ANZOATEGUI & LEVY

Consulting on National and Foreign Investments

a) Analysis of socioeconomic conditions; macroeconomic and balance of payments of the country, with direct or indirect impact on the action of the current government administration, related to the framework of the investment project that intends to be submitted for approval by the PEN.

b) Scope, incidence and opportunity for the presentation and subsequent execution of the projected investment.

c) Economic and financial effects of the applicable customs and exchange tax incentives, in accordance with the new legislation.

d) Conditions for the presentation of the investment project, subject to approval. Adequate legal framework (VPU), in accordance with the content and scope of the Incentive Regime for Large Investments (RIGI).

ARGENTINE REPUBLIC - FOREIGN INVESTMENTS - BRIEF HISTORICAL BACKGROUND - NEW PERSPECTIVE

Between 1880 and 1945, it is clearly established that the Argentine Republic maintained its economic policy based on an export agricultural model. Although some nuances, different from this scheme, were introduced with the arrival of Hipólito Yrigoyen to the Presidency of the Republic (1916/1922), the productive matrix of the country remained attached to the production of cereals, meats and dairy products. low added value.

Argentine production was essentially traded with England. In this sense, the most notable point of consolidation was the signing of the treaty called Roca - Runciman, signed between the Argentine Republic and the United Kingdom on May 1, 1933. This treaty ensured the sale of Argentine meat to England, as long as the price was lower than that of other producers. In exchange, for the placement of Argentine production at extremely low prices, England was granted concessions that were no less than dishonorable, such as not being able to install Argentine refrigerators in our own country. An English corporation was also given a monopoly on public transportation.

It should be added that the close ties with England made possible the establishment of true exploitation fiefdoms such as those of the quebracho in northern Argentina and the establishments for the production of sheep in Patagonia.

This relationship between the Argentine and British states was colonial in nature, therefore the investment made in the country enjoyed all the prerogatives that foreign companies imposed.

In 1946, during the presidency of Juan D. Perón, this relationship with foreigners was reversed, given that the proposed economic model was based on the industrialization of the country, in order to substitute imports and generate employment with greater added value. This led to the strategic decision to pay off the foreign debt that Argentina still owed and nationalize transportation, energy and foreign trade.

Foreign investment has had a very diverse strategic perspective, to establish development policies of the Argentine Nation, which has been no less than controversial to retrace our history.

I will take as a starting point, to succinctly raise the issue, Law 14,222 of the year 1953, given that this is the first regulatory plexus that organically contains some of the essential elements that define and regulate the issue: a) the strategic orientation of the investment foreign investment towards determined objectives for development and b) the sustainability of investment in the local economy.

The then President of the Nation Juan D. Perón, already in his second term, sets his sights on foreign capital given that the import substitution policy developed in his first term has reached a first stage understood as light industrialization, but without reaching to the location of heavy industry or energy development (oil and electrical energy), to sustain the industrial growth proposed in its five-year plan. Hence, the paradigm sustained in his first mandate, that of maintaining economic growth based on national production without interference from foreign corporations, is abandoned to turn to oil concessions, among others, as a vector for energy development.

This law contemplates extremes that define limits, at least appreciable, for the investor.

His art. 3, inc. a) reads: That the activity to which the investment is destined contributes to the realization of the economic development foreseen in the government's plans, translating directly or indirectly into obtaining foreign currency savings.

The art. 4 says: Foreign capital that enters in accordance with this law will be adjusted to Argentine legislation and will be equated to national capital.

The art. 6 establishes: Starting two years from the date on which the foreign investment has been registered in the registry mentioned in article 5, the investor will have the right to transfer to the country of origin liquid and realized profits from the same investment up to 8% on the registered capital that remains in the country, in each subsequent annual exercise.

The art. 10 fixed: Starting ten years from the date of registration of the original foreign capital in the registry indicated in article 5, the investor will have the right to withdraw it from the country in installments of 10 to 20% annually, as established in each case, when authorizing the investment. The repatriation of capital can only be carried out with the investor's own funds. Capitalized profits will gain the age of the original capital.

As can be seen, the transcribed articles establish, first of all, a political and strategic guideline appropriate to the state policies established by the executive branch.

Secondly, it establishes a progressive rate both for the remission of profits and for the repatriation of the capital corresponding to the investment made, with the aim of generating stability in the activity achieved by the investment.

With the overthrow of President Perón, in September 1955, a Copernican shift occurred in the essence of the economic policy to be deployed. The self-proclaimed liberating revolution resumes agro-export policies, breaking away from the industrial development policies executed by the previous government. Therefore, it repeals the law under analysis in 1957. At the same time that it reimplants the Constitution of 1953, deposing that of 1949. At the same time, it adheres to the Bretton Woods agreements, integrating the Argentine Republic into the International Monetary Fund and the World Bank. These events have a series of very specific consequences: the devaluation of the peso; salary reduction; the increase in the cost of foreign inputs and the transfer of resources to agriculture to the detriment of industry. This military government restarts the country's external debt, contrary to the cancellation of said obligations carried out by the government of President Juan D. Perón.

With the institutional normalization of 1958, Dr. Arturo Frondizi, new president of the Republic, applied an aggressive industrial and infrastructure development plan, resuming the productive bias in the areas of energy development, aiming at oil self-sufficiency, the establishment of steel mills, the development of the petrochemical industry and modernization of the transportation network, among other policies. To do this, it resorts to foreign investment, but making concessions that exceed the regulatory framework of Law 14,222.

The Frondizi government promoted the sanction of laws 14,780 on the establishment of foreign capital and 14,781 on industrial promotion, through which they granted the maximum legal guarantees to foreign capital.

Through these laws, foreign investors were assured freedom to remit profits and repatriate capital, granting preferential treatment in terms of customs duties, credits, taxes and energy supplies.

Law 14,780 extended to all productive activities (not only industry and mining), and sought to accelerate the process of economic development, taking into account the limited capacity for internal savings.

These laws attracted the attention of the US Government, which urged companies from that country to invest in the Argentine Republic, a fact that motivated a flow of capital that raised the annual rate of direct investment to more than 10 times the amount achieved in governments. previous. Computed the period between 1958 and 1963. The area of oil exploitation, (YPF), as well as the development of the generation and distribution of electrical energy by the company, (CADE) stood out.

It should be noted that the regulations of the period corresponding to Dr. Frondizi's government establish a lax regulatory framework that is very favorable to foreign investors, lacking restrictions that contemplate the continuity of investment in the medium and long term.

President Frondizi faces a crisis in the country's trade balance that causes him to lose foreign currency reserves, generating unemployment and recession. Additionally, the refinancing of new loans to continue with the development process is hindered.

Of course, this critical situation inevitably escalated since foreign capital contracted and fled, facilitated by the regulations under analysis. After President Frondizi was deposed by a military coup, his successor, Dr. Guido, devalued the peso, consequently lowering salaries. The scarce resources of the state are directed again to agriculture, to the detriment of the industrial development model established in 1958.

In 1963, institutionality returned, with Dr. Arturo Illia being anointed president of the Nation. In the matter under analysis, at the end of 1963, Dr. Illia signed Decrees 744/63 and 745/63, which annulled the oil contracts signed by Dr. Frondizi in his government, finding in them defects of illegitimacy and being harmful to the rights and interests of the Nation. This annulment forced the State to pay heavy compensation to the companies and caused a stagnation in fuel production, while generating distrust in potential foreign investors, deteriorating the international position of the government.

In 1966, Dr. Arturo Illia was deposed by another military coup in which Juan Carlos Onganía became de facto president. This period is characterized by an economic policy marked by the adjustment of the public sector and the compression of wages (suspension of collective labor agreements), policies that had a high social cost on the other hand. Here the degree of foreign direct investment was very scarce, but highly speculative, since foreign capital focused: a) on short-term financial investment and b) on the purchase of shares of companies whose profitability was assured, without generating more than costs to the Argentine economy, given that they took profits and sent them abroad without any restrictions.

The de facto government of Juan C. Onganía was deposed by an internal military coup that brought Roberto Marcelo Levingston, (1970 - 1971), to the first magistracy, who in turn was deposed, through another military internal coup by General Alejandro Agustín Lanusse , (1971 - 1973). In 1971, the legislation passed during Dr. Frondizi's mandate was replaced by Law 19,151, which established a system of prior evaluation and registration of foreign investments. The new legal framework was in charge of the Secretariat of Planning and Government Action, the body that created the Foreign Investment Registry. Applications that had a positive opinion had to be approved by the Executive Branch, through a decree. Through this approval, the conditions for remittances of profits and repatriation of capital were also established. Clearly the text gave room to negotiate investments tailored to the investor given the discretion that the P.E.N had. to establish the conditions and deadlines for remitting profits and repatriating capital. Furthermore, the law enforcement authority was to give preference to investments that proposed a partnership with national capital. A registry of pre-existing investments was also created.

The novelty of the aforementioned regulations was the search for foreign investments that were associated with national public companies. This period was marked by great social, union and political asphyxiation. And with a worsening of violence, which led to democratic normalization that concluded with the election of Dr. Cámpora as President of the Republic in 1973, who resigned in order to make way for a new election in which Juan D. Perón prevails. , assuming his third presidential term on October 12, 1973.

An enormous political, social and economic upheaval overwhelmed the country. The government proposes a social pact in which unions and businessmen are convened in order to give way to the gradual normalization of the Nation. In this delicate context, where the flight of foreign currency was bleeding the economy, Law 20,557 was passed, which introduced important innovations. In principle, it established that investments had to be implemented through settlement contracts, which were subject to approval, as the case may be, by the Executive Branch or the Legislative Branch. Likewise, the repatriation of capital could not be carried out before five years had elapsed from the approval of the settlement contract, nor could it be carried out for amounts greater than 20% per year, with maximum percentages also set for the remission of profits.

Here we can distinguish a new advance that improves the preceding regulatory bodies. Depending on the area to which the investment is intended, it must be approved by parliament. Fact that will allow bicameral discussion on the scope of the settlement contract, since they constitute a true state policy. Regarding the repatriation of capital, it resumes the gradual nature that ensures that investment is projected in a stable manner on the economy.

On March 24, 1976, the constitutional government, at that time headed by Isabel Martínez de Perón, was deposed by the military coup that appointed Jorge Rafael Videla as president. This period unleashes the disintegration of the State, fraudulent public debt, unemployment and financial speculation, on the economic level. On the political level: illegal repression, systematic violation of human rights and suppression of political and union rights.

In this framework, the current legislation regarding foreign investment was an obstacle to the economic and financial goals established by the dictatorship, which is why on August 13, 1976, Law 21,382 was passed, which established a new regime for investments. foreigners. As a general principle, it grants equal rights to the foreign investor with respect to the local investor. This concept annihilates the economic policy development instrument of industrial promotion that encouraged local capital towards certain strategic activities. Furthermore, this alleged equality of treatment clears the way for the foreign investor to access local credit, flatly denaturalizing the concept of genuine foreign investment.

The law refers to several categories of investment depending on the subject, implying a distinction in the authority that had to authorize them. Those corresponding to the first category had to have the approval of the P.E.N. and it included investments destined for the following areas: defense and national security; provision of public services, electricity, gas and telecommunications; radio stations, television stations, newspapers, magazines and publishing houses; energy; education; financial and insurance entities. Subsequently, the transportation sector (originally included within public services) and banking activity (included in the category of financial entities) were removed from this classification. They also had to request authorization from the P.E.N. those investments that involve the "denationalization" of an existing company, provided that its net worth exceeds ten million dollars.

The legal text refers to a second category of investments whose registration is automatic and concerns the total or partial reinvestment of profits, additional investments to those that have been previously approved, up to 30% of the registered foreign capital and capital contributions up to 5 million of dollars. The third category referred to investments not contemplated in the previous 2 categories, requiring authorization from the application authority (Ministry of Economy) for approval. Regarding access to local credit by the foreign investor, a distinction was made between short-term and long-term credits. The short-term ones were free access, while the long-term ones required authorization from the P.E.N. It should be added that this distinction was abolished in 1980, so that foreign investors could take local credit without restrictions.

The remission of profits contemplated 2 scenarios. If the free exchange of foreign currency for local currency was in force, there would be no restrictions on the remission of profits. If the monetary authority had established exchange control, the state would deliver public debt securities to the foreign investor, issued in foreign currency, that covered the amount to be transferred, plus the interest rate in force in the international market. Well understood, foreign investors could always remit profits and were only affected by the rate set as a tax on remittances, those that exceeded 12% per year of the registered capital. Regarding the repatriation of the capital, a period of 3 years of unavailability was set for its remission, which could be repatriated in installments or in one go.

Another salient point is the definition of the legal scope between the foreign investor's parent company, its subsidiary in the country or another controlled company.

It was stipulated that legal acts concluded between a local company with foreign capital and the company that directly or indirectly controls it or another subsidiary of the latter would be considered, for all purposes, as concluded between independent parties when their services and conditions were in accordance with normal market practices between independent parties. The analyzed regulatory plexus remained in full force until the enactment of Law 22,208, (sanctioned on April 11, 1980, text ordered by Decree 1062/80), which introduced modifications aimed at deepening the opening of the economy, but without changing the essence of the analyzed norm.

As can be seen, this law facilitates the entry of capital, on the initial premise of legal equality between the foreign and local investors. It attempts a make-up that appears to retain strategic control of certain areas of concern, but clearly wields a parallel line with the country's fraudulent external debt. It frees the financial forces to carry out all kinds of accounting tricks that have nothing in common with the doctrine of foreign investment, which is framed in long-term strategic production and development.

This is how financial entities and/or conglomerates of linked foreign capital companies went to the local capital market to obtain financing. Then they freely remitted their profits, which in all cases came from the financial sector and repatriated part of their capital, without meeting their obligations to the local creditor, which was ultimately the National State, a taker of funds abroad and a lender. of the foreign investor in the country.

These operations were placed under protection after the short period established by law for the repatriation of capital, 3 years, to remit all or part of the investment and the doctrine that frees the parent company from all liability for the acts of the subsidiary in the country, given that, by considering them independent legal entities, it generates a cause for exoneration of liability on the parent company.

With the restoration of democracy and the election of Dr. Raúl Alfonsín as President of the Republic in 1983, an attempt was initially made to restrict the current legal scheme, but with very limited scope. In 1984, a decree was issued by which the remission of profits and repatriation of capital abroad was suspended. In 1987, by resolution of the Ministry of Economy, the suspension established by the aforementioned decree was annulled. The government of Dr. Alfonsín, in the course of the different positions adopted regarding the external debt, did not seem to shed light on the dismantling of the current scheme on this matter.

With Dr. Alfonsín's constitutional mandate concluded early, Dr. Carlos Menem prevails in the 1989 elections, who resumes the economic policy established in 1976 and therefore reaffirms the legal concepts of the law of the dictatorship, stripping it of what little it had. was left as a regulatory framework for the matter, thus reaching the current legislation.

Law 21,382 - Ordered text of the foreign investment law - approved as Annex I of Decree N 1853/1993. (B.O. 8/9/93) in its art. 1 reads: Foreign investors who invest capital in the country in any of the ways established in art. 3 intended for the promotion of economic activities or the expansion or improvement of existing ones, will have the same rights and obligations that the Constitution and the laws grant

to national investors, subject to the provisions of this law and those contemplated in special or promotion regimes. His art. 2 - For the purposes of this law it is understood as: ... 2. Foreign investor: Any natural or legal person domiciled outside the national territory, holder of an investment of foreign capital and local companies of foreign capital when they participate as investors in other local businesses. 3. Local company with foreign capital: Any company domiciled in the territory of the Republic, in which natural and legal persons domiciled outside it, are direct or indirect owners of more than 49% of the capital or have directly or indirectly the number of votes necessary to prevail in shareholders' meetings or partner meetings. 4. Local company with national capital: Any company domiciled in the territory of the Republic, in which the natural or legal persons also domiciled there own directly or indirectly no less than 51% of the capital and have directly or indirectly the number of votes necessary to prevail in shareholders' meetings or partner meetings. art. 3 - Foreign investment may be made in: 1. Freely convertible foreign currency. 2. Capital goods, their spare parts and accessories. 3. Profits or capital in national currency belonging to foreign investors, provided that they are legally able to be transferred abroad. 4. Capitalization of external credits in foreign currency. 5, Intangible assets, in accordance with specific legislation. 6. Other forms of contribution that are contemplated in special or promotion regimes. art. 5 - Foreign investors may transfer liquid and realized profits from their investments abroad, as well as repatriate their investment. art. 6. - Foreign investors may use any of the legal forms of organization provided for by national legislation. art. 7. - Local companies with foreign capital will be able to use internal credit with the same rights and under the same conditions as local companies with national capital. art. 9. - Legal acts entered into between a local company with foreign capital and the company that directly or indirectly controls it or another subsidiary of the latter will be considered for all purposes as entered into between independent parties when their benefits and conditions conform to current practices. normal market conditions between independent entities.

As can be seen, the current regulatory body contemplates each and every one of the conceptual characteristics of the law of the dictatorship. Furthermore, this rule takes to the limit the lack of strategic objectives and controls on capital inflows, which, hidden under the label of foreign investment, are only tax-free speculative investment. In honor of brevity, I will not reiterate the concepts expressed when analyzing the norm sanctioned in 1976, given its identity with the present one, which only had the legitimation of Congress.

In addition to the consideration made in the preceding paragraph, it is worth introducing the true guiding principle of this new foreign investment strategy, established by the Bilateral Investment Treaties (BITs), that the Argentine Republic has signed in the 1990s, which To date they are valid with 50 states.

These first-generation treaties have not contemplated the intrinsic risks of the Argentine economy, and their consequences have been harmful to both the country and the investor. The Argentine Republic had to face before the ICSID, the jurisdictional body established for the case of disputes between the investor and the Argentine state, an innumerable number of claims that, although the majority accepted the demands of the investors, resulting in public debt for the country, such a situation led to the disinvestment of these private agents, unemployment, and debt as general symptoms of the crisis that has arisen.

It is clear that crisis processes leave lessons that should allow us to generate instruments that avoid suffering the same harmful effects in society.

Other nations have signed new bilateral investment treaties, called second and third generation, which introduce instruments to avoid crises in the balance of payments such as a stable relationship between the investor and the state, about to generate a framework that avoids conflicts. so frontal that they lead to irremediable litigation, detrimental to both parties.

Today, we find ourselves facing old challenges that the young Argentine Republic has not yet overcome, in a firm and definitive way, as shown in this brief account of the legislative remedies that were resorted to, recurrently, in history, to call for investment. as a way of developing the country.

The chosen remedy, on this occasion, seems to be the same, but the patient does not have exactly the same diagnosis.

The Argentine Republic is implementing a new regulatory plexus that calls for both local and foreign investment (RIGI), with long-term tax, tariff and exchange incentives, in order to provide stability and predictability to the investment program. The project determines specific development areas, understanding that they are the most promising and attractive for investment, but also those that have the greatest international projection. (a. Agribusiness; b. Infrastructure; c. Forestry; d. Mining; e. Gas and Oil; f. Energy; g. Technology).

We are facing a local context, eager for development and with a scenario of extremely low prices and costs. Furthermore, the international context is affected by an adjustment of prices and salaries, in hard currency, which calls many investment projects unviable or of uncertain margin, added to the variable uncertainty that will surely continue to affect these costs; prices and wages, harshly, in regions with less macro and microeconomic flexibility, due to international conflicts that are destabilizing the normal bases of international development and trade.

Argentina today is an investment opportunity, both because its local and international context fits it into unbeatable political and economic conditions for the future.