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Argentina Has Capped Rural Land Ownership by Foreigners

In the last days of 2011 the Argentine Congress passed a bill sent by the Executive, which set restrictions on ownership and possession of rural land by foreigners. Although the original bill was amended during the congressional debate, its confusing provisions were left untouched, and may cause uncertainty in real estate transactions.

In December 2011, the Argentine Congress passed the Rural Lands Act (Law 26,737, the “Act”), which set a cap on ownership and possession of rural land by foreigners.

What Are the Restrictions Set Forth by the Act?

The Act:

- (a) bans foreign ownership or possession of more than 15% of the country’s rural land,
- (b) prevents foreign individuals or companies—please see below how a foreign company is defined—of a given nationality from owning or possessing more than 4.5% of the country’s rural land, and
- (c) bans any given foreign individual or company from owning or possessing rural land in Argentina:
 - (i) in excess of an aggregate area of 1,000 hectares (equivalent to 2,470 acres, approximately) in the so called “core zone” (*zona núcleo*), or an equivalent area (to be determined by an Inter-ministerial Rural Property Council created by the Act) in other parts of the country, or
 - (ii) that contains or borders major and permanent water bodies.

These rules apply to properties located outside urban areas, irrespective of the intended use of the land. This means that, for example, the restrictions apply to industrial facilities or hotels, if located outside a city or town.

In order to assure compliance with these prohibitions, the Act requires that a clearance certificate be obtained prior to the transfer of title to, or possession of, rural land to a foreign party (as defined by the Act). Said certificate shall be issued by the National Rural Lands Registry (the “Registry”), a governmental agency created by the Act.

When rural land is owned by a company deemed foreign under the Act, Section 3-b) of the Act provides (with reference to that company):

“(...) Any change [of ownership] in [the company’s] shares, either by public or private instrument, shall be notified by the company to the National Rural Lands Registry, within 30 days of the [change], in order to allow the control of the compliance with the provisions of the law. (...)”

Under a literal reading of this provision, any transfer to a foreign party of shares that represent more than 25% (we explain the reason for this threshold below) of the capital of a company that owns rural property in Argentina would only need to be reported to the Registry, and no clearance certificate should be obtained. However, the Registry’s staff has indicated that their criterion on the matter is that any direct or indirect change of ownership or possession of rural land to a foreign party will require prior clearance by the Registry.

The Act also provides that the acquisition of rural property shall not be deemed “an investment” under the bilateral investment treaties entered into by Argentina, because of land’s non-renewable nature.

Who Is Subject to the Restrictions?

While foreign individuals—even if resident in the country—are unambiguously subject to the Act’s restrictions, the rules that define when those restrictions apply to companies are less than clear.

The Act deems a company as “foreign” (and thus subject to its provisions) on the basis of an equity-holding threshold. If, for example, an equity interest held by a foreign individual or company in a local entity reaches that threshold, application of the restrictions is triggered.

However, the Act has two conflicting provisions on this point, one setting that threshold at more than 51% of the company’s equity, and the other at only 25%. A

company is also deemed as “foreign” when it has issued security instruments that entitle their holder to convert them into more than 25% of the company’s equity (or any other percentage that allows the holder to control the company), and the holder or holders of such instruments are foreign.

The Act includes other provisions aimed at preventing the circumvention of its restrictions through trusts or simulated structures.

In the case of foreign individuals, they are exempted from the restrictions if: (a) they have resided ten or more years in the country, (b) they have Argentine children and have resided five or more years in the country, or (c) they have been married to an Argentine citizen for five or more years and have resided in the country during that period.

What Will Happen with Foreigners who Already Owned or Possessed Land in Excess of the Restrictions when the Act Was Passed?

The Act specifically provides that it does not affect rights already vested, so foreign individuals and companies (as defined by the Act) who already owned or possessed rural land in the country at the time of the Act’s passage are not be affected. However, Act requires them to report their ownership or possession to the Registry. The time period for this reporting has already elapsed.

Pursuant to the Act’s Implementing Regulations,¹ if a foreign party (as defined by the Act) is found to have omitted that reporting, the Registry shall bring such circumstance to the attention of the Federal Public Revenue Administration (the “AFIP”, the Federal tax authority), and the Financial Information Unit (the “UIF”, the agency charged with enforcement of money laundering legislation), so that they investigate whether tax and money laundering obligations related to the persons and assets involved have been complied with. In the case of legal entities, the inquiries shall include its equity holders, board members and legal representatives.

What Impact Will the Act Have in Real Estate Transactions?

The Act lacks clarity in several of its key provisions; most notably (as explained above) on the following:

- (a) what is the equity holding threshold that triggers the characterization of a local business entity as “foreign” under the Act, and
- (b) how to proceed in case of transfers of equity interests in such kind of entity (especially when a real estate asset is owned through more than one layer of corporate vehicles).

Other usual issues, such as conveyance of title through inheritance, have been completely omitted.

Conveyances of title (or deliveries of possession) performed in breach of the Act's provisions may result in a transaction being null and void. Hence, foreign companies and investors involved in real estate transactions are well advised to conduct enhanced due diligence and careful planning about intended land holdings.

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¹ Approved by Decree 274/2012.