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LEGAL MEMORANDA

EDITOR'S NOTE

"Legal Memoranda" is a regular section of the Review devoted to reports from corresponding law firms throughout the hemisphere. The reports are compiled by the Review, but their accuracy is represented by the corresponding law firms, to which all inquiries should be directed.

We appreciate the contributions of our corresponding law firms and invite other law firms interested in participating in this section to contact us.

ARGENTINA

DEBT FOR DEVELOPMENT: A NEW CONVERSION MECHANISM

On January 29, 1992, through the enactment of decree 165/92, Argentina established the so-called "debt for development" program, a new "conversion" mechanism for its foreign debt obligations.

Under this new decree, Argentine non-profit organizations may be allowed to convert foreign debt obligations into a new instrument known as Certificado de Inversión para el Desarrollo (CIDES).

Authorizations will be granted by a special Commission (Comisión de Asesoramiento, Análisis de Propuestas y Seguimiento de Programas), to be appointed by the Ministry of Economy and Public Works and Services, who may receive a wide range of requests connected with different development projects. Such projects may be very diversified and include *inter alia*: economic, social, ecological, cultural, scientific and/or technological components.

If approved, the beneficiary of a specific project will be au-

thorized to swap foreign debt obligations in exchange for CIDES.

The main features of the CIDES are as follows:

- (1) *Ownership*: Nominative. To be held only by non-profit entities.
- (2) *Term*: 30 years.
- (3) *Interest rate*: 4% per annum, to be paid semi-annually.
- (4) *Repayment*: The State may repurchase the CIDES at maturity (30 years) by paying a nominal amount, i.e. one US dollar for each certificate.
- (5) *Taxes*: Fully exempt.
- (6) *Administration fee*: 1.5% on all interest payments.
- (7) *Total amount of the first CIDES issue*: US\$ 200 million.

Under this program, Argentine non-profit organizations (and foreign non-profit organizations authorized to operate in Argentina) will be able to obtain donations from third parties holding Argentine foreign debt instruments of any kind or nature eligible for this purpose. Once these instruments are obtained, the organizations must seek the required authorization to swap those instruments in exchange for CIDES. All interest payments later generated by the CIDES shall be applied to the individual non-profit development project approved by the Ministry of Economy's special Commission.

Depending on the success of the new "debt for development program," which could convert obligations held by both public or private creditors, the Argentine Government may authorize the issuance of additional CIDES for a higher aggregate volume.

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A NEW FOREIGN INVESTMENT PROTECTION AND PROMOTION TREATY BETWEEN ARGENTINA AND THE UNITED STATES

On November 14, 1991, the Governments of Argentina and the United States signed a new Foreign Investment Protection and Promotion Treaty (FIPPT). This treaty concerns the reciprocal encouragement and protection of investment, but remains subject to ratification by both countries.

FIPPT is designed to stimulate the flow of private capital between both countries through the creation of a more stable legal

framework for foreign investment.

For the purposes of FIPPT, investment includes equity, debt, and service and investment contracts and may apply to mortgages, liens and pledges, a company's interest or participation in other companies, a claim to money or to performance, and intellectual property such as inventions, know-how, trademarks and other rights. Therefore, transactions such as loans, equity contributions, and industrial property rights are clearly included, while ordinary commercial transactions, like sales of goods would be excluded.

FIPPT incorporates the basic principles of (i) most favored nation treatment (that each Party shall permit and treat investment and its activities on a basis not less favorable than that accorded to its own nationals or companies or to nationals or companies of a third country); and (ii) no retroactivity of new laws or regulations.

Note, however, that some exceptions and limitations apply with respect to certain sectors or matters listed in a Protocol which is part of the Treaty. These exceptions include sections such as: air transportation, real estate, fishing, and communications for investments made by an Argentine company or national in the United States. In addition, Argentina may maintain performance requirements for the automotive industry, and if it puts into effect a Debt-for-Equity Program, certain restrictions may apply with respect to the transfer of returns on investments made under such a Program.

The possibility of expropriation is also regulated, in order to provide adequate compensation to the party who may be subject to it. Compensation shall be equivalent to the "fair market value" of the expropriated investment plus interest from the day of expropriation and shall be fully realizable and transferable.

FIPPT provides that all transfers shall be made freely and that only income taxes may be imposed. The transfer shall be made in convertible currency and at the prevailing market rate of exchange. These transfer provisions apply to transfers related to an investment, such as like dividends, compensations for expropriations, payments arising out of an investment dispute, payments under contracts, proceeds from the sale or liquidation of an investment, and any other additional capital contribution.

An important part of FIPPT is Chapter VII which provides a method for the resolution of eventual disputes between a State and

a national or company of the other Party. The Treaty establishes that if a dispute has not been submitted by the affected Party to the courts of the other Party (usually the country receiving the investment) the Party concerned may choose to submit the dispute for settlement by binding arbitration to any of the following forums:

- 1) The International Centre for the Settlement of Investment Disputes (ICSID), created by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of March 18, 1965. The ICSID which is part of the World Bank Group, has the purpose of facilitating arbitration for the conciliation and arbitration of investment disputes between the government of a Contracting State and nationals of another Contracting State. The Convention that established ICSID was signed by Argentina on May 21, 1991, but is pending ratification;
- 2) The Additional Facility of the ICSID. This facility consists of:
 - (i) conciliation and arbitration proceedings for the settlement of investment disputes arising between parties one of whom is not a Contracting State or a national of a Contracting State;
 - (ii) conciliation or arbitration proceedings between parties at least one of whom is a Contracting State or a national of a Contracting State for the settlement of disputes that do not directly arise out of an investment; and
 - (iii) fact-finding proceedings;
- 3) The Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or
- 4) Any other arbitration institution or agency which may be agreed upon between the Parties. Any arbitral award rendered shall be held as a valid and binding one, and the affected Party shall agree to the enforcement of the award in its territory.

The significance of Chapter VII is that Argentina has now clearly abandoned the so-called "Calvo Doctrine" which has had an adverse impact on foreign investment in Argentina for more than a century. This doctrine established that the courts of the host country had exclusive jurisdiction over its territory, eliminating any possible recourse to international arbitration by a foreign investor in the event of a dispute.

FIPPT shall remain in force for a period of ten years, beginning to run 30 days after the exchange of the respective instruments of ratification between the Parties. However, with respect to investments made prior to the date of termination of the Treaty, it shall apply for an additional period of ten years to be counted

from such termination date.

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