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## Latin America and Caribbean

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## Latin America and Caribbean

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# Latin America and Caribbean\*

## I. Argentina

### A. DIRECTORS' JOINT AND SEVERAL LIABILITY FOR LABOR OBLIGATIONS

In May 2007, the Supreme Court of Argentina refused to hear an appeal by the directors of a company from the decision of the Labor Court of Appeals, which had held the directors jointly and severally liable for the labor obligations of the company based on proof of inappropriate registration of labor relations.<sup>1</sup> The Labor Court's decision was in stark opposition to the previous judgments of the Supreme Court in the area.<sup>2</sup> The Supreme Court's refusal to hear the appeal may imply that the Court now regards the question of directors' joint and several liability to be a question of ordinary law and thus not one involving a federal question to be reviewed by the Supreme Court. If so, the issue of directors' joint and several liability will now be subject to the interpretation of the Panels of the National Labor Court of Appeals<sup>3</sup> or the Provincial Supreme Courts.

### B. CANCELLATION OF INCREASED MANDATORY SEVERANCE PAYOUT

In September 2007, the Executive Branch<sup>4</sup> cancelled the increased mandatory severance payout for terminated employees enacted in 2001 as part of the Economic Emergency Act.<sup>5</sup>

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1. See Corte Suprema de Justicia de la Nación [CSJN], 29/5/2007, "Daverede, Ana Maria v. Mediconex S.A. y otros/recurso extraordinario," La Ley [L.L.] (2001-D-439) (Arg.).

2. In the precedents known as *Palomaque*, *Carballo* and *Tazzoli*, the Supreme Court (with its former justices) held that in cases where directors questioned their joint and several liability, a motion for consideration of appeal and extraordinary appeal should be granted and the judgment entered by the Labor Court of Appeals against the directors was reversed.

3. With respect to the opinion of the ten panels forming part of the National Labor Court of Appeals: five panels currently consider that, in the case under analysis, directors' joint and several liability shall be imposed; four of them consider that directors shall not be held jointly and severally liable; and one panel has not made its opinion public in this respect so far.

4. See Decree No. 1224/07, Sept. 11, 2007, [31236], B.O. 5.

5. See Law No. 25792, Nov. 11, 2003 [30274], B.O. 1.

### C. COURT CHARGE AS A TAX

In July 2007, the Supreme Court examined the nature of the *tasa judicial* (court charge) and concluded that it is a tax and not a fee.<sup>6</sup> Based on its review of the agreement creating the *Corporación Financiera Internacional* (International Finance Corporation - IFC),<sup>7</sup> the Supreme Court ruled that the IFC is exempt from the tax levied on claimants bringing an action in the Argentine courts.<sup>8</sup> This ruling overturned lower court precedent characterizing the court charge as a fee and not as a tax.

### D. TAX ON PERSONAL ASSETS

In June 2007, a panel of the Federal Appeals Court addressed the payment of federal tax on personal assets in relation to companies and their shareholders. In *Agrobos S.A. v. EN AFIP-DGI*,<sup>9</sup> the court ruled that a company may not apply a tax credit earned through its corporate activities toward the tax liability for personal assets of its shareholders. The ruling overturns precedent in the Argentine Tax Courts,<sup>10</sup> which, acknowledging the company's liability to pay taxes as a "substitute party"<sup>11</sup> for shareholders, had previously allowed an offset against the company's own tax credit.

## II. Bolivia

### A. NATIONALIZATION POLICIES

In 2007, the administration of President Evo Morales continued its program of "nationalization" policies in the oil and gas sector and other sectors begun in 2006.<sup>12</sup> The most significant development in the oil and gas industry has been the nationalization of the two most important refineries belonging to and operated by Petrobras (from Brazil)<sup>13</sup>. This action unleashed a dispute with Petrobras that, after long negotiations, was finally settled by agreement.<sup>14</sup> The Bolivian Government agreed to pay a compensation of 112 million dollars, and the ownership and control of the refineries were transferred to the Bolivian State Oil Company, YPFB. Other negotiations with international oil companies are pending completion for the transfer of ownership and control to the Bolivian State of

6. See Corte Suprema de Justicia de la Nación [CSJN], 3/7/2007, "Corporación Financiera Internacional v. Aragón, Luis Alberto Facundo," *La Ley Impuestos* [L.L. Impuestos] (2007, 17, 1645) (Arg.).

7. Providing a tax exemption to the member countries.

8. See *id.*

9. See Cámara Nacional de Apelaciones en lo Federal y Constencioso administrativo de la Capital Federal, Sala II [CNFed.], 5/6/07, "Agrobos S.A. v. EN AFIP-DGI - resolución 23/5/2003 s/ amparo ley 16986," *Doctrina Tributaria, ERREPAR* [DTE] (2007-331-947) (Arg.).

10. See Tribunal Fiscal de la Nación, Sala B [Trib. Fisc. Nac.], 9/2/07, "*Cubecorp Argentina S.A. v. Recurso de apelación*," *La Ley Impuestos* [L.L. Impuestos] (2007-13-1289) (Arg.).

11. The "substitute party" characterization insures the tax is paid even when the real interested party (i.e., the shareholder) is not otherwise subject to Argentine tax.

12. See Fernando Aguirre et. al., *Latin America*, 41 INT'L LAW. 813, 816-17 (2007).

13. See *Gaceta Oficial de Bolivia* No. 2994, Decreto Supremo No. 29128, 15 de mayo de 2007, available at <http://www.derechoteca.com/gacetabolivia/decreto-supremo-29128-del-15-mayo-2007.htm>.

14. See *id.*

three oil and gas operating companies, which were privatized during the 1990s and nationalized in 2006.<sup>15</sup>

On May 1, 2007, the Bolivian Government decreed the nationalization without right of compensation of the most important Bolivian tin refining plant (Vinto), which was indirectly owned by Glencore of Switzerland<sup>16</sup>. The Swiss Government supported Glencore in claiming unfair treatment and compensation, and Glencore filed a letter of controversy against the Bolivian Government requesting negotiations within a period of one year, as provided by the Swiss-Bolivian Bilateral Investment Treaty.<sup>17</sup> By the end of 2007, negotiations for settlement by mutual agreement were underway.

In the telecommunications sector, the government decreed the nationalization of the *Empresa Nacional de Telecomunicaciones S.A.* (ENTEL),<sup>18</sup> the largest telecom operator in Bolivia arising from the original State Telecom Company privatized in the 1990s. Its principal shareholder, Euro Telecom, initially participated in negotiations with the Bolivian Government, which eventually broke down, causing Telecom to file, in late April 2007, a case with the International Centre for Settlement of Investment Disputes (ICSID) Secretariat. Bolivia contends that ICSID lacks jurisdiction to hear the case because Euro Telecom did not consent to arbitration before Bolivia's denunciation of the ICSID Convention, discussed below.<sup>19</sup>

## B. DENUNCIATION AGAINST THE WASHINGTON CONVENTION (ICSID).

On May 2, 2007, Bolivia provided formal notice that it was withdrawing from the ICSID Convention, effective November 3, 2007.<sup>20</sup> Because no other signatory to the ICSID Convention has ever withdrawn, the implications of Bolivia's actions are unclear. In a letter to Ana Palacio, Secretary-General of ICSID, 134 civil society organizations from around the world supported the Bolivian Government's decision to file the denunciation.<sup>21</sup> The legal ramifications of the denunciation are discussed in further detail in the report of the International Commercial Dispute Resolution Committee in this Issue.

15. See Gaceta Oficial de Bolivia No. 2883, Decreto Supremo No. 28701, 1 de mayo de 2006, available at <http://www.derechoteca.com/gacetabolivia/decreto-supremo-28701-del-1-mayo-2006.htm>.

16. See Gaceta Oficial de Bolivia No. 2969, Decreto Supremo No. 29026, 7 de febrero de 2007, available at <http://www.derechoteca.com/gacetabolivia/decreto-supremo-29026-del-2-febrero-2006.htm>.

17. Accord entre la Confédération Suisse et la République de Bolivie concernant la promotion et la protection réciproques des investissements [Swiss-Bolivian Bilateral Investment Treaty], Switz.-Bol., Nov. 6, 1987, [http://unctad.org/sections/dite/ia/docs/bits/suisse\\_bolivie.pdf](http://unctad.org/sections/dite/ia/docs/bits/suisse_bolivie.pdf).

18. See Gaceta Oficial de Bolivia No. 2982, Decreto Supremo No. 29087, 28 de marzo de 2007, available at <http://www.derechoteca.com/gacetabolivia/decreto-supremo-29087-del-28-marzo-2007.htm>.

19. Damon Vis-Dunbar et al., *ICSID Registers Arbitration Claim in Face of Bolivian Objections*, INVESTMENT TREATY NEWS, Nov. 15, 2007, available at [http://www.iisd.org/pdf/2007/itm\\_nov15\\_2007.pdf](http://www.iisd.org/pdf/2007/itm_nov15_2007.pdf).

20. News Release, International Centre for Settlement of Investment Disputes, Bolivia Submits a Notice under Article 71 of the ICSID Convention (May 16, 2007), available at <http://icsid.worldbank.org/ICSID/ICSID/ViewNewsReleases.jsp>. According to Pablo Solon, Bolivia's Charge D'affaires for Trade, Bolivia also intends to revise or terminate many of its BITs. See Damon Vis-Dunbar et al., *Bolivia Notifies World Bank of Withdrawal from ICSID, Pursues BIT Revisions*, INVESTMENT TREATY NEWS, May 9, 2007, available at [http://www.iisd.org/pdf/2007/itm\\_may9\\_2007.pdf](http://www.iisd.org/pdf/2007/itm_may9_2007.pdf).

21. See Letter from 134 Organizations and Thirty Four Countries to Ana Palacio, Secretary-General of the International Centre for Settlement of Investment Disputes (June 21, 2007), available at [www.foodandwaterwatch.org/water/right/ICSID%20letter.pdf](http://www.foodandwaterwatch.org/water/right/ICSID%20letter.pdf).

### III. Brazil

#### A. CHANGES IN BRAZILIAN FEDERAL LAW

Brazil, like most Latin countries, has a Civil Law system derived from Roman and Germanic laws, strongly influenced by provisions of the Napoleonic Code of 1804 and of the Germanic Code of 1896.<sup>22</sup> In recent years, however, several modifications in the Federal Constitution and minor laws have introduced some successful initiatives from the common law, making the Brazilian legal system more heterogeneous. Specifically, these include the Federal Law numbers 11.187/05, 11.232/05, 11.276/06, 11.277/06, 11.280/06, 11.341/06, 11.382/06, 11.418/06, 11.419/06, 11.441/07, and a few legislative proposals currently pending approval.

In sum, it can be said that this group of laws has the aim, *inter alia*, of creating greater jurisprudential uniformity. One of the most controversial, and possibly most effective, changes brought about by the legislation is the power granted to the Brazilian Federal Supreme Court to issue precedent capable of binding not only the Judiciary Branch when issuing future decisions but also public administrative bodies.<sup>23</sup> Although such precedent, called binding precedents (or, in Portuguese, *súmulas vinculantes*), was first introduced by Constitutional Amendment no. 45/2004 of December 30, 2004, it was not applied until recently, when Law no. 11.417, which was promulgated by the President of Brazil on December 19, 2006, became effective on March 20, 2007.<sup>24</sup>

Under the new law, the Brazilian Federal Supreme Court may create, by a favorable vote from at least two-thirds of its members,<sup>25</sup> precedent on constitutional matters that will bind lower courts and public administrative bodies.<sup>26</sup> Before this law, the Brazilian Federal Supreme Court was only able to issue abstract decisions, which were regarded merely as guidance and thus not binding on the lower courts and public administrative bodies. Now, such abstract decisions will continue to exist as a guide, along with the binding precedent, whose observance will be mandatory.<sup>27</sup> The new law is designed to discourage frivolous litigation, particularly by the government, which, as the most active litigant in Brazil today,<sup>28</sup> disrupts the Brazilian judiciary, overwhelming it with numerous cases of which the final result is already known.

In practice under the new law, when a decision is issued either by a lower court or a public administrative body that is inconsistent with a binding precedent, a party may file a complaint directly with the Brazilian Federal Supreme Court, which, in turn, may dismiss

22. See DURVAL DE NORONHA GOYOS JR., *LEGAL GUIDE: BUSINESS IN BRAZIL* 115 (6th ed. 2003).

23. See Lei No. 11.417/06, de 19 de dezembro de 2006, D.O.U. de 20.12.2006 (Braz.), available at [https://www.planalto.gov.br/ccivil\\_03/\\_ato2004-2006/2006/lei/111417.htm](https://www.planalto.gov.br/ccivil_03/_ato2004-2006/2006/lei/111417.htm).

24. See *id.*

25. See Constituição Federal [C.F.] [Constitution] art. 103-A (Braz.).

26. Such binding precedent may also be reversed or modified by similar two-thirds vote of the Supreme Court's members.

27. See Lei No. 11.417/06, art. 4, de 19 de dezembro de 2006 (Braz.).

28. See ORDEM DOS ADVOGADOS DO BRASIL, Busato: Poder Público é o Maior Litigante de má-fé do País ["Busant: The Government is the Largest Bad-Faith Litigant in the Country"], <http://www.oab.org.br/noticia.asp?id=2451> (last visited Nov. 29, 2007).

such judicial or administrative decision and order that a new decision be issued in accordance with the binding precedent.<sup>29</sup>

On May 30, 2007, the Brazilian Federal Supreme Court issued its first three binding precedents,<sup>30</sup> ruling on certain issues that have affected many cases throughout Brazil. Other binding precedents are under discussion and it is expected that several other relevant legal controversies will be finally settled, decreasing the serious overcrowding of the judicial dockets and speeding up the processing time of cases before the Brazilian courts. It is also hoped that the new system will diminish the volume of frivolous litigation and appeals currently pending, which, in turn, will promote greater swiftness in the resolution of judicial proceedings.

#### IV. Chile

##### A. NEW TYPE OF LEGAL ENTITY

On June 5, 2007, Law 20.190<sup>31</sup> was enacted. Among other matters, the Law creates and regulates a new form of corporate entity structure—a particular type of stock corporation type called *Sociedad por Acciones* (SpA). SpAs provide a very useful alternative to Chilean close corporations (*sociedades anónimas*) and limited liability companies (*sociedades de responsabilidad limitada*) by providing formation, maintenance, management, and profit distribution mechanisms that are substantially simpler, faster, cheaper, and more flexible.

Some of the main provisions of the Law<sup>32</sup> include the following: (1) SpAs may be created by one or more shareholders (legal entities or individuals);<sup>33</sup> (2) incorporation of SpAs may be executed by a notarized private document signed by the shareholders (instead of the more formal and cumbersome *escritura pública*);<sup>34</sup> (3) broad flexibility is afforded regarding corporate governance structures (a board of directors need not exist);<sup>35</sup> (4) capital increases may be approved by the board or manager (shareholder approval is not required);<sup>36</sup> (5) unless otherwise stated in the bylaws, (i) shareholders do not have preemptive rights,<sup>37</sup> (ii) unpaid shares do not have any voting rights,<sup>38</sup> and (iii) the legal entity is not statutorily dissolved if all shares become owned by one sole shareholder;<sup>39</sup> (6) a preferred class of shares entitling the relevant stockholder to fixed dividends is allowed;<sup>40</sup>

29. See Lei No. 11.417/06, art. 7, de 19 de dezembro de 2006.

30. See Supreme Court Binding Precedent Number 1 (discussing the Dismissal Funs—FGTS); Supreme Court Precedent Number 2 (discussing the regulation of bingos and lotteries); Supreme Court Binding Precedent Number 3 (discussing a party's right of defense in Administrative Proceedings before the Administrative Audit Court of Brazil—TCU), [http://www.stf.gov.br/portal/cms/verTexto.asp?servico=jurisprudenciaSumulaVinculante&pagina=sumula\\_001\\_003](http://www.stf.gov.br/portal/cms/verTexto.asp?servico=jurisprudenciaSumulaVinculante&pagina=sumula_001_003) (last visited Dec. 3, 2007).

31. See Ley No. 20.190, of 17.5.2007 (Chile), available at <http://www.bcn.cl/leyes/pdf/original/261427.pdf>.

32. See *id.*

33. See *id.* art. 17 (1) (c) (new art. 424 of Commerce Code).

34. See *id.*, art. 17 (1) (c) new art. 425 of Commerce Code.

35. See *id.*, art. 17 (1) (c) (new art. 424, ¶2 of Commerce Code).

36. See *id.* art.17 (1) (c) (new art. 434, ¶2 of Commerce Code).

37. See *id.* art. 17 (1) (c) (new art. 439 of Commerce Code).

38. See *id.* art. 17 (1) (c) (new art. 434, ¶3 of Commerce Code).

39. See *id.* art. 17 (1) (c) (new art. 444 of Commerce Code).

40. See *id.* art. 17 (1) (c) (new art. 442 of Commerce Code).

and (7) payment of certain dividends directly related to the profits produced by a specific business unit of the SpA, regardless the profits of the entire SpA, is allowed.<sup>41</sup>

Other than as provided in the Law or the relevant bylaws of the SpA, the corporate laws and regulations applicable to close corporations also apply to SpAs.<sup>42</sup> Likewise, the tax laws and regulations applicable to corporations shall apply to SpAs.

## B. UNFAIR COMPETITION ACT

On February 16, 2007, Law No20.169<sup>43</sup> on Unfair Competition (the “Unfair Competition Law”) came into force.<sup>44</sup> The Unfair Competition Law integrates regulations formerly found in the Consumer Protection Law, the Industrial Property Law, the Copyright Law, and the Antitrust Law, and fills an important void in Chilean legislation.

The Unfair Competition Law emphasizes the protection of competitors, consumers, and, in general, any person whose legitimate interests are negatively affected by unfair competitive practices. According to the Law, acts of unfair competition include any conduct contrary to good faith or good social custom that, through unlawful means, is intended to divert clients from one competitor to another.<sup>45</sup> The Law further indicates,<sup>46</sup> albeit merely by way of example and without limitation, certain conduct that will be considered unfair competition, such as: incorrect or false use of signs or advertising that is misleading in connection with the nature, components, and other characteristics of the products or services offered; comparisons of goods, services, activities, or establishments, that are not based on true and demonstrable facts; and abusive use of judicial claims aimed at hindering an agent’s operation in the market.<sup>47</sup> In addition, the Law provides different courses of action against unfair competition, aiming both to prevent the effects of and redress the damages caused by unfair competition. Thus, the Law provides for a fine of up to approximately \$60,000 if the offender obtains substantial benefit from the misconduct.<sup>48</sup>

41. *See id.*, art. 17 (1) (c) (new art. 443 of Commerce Code).

42. *See id.*, art. 17 (1) (c) (new art. 424, ¶2 of Commerce Code).

43. *See Ley No. 20.169*, of 2.2.2007 (Chile), available at <http://www.bcn.cl/leyes/pdf/original/258377.pdf>.

44. The Law was inspired on the relevant Argentine, Colombian, and Spanish legislation and, consequently, shares similar rules with those legislations.

45. *See Ley No. 20.169*, of 2.2.2007, art. 3 (Chile), available at <http://www.bcn.cl/leyes/pdf/original/258377.pdf>.

46. *See id.* art. 4.

47. Some critics argue that: (i) the Law purports to protect those already protected by existing antitrust laws and regulations, pursuant to which unfair competition exists whenever a person abuses its dominant position in the market; and (ii) the Law’s definition of unfair competition is too broad and is likely to lead to (1) conflicting interpretations and legal uncertainty, and (2) over-zealous market participants who may refrain from competitive actions under such legal uncertainty, thus promoting less competitive markets and less satisfied customers.

48. *See Ley No. 20.169*, of 2.2.2007, art. 3.



## V. Colombia

### A. RECENT LEGAL REFORMS

The economy in Colombia has maintained steady growth over the past several years. The growth observed in 2006 (6.8 percent of GDP) exceeded all expectations and estimates in 2007 suggest a growth rate of approximate 6 percent and 7.8 percent.<sup>49</sup> This growth has improved the confidence of consumers and investors in the national economy. Recent legal reforms in areas such as securities, social security, and taxation have also contributed to create a favorable environment for investment.<sup>50</sup>

Although enacted last year, Law 1116 of 2006<sup>51</sup> came into full force and effect on June 27, 2007, establishing a new insolvency regime in Colombia. Article 124A of this Law is remarkable, as it modifies Article 470 of the Code of Commerce with regard to the supervision and control of foreign branch offices by the Superintendence of Corporations. Under the new law, branch offices will no longer be under automatic surveillance and control of the Superintendence of Corporations for the sole reason of being foreign branch offices. Instead, they will be subject to the same general provisions, which apply to other types of corporations as provided for in Article 84 of Law 222 of 1995.

Law 1111 of 2007<sup>52</sup>, enacted on December 27, 2006, came into full force and effect on January 1, 2007. This law introduces several changes in the Colombian tax system, including: (i) the abolishment of capital cross-border transfer tax and income tax on dividends paid to non-residents; (ii) the elimination of the inflation adjustments system for fiscal purposes; (iii) the extension of the patrimony tax until 2010; (iv) the lowering, from 6 percent to 3 percent, of the presumptive income rate; (v) the gradual reduction of the stamp tax and its complete abolishment by the year 2010; and (vi) the creation of the Tax Value Unit which allows the annual adjustment of all tax figures.<sup>53</sup>

Colombia has a new public contracting statute, codified by Law 1150 of 2007<sup>54</sup> and enacted on July 16, 2007, that reformed Law 80 of 1993. This new regulation introduces measures to guarantee further efficiency and transparency in the public contracting process and includes, among other major changes: (i) different contracting modalities; (ii) a redefinition of the objective selection principle and the criteria involved in its application; and (iii) the possibility of further extending concession contracts (up to 60 percent increases), regardless of their value.

Law 1122 of 2007<sup>55</sup> modified Law 100 of 1993<sup>56</sup>, which regulates the Social Security system in Colombia, specifically the health regime, maintaining unaffected the pensions

49. See Departamento Nacional de Planeación, <http://www.dnp.gov.co/>.

50. See *infra* notes 51-55.

51. See Diario Oficial No. 46.494, 16 de julio de 2007, Congreso de la República de Colombia, Imprenta Nacional, available at [http://www.upme.gov.co/siel/documentos/Ley\\_1117\\_2006.pdf](http://www.upme.gov.co/siel/documentos/Ley_1117_2006.pdf).

52. See *id.*

53. *Id.*

54. See Diario Oficial No. 46.691, 16 de julio de 2007, Congreso de la República de Colombia, Imprenta Nacional.

55. See Diario Oficial No. 46.506, 9 de enero de 2007, Congreso de la República de Colombia, Imprenta Nacional.

56. See Diario Oficial No. 41.148, 23 de diciembre de 1993, Congreso de la República de Colombia, Imprenta Nacional.

system and the professional risks system. The most important modification was introduced by Article 10, which modifies the first paragraph of Article 204 of Law 100 of 1993 and establishes that, as of January 2007, contributions to the Social Security system will increase by 0.5 percent (for a total of 12.5 percent), an increase which shall be borne by the employer .

Law 1149 of 2007<sup>57</sup> reforms the Labor and Social Security Procedural Code and introduces the oral system in judicial controversies. The new regulation reduces the number of hearings from four to two and is, hence, expected to shorten labor trials.

## VI. Ecuador

### A. CONSTITUTIONAL REFORM PROCESS

Ecuadorian voters approved a referendum on April 15, 2007, to initiate the broad constitutional reform process sought by President Correa.<sup>58</sup> Elections for the Constituent Assembly were held on September 30, 2007, with the pro-government party, Alianza PAIS, winning roughly 70 percent of the seats in the 130-member assembly.<sup>59</sup> Once installed, the Assembly will have six months to draft a new constitution, which will have to be approved in a subsequent referendum.<sup>60</sup> Proposed reforms will include limiting the power of Congress, restructuring the Supreme Court and Constitutional Tribunal, and expanding the powers of the Executive Branch.<sup>61</sup>

### B. CUSTOMS: ELIMINATION OF PRIVATE VERIFICATION COMPANIES

The Ecuadorian Congress approved reforms to the Organic Customs Law to phase-out the operation of private verification service companies in the country.<sup>62</sup>

### C. FINANCE

The Law for the Regulation of Maximum Effective Credit Costs established the parameters by which the Central Bank of Ecuador may set minimum and maximum interest rates.<sup>63</sup>

57. See Diario Oficial No. 46.688, 13 de julio de 2007, Congreso de la República de Colombia, Imprenta Nacional.

58. See República del Ecuador, Consulta Popular 2007 [Official Ecuador Election Board Results], available at <http://app.tse.gov.ec/Resultados2007/>.

59. See República del Ecuador, Asamblea Constituyente 2007 [Official Ecuador Election Board Results], available at <http://app.tse.gov.ec/ResultadosAsamblea2007/inicio.htm>.

60. See Simon Romero, *Ecuador Appears Likely to Rewrite Constitution*, N.Y. TIMES, Apr. 16, 2007, at A, available at [www.nytimes.com/2007/04/16/world/americas/16ecuador.html?n=Top/News/World/Countries%20and%20Territories/Ecuador](http://www.nytimes.com/2007/04/16/world/americas/16ecuador.html?n=Top/News/World/Countries%20and%20Territories/Ecuador).

61. See *Ecuador Congress is Dissolved in Vote*, N.Y. TIMES, Nov. 30, 2007, at A, available at <http://www.nytimes.com/2007/11/30/world/americas/30ecuador.html?n=Top/News/World/Countries%20and%20Territories/Ecuador>.

62. See Organic Customs Law Reform Act, Registro Oficial No. 196, 23 de octubre de 2007 (Ecuador).

63. See Registro Oficial [R.O.] No. 135, 26 de julio de 2007 (Ecuador).

#### D. HYDROCARBONS

President Correa, through executive decree,<sup>64</sup> modified the Regulation for the Application of Law No. 42-2006, the Hydrocarbons Law Reform Act. The decree gives the Ecuadorian State ninety-nine percent of all windfall oil profits, whereas before foreign oil companies operating under participation contracts split these profits with the Government fifty-fifty. In addition, the Ecuadorian Congress amended the Hydrocarbons Law and Criminal Code to increase the penalties for the illegal commercialization of subsidized hydrocarbons—domestic gas and petroleum. The new sanctions establish fines and jail sentences ranging from three to six years.<sup>65</sup>

#### E. LABOR REFORMS: LIMITATIONS ON HOURLY WORKERS

The reforms to the Regulations for Hourly Employment Contracting Reform Act stipulate that no more than twenty percent of a company's workers may be hired on an hourly-wage basis.<sup>66</sup>

#### F. TELECOMMUNICATIONS AND BROADCASTING: BROADCASTING LICENSE FOR TELECOM OPERATORS

Andinatel S.A., the wholly-owned state telecommunications company, obtained a broadcasting license to operate public audio and video broadcasting. The government's goal is to create a state public TV channel. It is the first broadcasting license that has been granted to a main fixed-line telecom operator.<sup>67</sup>

### VII. Mexico

#### A. TAX

Through the amendment of several laws<sup>68</sup> and the issuance of two new ones,<sup>69</sup> the Mexican Federal Government intends to increase the collection rate of tax by fighting tax evasion in informal commerce in order to generate funds to allocate to marginalized sec-

64. See Executive Decree No. 662, Registro Oficial No. 193, 18 de octubre de 2007 (Ecuador).

65. See Hydrocarbons Law and Criminal Code Reform Act, Registro Oficial No. 170, Sept. 14, 2007 (Ecuador).

66. See Executive Decree No. 200, Registro Oficial No. 55, 2 de abril de 2007 (Ecuador).

67. See CONARTEL Resolution 5811, May 9, 2007, available at <http://www.conartel.gov.ec/>.

68. See e.g., Código Fiscal de la Federación [C.F.F.] [Federal Tax Code], as amended, Diario Oficial de la Federación [D.O.], 1 de octubre de 2007, available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/8.pdf> (Mex.); Ley del Impuesto Sobre la Renta [L.I.S.R.] [Income Tax Law], as amended, Diario Oficial de la Federación [D.O.], 1 de octubre de 2007, available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/82.pdf> (Mex.); Ley del Impuesto Especial Sobre Producción y Servicios [L.I.E.S.P.Y.S.] [(Production and Services Special Tax Law), as amended, Diario Oficial de la Federación [D.O.], 21 de diciembre de 2007, available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/78.pdf> (Mex.).

69. See e.g., Ley del Impuesto a los Depósitos en Efectivo [L.I.D.E.] [Cash Deposits Tax Law], as amended, Diario Oficial de la Federación [D.O.], 1 de octubre de 2007, available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/LIDE.pdf> (Mex.); Ley del Impuesto Empresarial a Tasa Única [L.I.E.T.U.] [Corporate Income Tax Law to Single Rate] as amended, Diario Oficial de la Federación [D.O.], 1 de octubre de 2007, available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/LIETU.pdf> (Mex.).

tors, such as education and security. The *Ley del Impuesto Empresarial a Tasa Única* (Corporate Income Tax Law to Single Rate) will displace the *Ley del Impuesto Sobre la Renta* (Income Tax Law).<sup>70</sup> Until then, however, both taxes shall be calculated and only the highest of the two shall be paid. These are important tax amendments that should be taken in consideration by any company established in Mexico.<sup>71</sup>

## B. TELECOMMUNICATIONS

In May and June of 2007, the *Suprema Corte de Justicia de la Nación* (Supreme Court) invalidated several articles of the amendments made to the *Ley Federal de Telecomunicaciones* (Telecommunications Federal Law)<sup>72</sup> as well as the *Ley Federal de Radio y Televisión* (Television and Radio Federal Law),<sup>73</sup> which became effective in April 2006. This invalidation was founded in the unconstitutionality of six articles, sixteen paragraphs, and parts of the laws' texts that provided an automatic countersignature and the perpetuity of the radio and television concessions without the payment of any consideration to the State as well as various provisions allowing monopolistic practices of television and radio stations, among others.<sup>74</sup>

## C. AVIATION

On October 17, 2007, one of the two biggest airlines in Mexico, Aeroméxico, was sold through an unprecedented process in Mexico—a public auction. After two intense days of bids, a private trust composed mainly by Banamex (a Citigroup bank) and seven other entrepreneurs bought the company for \$249.1 million. Aeroméxico was bought in 1996 by the Federal Government due to the Company's economic problems and under sale by the *Instituto de Protección al Ahorro Bancario* (Bank Savings Protection Institute).<sup>75</sup>

70. See, e.g., Cash Deposits Law, *supra* note 69; Corporate Income Tax Law to Single Rate, *supra* note 69.

71. See Edith Ávila, *Las Tres Caras de la Reforma Fiscal* [The Three Faces of the Fiscal Reform], *EXPANSIÓN*, at 976 (Mex.).

72. See *Diario Oficial de la Federación*, Supreme Court's Resolution (2007), [http://www.dof.gob.mx/nota\\_detalle.php?codigo=4996806](http://www.dof.gob.mx/nota_detalle.php?codigo=4996806) (last visited Mar. 30, 2008); See also, *Ley Federal de Telecomunicaciones* [L.F.T.] [Telecommunications Federal Law], *Diario Oficial de la Federación* [D.O.], 11 de abril de 2006, available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/118.pdf> (aclaración a sentencia de la S.C.J.N. D.O. 19 de octubre de 2007) (Mex.).

73. See *Diario Oficial de la Federación*, Supreme Court's Resolution (2007), [http://www.dof.gob.mx/nota\\_detalle.php?codigo=4996806](http://www.dof.gob.mx/nota_detalle.php?codigo=4996806) (last visited Mar. 30, 2008); see also *Ley Federal de Radio y Televisión* [L.F.R.T.] [Television and Radio Federal Law], *Diario Oficial de la Federación* [D.O.], 11 de abril de 2006, available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/114.pdf> (aclaración a sentencia de la S.C.J.N. D.O. 19 octubre de 2007) (Mex.).

74. *La Corte Notifica a Senadores su Fallo Sobre la ley Televisa*, *La Jornada* (Mex.), 10 de agosto de 2007, available at <http://www.amedi.org.mx/spip.php?567>.

75. See Lilián Cruz, *Es Aeroméxico para Banamex*, *REFORMA*, 18 de octubre de 2007 (Mex.).

## D. ELECTORAL

On November 13, 2007, the *Diario Oficial de la Federación* (Federal Official Gazette)<sup>76</sup> published the amendments to nine Constitutional articles,<sup>77</sup> which, among other things, establishes: mandatory airtime for the broadcast of political parties' messages, a business that had represented about \$750 million every year to the two nationwide open TV stations;<sup>78</sup> the election of a new President Counselor for the *Instituto Federal Electoral* (Federal Electoral Institute); and the renewal of two Electoral Counselors. Most political analysts consider these provisions to be a strike against the autonomy recently acquired by the electoral system in Mexico.<sup>79</sup>

## VIII. Venezuela

### A. TRANSFORMATION OF THE HEAVY OIL PROJECTS TO MINORITY JOINT VENTURES

On February 26, 2007, the government converted four heavy oil projects<sup>80</sup> into minority joint ventures with the state oil company, *Petroleos de Venezuela, S.A. (PDVSA)*, having more than a 60 percent participation and total control.<sup>81</sup> These projects represented the most significant foreign investment in the Venezuelan oil sector, having been designed to convert the heavy oil of the Orinoco "tar belt" to light crude.<sup>82</sup> The foreign oil companies, which previously had majority stakes in all of these projects, were given four months to negotiate the transition to minority positions plus a period of two months for the Venezuelan National Assembly to approve the new arrangements. The new PDVSA-dominated joint ventures took over all of the assets of the previous joint venture entities as well as all of the downstream and upstream operations related to these projects. Moreover, the decree provided that all matters related to it were to be resolved in accordance with Venezuelan law and in Venezuelan courts.<sup>83</sup> ExxonMobil and ConocoPhillips did not accept the terms offered by PDVSA and refused to participate in the new joint ventures. Both

76. See *Diario Oficial de la Federación* [D.O.], <http://www.dof.gob.mx/> (last visited Mar. 30, 2008).

77. See *Constitucion Política de los Estados Unidos Mexicanos* [Const.], as amended, arts. 6, 34, 41, 85, 97, 99, 108, 116, 122, *Diario Oficial de la Federación* [D.O.], 13 de noviembre de 2007 (Mex.), available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/1.pdf>.

78. See Jenaro Villamil, *Aspirinas como reforma electoral*, ASOCIACION MEXICANA DE DERECHO A LA INFORMACION [AMEDI], Sept. 2, 2007, available at <http://www.amedi.org.mx/slip.php?article633> (Mex.).

79. See *Aprueba Senado Reforma Electoral*, EL FINANCIERO, Sept. 13, 2007 (Mex.).

80. These projects were Petrozuata, Sincor, Cerro Negro, and Hamaca. The international companies involved were ExxonMobil, BP, ConocoPhillips, ChevronTexaco, Total, and Statoil. All of these projects have since been renamed. In addition, several other heavy oil projects were similarly affected.

81. See *Decreto No. 5.200: Decreto con Rango, Valor y Fuerza de Ley de Migración a Empresas Mixtas de los Convenios de Asociación de la Faja Petrolífera del Orinoco, así como de los Convenios de Exploración a Riesgo y Ganancias Compartidas*, Gaceta Oficial de la República Bolivariana de Venezuela [Official Gazette] No. 38.632, Feb. 26, 2007.

82. The total cost of these investments was some \$12 billion, and at the time of transformation they were producing about 660,000 barrels of commercial oil per day.

83. See *Aprueba Senado Reforma Electoral*, *supra*, note 79, at art. 13.

ExxonMobil and ConocoPhillips are now suing Venezuela for damages in ICSID arbitrations, as was contemplated under their previous contracts with the State.<sup>84</sup>

## B. INCOME TAX LAW MODIFICATIONS

In February, the National Assembly introduced two significant modifications to the income tax law.<sup>85</sup> The first of these changes attempts to discourage debt investment in favor of equity investment in local companies by prohibiting companies from taking tax deductions for interest paid if their aggregate indebtedness to related and non-related borrowers exceeds the level of paid-in equity.<sup>86</sup> The second change intends to discourage local companies from maintaining assets or debt in foreign currency by providing that accounting adjustments based on exchange rate variations may only be taken in the fiscal year when such assets or liabilities are payable, collected, or paid.<sup>87</sup> This substantially increases the financial impact of maintaining such foreign currency items for more than a single year, given the inflation-devaluation cycle of the Venezuelan economy.

## C. EXTRAORDINARY DECREE-LAW AUTHORITY

President Chavez requested, and the wholly-controlled National Assembly granted,<sup>88</sup> extraordinary decree-law authority,<sup>89</sup> which authorized him to legislate by decree in eleven vaguely worded areas<sup>90</sup> that impose few restrictions on the type of laws that may be so promulgated. This extraordinary authority is to remain in effect for eighteen months or until August 2008. On the basis of this authority, it was expected that President Chavez would quickly begin to issue an array of new laws as he did in 2001 when he also had extraordinary decree powers. But it became apparent that the current constitution, adopted at the end of 1999 at the urging of President Chavez and through a constituent assembly, created a number of legal obstacles to the president's plans, for which reason the government changed strategy and determined to first modify the constitution.

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84. See *ConocoPhillips Company v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30) (pending), available at <http://icsid.worldbank.org/ICSID/>; *Mobil Corporation and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27) (pending), available at <http://icsid.worldbank.org/ICSID/>.

85. See *Ley de Reforma Parcial de la Ley de Impuesto Sobre la Renta*, Gaceta Oficial de la Republica Bolivariana de Venezuela [Official Gazette] No. 38.628, Feb. 16, 2007.

86. See *id.* art. 118.

87. See *id.* art. 188.

88. In the December 2005 National Assembly elections, the opposition abstained due to a lack of confidence in the electoral process, resulting in the election of only Chavez followers by a mere eight percent of the electorate.

89. See *Ley que Autoriza el Presidente de la República para Dictar Decretos con Rango, Valor y Fuerza de Ley en las Materias que se Delegan*, Gaceta Oficial de la Republica Bolivariana de Venezuela [Official Gazette] No. 38.617, 1 de febrero de 2007.

90. Such areas include, for example, "transformation of the institutions of the State," "popular participation," "economic and social," "financial and tax," "security and justice," "territorial organization," and "energy." See *id.* art. 1.

## D. PROPOSED CONSTITUTIONAL REFORMS

On August 15, 2007, President Chavez proposed and presented to the National Assembly, the reform of thirty-three of the 350 articles of the constitution.<sup>91</sup> In its debate on the reforms, the National Assembly added a proposal to further reform thirty-six articles of the constitution, to change the transitory articles of the present constitution and to substitute them with fifteen new transitory provisions, and to repeal the Law on States of Exception.<sup>92</sup> The National Assembly further decided that the proposed reforms are to be submitted to the electorate in a referendum to be held on December 2, 2007. On December 3, 2007, however, the proposed constitutional reform was defeated by approximately 51 percent of the popular vote.<sup>93</sup>

Leaving aside the dubious constitutionality of the reform procedure itself, the proposed constitutional reforms, if approved, would have entailed a radical transformation of the political, economic, and legal structure of the Republic of Venezuela as well as, arguably, the indefinite entrenchment of President Chavez as head of the Venezuelan government. The proposed reforms included, among other things: the conversion of Venezuela into a socialist state;<sup>94</sup> the indefinite reelection of the president;<sup>95</sup> the lowering of the voting age from eighteen to sixteen-years old;<sup>96</sup> the ban on foreign funding of certain associations;<sup>97</sup> the geo-political reorganization of the Venezuelan territory and the granting of broad powers to the President in this regard;<sup>98</sup> the substantial weakening of private property rights;<sup>99</sup> the creation of mandatory central government planning tools;<sup>100</sup> further governmental control over the energy and food sectors;<sup>101</sup> the dismantling of the Central Bank's autonomy and the administration of the foreign reserves by the President;<sup>102</sup> the lowering

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91. See *El Universal* of Caracas, 19 de agosto de 2007, for the text of the reforms proposed by President Chavez. See also Constitución de la República Bolivariana de Venezuela, Gaceta Oficial de la Republica Bolivariana de Venezuela Extraordinaria [Extraordinary Official Gazette] No. 5.453, 24 de marzo de 2000 (corrected text), for the text of the 1999 Venezuelan Constitution.

92. See Asamblea Nacional, Reforma de la Constitución de la Republica Bolivariana de Venezuela, [www.infocentro.gob.ve/encuentro/admin/files/leyes/reforma.pdf](http://www.infocentro.gob.ve/encuentro/admin/files/leyes/reforma.pdf) (last visited Mar. 30, 2008), [hereinafter Reform Proposal], for the full text of all the proposed constitutional reforms.

93. See Harris Whitbeck, *Jubilant Chavez Opponents Revel in Referendum Defeat*, CNN.COM/WORLD, (Venez.), Dec. 3, 2007, <http://www.cnn.com/2007/WORLD/americas/12/03/venezuela.referendum/index.html> (last visited Mar. 30, 2008).

94. See Reform Proposal, *supra* note 92, art. 112, 158.

95. See *id.* art. 230.

96. See *id.* art. 64. This was one of the proposals added by the National Assembly.

97. See *id.* art. 67. This provision is aimed at Sumate and other pro-democracy NGO's that have received funding from certain Western Governments.

98. See *id.* arts. 16, 18, 184, and 225. As currently proposed, however, the existing states would not be eliminated.

99. See *id.* arts. 113, 115.

100. See *id.* arts. 185, 236(20).

101. See *id.* arts. 302, 305.

102. See *id.* art. 318.

of foreign investment's equal treatment standard by a provision whereby foreign entities may not be granted more beneficial treatment than that accorded to national entities;<sup>103</sup> etc.<sup>104</sup>

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103. *See id.* art. 301.

104. Other major reforms included the elimination of the non-political nature of the armed forces, the institutionalization of special "militias" or "popular reserves," and the suspension of additional fundamental rights in certain constitutional states of emergency, etc.