

## **Latin America and the Caribbean**

POLIBIO VALENZUELA-SCHEKER, DIEGO M. GANDOLFO, LUIS E. DENUBLE,  
LINDSAY SYKES, EDUARDO QUINTANILLA, MAURICIO BECERRA DE LA ROCA DONOSO,  
POLINA CHTCHelok, FERNANDO AGUIRRE, JULIANA MARTINES, PATRICK DEL DUCA,  
ROGÉRIO DAMASCENO LEAL, CAROLINA PETT GABRIEL GONÇALVES,  
GUILHERME FRAIHA GRANJO, ALEXANDRE L. RIBEIRO DO VALLE,  
CAMILA MACHADO BOUERI, FERNANDA P. DO AMARAL GURGEL,  
GLENYS P. SPENCE, DIEGO PERÓ, MATÍAS VERGARA, MARÍA JOSÉ MARTÍNEZ,  
CARLOS FRADIQUE-MÉNDEZ, JOSÉ FRANCISCO MAFLA, LEONARDO SEMPÉRTEGUI,  
AND GABRIEL HUERTAS DEL PINO\*

### **I. Argentina**

#### **A. NEW CIVIL AND COMMERCIAL CODE BILL**

President Cristina Fernandez de Kirchner announced the creation of a committee to examine a bill to reform, update, and unify the 150-year-old Civil and Commercial Codes during the 2012 legislative sessions. After her party kept control of both houses of Congress during the October 2013 elections, there was a renewed impetus to begin the proposed unification of the codes. While both codes have been subject to several amendments, the new bill repeals more than 5,000 sections, replacing them with only 2,671.<sup>1</sup> The bill is expected to be approved by the Senate in December 2013 and by the House of Representatives in 2014.

---

\* Polibio Valenzuela-Scheker, Squire Sanders (U.S.) LLP, Santo Domingo, Dominican Republic, served as committee editor. The following authors submitted contributions: Diego M. Gandolfo and Luis E. Denuble, Melchionna & Gandolfo LLP, New York (Argentina); Lindsay Sykes, Ferrere Abogados, Santa Cruz, Eduardo Quintanilla, Quintanilla, Soria & Nishizawa Soc. Civ. Abogados, La Paz, Mauricio Becerra de la Roca Donoso and Polina Chtchelok, Becerra de la Roca Donoso & Asociados, Santa Cruz; Fernando Aguirre and Bufete Aguirre, La Paz (Bolivia); Juliana Martines, Gilead, São Paulo; Patrick Del Duca, Zuber & Taillieu, Los Angeles; Camila Machado Boueri, São Paulo; Rogério Damasceno Leal, Carolina Pett Gabriel Gonçalves, Guilherme Fraiha Granjo, Alexandre L. Ribeiro do Valle, and Fernanda P. do Amaral Gurgel, V, M & L—Sociedade de Advogados, São Paulo (Brazil); Glenys P. Spence, Phoenix School of Law, Phoenix (Caribbean Community); Diego Peró, Matías Vergara, and María José Martínez, Carey y Cía, Santiago (Chile); Carlos Fradique-Méndez and José Francisco Mafla, Brigard & Urrutia, Bogotá (Colombia); Leonardo Sempértegui, Sempértegui Ontaneda Abogados, Quito.

1. MARVAL, O'FARRELL & MAIRAL, *DOING BUSINESS IN ARGENTINA*, 84 (2013).

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

620 THE YEAR IN REVIEW

All the modifications that the bill tries to introduce cannot be addressed, but we will mention some of the most important proposals without editorial comment.

**Human beings:** A person is considered a human being from the time of conception in cases of natural procreation or from the moment of implantation in cases of assisted reproduction.<sup>2</sup> The bill removes the requirement that a person's name must connote the person's gender.<sup>3</sup> It also changes the current surname regime for matrimonial children. It allows children to have the surname of either parent or of both. Previously, children had to use the father's surname.<sup>4</sup>

Minors have two separate sets of rules depending on their age, one for children under thirteen years old and one for adolescents from age thirteen to eighteen.

**Individual rights:** A person's image and voice are expressly protected and cannot be published without his consent. The bill contains exceptions to this, such as pictures of people in public demonstrations and the news media's right to inform.<sup>5</sup>

**Marriage:** The bill significantly changes the current law. First, the duties of fidelity, cohabitation, and moral assistance are deleted. However, fidelity is required in common law relationships.<sup>6</sup> The bill removes the status of "legal separation" and permits same-sex marriages (this is already allowed under other laws) and prenuptial agreements.<sup>7</sup> It also simplifies divorce procedures.

**In vitro fertilization:** The bill permits surrogate mother contracts and post-mortem fertilization.<sup>8</sup>

**Contracts:** The bill regulates pre-contractual liability and contracts that were not previously regulated, such as franchising, leasing, trusts, concession, agency, supply, factoring, and joint ventures.<sup>9</sup>

**Real estate:** The bill establishes new kinds of real property rights, such as country clubs and cemeteries. It also recognizes the rights of indigenous communities to land.<sup>10</sup>

**Civil liability:** The classic distinction between contractual and extra-contractual (torts) liability is erased.<sup>11</sup>

**Liability of the State:** The original bill included provisions intended for the State to compensate citizens for licit and illicit actions perpetrated by government officials.<sup>12</sup> Legislators of the ruling party are proposing to remove these provisions from the bill and to regulate the State's liability in a separate and specific law. This issue is currently generating a lot of controversy from the opposition and human rights organizations.

Regardless of the changes that may affect the final text of the bill, if passed, it will undoubtedly be a turning point in Argentina's legal history.

---

2. CÓDIGO CIVIL Y COMERCIO [CÓD. CIV. Y COM.] [CIVIL AND COMMERCIAL CODE] art. 19 (Arg.).

3. *Compare id.*, with CÓDIGO CIVIL [CÓD. CIV.] [CIVIL CODE] (1869) (Arg.).

4. CÓDIGO CIVIL Y COMERCIO [CÓD. CIV. Y COM.] [CIVIL AND COMMERCIAL CODE] art. 64 (Arg.).

5. *Id.* art. 53.

6. *Compare id.*, with CÓDIGO CIVIL Y COMERCIO [CÓD. CIV. Y COM.] [CIVIL AND COMMERCIAL CODE] art. 208–09.

7. CÓDIGO CIVIL Y COMERCIO [CÓD. CIV. Y COM.] [CIVIL AND COMMERCIAL CODE] art. 509.

8. *Id.* arts. 563, 914.

9. *Id.* art. 1387.

10. *Id.* arts. 18, 2073, 2103–13.

11. *Compare id.*, with CÓDIGO CIVIL [CÓD. CIV.] [CIVIL CODE].

12. CÓDIGO CIVIL Y COMERCIO [CÓD. CIV. Y COM.] [CIVIL AND COMMERCIAL CODE] art. 334.

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

LATIN AMERICA & THE CARIBBEAN 621

**II. Bolivia**

A. NEW FINANCIAL SERVICES LAW

Bolivia enacted a new Financial Services Law on August 21, 2013 (Law 393) (FS Law).<sup>13</sup> Among other noteworthy provisions, the FS Law:

- Establishes a Financial Stability Council (CEF), comprising the Minister of the Economy, Minister of Development Planning, President of the Bolivian Central Bank, Executive Director of the Financial System Supervisory Authority (ASFI), and the Executive Director of the Pension and Insurance Supervisory Authority. The CEF's mandate is to propose and execute financial policy.<sup>14</sup>
- Provides that the ASFI will establish an obligatory Code of Conduct for financial entities to protect the rights of financial consumers, as well as a special Financial Consumer Protection Unit.<sup>15</sup>
- Establishes several new types of private financial intermediaries: private development banks (focused on providing financial and technical support for productive sector development); "multiple" banks (to provide financial services to the general public); PYME banks (specialized in providing services to small and medium businesses); Housing Financial Entities (specialized in residential housing loans); Development Financial Institutions (focused on social and sustainable development; that is, small businesses in the agriculture or forestry sectors); and Communal Financial Entities (established by the communal donation of capital to finance that group's activities).<sup>16</sup>
- Provides that ceilings on interest rates on productive and housing sector loans will be established through executive decrees.<sup>17</sup>
- Provides that floors on interest rates for deposits will be established through executive decrees.<sup>18</sup>
- Provides that non-conventional collateral, such as agrarian insurance, contracts for the future sale of goods, unregistered machinery, community or territorial organization guarantees, and registered intellectual property, may be used to secure productive sector loans.<sup>19</sup>

The full effect and scope of the FS Law will remain unclear until the Ministry of the Economy, the Bolivian Central Bank, and the ASFI, as applicable, issue implementing regulations.

---

13. Law No. 393, Aug. 21, 2013, G.O. 551 NEC (Bol.).

14. *Id.* arts. 9–11.

15. *Id.* arts. 70, 73.

16. *Id.* arts. 478–485.

17. *Id.* art. 59.

18. *Id.*

19. Law No. 393, art. 99, Aug. 21, 2013, G.O. 551 NEC (Bol.).

SPRING 2014

**PUBLISHED IN COOPERATION WITH  
SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

622 THE YEAR IN REVIEW

**B. NEW ARBITRATION CENTER WILL SPECIALIZE IN HYDROCARBONS DISPUTES**

In October 2013, the Bolivian Chamber of Hydrocarbons and Energy (CBHE)<sup>20</sup> announced the creation of a new arbitration center that will specialize in adjudicating hydrocarbons and energy-related disputes.<sup>21</sup>

The center fills a gap created by the constitutional prohibition on recourse to international arbitration for these types of disputes. Pursuant to the Constitution, the State owns all hydrocarbons in all forms and controls their production and sale.<sup>22</sup> The state-owned hydrocarbons company, Bolivian State Oilfields Corporation (*Yacimientos Petrolíferos Fiscales Bolivianos* or YPFB) may, and typically does, enter into service contracts with private companies operating in the hydrocarbons supply chain.<sup>23</sup> The Constitution, however, provides that foreign companies conducting activities in the hydrocarbons supply chain are “subject to State sovereignty” and the laws and authorities of Bolivia.<sup>24</sup> It further establishes that “no foreign tribunal or jurisdiction will be recognized” and that these foreign companies may not invoke international arbitration under any circumstances nor rely on diplomatic channels.<sup>25</sup> This new arbitration center offers an alternative to foreign operators seeking to resolve disputes outside of the Bolivian judicial system.

**C. THE LAW OF REVERSION OF MINING RIGHTS**

Under the 2009 Bolivian Constitution, mining contracts are required to accomplish a “social economic function” and non-compliance may cause the reversion of such rights.<sup>26</sup> In the absence of a definition regarding social economic function, however, questions remained regarding the breadth of this concept, as well as the conditions under which such reversions would be applied.

Law 403, dated September 13, 2013, provides a system for applying those constitutional provisions. The law, seeking to promote productive investment in the mining industry, provides that the verified inexistence of mining activities may be cause for the reversion of mining rights granted by means of the Transitory Special Authorizations (formerly mining concessions). The Vice-Ministry of Mining Policies, Regulation, and Control undertakes this verification. The General Administrative Jurisdictional Mining Authority (AGJAM) would determine the reversion of mining rights. Reversion would not proceed, however, when the absence of mining activities is due to the invasion of mining sites—a criminal legal concept also regulated by law—or is a result of a decision by the competent authority.<sup>27</sup>

---

20. The CBHE is comprised of 115 members, including Repsol YPF, Andina YPFB, and Petrobras.

21. This center is the fifth arbitration center in Bolivia. The others include the National Chamber of Commerce (CNC) Center for Conciliation and Arbitration; the Center for Conciliation and Arbitration of the Chamber of Industry, Commerce, Services, and Tourism (CAINCO); the Center for Arbitration of the Bolivian Engineers' Society (SIB); and the Bolivian Center for Arbitration and Conciliation (CEBAC).

22. Art. 359, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Bol.).

23. *Id.* art. 361.

24. *Id.* art. 366.

25. *Id.*

26. *Id.* art. 370.

27. Law No. 367, May 1, 2013, G.O. 527 NEC (Bol.), incorporates into the Penal Code the crime of “mining invasion” (*Avasallamiento*) within the Chapter of Crimes Against Industry and Commerce.

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

LATIN AMERICA & THE CARIBBEAN 623

D. INVESTMENT

1. **Nationalization:** Just one company was nationalized in 2013;<sup>28</sup> this company was SABSA,<sup>29</sup> which was responsible for the management of the three international airports<sup>30</sup> in Bolivia and which was accused by the Government to be in breach of Article 18 of the Concession Agreement.<sup>31</sup>

2. **Sporting events:** The Government has declared the preparation and organization of the “Dakar 2014” rally race, an activity of national interest and priority<sup>32</sup> because the anticipated arrival of over 70,000 domestic and international visitors is expected to generate significant investment.<sup>33</sup>

3. **Imports and taxes:** Importers that are legally incorporated in Bolivia may now opt to perform the customs clearance on their own<sup>34</sup> and are no longer required to use a customs broker.<sup>35</sup> The import of printed books, newspapers, and magazines (with the exception of pornographic material) is exempted from Value Added Tax (VAT).<sup>36</sup> Likewise, the sales of imported or domestically produced books, as well as printed publications of the Governmental Institutions, are subject to zero VAT.<sup>37</sup>

4. **Energy Sector:** The Energy Sector in 2013 was a hive of activity. The Government not only ratified the “Agreement on Functioning of the Gas Exporting Countries Forum (GECF)”<sup>38</sup> and the “Statute of the GECF,”<sup>39</sup> but also showed strong interest in further developing its natural gas deposits through the signature of a number of exploration and exploitation contracts between the state-owned YPFB and various oil and gas companies.<sup>40</sup> Ministerial Resolution 255-13 introduced the retroactive application of pricing mechanisms for gas domestically supplied by petroleum companies to local Liquid Separation Plants.<sup>41</sup>

---

28. See Decreto Supremo 1494, Feb. 18, 2013, G.O. 483 NEC (Bol.).

29. Joint venture between Spanish Abertis Infraestructuras, S.A. and AENA.

30. In Cochabamba, the Jorge Wilstermann International Airport, in La Paz, El Alto International Airport, and in Santa Cruz de la Sierra, Viru Viru International Airport.

31. Article 18 of the Concession Agreement required SABSA to maintain “Level of Service–B” of IATA Airport Development Reference Manual. See Decreto Supremo 1494, Feb. 18, 2013, G.O. 483 NEC (Bol.).

32. See Decreto Supremo 1551, Apr. 10, 2013, G.O. 507 NEC (Bol.).

33. For more information see *Gobierno Afirma que Bolivia Está Preparada Para el Dakar 2014* [Government Claims that Bolivia is Ready for Dakar 2014] (Sept. 27, 2013, 7:01 PM), <http://www.eldeber.com.bo/gobierno-afirma-que-bolivia-esta-preparada-para-el-dakar-2014-130927190159>.

34. Decreto Supremo 1487, art. 53, Feb. 16, 2013, G.O. 481 NEC (Bol.).

35. Decreto Supremo 25870, art. 53, Aug. 11, 2000, G.O. 2238 (Bol.) (required use of a customs broker for customs clearance).

36. See Law No. 366, art. 8, Apr. 29, 2013, G.O. 518 NEC (Bol.).

37. *Id.*

38. See Law No. 382, June 7, 2013, G.O. 533 NEC (Bol.) (ratifying “Agreement on Functioning of the Gas Exporting Countries Forum” and “Statute of the Gas Exporting Countries Forum”).

39. See generally *GECF History File*, GAS EXPORTING COUNTRIES F., <http://www.gecf.org/Resource/GECF-History-File.pdf> (last visited Jan. 15, 2014).

40. See Law No. 420, Sept. 30, 2013, G.O. 568 NEC; Law No. 409, Sept. 30, 2013, G.O. 568 NEC; Law No. 408, Sept. 30, 2013, G.O. 568 NEC; Law No. 407, Sept. 20, 2013, G.O. 566 NEC; Law No. 406, Sept. 20, 2013, G.O. 566 NEC; Law No. 405, Sept. 20, 2013, G.O. 566 NEC; Law No. 380, May 17, 2013, G.O. 527 NEC (Bol.).

41. See Decreto Supremo 1719, Sept. 11, 2013, G.O. 558 NEC (Bol.); Resolución Ministerial No. 255-13 (Ministerio de Hidrocarburos y Energía), Oct. 28, 2013, (announced in *Cambio*, Nov. 2-3, 2013).

SPRING 2014

**PUBLISHED IN COOPERATION WITH**  
**SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

624 THE YEAR IN REVIEW

**III. Brazil**

**A. ANTI-CORRUPTION LAW: A NEW REGULATORY FRAMEWORK**

Federal Law 12.846, signed on August 1, 2013, by President Dilma Rousseff, defines the administrative and civil liability of corporations for the conduct of “acts against the public administration, national or foreign.”<sup>42</sup> The law imposes a strict liability standard. Moreover, liability survives any corporate reorganization.<sup>43</sup>

Administrative penalties range from 0.1 percent to 20 percent of the company’s gross revenue for the year prior to the filing of an administrative case, but penalties are not less than the value of the unlawful advantage received.<sup>44</sup> A company must also pay full restitution for the damages caused by the corrupt activity.<sup>45</sup>

Judicial proceedings may take place concurrent with the administrative sanctions described above. Judicial proceedings may require the company to forfeit assets, rights, and other gains arising from the illegal act; may bar the company from receiving subsidies, donations, and other benefits; and, ultimately, may cause the suspension of the company’s activities or its dissolution.<sup>46</sup>

Almost any public authority is empowered to investigate unlawful acts, although the Federal Controller-General is designated to investigate matters involving corrupt practices against foreign governmental entities.<sup>47</sup> Statutes of limitation run for five years from knowledge of the misconduct, or in the case of continued violation, its cessation.<sup>48</sup>

The law contemplates a leniency program, pursuant to which a company may negotiate full immunity or reduced penalties if it cooperates with investigations. The *Cadastro Nacional de Empresas Punidas*, a national registry of punished enterprises lists offenders, penalties imposed, and dates of imposition.<sup>49</sup>

**B. ALL-ELECTRONIC FILING POSTPONED IN SÃO PAULO STATE**

Brazil’s *Conselho Nacional da Justiça* (CNJ, or National Council of Justice) postponed the rollout in São Paulo State of the so-called *Processo Judicial Eletrônico* (PJE or Electronic Judicial Filing). Following contentious discussions with the São Paulo Court of Justice instigated by bar associations (*Ordem dos Advogados do Brasil* (OAB), *Instituto dos Advogados de São Paulo* (IASP), and *Associação dos Advogados de São Paulo* (AASP)), the CNJ issued a decision on December 4, 2012.<sup>50</sup>

---

42. Lei No. 12.846, de 1 de agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], de 1.8.2013 (Braz.).

43. *Id.* art. 2.

44. *Id.* art. 6.

45. *Id.* art. 6, § 3.

46. *Id.* arts. 18, 19.

47. *Id.* art. 9.

48. *Id.* art. 25.

49. *Id.* art. 22.

50. See CNJ *Aprova Processo Judicial Eletrônico em meio às Críticas de Advogados e Servidores* [CNJ Approves Electronic Court Case amid Criticism of Lawyers and Servers], POLÍTICA (Dec. 17, 2013, 10:16 PM), <http://blogs.estadao.com.br/fausto-macedo/cnj-aprova-processo-judicial-eletronico-em-meio-as-criticas-de-advogados-e-servidores/>.

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

LATIN AMERICA & THE CARIBBEAN 625

The São Paulo Court of Justice was to discontinue acceptance of petitions and related documents in paper format as of December 3, 2012.<sup>51</sup> Both electronic and paper format documents had been accepted since November 19, 2012. OAB, IASP, and AASP asserted the need for an additional 180 days for lawyers to be ready to join the system. The bar associations asserted that the original implementation period did not provide enough time for lawyers to adjust to the new rules or to obtain the digital certification required to use electronic filing.<sup>52</sup>

The CNJ postponed full implementation of PJE to February 1, 2013, because it found that the imposition of the deadline was so unreasonable that it frustrated access to justice.<sup>53</sup> AASP President Arystóbulo de Oliveira Freitas has since reported that only 10 out of 800 petitions submitted daily at the João Mendes Júnior civil court in São Paulo are in the electronic format.

C. NEW ANTI-MONEY LAUNDERING REGULATIONS

On January 16, 2013, the Financial Activities Control Council (COAF in Portuguese) issued Resolutions 24 and 25 to regulate individuals and companies who provide specific services and trade assets to the luxury market.<sup>54</sup> These resolutions came into force on March 1, 2013,<sup>55</sup> and complemented Resolutions 21, 22, and 23 issued in December 2012.<sup>56</sup>

Parties shall promptly inform COAF and maintain registers of all information related to clients and assets commercialized with a value of BRL 10,000 or more at one time and/or one or more operations of BRL 30,000 or more within a period of six months.<sup>57</sup> Moreover, service providers not enrolled with a specific regulatory body must now comply with the terms of these resolutions. These resolutions do not affect lawyers regulated by the

---

51. Press Release, Tribunal de Justiça São Paulo, Varas Cíveis do Fórum João Mendes Júnior Recebem Primeiros Processos Eletrônicos [Civil Court Forum João Mendes Júnior Receives First Electronic Processes] (Nov. 19, 2012), available at <http://www.tjsp.jus.br/Institucional/Corregedoria/Noticias/Noticia.aspx?Id=16347>.

52. See *Processo Eletrônico: CNJ Atende Pedido da Advocacia* [Electronic Process: CNJ Meets Application of Law], ORDEM DOS ADVOGADOS DO BRASIL (Dec. 5, 2012), <http://www.oabsp.org.br/noticias/2012/12/05/8394>.

53. Press Release, Tribunal de Justiça São Paulo, Audiência Pública Sobre Prazo para Implantação de Processo Digital no FJMJ Termina sem Conciliação [Public Hearing on Deadline for Implementation Process in Digital FJMJ Complete Without Reconciliation] (Dec. 3, 2012), available at <http://www.tjsp.jus.br/Institucional/CanaisComunicacao/Noticias/Noticia.aspx?Id=16496>.

54. CONSELHO DE CONTROLE DE ATIVIDADES FINANCEIRAS [BOARD OF CONTROL OF FINANCIAL ACTIVITIES], C.O.A.F. RES. NO. 24 (16 de janeiro, 2012); CONSELHO DE CONTROLE DE ATIVIDADES FINANCEIRAS [BOARD OF CONTROL OF FINANCIAL ACTIVITIES], C.O.A.F. RES. NO. 25 (16 de janeiro, 2012).

55. *Id.*

56. CONSELHO DE CONTROLE DE ATIVIDADES FINANCEIRAS [BOARD OF CONTROL OF FINANCIAL ACTIVITIES], C.O.A.F. RES. NO. 21 (20 de dezembro, 2012); CONSELHO DE CONTROLE DE ATIVIDADES FINANCEIRAS [BOARD OF CONTROL OF FINANCIAL ACTIVITIES], C.O.A.F. RES. NO. 22 (20 de dezembro, 2012); CONSELHO DE CONTROLE DE ATIVIDADES FINANCEIRAS [BOARD OF CONTROL OF FINANCIAL ACTIVITIES], C.O.A.F. RES. NO. 23 (20 de dezembro, 2012).

57. *Id.*

SPRING 2014

**PUBLISHED IN COOPERATION WITH  
SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

626 THE YEAR IN REVIEW

OAB<sup>58</sup> who may represent people involved in crimes related to money laundering.<sup>59</sup> Non-compliance may be sanctioned with warnings or significant fines.<sup>60</sup>

D. INTERNET REGULATION

After more than two years of debate, the National Congress is about to vote on the Brazilian Internet Law Framework Bill.<sup>61</sup> Internet use is currently regulated by a scheme of separate laws and decrees. For example, fiscal legislation created the electronic invoice,<sup>62</sup> labor laws regulate the monitoring of corporate e-mails and files,<sup>63</sup> and criminal laws govern the misuse of the Internet, including libel, defamation, slander, threats, and larceny.<sup>64</sup>

The bill provides that (i) the party responsible for transmitting, switching, or routing data must grant equal treatment to every data package or terminal;<sup>65</sup> (ii) Internet service providers shall not be held liable for damages resulting from content generated by third parties,<sup>66</sup> unless, after receiving a court order to eliminate the content, the company does not take action<sup>67</sup> (a provision intended to balance freedom of speech with the right to privacy);<sup>68</sup> and (iii) Internet service providers may store connection logs, but are prohibited from becoming aware of the contents of those logs.<sup>69</sup>

E. BUILT-TO-SUIT: FIRST YEAR OF NEW RULES

Built-to-suit lease agreements have been commonly used in Brazil since the end of the 1980s. No specific legal regulations covered these agreements, however, until the enactment of Federal Law 12.744/2012<sup>70</sup> on December 19, 2012, which substantially changed Law 8.245/91,<sup>71</sup> applicable to lease agreements. In Brazil, built-to-suit lease agreements are atypical contracts in which the lessor holds the obligation of acquiring a property or remodeling it based on the lessee's specifications and, in return, the lessee must lease the real estate during the contractual period. Federal Law 12.744/2012 added Article 54-A to

---

58. Lei No. 8.906, de 4 de julho de 1994, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 5.7.1994 (Braz.).

59. C.F.C. Res. No. 1445/13, de 26 de julho de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], de 30.07.2013 (Braz.).

60. C.O.A.F. RES. No. 21; C.O.A.F. RES. No. 22; C.O.A.F. RES. No. 23.

61. Lei No. 2.126, de 25 de abril de 2011 (Braz.).

62. Ajuste Sinief No. 7, de 30 de setembro de 2005, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], de 05.10.2005 (Braz.).

63. R.T.S.T., No. 61300-23.2000.5.10.0013, Relator: João Oreste Dalazen, 21.09.2005, DIÁRIO DA JUSTIÇA [D.J.], 28.10.2005 (Braz.).

64. CÓDIGO PENAL [C.P.] [Penal Code] art. 138 (1940) (slander); CÓDIGO PENAL [C.P.] art. 139 (1940) (defamation); CÓDIGO PENAL [C.P.] art. 140 (1940) (libel); CÓDIGO PENAL [C.P.] art. 146 (1940) (threats); CÓDIGO PENAL [C.P.] art. 171 (1940) (larceny) (Braz.).

65. Lei No. 2.126, art. 9, de 25 de abril de 2011 (Braz.).

66. *Id.* art. 14.

67. *Id.* art. 15.

68. CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] art. 5 (Braz.).

69. Lei No. 2.126, art. 10, de 25 de abril de 2011 (Braz.).

70. Lei No. 12.744, de 19 de dezembro de 2012, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], de 20.12.2012 (Braz.).

71. Lei No. 8.245, de 18 de outubro de 1991, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], de 21.10.1991 (Braz.).



**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

LATIN AMERICA & THE CARIBBEAN 627

the Lease Law to regulate built-to-suit lease agreements, making them subject to the general rules applicable to lease agreements.<sup>72</sup>

Article 54-A gives parties the opportunities to waive the right to file a lawsuit to adjust rent after a three-year period, as well as the lessee's right to terminate the contract before the end of its term by paying a fine proportionate to the period of the lease agreement. In the latter case, a fine shall be paid in the terms defined in the agreement but cannot exceed the amount of the upcoming rents.<sup>73</sup>

F. LITIGATION: INSIGHT INTO BRAZIL'S PROPOSED REVISION TO CIVIL PROCEDURE LAWS

The National Congress is about to approve a new version of the Civil Procedure Code<sup>74</sup> with substantial modifications, aiming to ensure access to justice through a faster and less bureaucratic judicial process.<sup>75</sup> Some of the most significant aspects of the bill include (i) the ability to consolidate legal claims to the Appellate Court, which would then be responsible for sending the consolidated claims to a unified trial;<sup>76</sup> (ii) the ability to convert a single lawsuit to a class action if the legal requirements are otherwise satisfied and provided the case is relevant to society in general;<sup>77</sup> (iii) a special interest in mediation and conciliation;<sup>78</sup> (iv) the elimination of some appeals commonly used to delay judicial procedures, such as the *Agravo Retido* (appeal held in the records for later analysis) and *Embargos Infringentes* (appeal used to request reconsideration in light of a variance or disagreement with the collective decision of the courts); and (v) maintenance of a uniform and stable jurisprudence to avoid unacceptable discrepancies in the results of similar cases.<sup>79</sup> The judge may reject a lawsuit if it is clearly contrary to the jurisprudential positions of the court.<sup>80</sup>

#### IV. Caribbean Community

A. THE CARIBBEAN: REPARATIONS CLAIM

In July 2013, heads of government at the Thirty-Fourth Regular Meeting of the Caribbean Community (CARICOM) in Guyana established a Reparations Commission to pursue claims for reparations for "native genocide and slavery."<sup>81</sup> The commission is led by Dr. Ralph Gonsalves, Prime Minister of St. Vincent and the Grenadines.

---

72. Lei No. 8.046, de 22 de dezembro de 2010 (Braz.).

73. Lei No. 12.744, art. 54-A, de 19 de dezembro de 2012, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], de 20.12.2012 (Braz.).

74. *Id.*

75. Lei No. 5.869, de 11 de janeiro de 1973, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], de 17.01.1973 (Braz.).

76. Lei No. 8.046, art. 998, de 22 de dezembro de 2010 (Braz.).

77. *Id.* art. 334.

78. *Id.* arts. 3, 166.

79. *Id.* art. 520.

80. *Id.* art. 333.

81. Press Release, Caribbean Community (CARICOM) Secretariat, Heads Agree on Reparations Follow-Up Action (July 6, 2013), available at [http://www.caricom.org/jsp/pressreleases/press\\_releases\\_2013/pres147\\_13.jsp?null&prnf=1](http://www.caricom.org/jsp/pressreleases/press_releases_2013/pres147_13.jsp?null&prnf=1).

SPRING 2014

**PUBLISHED IN COOPERATION WITH  
SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

628 THE YEAR IN REVIEW

CARICOM states, including Haiti and Suriname, have hired British law firm Leigh Day to pursue claims against European nations for the trans-Atlantic slave trade.<sup>82</sup> The plaintiffs seek an out-of-court resolution to the matter but will forge ahead with a claim before the International Court of Justice if negotiations are unsuccessful.<sup>83</sup> Leigh Day successfully won compensation from the British Government for Kenyan victims early this year.<sup>84</sup> The claim provides an opportunity to address challenges confronting developing nations on issues of poverty, education, and healthcare. The ensuing dialogue, however, must necessarily engage the epistemic foundations that undergird the issue of reparations.

At the Sixty-Eighth Assembly of the United Nations in September 2013, Dr. Gonsalves presented the case against Britain, France, and the Netherlands, arguing that reparations are due for the “awful legacy of slavery.”<sup>85</sup> The slave trade is the genesis of European imperialism in the Caribbean. The abolition of slavery in the Caribbean began with the Haitian Slave Revolts in 1789,<sup>86</sup> but Britain did not free its slaves in the West Indies until 1834.<sup>87</sup> Slavery was abolished in Dutch-controlled Suriname in 1863.<sup>88</sup> Decolonization began in the 1970s, but the Caribbean continues to struggle due to underdevelopment and dependency on former colonial powers.<sup>89</sup> The CARICOM plaintiffs’ claim is based on the economic impacts faced by the countries today, rather than on reparations for the slave trade itself. The plaintiffs assert that reparations are necessary to achieve the goals of the post-2015 development agenda and are “an integral element of the Community’s development strategy.”<sup>90</sup> Their position is that the limited economic development in the Caribbean has its nexus in the slavery and colonial projects in the region.<sup>91</sup> The claim is “directed toward repairing the damage inflicted by slavery and racism.”<sup>92</sup> Thus, the CARICOM plaintiffs seek a remedy for economic redress rather than compensation for personal injuries.<sup>93</sup> The claim is also premised on international legal principles, namely the

---

82. Stephen Castle, *Seeking Reparations: Putting a Price on Damage of Slavery*, N.Y. TIMES, Oct. 20, 2013, at A4; Laurent Dubois, Op-Ed., *Confronting the Legacies of Slavery*, N.Y. TIMES, Oct. 28, 2013, at A29.

83. Fred Mitchell, Bah. Minister of Foreign Affairs, Statement on Caricom and Reparations for Slavery (Oct. 16, 2013), available at [http://www.thebahamasweekly.com/publish/international/Statement\\_by\\_Fred\\_Mitchell\\_Minister\\_of\\_Foreign\\_Affairs\\_On\\_Caricom\\_and\\_Reparations\\_for\\_Slavery31198.shtml](http://www.thebahamasweekly.com/publish/international/Statement_by_Fred_Mitchell_Minister_of_Foreign_Affairs_On_Caricom_and_Reparations_for_Slavery31198.shtml).

84. *The Mau Mau Claims*, LEIGH DAY, <http://www.leighday.co.uk/International-and-group-claims/Kenya/The-Mau-Mau-claims> (last visited Jan. 19, 2014).

85. Dr. Ralph Gonsalves, Prime Minister of St. Vincent and the Grenadines, Statement at the General Debate of the 68th Session of the United Nations General Assembly (Sep. 27, 2013), available at [http://gadebate.un.org/sites/default/files/gastatements/68/VC\\_en\\_0.pdf](http://gadebate.un.org/sites/default/files/gastatements/68/VC_en_0.pdf).

86. ERIC WILLIAMS, *FROM COLUMBUS TO CASTRO: THE HISTORY OF THE CARIBBEAN*, 237–79 (1970).

87. Tom Leonard & Simon Tomilson, *14 Caribbean Nations Sue Britain, Holland and France for Slavery Reparations That Could Cost Hundreds of Billions of Pounds*, MAIL ONLINE (Oct. 10, 2013, 7:32 AM), <http://www.dailymail.co.uk/news/article-2451891/14-Caribbean-nations-sue-Britain-Holland-France-slavery-reparations.html#ixzz2lOErFnXQ>.

88. *Abolition of Slavery in Suriname & Dutch Antilles Marks 150 Years*, AFR. STUD. LIBR. (June 26, 2013), <http://africanstudieslibrary.wordpress.com/2013/06/26/abolition-of-slavery-in-suriname-dutch-antilles-marks-150-years/>.

89. GLENYS P. SPENCE, *CALIBAN’S BURDEN: APPLICABILITY OF THE CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) TO ST. VINCENT AND THE GRENADINES: A STEP TOWARDS UNIFORMITY, SYNTHESIS, OR INTERPRETIVE INJUSTICE IN INTERNATIONAL CONTRACTS* (2010).

90. Press Release, CARICOM Secretariat, *supra* note 81.

91. *Id.*

92. *Id.*

93. Leonard & Tomilson, *supra* note 87.

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

LATIN AMERICA & THE CARIBBEAN 629

International Convention for the Elimination of All Forms of Racial Discrimination to which all state parties are signatories.<sup>94</sup>

## V. Chile

### A. AMENDMENT TO THE URBANISM AND CONSTRUCTION ACT

Chilean urbanism and construction regulations have been modified throughout the years in an attempt to ensure high standards in construction quality. Act 20,703, the Construction Act,<sup>95</sup> was passed on November 5, 2013, amending the Urbanism and Construction Act,<sup>96</sup> the Municipalities Constitutional Act,<sup>97</sup> and the Real Estate Co-ownership Act.<sup>98</sup>

The Construction Act's main purposes are to (i) improve standards of construction, emphasizing earthquake resistance; (ii) specify the participating parties' registration requirements, duties, and liabilities; and (iii) establish the obligatory use of Works Technical Inspectors (*Inspectores Técnicos de Obra*) in certain construction projects.<sup>99</sup>

Among other provisions, the Construction Act (i) creates the National Registry of Works Technical Inspectors;<sup>100</sup> (ii) grants legal status to the National Registry of Structural Calculation Project Reviewers;<sup>101</sup> (iii) imposes the obligation to include, in the first purchase deed, a roster identifying the designers and builders who are subject to liability;<sup>102</sup> and (iv) if the Regional Secretariat fails to issue a decision regarding a permit or denies a permit without justification within the statutory timeline, reduces by 50 percent the payment ordinarily made to the Municipal Construction's Department. The other 50 percent is to be paid to the Housing Ministry.<sup>103</sup>

### B. FUNDS MANAGEMENT

Aiming to boost Chile's export of financial services, the government submitted a bill to modernize and consolidate existing third-party funds management regulations.<sup>104</sup> The House of Representatives and Senate approved the bill on November 11, 2013.

The bill's main objective is to unify funds regulation in a single legal body, thereby (i) stating symmetrical treatment for the administration of investment funds, mutual funds,

---

94. International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, Jan. 4, 1969, 660 U.N.T.S. 195.

95. Law No. 20703, Noviembre 5, 2013, DIARIO OFICIAL [D.O.] (Chile).

96. Decree Law No. 458, Abril 13, 1976, DIARIO OFICIAL [D.O.] (Chile).

97. Decree with Force of Law No. 1, Ministry of Internal Affairs, Julio 26, 2006, DIARIO OFICIAL [D.O.] (Chile).

98. Law No. 19537, Diciembre 16, 1997, DIARIO OFICIAL [D.O.] (Chile).

99. Mensaje No. 312-359 a S.E. El Presidente de la H. Cámara de Diputados [Message No. 312-359 from the S.E. President to the H. Chamber of Deputies] (Jan. 2, 2012), available at [http://www.senado.cl/app-senado/index.php?mo=tramitacion&ac=getDocto&iddocto=8535&tipodoc=mensaje\\_mocion](http://www.senado.cl/app-senado/index.php?mo=tramitacion&ac=getDocto&iddocto=8535&tipodoc=mensaje_mocion) [hereinafter Message No. 312-359].

100. Law No. 20703, Noviembre 5, 2013, § 1, art. 1, DIARIO OFICIAL [D.O.] (Chile).

101. *Id.* § 1, art. 8.

102. *Id.* § 2, no. 2(e).

103. *Id.* § 2, no. 6(b).

104. Message No. 312-359, *supra* note 99.

SPRING 2014

**PUBLISHED IN COOPERATION WITH  
SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

630 THE YEAR IN REVIEW

foreign capital funds, and housing funds;<sup>105</sup> (ii) promoting foreign investment; (iii) reducing costs associated to funds management; and (v) improving access to fundraising for risk capital and for medium and small companies.<sup>106</sup>

The bill would modify existing regulations by (i) replacing an exhaustive list of permitted investments with provisions allowing freedom of choice subject to additional supervision by the Securities Superintendence;<sup>107</sup> (ii) modifying the tax regime applicable to foreign capital funds by granting an exemption from applicable income tax over the sale of quotes when 80 percent of a fund's resources are destined to foreign investment for at least 330 days;<sup>108</sup> and (iii) providing that only administrators with an investment portfolio comprised of five hundred or more clients, or with a portfolio valued over Chilean Unidad de Fomentos (CLF) 10,000, shall be supervised by the Securities Superintendence.<sup>109</sup>

C. NEW INSURANCE AGREEMENT ACT

On May 9, 2013, the New Insurance Agreement Act (NIAA) was enacted,<sup>110</sup> updating a regulation dating from 1865.<sup>111</sup> The NIAA considers the insured to be a consumer and insurance companies to be expert risk evaluators and mass contracting entities. The NIAA aims to minimize the information asymmetry between the companies and consumers by imposing certain rules, requirements, and information duties on insurance companies.<sup>112</sup>

The NIAA's amendments provide that (i) an insurance policy is a consensual agreement;<sup>113</sup> (ii) NIAA content is mandatory, unless otherwise provided therein;<sup>114</sup> (iii) insurance companies are legally obligated to properly advise insureds who contract a policy directly from them or their direct sales agents;<sup>115</sup> (iv) the insurance companies have a duty to ask questions to evaluate risks, making the insured responsible for providing only the requested information;<sup>116</sup> (v) in case of multiple causes of an insured event, insurance companies are obligated to respond if any one of them is covered by the relevant policy;<sup>117</sup> (vi) the existence of multiple insurance policies covering the same risk or event allows the insured to select the policy under which the relevant claim will occur;<sup>118</sup> and (vii) disputes arising from insurance policies shall be set by arbitration, unless the disputed amount is

---

105. Law No. 18815, Julio 29, 1989, DIARIO OFICIAL [D.O.] (Chile); Law No. 18045, Octubre 22, 1981, DIARIO OFICIAL [D.O.] (Chile); Law No. 19281, Junio 5, 2007, DIARIO OFICIAL [D.O.] (Chile); Law No. 18657, Septiembre 29, 1987, DIARIO OFICIAL [D.O.] (Chile).

106. Message No. 312-359, *supra* note 99.

107. *Id.* arts. 59, 61.

108. *Id.* art. 82.

109. *Id.* art. 97.

110. Law No. 20667, Abril 15, 2013, DIARIO OFICIAL [D.O.] (Chile).

111. *See generally* CÓDIGO COMERCIO [CÓD. COM.] (Chile).

112. Law No. 20667, Mayo 9, 2013, DIARIO OFICIAL [D.O.] (Chile).

113. *Id.* art. 515.

114. *Id.* art. 542.

115. *Id.* art. 529.

116. *Id.* art. 521.

117. *Id.* art. 533.

118. *Id.* art. 556.

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

LATIN AMERICA & THE CARIBBEAN 631

less than CLF 10,000, in which case the insured is allowed to resort to the ordinary courts.<sup>119</sup>

## VI. Colombia

### A. TRADE AGREEMENTS

On July 16, 2013, the Columbian Congress issued Law 1669 of 2013, ratifying the Free Trade Agreement (FTA) with the European Union (EU).<sup>120</sup> While ratification proceedings are completed within the EU countries, provisional application of the FTA began on August 1, 2013.

The FTA signed with Korea is still pending ratification. The Senate approved the text on November 12, 2013, but approval from the House of Representatives is still pending.<sup>121</sup> During 2013, Colombia also signed FTAs with Israel, Panama, and Costa Rica. Furthermore, the Pacific Alliance FTA, including Mexico, Chile, and Peru, is under legal review. Finally, negotiations of FTAs with Japan and Turkey are still ongoing.<sup>122</sup>

### B. PANAMA REQUESTED CONSULTATIONS WITH COLOMBIA BEFORE THE WORLD TRADE ORGANIZATION

Panama requested consultations with Colombia before the World Trade Organization (WTO) on June 18, 2013.<sup>123</sup> According to Panama, the compound tariff established by the Colombian government over the importation of textiles, apparel, and footwear violates WTO law, including GATT Articles II, VIII, and X. The disputed measure entered into force on March 1, 2013,<sup>124</sup> and was implemented in order to deter technical smuggling and underpriced imports, which create unfair competition for Colombian products. The measure established a 10 percent ad valorem duty and a specific five U.S. duty for each kilogram of textiles and for each pair of shoes.<sup>125</sup> The measure was also controversial among the private sector in Colombia. A WTO panel was established on September 25, 2013, to address this matter.<sup>126</sup>

---

119. *Id.* art. 543.

120. L. 1669, julio 16, 2013, DIARIO OFICIAL [D.O.] (Colom.), available at <http://wsp.presidencia.gov.co/Normativa/Leyes/Documents/2013/LEY%201669%20DEL%2016%20DE%20JULIO%20DE%202013.pdf>.

121. *South Korea, Colombia to Implement Free-Trade Agreement*, UNITED PRESS INT'L (July 8, 2013, 1:37 AM), [http://www.upi.com/Business\\_News/2013/07/08/South-Korea-Colombia-to-implement-free-trade-agreement/UPI-84671373261832/](http://www.upi.com/Business_News/2013/07/08/South-Korea-Colombia-to-implement-free-trade-agreement/UPI-84671373261832/).

122. See Carlos F. Méndez & José F. Mafla, *Customs-Year in Review*, BRIGARD & URRUTIA (Dec. 18, 2013, 12:47 PM), <http://bu.com.co/en/newsandpublications/219>.

123. *Panama Files Dispute Against Colombia on Textiles Measures*, WORLD TRADE ORG. (June 18, 2013), [http://www.wto.org/english/news\\_e/news13\\_e/ds461rfc\\_18jun13\\_e.htm](http://www.wto.org/english/news_e/news13_e/ds461rfc_18jun13_e.htm).

124. L. 0074, enero 23, 2013, DIARIO OFICIAL [D.O.] (Colom.).

125. See Request for Consultations by Panama, *Colombia—Measures Relating to the Importation of Textiles, Apparel, and Footwear*, WT/DS461/1 (June 20, 2013).

126. *Panels Established at the Request of Panama, Honduras, Mexico and Canada*, WORLD TRADE ORG. (Sept. 25, 2013), [http://www.wto.org/english/news\\_e/news13\\_e/dsb\\_25sep13\\_e.htm](http://www.wto.org/english/news_e/news13_e/dsb_25sep13_e.htm).

SPRING 2014

**PUBLISHED IN COOPERATION WITH  
SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

632 THE YEAR IN REVIEW

C. NEW CUSTOMS STATUTE

A new customs statute was expected during 2013. The National Customs Authority (DIAN, in Spanish) presented the final text on October 17, 2013.<sup>127</sup> But on October 21, a judge suspended issuance of the statute because DIAN did not fulfill the required prior consultation process with the ethnic communities with respect to loading and unloading operations in anchorage areas near Cartagena.<sup>128</sup> According to the decision, issuance of the customs statute would violate the constitutional right of ethnic communities to prior consultation.<sup>129</sup> Therefore, the issuance of the new customs statute will be delayed until this process is satisfied.<sup>130</sup>

D. TRADE REMEDIES

This was an active year at the Colombian Deputy Directorate for Trade Practices at the Ministry of Trade, Industry, and Commerce. The Ministry initiated several antidumping and safeguards investigations. Antidumping investigations included imports of aluminum profiles originating in China and Venezuela, PVC films originating in China and Korea, and galvanized sheets, steel wire, and wooden boards originating in China. Antidumping measures were established over the import of aluminum profiles and PVC films. Additionally, safeguard investigations of imports of corrugated sheets, hot-rolled wire, iron profiles, steel angles, iron bars, and tubing and casing were conducted. Final determinations of these investigations are expected during 2014.<sup>131</sup>

E. TAX REFORM

Law 1607,<sup>132</sup> the most recent tax reform in Colombia, became effective in 2013. Law 1607 includes a broader regulation of mergers and spin-offs. The reforms provide for stricter requirements for the imposition of taxes on mergers and spin-offs and a much more complex set of tax rules. But the practical application of this regulation is yet to be determined.<sup>133</sup>

---

127. Resolución Número 000214, octubre 17, 2013, 48947 DIARIO OFICIAL [D.O.] (Colom.).

128. See *DIAN Ordenó a Gobierno Suspender el Proyecto Sobre el Cargue por Fondo* [DIAN Ordered the Government to Suspend the Project for Funding Charge], ZONACERO (Jan. 21, 2014), <http://zonacero.info/index.php/zona-caribe/46673-dian-ordeno-a-gobierno-suspender-el-proyecto-sobre-el-cargue-y-descargue-por-fondo>.

129. See CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 330.

130. See *La Unidad Administrativa Especial Dirección de Impuestos y Aduanas Nacionales DIAN* [Special Administrative Unit Directorate and National Customs Tax Dian], DIRECCIÓN DE IMPUESTOS Y ADUANAS NACIONALES, [http://www.dian.gov.co/DIAN/12SobreD.nsf/pages/Acatando\\_fallo\\_de\\_tutela\\_21\\_octubre\\_20013](http://www.dian.gov.co/DIAN/12SobreD.nsf/pages/Acatando_fallo_de_tutela_21_octubre_20013) (last updated Nov. 6, 2013).

131. See *Perfiles y Tubos de Aluminio* [Aluminum Profiles and Tubes], MINISTERIO DE COMERCIO, INDUSTRIA Y TURISMO (Feb. 15, 2012), <http://www.mincit.gov.co/publicaciones.php?id=1833>; *Policloruro de Venilo* [Polyvinyl Chloride], MINISTERIO DE COMERCIO, INDUSTRIA Y TURISMO (Feb. 15, 2012), <http://www.mincit.gov.co/publicaciones.php?id=1834>; *Soportes de Tapete Tejido en Polipropileno* [Supports Mouse Polypropylene Fabric], MINISTERIO DE COMERCIO, INDUSTRIA Y TURISMO (Feb. 15, 2012), <http://www.mincit.gov.co/publicaciones.php?id=1835>; *Vajillas y Piezas Suetas de Cerámica* [China and Pottery Loose], MINISTERIO DE COMERCIO, INDUSTRIA Y TURISMO (Feb. 15, 2012), <http://www.mincit.gov.co/publicaciones.php?id=1836>.

132. L. 1607, diciembre 26, 2012, DIARIO OFICIAL [D.O.] (Colom.).

133. Juan Pablo Godoy & Mónica Inés Hernández, *Revista de Orientación Tributaria Impuestos*, 180 TAXING ORIENTATION MAGAZINE TAXES 25–30, 25 (Nov.–Dec. 2013).

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

LATIN AMERICA & THE CARIBBEAN 633

The new reforms include regulation over the fraudulent and abusive use of legal schemes for the purpose of avoiding taxes. This regulation has somewhat limited the freedom of the private actors in the structuring of transactions; while allowing deals seeking the most effective tax structure correlated to the business purposes, this regulation forbids the creation of tax structures designed with the sole purpose of obtaining a tax benefits beyond those allowed by the law.<sup>134</sup>

F. CASE LAW DEVELOPMENTS APPLICABLE TO SHAREHOLDER AGREEMENTS

A new procedural code (applicable in 2012) allows the Colombian authority for companies (*Superintendencia de Sociedades*) to decide issues in relation to shareholder agreements. In 2013, an important decision was issued in relation to the enforceability and applicability of shareholder agreements. The decision indicated that shareholder agreements are effective against the company only in those matters concerning voting agreements and only if certain formal requirements are met, such as the company's registration of the shareholder agreement and indication that none of the parties to the agreement are also managers. As a consequence, the Superintendencia held decisions taken by the shareholders' assembly in breach of a shareholder agreement can be challenged by disregarding those votes that breach the agreement. If, after disregarding the breaching votes, the required majorities are not met, decisions taken on such assembly would be invalid.<sup>135</sup>

VII. Ecuador

A. AUTHORIZATION FOR OIL EXPLOITATION IN ITT BLOCK

At the beginning of his term as president, Rafael Correa sponsored the Yasuni ITT Initiative,<sup>136</sup> intending to attract support to avoid oil exploitation in the Yasuni ITT field in exchange for monetary contributions from the international community.<sup>137</sup> The ITT field is a very important oil field, capable of providing an estimated 846 million barrels of oil per day—approximately 20 percent of the country's oil reserves.<sup>138</sup> But after failing to receive a sufficient amount (U.S. 11,321,172 in the United Nations Development Program-managed trust and U.S. 2,041,341 in the Ecuadorian Yasuni ITT trust),<sup>139</sup> President Correa ordered the liquidation of the project and requested permission from the National

---

134. Mauricio Piñeros Perdomo, *Revista de Orientación Tributaria Impuestos*, 180 TAXING ORIENTATION MAGAZINE TAXES 10–13, 11 (Nov.–Dec. 2013).

135. Superintendencia de Sociedades [Superintendence of Companies], julio 11, 2013, José Miguel Mendoza, Sentencia, Número del proceso 2012-801-053, available at [http://media.wix.com/ugd/ec4bc2\\_89d23b5296c8897a27b4c7564759e51c.pdf](http://media.wix.com/ugd/ec4bc2_89d23b5296c8897a27b4c7564759e51c.pdf) (Colom.).

136. Julia Henrichmann, *Protección del Parque Nacional Yasuni: ¿bendición o maldición?*, Terra (Jan. 22, 2013, 10:14 AM) <http://noticias.terra.com.mx/cambio-climatico/proteccion-del-parque-nacional-yasuni-bendicion-o-maldicion,ecf3803c90b5c310VgnCLD2000000ec6eb0aRCRD.html>.

137. See *¿Qué es la Iniciativa?* [What is the initiative?], Yasuni-ITT, <http://yasuni-itt.gob.ec/quees.aspx> (last visited Jan. 16, 2013).

138. *Rafael Correa Pone Fin a la Iniciativa Yasuni ITT*, EL UNIVERSO (Aug. 15, 2013, 8:17 PM), <http://www.eluniverso.com/noticias/2013/08/15/nota/1294861/rafael-correa-pone-fin-iniciativa-yasuni-itt>.

139. Decreto Ejecutivo [Executive Decree] No. 74 de Rafael Correa Delgado, 15 de agosto de 2013 (Ecuador).

SPRING 2014

PUBLISHED IN COOPERATION WITH  
SMU DEDMAN SCHOOL OF LAW

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

634 THE YEAR IN REVIEW

Assembly to exploit non-renewable resources in national parks and other natural protected areas.<sup>140</sup>

Following an intense debate within Ecuadorian society, the National Assembly decided to authorize the oil and gas activity in the ITT field.<sup>141</sup> This authorization was conditioned on limiting activity to 0.001 percent of the national park area and on investing the money received into the promotion of new industries, technology, and human development.<sup>142</sup>

**B. REFORMS IN MINING ACT**

On July 16, 2013, changes to the four-year-old<sup>143</sup> Ecuadorian Mining Act were enacted.<sup>144</sup>

First, fewer required permits are required to begin mining activities. Most permits were replaced with a sworn declaration from the company responsible for the mining concession. But environmental and water use permits are still required.<sup>145</sup>

Additionally, the royalty regime was modified. The licensee must pay a royalty of up to 8 percent for gold, silver, and copper, and no less than 5 percent for other minerals.<sup>146</sup> This royalty is on top of other taxes under Ecuadorian law, most notably the extraordinary income tax, which requires the payment of 70 percent of the income obtained from the increase of non-renewable resources.<sup>147</sup>

Finally, the reforms establish a process to regulate the termination of mining contracts. The process includes a provision clarifying that after termination for a violation of the contract, all the machinery and other goods related to the exploitation of the mineral must become government domain.<sup>148</sup>

---

140. CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR [CONST.] 2008, art. 407 (“Activities for the extraction of nonrenewable natural resources are forbidden in protected areas and in areas declared intangible assets, including forestry production. Exceptionally, these resources can be tapped at the substantiated request of the President of the Republic and after a declaration of national interest issued by the National Assembly, which can, if it deems it advisable, convene a referendum.”).

141. Exposición de Motivos del Pleno de la Asamblea Nacional [Explanatory Memorandum of the Plenary of the National Assembly] (Oct. 3, 2013), available at [http://documentacion.asambleanacional.gob.ec/alfresco/d/d/workspace/SpacesStore/19134869-b3e2-4868-a430-7b23e63fadfb/Resoluci%c3%b3n%20del%20Pleno%20\(Yasun%c3%ad\)%20\(03-10-2013\).pdf](http://documentacion.asambleanacional.gob.ec/alfresco/d/d/workspace/SpacesStore/19134869-b3e2-4868-a430-7b23e63fadfb/Resoluci%c3%b3n%20del%20Pleno%20(Yasun%c3%ad)%20(03-10-2013).pdf) (Ecuador).

142. *Id.*

143. The Mining Law was enacted on Jan. 29, 2009, when it was published in the Registro Oficial (Official Register). Law No. 045, Ley de Minería [Mining Law], Enero 29, 2009, REGISTRO OFICIAL NO. 517 (Supp.) (Ecuador).

144. Expídese la Ley Orgánica Reformatoria a la Ley de Minería [Law Amending the Law on Mining], julio 16, 2013, REGISTRO OFICIAL NO. 37 (Second Supp.) (Ecuador).

145. *Id.* art. 3.

146. *Id.* art. 18.

147. Arts. 165, 167, 170, Ley Reformatoria para la Equidad Tributaria del Ecuador [Law Amending the Ecuadorian Tax Equity Act], diciembre 29, 2007, REGISTRO OFICIAL NO. 242 (Third Supp.) (Ecuador).

148. *Id.* arts. 20–21.



**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

LATIN AMERICA & THE CARIBBEAN 635

C. COMMUNICATIONS ACT

The new Communications Act<sup>149</sup> became law despite strong criticism from different groups.<sup>150</sup> The law includes the following important changes:

- It creates two new government agencies to oversee media and journalists' work: the Communications Superintendency, which investigates infringements to the law and imposes penalties;<sup>151</sup> and the Regulation and Development of Communication Council, which is tasked with enacting regulations and policies.<sup>152</sup>
- Three types of media may exist in Ecuador: government media, private media, and community media (administered by NGOs and other social organizations).<sup>153</sup> Each type of media can control up to a third of the radio spectrum.<sup>154</sup>
- It establishes the specific circumstances under which the President can suspend the Freedom of Information Act.<sup>155</sup>

D. REFORMS TO PUBLIC PURCHASES ACT

Several important reforms to the Public Purchases Act were enacted on October 14, 2013,<sup>156</sup> including the creation of a new agency (SERCOP) to manage and control the technology platform that processes most government purchases.<sup>157</sup> SERCOP is also authorized to investigate irregularities in the purchases processes and take necessary actions.<sup>158</sup> The act also obligates government institutions and agencies to maintain a preference for Ecuadorian suppliers and products.<sup>159</sup>

Finally, the act modifies the role of judges in expropriation cases. Under Article 16, judges are not allowed to freely determine the price of the estate property harmed by expropriation, but must accept the value previously calculated by municipal authorities.<sup>160</sup>

**VII. Trans-Pacific Partnership and Latin America**

As 2013 comes to an end, the countries of Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Viet-

---

149. Ley Orgánica de Comunicación [Communication Law], junio 25, 2013, REGISTRO OFICIAL NO. 22 (Third Supp.) (Ecuador).

150. *Rafael Correa Aprobó la Ley de Comunicación*, DIARIO EL HOY (June 21, 2013, 6:09 PM), <http://www.hoy.com.ec/noticias-ecuador/rafael-correa-aprobo-la-ley-de-comunicacion-584219.html>.

151. Communication Law, art. 56 (Ecuador).

152. *Id.* art. 49.

153. *Id.* art. 70.

154. *Id.* art. 106.

155. *Id.* art. 77.

156. Ley Orgánica Reformativa a la Ley Orgánica del Sistema Nacional de Contratación Pública [Law Amending the Public Purchases Act], octubre 14, 2013, REGISTRO OFICIAL NO. 100 (Second Supp.) (Ecuador).

157. *Id.* art. 2.

158. *Denuncian Que Reforma a la Ley de Contratación Pública Atenta Contra Gobiernos Autónomos*, LA REPÚBLICA (July 30, 2013), <http://www.larepublica.ec/blog/economia/2013/07/30/denuncian-que-reforma-a-ley-de-contratacion-publica-atenta-contra-gobiernos-autonomos>.

159. Law Amending the Public Purchases Act, art. 4 (Ecuador).

160. *Id.* art. 16.

SPRING 2014

**PUBLISHED IN COOPERATION WITH  
SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

636 THE YEAR IN REVIEW

nam<sup>161</sup> are closer than ever to finalizing the landmark Trans-Pacific Partnership (TPP).<sup>162</sup> A testament to the efforts of negotiators and trade ministers, the strides taken in 2013 demonstrate the successful integration and joint commitment of a diverse group of nations.

Though these efforts are well documented, the contents of these efforts are not. Indeed, the opacity behind the negotiations has been the subject of international criticism and has led to widespread speculation behind the nature of the agreement. Media, public and private entities, and government officials worldwide have called for greater transparency and signaled a lack of support in the continuing negotiations.<sup>163</sup> This section reviews the interests and goals of Chile and Peru and the positions taken by their trade authorities therein.

A. CHILE

Unlike any other country in the TPP negotiations, Chile has active FTAs with every other TPP member. Critics to the negotiations astutely observe that if Chile has tailored previous trade agreements to their interests, then why would they jeopardize these agreements for unknown and perhaps stricter concessions? When Chile first entered the agreement, the P4 proposal—as it was known at the time—contained substantially different provisions than the proposed TPP. Specifically, the TPP proposal is widely believed to contain specific intellectual property demands that will conflict with Chile's standing FTAs.<sup>164</sup>

With an upcoming presidential election and the TPP deadline rapidly approaching, Chile's participation in the TPP is unsure at best. The rejection of the TPP could be the platform of one presidential candidate or the last objective of an executive office before a change in power.

B. PERU

As Peru has FTAs with many TPP countries, Peru and Chile share a similar perspective. In a study conducted by the Asian Development Bank on the estimated impact of the TPP, Peru and Chile are expected to experience a negative impact on their gross domestic product.<sup>165</sup> Accordingly, in the recently leaked TPP agreement, Peru and Chile share more than a handful of overlapping positions on the negotiation table. Peru and Chile do maintain one substantial difference, however; unlike Chile, Peru and the United States

---

161. Statement of the Ministers and Heads of Delegation for the Trans-Pacific Partnership Countries (Dec. 10, 2013), available at <http://www.ustr.gov/tpp>.

162. See Joe Wolverton II, *Trans-Pacific Partnership Ready for Christmas Delivery?*, NEW AM., (Nov. 13, 2013, 9:41 AM), <http://www.thenewamerican.com/economy/item/16929-trans-pacific-partnership-ready-for-christmas-delivery>.

163. Annie Lowrey, *House Stalls Trade Pact Momentum*, N.Y. TIMES, Nov. 12, 2013, at B1.

164. Sean Flynn, *Chile Threatens to Pull Out of TPP because of US IP demands*, InfoJustice.org (May 12, 2012), <http://infojustice.org/archives/21414>.

165. Moran Zhang, *Trans-Pacific Partnership (TPP): A Trade Agreement You Should Care About*, INT'L BUS. TIMES, (Oct. 15, 2013, 6:19 AM), <http://www.ibtimes.com/trans-pacific-partnership-tpp-trade-agreement-you-should-care-about-1425468>.

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

LATIN AMERICA & THE CARIBBEAN 637

have negotiated many specific intellectual provisions within their FTA, and thus Peru has much less to lose.<sup>166</sup>

---

<sup>166</sup> Henry Farrell, *The United States is Isolated in the Trans-Pacific Partnership Negotiations*, WASH. POST (Nov. 18, 2013, 10:40 AM), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/11/18/the-united-states-is-isolated-in-the-trans-pacific-partnership-negotiations/>.

SPRING 2014

**PUBLISHED IN COOPERATION WITH  
SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

**PUBLISHED IN COOPERATION WITH**  
**SMU DEDMAN SCHOOL OF LAW**