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NEW TERMS FOR TRANSFERRING EXPORT-RELATED FOREIGN CURRENCY INTO ARGENTINA

1. On April 25, 2012 the Ministry of Economy and Finance issued Resolution 142/2012 (hereinafter “Resolution 142/12”), amending Resolution 269/2001 by the former Secretariat of Commerce, establishing maximum terms for the settlement of foreign currency in the local Unified Free Foreign Exchange Market (hereinafter, the “MULC”) received as consideration for exports. This Resolution has replaced Annex I to the amended resolution, establishing the custom categories of the goods affected, and setting terms of 15, 90, and 360 calendar days since the date of shipment of export goods. The new resolution came into force on April 26, 2012.

2. A very significant change introduced by this regulation is that the term for settlement of proceeds from exports among related companies (pursuant to the cases listed in Annex I, General Resolution 1122 of the Federal Administration of Public Income) is 15 calendar days since the date of shipment, irrespective of the type of export goods. In other words, commercial export terms agreed-upon with a foreign entity related to the domestic exporter cannot provide for payment terms longer than 15 calendar days, at the risk of breaching applicable foreign exchange regulations. Moreover, commercial export terms applicable to all other products among non-related entities must also be revised in light of the changes so introduced.

3. The terms indicated in Resolution 142/12 may be extended on a case-by-case basis and based on the special nature or characteristics of the transaction, upon prior report issued by the Evaluation Unit mentioned in this regulation.

4. Accordingly, on April 27, 2012 the Central Bank of Argentina issued Communication “A” 5295 (enforceable as from April 27, 2012) by which it amended Com. “A” 4860, and abrogated the existing additional 120 business days term for transferring exports collections into the MULC and also set a 15 business days term as from the date of disbursement of funds abroad, for exporters to transfer and liquidate in the MULC all exports collections subject to a repatriation obligation, all exports’ advanced payments and all pre-export finance loans. However, in all cases the applicable term shall be the shortest between the preceding term and the general term applicable in accordance with the kind of exported good.

5. Likewise, exporters shall have a 10 business days term to transfer the export collections from their collection account to the account of the local banks’ foreign correspondent banks and five addition business days to transfer and liquidate those funds into the MULC. The stock of exports’ proceeds collected abroad as of the day of issuance of this Communication should be transferred and liquidated into the MULC within 15 business days as from April 27, 2012.

6. The corresponding proceeds in Pesos must be deposited in a local bank account to the order of the exporter.

7. Due to the negative effect of the commented Resolution, on May 10, 2012 the Ministry of Economy and Finance issued Resolution 187/2012 creating an exception to Resolution 142/2012 for all exporters that during 2011 have recorded exports for an amount less than US$ 2 MM (based on Free on Board values), in which case the applicable terms for the settlement of foreign currency for the relevant export contracts shall be those valid prior to Resolution 142/12. For such purpose, this Resolution created a preexisting contracts registry, which requirements shall be set forth by the Ministry of Economy and Finance. Exporters framed under this exception shall be notified by the Secretariat of the Foreign Trade.

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NEW FOREIGN EXCHANGE REGULATIONS REGARDING REMITTANCES OF FUNDS ABROAD

Argentine Central Bank (hereinafter, the “ACB”) Communication “A” 5295 became effective on April 3, 2012. It amended the system applicable to remittances of funds abroad to pay services, income and current transfers. Communication “A” 5295 sets forth more stringent formal requirements to access the foreign exchange market at the time of payment/maturity of the obligation that must be honored. Thus, for example, in case of services that have no direct relationship with the activity performed by the payor, an authenticated copy of the underlying agreement on which the relevant obligation is based shall be sub-
mitted and, additionally, some specific requirements must be satisfied regarding the information to be included in the external auditor’s report about the existence of the obligation it is intended to satisfy.

In case of payment for information and computing services, professional and technical entrepreneurial services, royalties, patents and trademarks, premiums for loans of players, copyrights, personal, cultural and recreational services, payments of commercial guarantees for exports of goods and services, exploitation rights of foreign movies, video and audio, transfer of technology services under Law No. 22,426 (except for patents and trademarks) ACB’s prior authorization shall be required for payment purposes when the beneficiary is a natural or corporate person: (i) either directly or indirectly related to the local debtor, or (ii) residing or organized or domiciled in such domains, jurisdictions, territories, or associated states of null or low taxation, or (iii) when payment is made to an account in such jurisdictions.

The prior authorization by the ACB shall not be required in case of agreements that do not generate, in the calendar year, payment obligations and/or debts in excess of the equivalent of US$ 100,000. Notwithstanding the foregoing, it is necessary to provide evidence of the registration of the relevant agreements in the relevant registries, as required by law, as of the date of the remittance or transfer.

The period of time for payment before the maturity date of interest on unpaid obligations or obligations that are paid simultaneously with the maturity date of interest on unpaid obligations or remittance or transfer.

The requirements for payment of profits and dividends abroad to non-Argentine resident shareholders and holders of ADR’s (American Depositary Receipts) and BDR’s (Brazilian Depositary Receipts) were also modified. If applicable, a declaration of foreign indebtedness shall be submitted together with the validation of the reported data under such obligation and evidence of having complied with the survey on direct investments set forth in Communication A 4237.

ACB’s prior authorization shall also be requested in connection with payments by the local foreign exchange market for the purchase of non-produced non financial assets (i.e.: non financial assets with an origin other than production, such as sales and purchases of land, sales and purchases of patents, trademarks, copyrights, transfers of sportmen, sales and purchases of going concerns), when the beneficiary is a natural or corporate person related to the local debtor, either directly or indirectly, or the beneficiary resides or is organized or domiciled in domestic, jurisdictions, territories or associated states of low or null taxation, or when payment is made to an account in such jurisdictions.

Furthermore, Communication “A” 5295 has also amended the rules applicable to payment of reinsurance premiums, sale of foreign exchange to non Argentine-residents for tourism and traveling purposes as well as payment of rentals of real property located in Argentina owned by non-Argentine residents and other payments of income abroad.

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Unification of Criteria Regarding Statute of Limitations Rules for Disciplinary Action Before the Argentine Central Bank

Financial Entities Law No. 21.526 (hereinafter, the “Law”) provides for a specific procedure for the application of disciplinary action by the Argentine Central Bank in banking and financial related matters. Section 42 of the Law provides for a 6 year statute of limitations, and states that such period shall be interrupted (reset) “…by the commission of another violation and by any action and proceedings inherent to the development of the disciplinary procedure…”.

On May 9, 2012, a plenary meeting was held with the entirety of the members of the Federal Administrative National Appeals Courts (which has a unifying and binding effect with regards to all judges in that judicial area, similar in effect to stare decisis), whereby the criteria for the resetting of the statute of limitations was unified.

In said meeting, the following acts were considered interruptive of the status of limitations: (i) the opening of the production of evidence stage; (ii) the summoning of the parties to value the merits of such proof; as well as (iii) any action
and proceedings inherent to the development of the disciplinary procedure.

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EXPROPRIATION OF THE CONTROLLING EQUITY INTEREST IN YPF S.A.

Law No. 26,741 (hereinafter, the “Law”) was published on May 7, 2012 in the Official Bulletin. The provisions of the Law declares self-sufficiency in hydrocarbons as a matter of National Public Interest. Furthermore, the Law provides for the creation of the Federal Council on Hydrocarbons and declares the expropriation of 51% of the equity of YPF S.A. and Repsol YPF Gas S.A. to be a Public Benefit. Accordingly, the Argentine Executive Branch jointly with the provincial Governments shall laid down the applicable policies and shall take those measures required for the attainment of the goals set forth in the Law.

The main aspects of the new regulation are described below:

1. Purposes of the Law. Development and increase of competitiveness in the various economic sectors; search for strategic alliances intended for the exploration and exploitation of conventional and non-conventional hydrocarbons; maximization of investments and resources used to achieve self-sufficiency in hydrocarbons; inclusion of new technologies and management forms that contribute to improve hydrocarbon exploration and exploitation activities; protection of consumers' interests and obtaining of balances of exportable hydrocarbons to improve the balance of payments, among others.

2. Creation of the Federal Council on Hydrocarbons. Similarly as in other producing countries, its duties shall include the promotion of a coordinated action of the Argentine Government and the Provinces in order to ensure the attainment of the purposes of the Law, the rendering of opinions on issues related to the attainment of such purposes and the establishment of the hydrocarbons policy of the Argentine Republic that the Argentine Executive Branch may submit for its consideration.

3. Expropriation. In order to ensure the attainment of the purposes of the Law, the expropriation of fifty-one percent (51%) of the equity of YPF Sociedad Anónima, represented by an identical percentage of Class D shares held by Repsol YPF S.A., its controlling or controlled companies, directly or indirectly, is declared to be of public interest. Further, the expropriation of fifty-one percent (51%) of the equity of Repsol YPF GAS S.A., represented by sixty percent (60%) of Class A shares held by Repsol Butano S.A., its controlling or controlled companies, is declared to be a public benefit. Since the expropriation of such shares is intended for the public benefit, any future transfer of such shares is prohibited unless authorized by the Argentine Congress by the vote of two-thirds of its members.

4. Allocation of expropriated shares. Fifty-one percent (51%) of expropriated shares shall be held by the Argentine Government and the remaining forty-nine percent (49%) shall be allocated among the Provinces that are members of the Federal Organization of Hydrocarbon-producing Provinces. The Argentine Executive Branch, acting by itself or through an appointed governmental agency, shall exercise the voting rights attaching to all expropriated shares until the assignment of the voting and financial rights of such shares is implemented.

5. Price of property subject to expropriation. The price for the expropriated shares shall be determined in the manner described in section 10 and related sections of expropriation Law No. 21,499. The appraisal shall be made by the Argentine Appraisal Board.

6. Continued operations in charge of YPF Sociedad Anónima and Repsol YPF GAS S.A. The continuation of the hydrocarbon exploration, production, industrialization and refining activities as well as its transportation, commercialization and distribution and the increasing investment flows for the proper supply of fuels is guaranteed.

7. Legal Continuity and Management. The Law provides that the companies shall continue operating as public corporations under the terms of Chapter II, Section V of Law No. 19,550 and related provisions, and such companies shall not be subject to any laws or administrative regulations governing the administration, management and control of companies or entities in which the Argentine Government or the Provinces hold an interest.

8. Sources of financing. In furtherance of the purposes of the Law, YPF S.A. shall resort to foreign and national financing and to the formation of strategic alliances, joint ventures, tem-
porary business associations (UTE’s) and any other association and business cooperation agreements with other national or foreign state-owned, private or partially state-owned entities.

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**Brazil**

**INNOVATION FINANCING IN BRAZIL AND THE NATIONAL FINANCIAL SYSTEM**

Brazil, the country of innovation. This is not a sentence extracted from a national sci-fi movie, nor the title of a report extracted from a newspaper in 2020. At least, not yet.

Innovative technologies developed in the nanotechnology field and for exploring the pre-salt reserves, are some of the leading areas struggling to make it possible to use that sentence nowadays. Internally, governmental entities aimed at innovation protection, namely the Intellectual Property National Institute (hereinafter, the “INPI”) have also done their jobs to help national innovation.

At the INPI, modernization of INPI systems with e-marcas (for trademarks) and/or e-patentes (for patents), as well as the increase in the number of the office’s employees, which has almost doubled and tripled the number of examiners, directly reflected in patent granting time reducing it from 11.6 years in 2006 to present 5.4 years, and still with a goal to reach 4 years by 2015.

All these factors reflect in a greater credibility in the innovation system and, consequently, in the rise of patent application numbers: from 2007 to 2011, the patent applications leaped from 105 thousand to more than 140 thousand.

This has also hit Brazil’s international classification in the World Ranking of Innovation, published by the INSEAD (formerly the Institut Européen d’Administration des Affaires) and lead by Switzerland, placing it in 47th.[1] The ranking position held by Brazil, which, by the results of its production could be 10 positions higher, finds as obstacle the Innovation Input Index, the “raw-material” of innovation composed mainly of institutional and intellectual infrastructure, and market and country’s business sophistication.

**Protecting and Stimulating Innovation**

The innovation stimulation can come in several ways, from intellectual property protection, going through financing offer from investors, to benefits created by the government by offering subsidies, financing and, of course, taxation.

Intellectual Property protection is the first means to stimulate innovation. On the patents field, the Intellectual Property Law guarantees the monopoly of economic exploitation of the inventions and utility models for a minimum term of 7 years and 10 years and maximum of 10 and 20 years respectively.[2]

The reasons to look for monopolies’[3] protection guaranteed by Intellectual Property, especially through patents are many: (i) protection of investments with thriving and failing projects; (ii) the costs with research, equipment, compliance regulation, tests, and the commercialization in the market; (iii) use of the government incentives for the development of certain areas of industry.

But creation protection is not enough to stimulate innovation. As previously said, two important aspects must be taken into consideration when intending to encourage innovation: the benefits established by the government through subsidies, financing and tax benefits, and the offer of credit and financing.

**Governmental Incentives to Innovation - The Brazilian Plan Plano Brasil Maior**

Willing to improve the raw-material of innovation, the Brazilian Government has invested beyond the institutional sphere of intellectual property protection managed by the INPI. Plans for multi-sector actions such as the Plano Brasil Maior [4] show the concern and planning made by the country to encourage innovation and technological development.

The Plano Brasil Maior has the tax reduction of investment and exports as one of the main steps; the increase and simplification of investment and exportation financing; the increase of resources for innovation; the improvement of innovation regulations; the growth stimulation of small and micro business; the strengthening of commercial defenses; the creation of special regimes to capital and technology aggregation in the creative chain; and regulation of govern-
mental purchases [5] to stimulate production and innovation in the country.

Objectively, some of the incentives that the government plans to offer to convince companies to invest in innovation are reducing taxation certain segments; the R$ 7 billion credit offer by Brazilian National Bank for Development (BNDES) for companies willing to invest in innovation; reduction of exportation costs, such as refunding up to 4% of the exported manufactured value (reintegro); the increase of credit compensation to the exporters allowing companies to go through an automatic process and get the refund in 60 days or less; and the creation of financing lines specific for the exportation encouragement, including micro, small e medium business.

**Seeking Innovation Financing in the National Financing System**

The National Financial System has several components of the National Monetary Council that cause impact on innovation, mainly on private financing matters.

Traditionally, the most used forms to finance innovation are credit lines from the fomentation Agencies and development Banks, due to governmental incentives for industry development established in actions such as those contained in The Plano Brasil Maior.

However, we notice that credit lines for innovation financing faces resistance from commercial and investment banks. The reasons for such resistance are basically five: (i) the difficulty to use it as credit warranty; (ii) the preference for bank liquidity; (iii) the difficulty to evaluate the safety margin; (iv) regional concentration; and (v) the need for improvement in the institutional infrastructures.

The difficulties of using innovation as credit warranty and the preference for liquidity have been caused mainly because of the adversities generated by the lack of a innovation culture. The last two, in the other hand have also caused difficulties in the others, generating a systemic reaction, a vicious circle which, in order to be broken, must comprehend changes in the whole innovation chain.


[2] Law 9.279, article 40: Invention Patent Protection shall have a term of 20 (twenty) years and a utility model patent a term of 15 (fifteen) years, from filing date. Paragraph: Such time period shall not be less than 10 (ten) years for invention patents and 7 (seven) years from utility model patents, counted from grant, except when the INPI is prevented from proceeding with the examination as to the merit of the application, due to a proven pending litigation or for reasons of force majeure.

[3] There are situations which suggest the abuse of protection of intellectual property based on the public humanitarian interests. These are the cases of abusive patenting, that is, those that do not effectively present innovation in the state of the art, biopiracy, abandonment of non-profitable markets and price diversification in different markets.

[4] *Plano Brasil Maior* is a continuity of the PDP (Productive Development Policy), established in 2008, more extensive, approaching actions and measures to encourage international trade and the trade and service section. It was regulated by the Medida Provisória 540/2011 and settles the trade and service, industrial and technological policy from 2011 to 2014.

[5] Law 12.349/2010 sets preference margins up to 25% in bidding processes of national manufactured goods and services that correspond to Brazilian technical rules according to job generating, revenue, development and technological innovation standards.

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**Ministerial Directive increases thresholds for antitrust clearance**

Brazil’s new Competition Law No. 12.529 entered into effect May 29, 2012, 180 days after its adoption. Unlike the old law that contemplated post-closing review, the new Competition Law requires submittal of a transaction to Brazil’s antitrust regulator, the Conselho Administrativo de Defesa Econômica (hereinafter, the “CADE”), for review prior to its consummation.

On May 30, 2012, the day following entry into force of the new law, Ministerial Directive...
(Portaria Interministerial) No. 994 raised the thresholds of revenue of the parties to a proposed transaction that would mandate submission to CADE for review. Proposed transactions must now be submitted for CADE review to analyze the potential for adverse effects on Brazilian markets when one of the economic groups involved has gross annual revenues in Brazil of at least R$750 million (about US$375 million) and any other group involved has gross annual revenue in Brazil of at least R$75 million (about US$37 million).

The Directive, signed by the Ministers of Finance and Justice, respectively Guido Mantega and José Eduardo Cardozo, raised the thresholds set by article 88, items I and II of the new law, which had established thresholds of respectively R$400 million (about US$200 million) and R$30 million (about US$15 million).

Legal commentators suggest that the rationale for this change is that CADE focus on transactions of significant potential economic impact in the Brazilian market and that the higher thresholds will reduce the number of transactions implicated by the new Competition Law.

The superseded Competition Law No. 8.884 of June 11, 1994 established a different trigger, turning on whether Brazilian gross revenues of any of the groups involved in the proposed transaction exceeded R$400 million. The old law further contemplated a trigger for review that an individual or combined market share resulting from a transaction exceed 20% in a relevant market. The new law supersedes this test.

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Internal Policies: Are they still applicable?
Sanctions for employee behavior specified in internal policies will no longer be valid, although the internal policy itself remains in force. As a result, it will be necessary to amend the section in the internal policy containing the sanctions. This is a result of Executive Decree 36946 (Section 30), which revoked the Decree published on April 26, 1966, which contemplated the possibility of creating disciplinary instruments without the approval of the Employment and Social Security Ministry.

It is important to highlight that even if the Labor Code does not recognize possible employee sanctions, these sanctions are still recognized by administrative bodies and courts, namely the employer’s ability to warn, suspend, or dismiss an employee.

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