES, (June 14, 1973).

62. Investment Law, art. 14, ¶ 2.

63. Investment Law, art. 14, ¶ 2.

64. Investment Law, art. 14, ¶ 2; Decree, art. 56(e).

rebates for the exchange of dollars received in payment for certain designated non-traditional exports produce an effective exchange of over seventeen pesos to the dollar.[65] Obviously, the low official rate benefits the foreign investor who is, thus, allowed the registration of more dollars for a given peso amount.

A number of problems related to the reinvestment of profits will be dealt with later in this article. These include questions involving: (1) profits in excess of those that may be transferred abroad or reinvested, so-called nationalized profits; (2) whether distributed earnings or undistributed retained earnings not included in stated capital serve as the basis for computations under the Law; (3) loss of transfer or reinvestment rights for failure to comply with certain prescribed time limitations; and (4) the effect of enjoying the benefits of industrial promotion laws or incentive plans.

B. *Capitalization of Technology*

Although there is some difference of opinion, it is generally assumed that the list of classes of foreign capital to which the Law applies is exhaustive. The main concern is with the question of capitalizing—as a foreign investment—rights to future payments for patents, trademarks and perhaps know-how; in other words the query centers on the capitalization of a lump sum representing the value of transferred technology. In general, the new Argentine company law permits the capitalization of such intangible rights when their value can be determined.[66] Without entering into the sometimes byzantine mechanics of actually achieving this result, it may be affirmed that many companies have successfully included the value of patents and trademarks, and perhaps know-how, in their stated capital.

Most relevant to present considerations, Argentina has in the past explicitly allowed foreign investors to capitalize certain intangible rights. The 1971 foreign investment law list of items capitalizable as foreign investments is basically identical to that of the new Law except it admits as capital certain foreign investments of "intangible assets" *(bienes inmateriales)* as provided in specific

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as reported in La Nación, June 2, 1974, at 3, and Buenos Aires Herald, June 9, 1974, at 3.

66. Law of April 3, 1972 (No. 19,550), Concerning Argentine Companies, arts. 40, 187, [hereinafter cited as Company Law].

legislation. The Decree issued by President Lanusse under this law prescribes that "[t]he evaluation of intangible assets included in the investment will be accomplished in accordance with the provisions of Law No. 19,231 and its regulations."[67] The law referred to is the 1971 statute regulating licensing contracts and technology transfers. Although a new draft technology law is being considered by Congress, the 1971 law is still in effect at the date of this writing. The latter not only permits the investment by means of the payment of a predetermined global amount, but also favors such investments by exempting them from otherwise applicable stamp taxes.[68] Further, the law favors the purchase and capitalization of imported technology by local capital companies as defined in the law regulating state purchases and contracting.[69] Moreover, the National Development Bank (Banco Nacional de Desarrollo) is directed to establish special credit lines to facilitate these purchases.[70]

The Registro Nacional de Contratos de Licencias y Transferencia de Tecnologia (the "Registro") created under this 1971 Technology Transfer Law is responsible for the approval and registration of contracts involving the importation of technology. In the past, the Registro has contemplated and permitted the capitalization of the widest array of technological rights. Its fifteen-page form for the registration of technology transfer contracts calls for disclosure of previously capitalized intangibles such as "patents, trademarks, technical assistance, know-how, models and industrial designs, used machinery and equipment . . . royalty debts, etc."[71] Officials of the Registro have indicated that until the question is clarified, any such capitalization of intangibles will be

67. Lanusse Investment Law, art. 2(e); Lanusse Investment Decree, art. 2(g).

68. Lanusse Technology Law, arts. 10, 11.

69. The applicable definition of a local capital company is found in the Buy National (*Compre Nacional*) Law and Decree, discussed *infra*. In most cases 51% of a company's total capital and voting shares must be in the hands of natural persons domiciled in Argentina and 80% of management must be so domiciled. *See* Law of Dec. 23, 1970 (No. 18.875), Concerning Buying Nationally, arts. 7, 11 (Argen.) [hereinafter cited as Buy National Law]; Decree of Dec. 23, 1970 (No. 2.930) [hereinafter cited as Buy National Decree].

70. Lanusse Technology Law, art. 11.

71. Application for Registration of Technology Contract obtained by author from INTI, 5-6.

denied.[72] However, the Draft Technology Transfer Law currently under congressional consideration would completely reverse previous policy. It specifically forbids the capitalization of any form of imported technology by any company regardless of ownership except for cases that the Authority determines to be of particular importance to the country and which in turn must be approved by the Executive Branch.[73]

Thus, the inspiration for the Draft Technology Transfer Law appears to have crossed the Andes. The principles embodied in the Argentine Draft Technology Transfer Law are included in Decision 24, which provides that "[t]he contribution of technological intangibles shall give a right to the payment of royalties upon previous authorization by the competent national organism, but it may not be computed as a capital contribution."[74]

Although the Argentine drafting effort leaves the matter open for speculation, its list of items subject to capitalization as foreign investments appears exhaustive. It would be insulting to the legislators involved to suggest that they were unaware of the question of intangible technological rights since they are treated specifically in the Andean Code, in the previous Argentine foreign investment law and decree and in both the current and projected technology laws. The draftsmen of the Law may have considered it sufficient to provide that the Statute does not cover contracts for technology use, transports or insurance.[75] The problem is that the exclusion of technology contracts from the ambit of the Law does not tell us unambiguously what to do with an imported patent or trademark. Consequently, a final answer must await the sanctions of the new Draft Technology Transfer Law. It is, however, abundantly clear that the Law contemplates the continued use of the fee or royalty payment system as a means of financing imported technology regardless of whether the capitalization of these rights is to be per-

72. Author's July 1974 conversations with INTI economist Dr. Daniel Chudnovsky.

73. Draft Technology Law prepared by the Ministry of Economy under Resolution 665/73 and entitled: Law for the Transfer of Technology from Abroad, art. 14 (undated and submitted to Congress during early 1974) [hereinafter cited as Draft Technology Transfer Law].

74. Decision 24, art. 21.

75. Investment Law, art. 1(c).

mitted.[76] In fact, the last article of the Law directs the President to submit a bill to Congress regulating the sums that may be remitted abroad as royalties or as fees for technological services. Thus, the Draft Technology Transfer Law goes far beyond the dictates of the Investment Law in covering the entire field of imported technology.

One reason for dwelling on the subject of capitalization of intangible rights is the now omnipresent problem of inflation. Capitalizing technological contributions in terms of dollars, or any other convertible currency, and permitting a fixed percentage of such an amount to be transferred abroad as dividend and capital repatriation provide no protection against worldwide inflation since the dollar total remains invariable. National inflation assumes a neutral form as far as transfers are concerned and as long as the applicable local dollar exchange rate climbs in unison with the rate of local inflation. The investor does enjoy some protection against devaluation of the local currency in terms of dollars, but here, as in the case of national inflation, he must always earn enough pesos to buy the number of dollars that he is permitted to transfer. Capitalization, if permitted, might seem preferable to the investor in spite of the inflation problem because, first and most obviously, it increases the registered capital base for computing transfers. Additionally, in an indirect way to be explained later, the new Law prohibits the tax deduction as a business expense of royalties paid by an Argentine subsidiary to its foreign parent.[77] However, if there exists a reasonable relation between the applicable exchange rate of the local currency and the worldwide value of the dollar, and if local inflation generally parallels the world rate, the royalty system provides protection. If royalties are computed as a percentage of sales, as prices rise the percentage will increase.

IV. DEFINITIONS AND CLASSIFICATIONS

A. *Investment Categories*

The Argentines chose to borrow intact the tripartite corporate classification system used in Decision 24. The labels were changed in the definitional section and the wording was slightly modified,

76. Investment Law, arts. 26, 36.
77. Investment Law, art. 26, ¶ 2.

but the show of originality was somewhat in vain because elsewhere in the Law and in the Decree the draftsmen forgot their new terminology. They begin by selecting as defined terms, "Foreign capital enterprises," "Enterprises with foreign and national capital participation" and "National capital enterprises"[78] but by the end of the Law refer to "national, mixed or foreign enterprises."[79] This is the irresistibly simpler Andean language,[80] which will be used at random in this study.

Foreign enterprises are those with less than 51 per cent national capital and more than 49 per cent foreign capital. A fraction over 49 per cent foreign capital, although presumably leaving control in national hands, produces a foreign enterprise. Firms with 51 per cent or more national capital are also considered foreign enterprises when the legal decision-making power and the effective technical, administrative, financial and commercial management are in the hands of foreign investors.[81] The Decree adds the language about effective power, which was apparently forgotten in the Law since similar language is included in the definitions of the other two categories of firms.

Mixed enterprises are those whose national capital, whether private or state, ranges from 51 per cent to 80 per cent, which allows foreign participation of 20 per cent to 49 per cent. The borderline cases, 49 per cent foreign and 51 per cent national as well as 20 per cent foreign and 80 per cent national, fall in the mixed category. The national capital must possess effective legal decision-making power as well as prove that national investors exercise management control.[82] National enterprises are those whose national capital exceeds 80 per cent, and thus limits foreign investor participation to under 20 per cent. Again the national capital must have real control.[83]

Some Argentine commentators question the need to import the three-way classification system since the benefits have yet to be proved in the Andean countries; they point out that this conflicts

78. Investment Law, art. 2.
79. Investment Law, art. 36.
80. Decision 24, art. 1.
81. Investment Law, art. 2(a); Decree, art. 1(c).
82. Investment Law, art. 2(b).
83. Investment Law, art. 2(c).

with Argentine legal tradition, which has always classified firms with majority local ownership as Argentine.[84] It is true that the new categories created a number of doubts; however they also serve as the basis for several interesting distinctions both in the Andean Code and in its Argentine offspring. In computing the percentages of capital necessary to classify a company, the Decree provides that the calculation will be based exclusively on voting shares with decision-making power.[85] This raises a question about the treatment of non-voting preferred shares, which must be permitted to vote in certain situations such as upon default in the payment of dividends.[86] Following the literal terms of the Decree, a company could have majority foreign ownership expressed in preferred shares and be considered national. This may, indeed, be the result intended by the Decree draftsmen since Argentine corporate law does not allow for the existence of non-voting shares other than the described species of preferred stock. This is the only conclusion that gives meaning to the Decree provision.

An Argentine lawyer has suggested that from a national point of view, this literal reading of the Decree may be desirable, especially with respect to preexisting firms.[87] By permitting foreign investors to hold non-voting preferred shares in proportions greater than those used to determine the classification of a firm, he suggests that a watering process may occur which could facilitate a gradual transfer of ownership to Argentine hands. The capitalization of earnings as preferred shares would reduce the book value of all the company's stock on a per share basis and would, thus, make voting shares more accessible to the Argentine investor. The manifest policy of the Government of achieving maximum national control over existing firms operating in Argentina would be advanced by

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84. Klein, *supra* note 54, at 8; Duggan, *supra* note 23.

The question of assigning nationality on the basis of ownership and/or control to companies incorporated in Argentina has been the subject of detailed study. *See* S. BIOCCA, NACIONALIDAD DES LAS SOCIEDADES MULTINACIONALES Y EXTRANACIONALES 21 (V. De Zavalia, ed., Buenos Aires, 1974) ; E. ZALDIVAR, RÉGIMEN DE LAS EMPRESAS EXTRANJERAS EN LA REPÚBLICA ARGENTINA: LA EXTRATERRITORIALIDAD, LA NACIONALIDAD Y EL SISTEMA DE LA LEY DE SOCIEDADES COMERCIALES (Buenos Aires, 1972).

85. Investment Decree, art. 2.

86. Company Law, arts. 217, 244, ¶ 4.

87. Dr. Jorge Eduardo Bustamante in conversations with the author.

reducing the cost of entry for local investors, especially at a time when sufficient capital does not exist to meet all new investment needs.

The validity of this idea, however, depends upon the existence of a direct relation between the dilution of non-voting preferred shares and the market price of voting stock as well as the willingness of the foreign investor to divest a portion of his voting capital at a price reflecting the increased number of outstanding shares. Furthermore, if the earnings capitalized are real and are indeed put to work, dilution on a per share basis should not occur; more shares would be outstanding, but they would reflect a correspondingly larger total capital base.

Rene Blondeau, head of the Foreign Investment Registration Office, has affirmed that the Government is aware of this confusion but has not yet decided how to deal with it.[88]

B. *Chain Ownership*

The definitions of the Law do not aid in determining how to classify firms that have corporate shareholders—both foreign and national shareholders—although there are indications that a reasonable and realistic attitude may be anticipated from the Authority.[89] A simple example shows that the accumulation of percentages system produces results that clash with reality. Firm *C* is 70 per cent owned by firm *A* and 30 per cent by firm *B*. Firm *A* is 51 per cent nationally owned and 49 per cent foreign owned and is thus a mixed company with control in the hands of Argentine investors. Firm *B* is a 100 per cent foreign owned firm. *C*, upon the accumulation of percentages, is 64.30 per cent foreign owned and 35.70 per cent nationally owned. The foreign component of *C* coming from *A* is 49 per cent of 70 per cent or 34.30 per cent, which when added to the 30 per cent of *C* owned by *B*, all of which is foreign, results in a 64.30 per cent figure for the foreign composition of *C*. In reality, however, *A* controls *C* with 70 per cent ownership and *A* is controlled by national investors with 51 per cent ownership. Nevertheless, *C* would have to be considered a foreign enterprise as opposed to a mixed enterprise. Other examples produce

88. Interview with Dr. Rene Blondeau, Buenos Aires, April 19, 1974.
89. *Id.*

the opposite result: the corporation at the end of the chain may show a lower percentage of foreign ownership than the corporation controlling it. Decision 24 does not indicate the appropriate method for adoption in the Andean countries although the question has come up for discussion in meetings of the Subregion's Governing Board, the *Junta de Cartagena.*

Unfortunately the Argentine Law does not explicitly provide for what would seem the most logical solution: each corporation should be classified in the same category as the company controlling it and so on down the line. The category would, of course, always depend upon effective control as well as ownership proportions.

C. *Distinctions Based on Classification*

The Argentine statutory scheme makes the following six distinctions based on the classification system: (1) All investments of foreign capital must be authorized by means of an investment contract negotiated with the Authority. Investments in national enterprises need no further approval, but those in mixed enterprises must be approved by the executive branch while those in foreign enterprises require congressional approval;[90] (2) Prohibited sectors are clearly off limits for foreign and mixed companies. The Law and its Decree disagree whether national enterprises with foreign participation may invest in these sectors;[91] (3) When more than one national or mixed enterprise, as opposed to foreign firm, is interested in a particular investment, the Authority is directed to give preference to the national or mixed company that commits itself to a fade-out program or guarantees to export an agreed part of its production;[92] (4) Limitations on access to local credit are applied to foreign enterprises only;[93] (5) Foreign investments in foreign and mixed enterprises, which were made before this Law became effective and which do not opt to be covered by the Law are subject to a graduated tax on profits remitted abroad. Profits remitted to a foreign investor in a national enterprise are not sub-

90. Investment Law, art. 4.
91. Investment Law, art. 6(c); Decree, art. 24.
92. Investment Law, art. 7.
93. Investment Law, art. 17; Decree, arts. 30-33.

ject to this tax;[94] and (6) Certain restrictions on external loans apply only to foreign enterprises.[95]

D. *Investors*

The Law never precisely defines "foreign direct investment" as does the Andean Code. It achieves a patchwork definition by pronouncing itself applicable to the five types of foreign direct investment listed.[96] It then defines three types of companies according to percentages of capital held by foreign or national investors. Finally foreign investor and national investor are introduced as defined terms, although once again the terminology is sometimes forgotten in the course of the legislation.

A foreign investor is any natural person or legal entity domiciled outside of Argentine territory that owns capital to be invested or already invested in a defined company.[97]

A national investor is any natural person domiciled in Argentina, the Government in any of its forms or any legal entity domiciled in the country whose capital is owned by *natural persons* domiciled in the country who neither directly nor indirectly represent foreign interests.[98] It is not absolutely clear whether mixed enterprises are excluded from the definition of national investor by the reference to the representation of foreign interests. Although, a mixed enterprise is by statutory definition controlled by local investors, it could be considered an indirect representative of foreign interests.

Domicile, rather than Argentine citizenship, seems to be the requirement although this reference to the representation of foreign interests, if taken literally, would negate the domicile principle. It indicates, however, that the national investor may not directly or indirectly represent foreign natural persons or legal entities but does not mention the question of *their* domicile. This is probably a drafting error since it would make the initial references to domicile rather meaningless. Domicile is defined in Argentina

94. Investment Law, art. 20.
95. Investment Law, art. 25.
96. Decision 24, art. 1; Investment Law, art. 1(a).
97. Investment Law, art. 3(a).
98. Investment Law, art. 3(b).

as "the place of principal residence and the principal place of doing business."[99]

The Andean Code defines national investors in terms of citizenship rather than domicile and includes foreign natural persons who have an uninterrupted residence of one year in the country and who renounce the right to transfer capital and profits outside of the country.[100] In both cases, a foreigner is thus permitted to do business as would a national although Argentina does establish some stiff nationality requirements in certain cases for persons in high management positions.[101]

The Argentine definitional structure provokes one curious but quite real problem. Argentina is an immigrant country with much of its immigration relatively recent.[102] Anyone familiar with the country is aware of the strong ties that often exist between its inhabitants and the exterior. Not only have many native born Argentines lived part of their lives outside the country and returned, but many have important family connections elsewhere in the world. Furthermore, the amount of Argentine wealth that has fled the country to be invested abroad is reputed to be considerable.[103]

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99. Investment Law, art. 3(c); C. Civ., art. 89 (Argen.).

100. Decision 24, art. 1.

101. *See* note 138 *infra* and textual discussion of this article under heading: *Industrial Promotion Plans* (VI.B *infra*).

102. Of Argentina's total 1914 population of somewhat less than eight million, almost 30% were born outside the country. No other major country has had a higher proportion of immigrants in its total population. The proportion of immigrants in the country's growing population remained high, at least into the 1930's. *See* J. ROMERO, A HISTORY OF ARGENTINE POLITICAL THOUGHT 169 (1963) (originally published in Spanish); C. SOLBERG, IMMIGRATION AND NATIONALISM: ARGENTINA AND CHILE, 1890-1914 35-36 (1970).

103. The amount of Argentine capital that has left the country can not be calculated because "these transfers are not captured as such in the balance of payments statistics of the Central Bank. In any case, some not very precise inferences may be drawn from an analysis of payments received from abroad in Argentina for financial services. These payments reflect the repatriation of profits and interest from exported capital, but the amount of such capital cannot be determined with precision analyzing the ups [and] downs of the flow since these sums may also be accumulated in the exterior rather than repatriated." Profits and dividends reached a 1961 high of $64 million and have since been extremely low while payments for interest have grown from $11 million in 1965 to $26 million in 1970. CIMILLO, *supra* note 17, at 172-73.

Thus arises the not improbable hypothetical case of the Argentine citizen domiciled in Buenos Aires with a fortune in Switzerland and his divorced wife and his daughter resident in Paris. He has decided to settle down for good in Argentina and would like to put his fortune to work at home, but he still needs to send some of the proceeds to France. According to the Law, to transfer earnings outside the country, one must be a foreign investor, which requires domicile outside of Argentina. That the investment consists of capital brought from outside is not sufficient. Obviously our hypothetical gentleman could resort to the subterfuge of using a dummy individual or corporation abroad and classify him or it as the foreign investor. But aside from the legality of the method, the investment would be subject to all of the controls imposed under the new Law in return for the right to transfer some part of his earnings abroad. In practice he might be expected to bring his money in via the purchase of pesos on the black, or as it is euphemistically termed, parallel market, and remove convertible currency by the same route. In this respect, the new legislation appears to encourage illegality and discourage the return home of legitimate Argentine capital.

In this case the Andean Code did not do much better than the Argentine Investment Law. Decision 24 defines capital as contributions by foreign persons or companies entering from abroad and foreign investors simply as owners of a foreign direct investment.[104] A Chilean commentator concludes from this that a citizen of an Andean country investing funds transferred from abroad in his country is quite simply not subject to the dictates of Decision 24,[105] probably not the result the Andean draftsmen had in mind. He

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The then Minister of Finance, *(Hacienda y Finanzas)* Juan Alberto Quilici, declared in 1972 that $8 billion in Argentine capital had fled the country to be invested abroad. The statement had political implications because the government was currently issuing dollar denominated bonds in an effort to bring these funds home. The newspaper reports of his comments do not explain how this calculation was made or if it covered a given period of time or represented an historical accumulation. *See,* Clarin, Jan. 27, 1972. Furthermore, Quilici was at the time being accused of the crime of covering up a continuing exodus of Argentine capital. Clarin, July 15, 1971, Aug. 4, 1971.

104. Decision 24, art. 1.

105. Casanova, *Anotaciónes a la Aplicación de la Decisión 24: El Caso de Chile,* 15, DERECHO DE LA INTEGRACIÓN 239, 248 (1974).

suggests that the transfer would be subject to national exchange control rules.

A reverse version of the last situation also springs from the Argentine definitions. An Argentine permanently resident outside of Argentina is not domiciled in the country and is, therefore, a foreign investor under the Law should he wish to invest in Argentina. This may be another undesirable result in respect of the need to attract lost capital. Worse, the Law makes him a foreign investor subject to its terms even when he is not interested in transferring earnings or capital abroad. This is not to criticize the selection of domicile rather than citizenship as the basic ground rule; however provision might have been made for these anomalous situations. An Argentine citizen or a foreign investor actually living in the country is more likely to be committed to the national well-being than is an absentee owner whose interest does not transcend corporate balance sheets. Furthermore, a citizenship standard hints of discrimination against immigrants resident in the country.

The problems do not stop here. It will be remembered that in defining national investor, the second tier of ownership of a national company is limited to natural persons. This is obviously intended to avoid complicated chains of corporate ownership, which might facilitate the hiding of the real source of capital and decision-making. On its face, however, the provision results in the ridiculous predicament of the absolutely pure Argentine firm with a few shares of its stock in the hands of another unquestionably Argentine firm. Technically the first company could not be considered a national investor although it is difficult to imagine its being considered a foreign investor. The Authority does not intend to apply this provision literally and anticipates searching back through a layer or two of corporate ownership before disqualifying firms for not being national.[106] This is fortunate since, to cite an example, even small Argentine family firms are known to own a few shares of other small Argentine family firms.

E. *Legal Form of Investment*

All foreign investments must be represented by nominative registered "shares, quotas or capital participations" transferable only

106. Blondeau, *supra* note 88.

upon inscription in the corporate records and with previous authorization.[107] Multiple voting is forbidden and the shares may not be transferred for a period of five years after the initiation of the project in question except to national investors upon authorization.[108] Although neither the Law nor the Decree explicitly says so, new investments must obviously take a corporate form. Old investments opting to come under the Law are expressly required to do so. The foreign-owned branch is doomed except for banks, finance and possibly insurance companies.[109]

The requirement that investments under the Law take a corporate form causes a conflict with Argentina's newly modernized Company Law, which provides that a commercial company *(sociedad comercial)* requires two or more founders and participants.[110] In fact, a company's 100 per cent ownership of another may entail the automatic dissolution of the subsidiary. The one-man corporation does not exist in Argentine law, thus, the foreign corporation seeking to create a wholly owned Argentine subsidiary may have to seek a nominal partner. Presumably, the other shareholder could be another foreign corporate entity or individual, perhaps an officer or director of the investing corporation or another of its subsidiaries.

Bearer shares representing foreign investment in existing firms

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107. Investment Law, art. 9; Decree, art. 11. Registration in the corporate records is a requirement in conformity with Argentina's 1972 Company Law, art. 213.

108. Investment Law, art. 9; Decree, art. 11.

109. This is the only conclusion to be derived from the language of art. 9 of the Investment Law, which requires investments to be represented by shares, quotas or capital participations and refers to shareholder registration in company books. This intention is confirmed by the Decree's treatment of preexisting investments. With one exception, art. 16 requires branches of foreign companies and all firms, defined in the classification of enterprises provisions of the Law, to convert themselves into types of companies envisaged by the country's legislation. Art. 1 of the Company Law limits the forms of commercial association to those described therein. These are the predictable civil law entities: general partnership *(sociedad colectiva)*, limited partnership *(sociedad en comandita simple)*, partnership with capital and service contributions *(sociedad de capital e industria)*, limited liability company *(sociedad de responsabilidad limitada)*, corporation *(sociedad anónima)*, and corporation with majority state ownership *(sociedad anónima con participacion estatal mayoritaria)*.

110. Company Law, arts. 1, 17.

must be converted to nominal form by February 22, 1975.[111] Within the same period the Decree stipulates that foreign branches and other investments, which wish to subject themselves to the Law, must be converted to a corporate or commercial form provided for in Argentine legislation. However, existing banking and other financial entities and probably existing insurance operations are excepted from this requirement.[112] Any doubt about the right of foreign financial entities to continue operating as branches in Argentina should be resolved by the new Financial Institutions Law, which was passed shortly after the Foreign Investment Law and which in several of its provisions was intended to complement the latter legislation. This statute provides that private financial entities must be organized as stock companies *(sociedades anónimas)* except "[t]he branches of foreign entities which must have a representation in the country endowed with powers sufficient to comply with Argentine law. . . ."[113]

The one-year time period for conversion to company form is an anomaly since no time limit is imposed on existing investors who may wish to come under the Law rather than pay the penalty tax on profit remittances.[114] Here, however, it is said that investors who wish to be covered by the Law have to convert to a Company Law form within a year. Not explained is the predicament of the branch that decides after more than a year to come under the Law but has not yet incorporated.

F. *Special Purpose Company Classifications*

Variations on the classification theme show up in other Argentine legislation in which questions of foreign ownership or control are considered important. These include a number of industrial promotion incentive laws, which are currently issuing from Congress and which the Foreign Investment Law indicates are to be treated with special interest;[115] namely, previous industrial promo-

111. Investment Decree, art. 12.
112. Investment Law, art. 6(c)(3); Decree, art. 16.
113. Law of Dec. 18, 1973 (No. 20.574), Concerning Financial Entities (Argen.), art. 11(a) published in *Boletín Oficial*, Jan. 4, 1974 [hereinafter cited as Financial Entities Law of 1973] which is a modification of Law of Jan. 15, 1969 (No. 18.061).
114. Investment Law, art. 20.
115. Investment Law, arts. 1(a)(1), 5(a); Decree, art. 23.

tion laws as well as banking, securities, state purchasing, technology transfer and other legislation. Although the substance of some of these laws will be treated *infra*, it may be noted that similar key language, even in statutes enacted at the same time, does not always receive the same definition. "National enterprises" in the Industrial Promotional Law[116] and "national entities" in the Amendments to the Financial Entities Law,[117] both enacted during the same month as the Investment Law, are defined by different classification standards. In some cases the domicile standard is replaced by citizenship as a factor in the definition of national enterprises; this has theoretical constitutional implications when it involves discrimination on the basis of citizenship status.[118]

V. INVESTMENT APPROVAL

Like the Andean and many other investment codes, the Argentine Law requires the foreign investor to obtain previous authorization from the Application Authority and subsequently register the amount of his investment with the government. If the application is made on behalf of a national enterprise, approval is obtained by means of an investment contract between the Authority and the foreign investor,[119] although at least one commentator has complained that the provision is unclear because it fails to stipulate who will give final approval to this contract.[120] A careful reading of article 4 of the Law and an understanding of the logic of its structure confirms the intention of the draftsmen to create a graduated approval mechanism based on the amount of foreign participation involved in a given enterprise. Thus, a contract involving a mixed enterprise requires Executive Branch approval; one involving a foreign enterprise must obtain congressional approval.[121]

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116. Law of Dec. 10, 1973 (No. 20.560), Concerning Industrial Promotion (Argen.), arts. 16-18 [hereinafter cited as Industrial Promotion Law].

117. Financial Entities Law of 1973, art. 10.

118. Industrial Promotion Law, art. 17(c); CONSTITUTION DE LA NACIÓN ARGENTINA arts. 14, 20 (1853, amended 1957) (Argen.) [hereinafter cited as CONST.].

119. Investment Law, art. 4.

120. Bruzzon, *La Ley de Radicaciones Extranjeras 20.557,* 21 EL DERECHO 4 (1974).

121. Investment Law, art. 4. This view of the graduated approval process is also expressed in a mimeographed letter for circulation to clients prepared by the

Requiring congressional approval for all investments involving a "foreign enterprise" regardless of the dimensions of the investment is of questionable wisdom. Perhaps a given dollar amount should have been established below which the Authority or the Authority in conjunction with the President might have been entrusted with its approval. An obstacle as imposing as a special law of Congress may frighten off all but the heartiest and especially those small investors, which least menace Argentine sovereignty. This threat could not have been the textbook case of the small initial foreign equity investment out of which mushrooms a huge wholly owned firm built on a foundation of local credits and profit retention since this Law limits access to local and foreign credit and restricts profit reinvestment. Perhaps the draftsmen were caught in the trap of their own three-way logic. Conceivably, Congress will devise a mechanism to streamline its own approval process. Although the Andean Code appears simpler on its face since the only authorization called for is that of the "competent national organism," the national mechanisms of the Subregion's Member States may be worse than cumbersome.[122]

Further, the Decree provides that the Application Authority shall be the State Secretary for Economic Programming and Coordination within the Ministry of Economy.[123] Its staff has principally come from the Secretariat for Government Planning and Action, which implemented the previous foreign investment law within the same Ministry.[124] Articles 34-48 of the Decree are largely devoted to the functions and prerogatives of the Authority, which include negotiating investment contracts, analyzing the financial condition of potential investors, seeking the advice of other governmental entities, receiving and analyzing the responses of potential or actual Argentine competitors and generally administering and enforcing the Law.[125] As a reminder that the control of foreign investment must be balanced with Argentina's need to obtain external capital, the Authority is instructed to make investment pro-

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Buenos Aires law firm M. & M. Bomchil, at 1, back, Dec. 1973, and by Klein, *supra* note 54, at 15.

122. Decision 24, art. 2. *See* Lacey, *supra* note 18, at 583-84.

123. Investment Decree, art. 34.

124. Lanusse Investment Decree, art. 8.

125. Investment Decree, arts. 37, 40, 42, 43, 44, 46, 48.

motion plans known abroad and to negotiate the participation of potential foreign investors in specific priority projects.[126]

VI. Requirements, Priorities, Preferences and Prohibitions

A. *Requirements*

The Authority is to be guided by the Law and its Decree in the negotiation of investment contracts and the authorization of proposals. The Law speaks in terms of requirements, priorities, preferences and prohibitions while the Decree adds a number of scattered provisions. Although the result is disorganized, it gives the government virtually absolute flexibility in negotiating most investment terms. The required conditions are vague enough to be satisfied with either a few well placed words of good intentions or by tightly drafted standards of specific and invariable application. All will depend upon the interest of the Government in a particular investment proposal assuming that it does not fall within a specifically forbidden sector or category. This flexibility increases the chances of the Law for survival in the absence of Juan Perón. Priorities are equally vague and, like preferences, are only mandatory in the event that the Authority should so determine; moreover priorities sometimes repeat the essence of requirements. Most carelessly, the article indicating preferences is included in the section entitled "Prohibitions."

B. *Industrial Promotion Plans*

Article 5 of the Law requires that investment contracts must substantially insure that the investment take place in activities and geographic zones determined by the Executive Branch to be of priority importance. The Decree requires congressional activity by adding that the sectors and zones referred to are those indicated in national development and industrial promotion plans, which may emerge from Congress.[127]

This introduces a key factor into the discussion: the role of the foreign investor in Argentina's industrial promotion programs. Past or future plans giving special advantages to foreign capital

126. Investment Decree, arts. 35(c)-(d).
127. Investment Decree, art. 23.

have been expressly outlawed by the new Law, which further provides that foreign investors in firms, which receive incentive benefits under promotion laws, lose their right to remit profits and repatriate capital as long as those benefits continue.[128] The Decree attempts to limit the application of this provision to foreign enterprises and permits up to 49 per cent foreign participation in mixed or national companies receiving incentive benefits without the loss of transfer rights.[129] This would deprive the provision of meaning since the promotion plans currently coming into effect expressly exclude foreign enterprises from their benefits. Furthermore, if foreign investors in mixed or national firms are allowed to make transfers based on the Decree's provision while the firms are receiving promotional benefits, it is conceivable that a judicial complaint will result since an executive decree cannot abrogate an expressly worded act of Congress.[130]

Investments intended for the modernization or expansion of existing enterprises are exempted by the Decree from the need for an executive declaration of priority geographical status.[131] The priority system, to the extent that it is under executive control, involves total flexibility since the President can be expected to dictate his wishes to the members of the Authority in the form of priority determinations. The emerging system may be less arbitrary than this, however, as Congress has already enacted a new blanket Industrial Promotion Law under which a general Decree[132] has appeared. The latter has been followed by specific decrees issued by the Executive. The Industrial Promotion Law, which was enacted at almost the same time as the Foreign Investment Law, is intended to promote the establishment, expansion and modernization of industrial activities, geographic decentralization, local

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128. Investment Law, arts. 18-19.

129. Investment Decree, art. 8.

130. CONST., art. 86(2) provides that the President of the Nation "issues such instructions and regulations as shall be necessary for the execution of the laws of the Nation without altering their spirit with regulatory exceptions."

131. Investment Decree, art. 36.

132. Industrial Promotion Law and Decree of Dec. 17, 1973 (No. 719), Concerning Industrial Promotion (Argen.) [hereinafter cited as Industrial Promotion Decree]. These measures replace Law of Oct. 20, 1972 (No. 19.904), Concerning Industrial Promotion (Argen.).

technology development and the consolidation of local industrial ownership.[133]

An ambitious three-year development plan announced at the end of 1973 is closely related to the Promotion Law and ensuing decrees. The plan, which emphasizes increasing exports, calls for direct public investment of five billion dollars during the period and specifies the goals of the Government in each major sector of the economy. Although the role of foreign investment is not spelled out, the emphasis on exports is certain to become a major factor as in the case of the automobile industry described elsewhere in this study.[134]

One of the benefits of the Promotion Law is available only to 100 per cent locally owned firms. The Executive Branch may grant "Industrial Promotion Certificates" to firms that meet standards set in the law. The certificates, valued up to two million pesos or about 200,000 dollars (U.S.) depending on the capitalization of the firm, are valued for ten years in payment of income and sales taxes.[135] The remaining benefits are limited to firms with a majority of national capital and which are otherwise far more restrictively defined than the national and mixed enterprises of the Investment Law. As in the latter, the owners of national capital businesses must be domiciled in the country with actual control identical to their share of the capital. The Argentine-domiciled owners must also possess a "decisive majority" of the capital.[136] No contract or agreement requiring capital or profit transfers to the exterior may exist; the behavior of the firm must indicate that it is Argentine in character; and it must have no dependent ties with public or private entities abroad.[137]

Significantly, the statute provides that to qualify, 80 per cent of the directors and 90 per cent of the professional, technical and executive personnel of a firm must be Argentine citizens domiciled in the country. The Investment Law Decree contains a similar provision,[138] but it does not relate to the definition of firm or inves-

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133. Industrial Promotion Law, art. 1.

134. For a summary of the plan see Business Latin America, Jan. 9, 1974, at 9.

135. Industrial Promotion Law, arts. 2-3.

136. Industrial Promotion Law, arts. 2(I)(f), 16-17(b).

137. Industrial Promotion Law, arts. 17(d)-(f).

138. Industrial Promotion Law, art. 17(c); Investment Law Decree, art. 4.

tor; rather it is a requirement for authorization of an investment already defined as foreign and, therefore, does not affect a local company without foreign interests. The Promotion Law citizenship provision may be important to existing firms that do not opt for treatment under the Investment Law and are, therefore, not subject to its restrictions but do encounter difficulty in their exclusion from future participation in the benefits of the Promotion Law.

As an immigrant country, which has taken pride in giving protection and opportunity to citizen and permanent resident alike, Argentina's citizenship requirements strike at a group of individuals accustomed to being treated as nationals. The Constitution promises that "[f]oreigners enjoy in the national territory all of the civil rights accorded the citizen; they may exercise their industry, commerce and profession, own purchase and dispose of real estate . . ."[139] The immigrant, resident most of his life in Argentina, may discover that his business no longer enjoys the benefits of promotional legislation vital to his competitive survival. (The author is aware of such cases.) This is somewhat more disturbing than the application of a comparable provision as a prerequisite to the establishment of a new business by non-citizens in the country. On the other hand, Argentina allows the immigrant to spend his entire life in the country without ever obliging him to acquire citizenship. In addition, unnaturalized residents are excused from such public obligations as military service. A number of wealthy businessmen may suddenly find it opportune to seek Argentine citizenship or to bow out of management in favor of their locally born offspring.

The Industrial Promotion Law offers qualifying majority owned firms the following possibilities: (1) state participation in capital; (2) medium and long term credits at preferential terms and interest rates including government guarantees when necessary; (3) government guarantees for foreign credits to be used in purchasing capital goods not produced locally; (4) tax exemption, reduction or postponement for periods of up to ten years; (5) state aid in obtaining raw materials and in infrastructure development; (6) subsidies for extra location costs; (7) technological assistance; and (8) exemption or reduction of import duties on imported capital

139. CONST., art. 20.

goods not locally obtainable under reasonable conditions.[140]

That the Foreign Investment Law limits (and the Decree attempts to prohibit) foreign investment in certain sectors[141] will presumably be reflected in sectorial decrees issued by the Executive under the Industrial Promotion Law. Those decrees referred to below incorporate the general provisions discussed unless otherwise noted.

1. *Regional Promotion.*—The blanket Promotion Decree contains provisions intended to discourage further industrial concentration within a 60 kilometer radius of Buenos Aires by excluding offending investors from the benefits of the Promotion Law and by imposing a one-time tax on capital invested.[142] This was followed by a Regional Promotion Decree,[143] which divides the country into very specific zones and quantifies the incentives applicable in each.

2. *Mining.*—An exception to the described pattern of executive decrees issued under the blanket Industrial Promotion Law is the mining industry, which is covered by its own law and decree enacted a few days before the basic statute.[144] The mining statute uses the same language in characterizing national capital but restricts its benefits to firms with over 80 per cent local ownership, that is, firms defined as national enterprises in the Foreign Investment Law.[145] In its nascent stages the Foreign Investment Law reportedly excluded foreign capital entirely from both mining and petroleum.[146] The question whether the denial of benefits offered in the mining promotion law and decree is tantamount to exclusion is beyond the scope of the present analysis.

In spite of this tough stance toward foreign participation in mining, the emergence of more congenial attitudes to foreign investment in this sector of the economy is not unlikely. The area is

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140. Industrial Promotion Law, arts. 3(b)-(i).

141. Investment Law, art. 6(c); Decree, art. 24.

142. Industrial Promotion Decree, arts. 31-34.

143. Decree of Dec. 26, 1973 (No. 922), Concerning Regional Promotion (Argen.).

144. Law of Nov. 20, 1973 (No. 20.551), Concerning Mining Promotion (Argen.) and Decree of Feb. 5, 1974 (No. 443), Concerning Mining Promotion (Argen.).

145. Mining Promotion Law, arts. 4, 6.

146. Business Latin America, June 28, 1973, at 202.

particularly appropriate for expansion since the country imports 400 million dollars worth of mineral products per year while producing only 150 million dollars worth. Argentina is, thus, supplying only 27 per cent of her own mineral needs.[147]

3. *Petrochemical Industry.*—An initial decree issued under the Industrial Promotion Law covered the petroleum industry and entrusted further elaboration and specific project formulation to the Ministry of Economy, which a month later issued its first resolution.[148] The respective amounts of Argentine private, Argentine state and foreign participation permitted and the benefits available are stipulated according to three detailed lists of products. Thus, the products named in List I may be produced by firms with any percentage of private Argentine capital and such foreign capital as is generally permitted by applicable law such as the rules of the Foreign Investment Law and the Industrial Promotion Law and their decrees. The state may only participate in limited cases.[149] The products in List II may be produced by firms with 51 per cent state ownership and state decision-making power. The remaining 49 per cent may be in private Argentine or foreign hands, the latter again subject to general law governing foreign investments. The state's portion may be increased if adequate Argentine private or foreign participants are not forthcoming.[150] List III products are reserved for state production.[151] Special rules apply for firms involved in producing products from more than one list.[152]

Existing firms with "private capital participation" in excess of that permitted by these measures may continue production but may not modify their installations or increase productive capacity without express authorization from the Ministry of Economy.[153] It is not expressly stated whether foreign capital is included in this provision. It is probably covered by the Foreign Investment Law,

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147. La Nación, June 12, 1974, at 18.

148. Decree of Dec. 10, 1973 (No. 592), Concerning National Petrochemical Program (Argen.) [hereinafter cited as Petrochemical Decree] and Plan for the Fulfillment of the National Petrochemical Program, Ministry of Economy Resolution No. 753, Dec. 11, 1973.

149. Petrochemical Decree, arts. 3-4.

150. Petrochemical Decree, arts. 5-6.

151. Petrochemical Decree, arts. 7 ff.

152. Petrochemical Decree, art. 16.

153. Petrochemical Decree, art. 12.

which provides that existing foreign investment in two out of several sectors denominated prohibited by that Law, may be taken over for management purposes *(intervenidas)* by the Authority, which is granted the discretion to recommend expropriation or nationalization by Congress.[154]

The Petrochemical Decree uses its lists as the basis for a graduated system of benefits or incentives. The more Argentine capital, the more favorable the treatment in most cases. For instance, income taxes may be deferred for ten years for List III products and for nine and seven years respectively for Lists II and I. Many of the benefits enumerated in the Industrial Promotion Law may be granted by the Ministry of Economy on the basis of individual project evaluations.[155]

According to the Argentine press, the feasibility of the Petrochemical Law and the foreign investment control system in general has been demonstrated by the interest of the Italian Montedison—Milano group in a multimillion dollar investment in the petrochemical sector. The Italians are reportedly entering into agreements with the Argentine Government to invest their own capital and that of other international lenders for approximately one billion dollars and have expressed their willingness to abide by the country's foreign investment rules including those reserving the power of decision to Argentine interests.[156]

4. *Steel Industry.*—Firms with majority national capital as defined in the Industrial Promotion Law are eligible under this decree.[157] In this case firms are grouped into three classifications according to the degree raw materials are industrialized. The benefits offered increase as the level of industrialization rises. The situation of existing companies is comparable to that of firms in the petrochemical industry.

5. *Other Industries.*—Other decrees issued under the aegis of the Industrial Promotion Law may be expected to follow patterns

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154. Foreign Investment Law, art. 20.

155. Petrochemical Decree, arts. 20(e)-(f).

156. La Nación, May 21, 1974, at 1; El Cronista Comercial, May 21, 1974, at 1 (includes text of Ministry of Economy announcement); La Nación, July 8, 1974, at 2 (later details); Business Latin America, June 19, 1974, at 193.

157. Decree of Feb. 21, 1974 (No. 619), Concerning, Steel Industry Promotion (Argen.), *as amended,* Decree of April 10, 1974 (No. 1.126).

similar to those described above. The forestry[158] and the newsprint industries[159] have been covered. The forestry decree ignores foreign investors because the Foreign Investment Law and Decree declare the sector off-limits to outsiders.[160] Banking, securities and state purchasing will be treated elsewhere.

C. *Additional Investment Contract Requirements*

Following the reference to priority activities and geographical zones in section 1 of article 5 of the Foreign Investment Law, this article further requires *inter alia* that investment contracts insure that the investment: (1) contributes to a better employment of the human and natural resources of the country; (2) tends to better the living conditions of the population; (3) includes necessary provisions to prevent or limit environmental pollution; (4) leads to import substitution or includes an express commitment that it will export and have a favorable effect on the country's balance of payments.

An example of the form that such export commitments might take is embodied in an agreement dictated to the automobile industry by the Minister of Economy, José Ber Gelbard, and confirmed by a presidential decree. The "Compromise Agreement" is a contract signed by Minister Gelbard, the chief executives of the seven foreign-owned passenger car manufacturing companies in Argentina and a number of union and industrial dignitaries.[161] Under the Compromise Agreement the firms are required to increase exports in each of the succeeding five years by a determined percentage of the firm's total sales in the base year of 1973. In 1974 the industry must export automobiles equal to fifteen per cent of its total 1973 sales with annual percentage increases until reaching 100 per cent of the base figure for 1978. Excesses of one year may

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158. Decree of Feb. 3, 1974 (No. 465), Concerning Forestry Promotion (Argen.).

159. Decree of April 16, 1974 (No. 1.177), Concerning Promotion of Newsprint and other Products (Argen.).

160. Investment Law, arts. 6(c), 7; Decree, art. 24.

161. Compromise Agreement of the new Automobile Edict (Acta Compromiso del Nuevo Ordenamiento Automotriz), Dec. 14, 1973; Ministry of Economy Executive Decree of Dec. 1973 (No. 680); and Ministry of Economy Press Release, Dec. 14, 1973. For a brief English language description of these measures see Business Latin America, May 8, 1974, at 146.

be applied to succeeding years. Firms are rewarded for success by being allowed to increase domestic sales by up to eight per cent of the figure for the previous year. The failure of a company to meet its export requirements in a given year will cause it to lose all of the eight per cent potential increase plus subject its sales to "inverse readjustment in proportion to the exports not accomplished."[162]

The industry privately insists that it will have great difficulty meeting these quotas in the highly competitive international automobile market especially given production costs in Argentina and the country's distance from many potential markets more rationally served from elsewhere. Enormous sales to Cuba were negotiated by the government in 1974 and may enable most manufacturers to meet their quotas for this first year of the plan's existence.[163] The Cuban sales were designed for political impact as well as economic gain and serve as an ironic reminder of the many factors entering into the foreign investment question. They were highly publicized in the country as a diplomatic victory over the United States, which was still clinging to the notion that its effective jurisdiction extended to the activities of companies incorporated in sovereign states. Eventually, however, increasing total production will necessitate many millions of dollars in new investment. If these sums cannot be met from domestic profits, firms may have to consider bringing in fresh outside capital subject to the rules applying to foreign investment.

Several well-placed Argentines have suggested that the government is using these measures to rationalize the automobile industry (seven firms and over 30 models) by forcing a couple of the less profitable companies into merger or bankruptcy. If this is so, the Agreement is a double reminder of the weapons available to a sophisticated government in the pursuit of its national economic aims. Although the conceptual underpinnings will likely be similar, the government may take a milder approach to initial export commitments under the Investment Law when it faces the question of enticing desirable new investments into the country.

The Andean Investment Code provides an interesting special option for the foreign enterprise (51 per cent or more foreign capi-

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162. Executive Decree, art. 2(c).

163. Business Latin America, May 8, 1974, at 146.

tal) primarily interested in exporting. If such a firm exports 80 per cent or more of its production to non-Andean markets, it is not required to meet the fade-out provisions of the Code. On the other hand, it is consequently denied the benefits of the Andean Common Market tariff reduction program.[164]

Article 5 of the Argentine Law further requires that investment contracts insure that the investment incorporates technology necessary for the socio-economic objectives of the country and contemplates the development of local technology. The draft omnibus foreign technology law currently in Congress is an attempt to achieve these goals by means of a set of precise rules. As noted, the Foreign Investment Law merely directed the Executive Branch to prepare a law regulating the amounts of royalties and other fees.[165] The drafting committee from the Ministry of Economy went further in determining that "much more desirable than the reform and updating of Decree-Law 19.231 [the old technology law] and the drafting of a law regulating fees would be the formulation of a single bill which would replace the Decree. [The goal of the proposed technology transfer law is] the development of our capacity to resolve our own technological problems."[166]

Investment contracts must also insure that the investment will employ directors, scientists, technicians and administrative personnel of Argentine nationality in such proportions as the Authority shall indicate on a case-by-case basis. The Decree adopts a rigorous minimum of 85 per cent Argentine top-level personnel[167] and reflects the foreign investment law of the Lanusse Regime, which required the same percentage. This previous law also allowed a three-year grace period if the Authority should be convinced that qualified Argentine personnel were not available.[168] Since this requirement applies to the negotiation of contracts with foreign investors who wish to be treated as such, the problem of the local businessman of non-Argentine nationality should not arise as it does under the Industrial Promotion Law. If this busi-

164. Decision 24, art. 34.

165. Investment Law, art. 36.

166. Statement to Congress by the Executive Branch Committee responsible for the Draft Technology Law, undated, at 2, 9.

167. Investment Decree, art. 4.

168. Lanusse Investment Law, art. 14.

nessman has foreign associates entitled to receive dividends, the provision could affect him if the outsiders should seek to increase their investment with new outside capital or if the company should opt to be subject to the Investment Law. Both cases would imply the negotiation of an investment contract and the possible invocation of the percentage rule.

Further, under the Law the investment contract must not cause the present or future displacement of national enterprises from the market. The Decree is more specific in providing for a system of publication of investment proposals and answers by affected parties composing "installed industry."[169] A government spokesman explained that the quoted phrase means that any firm already functioning in the country, regardless of its foreign ownership category, is protected from new entrants if it is determined to be operating rationally and efficiently.[170]

Finally, the investment contract must insure that the investment will not require the capture of internal savings beyond limits to be established under the Law and will possess a financial structure adequate for the project proposed. However, the reference to internal savings is not clear. One commentator argues that the provision is unrelated to the question of local short-term credit covered elsewhere in the Law.[171] The Decree offers no alternative clue although it seems probable that Congress was attempting to avoid foreign participation in ultra-dynamic sectors of the economy with high internal growth potential. As will be seen, only a limited portion of reinvested earnings may be considered foreign capital available as a base for calculating remittances. However, a fast growing foreign-controlled firm remains foreign controlled regardless of the classification assigned to its reinvested earnings, a situation in fundamental conflict with the aim of insuring maximum national decision-making power. Such subtle determinations obviously must be based upon flexible sectorial or individual project judgments.

D. *Priorities and Preferences*

The Authority is instructed to give priority to investments that,

169. Investment Decree, arts. 42-44.
170. Investment Decree, art. 42; Blondeau, *supra* note 88.
171. Bruzzon, *supra* note 120, at 5.

in addition to meeting the above mentioned requirements, also offer some of the listed advantages. Overlapping the requirements provisions, these advantages include offering jobs and training to the unemployed, using Argentine technology, raw materials, intermediate products and capital goods and contributing to economic decentralization. The Decree elaborates even further on the first of the above by granting priority to the investor (assuming there are more than one) who will hire the maximum number of unemployed Argentine citizens and offer the most attractive commitment for the provision of state approved training programs.[172]

The reference to Argentine nationality rings unfortunate since it is not in this case a reference to highly paid international executives or local businessmen lacking Argentine citizenship. Instead, it is an attack on the most disfavored and least protected of the country's inhabitants: the immigrants, legal or otherwise, principally from neighboring Bolivia, Paraguay and southern Chile. This provision undoubtedly reflects the wishes of organized labor, which through the powerful *Confederación General de Trabajo* is dedicated to the protection of the vested interests of its members while constituting the backbone of the Peronist movement. Only a statistical survey would reveal if this criticism is entirely fair, as the government is reputedly engaged in a campaign to facilitate the conversion of immigrants to Argentine citizenship. To the extent it is actually doing so, the present criticism loses practical force.

Priority is offered the investor willing to guarantee the deposit of earnings (in excess of those he is permitted by the Law to withdraw from the country) in the National or other development banks. This may be seen as a solution to the problem cited in allowing a foreign firm to enter a potentially fast-growing sector of the economy as excess earnings development bank the foreigner obviously loses decision-making power over this portion of the internal savings of the country. The limitation to government-owned banking institutions reflects a congressional bias against banking's private sector, whether in foreign or national hands. Presumably government institutions are considered more apt to use these funds for the common good.

Finally, priority is offered the investor willing to reinvest his

172. Investment Law, art. 10; Decree, art. 26.

earnings. It is not clear whether reference is exclusively to those earnings the investor would otherwise extract from the country or to earnings in excess of such amounts. In the latter case, the provision clashes philosophically with the commitment to deposit excess earnings in development banks.

Article 7 of the Law directs the Authority in cases involving multiple proposals by foreign and mixed enterprises to give "preference" to the firm that will commit itself to a described fade-out plan for conversion into a national enterprise and to the firm subscribing to a predetermined export program in the investment contract.[173] The export commitment is a virtual repetition of the requirement illustrated by the automobile industry agreement.

Obviously, the Decree writers were disturbed by the poor drafting revealed in these provisions establishing standards for judging investment proposals. They attempt to remedy the confusion of preferences, priorities and requirements by providing that "[w]hen various investment proposals are presented for the same project and for reasons of economy of scale it is not considered desirable to approve all of them, preference will be given to the most advantageous as determined on the basis of the extent to which they meet the requirements set forth in articles 5 and 10 and when appropriate, article 7 of the Law."[174] In other words, it would have been possible to make a single list of all of these considerations and evaluate them as provided above.

This is essentially the Andean approach and was the approach of the Lanusse foreign investment law, which covered much of the same ground. The latter legislation briefly lists fifteen items for consideration by the Authority in its evaluation of investment proposals.[175] The new Argentine Law represents a gallant but unsuccessful effort to achieve sophistication by presenting distinct levels of criteria for consideration. A little less sophistication, although more than that of the Lanusse Law, might have worked: for instance, a list of a few unmalleable requirements followed by another list of considerations or recommendations. In an annex to the Andean Investment Code, guidelines for investment approval are presented in the form of a summary outline of information to be

173. Investment Law, art. 7.

174. Investment Decree, art. 25.

175. Lanusse Investment Law, art. 4.

furnished by the potential investor. Thus, an investor must show how each proposal fulfills certain local requirements and must indicate its effects on a number of listed local conditions, such as new employment generated and use of imported or national materials.[176]

E. *Fade-Out*

The fade-out preference referred to is essentially a milder version of the concept pioneered in the Andean Investment Code. The Lanusse Government legislation did not contemplate fade-out; it merely instructed the Authority to give preference to investments with Argentine participation.[177] Article 22 of the new Law, not part of the preference section, gives the Executive Branch virtual *carte blanche* to dictate fade-out provisions in the future. As a condition to entry the executive may require the gradual conversion to national status of designated classes of foreign and mixed enterprises.[178] Provisions governing the fade-out and expropriation of existing foreign investments are treated separately in this study.

The preferences section[179] prescribes a single and detailed fade-out method. This is strange since the preference is incorporated as one of a number of rather vague considerations to be weighed in comparing alternative investment proposals. Why should only one version of a fade-out plan be worthy of attention? This section offers preferential consideration to the firm that will become a national enterprise in ten years and will convert at least twenty per cent during the first five years of operations and at least sixteen per cent per year thereafter. To belabor the point, does it seriously mean that an investor, offering to fade-out according to these terms, is to be considered preferable to another equally attractive investor willing to fade-out in six years? Should no special consideration be given the investor willing to fade-out in fifteen years if the competition refuses any fade-out plan? Fade-out was reportedly required in all cases in early internal executive drafts of the bill preceding the version sent to Congress and made public. When fade-out became a preferential consideration rather than an abso-

176. Decision 24, Annex No. 1, Parts III, V.
177. Lanusse Investment Law, art. 1, ¶ 2.
178. Investment Law, art. 22.
179. Investment Law, art. 7, intro., 7(a).

lute requirement, the necessarily precise terms of the earlier version were probably left behind inadvertently.

The Andean provisions require the transformation of foreign companies into mixed companies as a condition to the approval of new investments except in the cited case of a company that exports 80 per cent or more of its production outside of the area. More developed Colombia, Chile and Peru are to give foreign investors fifteen years to accomplish the transition while Bolivia and Ecuador have a total of 22 years at a more gradual pace, which includes an initial grace period. Firms failing to comply with these provisions lose access to the Andean Common Market tariff liberation program.[180] Thus, Argentina has taken a milder initial position while expressly reserving for itself the right to impose fade-out as a condition for entry. Except for exporters, the Andean countries make fade-out an invariable condition for entry.

The Argentine fade-out provision involves a contradiction or at least reveals a gap in the Law's instructions. When imposed, fade-out will require foreign investors to transfer twenty per cent of their initial investment to Argentines within five years. This clashes with the injunction against the repatriation of invested capital for five years after entry.[181] What is the foreign investor allowed to do with the liquidity received from the fade-out sale of twenty per cent of the firm's capital? It is not clear whether it should be considered an exception to the nonrepatriation rule or if not, whether it can be freely reinvested in Argentina while awaiting the lapse of the designated time.

F. *Prohibited or Restricted Sectors*

At least since Mexico's nationalization of its oil industry, modern foreign investment laws have tended to limit or prohibit foreign activity in at least some economic sectors. Argentina's prior foreign investment law only exercised this prerogative in relation to military production.[182] The Andean Code seeks to impose the concession system on the raw material and primary production sectors and applies special rules or prohibitions in the public utility-public

180. Decision 24, arts. 30-36.
181. Investment Law, art. 12(c).
182. Lanusse Investment Law, art. 7(a).

service sectors, in finance, insurance, domestic transportation, advertising, virtually any aspect of the media and domestic marketing.[183] Argentine has chosen to limit new investment activity in generally the same economic sectors although the restraints imposed are not identical.

There is an element of confusion or discord in the Argentine measures: The Law provides that new investment will not be authorized in the designated sectors except as part of national enterprises, and thus, limits foreign participation to under twenty per cent.[184] Except for banking and insurance, which it continues to permit in national enterprises, the Decree expressly prohibits any new foreign investment in these activities.[185] This contradiction will have to be resolved since the President has no right to modify the plain meaning of a congressional mandate.[186] Meanwhile, it will be difficult for the Authority to rely on the Decree provision to deny an investment otherwise permitted by the Law. Regardless, these measures offer an abundance of unrelated grounds for denial should the Government be intent upon exclusion.

On its face, the prohibition article does not unequivocably specify whether (1) only new foreign investment qualifying and registered as foreign capital is to be denied entry into the designated sectors or (2) it excludes all new economic activity by firms with a given percentage (or any) foreign participation. Article 6 speaks in terms of "new investments" rather than using the defined term "direct investment of foreign capital" and specifies that investments in national enterprises will not be considered new investments. This change in wording plus the philosophical goal of the Law of achieving maximum national control of the economy, particularly in sensitive or key sectors, argue for the second interpretation. Thus, companies to which these provisions apply are not allowed to dedicate any of their resources to prohibited sectors since this would result in an extension of foreign economic control.

The consequences of this conclusion may prove disturbing to some well-established foreign firms operating in Argentina. For instance, the prohibitions of the Law relating to domestic market-

183. Decision 24, arts. 38-44.
184. Investment Law, art. 6(c).
185. Investment Decree, art. 24.
186. *See* note 130 *supra*.

ing would prevent a foreign-owned consumer goods company with an excellent national distribution system from taking on the distribution of a nationally owned company's products. Coca Cola or Pepsi could not distribute wine for a family-owned Mendoza vineyard desiring to go national even though this might be the winemaker's most efficient and least expensive alternative. Consistent with the goals of the Law, the measure is intended to stimulate new Argentine competition for entrenched foreign interests.

The sectors in which new foreign investment is to be limited or prohibited are activities related to defense and national security;[187] public utilities; advertising; the communications media; activities reserved by law for state or national capital companies;[188] agriculture; cattle and forestry, except when new technology is involved;[189] and fishing, except when the opening of new international markets is promised.[190]

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187. The Decree limits the prohibition to the production of goods directly related to the national defense as determined by the Ministry of Defense. Investment Decree, art. 5.

188. An example is the government-owned petroleum company *Yacimientos Petroliferos Fiscales (Y.P.F.)*, already dominant in the industry. A bill introduced to Congress by Mrs. Perón and the Ministry of Economy on July 25, 1974, would greatly expand that role. The bill, said to have multiparty support, is intended to return "absolute control of energy policy to the State; return the exploitation, refining and sale of hydrocarbons to *Yacimientos Petroliferos Fiscales*; and deny international consortiums any presumed right to supply the local market. As a fundamental principle, market expansion must be reserved for YPF." La Nación, July 26, 1974, at 1 (reporting on the Draft Hydrocarbons Bill).

189. A Buenos Aires newspaper suggests that the restriction on foreign participation in agriculture and cattle should perhaps be reconsidered in view of ambitious schemes emerging elsewhere in the world for investing huge sums in capital intensive, high productivity food production. Argentina, Brazil and Australia have reportedly been singled out by Japanese and Italian groups as possible locations for the formation of joint food-production ventures. A percentage of the food would be guaranteed for the outside investor with the remainder belonging to the host country. Argentina is already developing similar ideas for its highly promising fishing industry. Ideally, the Law might have provided more explicitly for the possibility of foreign participation in these circumstances when and if such participation is considered desirable for the country. Nevertheless, the exception for new technology could probably be invoked should the government be interested. *See* El Economista, July 12, 1974, at 7.

190. Recent examples of possible exceptions to the prohibition of foreign participation in the fishing industry in order to develop export markets involve Poland and Spain. Both countries are reportedly interested in forming joint ven-

As noted, the Decree and the Law agree that foreign investments of up to twenty per cent will be permitted in insurance, commercial banking and finance.[191] Foreign bank branches—in cases of reciprocity and when it is judged in the interest of the country as well as investment banks—are exempted from these percentage limitations on new investments and are subject to the general provisions of the foreign investment measures and other applicable law.[192] More specific regulation of foreign activities in these and other sectors may be expected in the decrees being issued under the Industrial Promotion Law discussed above.

A last center from which new foreign investment is excluded, the domestic marketing by firms of products "other than those of [their] own elaboration,"[193] may prove troublesome. The Andean provision is even stronger, forbidding the domestic marketing of products of any type,[194] but has the virtue of eliminating certain doubts. The apparent intention in Argentina is to forbid the marketing by a foreign-owned firm of anything manufactured by any other firm whether Argentine or foreign, parent or subsidiary. On its face, the prohibition would, therefore, embrace the marketing by a firm in Argentina of products manufactured by its 100 per cent owned subsidiary also located in Argentina.

Further questions arise around the definition of the term "own elaboration." If the finished product has to be entirely manufactured by the same corporate entity, Congress is also prohibiting foreign-owned firms from subcontracting with locally owned enterprises for a part in the productive process, an exclusion of doubtful

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tures with controlling Argentine interests to utilize the fishing resources off of Argentina's Patagonian coast. The Government says that in the Polish case, fishermen from the two countries will work together but that eventually 75% will be Argentine citizens. Poland is to buy the entire catch with the Argentine Government retaining an option to keep 20% for local needs. No indication is given of how prices are to be determined or costs allocated or of the anticipated term of the agreement. *See* Buenos Aires Herald, July 14, 1974, at 9. *See also* El Economista, May 17, 1974, at 1, 3; El Cronista Comercial, May 29, 1974, at 24; La Nación, May 9, 1974, at 1-2; La Nación, May 10, 1974, at 1-2; Business Latin America, March 6, 1974, at 79.

191. Investment Law, art. 6(c)(3) and paragraph following art. 6(c)(8); Decree, art. 24.

192. Investment Law, art. 6(c)(3).

193. Investment Law, art. 6(c)(5).

194. Decision 24, art. 43, ¶ 1.

benefit to the country. Since it has been determined that marketing without production should not be in foreign hands, local content requirements may be directed at the foreign-owned firm that markets a finished product with which it has had only limited or last stage industrial contact. This is a well-known practice long deplored in the non-industrial world. Goods are manufactured at home by the parent company and merely assembled by subsidiaries for sale on local markets. Unfortunately, the Law does not tell us how much of the productive process must be entirely local (or within a given enterprise) to qualify as "own elaboration."

Regional economic bodies are making an effort to define more adequately what is meant by local content. This can be fundamental, for instance, if greater benefits are available in several countries for the same product when it is manufactured in a given country. The more developed Andean countries offer special benefits for products manufactured in Bolivia and Ecuador. Preferential trading arrangements in the Latin American Free Trade Association require the definition of what constitutes national manufacture.[195]

These marketing restrictions also reflect the frequent complaint that through their commercial efforts, the industrial countries, particularly the United States, have imposed alien cultural values on other social systems.[196] In Argentina, as elsewhere, the *sociedad de consumo* ranks with *dependencia* as a call to arms. The lack of control over foreign investments in the past has meant, according to President Cámpora, that "the dependent country adopts the consumer patterns of the dominant countries. . . ."[197]

Moreover, the proposed technology law seeks to increase national control over consumer patterns by virtually eliminating the

195. As an example, see Argentine Decree of May 23, 1973 (No. 4877), regulating exports in the autoparts industry compensated by similar imports from LAFTA countries.

196. Coca Cola is a favorite for attack. In Argentina, as elsewhere, it is widely consumed and frequently condemned. After more than 30 years in this market, Buenos Aires is said to "enjoy" the highest total consumption of the beverage of any city in the world, including the principal cities of the United States and in spite of plentiful competition from Pepsi Cola. *See* La Opinión, Aug. 3, 1972, at 12. The firm is occasionally threatened with the suggestion that the advertising and sale of any beverage not based on local fruits should be prohibited.

197. Cámpora speech, *supra* note 7.

licensing of new foreign trademarks in the country. Within five years, existing trademarks must be replaced by local substitutes or the original trademarks acquired without payment of any kind.[198]

G. *Additional Prohibitions*

1. *Export Limitations.*—Predictably, the Law prohibits investments by firms party to agreements limiting exports or by firms that appear to be subject to any other "unacceptable" contractual provision.[199] The injunction may seem superfluous, if not naive, since prospective investors would hardly be expected to admit to the existence of such agreements. However, its inclusion is justified by restrictions of the type imposed by the United States on the export to certain countries of products incorporating United States technology. The limitation of exports in technology transfer contract was common, at least until the practice was specifically outlawed by the 1971 Technology Transfer Law.[200] The Government Instituto Nacional de Transferencia de Tecnologia (INTI) found that in 1,408 contracts signed before October 1971, 53 per cent restricted sales to the Argentine market.[201]

2. *Choice of Forum and Subrogation.*—Investors may not deny the jurisdiction or competence of Argentine courts for the settlement of disputes nor may other States or international legal entities be subrogated to the actions and rights of the foreign investor.[202] This view of choice of forum clauses is in direct opposition to modern Anglo-American practice.[203] Furthermore, prohibiting subrogation by international legal entities goes beyond Argentina's own Calvo Doctrine[204] and is an addition to the otherwise compara-

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198. Draft Technology Transfer Law, art. 7.

199. Investment Law, art. 6(a).

200. Lanusse Technology Law, art. 3(f) reaffirmed by Resolution No. 119 of the Secretaria de Desarrollo Industrial. *Normas para la evaluacion de contratos inscriptos automáticamente,* art. 2(1)(a), Dec. 19, 1973.

201. INTI study, *supra* note 12, at 13.

202. Investment Law, art. 6(b).

203. Farquharson, *Choice of Forum Clauses—A Brief Survey of Anglo-American Law,* 1 INT'L LAW. 83, 99-100 (1974).

204. The well-known Calvo Doctrine is the century old product of the Argentine Carlos Calvo who argued the principle of absolute equality of sovereign states. According to one authority Calvo maintained that "the courts of the coun-

ble Andean provision.[205] This additional ban not only eliminates the possibility of contract subrogation by international development agency direct investors such as the International Finance Corporation of the World Bank but would also affect the future development of a multipartite investment insurance program.[206] The clause would also prohibit submission to the dictates of an international arbitration agency and would presumably prevent access to the financial and political risk guarantee programs of the United States Overseas Private Investment Corporation (OPIC).[207] Argentina's nationalistic attitude in this respect obviously derives from the conviction that most international entities are controlled by the developed countries and in particular by the United States.

3. *Take-Overs of Existing Companies.*—Although the ramifications are not entirely clear, the Law and Decree apparently prohibit foreign investors from purchasing shares or other interests in national enterprises (those with over 80 per cent Argentine ownership) from national investors.[208] It is not known whether the term "national investor" includes mixed enterprises. Taken literally, these provisions sanction the purchase of shares in mixed enterprises, a result inconsistent with national policy since it would allow passage of control from Argentine to foreign hands. It is not yet possible to say with assurance in all cases who has the right to buy what interests from whom. It is clear that, with authorization, foreign investors may purchase interests in foreign enterprises from other foreign investors. With previous authorization, new capital investment in existing businesses is sanctioned by a Decree provi-

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try are not subject to appeal in cases where the rights of foreign nationals are involved. [Consequently,] the so-called Calvo clause, inserted by most Latin American governments in contracts with foreign nationals . . . stipulates that in case of any doubts or disputes arising out of the contract, the foreign party to the instrument agrees that they shall be settled by the courts of the country, and forswears the right to appeal to his own government for the defense of his rights." BEMIS, THE LATIN AMERICAN POLICY OF THE UNITED STATES 230 (1943).

205. Decision 24, art. 51.

206. Oliver, *supra* note 5, at 773-75.

207. In the past, OPIC reportedly has refused its guarantees when international arbitration and the subrogation of an investor's interest to his state were not permitted and recognized in bilateral agreements. *See* Valdez, *The Andean Foreign Investment Code: An Analysis,* 7 J. INT'L L. & ECON. 1, 15 (1972).

208. Investment Law, art. 6(d); Decree, art. 6.

sion amplifying the definition of foreign capital direct investment. In all cases, the foreigner must participate in the risks and the rewards of the enterprise.[209] These provisions thus distinguish between a basic goal of preventing the absorption of existing firms by foreign investors and the addition of fresh risk capital to the same firms.

4. *The Bankruptcy Exception.*—As an exception to the above restrictions the assets of a national enterprise may be acquired by foreign investors during liquidation for bankruptcy if there are no Argentine buyers available.[210] The Argentines introduced an unfortunate variation to the Andean Code concept. The Andean Code permits the purchase if the local firm is proved to be in imminent danger of bankruptcy whereas in Argentina, the firm must already be in liquidation.[211] While the Andean provision requires a commitment to resell the firm to national investors within a stipulated period, which shall not exceed fifteen years,[212] the Argentines impose no such explicit requirement although fade-out may be made a condition for investment approval.

5. *State Purchasing—Buy Argentine.*—Predating the Foreign Investment Law by several years, the Buy National Law seeks to direct the purchasing and contractual power of the national government, including majority state owned enterprises, to the local marketplace.[213] The principal architect of the Law and Minister of Economy under two Presidents, Aldo Ferrer, recently noted that in addition to supporting the purveyors of local goods and services, the measure "should serve as an engine for stimulating the development of local technology and for escaping dependency on package deals."[214] By package deals he was referring to the practice of international companies of selling capital goods, patents, know-how and licenses as complete units and, thus, excluding the participation of available local technology and stifling its progressive development.

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209. Investment Decree, art. 1(a).
210. Investment Law, art. 6(d).
211. Decision 24, art. 3.
212. Decision 24, art. 3(c) as amended by Decision 37.
213. Buy National Law and Decree, *supra* note 69.
214. Address by Aldo Ferrer, Instituto de Desarrollo Economico y Social (IDES) Lecture, in Buenos Aires, July 12, 1974.

Basically the law directs the national government and dependent entities to buy from and contract with firms defined as "local internal capital enterprises" *(empresas locales de capital interno)* whenever possible. Industrial, construction and service firms with corporate domicile in the country are so defined when 80 per cent of upper management is domiciled in Argentina and genuine effective control emanates from the country. In addition, at least 51 per cent of both the capital and the voting power must belong to natural persons domiciled in Argentina.[215] To be considered local, an engineering or consulting firm is subject to more rigorous norms, including the requirement that 100 per cent of the capital and voting power belong to persons domiciled in the country.[216]

6. *Import-Export Controls.*—Legislation philosophically akin to the Buy National statute and to other measures intended to increase the participation of Argentine interests in the economy emerged from Congress on October 24, 1973, a few days before the appearance of the Foreign Investment Law. The Law for the Protection of Labor and National Industry[217] grants the Executive Branch ample powers to regulate and control foreign trade so as to favor the purchase and export of local goods produced by "national capital enterprises." Although the Statute neither defines the latter term nor refers to the Foreign Investment Law, by analogy a "national capital enterprise" presumably must have over 80 per cent local participation.

The Law for the Protection of Labor and National Industry followed a trajectory similar to that of the Foreign Investment Law. It was introduced by Cámpora accompanied by a Presidential message couched in nationalistic terms but became law after Perón had assumed the Presidency. Cámpora said that:

> Within the framework of national liberation, the draft law . . . embodies a fundamental decision in favor of the development of national production with the object of stimulating the development of local technology thus breaking ties by means of exporting manufac-

215. Buy National Law, arts. 7, 11; Decree, art. 7.

216. Buy National Decree, art. 11.

217. Law for the Protection of Labor and National Industry *(Ley de Protección al Trabajo y a la Producción Nacional)*, which became Law of Nov. 15, 1973 (No. 20.545), *as amended,* Law of Dec. 29, 1973 (No. 20.636) [hereinafter cited as Labor Law].

> tured goods . . . eliminating the debt . . . imposed by the centers of international finance, of preventing the use of foreign exchange for the purchase of luxury goods which can be done away with or produced nationally and, finally, of orienting public and private investment to the purchase of capital goods of national origin.[218]

Among other things, this Statute authorizes the limitation or suspension of imports and exports as well as the establishment of quotas and fixed prices for determined goods. New tariffs and export duties may be imposed at rates of up to three times the present levels, and the existing systems of tax rebates and special price reimbursements may be modified. Invariably, these measures are intended to favor the competitive situation of national capital enterprises in relation to those with foreign capital participation. For instance, in fixing import or export quotas the Executive is directed to consider the "oligopoly or monopoly coverage of national or foreign capital" in the sector involved. In issuing import or export licenses to fill those quotas, "national capital enterprises will have absolute priority."[219] Although the law consistently adopts this tone, its application remains firmly within the Presidential grip. The administrations of both Perons have demonstrated a reluctance to apply grossly discriminatory sanctions against foreign investors. Regardless, this import-export law offers the present or a future administration the flexibility to be as discriminatory as it may wish.

VII. Capital Repatriation and Profit Remittances

A. *Defining Repatriable Capital*

Foreign investors in Argentina may eventually repatriate determined percentages of "repatriable capital" as defined by the Law. Rejecting the Andean term "reexportable capital," the Law adopts the definition of Decision 24 with one variation.[220] Repatriable capital is the amount of the original investment in the currency of

218. President Héctor J. Cámpora, message to Congress introducing executive draft of the Labor Law. *See also* Decree of Dec. 11, 1973 (No. 618); Decree of March 8, 1974 (No. 751); and Resolution 44 of April 25, 1974.

219. Labor Law, art. 10, ¶¶ 1-2. Preferential references to national capital enterprises appear in this law in arts. 1, 3(b), 4, ¶ 4, 7, 8, 10.

220. Decision 24, art. 8.

origin plus authorized reinvestments of profits eligible for transfer minus capital repatriated and net losses.[221]

The Andean provision does not require the subtraction of repatriated capital in determining the base amount while a literal reading of the Argentine version suggests that each profit repatriation should be subtracted to arrive at the amount on which the next transfer is calculated. A determined percentage would always be repatriated from a constantly declining amount. If this method is followed, the total investment would never be repatriated just as the indefinite subtraction of half from half will never produce a nullity. In spite of this drafting, it is probable that the percentage will be applied to the original capital base before subtracting previous repatriations so that a firm will eventually be able to repatriate 100 per cent of its initial investment.[222] The limitation was probably included to show that more than 100 per cent of the base amount could not be transferred out of the country; *e.g.*, annual percentage transfers could not continue after reaching the 100 per cent total.

This interpretation is supported by comparison of the Andean and Argentine repatriation provisions. A foreign investor in the Andean countries may only repatriate his investment by selling to national investors or liquidating his business.[223] Since the capital figure is not used as the basis for a percentage calculation, no question arises with respect to amounts already repatriated that would require selling or liquidating the same thing twice. The Andean method fits in with its required fade-out philosophy; the foreigner loses his investment permanently as he repatriates capital whereas in Argentina the foreign investor recoups his original investment over a period of years without sacrificing his equity position in the enterprise. He is not forced to dispose of his interests and leave the country unless committed to fade-out. Argentina, on the other hand, does not permit the transfer abroad of capital gains in excess of the profit percentage maximum on the

221. Investment Law, art. 11.

222. Blondeau, *supra* note 88, expressed this view and felt that any other interpretation was out of the question. Duggan indicated that the government's foreign investment office had definitely decided upon this interpretation. *See* Duggan, *supra* note 23.

223. Decision 24, art. 7.

amount of the original investment should it be sold to national investors or liquidated. Under the Andean Code, such capital gains may leave the region after the payment of appropriate taxes.[224] Argentina, therefore, offers no protection against the effects of world inflation on capital investment, particularly significant since the country limits the percentage of profits which may be remitted and denies any capital repatriation for at least five years. This may constitute a serious disincentive for new investment since profit transfers may barely or not even keep up with the annual rate of global inflation and the eventual capital repatriated, although the dollar equivalent of the original amount, will certainly be worth far less in real terms than when it entered the country. Given alternative investment opportunities elsewhere in the world offering probable rates of return roughly comparable to the profit transfer limit imposed in Argentina, the inflation protection offered by the possibility of realizing a capital gain may prove decisive. By expressing investments and permitted transfers in convertible currencies, Argentina does offer protection against purely internal inflation and currency devaluation; however the investment alternative may be in Europe or North America, home of these currencies.

Both the Andean and Argentine definitions of repatriable capital subtract net losses *(perdidas netas)*, a case of borrowing by the Argentines since the term has no established meaning in the country and does not appear in previous foreign investment codes. The definitional rationale is obvious: An investor should not be allowed to enter a country, misuse and lose his capital and then transfer the same amount abroad, which would raid national savings and cause a net loss of capital stock for the recipient country. This rationale holds true even though the balance of payments effects of the original investment bear no relation to the performance of the investment once in the country. A functioning and profitable factory is not the same thing as a collection of rusting imported machinery or red ink representing losses attributable to the misuse of working capital by high living executives. On the other hand, it would be neither fair nor logical to subtract the normally inevitable losses of the first year or two after start-up of an eventually

224. Decision 24, arts. 9-10.

successful industrial project from the amount originally invested. The Law gives no hint of the intent of its drafters. The term does not as yet appear to have acquired a precise Andean definition[225] although it is likely that it was adopted for lack of an expression common to all of the member countries.

A possible source of local content for the term net losses is the Argentine Company Law, which demands a reduction in stated capital when losses reach a sum equivalent to reserves plus 50 per cent of stated capital. Stated capital must be brought into line with the company's net tangible assets *(patrimonial social)*.[226] This is consistent with the Latin concept that a corporation must have tangible assets, which upon liquidation would produce a sum equal to stated capital. A less legalistic interpretation involves a minor twisting of the literal terms of the statute but produces the result that was probably intended. Each time that a capital repatriation is to be effected, an overall historical computation of net losses might be made. Starting from day one of the investment, profits and losses would be netted in order not to support the repatriation of capital that has been lost and not compensated for by later profits. This interpretation allows for the usual losses during the first year or two or during any lean period but does not subtract them permanently from the amount the investor is eventually entitled to repatriate. The twisting is necessary because the literal terms of the Law require the subtraction of net losses each time a calculation of repatriable capital is made without providing for their later recuperation from future earnings. Neither interpretation, however, has received official sanction of any kind.

B. *Terms of Repatriation*

The terms of capital repatriation are to be negotiated and included in the investment contract but in no case may repatriation

225. Felix Peña, head of the Legal Section of the Instituto para la Integracion de America Latin (INTAL) in Buenos Aires and a membeer of the group of advisers who collaborated in the drafting of Decision 24, informally opined that no such Andean definition so far exists. Conversation with Felix Peña, Buenos Aires, May 21, 1974. A two volume loose-leaf service covering Andean group legal developments is silent on the subject. *See* J. VANEGAS, RÉGIMEN DEL MERCADO ANDINO (Legislación Económica Ltda—a looseleaf service).

226. Company Law, arts. 205-06.

exceed twenty per cent of repatriable capital or begin during the first five years of the existence of the contract. Repatriations must be previously authorized by the Authority and will be made in the currency in which the investment was registered or in its equivalent at the exchange rate in effect at the time of transfer. The continuity of the firm must not be affected by the transfer.[227]

Krebs made an interesting point in his ill-fated diplomatic note with reference to this last stipulation. He suggested that the continuity provision will make it impossible for the investor to recuperate a part of his investment should external economic factors, not attributable to the investor, make profitable operation impossible.[228] The Law, thus, adopts an all-or-nothing approach in this respect.

C. *Profit Repatriation*

Profits eligible for transfer abroad must also be stipulated in the investment contract and expressed as an annual percentage of registered capital after the deduction of income and withholding taxes. This annual amount may not exceed the higher of 12.5 per cent or four points over the 180 day certificate of deposit rate paid by top banks for the money in which the investment is registered.[229] The later calculation would produce a limit in excess of fifteen per cent at the time of this writing. These rates compare with a fourteen per cent maximum for the Andean countries, which may allow higher rates in special cases and which are free to determine their own arrangements in the raw materials and primary products sectors.[230]

Other than upon express authorization, companies are limited to their own liquid resources for profit transfers and are denied recourse to credit of any kind for the purpose.[231] This could be applied with unrealistic severity since a normally leveraged company operates with a continuous flow of loan funds. In keeping with the philosophy of the provision,[232] a general flow-of-funds

227. Investment Law, art. 12; Decree, art. 18.
228. Krebs note, *supra* note 33, at 2.
229. Investment Law, art. 13; Decree, art. 7.
230. Decision 24, arta. 37, 40.
231. Investment Law, art. 13.
232. Cámpora's speech presenting the original executive Draft Law to Con-

analysis would insure against deliberate and consistent dependence on debt capital for the purpose of profit remittances.

D. *Special Restrictions on Transfers*

Transfers will not be authorized if a firm has outstanding tax or social security obligations.[233] This is a potent weapon since a firm could be required to obtain certification of its fiscal standing from the appropriate authorities, a procedure viewed with Kafkian apprehension in Argentina. The capital repatriation rules do not contain the above restrictions limiting transfers to the firm's own liquid capital and imposing the tax restriction. This may be because sufficient protection was perceived in the elimination of net losses from the base amount in conjunction with the requirement that the continuity of the firm should not be affected. It is also possible that the process of adapting the Andean Code to different circumstances led to the omission of requirements that might have been included. Capital repatriation in Argentina is not limited to the sale or liquidation of a business as in the Andean countries. In the Andean case, the restrictions are unnecessary because investors are permitted to repatriate the entire amount received upon partial or complete sale of their local interest, including capital gains, after payment of appropriate taxes. In the Argentine case, however, the reasons for imposing these restrictions on profit remittances apply with equal vigor to capital repatriation.

In addition to the tax and liquidity restrictions on profit transfers, neither profit nor capital may be transferred in two additional situations: (1) while the country suffers critical balance of payments difficulties as determined by the Ministry of Economy and the Central Bank,[234] and (2) while benefiting from special develop-

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gress suggests that this provision may be accepted at face value and is not an attempt to restrict further access to credit, national or foreign. He refers to Decision 24 of the Andean Pact and to the earlier Peronist Law and decree. They "provided that profit remittances as well as capital repatriation had to be accomplished with a company's own funds. In this way recourse to internal (Argentine) bank or other credit for these purposes is prevented." *See* Cámpora speech, *supra* note 7.

233. Investment Law, art. 13.

234. Investment Law, art. 16; Decree, art. 22.

ment or industrial promotion incentive plans, as previously indicated.[235]

Moreover, the right to transfer profits is lost a year after the close of the fiscal year of their realization or 90 days after authorization of the transfer. However, the investor is allowed to preserve his transfer rights after the expiration of these periods when the balance of payments situation is declared critical, when restricted for tax or liquidity reasons and when there exist special provisions in the investment contract. Preserving transfer rights after the expiration period is accomplished by placing the sums in a reserve account in the name of the foreign investor entitled to their receipt.[236] Furthermore, profit remittance rights may not be accumulated from year to year. Unused annual percentage rights are lost forever upon expiration of the indicated time limit.[237] This rule also presumably applies to profits and capital not remitted during periods in which a company benefits from industrial promotion incentive laws. The unused transfer rights are apparently also lost forever.

E. *External Dollar Bonds*

Discussing restrictions on transfers of profits and capital would be unrealistic without consideration of dollar denominated external bonds *(bonos externos)*. Previously alluded to, the external bond system was devised after the March 1971 Central Bank suspension of foreign exchange sales for profit and for certain other remittances as a result of an unfavorable balance of payments. Foreign exchange for these purposes remains unavailable from the Central Bank as of this writing although the payments situation has improved.[238] Rather than permit the outflow of foreign ex-

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235. Investment Law, art. 18; Decree, art. 8.

236. Investment Decree, arts. 20, 21, 29(b).

237. Investment Decree, art. 29(c).

238. According to the United Nations Economic Commission for Latin America (ECLA) the value of Argentine exports during 1973 was in excess of $3 billion, the highest in the country's history and 57% over the previous year's figures. This produced a current account balance of payments surplus of $660 million and accumulated reserves of $900 million. Much of this success story is attributable to increases in international prices for the products exported by Argentina rather than a major increase in export volume. *See* La Nación June 25, 1974, at 1. For the following reasons, similar results are not guaranteed for 1974 or succeeding

change, the Government authorized the purchase of bonds for the payment of certain debts to foreign creditors. Thus, the first of seven bond issues emerged in September 1971. So far eligible debts have been limited to dividends, royalties and branch profits except for the latest issue, which may also cover certain other currently due debts with the exterior. However, no other legal means of meeting these obligations is currently available. The bonds are also viewed as a means of repatriating Argentine flight capital, at least temporarily.

Enabling laws followed by decrees[239] have provided for issues

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years: The petroleum crisis and other factors have caused a cutback in international demand for Argentina's most important export products, meat and grains, with the European Common Market leading the way; imports were artificially held in check during 1973 and pent-up demand will continue for some time into the future; and in general, international terms of trade have become less favorable for the country.

The questions of terms of trade and import demand are matters of great importance to the less-developed, primary-product producing countries of the world, which insist with considerable statistical support, that they suffer an unfair disadvantage in relation to the world's exporters of manufactured goods. Argentina's import statistics for the first quarter of 1974 compared with the same period during the previous year show these characteristics, although various other factors and explanations obviously play a part. Imports increased 45.4% from $562.9 million to $818.7 million while the physical volume of the goods increased by slightly more than half as much or 23%. The average cost of imported goods increased by 18.1%. Predictably petroleum appears to have been the greatest offender: The price for somewhat less than double the volume jumped from $30.8 million to $165 million. El Economista, June 14, 1974, at 1; June 28, 1974, at 3.

239. The system was created during the Lanusse administration. Law of July 29, 1971 (No. 19.145), published in BOLETÍN OFICIAL July 30, 1971. The First Series appeared in Sept. 1971. Decree of Oct. 11, 1971 (No. 4590); Decree of Sept. 8, 1971 (No. 3759); Ministry of Treasury and Finance Resolution of Sept. 8, 1971 (No. 57); Central Bank Circulars R.C. 407, 408 (Sept. 16, 1971). With the exceptions indicated in the text, the provisions for the issuance of succeeding series have been virtually identical. The currently effective enabling law under which the Seventh Series was announced is Law of July 15, 1972 (No. 19.686), accompanied by Decree No. 3.767 during the Lanusse Government. The Seventh Series, with slightly less attractive terms, is the first to be announced by the Peronist government. It was authorized by Decree of May 22, 1974 (No. 1.576) and partially modified by Decree of May 29, 1974 (No. 1640). For further details see Resolution (No. 726) of May 22, 1973 and Central Bank Circular R.C. No. 495 (June 3, 1974).

For brief references to external bonds in English see INTERNATIONAL MONETARY FUND, FOREIGN EXCHANGE REGULATIONS: ANNUAL REPORT FOR 1973 36 (1973) and BUS. INT'L CORP., 3 INVESTING, LICENSING & TRADING CONDITIONS ABROAD 11 (1974)

ranging in value from 20 to 70 million dollars each. Companies with qualifying obligations abroad, upon obtaining the obligee's written acquiescence to payment in this form, may apply to the Central Bank for the purchase of bonds, which apparently are rather selectively sold. Since they are sold at the official controlled exchange rate of a fraction under ten pesos to the dollar while the free market dollar has at times been 30 or 40 per cent more costly, it will be seen that Central Bank purchase approval is of significant and immediate monetary value.

The bonds have been issued for five-year terms with semiannual interest payments and somewhat varying amortization schedules. Interest is determined for each six month period on the basis of the prevailing 180 day London interbank eurodollar rate. For the first five issues it was set at one and one half per cent over this rate, at one per cent for number six and with no premium in the case of the recently announced seventh series. Minimum interest rates for these series were respectively set at eight, seven and six per cent, rather wishful thinking on the part of the Government.

The bonds are exempt from all taxes, freely transferable and in bearer form. No restrictions on movement in or out of the country are imposed. Interest and amortization are paid in Buenos Aires, New York, London, Frankfort or Zurich in US dollars or an equivalent at the holder's option. A secondary market in dollars exists in Argentina where these bonds normally command a premium in excess of their face value. Over the counter markets exist elsewhere in the world.

In the past, enough bonds have not been issued to absorb the demand resulting from legitimate, qualifying foreign obligations. However, the Government has permitted the purchase of bonds for pesos on the secondary market if for use in meeting the same categories of foreign obligations for which initial sale was permitted. The secondary market price in pesos is a function of the parallel or black market dollar rate. Given a significant spread between the two exchange rates, the attractiveness of being permitted to purchase these securities at the official rate rather than on the

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[hereinafter cited as IL&T]. For new issues, developments and interest rate announcements see BANK OF LONDON & SOUTH AM. REV. *See, e.g.*, 8 BANK OF LONDON & SOUTH AM. REV. 206 (1974). Price quotations for each series appear in the El Economista.

secondary market, is apparent. The exact legal status of this secondary market for the purchase of bonds for pesos is not clearly defined. Dealers indulge in the curious self-deceit of preparing sales receipts, which do not state the exchange rate used to relate pesos to the dollar denomination of bonds involved in transactions. For the time being though, when bonds are available, lucky investors obtain them from the Government at the official rate while less fortunate firms must do so at a hefty premium in the secondary market. In both cases purchases permit firms to indirectly extract foreign exchange from Argentina without immediately affecting the balance of payments situation.

The external bond device is obviously not a permanent panacea for the country's balance of payments problems since these securities remain medium term debt obligations at international commercial rates regardless of their immediate impact on the Argentine payments situation.[240] Furthermore, the often considerable spread between the Central Bank and secondary market price may be a tempting opportunity for graft. There is a real and immediate financial prize for obtaining approval to purchase these bearer securities from the Central Bank and the sums available for distribution according to bureaucratic discretion are impressive. The first issue authorized for 1974 was set at 70 million dollars. Approval is currently a ticket to buy dollars for ten pesos today and sell for fourteen or fifteen tomorrow. At some point, Argentines should decide whether the risks are worth the gain of a temporary deferment of certain foreign exchange obligations.

On the other hand, the graft problem may simply be endemic to countries that find it necessary to establish artificial exchange rates while simultaneously purchasing foreign exchange at special rates in determined cases. As a practical matter, the privilege of purchasing pesos at a dollar price 40 per cent under the black market price does not differ appreciably from the right to purchase dollar bonds at a similar price. The question is whether the added

240. The bond device does not necessarily offer the country a debt capital bargain. A record interest rate for external bonds was recently announced to cover a six month period for the first series of 1972. Holders of this series will receive 14.48%, the result of adding a point and a half to the 180 day London eurodollar rate. *See* La Nación, June 29, 1974, at 5. As indicated, the Seventh Series will pay no premium over the London rate.

complexity of external bonds facilitates dishonesty.

The new Foreign Investment Law offers no unambiguous assurance that foreign investments subject to it will actually enjoy access to foreign exchange for transfers to which that Statute entitles them. There is no apparent reason to assume that the external bond system or the Central Bank's ban on sales of foreign exchange are about to be suspended because of the new Law. The May 1974 announcement of a new bond issue only answers part of the question; obviously the Government intends to make use of the dollar bond mechanism. The announcement does not reveal what relation will exist between the bonds and the Foreign Investment Law. Since the payments situation is much improved over that of 1971, it is possible that foreign exchange will be sold for transfers guaranteed in investment contracts negotiated under the Law while new and succeeding bond issues will be selectively sold to cover foreign obligations of other companies. The new issue may also be devoted to meeting outstanding obligations as the Central Bank is apparently deluged with applications for bonds to cover legitimate foreign transfers. Most likely, they are envisaged by the Government as, among other things, an accessory tool in the conduct of Argentine foreign investment policy. They can be part of a rewards and penalties system to encourage desirable behavior on the part of foreign investors. For instance, even if foreign exchange is not made available for obligations under the Investment Law, bond purchases could be effectively limited to firms subject to the Act. They would be a potent force in a government campaign to push companies toward acceptance of the Law's option.

Regardless of other considerations, the Law appears to leave the Government in possession of the power to block payments in foreign exchange and use external bonds for meeting obligations under investment contracts. The Law gives the Central Bank express authority to defer the right to repatriate capital and remit dividends during periods of balance of payments difficulty.[241] That the right to remit profits blocked by balance of payments problems may be preserved by means of their deposit in a special account

241. Investment Law, art. 16. The Decree in art. 22 shifts the responsibility. The Minister of Economy, with the advice of the Central Bank, is charged with determining and declaring the existence of such difficulties.

does not alter the conclusion.[242] Since the establishment and use of such an account is subject to authorization by the Authority, there exists the possibility that authorization might be denied. In such a case, external bonds whether at the official or the parallel rate would be the only recourse short of permanently foregoing the transfer. Even though the use of a special account, once it is unblocked, has been authorized there exists no guarantee that the Government will not determine that the availablity of dollar bonds adequately meets the obligation of the country to allow transfers to foreign investors with whom it has entered into investment contracts.

F. *Nationalized Profits*

Profits that annually exceed the permitted percentages or for which transfer authorization has not been properly obtained or which have not been timely remitted after authorization become permanently nationalized and in no case may leave the country. Upon the agreement of the Authority they may be invested as local capital although not in prohibited sectors.[243] As seen in the discussion of capital susceptible to foreign investment treatment, profits eligible for transfer abroad may be reinvested in the same firm upon authorization without the need for a new investment contract.

A fundamental question exists with respect to the determination of exactly when earnings are subject to the above treatment and which earnings are so affected. The Decree gives the impression, rather contrary to normal corporate concepts, that undeclared, undistributed retained earnings as well as distributed earnings or dividends are intended.[244] This would involve several unattractive consequences for the foreign investor. Unable to accumulate earnings in excess of the percentage permitted for profit transfers or reinvestment as foreign capital because of the year limitation, the foreign investor would be prevented from applying this excess amount from good years to reach his profit percentage in less successful periods. No form of averaging through accumulation of

242. Investment Decree, art. 20.
243. Investment Law, art. 15; Decree, art. 21.
244. Investment Decree, art. 29(b).

retained earnings would be available. The erratic performer could not transfer profits or reinvest earnings that were not actually produced during the course of the year in question.

Furthermore, since these excess retained earnings could not be registered as a reinvestment they would become national capital. An exceptionally profitable firm might see itself gradually transformed into a national company with respect to the status of its capital assets although this would not proportionately change the holdings attributable to foreign and Argentine interests. A company could, thus, become quite large in terms of accumulated capital while retaining a relatively meager capital base on which to compute allowable profit remittances and capital repatriation allowances. Ironically such a company would be subject to the restrictions of the Law affecting foreign enterprises such as limitations on access to local capital and to the benefits of promotional laws.

A foreign minority participant in a joint-venture with Argentine capital would be particularly vulnerable to the consequences of a denial of the right to accumulate earnings for later declaration. The controlling Argentine interests could perpetually block the declaration of dividends. The Law is silent on whether the Authority could approve as a reinvestment the applicable percentage of the foreign investor's share of these undeclared retained earnings. Should government authorization be denied, the investor would see all of his part of the company's earnings annually transformed into national capital yet not even available as part of the total figure on which future profit transfers or capital repatriation could be based.

The question is less momentous under Decision 24. As in Argentina, upon authorization, profits may be reinvested in the same firm as an addition to registered foreign capital subject to the original investment contract.[245] Since Decision 24 neither limits the amount to profits eligible for transfer, in this case fourteen per cent of the registered investment,[246] nor imposes time constrictions on profit transfers, the problem of distributed versus undistributed earnings does not arise. Earnings may be maintained within the firm indefinitely without risking transformation into national capi-

245. Decision 24, arts. 1, 12, 13.
246. Decision 24, art. 37.

tal, which lacks the rights accorded registered direct foreign investments.

The Argentine doubts may be the result of borrowing from the Andean rules. More probably, the Argentines quite consciously added the time limitation on profit transfers to the Decree precisely to nationalize earnings in excess of the annual percentage. Unfortunately, the Statute leaves the question unresolved.

VIII. EXISTING INVESTMENT

Given the dimensions and importance of the foreign presence in Argentina, the treatment of existing investments under the new Law is undoubtedly the issue that most interests the international investment community. These investors are already committed in varying degrees. The Argentines also view the question of installed investment as primordial. According to President Cámpora:

> in all countries in the process of liberating themselves from foreign dependence there arises the need to establish standards governing foreign investments and conforming the activities of multinational companies to the national interest. [He also indicated that the new] policy will be based on principles of economic independence, political sovereignty and social justice maintained by the National Government.[247]

Given the scarcity of new foreign entrants over the past years and the general tone of the Law and of current policy, questions of dependency are obviously allied to the activities of those already on the scene. On the other hand, to the extent that existing investment cannot be physically removed from the country but can be regulated successfully, Argentines can concentrate on determining new capital investment needs, finding the necessary resources and putting them to work to the benefit of the country.

A. *Registration of Existing Investments*

To preserve the right to remit profits and repatriate capital even in cases when such right is established by contract with the Government under previous laws or incentive promotion plans, the amount of foreign capital invested must be registered with the

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247. Cámpora speech, *supra* note 7.

Authority. This is of the utmost importance to the investor since all future transfers of profits or capital will be based upon having accomplished this registration.[248] Foreign investors, seeking to register the maximum amount possible as a base for future percentage transfers, will soon be engaged in a bureaucratic contest with the officials of the Authority who are apparently determined to restrain their generosity.

Although the Law grants existing firms (or certain existing firms if one interpretation of the Law is accepted) the option of refraining from subjecting themselves to most of its provisions,[249] no such option exists with regard to registration. By not opting, firms with investment contracts under prior laws and perhaps all existing firms may avoid the percentage limitations of the Law on profit and capital transfers. However, it is still very decidedly in the best interests of the investor to register the maximum amount possible because, as will be seen, a penalty tax applied to profit remittances by non-opting firms decreases in inverse relation to the amount of capital registered.[250]

Furthermore, cynical students of official behavior are likely to agree that the Government will eventually and inevitably seek to push the new legislation to its outer reaches. Since a variety of tools exist for forcing the recalcitrant into the mold, exposed to the percentage limitations of the Law, the investor has reason to fight from the beginning for registration of a maximum amount.

A June 23, 1974, deadline was fixed for the submission of registration requests but that date has been extended. By mid-July, appropriate forms and instructions still had not appeared.[251] It is likely that definitive registration for all applicants will be a rather lengthy process since about 1400 are anticipated and many of them are likely to be challenged.[252]

B. *Qualifying Capital*

In spite of the vital importance of determining the amount of capital that qualifies for registration as an existing investment, the

248. Investment Law, arts. 20, 23, 32.
249. Investment Law, art. 20.
250. Investment Law, art. 20.
251. Investment Decree, arts. 50-51.
252. Blondeau interview, *supra* note 88.

Law offers inadequate guidelines for its calculation. There is an initial problem of the eligibility of capital invested in the country independently of previous investment or promotion laws. Registration is available for those investments of foreign capital defined in the Statute that "entered the country by virtue of any norm in effect prior to the Law, [which are] the property of foreign investors, are actually *(efectivamente)* invested in the country and authentically verified by the Authority."[253]

Members of the Authority have privately suggested, as has at least one commentator,[254] that registration will be denied those investments effected without registration under a prior law or specific government approval. Such approval would be reflected in an investment contract specifying the terms under which profits may be remitted and capital repatriated. This interpretation is exceptionally harsh considering that only the ephemeral Peronist legislation of twenty years ago and the Lanusse Statute, which was never effectively applied, were mandatory in requiring registration of foreign investments and that other measures were optional and involved contracts with the Government if the investor were interested in the benefits offered. The result appears yet harsher if investments effected prior to the existence of any measures offering the possibility of registration or contractual guarantees are to be similarly treated. Some of the advocates of the harsh view limit it to those investments that have entered the country since the enactment of the first Peronist law in 1953.

The proponents of the above views could argue that any investor anywhere in the world who has not obtained the guarantees of a government, when these are available, risks modification in the legal climate in which he is operating. Argentina cannot be required to provide a static legal environment for the convenience of the foreign investor, the Government need only respect its specific obligations. If the Authority takes this view, the matter will be hotly debated since many important investments fall in the free entry category. Those affected will certainly allege expropriation without adequate compensation upon finding themselves abruptly denied repatriation and profit transfer rights.

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253. Investment Law, arts. 20-21.
254. Bruzzon, *supra* note 120, at 7.

The type of capital defined in the Law and discussed earlier in this study are eligible for registration. As seen, capitalized technology rights are probably excluded. The Authority had indicated that it will only register assets capitalized prior to the effective date of the Law and will definitely exclude uncapitalized retained earnings.[255] Some companies reportedly capitalized their assets as completely as possible in anticipation of this position.[256] In all probability, this limitation is the fruit of the union of bureaucratic convenience and governmental interest in reducing registration amounts. Neither the Law nor any other legal norm brought forth requires this interpretation rather than one permitting greater reference to the economic reality of total equity including net assets. A rationalization for this approach would undoubtedly be based on the rather fatuous presumption that capitalization of assets implies a greater commitment to the country and to the enterprise.

The Authority has indicated that the value of the foreign currency to be registered will be computed on the basis of the historical official exchange rate of the peso. This means that original investments and the capitalization of internal growth will be registered in terms of their official dollar equivalents at the time the investment or capitalization took place.[257] This is only fair considering that as recently as mid-1971 the dollar purchased only half as many pesos from official sources as has been the case since.

The treatment of historical growth may turn out to be an important question. Although the Law speaks of the types of capital listed in terms of having "entered *(ingresadas)* the country," the defined items include reinvestment of profits eligible for transfer abroad. However, it does not indicate the treatment envisaged for companies that have enjoyed long histories of growth based on a small initial capital investment but have chosen to recapitalize earnings rather than transfer them out of the country. Will all such historically capitalized earnings be registered as foreign capital or will the 12.5 per cent limit be imposed retrospectively? In the latter case, the Law on its face would require allowance of a higher limit if in any past year the bank rate plus four per cent exceeded this

255. Duggan lecture, *supra* note 23. According to Dr. Duggan, members of the Authority so indicated to him.

256. Business Latin America, Dec. 5, 1973, at 389.

257. Blondeau interview, *supra* note 87.

figure. On the other hand, if non-opting companies are to be allowed the future right to reinvest profits in excess of the rate applicable to companies covered by the Law, consistency would decry any such historical limitation on existing investors. It is inconceivable that the Authority would grant this future right to companies that choose not to be covered by the Law and not allow them the same right during a period when the Law did not even exist. In both cases, the indicated logic applies with equal force: not subject to the Law, not subject to its percentage limitations.

If prior investors without contracts under previous laws are to be considered subject to this Law without the right of option, the above reasoning loses some of its force. Clearly non-opting, existing investors with contracts will continue to have the right to reinvest or transfer the profits stipulated in the contract even though they might be in excess of the limitations of the new Law. Presumably, no argument would be made with respect to the right of these firms to register earnings up to this amount, which were capitalized historically rather than transferred. However, if the firm without a contract is to be entirely subject to the Law, the percentage limitations, it may be asserted, should apply to historical reinvestment.

In view of the new statutory limitations on credit, especially from local sources, and the reasons for them, the policy makers may attempt to introduce standards designed to measure the type or quality of internal growth. One of the commonplaces of the *dependencia*—economic imperialism theme is the use of local credit by foreign investors as a means of achieving rapid growth on the basis of a small initial commitment of capital. For instance, reference is often made to the ties between international banking institutions and foreign investors, particularly multinational companies. The latter have been said to enjoy easier access to local credit and on better terms than their competitors through these institutions.[258] Avoiding a polemical (or empirical) fray in these

258. *See* FIEL, *supra* note 8 *La Asignación del Crédito y el Comportamiento de los Bancos Extranjeros* Ch. IX, at 154; Goff, *El Bank of America tiene a su Hombre en la Agricultura Latinoamericana* in EL PODER DE LOS BANCOS EXTRANJEROS 117 (1972) (originally in English in NACLA Newsletter, New York, Sept. 1970); Amadeo, *Dependencia y Estructura del Sistema Financiero Argentina*, 1 CUADERNOS NACIONALES 93 (1974); CIMILLO, *supra* note 17, at 51;

pages, it will be seen that the Foreign Investment Law vigorously reflects this attitude in its measures dealing with credit. Unfortunately, it offers no definitive guidance with respect to registration of historical capital growth by companies that have benefited from prior access to local capital.

The Government will face another difficult problem should its policy decision be to impose an historical value judgment on company growth. The secrecy and scarcity of corporate financial records, particularly the less recent, may relegate adequate analysis to the land of pipe dreams. It simply may not be feasible to determine if a successful growth pattern resulted from privileged access to local capital or was, instead, the honest result of the application of superior management, better technology or greater expenditure of energy.

Original direct capital investments introduced from the exterior would seem less troublesome. Nevertheless, since "direct proof as to the actual entrance to [sic] the country of the foreign investment may be difficult or impossible,"[259] an important Buenos Aires law firm suggests the use of a series of evidentiary materials. These include minute books, shareholder registers, banking vouchers recording the remittance or crediting of dividends, certificates of chartered public accountants attesting to matters not otherwise documented and home country tax records.[260] The data supplied in accordance with the registration provisions of the Lanusse investment law have no probative value. Applications were received, collected and organized but no registrations of capital were accomplished. The present position of a firm will certainly suffer if it estimated low in its previous submission, while the Government is in no way committed to acceptance of the earlier self-serving generosity of the business community. These complex and rather technical questions about capital evaluation should be of interest beyond Argentina; other countries seeking tighter control of foreign operations will or have faced the same issues. Venezuela adopted an easy solution in its extraordinarily prompt incorporation of the

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Onnes, *Bancos Extronjeros en la America Latina,* (prepared for Consejo Interamericano de Comercio y Producción, (CICYP) 1972).

259. Letter to clients by the Buenos Aires law firm Marval & O'Farrell, at 3, April 4, 1974.

260. *Id.*

rules of Decision 24 into the its national legislation; all foreign investments must be registered. "In the case of enterprises in existence in the country as of January 1, 1974, foreign direct investments will be made up of their own actually existing capital, calculated at book value. . . ."[261]

C. *The Option*

Having registered their foreign capital investment, companies are given the option of subscribing to the new Law or declining to do so. The option may be exercised at any time. Companies that do not opt for the Law are subject to a special tax on profits transferred abroad. The tax is expressed as a graduated percentage of the transfer increasing in relation to the percentage that the transfer represents of capital on which profit remittances may be calculated. It ranges from twenty per cent of transfers equalling up to six per cent of capital to forty per cent of transfers that are the equivalent of over fifteen per cent of capital. The Law does not indicate whether the top percentage is to be applied against the entire amount of the remittance or if the tax is to be calculated on a step-by-step basis. The latter alternative would tax twenty per cent of the first six per cent of capital, twenty-two per cent of six to nine per cent and so on. It is assumed that the Government prefers the first interpretation.

This tax is applied to payments made to foreign participants in foreign enterprises and mixed enterprises. The less than twenty per cent foreign interest permitted in national enterprises may receive profits free of the levy.[262]

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261. Decree of April 29, 1974 (63 (Venez.), *supra* note 28, arts. 19, 32.

262. Investment Law, art. 20; Decree, art. 13; Resolution of May 20, 1974 (No. 1623), Dirección General Impositiva (regulation regulating collection of this tax). The scale is as follows:

Per cent that profit transfer represents of total capital base on which such transfers may be calculated:	Tax as percentage of profit transfer:
Up to 6%	20%
Over 6% up to 9%	22%
Over 9% up to 12%	25%
Over 12% up to 15%	30%
Over 15%	40%

This study does not attempt an examination of two important peripheral questions related to the option decision. First, to the extent that the option really is a free choice, United States investors must determine if the United States foreign tax credit applies to the profit remittance penalty tax. Secondly, the effect of the option on insurance coverage for inconvertibility would demand study.

In the Executive Draft version of the Law, it was relatively clear that only those investments confirmed by previous registration or a contract under an earlier law could be registered. These would have been allowed to voluntarily subject themselves to the new Law or "remain subject to the terms (*'regimen'*) under which they were made."[263] Other existing investments were to be nationalized; registration and treatment as a foreign investment would be denied. This is the position currently in vogue among certain hardliners and discussed in the preceding section of this study.

The Executive Branch drafted the original version of the Law and in the Decree reaffirmed its earlier position in spite of a contrary expression of congressional intent, just as the Executive had done with the question of foreign participation in prohibited sectors. Since the Authority is part of the Executive Branch and reflects its viewpoint, it is very probable that the Decree provision will be utilized to force companies into the framework of the Law in spite of the option. It says that existing foreign investments, which "do not opt to be subject to the Law, will continue to be governed by the norms under which they entered the country."[264]

Those companies, which never entered into an investment contract or registered their investment under a previous law and do not opt for the new Law, may find their applications for foreign exchange or dollar bonds denied on the basis of the Decree provision when they seek to transfer profits or capital. The Central Bank can easily choose to inquire by what authority such a transfer must be authorized if it is not provided for in a written instrument negotiated under the new Law or under previous norms. In spite of the evident perversion of congressional intent involved in such executive sanctions, political realities insure that should the Executive wish to bring foreign investors within the ambit of the Law,

263. Draft Investment Law, art. 19.
264. Investment Decree, art. 15.

the means to do so are available.

The optional character of the new Law is an Argentine feature added to the Andean model. The executive version of the Law undoubtedly reflected a desire to extend its control over as wide a field as possible. Rights conceded under other laws could only be voluntarily renounced, hence, an option to do so was provided, and it was correctly assumed that the Government had the power to "encourage" recourse to the option. Those improvident foreigners who had chosen to take their chances and, therefore, did not enjoy the contractual guarantees of the Government, were to lose out entirely. The Decree provision reflects the same attitude, and the same general conclusions apply. In the measure that the Government elects to extend the applicability of the Law by means of the option, it will in all likelihood do so successfully.

Providing that non-opters will be governed by the norms under which they entered the country has a second aspect. It reaffirms Government commitments expressed in previous contracts for those investors who are so protected. Most of these contracts were made under promotion laws and include tax and other incentive benefits, which will not be lost. The prohibition of better-than-equal treatment for foreign investors[265] is clearly prospective and will not affect previous contractual dispositions.

On the other hand, the existing investor unprotected by a contract under an earlier law who avoids opting for the new Law is in an ambiguous situation. It is unclear to what extent, if any, the new legislation applies to him other than the special profit remittance tax, its capital registration requirement, the transfer restriction for periods of balance of payment difficulties and the limitations on access to local credit.[266] As suggested, the coercive power of the Government may bring all the restrictions of the Law to bear on the existing investor. Moreover, until mid-1974, apparently no existing investor had manifested an intention to opt to come under the Law.[267] In the June annual meeting of Business International in Buenos Aires, however, about six of the sixty major firms repre-

265. Investment Law, art. 19.

266. Investment Law, arts. 16, 17, 20; Decree, art. 15.

267. This has been the advice of the Commercial Section of the United States Embassy in Buenos Aires as well as that of the City's major law firms. *See, e.g., supra* note 259.

sented indicated that they had decided to opt. Since the only penalty for remaining outside the control of the Law is the special tax on profit transfers, no obvious reason exists for rushing forth. Until the capital registration process is completed, the Authority is not permitting profit transfers, which, in any case, would only have been possible through the external dollar bond secondary market at disadvantageous parallel market rates.

Should a company decide to opt for the new Law it will then be required to negotiate and enter into an investment contract subject to the rules applying to those negotiated with newcomers.[268] It is realistic to assume that a firm having manifested its intention to opt will be able to back out if unable to agree upon mutually satisfactory contractual terms with the Government.[269] Contact with the Authority will be sufficiently open to avoid the necessity of exercising the choice blindly. It is virtually inevitable that terms will be agreed upon before the formal option is itself manifested unless the Government dictates contracts by fiat and, thus, ignores the substance of the option concept.

The Law directs the Executive Branch to consider imposing a fade-out requirement in investment contracts negotiated with existing investors.[270] Curiously, this application of the fade-out concept is not burdened with the rigid divestment formula applying to contracts for new investments. Contracts will be for a term of five years, automatically extended for an equal term unless during the first four years the Authority demands the introduction of a fade-out system in the second contract.[271] Theoretically, by opting and negotiating a contract, the fade-out possibility exposes a company to a greater risk of forced nationalization. As in the case of new investments, Argentina has avoided the mandatory fade-out requirements of the Andean Code but has given the Government almost absolute case-by-case flexibility. This represents a congressional softening of the Executive Draft Law, which adopted the Andean approach in combination with the Argentine idea of an option. Under the Andean scheme, after the first step of opting to

268. Investment Law, art. 20; Decree, art. 13.

269. Some parties fear that opting will put a firm at the government's mercy. The Bomchil letter *supra* note 121, at 3.

270. Investment Law, art. 22.

271. Investment Decree, art. 14.

be subject to the Law, fade-out was to have been mandatory.[272] Beyond the scope of this article some obvious questions arise: Will the uncertainty of the divestment provisions erode investor confidence? Will the introduction of new technology and methods be reduced in view of the possibility of fade-out?

D. *Expropriation of Existing Firms*

In addition to the rights of the Government to impose fade-out requirements in investment contracts negotiated with existing firms that opt for treatment under the new Law, there exist two possibilities for outright expropriation of certain investments. These are, first, foreign ownership of companies acquired from Argentines and, secondly, foreign participation in certain now prohibited sectors.[273]

1. *Firms Acquired from Argentine Interests.*—Article 33 empowers the President to take measures during a period of three years to reconvert to national companies any firms that, once Argentine, have been taken over by foreign investors by direct acquisition. Excepted are firms absorbed during bankruptcy proceedings when no Argentine buyer was available.[274] The President's decision must be based on the same factors that determine whether fade-out is to be insisted upon in investment contracts, *e.g.*, "characteristics of the sector, company volume, balance of payments situation and the possibilities of national investment."[275]

Decision 24 of the Andean Code contains no precisely comparable disposition. There is a provision for the nationalization of firms operating in prohibited sectors, while investors who entered prior to June 30, 1971, are given three years, until June 30, 1974, to decide if they will subscribe to the fade-out provisions of Decision 24. Foreign firms are not required to submit to fade-out, but not agreeing to it costs them the duty-free advantages of the Andean Common Market.[276]

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272. Draft Investment Law, arts. 19(a), 21.

273. Investment Law, arts. 20, ¶¶ 1, 33.

274. Investment Law, arts. 6(d), 33.

275. Investment Law, art. 22.

276. Decision 24, art. 43. With the approach of the three-year deadline, the Junta and the Commission of the Andean Pact have reportedly softened the fade-out provision. A new ruling is said to continue the lock-out from tariff concessions

The Argentine rule, on the other hand, gives the President the power to force the expropriation of the defined class of firms without consulting Congress. Events in Chile and Peru are reminders that the inclusion of facilitating clauses in Andean Pact Commission Decisions is not a prerequisite to nationalization in member countries. It is, nevertheless, interesting that the Argentine Congress chose to grant the President this right to by-pass the legislative branch. When the Law was passed, Congress was still acting as Perón's right arm and public opinion apparently favored a firm approach to foreign investors who had taken over Argentine companies.

This section entered the Argentine Law as a result of public resentment toward the economic policies of General Onganía's military regime, which took office after a 1966 coup (or for cultural consistency *golpe*). Onganía's controversial Minister of Economy, Adalberto Krieger Vasena encouraged or permitted the take-over of Argentine companies by foreign interests. The current situation of seven foreign-controlled banks lends credence to this supposition.

On August 2, 1973, while the foreign investment bill was being considered, Congress sanctioned Law No. 20.522, which provided for the expropriation of seven Argentine banks taken over by six different foreign banks since 1966. The treatment accorded these banks as well as their identities give content to article 33. These banks came under foreign control after 1966, including the only branch of First National City Bank affected, whereas the pre-1966 acquisitions of City Bank were not touched. In addition, about fifteen other foreign banks that own branches and subsidiaries in Argentina were ignored.

Law 20.522 is skeletal. It singles out the banks affected and directs the President through the Central Bank to see to their continued normal functioning. It directs the President to dictate measures by which the expropriated banks will eventually be

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for firms unwilling to begin a divestment plan providing an immediate minimum of 15% national equity participation. Nevertheless, according to the ruling, firms that later comply with the fade-out plan will be granted the subregional tariff concessions. The entry of national participants has ceased being an academic problem in 1974 since international firms have been forced to face the first stages of the process. *See* Business Latin America, May 29, 1971, at 170; June 5, 1974, at 183; June 12, 1974, at 186.

transferred back to national hands—private, federal, provincial or municipal—with preference to be accorded the public sector assuming other factors equal.[277] The Central Bank is instructed to determine the amount of indemnification to be offered on the basis of book value plus the nominal value of collectible credits minus obligations. No intangibles such as good will, names or insignias are to be considered in the evaluation.[278]

Decree 1.430 dated September 23, 1973, contributes detail, especially to the indemnification question. It also adds a theme not mandated by the original measure but consistent with the public reaction against foreign takeovers of Argentine companies: The Central Bank while administering these banks during the period between expropriation and sale to national interests is ordered to consider the reincorporation of personnel who lost their jobs "as a consequence of the application of efficiency and reorganization policies during the period when such entities were managed by foreign capital."[279] Further, Decree 1.430 established September 30, 1973, as the evaluation date and Decree 889 of March 25, 1974, provides for adjusting this figure to the date of indemnification. Later decrees have established values ranging from 1.3 million dollars to 8.5 million dollars.[280] Decree 889 gives the banks 60 days to reach a decision. Should a bank refuse the offer or not respond during this lapse, the Central Bank is directed to assume control.[281] The banks appear to be promised cash payment in convertible currency rather than forced to convert payment into external bonds.[282] A publication distributed in early May 1974 reports that no bank has yet indicated its position although Chase Manhattan has said that it intends to continue negotiating. Most of the other

277. Law of Aug. 23, 1973 (No. 20.522), Concerning Bank Expropriation, art. 4.

278. Bank Expropriation Law, art. 3.

279. Decree of Sept. 9, 1973 (No. 1.430), Concerning Financial Entities, art. 9.

280. Decrees of April 16, 1974 (Nos. 1.183, 1.184, 1.185, 1.186, 1.187), Concerning Bank Expropriation Indemnization . *See also* Business Latin America, May 1, 1974, at 141.

281. Decree of March 25, 1974 (No. 889), Concerning Norms for Bank Expropriation, arts. 8, 9 [hereinafter cited as Decree 889]. *See* La Nación, Mar. 26, 1974, at 12.

282. Decree 889, art. 10.

banks apparently do not feel that they are likely to get more. General opinion is that the amounts are fair although some are under book value and, of course, none represent the arguably considerable value of intangibles.[283]

Present policy, thus, seems to be limited to the expropriation of companies sold to foreigners after 1966[284] except for operations in prohibited sectors or special cases. Furthermore, that the Government has manifested its intention to pay cash compensation for expropriated interests suggests that selective criteria will be applied; the country is in no position to be reckless with its foreign exchange. Although the executive faculty expires in a mere three years, its extension is a foregone conclusion unless major political realignments interfere in unpredictable ways.

2. *Participation in Prohibited Sectors*.—The Law adopts a relatively lenient and flexible approach toward foreign investments already operating in so-called prohibited sectors of the economy. Existing investment is affected in only two of the several general areas in which the entry of new foreign investment is restricted. In cases of foreign investment in these sectors, the Authority may take over management of firms and, if it so chooses, recommend their expropriation by Congress. The vulnerable activities are those related to the armed forces and such mass media activities as advertising, radio, television and publishing.[285]

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283. Business Latin America, *supra* note 280.

284. Admittedly, the provision is drafted to facilitate its application in other cases and would, thus, cover additional past take-overs of Argentine firms by foreigners should a more active expropriation policy be considered desirable. However, such a policy is feasible with or without this provision, given current political realities, such as the influence of the Peronist Government over the political process. Thus, judgment may be limited to Government intentions as currently manifested. The Government's present expropriation policy is unambiguously stated in the presidential message to Congress accompanying the draft Industrial Promotion Law. The first in a list of objectives advanced by the measure is to "[i]ncrease national decision-making power in the industrial sector. For this reason, support will be given national capital enterprises for which promotion benefits will be reserved. The objective is also to reverse the process of the economy's denationalization resulting from the economic policy of the last few years which has resulted in the shift of a great number of industrial companies to the domain of foreign capital." *See* Executive message accompanying draft Industrial Promotion Law *in* 15 DERECHO DE LA INTEGRACIÓN 299 (1974).

285. Investment Law, arts. 6(c)(1), (4), 20; Decree, art. 5.

This represents a considerable Congressional softening of the Executive Draft Law, which took a harsh view inspired by the Andean Code. Established firms with contractual legitimacy founded in other legislation were allowed, as always, to remain subject to the terms by which they entered the country.[286] Perhaps unwittingly, the executive office draftsmen did not include a word about the consequences envisaged for these non-opting companies if they were engaged in prohibited sectors. Those without prior investment contracts would probably have been forced by the ambiguity of the Draft Law to opt either for the Law or see their capital considered national and, therefore, without transfer rights. The option would have assumed more importance because opting foreign investments in any of the listed prohibited sectors would have been obligated to divest until the companies reached national enterprise status, that is, less than twenty per cent foreign participation. As a backdrop, it might also be borne in mind that this draft required the transformation of all opting majority-held foreign enterprises to mixed status.[287]

The Executive Branch can probably achieve the result sought in its Draft Law by way of the Industrial Promotion Law and decrees issued thereunder. Thus, no foreign investor in a sensitive sector of the economy can rely with certainty on the limitations to executive omnipotence included in the new Law. However, some judiciousness seems to be evidencing itself in the process of issuing decrees since promotion decrees have so far allowed existing businesses to continue with the same ownership while requiring special authorization for plant expansion or modifications in the business.

To participate in the Andean Common Market tariff reduction scheme, all foreign enterprises are required to submit to a prescribed fade-out plan.[288] Each of a number of prohibited sectors is accorded individual legislative treatment with considerable detail left to the discretion of member governments.[289] Thus, in broad terms, the Andean Code includes provisions that Argentina has generally reserved for promotional and other specific legislation. In general and in addition to other requirements, Decision 24 requires

286. Draft Investment Law, art. 19(b).
287. Draft Investment Law, art. 19(a).
288. Decision 24, arts. 27-36.
289. Decision 24, arts. 38-44.

a reduction in ownership to an 80:20 ratio for preexisting foreign participation in the sectors treated. As in the Argentine Executive Draft, these reductions are obligatory,[290] whereas the new Argentine Law places them within the discretionary realm of the Authority subject to congressional approval. The softening of the final Argentine version with its consequent estrangement from Andean origins, in part, reflects a different legislation-producing mechanism. The Argentine Executive Draft was based on a document drafted by a group of rather like-minded, internationally oriented, technocratic idealists. At least some of the details of that innovative document might not have survived a congressional ordeal comparable to that undergone in Argentina.

3. *Participation in Prohibited Sectors—Banking.*—Banking (with finance in general as well as insurance) is a sector in which both the Law and the Decree allow new foreign participation of up to but less than twenty per cent.[291] Neither measure suggests that existing foreign participation in banking is marked for extirpation when it exceeds this limit.[292] It was, thus, noteworthy when a respected lawyer involved in foreign investment questions observed that two recent Central Bank circulars order the conversion of all commercial banks and other financial entities to national status as defined in the Financial Entities Law and its modification.[293] For a financial entity to be considered "national" under these statutes, Argentine citizens must hold over 80 per cent of both the capital and the vote.[294] The Bank circulars in question repeat the relevant text of the law referred to and order "entities which do not conform to the cited proportions to formulate a plan enabling fulfillment

290. Decision 24 permits member countries to apply different norms when the country involved determines that special circumstances exist. In the absence of such a specific determination, Decision 24 requires the indicated reduction in foreign participation. The products of companies that do not make the reduction due to a determination of special circumstances are denied the benefits of the special tariff program. Decision 24, art. 44.

291. Investment Law, art. 6(c), last ¶; Decree, art. 24.

292. Banking is not an area in which the Authority is empowered to take-over *(intervenir)* firms in order to propose their nationalization or expropriation to Congress. Investment Law, art. 20, ¶ 1.

293. Klein, *supra* note 54 at 29-30. Financial Entities Laws, *supra* note 113.

294. Financial Entities Law No. 20.574, art. 10. Klein, *supra* note 54, at 29-30.

of the requirement before July 13, 1974, which plan shall be made known to this Institution no later than next March 15. . . ."[295]

In spite of this mandatory language it is more probable that the Central Bank was telling the financial community that to maintain "national bank" status, these institutions would be required to conform their ownership and voting to the provisions of the newly modified Financial Entities Law. Credence is given to this conclusion since as of late July the Bank had not issued any further circulars touching the question. If in fact, it was the intention of the Bank to order the conversion of all banks to national status, "the Central Bank by means of a circular letter is attempting to nullify legal norms of superior authority."[296]

4. *Nationalization of Bank Deposits.*—Coincidentally with the recent changes in ownership requirements for consideration as a national banking enterprise, Congress enacted controversial legislation affecting all deposit receiving institutions in Argentina. Although foreign banks are not specifically discriminated against in the measures, the Central Bank is granted increased control over commercial banking activities. Given the previously noted attitudes of the Central Bank toward foreign participation in this sector of the economy, it is likely that foreign deposit receiving institutions will find themselves under close scrutiny.

The law in question nationalized the deposits of all banks and financial institutions regardless of ownership.[297] Banking institutions in a sense are transformed into paid agents of the Central Bank as all peso deposits are to be considered Central Bank deposits. The Central Bank is given generally complete control over the use of these funds as well as interest rates paid and received; however, the Central Bank guarantees deposits without limitation as to amount or title. The law includes standards to guide the Central Bank in its determination of rediscount rates to be granted to all banks of a like class.

"Foreign banking entities" are singled out only once as follows: "In determining rediscount limits and conditions for foreign banking entities, special attention will be given to the extent to which

295. Central Bank Circulars, B 1106 and IF 433 (Feb. 21, 1974).

296. Klein, *supra* note 54, at 30.

297. Law of Aug. 16, 1973 (No. 20.520), Concerning Deposit Nationalization, Central Bank Circular, B 1055 (Aug. 22, 1973).

such entities contribute to the development of favorable financial and commercial relations with the rest of the world."[298] "Foreign banking entities" must be those defined in terms of capital and vote by the modified Financial Entities Law although the Statute was enacted some four months after deposits were nationalized. This is obviously a fine case of reciprocal backscratching: More local lending funds made available for banking operations in return for doing a good job on behalf of Argentina in international financial and export markets.

The Andean scheme for banking outlined in Decision 24 is generally stricter than the Argentine treatment although once again rather close to that of the Executive Draft Bill. Under the Andean Code no new investment in any percentage is allowed in insurance, banking or finance whereas Argentina permits up to but under twenty per cent. Far stricter in principle than the Argentine nationalization of bank deposits, Decision 24 orders foreign banks to stop receiving such deposits within three years. To avoid the latter prohibition, banks must sell at least 80 per cent of their ownership to local interests within this three-year period.[299] Thus, Decision 24 would eliminate any banking activity based on the receipt of local deposits by institutions with more than twenty per cent foreign participation.

IX. Credit, Interest, Securities and Technology Payments

A. *Local Credit*

In the case of foreign, as opposed to mixed and national enterprises, the Authority is directed to fix maximum limits of local indebtedness from banks or from any other Argentine domiciliary. Foreign enterprises are limited to short-term internal credit of a one-year maximum except for firms that the Central Bank declares eligible under special financial incentive measures.[300] Although at least one commentator feels that these limitations even extend to credits for local capital goods,[301] a less rigid approach is conceivable. The General Manager of the Central Bank suggests that the

298. Deposit Nationalization Law, art. 5.
299. Decision 24, art. 42.
300. Investment Law, art. 17; Decree, arts. 30-33.
301. Klein, *supra* note 54, at 22.

principal use of internal credit will be for the financing of credit sales; he does not indicate that such credits will be subject to a maximum term.[302]

Rather than specify maximum limits of local debt on an across-the-board basis, the Decree elected a case-by-case approach, obviously because the Executive preferred flexibility. The Authority is directed to impose guidelines in each investment contract with foreign capital enterprises. Further, these must be based on the particular situation and expressed in relation to the sum of capital plus reserves computed according to Central Bank standards.[303]

Existing companies with local debt in excess of established limits are directed to reduce it to prescribed levels over a period of six months with an additional six-month period offered for cause. Longer term debts may be phased out in due course.[304] Since virtually no existing firm is likely to have opted and negotiated an investment contract during this period, and since the local credit provisions are amongst those few that apply regardless of the option, it is not clear what is intended by the prescribed rules. Unless a general directive is issued, there does not appear to be any practical limitation on firms that have not been individually notified.

Rejecting the invitation of the Law to declare a fixed maximum standard was perhaps sensible since it permits matching the accessibility of local credit to the attractiveness or importance of each investment proposal. This almost total flexibility was not anticipated although a trend in this direction may be discerned in an examination of the relevant precedents. The Executive Draft Law also directed the establishment of individual limits in investment contracts but in no case permitted such limits to exceed the sum of repatriable capital plus nationalized reserves. The draft was, in turn, less restrictive of executive prerogatives than was its predecessor. The Lanusse investment law limited access to local bank credit by firms with majority foreign ownership to short-term loans totalling an amount equal to half of registered capital plus accumulated reserves.[305] It is unclear, however, to what extent

302. Cairoli, *El Régimen para las Inversiones Extranjeras en la República Argentina,* 20 BOLETÍN FINANCIERO, 1, 4 (1974).

303. Investment Decree, art. 32.

304. Investment Decree, art. 31.

305. Lanusse Investment Law, art. 12.

these restrictions were actually applied if applied at all. Actual comparison of the severity of the two measures is imprecise since the Lanusse provision did not include nonbank credit as does the new Law.

The final Argentine provision without its Decree resembles its Andean counterpart since the latter also denies access to other than short-term local credit while also shifting responsibility for the formulation of terms, in this case to the Andean Commission.[306] Since the Commission has not yet issued directives, the question has been left in national hands for the time being. The Andean measure was itself borrowed from Peruvian legislation, which, like the Argentine Draft Law, permits such credit up to a maximum equal to the capital plus reserves of each firm. Peru is said to also allow foreign enterprises some exceptions to the short-term limitation.[307]

Since all of these precedents are quite restrictive, it cannot be assumed that the decision of the Government to drop its self-imposed limitation was accidental. Presumably in what it considers appropriate cases, it will adopt a generous approach. Even a generous approach would, according to the Law, preclude access to medium- or long-term credit, but as a practical matter such credit has not been available on a significant scale. Foreign investors are said to be relatively unconcerned about local credit restrictions but rather uneasy about the rules applying to international sources of credit.[308]

This question of local credit restrictions may be viewed on a macro as well as on a micro level. One aspect of the macro view was revealed recently by the Central Bank's establishment of standards governing commercial bank loans to "local external capital enterprises."[309] The latter firms are those of Argentine domicile with fewer than 80 per cent of their technical and management personnel domiciled in the country and with over 49 per cent of their capital and votes in foreign hands.[310] Total loans to these

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306. Decision 24, art. 17.

307. Furnish, *El Régimen Común del Grupo Andino para las Inversiones Extranjeras,* 14 DERECHO DE LA INTEGRACIÓN, 85, 94-95 n. 63 (1973).

308. Business Latin America, Dec. 5, 1973, at 389.

309. Central Bank Circular, B 1102, Feb. 7, 1974.

310. Central Bank Circular, B 765, art. 3 (Nov. 12, 1970).

firms as a group, which are basically those defined in the Foreign Investment Law as foreign enterprises, are limited to the proportion that such loans represented in the total loan portfolio of each bank on September 30, 1973. The proportion is said to be 25 per cent while banks that have not previously loaned to foreign-owned firms are allowed three per cent of their total loan portfolio.[311]

B. *Stock Market Tax Incentives*

Foreign and mixed firms are excluded from legislation creating tax incentives for both the purchase of shares in other companies and the sale of their own shares on the domestic market. Passed after the Foreign Investment Law, the Stock Market Promotion Law[312] makes it possible for both individual and corporate taxpayers to purchase shares in firms approved by the Ministry of Economy with a portion of the funds that would otherwise go toward payment of tax obligations for the years 1974 through 1976. Familiar to students of the Brazilian model, the system permits individuals with small tax bills to devote the entire sum to these purchases with the permissible percentage decreasing to just over eight per cent as the tax obligation increases. Corporations are permitted to use three per cent of their tax obligation for stock purchases in 1974 and two and one per cent respectively in 1975 and 1976.[313]

Only the shares of national enterprises as defined in the Foreign Investment Law (over 80 per cent Argentine capital) are eligible for purchase in lieu of the payment of income taxes.[314] Generally, the Government has been strict in denying eligibility to firms with foreign participation under similar previous incentive laws.[315] Foreign and mixed firms are, thus, cut off from a potential capital source and, in addition, are apparently denied the tax exemption for the purchase of shares in approved companies since the Foreign Investment Law specifically proscribes the purchase by foreign investors of shares in national companies except during liquidation

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311. IL&T, *supra* note 239, at 16.
312. Law of Feb. 5, 1974 (No. 20.643), Concerning Stock Market Promotion.
313. Stock Market Promotion Law, art. 1(c).
314. Stock Market Promotion Law, arts. 3(a), (b), 12.
315. IL&T, *supra* note 239, at 18.

for bankruptcy.[316] Thus, only national firms will be permitted to buy these shares even though purchases are limited to a maximum of two per cent of the total capital of the issuing corporation and the total portfolio this special class of securities may not exceed ten per cent of the total capital of the purchasing corporation.[317] Since the device is an attempt to popularize and broaden stock ownership and increase available equity capital, permitting a maximum foreign participation of two per cent would not have sullied the principle of national control over the economic destiny of the country. However, it would have involved the sacrifice of an equivalent amount of tax revenue. Just as access to local credit is restricted by the desire to reserve national savings for Argentine companies, foreign and mixed enterprises are excluded from a potential source of equity capital by the ineligibility of their shares for purchase under this program.

C. *Foreign Credit*

With the exception of foreign credits for the purchase of capital goods and to cover imports, all external credits are subject to prior Central Bank authorization and registration. The Bank may also fix overall or sectorial debt limitations for determined periods.[318] According to a provision of the Law included in an article dealing with another question,[319] the effective annual interest rate may not exceed the equivalent of two points over the prime rate paid in the country from which the currency to be registered originated. This rate may in no case exceed overall rates established by the Central Bank.

Subject to the same exception indicated above, a number of special limitations are imposed on foreign credits conceded to foreign enterprises[320] as distinguished from national and mixed com-

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316. Stock Market Promotion Law, art. 4; Investment Law, art. 6(d).

317. Stock Market Promotion Law, art. 4.

318. Investment Law, art. 24.

319. The first paragraph of article 26 of the Law applies to foreign credits in general. The rest of the article deals with and bears the title "Credits and other contributions between parent and/or branches or between subsidiaries."

320. Investment Law, art. 25. Actually the article refers to "foreign enterprises" although it undoubtedly means "foreign capital enterprises" as defined in article 2(c) of the Investment Law. This is an example of slipping into the handier Andean terminology.

panies. The foreign enterprises are allowed Argentine bank guarantees only in special cases; the amount of any transfers related to certain penalties incurred under the loan is directly discounted from the repatriable capital of the firm; and credit lines without fixed terms or totals are subject to additional Central Bank control.[321] Special rules governing loans by foreign parents to their Argentine subsidiaries will be discussed below.

Again with the same exception, future modifications or extensions of existing credits must conform to the rules for foreign loans while credit lines without fixed terms or amounts have a year to adjust. After this period transfers abroad for servicing will not be permitted.[322]

In this case the Argentine measures are somewhat stricter than their Andean prototype. Authorization, registration and overall limits are provided for in Decision 24[323] while only official or semioffical institutions are prohibited from guaranteeing external credits granted to foreign enterprises. Guarantees may be offered to firms that include state participation.[324] Thus, as long as private banks exist,[325] they may guarantee foreign loans. Except for foreign credits to subsidiaries, a maximum interest rate is not imposed but is to be nationally determined. As in Argentina the rate must be related to the financial market in the country from which the registered currency originates.[326]

D. *Parent-Subsidiary Relations*

Previous Argentine foreign investment laws did not deal with external credits, whether with third-parties or between a foreign parent and its local subsidiary. This was undoubtedly because these pioneer statutory draftsmen were wed to the notion of regulating capital rather than debt investment. The primary reasons

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321. Investment Law, art. 25.
322. Investment Law, art. 27.
323. Decision 24, art. 14.
324. Decision 24, art. 15.
325. Their immediate demise is far from assured. Article 44 of Decision 24 permits member countries to modify the rules with respect to prohibited sectors. Bolivia is reportedly inviting proposals for new foreign investment in banking and finance. *See* Business Latin America, June 12, 1974, at 190. .
326. Decision 24, art. 16.

for the inclusion of debt in the statutory framework of the Andean Code and consequently in the new Argentine Foreign Investment Law are well-known. As Cámpora recognized in his congressional speech, "the limitations on foreign indebtedness by foreign companies . . . prevent these firms from being able to transfer hidden profits abroad in the form of interest payments."[327] Even better for the foreign investor, interest payments had been tax deductible. Thus, in some instances capital was not only illegally removed from the country, but the operation also received a windfall in the form of a tax deduction. Identical principles apply and have applied to technology transfers and technology payments in the form of royalties, licensing fees and the like.

Before the Foreign Investment Law was reality, Argentine courts took what, even in Anglo-Saxon jurisdictions, might be considered legislative action. Borrowing from Brazilian and Andean statutory foreign investment provisions,[328] the Supreme Court affirmed what is now known in Argentina as the *Parke Davis* rule.[329] The rule springs from the conviction that arms-length transactions cannot be expected between a parent and its subsidiary and, therefore, denies the tax deduction of royalties paid by an Argentine subsidiary to its foreign parent.[330] The same principle is extended to include interest[321] and other payments between related entities.

327. Cámpora speech, *supra* note 61.

328. Law of Sept. 3, 1962 (No. 4.131), art. 14 (Braz.) and Decision 24, arts. 16, 21; *see* Sábato, El Cronista Comercial, Oct. 8, 1973.

329. Parke Davis y Cia. de Argentina S.A.I.C. s/ recurso de apelación, Fallos de la Corte Suprema de Justicia de la Nación, 151 La Ley 353 (1973). Gordon, *Argentine Jurisprudence: The Parke Davis and Deltec Cases*, 6 LAW. AMERICAS 320 (1974); Martinez de Sucre & A. Corti, *Parke Davis—Caso Rector*, 49 EL DERECHO 481 (1973) (originally appeared Aug. 20, 1973, No. 3262, at 1); La Opinión, Sept. 9, 1973, at 12.

330. Sixty-four percent of the firms making technology transfer payments between March 1972, and December 1973, were over 50% foreign-owned while only 19% were 100% locally owned. Most payments probably went to parent companies. Instituto Nacional de Technologí́a Industrial study, *supra* note 12, at 11. The weekly newsletter *Business Latin America*, no enemy of foreign investment, commented "that foreign investors were avoiding the risks of doing business in Argentina by shunning direct investment in favor of relatively safe licensing based on sales volume." Business Latin America, April 24, 1974, at 130.

331. Ford Motor Argentina, S.A., Fallos de la Corte Suprema de Justicia de la Nación, La Ley June 19, 1974, at 7 (advance sheet), File No. 70.475, No. 117;

Thus, the new Income Tax Law, enacted during the last days of December 1973, a few weeks after passage of the Foreign Investment Law, incorporates these principles as follows:

> Payments resulting from financial or technological contributions or for technical assistance provided to a foreign enterprise located in the country by its parent, by another subsidiary or branch or by a third party economically tied to these will not be tax deductible by the enterprise which makes such payments. Such payments will be subject to the same treatment provided in this law for profits from firms referred to in article 63, section (b) of this law.[332]

The same treatment will apply even though a parent-subsidiary or similar relationship cannot be shown, if an analysis of the situation indicates that decision-making power is not in the hands of the Argentine company or if the relevant contract or agreement with a third party fails to conform to normal international commercial practices. These references to commitments negotiated on an other than arms-length basis recognize the use of tax-haven jurisdictions by multinational corporations and other investors. Panama has proven particularly popular since a dummy company with absolute ownership secrecy can be formed in a matter of hours to serve as the "unrelated" firm to which payments are made.[333]

Article 63(b) imposes on these payments a 45 per cent tax rate, which is the same rate applied to profits earned by foreign branches operating in Argentina. The rate applied to businesses incorporated in Argentina, regardless of the nationality of their ownership, is 22 per cent.[334] Besides applying the *Parke Davis* roy-

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see also Martinez de Sucre, *Compendio, Afirmación y Extensión de Principios Aplicados por la Corte Suprema,* La Ley, June 19, 1974, at 6.

332. Law of Dec. 29, 1973 (No. 20.628), Concerning Income Tax, art. 14.

333. *See* Stebbings, *Panamá y la Empresa Multinacional: Su Papel de Paraíso Fiscal y Otras Consideraciones,* 15 DERECHO DE LA INTEGRACIÓN, 258 (1974), which appears in English as *Panama and the Multinational Corporation: Tax Haven and other Considerations.* 3 INT'L LAW. 626 (1974); The INTI study, *supra* note 12, at 9 indicates that companies doing business in Argentina planned on remitting over $7 million to Panama for technology payments during 1973. One may ask how much of this technology was actually developed in and provided by Panama. The figure is undoubtedly inflated, but any significant amount makes the point.

334. Income Tax Law, arts. 63(b), 64. Article 64 of this law imposes an additional 29.5% tax on the amount of undistributed earnings remaining after the

alties rule to all payments from Argentina to related foreign firms, the Income Tax Law dared to double the normal corporate income tax rate on the principle that a subsidiary really does not differ appreciably from a branch. This philosophy is consistent with another recent and already famous judicial decision in Argentina, involving the Swift-Deltec group in which the judiciary dissipated the Argentine corporate veil on the grounds that the activities of the group were basically those of an economic unit under common control and should be so considered.[335]

Again, the author does not propose to enter into the economic and psychological wisdom of these measures, which some say will frighten away new foreign technology and perhaps capital as well. However, these restrictions may pose problems for the automotive industry or other industries or firms subject to agreements requiring the expansion of existing investment. In addition to denying access to medium- or long-term local credit, loans from the foreign parent are effectively rendered impossible. Should local profits not be sufficient to cover new investment capital needs and should external credits from unrelated sources not be available on reasonable terms, some difficult questions may arise for investors. It may

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payment of these taxes, whether the latter be 22% or 45%. There is a withholding tax of 29.5% on dividends paid to the exterior (art. 98 of the same law). The 45% nondeductible rate referred to in the text is, of course, the equivalent of a withholding tax on interest and technology transfer payments. Income Tax Law, arts. 14, 63.

Two emergency surtaxes have been enacted covering at least fiscal 1973 and 1974. One imposes an additional 30% tax on the total of all other income and earnings taxes and the other involves a 1% levy on total capital including reserves. Surtax Law of May 11, 1973 (No. 20.372), Concerning Federal Emergency; Law of Dec. 29, 1973 (No. 20.629), Concerning Tax On Capital.

335. Companía Swift de la Plata S.A., Frigorífica s/ convacatoria de acreedores, Fallos de la Corte Suprema de Justicia de la Nación, 151 La Ley 516 (1973). *See* C. ARAMBURÚ, EL CASO SWIFT-DELTEC: LA REPARACIÓN JUDICIAL DE UNA AGRESIÓN ECONÓMICA FORÁNEA (Buenos Aires, 1973); Laguis, *El Caso Swift y la Interdependencia Económica*, 51 EL DERECHO 223 (originally appeared Nov. 16, 1973, No. 3326, at 1). This book includes the judicial material related to the case with an explanatory introduction; Gordon, *supra* note 329; *Justicia: El Escandálo de Swift*, PANORAMA, July 13, 1972, at 30; *Caso Swift: Poder judicial versus poder nacional?*, PANORAMA, June 15, 1972, at 28; Lozada, *El Caso Swift-Deltec*, La Opinión, Aug. 26, 1973, cultural section, at 8 (Lozada, the Commercial Court judge whose decision was confirmed by the Supreme Court, is the man most intimately associated with Swift-Deltec).

be necessary for them to face the choice of either suffering the penalties incurred as a result of not fulfilling a given agreement, such as loss of domestic markets, or making a new capital investment in Argentina.

The latter alternative, of course, implies the negotiation of an investment contract, submission to the new Law and all that is involved in a new capital investment decision. In this case, there may exist more appealing alternatives than a long-term commitment to Argentina, which offers no possibility of capital gains or spectacular earnings. There remains a possibility for the foreign investor unwilling to introduce new capital into the country, which happens, not by chance, to be consistent with the policy motivating the architects of the entire panoply of measures under discussion. Local equity capital participation may be sought leading to at least a percentage change in ownership and initiating the process of economic "nationalization" considered so fundamental.

The Income Tax Law refuses to risk omitting anything; article 63(b) quoted above ends with the paragraph: "Likewise, any contractual agreement between persons or enterprises provided for in this article shall be without tax effect and any payments actually made shall be treated according to the principles governing contributions and profits."[336]

Moreover, subsidiary is not defined in article 63(b) of the Income Tax Law although Parke Davis Argentina was 99.95 per cent owned by its Detroit parent. The tone and logic of the tax measures suggest that majority ownership and, hence, foreign control or control without ownership would be enough to thrust a firm into the prejudiced category.

None of the above was reflected in the Executive Draft of the Foreign Investment Law although after *Parke Davis* was decided the issues became the subject of heated congressional debate.[337] Crossfertilization with the Income Tax Law, which was in Congress at exactly the same time, led to a generally unintelligible provision. Thus, awareness of *Parke Davis* is essential to give it meaning. The provision was included as the second of the two paragraphs of article 26, which is entitled "Credits and other contributions between parent and/or branches or subsidiaries." The first

336. Income Tax Law, art. 14, last ¶.

337. Sábato, *supra* note 328.

paragraph treats interest rates for foreign loans on a general basis while the second part deals with the subject of the article's title and excludes the question from the general treatment of foreign credits.

Furthermore, article 26 borrows its language from the Income Tax Law without providing the surrounding content of the tax statute. As an obvious minimum, it is intended to guarantee the same result; more can not be said with certainty. The terms parent *(casa matriz)* branch *(filial)* and subsidiary are borrowed directly from the tax legislation, again without definition. It is ironic that a Law so dependent upon its defined terms should be so careless in using them. It also refers to loans, technology and any other kind of payment between the entities in question and provides for their treatment according to the rules governing contributions and profits. The latter could mean that royalties, interest and other payments will not only suffer the described tax consequences but will be subject to the liquidity, percentage limitation and other rules of the Investment Law covering profit transfers. If it means that technology and credit contributions between parent and subsidiary must be capitalized and registered and are subject to the negotiation of an investment contract with the Government, the provision is in direct conflict with the list of items defined as direct foreign investments in the Law.

Unfortunately, the Decree makes no attempt at clarification. Until the Government takes its stand, the provision may be regarded as the incorporation of the *Parke Davis* rule as expressed in the new Income Tax Law, without other interpretative dimensions. The omission of any reference to parent company credits for the purchase and importation of capital goods is probably an error. An exception for such credits was included in the provisions for foreign credits in general, for such credits granted to foreign enterprises and for existing foreign credits. As noted, no reference was made to credits for purchasers of capital goods in the rules governing access to local credit. Since the parent-subsidiary provision was a legislative after-thought, the omission in this case may have been inadvertant.

As noted, the Andean Code deals with the same problems and was a conceptual inspiration for the *Parke Davis* case. It does, however, make the granting of foreign credits to a subsidiary more feasible than do the Argentine rules. These are permitted with the

sole reservation that the interest rate may not exceed three points over the prime rate in the country from which the currency registered originates.[338] In the Andean judgment, then, parent company credits are still regarded as desirable given reasonable service charges.

The Andean approach to technology, however, is rigid. Royalty payments to a parent will not be authorized and any made will not be deductible. As seen earlier, Decision 24 is unequivocal in its declaration that intangible technology transfers may not be capitalized.[339] This is an expression of the extreme view that technology should be the unpaid, uncapitalized accompaniment of the investment of a foreign company in a local subsidiary. Compensation should take the form of profits resulting from the ultimate economic success of the venture. It is still far too early to measure the economic results of this view in terms of the flow of new technology into the Andean countries. This eliminates the possibility of offering predictions applicable to the Argentine case.

Another expression of the doctrine, which unites related companies, makes the foreign investor jointly and severally liable *(forma conjunta y solidaria)* with the "local enterprise which receives the foreign investment" for obligations assumed in the investment contract.[340] This is obviously harsh if a foreign minority investor without effective control is to be made liable for risks beyond his control. On the other hand, it should be possible to insure reasonable terms in the investment contract, at least for the potential entrant negotiating reasonable conditions for initial entry. Harshness would result in the case of existing firms forced to exercise the option of the Law and then required to accept onerous contractual terms theoretically binding upon a foreign minority shareholder.

A situation reportedly troubling Argentine lawyers and some of their international clients focuses on another version of the transfer-of-disguised-profits theme. The Foreign Investment Law, coupled with the Argentine Company Law, indirectly adds a new weapon to the Government arsenal for use against the oft-condemned practice of transfer pricing,[341] already alluded to in

338. Decision 24, art. 16.
339. Decision 24, art. 21.
340. Investment Law, art. 31.
341. According to the FIEL study on foreign investments in Argentina, *supra*

reference to the capitalization of imported capital goods. There are obvious variations on the theme, but an example will make the point. The meagerly capitalized Argentine subsidiary of a foreign company imports over-priced raw materials from its parent, which makes its profit on the inflated sales prices. Meanwhile, the Argentine firm operates at a loss and assumes a heavy and constantly growing debt burden with its parent-supplier.

As has been seen in relation to the role of net losses in the determination of repatriable capital, the Argentine Company Law requires the maintenance of a defined equilibrium between stated capital plus reserves and book losses.[342] Since the Argentine side of the operation is not allowed to generate profits, past practice has been to reestablish the equilibrium endangered by the potential default of this debt by simply capitalizing the latter as an addition to the investment of the parent. It appears that the new Law can be used to end this practice although the problem is not attacked specifically. Capitalizing debt owed a foreign investor requires government authorization and the negotiation of an investment contract. The Government may force the dissolution of a subsidiary under corporate law by not permitting capitalization of the debt; it may force a change in the pricing policies of the parent to allow the local firm sufficient profits to eradicate past debt and maintain future profit-loss equilibrium ; or finally, it may permit capitalization under an investment contract guaranteeing modification of undesirable practices.

It must be granted that the above does not represent a total solution. Many firms may succeed in collecting inflated transfer prices from their subsidiaries without allowing the latter to show negative balances. In such cases, the Government can marshall its forces and oblige the offending company to "opt" for coverage under the new Law and negotiate an investment contract. Pressure

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note 8, United States companies have not been great transfer pricing offenders because the United States Foreign Tax Credit has made it advantageous for foreign subsidiaries to show the best results possible rather than concentrate earnings in the North American based parent. FIEL assumes that transfer-pricing abuses between foreign subsidiaries cancel themselves out in the case of Argentina. *See* FIEL, *supra* note 8, at 109-10. Motivations may be expected to change with Argentine taxes in excess of United States corporate rates and with the imposition of percentage limitations on profit transfers and capital repatriations.

342. Company Law, *supra* note 66, arts. 205-06.

by the Central Bank or the tax authorities should be adequate. Further pressure could be applied by the Authority should the company, finding itself unable to remove profits from the country, seek to capitalize them to increase its foreign capital base for eventual transfers. Even though the company is not covered by the Law and has not exercised its option to be so covered, this capitalization of reserves would require independent authorization and possibly an investment contract. The complications of authorization and the mixture of new Law capital and old capital might be such that the firm would eventually opt for complete submission to the Law.

E. *Contracts other than Loan Agreements*

This is the last of the three areas listed in the first article of the Law as within the ambit of the statute, accompanied by direct investments of foreign capital and external credits. Foreign remittances under any type of agreement will only be permitted after authorization by the Authority with the advice of the Central Bank.[343] A literal reading would include import purchase agreements although they are specifically exempted from all but one of the provisions dealing with external credits. Their status remains unresolved although importers are conducting themselves as if the provision did not exist.

Contracts for technology use, transportation and insurance are excluded from the control of the Foreign Investment Law. The last article of the statute[344] directs the President to submit to Congress a bill regulating amounts payable for technology use of any and all kinds. As seen, a much more comprehensive foreign technology transfer act is currently in Congress; thus, further discussion of this very important legislation is impossible here. The Andean Code provides guidelines for the treatment of technology but leaves many areas open for determination on a national level.[345] The initial exclusion of technology agreements from the control of the Argentine Law is contradictory given the addition of the Parke Davis rule to article 26. Since Argentina has introduced a revolu-

343. Investment Law, arts. 1(c), 28.
344. Investment Law, art. 36.
345. Decision 24, arts. 18-26.

tionary change in the treatment offered transfers of foreign technology, it is strange that no one thought to modify the text of the Act accordingly. The initial reference to the exclusion of technology agreements was merely to put the reader on notice that the draftsmen had decided to split the Andean Code into two parts and would come back later with a new technology bill.

X. CONCLUSION

While recognizing a need for foreign investment capital in their economies, many countries and regions have created specific statutory schemes for its regulation and have invariably referred to the importance of clearly defining the "rules of the game." Once these rules have been spelled out their stability has usually been considered crucial. The head of the legal section of the Andean Pact points out that Decision 24 may not be unilaterally modified; its modification is only possible with the approval of two-thirds of the member countries and in the absence of negative votes. Consequently, he insists that "the stability of Decision 24 is greater than that of national Foreign investment codes."[346] That may be argued and it is, indeed, a fact that Argentina has had at least six different foreign investment regulatory schemes since 1953,[347] but it is doubtful that potential foreign investors are excessively concerned about the durability of given investment laws.

In Argentina and in the Andean countries, new investments as well as some old investments are to be subject to contracts negotiated with the national government according to the "rules of the game." For each investor, the basic rules will be or should be those

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346. Saavedra, *supra* note 46, at 262. Unfortunately, the Chilean military junta seems to have proved Dr. Fernández Saavedra wrong by its passage of a new foreign investment statute in July 1974. *See* note 26, *supra*.

347.	Under Perón:	Law 14.222 (1953)
		Decree 19.111 (1953)
		Decree 637 (1955)
	Under Aramburú:	Decree-Law 16.640 (1957) (Merely revoked the Peronist measures and confirmed a free exchange system.)
	Under Frondizi:	Law 14.780 (1958)
	Under Onganía:	Law 18.587 (1970)
	Under Lanusse:	Decree-Law 19.151 (1971)
	Under Perón:	Law 20.557 (1973)
		Decree 413 (1973).

established in these bilateral instruments. Investors will be interested in the respect of the country for its national commitments and in its general attitudes toward foreign investment and private enterprise. The supposed difficulty in modifying Decision 24 does not make it superior to the Argentine model, especially in view of the development of sometimes significantly different attitudes toward foreign investment in the various member countries of the Andean Pact.

An attempt has been made throughout this article to emphasize the general flexibility of both statutes. Actual national application of the measures as they stand may be more significant than their substantive differences or their inherent stability. It is probably true that "economic growth rates and development prospects of capital-receiving countries . . . determine the flow of foreign investment much more than do their tax or specific foreign investment policies (short of expropriation or nationalization)."[348] Regardless, the measures to be applied to that investment remain important especially in view of the considerable latitude granted the government in its selection of contractual terms to be offered to potential entrants.

Avoiding extensive analysis of the many difficult philosophical, political and economic decisions required of the proponents of the Argentine legislation, one may criticize them for not achieving a higher level of statutory workmanship. This is to be particularly deplored in Argentina, a country replete with exceptionally gifted lawyers, economists and other specialists who have produced other legislation of the highest quality. The Andean model is fortunately available to aid in understanding the intentions embodied in the hazy areas of these Argentine measures.

Regional level Andean officials are interested in demonstrating that foreign investment can be effectively controlled in a way beneficial to the host region without sacrificing its continued availability. They have prematurely begun claiming quantifiable, statistical success in attracting desirable new investment into the area under the rules.[349] This may be their prerogative, but the infancy

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348. Grunwald, *supra* note 30, at 158.

349. 23 *Grupo Andino* 1, 7 (April 1973), official information organ of the Junta of the Cartagena Agreement (published in Lima, Peru) states at 1 that "[i]t has been proved with statistics in Columbia that the Common Regime for

of the Andean experiment coupled with a plethora of impinging and largely unrelated events make the data meaningless. Consequently, no hard predictions for Argentina can be based on Andean experience.

Understandably, Argentina is also anxious to attract outside capital while simultaneously subjecting it to regulation. The leaders of the country often manifest a decidedly congenial attitude towards foreign investors in spite of the turmoil, which surrounded the birth of the Investment Law. Their words represent an attempt to mold national attitudes as well as tranquilize foreign investors. Referring to the General Motors automobile sales to Cuba as well as to the general expansion of Argentine foreign trade, the Minister of Economy said in late June 1974 that "we would not have been able to accomplish this without the efforts of the companies."[350] Since the automobile industry is entirely in foreign hands, he was applauding an important group of foreign investors, at least for their role in boosting exports. He added that "in almost every case, what you produce requires many Argentine technicians, engineers and workers. This is what we are selling: Argentine work at the price for which Argentina should sell it."[351]

The country is by no means relying entirely on prosaic efforts to boost exports and attract new conventional investments. Conditions have been such that the flow of new equity capital has been limited over the last few years. The government has put Peronist Third World principles into action by aggressively seeking joint-venture capital from the Soviet Bloc countries. Theoretically subject to the new Law, these bold overtures are part of a logical effort to expand the economic horizons of the country by adding new alternatives.

In essence, the new Foreign Investment Law and the eventual

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the Treatment of Foreign Capital inspires confidence in investors. In Peru, something similar is happening." Señor Luis E. Ramos, director of the National Department of Planning in Colombia recently made a similar statement. *See* 102 BOLETÍN DE LA INTEGRACIÓN, 319 (1974).

350. José Ber Gelbard, in La Nación, June 26, 1974, at 5.

351. La Nación, June 26, 1974, at 5. To add a little uncertainty to the picture, at precisely the same time, which happened to be the week preceding President Perón's death, another Buenos Aires newspaper reported that "Gelbard described his critics as agents of international monopolies and his opponents as 'immature pigmies.'" Buenos Aires Herald, June 23, 1974, at 3.

Technology Transfer Law are part of the response by a sophisticated country to problems perceived by much of the capital-importing world. The impact of this amalgam of both Argentine and Andean ideas merits continued attention.