Recent Developments - Investment Issues in the Americas

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Recent Developments—Investment Issues in the Americas

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I. Introduction

This piece raises some legal developments in various jurisdictions of the Americas, which affect foreign trade and investment. It is by no means a compilation of the most
significant legal developments in this area, but is rather a limited survey of limited jurisdictions.

II. Andean Community

A. Intellectual Property Law

On September 14, 2000, the countries comprising the Andean Community—Bolivia, Colombia, Ecuador, Peru, and Venezuela—enacted Decision 486, which contains the new common intellectual property legal framework for the Andean Community. Decision 486 took effect on December 1, 2000.

The new general provisions essentially incorporate many of the provisions that previously applied under international agreements, such as the Paris Convention and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

Decision 486 includes much more detailed provisions regulating patents than the previous legislation. It also includes many new provisions regarding the layout designs of integrated circuits. A new section regarding the protection of proprietary industrial property information includes the requirements for registration of pharmaceutical and agricultural products. Decree 486 also contains provisions regarding trademarks, preventative measures, injunctions, revesting actions (acción reivindicatoria), and damages—again, many of which are based on provisions of international agreements, such as TRIPS.

III. Argentina

A. Law Reforms the Collective Bargaining Process

In June 2000, Argentina enacted a new law, Law No. 25,520, amending the collective bargaining negotiation process. This new law means that employers can expect a new round of collective bargaining negotiations within the next three or four years, during which time they will have an opportunity to introduce more modern and flexible clauses within their collective bargaining agreements, thereby reducing overall costs. Law No. 25,250 is the result of six months of difficult negotiations with the Central Confederation of Workers and the Peronist Party. Interestingly, unions have been split in their reaction to the bill.

B. Payments

On November 14, 2000, the Argentine Legislature enacted Law 25,345, which requires that any payment over 10,000 pesos must be made in accordance with certain

statutorily-prescribed requirements, including a newly-created payment instrument called a "cancelatory check" (cheque cancelatorio). This law, which took effect on January 15, 2001, was enacted to prevent tax evasion.

Under Article 1 of Law 25, 345, any payment over 10,000 pesos, or its equivalent in foreign currency, will have no legal effect between the payor, payee, or any third parties, unless it is made through: (i) a bank deposit; (ii) a wire transfer; (iii) a "cancelatory check;" (iv) a credit card; or (v) any other procedure expressly authorized by the executive branch.

The Argentine Central Bank issued regulations in Communication “A” 3201, specifying the requirements related to the new payment instrument—the “cancelatory check.” Basically, it is a payment instrument that may be issued by, and presented for payment, at any Argentine financial institution that elects to participate in the “cancelatory check” system (CHC). Once issued, the “cancelatory check” may be transferred up to two times to any creditor, through a nominative endorsement, certified by a notary public, or a judicial or bank authority. In other words, a “cancelatory check” may not be endorsed privately (as any regular check).

C. Taxation on Leases

On June 14, 2000, the Argentine government published Law 25,248, establishing a new regime for the leasing of assets. Under this new regime, a lessee must bear any taxes applicable to the leased assets. In addition, any value added taxes are due upon either payment, or accrual, of the lease payment, whichever occurs first. Finally, the new law allows for the financing of the value added taxes arising from the purchase or importation of assets for leasing purposes.

IV. Brazil

A. Trademarks

For the purposes of trademark registration, Brazil’s National Institute of Industrial Property (INPI) has adopted: (i) the seventh edition of the International Classification of Goods and Services, as provided for in the Nice Agreement (Nice Classification); and (ii) the fourth edition of the International Classification of Design Elements, as implemented by the Vienna Agreement (Vienna Classification).

INPI’s recent and significant actions for the adoption of these largely accepted international classifications aim at bringing Brazil up to speed with the rules generally practiced by the international trademark community.

1. The Nice Classification

The Nice Classification replaces the former local classification of goods and services that had been in effect since 1981. The local classification proved to be virtually unable to encompass the increasing variety of products and services arising from the continuous technological developments. Trademark practitioners in Brazil were therefore faced with the considerably difficult, creative task of including brand-new products and services into a rather obsolete and generic system of classifications. With a focus on detail and specification, the Nice Classification covers a broad range of fields of activities and their resulting products and services, so that it is possible to include virtually any items into one of its categories.

2. Applicability

As of January 3, 2000, the new classification has become immediately applicable to all trademark applications filed as of said date. This means that all such applications must be filed in one international class, and with a clear citation of the goods or services covered by the mark. The citation of general headings is no longer allowed, and may result in the issuance of an official action calling for clarification on the actual goods or services encompassed in the application.

3. The Vienna Classification

The Vienna Classification replaces the IMP’s internal classification of design elements. Before the adoption of the Vienna Classification, a trademark applicant was not expected to submit a classification for the design elements of his mark. The classification of such elements was effected internally by IMP’s examiners. INPI’s classification was not mentioned on any official notices published in respect of a pending application or granted registration.

The adoption of the Vienna Classification changed all of these procedures. An applicant is now expected to submit his own classification at the time it files for the registration of his trademark. The examiner will confirm the accuracy of this classification, and any amendments or corrections to the applicant’s proposed classification will be made by the examiner. However, the final classification, as acknowledged or amended by the examiner, will be mentioned on the official notices relating to decisions on the trademark applications submitted to INPI.

Pending applications will be automatically subjected to conversion into the Vienna Classification. Therefore, the applicant in this connection must take no actions. Registrations granted would also be automatically converted at the time they are due for renewal. In this case, the owner of the registration must simply apply for such renewal.

B. Patents

Since it became effective on May 15, 1997, the Brazilian Industrial Property Law (IPL) progressed through a considerably smooth path until Provisional Measure

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6. See id.
2014-3 amended it on December 30, 1999. Provisional Measure 2014-3 has been repeatedly extended, most recently on December 22, 2000.

Article 229-C of Provisional Measure 2014-3 provides that the issuance of patents for pharmaceutical products and processes shall require the prior approval of the National Agency for Health Care (ANVS) of the Ministry of Health. This article is clearly inconsistent with the international treaties signed by Brazil (the Paris Convention and TRIPS). Restricting the issuance of patents for pharmaceutical products and processes to the prior approval of ANVS interferes with the very nature of the technical examination, to determine the patentability of a given product or process. This limitation further invades INPI's competence, established in Article 240 of the IPL, to examine and make decisions regarding patent applications, among other issues.

Article 229-C of Provisional Measure 2014-3 clearly violates Article 4 of the Paris Convention, which establishes that the issuance of a patent shall not be refused, nor shall a patent become invalid on the grounds that the patented product has been made available for sale, or has been obtained through a patented process which, in turn, has been subject to restrictions or limitations imposed by local laws.

Article 229-C of Provisional Measure 2014-3 further violates Article 27.1 of TRIPS, which determines that patents shall be available, and patent rights shall be enjoyed regardless of conditions, such as the place of the invention, technological field, importation, or local manufacture.

There is reason to suspect that Provisional Measure 2014-3 and its predecessors may have been issued out of political motivation. It seems to be related to current controversial issues in the pharmaceutical market, such as overt resistance to the commercialization of generic drugs (introduced in the country through Law 9,787 of February 10, 1999, which has recently become effective), and high prices for trademark branded medicines. As such, the governmental action may stand as a hard blow to pharmaceutical applicants, through a strategy of making the issuance of patents in this area a very slow and costly process, most likely involving litigation.

In addition to restricting the issuance of pharmaceutical and related patents for internal political reasons, Provisional Measure 2014-3 may actually be risking Brazil's commitments before the international community, in view of its flagrant violation of international treaties and local laws. Currently, the local intellectual property community has been mostly concerned with the analysis of its main points and how to possibly overcome them through court actions. However, the United States has recently announced that it intends to request a review of the Brazilian position by a World Trade Organization (WTO) panel.

C. Taxes

On December 29, 2000, Brazil adopted Provisional Measure No. 2,062-61, which increases the income tax withholding rate applicable to royalty payments to nonresidents from 15 percent to 25 percent. Concurrently, Federal Law No. 10, 168 was enacted in Brazil, which imposes a new contribution tax of 10 percent on any remittance abroad related to licenses for the use of rights, technology transfers, and technology assistance

7. See supra note 3.
(CIDE). The CIDE is intended to finance a technology innovation program between universities and private enterprises, and to stimulate technological development in Brazil. Both Provisional Measure No. 2,062-61 and Federal Law 10,168 took effect on January 1, 2001.

The increase in the income tax withholding tax rate provided under Provisional Measure No. 2,062-61 does not apply to payments that are subject to CIDE. In addition, the increase is subject to any limitations (i.e., maximum withholding rate) contained in any double taxation treaty to which Brazil is a party. As a result, the effective tax burden on payments of royalties or for the supply of technical assistance or services may not be as high as 25 percent. However, this burden is allocated between different parties, because the Brazilian Party is liable for the CIDE.

Under Provisional Measure No. 2,062-61, remittances abroad for certain payments to foreign companies are exempt from the withholding of income tax. To qualify, the remittances must be in consideration for the supply of telecommunications services, and for the payment of expenses related to market research and incurred in advertising in expositions, trade fairs, and similar events to promote Brazilian export products.

V. Ecuador

A. Piracy

Resolution No. CD-IEPI 00-64 was enacted on December 13, 2000, essentially declaring the Ecuadorian Intellectual Property Institute’s high priority for the elimination of piracy of goods and services that breach intellectual property rights. It makes several recommendations in furtherance of a plan against such piracy.

B. Dollarization

On March 13, 2000, Law 2000-4, the Ecuadoran Dollarization Act, was published in the Official Gazette of Ecuador. The most important features of the Dollarization Act, which effectively makes the U.S. Dollar the currency of Ecuador, include the following:

—Foreign currencies have free circulation in Ecuador and can be freely transferred abroad.
—The Central Bank of Ecuador shall exchange the Sucres currently in circulation with United States Dollars at the rate of 25,000 Sucres to one Dollar.
—The Central Bank of Ecuador shall only issue Sucres in coins, which can only be released to the public in exchange for Sucres currently in circulation.
—All operations of financial institutions shall be recorded in U.S. Dollars, but may be executed or paid in Dollars or Sucres at the 25,000 to 1 rate.
—The governmental guarantee on deposits in financial institutions will no longer be unlimited, and restrictions have been established.
—Amendments have been made to the Hydrocarbons Law designed to facilitate foreign investment in pipelines, refineries, and upstream joint ventures with Petroecuador.

8. See supra note 1. See also Resolution No. CD-IEPI 00-64.
—Other amendments have been introduced that are designed to facilitate privatization of and joint ventures in the generation and distribution of electricity, and in the telecommunications industry.
—The Labor Code has been amended to allow the employment of workers on an hourly basis.
—Companies are allowed to provide in their bylaws that they will not set aside reserve funds, which were previously required of all companies.

C. Investment Law

A new regulation of the investment law was decreed by Executive Decree No. 1132.RO/252, which was published in the Federal Gazette on January 25, 2001. The new regulation addresses the National System to Promote Investment, the Investment Registry investment agreements, general investment guarantees, environmental obligations, technology transfers, and dispute resolution.

VI. Mexico

A. Amendments to Secured Transactions Law

On May 23, 2000, Mexico amended its General Law on Negotiable Instruments and Credit Transactions (LGTOC) to allow for the creation of a “non-possessory” pledge or lien (prenda sin transmisión de posesión) over any type of personal property. The amendments, which became effective on May 24, 2000, change and improve significantly Mexico’s secured transactions system. In the past, the system generally required actual or constructive (through a third-party depository) delivery of the collateral, or pledged assets, to the creditor and specific identification of the collateral or pledged assets in order to perfect a security interest over such collateral. Now, a debtor in Mexico may perfect a pledge or lien over any of his personal property, to secure any obligation, without having to give up physical possession of that property. This allows the debtor to continue using the collateral in its regular course of business. In addition, if the creditor is granted a “blanket” security interest (covering all of the debtor’s assets used in its business), then only a general identification of the collateral is required.

These amendments grant priority over any unsecured debts, unregistered security interests, unregistered judicial liens, and any subsequently registered secured interests to a registered “non-possessory” pledge. The amendments prohibit granting any other pledge or security interest over property already subject to a “non-possessory” pledge, but allow for the creation of a purchase money security interest to new creditors over after-acquired property, provided that such property is specifically identified. The amendments allow the debtor and the creditor to agree on and use voluntary extra-judicial procedures for the foreclosure of the collateral, provided that there are no disputes regarding the credit. They also establish a new procedure for the judicial enforcement of a “non-possessory” pledge and foreclosure of the collateral when the debtor contests the matter.

B. Amplendments to Foreign Trade Legislation

A series of amendments to the following foreign trade legislation were decreed in the Federal Gazette on December 28–31, 2000: (i) the customs law; (ii) the general import duty law; (iii) the regulations to the foreign trade law; (iv) the Maquiladora Decree; (v) the PITEX Decree; (vi) the Sectoral Promotion Program Decree; (vii) the NAFTA general rules; (viii) the foreign trade general rules; and (ix) the import/export permit accord.

Significantly, many of the amendments were geared towards harmonizing the provisions of Mexico's Customs Law, Maquiladora and PITEX Decrees, and the NAFTA General Rules.

C. Anti-dumping

On April 10, 2000, the Mexican Ministry of Commerce and Industrial Development (Secretaria de Comercio y Fomento Industrial or SECOFI) announced in a resolution in the Federal Official Gazette the second review of anti-dumping duties for certain imports from the People's Republic of China. Anti-dumping duties are imposed on Mexican imports of machines, apparatus and electrical material, and their parts, originating from China, classified under tariff items with headings 8501 through 8548. The reason for this second revision is that SECOFI is considering changing the way it determines the existence of dumping in connection with these items. The period under review will be July 1 through December 31, 1999.

D. Trade Agreements

On November 27, 2000, Mexico signed a free trade agreement with the European Free Trade Association—Iceland, Liechtenstein, Norway, and Switzerland. Upon enactment, Mexico will have ten free trade agreements with thirty-one countries. It is scheduled to become effective in July 2001.

Brazil and Mexico are supposedly working overtime to finalize a bilateral trade due June 30, 2001, because any agreement reached after that date must include Brazil's MERCOSUR partners, which already have a free trade agreement with Mexico.

E. Income Tax Law—Onerous Reporting Requirements

In its annual revision of the income tax law, effective January 1, 2001, Mexico imposed new requirements for documenting and supporting the arm's length nature of intercompany transactions. Companies that fail to file such documentation by the end of February 2001 will not only be subject to fines, but more significantly, would be precluded from obtaining a waiver of penalties if the Treasury ultimately determines a deficiency in tax arising from such intercompany transactions.

12. See supra note 1.
15. See Id.
VII. NAFTA

A. United States Restricted from Banning Mexican Trucks

The cross-border trucking provisions in NAFTA provide that Mexican trucks are to have full access to four U.S. border states as of December 1995, and full access to the United States as of January 1, 2000, but the United States has delayed such border openings because of safety concerns.

A unanimous final decision of a NAFTA panel, which was established under NAFTA Chapter 20, found that the U.S. policy of not reviewing applications from Mexican firms until Mexico improves its trucking safety regime violates NAFTA. Accordingly, the United States may not impose blanket restrictions on Mexican trucks, but rather must consider applications from Mexican operators on a case-by-case basis.

B. Amicus Curiae Brief Accepted by a NAFTA Panel

Based on jurisprudence developed by the WTO, the NAFTA panel hearing a claim made by Methanex Corporation against the California government under Chapter 11 of NAFTA concluded that it is "minded" to accept amicus curiae briefs. The panel indicated that there are significant public interest issues involved in investor-state cases under NAFTA Chapter 11 that require a different approach than strictly commercial arbitrations require. Although the ruling is not binding on other NAFTA panels, it should be an important legal precedent.

VIII. Puerto Rico

A. Dealer Protection Act

On December 28, 2000, the Puerto Rican Legislature enacted Law 448 to amend Puerto Rico’s Dealer Protection Act, or Act 75, with respect to the validity and enforceability of arbitration clauses contained in distribution or other dealer agreements.

Puerto Rico’s Dealer Protection Act protects local distributors by requiring a principal, as a matter of non-waivable public policy, to pay extra-contractual indemnification to its local distributor upon the principal’s unilateral termination of, refusal to renew, or other act impairing the relationship with the local distributor without “just cause.” The impact of the Dealer Protection Act had been somewhat lessened by the possibility of specifically enforcing a contractual clause submitting any disputes under Act 75 to binding arbitration, even if the arbitration is held outside of Puerto Rico. This was possible as a result of court decisions holding that the U.S. Federal Arbitration Act preempts

17. See supra note 1. See also NAFTA Panel Says NGOs Can Intervene In Cases Brought for Arbitration Purposes, Int’l Trade Rep (BNA), No. 5 (Feb. 1, 2001).
18. See supra note 3.
any Puerto Rican law affecting the enforceability of a contractual agreement to arbitrate disputes.

In response, the Puerto Rican legislature has enacted Law 448, amending the Dealer Protection Act as follows:

(a) Prior to the commencement of any arbitration proceedings, the dealer has the right to seek a ruling from a Puerto Rican court establishing that the arbitration clause in question was in fact freely and voluntarily entered into.

(b) There is now a rebuttable presumption that arbitration clauses in distribution agreements are adhesion contracts, not voluntarily entered into between the parties.

(c) If the dealer contract did not specifically name an arbitrator, entity, or forum, or if the parties cannot agree on an arbitrator, entity, or forum, a Puerto Rican court shall appoint the arbitrator, entity, or forum to adjudicate the controversy.

The clear intent of these amendments are to prevent principals from diminishing the protection afforded to local dealers under the Dealer Protection Act by including an arbitration clause in the dealer agreement. Essentially, the amendments give the authority to a Puerto Rican court, rather than the appointed arbitrators, to decide whether an arbitration clause is valid. As a result, the new provisions may be found to interfere with the Federal Arbitration Act, which preempts conflicting state or territorial law, causing the new provisions to be invalid. Whether this is the case, however, may not be decided soon because it depends on a party bringing an action involving the new provisions.

IX. Peru

A. Income Tax

Amendments to the Income Tax Law were imposed by Law No. 27, 356, which became effective on January 1, 2001. Among its provisions, it addresses; (i) losses carried forward; (ii) measures to prevent evasion on income acquired in tax havens; (iii) deductible expenses; (iv) taxation of leases; (v) measures to prevent under or low capitalization of companies; (vi) transfer pricing rules; and (vii) taxation of reorganizations.