Latin America

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I. Argentina

A. PROMOTIONAL SYSTEM FOR THE PRODUCTION AND SUSTAINABLE USE OF BIOFUELS

In May 2006, the Argentine Congress approved the *Régimen de Regulación y Promoción para la Producción y Uso Sustentable de Biocombustibles* (Promotional System for the Production and Sustainable Use of Biofuels).[1] The new system is intended to decrease the demand for domestic oil and gas, and following the successful examples of Brazil and other countries, Congress created a set of incentives to encourage the use of biofuels (e.g., bioethanol, biodiesel, and biogas). Under the law, a project that produces biofuels will enjoy the following benefits: (i) reimbursement of anticipated value-added tax and accelerated depreciation of assets; (ii) assets related to a project using qualifying biofuel will not

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1. Law No. 26093, May 12, 2006, [30905] B.O. 1. The law became effective in May 2006 and has an initial term of fifteen years. This term may be extended by the Argentine Executive Branch.

be considered part of the taxable base for minimum presumed income tax calculations; and (iii) biodiesel and bioethanol are exempt from a series of taxes.[2]

Effective January 1, 2010, the law also requires that (a) gas oil and diesel oil be blended with at least 5 percent biodiesel and (b) gasoline be blended with at least 5 percent bioethanol.[3]

It is expected that the new legislation will trigger increased cross-border investments and will help address the current problems of soaring demand, insufficient domestic capabilities, and high prices for imported fuels, as well as promote the implementation of projects under the Clean Development Mechanism under the Kyoto Protocol.[4] To qualify for advantages under the legislation, biofuels must be produced by licensed plants that meet the relevant biofuel quality requirements and must follow certain administrative procedures, including a prior environmental impact study to be approved by the enforcement authorities.[5]

B. Bankruptcy Law

In April 2006, the Argentine Congress amended[6] several aspects of the Argentine Bankruptcy Law.[7] The new legislation provides the following:

(i) A bankruptcy trustee is now obligated to file a report with the court within ten days of his appointment, noting all amounts due with respect to labor claims that according to law[8] are entitled to immediate payment, without the need to wait until a court decides on asset allocation among the creditors.[9]

(ii) The bankruptcy judge is now empowered to pay, as a statutory preference, all such labor claims specified in that report.[10] All amounts are to be paid from the debtor's liquid assets, if any, or from 1 percent of the debtor's monthly gross revenue until the debt is fully discharged.[11]

(iii) Pending labor claims are now exempted from the automatic stay otherwise applicable to *Acuerdo Preventivo Extra Judicial* (APE) proceedings.[12] APE proceedings are akin to a "cram-down" under U.S. bankruptcy law and allow a debtor to

2. Including the *Impuesto sobre los Combustibles Líquidos y el Gas Natural* (Tax on Liquid Fuels and Natural Gas), the so-called *Impuesto sobre la transferencia a título oneroso o gratuito o sobre la importación de Gasoil* (Tax on Gas Oil Transfers or Gas Oil Imports) and Rate on Hydro-Infrastructures, art. 15.

3. *Id.* at arts. 7, 8.

4. One of the two project-based flexible mechanisms of the Kyoto Protocol, designed to make it easier and cheaper for industrialized countries to meet the greenhouse gas emission reduction targets that they agreed to under the Protocol. *See* United Nations Framework Convention on Climate Change, Clean Development Mechanism, http://unfccc.int/kyoto_protocol/mechanisms/clean_development_mechanism/items/2718.php.

5. *Impuesto sobre la transferencia a título oneroso o gratuito o sobre la importación de Gasoil* (Tax on Gas Oil Transfers or Gas Oil Imports) and Rate on Hydro-Infrastructures, art. 6.

6. *See* Law No. 26086, Apr. 10, 2006, [30884] B.O. 1.

7. Law No. 24522, Aug. 7, 1995, [28203] B.O. 1 to 24.

8. Among others, unpaid salaries, severance, indemnities to employees in case of labor accident or illness, etc.

9. Law No. 24522, art. 14.

10. *Id.* at art. 16.

11. *Id.*

12. *Id.* at art. 21.

impose a reorganization plan upon all creditors. As a general rule, the APE triggers an automatic stay of claims against the debtor.[13] Now, however, labor claims will no longer be subject to this automatic stay.

C. Amendments to the Employment Act

In May 2006, the Argentine Congress amended the *Ley de Contrato de Trabajo* (Employment Contract Act)[14] to strengthen an employee's ability to refuse changes to the terms of his employment.[15] The amendments restrict the principle of *ius variandi*—an employer's right to change, without the employee's consent, an employee's job description to reflect a business' changing organizational needs. Under the new law, an affected employee may now elect between declaring a constructive discharge or demanding reinstatement of the prior employment terms.[16] Following the trends of the last three years, this amendment imposes stringent obligations on the employer and is expected to increase labor costs.[17]

D. The Ramirez Decision

A company's ability to use outsourcing to reduce labor costs was impacted by a recent labor court decision.[18] With taxes and employers' contributions representing as much as 50 percent of an employee's salary, businesses in the 1990s turned to outsourcing as a means to reduce labor costs. Under Section 30 of the Employment Contract Act, a party outsourcing services determined to be within its normal business activity is jointly and severally liable for labor claims brought by the service provider's employees.[19] Certain labor courts have treated the outsourced contractor as a guarantor of the employer's labor obligations, while others have treated the contractor as a primary obligor, upholding an employee's right to sue it independent of any claims against the employer.[20]

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13. *Id.* at art. 56.

14. Law No. 20744, Sept. 20, 1974, [23003] B.O. 2-12.

15. Law No. 26088, Apr. 21, 2006, [30891] B.O. 1.

16. *Id.* at art. 66.

17. *Id.* at art. 66; recent modifications to Law 20,744.

18. Cámara Nacional de Apelaciones del Trabajo de la Capital Federal [CNTrab.], 02/03/2006, "Ramírez, María Isidora c/ Russo Comunicaciones e Insumos S.A. y otro s/despido," Fallos Plenario, 309 Acta N° 2448 (Arg.).

19. Law 20744, Sept. 20, 1974, 23003 B.O. 3, art. 30.

> The responsibility assumed by the employer to control the fulfillment of obligations undertaken by the assignees or subcontractors towards each employee who renders services may not be delegated to third parties and each and every piece of evidence and voucher must be exhibited, upon request by the employee and/or the administrative authority. Failure to comply with any one of these requirements shall cause the employer to be jointly and severally liable for the obligations undertaken by assignees, contractors or subcontractors, in respect of the personnel they employ to perform the work or render the services arising from the labor relationship.

Id.

20. *See, e.g.*, Cámara del Trabajo [CTrab.], Sept. 17, 2004, "Vázquez, Gabriel v. Telefónica de Argentina S.A. y otro/in re. Dismissal," L.L, Jul. 22, 2005, 8 (Arg.); Cámara del Trabajo [CTrab.], Jul. 29, 2005, "Filetti Alfredo Esteban y otros v. Strudel S.A. y otros/in re. Dismissal," El Dial AA2CB1 (Arg.); Cámara del Trabajo [CTrab.], Jun. 22, 2005, "Gonzalez Hugo Osmar v. Dihuel S.A. y otro/in re. Dismissal," El Dial AA2D1B (Arg.).

In February 2006, the National Labor Court of Appeals in *In Re Ramírez*[21] addressed an employee's right to sue a contracting party for statutory severance pay. In *Ramirez*, the National Labor Court established the absolute right of a claimant to sue all obligors. The court reasoned that a contrary interpretation would "unreasonably discriminate" against labor claimants.[22] *Ramirez* advances the tendency of Argentine labor courts to hold contractors liable for labor claims of personnel providing outsourced services. Nonetheless, for now the contractor's obligation is not absolute. *Ramirez* clarifies that the contractor's liability under Section 30 arises only when the outsourced services form part of the contractor's normal business activity.[23]

The *Ramirez* decision is a plenary decision, and thus binding on all labor courts. As such, contractors of outsourced services will need to adjust their policies, and one obvious result will be to force employers to closely oversee the labor practices of their contractors with such entity's employees.

II. Bolivia

A. Nationalization of Hydrocarbons

In 2005, a new *Ley de Hidrocarburos* (Law of Hydrocarbons),[24] governing all activities in the sector, was passed. The intent was to change radically the regulatory regime of economic liberalization, which had been enacted in the 1990s. The law includes substantial changes in taxation rules,[25] the permitted ownership of energy production endeavors,[26] and trading rights.[27] It also obligates foreign entities to execute new agreements within six months of the enactment of the law, while providing also that foreign entities may not hold ownership rights to production.[28] Under the new law, ownership rights are reserved completely to the state-owned oil company *Yacimientos Petrolíferos Fiscales Bolivianos*.[29]

Energy companies with previous joint venture agreements with Bolivia have objected to the new law and so notified the government under the terms of relevant bilateral investment treaties. Initial negotiations between the government and energy companies were not successful.[30] On May 1, 2006, a *Decreto de Nacionalización de los Hidrocarburos* (Decree

21. *In Re Ramirez*, Fallos Plenario, 309 Acta N° 2448.

22. *Id.*

23. Nonetheless, certain labor court judges have ruled that *any activity* advancing the contractor's business activity falls within the scope of Section 30. In general terms, case law has considered as normal activity any activity ordinarily carried out by the company. *See, e.g.*, Corte Suprema de Justicia de la Nación [CSJN], Apr. 15, 1993, "Rodríguez, Juan v. Compañía Embotelladora Argentina/in re. Dismissal," Labor Law Magazine, 1993-A, 753. (Arg.); Corte Suprema de Justicia de la Nación [CSJN], Jul. 2, 1993, "Luna, Antonio v. Agencia Marítima Rigel/in re. Dismissal," Labor and Social Security, 1993, 589 (Arg.); Corte Suprema de Justicia de la Nación [CSJN], Sept. 14, 2000, "Escudero, Segundo y otros v. Nueve A.S.A. y otro/in re. Dismissal," Labor Law Magazine, 2001-A, 98 (Arg.).

24. Law No. 3058 of May 17, 2005.

25. *Id.* § II, ch. II.

26. *Id.* at art. 16.

27. *Id.* at art. 17, ¶¶ I-VI.

28. *Id.* at art. 5.

29. *Id.*

30. As a result of general elections held in December of 2005, the new administration, headed by President Evo Morales took power in January 2006 with an agenda offering substantial changes to social and economic policies in effect since 1985, which at that time represented the aggressive liberalization of the economy,

of Nationalization of Hydrocarbons)[31] expanded the rules of the Law of Hydrocarbons and allowed current energy companies until October 31, 2006, to execute new agreements in compliance with the law. Had the Decree not been issued, under the terms of the Law of Hydrocarbons, rights previously issued would have been nullified, and such rights (and probably assets) would have been subject to mandatory assignment to the state. After difficult negotiations, all companies executed new agreements before the second deadline fixed by the Decree.[32] These agreements are basically operation/production sharing agreements between the state and the energy companies, with operators being entitled to a fixed participation on production (which varies depending on the technical characteristics of fields), plus a reimbursement of certain authorized costs.[33] This has been viewed as a political victory for President Evo Morales' administration.

B. Mining Code

In May 2006, the Constitutional Court ruled that those provisions of the Bolivian Mining Code[34] that allow mining concessions to be disposed of and mortgaged as any other real property were contrary to the Constitution, reasoning that the public domain over natural resources disallows any disposition of such mining rights.[35] Unless new legislation is passed by Congress before May 12, 2008, such provisions will be determined to have no force of law, thus affecting existing mining rights.

III. Brazil

Due to the presidential elections, very few laws were passed by the Brazilian Congress in 2006. Despite this, however, Congress continued with reforms to Brazil's convoluted civil procedure rules.[36]

A. Stare Decisis

In a significant change to Brazil's civil procedure system, rules akin to the stare decisis doctrine that prevails in common law jurisdictions have been enacted. According to the new legislation, an appellate judge "will not accept the appeal when the judgment is in

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including a very complete policy of privatization of public companies and services. Bolivian media reported often on the lack of progress of these negotiations. *See, e.g.*, *La Prensa*, La Paz, May 25, 2005, at 4C; *La Prensa*, La Paz, May 30, 2005, at 10A; *El Diario*, La Paz, Nov. 9, 2005, at I-6; *El Diario*, La Paz, Nov. 11, 2005, at I-4; *El Diario*, La Paz, Nov. 15, 2005, at I-A; *La Prensa*, La Paz, Aug. 11, 2006, at 7B; *La Prensa*, La Paz, Aug. 23, 2006, at 11A; *La Prensa*, La Paz, Aug. 26, 2006, at 7B.

31. Law No. 28701 of May 1, 2006.

32. Agreements were executed in public ceremonies on October 27 and 28, 2006, of which Bolivian media reported extensively. *See, e.g.*, *La Razón*, La Paz, Oct. 28, 2006, at A8, A9; *La Razón*, La Paz, Oct. 29, 2006, at A12.

33. Cfr. Agreement between Yacimientos Petrolíferos Fiscales Bolivianos and Empresa Petrolera Andina S.A. of Oct. 30, 2006.

34. Law No. 1777 of Mar. 17, 1997.

35. Constitutional Ruling No. 0032 of May 10, 2006, *available at* www.tribunalconstitucional.gov.bo/resolucion14077.

36. In Brazil, civil procedure rules are promulgated by Congress, in the form of laws. These amendments refer to Laws Nos. 11,276, 11,277, 11,280, and 11,341 of 2006, which amend the Brazilian Code of Civil Procedure.

accordance with a direction [*súmula*][37] from the Superior Tribunal of Justice or the Supreme Federal Tribunal."[38] The effect of this provision is that once *súmulas* are issued by one of the two highest courts in Brazil, they will be binding on all lower courts (to the extent that they follow other *súmulas*). This amounts to a significant change in the Brazilian system, as heretofore, higher courts lacked the ability to bind lower courts.[39]

B. Summary Judgment

Courts may now issue a ruling prior to a defendant being served.[40] In cases where the issue in dispute is solely a question of law, and the same court has previously decided the identical issue, the court can simply duplicate the prior ruling and immediately hand down a judgment.[41] Courts may also declare that a suit is untimely on a *sua sponte* basis.[42]

C. Choice of Forum

Judges are now empowered, on an *sua sponte* basis, to declare choice of forum clauses null and void when they are part of pro-forma agreements.[43] Instead, jurisdiction will be determined by the location where the defendant resides.[44] If the judge decides to accept jurisdiction and his decision is not timely challenged by the defendant, then the court chosen by the parties in the agreement will be deemed to have jurisdiction.[45]

D. Electronic Notices

Court cases in Brazil are moved by the judges, not by the parties. Therefore, all requests and decisions made by judges are published in the *Diário da Justiça* (Courts' Official Daily Publication). This is used to give notice to the parties' lawyers[46] that a request or decision has been made. Under the new amendments, courts will now be allowed to issue electronic notices regarding proceedings.[47] Moreover, cases cited in an appeal will no longer have to be attached to the court file; appellants may simply provide an Internet citation of the lower court decisions.[48]

Other important procedural changes have been made regarding choice of judges and joinder of parties,[49] letters rogatory[50] and domestic letters of request,[51] and suits seeking

37. *Súmulas* are summaries of the court's findings on particular points of law.

38. Lei No. 11.276, de 7 de fevereiro de 2006, D.O.U. de 08.02.2006, art. 518, §1. (Brazil).

39. Except for decisions from the Supreme Federal Tribunal regarding whether a particular law complies with the Constitution.

40. Lei No. 11.276, art. 285-A.

41. If the plaintiff appeals, the court will have five days to change its decision and let the suit continue. If the decision is not changed, the defendant will be given notice to file the appeal. This will apply whether or not the matter relates to injunctive relief.

42. Lei No. 11.280, de 16 de fevereiro de 2006, D.O.U. de 17.02.2006, art. 219, §5 (Brazil).

43. *Id.* at art. 112.

44. *Id.*

45. *Id.* at art. 114.

46. Parties must be represented by lawyers in Brazil, except for Special Civil Courts.

47. *See* Lei No. 11.280, art. 154.

48. *Id.* at art. 547.

49. *Id.* at art. 253.

annulment of previous court decisions.[52] It is expected that these changes will improve and expedite the judicial system in Brazil.

IV. Chile

A. Bankruptcy Law

In November 2005, several amendments to the bankruptcy law became effective.[53] These amendments provide new mechanisms to promote agreements between debtor and creditors, and to avoid liquidation of the debtor's assets, including the elimination of some statutory limitations to reach out-of-court settlements. They also aim to improve the regulations governing the *Superintendencia de Quiebras* (Bankruptcy Agency) and provide new standards and requirements applicable to bankruptcy trustees.[54]

B. Labor Law

Important amendments to the Labor Code were enacted in October 2006.[55] These amendments regulate labor outsourcing, the operation and registration of personnel supplier companies, and the employment agreements for supplied personnel.[56] According to these amendments, which became effective January 2007, the current alternate liability of the principal in a subcontracting relationship became a joint and several liability, such that the principal and its contractor shall be jointly and severally liable for any and all labor and social security obligations and amounts owed to the contractors' employees, including applicable severance payments. If the principal meets certain requirements, however (for example, by having the right to audit its contractor's compliance with labor and social security laws and regulations and to replace the contractor if it fails to comply with all such laws and regulations), the principal's liability will cease to be joint and several and will become an alternate or residual. The new regulations impose high penalties for noncompliance.

C. Casino Authorizations

The first public bidding process for casino operation licenses granted pursuant to the *Ley de Casinos de Juegos* (Gaming Law) enacted in May 2005,[57] which also created the *Superintendencia de Casinos de Juego* (Gaming Authority), is in its final stage. The Gaming Law provides for a bidding process by which casino operating licenses may be granted in all Chilean regions except for the Metropolitan Region (Santiago). A maximum of seven-

50. *Id.* at art. 338. Rogatory letters are the written requests made by a judge to a judge in another jurisdiction requesting assistance in connection with a case pending trial with the former court.

51. *Id.* at art. 338.

52. *Id.* at art. 489.

53. Law 20.080, Official Gazette, Nov. 24, 2005.

54. A more detailed discussion of the changes to Chilean bankruptcy law is contained in this issue, in the article entitled *International Secured Transactions and Insolvency*.

55. Law No. 20.123,Official Gazette, Oct. 16, 2006.

56. *Id.*

57. Law No. 19.995, Official Gazette, Jan. 7, 2005.

teen new casinos may be created in Chile under the provisions of the Gaming Law, which, combined with the seven casinos currently operating in Chile, allows for a maximum of twenty-four casinos in the country. Licenses will be granted for a maximum renewable term of fifteen years. By November 2006, forty-eight companies had already applied for the relevant authorizations by presenting projects in twenty-two districts nationwide, with an overall investment of approximately US$1.34 billion. Thirty of such projects were disqualified during the bidding process, ten were accepted, and eight are currently under evaluation and approaching final decision. The bidding process has not been without controversy, as some disqualified bidders continue to provide tough judicial and media opposition to the Gaming Authority and the bidding process.

V. Colombia

In May 2006, President Alvaro Uribe became the first reelected president in Colombia in over half a century. In November 2006, Colombia signed the U.S.-Colombia Free Trade Agreement.[58] The Agreement requires approval by the congresses of both the United States and Colombia to enter into effect.

A. Foreign Investment

The foreign and local investment regime was given a boost with Law 963 of 2005, which established a special "legal stability regime" that, subject to certain limitations, enables the government to agree to maintain existing legal regulations during the term of an investment.[59] The first stability agreement was executed in January 2006, between Alpina S.A. and the government with the purpose of ensuring a stable legal framework for the next ten years to support a US$25 million investment plan.

B. Labor Harassment

In January 2006, Congress passed Law 1010,[60] which provides sanctions for labor harassment in the workplace. The law is not applicable to commercial relationships derived from service contracts, nor in contracts with the public entities.

C. Privatizations

Privatizations of state-owned companies continued. The sale of the last state bank, Gran Banco S.A., was concluded on October 12 with the purchase made by Banco Davivienda S.A. for approximately US$1 billion. The government also concluded the sale of the Cartagena refinery to Glencore International AG for US$656 million, surpassing the offer made by competitor Petróleo Brasileiro S.A. The sale process of Empresa Colombiana de Gas is in its final stage, and Congress is evaluating a project for the sale of 20 percent of Ecopetrol S.A.'s capital stock.

58. Colombia-U.S. Free Trade Agreement, U.S.-Colom., Nov. 22, 2006, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Final_Text/Section_Index.html.

59. Law No. 963, Official Gazette, July 8, 2005.

60. Law No. 1010, Official Gazette, Jan. 23, 2006.

VI. Mexico

A. Elections

On September 5, 2006, the *Tribunal Federal Electoral* (Tribunal of Elections) declared Felipe Calderon Hinojosa the President-elect of Mexico.[61] Calderon Hinojosa, a member of the ruling *Partido Acción Nacional* (PAN), received just 233,831 more votes than the nominee of the *Coalición por el Bien de Todos*,[62] a left-wing alliance of political parties formed to promote Andres Manuel Lopez Obrador's candidacy. The election had been challenged by the coalition.

B. Telecommunications

In April 2006, amendments to the *Ley Federal de Telecomunicaciones* (Telecommunications Federal Law) as well as the *Ley Federal de Radio y Televisión* (Television and Radio Federal Law) became effective. These amendments caused great controversy among those in the communications industry as they effectively gave Grupo Televisa S.A. de C.V. and Televisión Azteca S.A. de C.V., the two largest providers of television programming, as well as large radio concessionaries, effective control over their respective media markets, as all but the largest of any putative concessionaires will most likely lack the ability to gain entry to such markets.

C. Oral Trials

Various states have proposed the implementation of oral trials in order to modernize the legal system by providing for speedier trials.[63] The state of Nuevo Leon has already provided for such trials in the case of criminal actions.[64] In jurisdictions such as Oaxaca and Mexico City, it is still an issue under discussion.[65]

VII. Venezuela

A. Introduction

In December 2006, Venezuela re-elected President Hugo Chavez for a further six-year term by a comfortable margin.[66] The election presented the starkest political choice in

61. Dictamen Relativo al Cómputo Final de la Elección de Presidente de los Estados Unidos Mexicanos, Declaración de Validez de la Elección y de Presidente Electo. Judgment Committee: Alfonsina Berta Navarro Hidalgo and Mauro Miguel Reyes Zapata, Sept. 5, 2006, *available at* http://www.lupaciudadana.com.mx/SACS/Xstatic/diarios_campana/docs/dictamen.pdf.

62. This coalition was formed by the Partido de la Revolución Democrática (PRD), Partido del Trabajo (PT), and Convergencia por la Democracia.

63. *See, e.g.*, Código de Procedimientos Penales del Estado de Nuevo León, Periodico Oficial del Estado, 28 del Marzo de 1990 (Mex.).

64. *Id.*

65. Carlos Avilés, *Juicio Oral, la Polémica*, El Universal, July 13, 2006, at 1, *available at* http://www.eluniversal.com.mx/nacion/140541.html.

66. Preliminary results indicate that President Chavez won with approximately 60% of the vote versus about 40% for the principal opposition candidate, Zulia State Governor, Manuel Rosales.

decades: President Hugo Chavez, with his pledge to move more quickly and radically toward a Cuban-style of socialism, versus the platform of democratic freedoms and an open capitalist economy (though with a major social welfare component) offered by the unitary opposition candidate, Zulia State Governor, Manuel Rosales.

Now that Chavez has won, 2007 may bring significant legal changes. Among others, the unicameral National Assembly, which is controlled by Chavez supporters, is likely to promulgate various measures currently under study including: a new anti-monopoly law, which, as presently drafted, would limit profits in an effort to foster a "social" economy; reform of the labor laws to substantially increase termination benefits and to make it more difficult to sever employment relationships; and the extension of further control by the state over the ideological content of both public and private education.

B. Economic Integration Organizations

One of the more dramatic developments in 2006 was Venezuela's renunciation of membership in the *Comunidad Andina de Naciones* (Andean Community of Nations) and the G-3 (Colombia, Mexico, and Venezuela), and its decision to join MERCOSUR.[67] In making these surprise announcements in April and May, President Chavez stated that the intention of Colombia and Peru to sign a free trade agreement with the United States had undermined the Andean Community and the G-3.[68]

At the same time, the Chavez administration has been actively diversifying its trade and investment relationships. During the eight years of the Chavez government, some 2200 international agreements have been executed, mostly related to trade and investment, with a large number involving Bolivia, China, Cuba, India, Iran, and Russia. Venezuela's principal economic (as well as political) partner, however, has been Cuba, which Venezuela is subsidizing in an amount exceeding US$2.5 billion per year.[69]

C. Increased National Control of the Petroleum Industry

By the *Ley de Regularización de la Participación Privada en las Actividades Primarias Previstas en el Decreto No. 1.510 con Fuerza de Ley Orgánica de Hidrocarburos*[70] (New Hydrocarbons Law) enacted in 2006, the government terminated the thirty-two operating contracts with mainly private, international oil companies and replaced these with twenty-one joint

67. The Protocol of Adhesion of the Bolivarian Republic of Venezuela to MERCOSUR, including the principal protocols and additional agreements of the MERCOSUR association, were signed on July 4, 2006. Venezuela ratified the protocol and other MERCOSUR agreements two weeks later. *See* Official Gazette No. 38.482 of July 19, 2006.

68. As widely reported in the press, the first announcement, to renounce the Andean Community, even took the Venezuelan foreign minister by surprise. Moreover, President Chavez was quite explicit in stating that the principal reason for this decision was his opposition to closer trade relations with the U.S., as opposed to his preferred scheme of mainly government to government arrangements.

69. The amount of this subsidy has been estimated by a variety of Venezuelan and U.S. experts. Two highly qualified Venezuelan experts, Humberto Calderon Berti and Jose Toro Hardy, have estimated that the oil agreement between the two countries alone costs Venezuela US$2.5 billion per year. *See Cuban Oil Agreement: What it Really Costs*, VenEconomy Weekly, Vol. 24, No. 50, Nov. 22, 2006.

70. Official Gazette No. 38.419 of April 18, 2006. Decree No. 1.510 was the original hydrocarbons law of the Chavez government, which has now been modified.

ventures[71] in which the state, through a subsidiary of *Petroleos de Venezuela, S.A.* (PDVSA), has an average majority ownership of 63 percent.[72] By accepting the joint venture conditions,[73] the private companies gave up most of their rights, lost management control, and agreed to submit all disputes to Venezuelan law and jurisdiction. They are also now subject to a host of increased taxes.[74]

In addition, the government continued to put pressure on the four heavy oil or deep conversion projects,[75] with the aim of forcing them to convert to similar joint ventures by the end of 2006. But, as 2006 drew to a close, no progress had been made in effecting this change. It would seem that the most likely solution, if this government initiative succeeds, is for the projects to be divided between the extraction phase, which would become joint ventures, and the upgrading phase, which would not, as the government does not have the technology to manage these sophisticated plants.[76]

D. National Promotion of Science and Technology

One of the important policy goals of the Chavez administration has been the promotion and coordination by the state of scientific and technological research.[77] On this basis, the National Assembly approved, in August 2005, the *Ley Orgánica de Ciencia, Technología e Innovación* (Law on Science, Technology, and Innovation).[78] This law declares the activities of science, technology, and innovation to be matters of public interest and establishes mechanisms to "stimulate and promote scientific research, the social appropriation of knowledge and the transfer and innovation of technology."[79] Among many other aspects,

71. The joint ventures with the state are governed by articles of constitution-bylaws imposed by the Ministry of Energy and Petroleum, and these joint ventures were then approved by the National Assembly. Agreements of the National Assembly approving the constitution of the twenty-one mixed companies. Official Gazette No. 38.430 of May 5, 2006.

72. Not all of the oil companies agreed to this forced migration to joint ventures. Of the majors, ExxonMobil, Total, and ENI refused to accept the leonine conditions being imposed by the government, and since then several smaller companies have sold their participations. ENI is suing the government before ICSID.

73. The new joint ventures are to continue for twenty years, whereas most of the operating contracts were previously due to expire in 2012. Official Gazette No. 38.430, art. 2, cl. 2.

74. Including a royalty of 30% (vs. 16% previously) on oil delivered to PDVSA, a surface tax based on the area assigned for exploitation, a tax on oil consumed for operations, a tax on oil sold for national consumption, an extraction tax and a special excise tax on export sales. In addition, the income tax rate for companies engaged in any aspect of the petroleum industry was increased from 34% to 50%. Finally, the National Assembly, when approving the new joint ventures, imposed a royalty surcharge of 3.33%, a special municipal tax of 2.22%, a payment of 1.11% for an endogenous development fund, and the obligation to invest 1% of pre-tax profits in endogenous development projects; moreover, the Assembly also provided that if the total of the foregoing taxes (including royalty and income) and charges is still less than 50% of the market value of the oil produced, the companies must pay the difference, up to the required 50%.

75. These involve extracting heavy, unmarketable crude from the Orinoco "tar belt" and upgrading it by a complex refining process into light petroleum products.

76. The international companies involved in these projects are ExxonMobil, BP, ConocoPhillips, ChevronTexaco, Total, and Statoil. In all cases, PDVSA is a minority partner, with shares ranging from 30% to 49.9%.

77. Const., art. 110 (1999) (Venez.).

78. *Ley Orgánica de Ciencia, Tecnología e Innovación*, Official Gazette No. 38.242 of Aug. 3, 2005.

79. *Id.* at arts. 1, 2.

this law establishes that large companies[80] (expressly including foreign companies with investments and those that execute contracts in Venezuela)[81] must allocate from 0.5 percent to 2 percent of their gross revenues to scientific and technological activities each year, depending on their economic sector.[82] Although the law was enacted in 2005, implementing regulations were only promulgated in October 2006.[83] Despite the late date of enactment, the regulations require such companies to invest in 2006 the required sums based on their 2005 gross revenues.[84]

In addition, the government will begin monitoring foreign technology entering the country under license agreements.[85] The government has created a presidential commission charged with the "instrumentation of mechanisms of insertion and monitoring of technology transfer, technical assistance, the use of trademarks and patents" in current and future contracts between public and private sector entities, domestic and foreign, that are registered with the Superintendency of Foreign Investment and the Ministry of Energy and Petroleum.[86]

80. Defined as both public- and private-sector companies with gross revenues of more than 100,000 tax units (or some US$1 million at the parallel exchange market rate in November 2006).

81. Official Gazette No. 38.242, art. 38.

82. The rates are 2% for companies in the petroleum sector, 1% for companies in the mining and electricity sectors, and 0.5% for all other sectors.

83. Decree No. 4.891 of Oct. 9, 2006, *Reglamento Parcial de la Ley Orgánica de Ciencia, Tecnología e Innovación Referido a los Aportes e Inversión*; Official Gazette No. 38.544 of Oct. 17, 2006. The regulations created the National Observatory of Science, Technology and Innovation, with which affected companies must register and which is to approve and monitor the investments in technology to be made on an annual basis.

84. *Id.* at Sole Transitory Provision.

85. Decree No. 4.994, Official Gazette No. 38.567 of Nov. 20, 2006.

86. The commission is to evaluate the following: 1) whether comparable technical assistance could have been obtained domestically; 2) whether personnel of the recipient entity are being adequately trained in the use of the technology; 3) whether the royalties and fees are within acceptable international ranges; 4) whether the licensed technology is bundled and parts thereof could be obtained locally; and 5) whether the way in which the technology is being transferred, and the technical assistance being provided, is evidenced by physical items (manuals, films, devices, etc.).