Latin America

GUILLERMO MALM GREEN, MEAGHAN MCGRATH BEAUMONT, ANGELES MURGIER, FEDERICO BUSSO, FABIANO DEFFENTI, JOHN PATE, YVES HAYAUX-DU-TILLY LABORDE, DIEGO ROJAS, MARCOS RÍOS, FRANCISCO PRAT, AND JEAN PAUL CHABANEIX*

I. Argentina[a]

A. Corporate Commercial Practice

There were several significant corporate law developments in 2005. First, the *Inspección General de Justicia* [General Inspection of Corporations] (IGJ) of the City of Buenos Aires, where the vast majority of foreign companies are registered, continued to establish new restrictions and, in certain cases, modified decades-old practices in an effort to increase the transparency of certain corporate actions. Of note, it has promulgated new regulations limiting irrevocable capital contributions (ICCs). ICCs were not regulated under the Companies Law of Argentina. They were a flexible method of receiving capital contributions from shareholders or third parties, which obviated the need to capitalize such contributions and issue new shares as a result of such capital contributions. Instead, ICCs were considered to be part of company's net worth. Pursuant to resolutions IGJ 25/04[1] and 1/05,[2] ICCs on account of future capital increases must have been capitalized on or before August 8, 2005; to the extent they were not, they are considered a liability of the company.[3]

The IGJ also continued to strengthen its control over foreign companies doing business in Argentina by prohibiting the registration in Buenos Aires of off-shore companies (i.e., companies registered off-shore that are not permitted to transact businesses in their place of incorporation) except for those registered as vehicles of another company.[4] The IGJ also requires foreign companies seeking to become registered in Buenos Aires (either through

*This summary was compiled and coordinated by Guillermo Malm Green, Partner, Brons & Salas, Buenos Aires, Argentina, and Meaghan McGrath Beaumont, Senior Counsel, International Finance Corporation, Washington D.C. Individual contributors will be referred to at the discussion of each relevant jurisdiction.

a. Contributed by Guillermo Malm Green and Angeles Murgier, Brons & Salas, Buenos Aires, Argentina, and Federico Busso, Partner, Negri & Teijeiro, Buenos Aires, Argentina.

1. IGJ Resolution 25/04, Nov. 24, 2004, B.O. No 30,532, page 13.

2. IGJ Resolution 1/05, Feb. 8, 2005, B.O. No. 30,587, page 5.

3. IGJ Resolution 7/05 (Aug. 25, 2005, B.O. No. 30,724, page 12) extended the term until February 21, 2006, provided that certain conditions are met.

4. IGJ Resolution 2/05, Feb. 17, 2005, B.O. No. 30,594, page 15.

the establishment of branches or through participation in a local company) to disclose the identity of their partners and/or shareholders.[5]

In May 2005, the National Appellate Court on Commercial Matters confirmed, on appeal by the company, the IGJ's requirement that a corporation may only be established if it has at least two shareholders and that it may not be wholly owned by another entity.[6] In *Fracchia Raymond S.R.L.*, the IGJ had denied registration of a company where one of the shareholders held 99.99 percent of the corporate capital because the company lacked "an effective and substantial plurality of partners."[7] The National Appellate Court agreed and explicitly approved this ground for its decision.[8]

B. Incentives For Private Sector Investment

In order to foster private investment in the country's infrastructure, the executive branch has established two novel programs: the *Régimen Nacional de Iniciativa Privada* [the National Private Initiative System] (RNIP)[9] and the *Régimen Nacional de Asociación Público-Privada* [the National System of Public-Private Partnerships] (RNAPP).[10] Under the RNIP, developers and contractors wishing to undertake work must identify a project, submit technical specification, and propose private financing for the project to the *Comisión de Evaluación y Desarrollo de Asociaciones Público-Privada* [Commission for Evaluation and Development of Public-Private Associations]. The *Comisión*, after internal investigation with the participation of the relevant authorities, determines whether it is a viable project and will send the project to the Executive Power for its inclusion with the RNAPP. The first party to submit such a bid is accorded preference over the other parties who submit subsequent competing bids for the work.

Although an established vehicle in other countries, the RNAPP is novel for Argentina. This form of public-private partnership allows agencies of the executive branch to solicit partnerships with private entities to undertake heretofore public duties. The government contribution to the partnership may take a number of different forms, including a cash payment, the allowance of tax credits, or an assignment of rights or property to the partnership. Public-private partnerships may be formed to operate and maintain or undertake capital expenditure programs with respect to public works and services, including via turnkey contracts.

C. Labor Law

Certain Supreme Court decisions may result in increased labor costs. In *Vizzoti v. AMSA S.A.*, the court ruled that the Employment Contract Law[11] unconstitutionally limited an employee's right to severance pay.[12] The Employment Contract Law requires employers

5. *See* IGJ Resolution 3/05, Mar. 10, 2005, B.O. No. 30,609, page 14.

6. IGJ Resolution 1270/04, Oct. 12, 2004.

7. *Id.*

8. Camara Federal de Apelaciones [CFed.], Panel E, 3/5/2005 "In re. Fracchia Raymond S.R.L. / pluralidad de socias" (Arg.), *available at* http://zamudio.bioetica.org/fallo86.htm.

9. Decree 966/05, Aug. 17, 2005, B.O. No. 30,718, page 3.

10. Decree 967/05, Aug. 17, 2005, B.O. No. 30,718, page 5.

11. Law No. 20744, Sept. 27, 1974, B.O. No. 23,003, page 2.

12. Corte Suprema de Justicia de la Nación [CSJN], 14/9/2004, "Vizzoti v. AMSA S.A. / despido" (Arg.), *available at* http://www.cpcesla.org.ar/doc/boletin/176/dict_y_fallo_corte.pdf.

to pay employees dismissed without cause a sum equal to the amount of their highest monthly salary multiplied by each year of employment. The highest monthly salary was capped at an amount equal to three times the average monthly salary, as established in the collective bargaining agreement governing such worker's employment. In *Vizzoti*, while the court confirmed that severance pay may be legislatively limited, it ordered that any limitation must be reasonably proportional to the employee's monthly salary. The court also ruled that this cap may not be less than two-thirds of the highest monthly salary received by the employee in the preceding year.

In *Aquino v. Cargo Servicios Industriales S.A.*, the Supreme Court declared unconstitutional the Workers' Risks Law[13] to the extent it releases the employer from civil liability on a work-related injury claim.[14] Enacted in 1995, the Workers' Risks Law provides that in cases of injuries caused by the performance of work or as a consequence of such work, the employee is entitled to claim, under the state-mandated insurance program, a fixed amount determined according to the kind of injury sustained. In *Aquino*, the court decided that the Workers' Risks Law improperly limited an employer's liability for employees' claims of negligence under the Argentine Civil Code. Therefore, in the case of injuries suffered as a consequence of the work performed, employees may also sue employers for negligence under the Civil Code.

D. Foreign Investments and Foreign Exchange Control

The *Banco Central de la República Argentina* [the Central Bank of Argentina] (BCRA) and the *Ministerio de Economía y Producción* [Ministry of Economy and Production] (MECON) have issued somewhat contradictory regulations regarding offshore investments and foreign exchange control. In moves seen as relaxing constraints, the BCRA now permits Argentine citizens residing in Argentina to purchase and transfer abroad up to the equivalent of US$2 million per month in a foreign currency in connection with any acquisition of assets, provided this is not undertaken for an illicit purpose.[15] The BCRA now also allows the settlement of securities transactions completed on the domestic stock exchanges in a foreign currency by means of transfers from off-shore accounts to Argentine financial institutions.[16] Further, the time allotted to a borrower to liquidate foreign currency loan proceeds of more than US$50 million in the official exchange market was extended from thirty days to ninety days.[17] And finally, local financial institutions were authorized to purchase cross-border loans under certain conditions (i.e., the purchase of loans already made by a foreign financial institution).[18]

In a bid to tighten certain foreign exchange controls, however, the BCRA issued implementing regulations for the previously-established *Sistema de Relevamiento de Inversiones Directas en el Exterior y en el País* [Foreign Direct Investment Registry]. Communication "A" 4237 created the registry but failed to clarify its purpose or penalties for non-

13. Law No. 24557, Oct. 4, 1995, B.O. No. 28,242, pages 1 to 5.

14. Corte Suprema de Justicia de la Nación [CSJN], 21/9/2004, "Aquino v. Cargo Servicios Industriales S.A. / accidents ley 9688" (Arg.), *available at* http://magnamed.com.ar/docs/follodelcorte.pdf.

15. Banco Central de la Republica Argentina, Communication "A" 4128 (Apr. 16, 2004).

16. Banco Central de la Republica Argentina, Communication "A" 4308 (Mar. 4, 2005).

17. Banco Central de la Republica Argentina, Communication "A" 4321 (Mar. 17, 2005).

18. Banco Central de la Republica Argentina, Communication "A" 4322 (Mar. 17, 2005).

compliance.[19] Registration, which must be made semi-annually through an electronic filing system, is mandatory for foreign direct investment in local companies and real estate property that equals or exceeds US$500,000. If the total value is less than the specified threshold, registration is optional. In June 2005, the Argentine Government implemented certain foreign exchange rules to discourage currency speculation and short-term capital investment.[20] Argentine residents receiving foreign funds in various types of transactions must now maintain 30 percent of those funds in a liquid reserve account. The liquid reserve must be maintained in a non-interest bearing, U.S. dollar account for at least one year.[21] The BCRA made it clear that the liquid reserve requirement does not, however, apply to proceeds from loans from multilateral and bilateral credit institutions and other official credit agencies.[22]

In addition to the liquid reserve requirements, recent exchange restrictions reaffirm the obligations of Argentine debtors to register all debt and repayment schedules with the BCRA as a condition to debt service. Current rules also leave in place the prohibition on repayment of a foreign-currency cross-border loan in less than 365 days (formerly 180 days).[23]

E. Tax Evasion Preventive Measures

In July 2005, the Anti Tax Evasion Reform Law became effective.[24] This law provides, in pertinent part, for:

(i) the use of undercover agents to monitor compliance with basic tax obligations such as providing receipts to customers and registering with the *Administración Federal de Ingresos Públicos* [Argentine Tax Authority] (AFIP);

(ii) the creation of a voluntary electronic tax domicile where the taxpayer authorizes the receipt of notices, requests for information, and other communications from the AFIP and the permitted use of an alternative domicile (as may be determined by the AFIP based on its own investigation and assessment of where the taxpayer receives business correspondence) at which the AFIP may also serve notices on the taxpayer; and

(iii) the creation of a system of binding precedents as a result of administrative rulings of the AFIP. Previously, the AFIP was entitled to change its opinion and overturn prior opinions at its sole discretion. Now, so long as the facts governing the issued opinion have not changed, both the AFIP and the taxpayer will remain bound by the ruling. The law also requires that all such opinions be published, allowing other taxpayers to cite them as precedent.

19. Banco Central de la Republica Argentina, Communication "A" 4237 (Nov. 10, 2004).

20. Decree 616/05, June 10, 2005, B.O. No. 30,672, page 1; Banco Central de la Republica Argentina, Communication "A" 4359 (June 10, 2005).; Ministerio de Economia y Produccion, Resolution 365/05 (June 29, 2005).

21. Specific transactions that must comply with the requirement are: (i) foreign loan proceeds; (ii) foreign funds used to purchase domestic currency, assets or financial indebtedness; and (iii) foreign funds invested in government bonds acquired in the secondary markets.

22. Banco Central de la Republica Argentina, Communication "A" 4377 (June 29, 2005).

23. Communication "A" 4359, *supra* note 20.

24. Law No. 26044, July 6, 2005, B.O. No. 30,689, page 1. Law 11683 was originally passed in 1933, and has been modified on several occasions. It was restated in 1998.

II. Brazil[b]

A. Public-Private Partnerships Law

On December 30, 2004, the Brazilian Congress enacted the long-awaited Public-Private Partnerships Law (PPP Law).[25] The PPP Law permits the Federation, States, and Municipalities to enter into public-private partnership contracts, with terms of no less than five and no more than thirty-five years.[26] The PPPs will be controlled by a special purpose corporation (SPC) set up specifically for each PPP project.[27] The public party is expressly prohibited from having control over the SPC.[28] The PPPs Law came into force on December 31, 2004.[29]

The law is innovative on various fronts. For instance, it allows for contractual disputes between the private and the public parties to be referred to arbitration,[30] and it allocates certain funds (Guarantee Funds) to ensure compliance with the government's contractual obligations.[31] Greater flexibility is provided in relation to the form of the government's contribution to the partnership[32] and the type of collateral to be used to guarantee the government's obligations.[33]

Moreover, the PPP Law allows private entities to present projects to governments. This was previously regarded as a crime under the Procurement Law.[34] PPPs involving the Federal government will be overseen by the Comitê Gestor de Parceria Público-Privada (CGP), the PPP management committee.[35] The CGP has broad powers, including, inter alia, the

b. Contributed by Fabiano Deffenti, Partner, Carvalho, Machado, Timm & Deffenti Advogados, Porto Alegre, Brazil.

25. Lei No. 11.079, de 30 de dezembro de 2004, D.O.U. de 31 de dezembro de 2004 (Brazil).

26. *Id.* at art. 5(I).

27. *See id.* at art. 9. The SPC may even be listed in the stock market.

28. *Id.* at art. 9, ¶ 4. The government may, however, take control in the specific case where there has been a breach of loan agreements. *See id.* at art. 9, ¶ 5.

29. *See* Lei No. 11.101, art. 83, de 9 de fevereiro de 2005, D.O.U. de 10 de fevereiro de 2005 (Brazil).

30. The arbitration must be held in Brazil and in the Portuguese language. *See* Lei No. 11.079, at art. 11(III). The arbitration will be governed by the Arbitration Law (Lei. No. 9.307, de 23 de setembro de 1996, D.O.U. de 24 de setembro de 1996 (Brazil). Note that there are major concerns about whether this would be permitted under the Brazilian Constitution.

31. These will operate somewhat like escrow accounts in common law countries. *See* Lei No. 11.079, at art. 8(V). The private party must also have sufficient and compatible guarantees to ensure performance. *See id.* at art. 5(VIII). The government's total participation in the fund is limited to R$6 billion (approximately US$2.4 billion at the time of writing). *See id.* at arts. 16, 18.

32. *See id.* at art, 6. Tax credits are not allowed to be used as part of the fund. *Id.* at art. 6(IV).

33. These include receivables as well as government-owned real estate. *See id.* at art. 8. The Ministry of Treasury must pass a resolution to set up the fund effect. *See* Decreto No. 5.411, art. 3, de 6 de abril de 2005, D.O.U. de 7 de abril de 2005 (Brazil). The initial assets of the fund will be deposits held by the Federal government in investment funds and shares in reputable listed corporations. *See id.* at art. 1. The funds hold shares in public corporations with high liquidity levels. They are CTEEP, Eletropaulo, Banco do Brasil, CVRD, Embraer, Petrobras, Usiminas, and Tractebel. *See id.* at annexure I. The shares directly held by the Federal government are in Eletrobrás, Coelba, Celpe, Comgás, Coelce, Gerdau, and Rhodia-Ster. *See id.* at annexure II. Further shares may be deposited into the fund where the Federal government holds less than 5% of the shareholding of the corporation and of the excess shareholding required for the Federal government to maintain control over Federal government-controlled corporations.

34. Lei No. 8.666, de 21 de Junho de 1993, D.O.U. de 22 de junho de 1993 (Brazil).

35. The Committee was set up by Decreto No. 5.385, de 4 de março de 2005, D.O.U. de 7 de março de 2005 (Brazil).

power to determine the PPP projects that are to be given priority, to establish the criteria to be used to enter into PPP projects, to set up procedures to be followed for making PPP agreements, to authorize procurement procedures, and to create the basic procedures for periodic evaluation of PPP projects.[36]

Unlike PPPs in other countries, Brazilian PPP contracts will need to go through a set of strict procurement procedures[37] provided by the Procurement Law.[38]

B. New Bankruptcy Law

On February 9, 2005, the Brazilian President signed the new Bankruptcy Law.[39] The new Bankruptcy Law allows for various types of transactions to reorganize businesses in financial trouble.[40] There are three procedures available under the Bankruptcy Law: *recuperação judicial* [judicial recovery],[41] *recuperação extra-judicial* [non-judicial recovery],[42] and *falência* [bankruptcy].[43]

The *recuperação judicial* is a court-controlled procedure where the debtor institutes voluntary insolvency proceedings and submits certain documents disclosing its financial situation. The goal is to reorganize the company and emerge it from bankruptcy in a position of solvency.[44] Once a *recuperação judicial* petition is filed, the court will appoint an *administrator judicial* [judicial manager] to run the company.[45] Within sixty days of the *administrador judicial* being appointed, a recovery plan must be filed with the court for its approval.[46] All pending actions against the corporation are automatically stayed, except for actions for employee entitlements up to a limit of 150 minimum-wages,[47] actions for unliquidated damages, and enforcement of tax-related obligations.[48] The *recuperação extra-judicial* allows corporations to negotiate directly with some of their debtors. Once this negotiation is

36. *See id.* at art. 3. The discretion over technical issues is delegated to the PPP Technical Commission (CTP), set up under art. VI do Decreto No. 5.385 de 4 de março de 2005. *Id.* § VI. The CTP will have representatives from various Federal Ministries as well as representatives from the Banco Nacional de Desenvolvimento Econômico e Social (BNDES), Banco do Brasil and Caixa Econômica Federal, all three being Federal government-owned banks. *See id.* at art. 10(I) -(II).

37. *See* Lei No. 11.079, at art. 10.

38. Lei No. 8.666.

39. Lei No. 11.101. Before its enactment, the bill was pending before the Brazilian Congress for more than ten years.

40. These include selling assets of the corporation, spinning off part of the corporation's business, reducing employees' salaries, and issuing negotiable instruments. *See id.* at art. 50.

41. *Id.* at ch. III.

42. *Id.* at ch. VI.

43. *Id.* at ch. V.

44. *See id.* at art. 48. This is a procedure similar to the procedures contained in 11 U.S.C. §§ 1101-1146 (2005) under U.S. Federal Law (otherwise known as a Chapter 11 proceeding).

45. *See* Lei No. 11.101, at art. 52(I). As to the qualifications of the *administrador judicial. See id.* at art. 28.

46. *See id.* at art. 53. Debtors may object to this plan. *See id.* at art. 55. If any objection is filed, the court must set up a creditor's meeting. *See id.* at art. 56.

47. Approximately US$20,000 at the time of writing. The minimum-wage is often used as an index in Brazil, even though its purpose is to ensure that a person receives a minimum income "capable of attending to his or her vital basic needs and those of his or her family with a dwelling, food, education, health, leisure, clothing, hygiene, transportation and social security." Constitutuição Federal, at article 7(IV) (Brazil). Currently, the minimum wage is set at R$300 per month. Lei No. 11.164 de 18 de agosto de 2005, art. 1, D.O.U. de 19 de agosto de 2005 (Brazil).

48. Lei No. 11.101, at art. 52(III). *See also id.* at arts. 6, 49.

finalized, the troubled corporation merely needs to obtain the court's approval of the settlements reached with debtors.[49] It is expected that this last procedure rarely will be used in practice.[50]

The procedures for *falência* continue to result in heavy court involvement. The positive change is that secured debts now rank second, just after employees' entitlements up to the 150 minimum-wage limit.[51]

III. Venezuela[c]

A. Public Institutions

Since February 1999, when Hugo Chavez assumed the Presidency, Venezuela has been witness to a number of controversial initiatives. In 2005, further changes evidenced the continuing struggle for control of the few remaining quasi-independent public institutions.

Significant changes were made to the Central Bank Law in July 2005.[52] Three modifications are of particular import and substantially change traditional central banking practices. First, the Central Bank (BCV) is now permitted to extend loans to private entities by means of on-lending through domestic banks. In the case of loans intended for the agricultural sector, the BCV is permitted to lend funds under special conditions (i.e., at below-market rates). This credit authority is expressly exempted from the traditional prohibition on the part of the BCV in order to inject liquidity into the monetary system.[53] Second, foreign exchange proceeds from the sale of oil and gas by *Petróleos de Venezuela S.A.* (PDVSA), the state petroleum company, in excess of all domestic and offshore operating expenses and taxes are to be transferred monthly to the *Fondo de Desarrollo Nacional* (FONDEN).[54] This newly created fund, controlled by the President through the Ministry of Finance, is intended to be used to finance general welfare investments, educational and health projects, and for use in "special and strategic situations."[55] And third, the BCV was required, on a one-time basis, to transfer the sum of US$6 billion from the country's foreign exchange reserves to FONDEN.[56] This sum is to be used for the same purposes as the PDVSA funds referred to above. This amount was equal to approximately 20 percent of then total reserves and was deemed by President Chavez to be in excess of the international reserve requirements of the country.

In September 2005, the National Armed Forces Law was also substantially modified.[57] The law contains a number of features that have become characteristic of the Chavez ad-

49. *See id.* at art. 161.

50. This is because debts relating to taxation, workers' compensation and general entitlements, secured debts, leasing arrangements, certain real estate debts and sales subject to retention of title are expressly excluded. *Id.* at art. 161, ¶ 1.

51. *See id.* at art. 83.

c. Contributed by John Pate, Partner, De Sola Pate & Brown, Attorneys & Counselors, Caracas, Venezuela.

52. *Ley de Reforma Parcial de la Ley del Banco Central*, Official Gazette No. 38.232, 20 de Julio de 2005 [hereinafter Central Bank Law].

53. *See id.* at art. 48.

54. *Acta Constitutiva y Estatutaria del Fondo de Desarrollo Nacional*—FONDEN, Official Gazette No. 38.269, 9 de Septiembre de 2005.

55. Central Bank Law, *supra* note 52, at art. 113.

56. *Id.* at Tenth Transitional Provision.

57. *Ley Orgánica de la Fuerza Armada Nacional*, Official Gazette No. 38.280, 26 de Septiembre de 2005.

ministration. Among the principal changes are the direct, personal command of all military forces by the President, who is now designated Commander in Chief,[58] and the creation of a national reserve (composed of retired military personnel) and a territorial guard (composed of volunteer citizens).[59]

B. Banking Institutions

In 2005, the profitability and autonomy of financial institutions diminished as a result of continued regulatory restrictions. Most significantly, the trend of obligating banks to dedicate minimum percentages of their loan portfolios to specific sectors at pre-determined, below-market interest rates continued. This percentage was 29 percent of total loan portfolios as of year end 2005.[60] The BCV further regulated the maximum interest that may be charged on loans, the minimum interest that must be paid on deposit accounts, and the commissions that may be charged for banking services.[61]

C. Criminal Law

In 2005, the National Assembly approved several significant laws primarily intended to penalize traditional forms of political protest. The Criminal Code[62] was modified so that those accused of acts of conspiracy, hostility toward the government, aiding a foreign country, or being a member of a subversive group (defined to include those receiving foreign funding) to the prejudice of the nation or its institutions, or any act that destabilizes the social order are to be tried without the right of bail. If convicted the defendant could be incarcerated for ten to fifteen years.[63] Further, anyone who is disrespectful to the President or other high officials is subject to a prison term of three to thirty months.[64]

In another step with political overtones, the Assembly adopted a new law against organized crime.[65] The mere participation or membership in an association that is deemed to have the purpose of "subverting the constitutional order and democratic institutions or severely affecting the public peace" is a crime, punishable with incarceration from four to fifteen years.[66] Incarceration is increased from eighteen to twenty years if these acts are committed against the President or various high-level public officials.[67] In the business realm, it is a crime to disrupt any industrial or commercial activity using violence or the

58. *Id.* at art. 7.

59. *Id.* at arts. 10-11.

60. *See, e.g., Ley Especial de Protección al Deudor Hipotecario de Vivienda*, Official Gazette No. 38.098, 3 de Enero de 2005 (requiring that 10% of loans be granted for housing of low-wage earners); *Ley Orgánica de Turismo*, Official Gazette No. 38.215, 23 de Junio de 2005 (requiring that 2.5% of loans be granted to the tourism sector, 5% in the case of government banks).

61. In 2005 the Central Bank issued several regulations in this area, the most significant of which were Resolutions 05-04-01 and 05-04-02, Official Gazette No. 38.174 of April 27, 2005.

62. *Ley de Reforma Parcial del Código Penal*, Official Gazette, Extraordinary, No. 5.768, 13 de Abril de 2005.

63. Código Penal, art. 140, Official Gazette No. 36.920, 28 de Marzo de 2000.

64. *Id.* at arts. 147-48.

65. *Ley Orgánica contra la Delincuencia Organizada*, Official Gazette No. 38.281, 27 de Septiembre de 2005.

66. *Id.* at arts. 6-7.

67. *Id.* at art. 8.

threat thereof.[68] Interestingly, this law also creates criminal sanctions for legal entities.[69] It is likewise important to banks and other financial institutions, in that it establishes anti-money laundering obligations, including that of reporting suspicious transactions.[70]

Finally, furthering the foreign exchange controls in effect since January 2003, the Assembly passed the long-debated Criminal Exchange Law[71] that imposes severe prison terms of up to six years, as well as significant fines, for violations by both individuals and legal entities.[72]

D. Expropriation of Private Property

During 2005, the government expanded its controversial practice of effectively confiscating property. These confiscations are primarily of large private agricultural holdings, although unoccupied urban buildings and inactive or underutilized company facilities have not been immune.[73] In the case of agricultural properties, the government is acting under the authority of the agricultural lands law.[74] In principle, any land holdings deemed by the *Instituto Nacional de Tierras* (INTI) to be idle or under-cultivated and larger than average holdings in the area where located, "in the context of a regime contrary to social solidarity,"[75] are subject to expropriation. But in practice the modus operandi is essentially confiscation, as the government administratively claims that properties are not legitimately owned unless title going back to the early nineteenth century can be proven.[76]

E. Vitiation of Petroleum Sector Contracts

President Chavez, based on the government's interpretation of the 2001 Hydrocarbons Law,[77] has claimed that all of the thirty-two petroleum operating agreements entered into between the Ministry of Energy and Petroleum and primarily foreign oil companies are illegal and will be terminated on December 31, 2005, despite, in most cases, having been

68. *Id.* at art. 15.

69. The sanctions that could be applied are permanent closure, the prohibition to engage in certain legitimate commercial activities, the confiscation of assets, the loss of concessions, and the application of fines. *See id.* at art. 27.

70. *See id.* at arts. 47-56.

71. *Ley Contra los Ilícitos Cambiarios*, Official Gazette No. 38.272, 14 de Septiembre de 2005.

72. Companies and other forms of legal entity are subject to fines of up to double the amount of the foreign exchange involved. *See id.* at art. 17.

73. According to the private sector entity Network for the Defense of Employment, Property and the Constitution, since 1999 (the first year of the present government) nearly 10,000 private rural, urban, and industrial properties have been invaded, usually with the acquiescence and continued protection of the military or police forces. Mariela Leon, *Casi 10 Mil Propiedades Han Sido Invadidos en el País*, El Universal, Oct. 16, 2005, at 2-2, *available at* http://buscador.eluniversal.com/2005/10/16/eco_art_16202B.shtml.

74. Decree 3.408, *Decreto sobre Reorganización de la Tenencia y Uso de las Tierras con Vocación Agrícola*, Official Gazette No. 38.103, 10 de Enero de 2005, superceded by Ley de Tierras y Desarrollo Agrícola, Official Gazette, Extraordinary, No. 5.771, 18 de Mayo de 2005.

75. *Id.* at art. 7.

76. This is often an impossible task due to the destruction of many public registries during the civil wars of the mid 19th century.

77. *Decreto con Fuerza de Ley Orgánica de Hidrocarburos*, art. 9 Official Gazette No. 37.323, 13 de Noviembre de 2001 (reserving to the state, as specified in this law, all the primary activities of exploration, extraction, transport and storage of hydrocarbons) [hereinafter Hydrocarbons Law].

authorized by the previous national congress.[78] The contracts will be terminated unless the companies are willing to enter into minority joint ventures with the PDVSA before the end of 2005.[79] Simultaneously, President Chavez has demanded that the operating companies retroactively pay income and other taxes at the higher oil company rate of 50 percent instead of the 34 percent corporate rate as contemplated in the operating company contracts. Acquiescence to the higher tax rate is further being made a condition for being permitted to form a joint venture with the PDVSA.[80]

F. Judicial Security

A March 2005 decision by the *Tribunal Supremo de Justicia* (TSJ), the nation's highest court, further undermined judicial security in Venezuela. The background of this decision was the confusing events of April 2002, when President Chavez apparently resigned and was replaced by an interim government, only to be reinstated several days later.[81] As a result, various members of the then military high command were accused of attempting a rebellion against the government and were tried by the TSJ.[82] In August 2002, the full chamber of the TSJ held that there was insufficient evidence for them to be tried in the ordinary courts.[83] Notwithstanding, following the expansion of the TSJ from twenty to thirty-two members and replacement of the justices who were not deemed to be pro-government,[84] the previous decision was reversed by the seven-member constitutional chamber of the TSJ in March 2005.[85] This decision not only subjects these individuals to retrial and double jeopardy, but it also undermines the authority of the full chamber of the TSJ.[86]

78. The petroleum sector was reopened to private companies starting in 1996 based initially on four types of operating service contracts. Most of these were expressly authorized by the sitting national congress that was created by the 1961 Constitution. A new Constitution was ratified at the end of 1999, abolishing the old congress and replacing it with the current National Assembly.

79. The state may allow joint venture companies in which the state has not less than 50% of the equity and management control. *See* Hydrocarbons Law, *supra* note 77, at art. 22.

80. Since the oil produced by the operating companies did not belong to them and rather had to be delivered to PDVSA, they were deemed to be mere service providers and so subject to the standard corporate income tax rate. Notwithstanding, the government has alleged that they are in fact oil companies and so subject to the higher tax rate. In addition, the government is seeking to disavow several of the other compensation and reimbursement provisions of the operating contracts. *See Ley de Impuesto sobre la Renta*, arts. 9, 11, 52, 53, Official Gazette, Extraordinary, No. 5.566, 28 de Diciembre de 2001.

81. President Chavez has continuously stated that this was a failed coup d'etat against his government.

82. According to article 266(3) of the Constitution, certain high officials and military officers must first be tried by the Supreme Court to determine whether there is sufficient cause to then try them in the ordinary courts; this is referred to as *antejuicio de mérito. Constitución de la República Bolivariana de Venezuela*, art. 266(3), Official Gazette, Extraordinary, No. 5.453, 24 de Marzo de 2000.

83. Prosecutor General v. Velazco, Decision No. 38, Franklin Arrieche, Magistrate, Full Chamber, Supreme Tribunal of Justice (14 de Agosto de 2002).

84. This was done based on the new Supreme Court law of 2004, and approved by the National Assembly by a simple, rather than a qualified two-thirds, majority. *See Ley Orgánica del Tribunal Supremo de Justicia de la República Bolivariana de Venezuela*, Official Gazette, No. 37.942, 20 de Mayo de 2004.

85. *Review Petition of the Prosecutor General against the Decision of August 14, 2002*, Decision No. 233, Francisco Carrasquero, Magistrate, Constitutional Chamber (11 de Marzo de 2005). This decision was based on the supposition that two ad hoc magistrates sitting at the time of the August 2002 decision had been improperly designated.

86. This time in the ordinary courts, as all of these officers have been retired from the military.

IV. Mexico[d]

During 2004 and 2005, due to the absence of a controlling political party in Congress, several bills submitted by President Fox that would have resulted in significant sector reforms failed to win approval. The most important of these bills (dealing with tax, energy, petrochemical, and labor issues) continue to be debated in Congress. Nonetheless, the legislature succeeded in enacting a number of laws and regulations; the most important are discussed below.

A. New Rules For Recognition of Citizenship To Mexicans Residing Abroad

The Regulation for Consular Matriculation sets forth the rules for consulate recognition of Mexican citizens who reside outside the country and would permit consulates to issue identification cards to those evidencing Mexican citizenship.[87] Such recognition may become crucial in the future for purposes of participating in Mexican presidential elections.

B. Criminal Law

The Federal Criminal Code was amended to include express kidnapping as a crime and to punish such acts by incarceration of up to forty years.[88] Express kidnapping is defined as the deprivation of liberty in order to undertake a robbery (usually a person is kidnapped a few hours for a ransom). The incidences of kidnapping for ransom have multiplied in recent years, becoming one of the most common crimes and dangerous threats to the country.

In addition, articles 222 and 222-Bis of the Federal Criminal Code were amended by decree to provide for stricter sanctions for bribery, both in Mexico and abroad, and to provide for sanctions for entities that benefit from such bribes.[89] These amendments were made to comply with requirements of the Organization for Economic Cooperation and Development.

C. Mexico Recognizes Jurisdiction of the International Criminal Court of Justice

Article 21 of the Mexican Constitution was amended by decree to grant the executive branch authority to recognize, with the prior approval of the Senate in each particular case, the jurisdiction of the International Criminal Court.[90] This amendment was required and went hand-in-hand with the Senate's ratification of the Rome Statute that Mexico had

d. Contributed by Yves Hayaux-Du-Tilly Laborde, Partner, Jáuregui, Navarrete y Nader S.C. Abogados, Mexico DF, Mexico.

87. Reglamento de Matrícula Consular [Regulation of Consular Registers], Diario Oficial de la Feceración [D.O.], 12 de Mayo de 2005 (Mex.).

88. Decreto por el que se Adiciona el Inciso d) a la Fracción I del Articulo 366 del Código Penal Federal [Decree of Addition to Part I, Article 366 of the Federal Penal Code], Diario Oficial de la Federación [D.O.], 16 de Junio de 2005 (Mex.).

89. Derecto por el que se Reforman Diversas Disposiciones del Código Penal [Decree Reforming Diverse Dispositions of the Federal Penal Code], Diario Oficial de la Federación [D.O.], 23 de Agosto de 2005 (Mex.).

90. Decreto por el que se Adiciona el Artículo 21 de la Constitución de los Estados Unidos Mexicanos [Decree Adding Article 21 to the Mexican Constitution], Diario Oficial de la Federación [D.O.], 20 de Junio de 2005 (Mex.).

already signed. With the ratification of the Senate and this amendment, Mexico follows its general commitment to international institutions and their search of justice beyond the limits of national borders.

D. Banking Institutions

Article 46 of the Law of Savings and Popular Credit was amended by decree[91] to forbid those who own more that 2 percent of the capital stock of a Popular Financing Company [*Sociedad Financiera Popular*][92] from receiving loans from such entities. The amendment is intended to limit self-dealing, a significant contributor to the Mexican financial crisis of the 1990s.

The Central Bank of Mexico published the Prudential Provisions on Loans Applicable to Banking Institutions setting forth minimum requirements to be followed by Mexican Banks to better organize the loan process and identify the different internal areas and officers to be involved in such processes.[93] These provisions are intended to improve management and control of loan transactions.

E. Promotion of Sugar Cane Industry

A new Law for the Sustainable Development of Sugar Cane was enacted to protect the sugar cane industry.[94] As a consequence, wholesale sales of sugar cane will be subject to maximum prices in accordance with antitrust law. The Law also creates a committee for the sustainable development of sugar.

V. Bolivia[e]

The year 2005 was a period of deep political unrest in Bolivia. On June 9, 2005, Eduardo Rodriguez Veltzé, who previously headed the country's Supreme Court, was appointed President following the resignation of Carlos Meza, who had suceeded the ousted Gonzalo Sanchez de Lozada.

Underlying the political crisis was the general hostility toward foreign invesment in the oil and gas industry. As a consequence, a new Hydrocarbons Law was enacted on May 17, 2005.[95] Under the law, the constitutional claim that all hydrocarbons are the direct, perpetual, and inalienable property of the Bolivian state is recognized. As a result, all current joint venture agreements entered into by private sector entities and the state oil and gas entity *Yacimientos Petrolíferos Fiscales Bolivianos* (YPFB) must be converted into new forms

91. Decreto por el que se Reforma el Articulo 46 de la Ley de Ahorro y Crédito Popular [Decree Amending Article 46 of the Law of Savings and Popular Credit], Diario Oficial de la Feceración [D.O.], 28 de Junio de 2005 (Mex.).

92. Popular Financing Companies [*Sociedades Financieras Populares*] are regulated entities licensed to carry out limited savings and credit activities with their shareholders and clients.

93. Prudential Provisions of Loans Applicable to Banking Institutions, Diario Oficial de la Federación [D.O], 28 de Julio de 2005 (Mex.).

94. Decreto por el que se Expide la hey de Desarrollo Sustentable de la Caña de Azúcar [Decree Sending the Law for the Sustainable Development of Sugar Cane], Diario Oficial de la Federación [D.O.], 22 de Agosto de 2005 (Mex.).

e. Contributed by Diego Rojas, C.R. & F. Rojas—Abogados, la Paz, Bolivia.

95. Ley de Hidrocarburos [Hydrocarbons Law], Law No. 3058, 17 de Mayo de 2005 (Bol.).

of agreements within 180 days from the law's enactment. As a consequence, existing shared production and operating agreements will need to be renegotiated. The law is intended to re-establish YPFB's role as a dominant player in the oil and gas industry.

The law also imposes a new direct tax on hydrocarbons, applicable to the total production of hydrocarbons at the wellhead. This new tax of 32 percent disallows deductions or credit offsets and is in addition to the existing 18 percent royalty fee, hence effectively imposing a 50 percent royalty rate.

The law is likely to trigger arbitration claims by private producers against the Bolivian state, based on existing bilateral investment treaties and the specific tax stability clauses and change in law provisions contained in most existing joint venture agreements.

Depending on the outcome of the December 2005 presidential elections, nationalization of gas fields may be on the agenda. At the same time, private producers have loudly challenged certain provisions of the Hydrocarbons Law, plunging the future of the oil and gas industry into doubt.

VI. Chile[f]

The most noteworthy legal events in Chile during the years 2004 and 2005 were the imposition of a mining royalty, the promising debut of the new Antitrust Court, the enactment of a viable arbitration law, and the implementation of a free trade agreement with the United States.

A. Mining

Following a protracted debate, in May 2005, Congress approved Law No. 20,026 (also known as the Royalty II Law)[96] that imposes a tax on the operating income earned by mining companies.[97] The tax rate will vary depending on a mining company's total annual sales.[98]

The Royalty II Law also amended Decree Law 600, the Chilean Foreign Investment Statute, by incorporating a new article pursuant to which foreign investments equal to or exceeding US$50 million will be granted the following stabilization rights for a fifteen-year term:[99] the investment will not be subject to any new taxes established after the relevant foreign investment agreement was signed; the statutory provisions governing the mining tax in force as of the execution date of the relevant foreign investment agreement will remain unchanged; and the investment will not be affected by modifications to the amounts or conditions of payment of mining exploration fees or mining exploitation fees.

f. Contributed by Marcos Ríos and Francisco Prat, Carey y Cía., Santiago, Chile.

96. Ley No. 20.026, Official Gazette, May 16, 2005 (Chile).

97. The tax becomes effective on January 1, 2006. *See id.*

98. Mining companies with total annual sales exceeding 50,000 metric tons of fine copper will be subject to a 5% tax rate. Those with total annual sales in the range of 12,000 to 50,000 metric tons of fine copper will be subject to a staggered tax rate based on total annual sales, ranging from 0.5% to 4.5%. Mining companies with total annual sales equal to or less than 12,000 metric tons of fine copper will not be subject to this tax. *See id.*

99. *See* Decree Law 600, Chilean Foreign Investment Statute, art. 11 bis, Dec. 16, 1993.

B. Antitrust

Established in May 2004, the Chilean Antitrust Court has decided thirty adversarial cases and ten non-adversarial matters.[100] In the course of 2005, the Antitrust Court has maintained the previously established criteria for review of horizontal integration and abuse of dominance cases.[101] It has also considered and analyzed specific features, boundaries, and limitations of the relevant markets, a positive development when compared to the decisions of its predecessor.[102] Finally, the Antitrust Court's decision-making efficiency has improved significantly. The average timeframe to resolve an antitrust claim or request is down from a previous average of approximately eighteen months to eight months.

C. Arbitration

The first anniversary of the entry into force of International Commercial Arbitration Law No. 19971 that intends to make Chile a leading venue for international commercial arbitration, particularly in Latin America, is also an important legal development.[103] This law, based almost entirely on the UNCITRAL Model Law, sets forth procedural rules for the resolution of international commercial disputes as a means to unify the legal framework applicable to the resolution of disputes between private parties from different states.

D. Free Trade Agreement with The United States

The Free Trade Agreement (FTA) signed between Chile and the United States, which became effective in Chile on January 1, 2004, has exceeded expectations. It has consolidated and widened access of Chilean products to a market that represents 148 times the Chilean market. The FTA has boosted the efforts of the Chilean producers to add value to the raw products. According to Chilean Customs, U.S. imports from Chile in the first semester of 2005 grew 33.5 percent, equivalent to US$2.9 million compared with the same period of 2004. U.S. exports to Chile, on the other hand, grew 62.8 percent in the same period. U.S. exports totaled US$2.4 million in the first semester of this year. Overall bilateral trade grew 45.5 percent accounting for US$5.8 million.[104]

The FTA provides benefits for all products—tariffs will reach 0 percent without exemption, although in different terms. The maximum term provided by the FTA is twelve years,

100. An adversarial proceeding deals with the review and resolution of adversarial matters, as requested by private parties or by the Antitrust Attorney General. In non-adversarial proceedings, the Antitrust Court issues general instructions and proposes the amendment, enactment, or repeal of legal rules and/or regulations.

101. According to these criteria, such claims must be analyzed on a case by case basis under the rule of reason. *See* Resolution No. 02/2005, 4 de Enero de 2005 (Chile), Acquisition of BellSouth Chile Inc. and BellSouth Chile Holdings Inc. (together BellSouth) by Telefónica Móviles S.A. The court, applying the rule of reason, approved the consulted operation based on the efficiencies that the integration would create, despite the existence of entry barriers in a highly concentrated market.

102. Likewise, when analyzing the relevant markets, the Antitrust Court has distinguished between the "relevant product market" and the "geographical market," and has considered the existence of barriers to market entry and growth (market contestability) when analyzing a relevant market and measuring the effects of a horizontal combination. *See, e.g., id.* Resolution 02/2005; Judgment No. 18/2005, [*Antitrust Attorney General v. Fuel Distribution Cos.*].

103. Ley No. 19.971, Official Gazette, Sept. 29, 2004 (Chile).

104. *See* Embassy of Chile in the United States-Economic Department, http://chileusafta.com.

which includes sectors such as the agriculture and textiles industries. Jointly with the tariff reduction, there are also other relevant matters regulated in the FTA. It rules, for example, on the protection of intellectual property, the establishment of labor and environmental standards, the material reduction of investment barriers, and the promotion of regulatory transparency.

VII. Peru[g]

The juxtaposition between a weakened government and a strong economy continued in Peru during 2004 and 2005. Gross national product growth figures are impressive, the level of exports are at an all time high, country risk ratings have been reduced, foreign reserves have continued to increase, and Peru is currently negotiating free trade agreements with the United States and countries in Asia and Latin America. By contrast, political scandals and social unrest have kept the government in a state of constant crisis. Alejandro Toledo, who assumed the presidency in 2001, continued to have approval ratings in the low double digits. A number of legal developments are of note.

A. Interim Tax On Assets

Law 28,424[105] created an *Impuesto Temporal a los Activos Netos* [Interim Tax on Assets] (ITAN) applicable to individuals and companies undertaking business activities in Peru, including branch offices, agencies, and all other establishments that non-Peruvian domiciled entities permanently maintain in Peru and whose net worth at the end of the previous fiscal year exceeded S/.5'000,000.00 (approximately US$1.5 million), at rate of 0.6 percent over said net worth. This tax is slated to be in force only during the years 2005 and 2006.

B. Constitutional Procedure Code

A Code of Constitutional Procedure was introduced by means of Law No. 28,237,[106] substantially modifying the procedures that regulate claims regarding constitutional rights[107] and setting forth general principles for the interpretation and application of all constitutional proceedings.

C. Criminal Law

A new Criminal Procedure Code was enacted that introduced substantial modifications intended to considerably expedite criminal procedures.[108] Under the new Code, criminal judges will no longer be in charge of criminal investigations, but will solely evaluate evidence provided by the District Attorney's Office.[109]

---

g. Contributed by Jean Paul Chabaneix, Partner, Rodrigo, Elías & Medrano Abogados, Cusco, Perú.

105. Ley No. 20,424, Official Gazette, Dec. 21, 2004 (Peru).

106. Ley No. 28,237, Official Gazette, May 3, 2004 (Peru).

107. The procedures include, inter alia, the Habeas Corpus, the Habeas Data, the Action of Compliance, and the Unconstitutionality Action.

108. Codigo Penal del Peru, Derecho Penal, July 29, 2004 (Peru).

109. Some articles of this code will be implemented progressively beginning in 2005. At the end of 2006, the whole Code is planned to be fully in force.

In conjunction with the modification of certain articles of the Peruvian Constitution,[110] Laws No. 28,339 and 28,449, fundamentally modified the public sector employees' pension funds.[111] Prior to the amendment, certain retired public employees were entitled to pensions that were automatically adjusted on the basis of current public employees' salaries, regardless of the contributions the employees had made during their years at work. Under the amendment, all public employees will be required to participate in private sector employee pension systems that allocate retirement benefits on the basis of the salaries earned while employed.

The constitutionality of these Laws was challenged by a group of former public employees and by the bar associations of Callao and Cusco.[112] The Peruvian Constitutional Court declared the laws to be constitutional in essence, although certain aspects thereof (particularly matters related to pensions for widows and orphans of employers) were declared to be unconstitutional.[113]

110. Ley 28,389, Official Gazette, 19 de Agosto de 2004 (Peru). This law modified articles 11, 103, and the First Final and Transitory Provision of the Peruvian Constitution. Article 11 refers to the free access to health and pension services through private or public entities, establishing that the State has to ensure said free access and supervise the efficient functioning of the services. By the modification, a new paragraph has been included to article 11, establishing that the government entity entitled to manage the pension funds regime in charge of the state will be appointed by law. Likewise, article 103 of the Constitution now establishes additionally that the laws shall be applied, since the moment they enter in force, to the consequences of the relations and situations existing prior to their approval. Finally, the First Final and Transitory Provision of the Constitution now sets forth that the public sector employees' pension funds are closed for new incorporations, forcing the workers that have not reached the requirements for obtaining a pension under the system to choose between the public or the private pension fund system.

111. *Id.*; Ley No. 28,449, Official Gazette, 30 de Diciembre de 2004 (Peru).

112. These unconstitutionality actions were resolved all together by the Constitutional Court in a decision published in the Official Gazette on June 12, 2005.

113. The Constitutional Court declared the following provisions unconstitutional: (i) the current text contained in article 32 of Law 20,530, modified by Law 28,449; (ii) the current text of article 34 of Law 20,530, and consequently the current text of articles 55(b) of Law 20,530 and 56(a) of Law 19,990; (iii) the first paragraph of article 35 of Law 20,530, modified by Law 28,449, and consequently the current text of article 57 of Law 19,990; (iv) the current text of article 32(b) of Law 20,530 and consequently the current text of article 54 of Law 19,990. *Id.*