

# Latin America and the Caribbean

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## I. Argentina

### A. NEW SECURITIES LAW

The Argentine Congress passed the new Securities Law on November 29, modifying the public offering regime set forth by Law No. 17,811.<sup>1</sup> Overall, it did not introduce major changes, except for the powers conferred to the Argentine Securities Commission (CNV, in Spanish).

The CNV can now (1) appoint supervisors with veto powers over the board of directors and (2) separate the board of directors for a period of 180 days when the CNV believes that the interests of the minority shareholders or security holders were infringed. The Law empowers the CNV to authorize, monitor, act as disciplinary authority, and regulate all participants in the capital market.

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1. Law No. 26831, Dec. 28, 2012 (Arg.), available at <http://www.infoleg.gov.ar/infolegInternet/verNorma.do?id=206592>.

## B. THE NEW HYDROCARBONS SOVEREIGNTY REGIME

Law 26,741, enacted on May 4, declared that the federal government had achieved self-sufficiency in hydrocarbons supply.<sup>2</sup> It also declared that the exploration, exploitation, industrialization, transport, and commercialization of hydrocarbons were of national public interest, subjecting 51 percent of the shares of YPF, S.A. and Repsol YPF Gas, S.A. to expropriation.<sup>3</sup>

The Executive Branch issued Decree 1277/2012 in July.<sup>4</sup> The Decree approves the Rules of the Argentine Hydrocarbons Sovereignty Regime (the Rules) and abrogates certain sections of Decrees 1055/1989, 1212/1989, and 1589/1989 — the pillars of the deregulation of the hydrocarbons sector — thus reaffirming the intention of the Executive to significantly increase its intervention in the hydrocarbons sector.<sup>5</sup> The Rules impose several new obligations on hydrocarbons industry players, such as registering in a National Registry of Investments in Hydrocarbons and providing the technical, quantitative, and economic information to evaluate performance.

## C. NEW EXTENSION OF THE STATE OF EMERGENCY

The Argentine Congress extended the state of emergency for another two years and delegated vast legislative powers to the Executive Branch. Pursuant to the extension, all the laws and decrees that declared a state of emergency in the social, economic, financial, administrative, exchange matters, public contracts, sanitary, occupational, and food fields remain in force until December 31, 2013.

The state of emergency was initially declared in 2002, and Congress has since successively extended it. The law stated that public finances had been correctly managed but that, in light of the international economic crisis, it was advisable to extend the state of emergency for another two years.

## D. NEW IMPORT RESTRICTIONS IN ARGENTINA

The Federal Tax Authority enacted Regulation 3252 on January 10, 2012, which created the Affidavit-Prior-to-Import system.<sup>6</sup> Under this regulation, importers must file an Affidavit before issuing a purchase order, production order, or similar document to its foreign counterparty. All system agencies are entitled to raise objections to the relevant import based on this information. The importer will be limited from issuing a purchase order before obtaining approval of its Affidavit by all the agencies.

Furthermore, Regulation 3276, published on February 22, establishes that Argentine residents who contract services from foreign residents must file an affidavit prior to services if the contract exceeds a certain amount (US \$100,000 per year) or if the amount is

2. Law No. 26741, May 4, 2012, art. 7 (Arg.), available at <http://www.boletinoficial.gov.ar/Inicio/In-dex.castle?s=01&idAviso=10192668&IdRubro=438&f=20120507>.

3. *Id.* art. 8.

4. See Decree No. 1277/2012, July 27, 2012, [37,447] B.O. 1. (Arg.).

5. See Decree No. 1589/1989, Jan. 4, 1990, [26,794] B.O. 11 (Arg.); Decree No. 1212/1989, Nov. 14, 1989, [26,760] B.O. 6 (Arg.); Decree No. 1055/1989, Oct. 12, 1989, [26,738] B.O. 10 (Arg.).

6. See Regulation 3252/2012, Jan. 10, 2012 (Arg.), available at <http://www.infoleg.gov.ar/infolegInternet/anexos/190000-194999/192595/norma.htm>.

not detailed.<sup>7</sup> Argentine residents who render services to foreign residents must also file an affidavit.

#### E. FEDERAL REGISTRY OF NON-MANUFACTURED CAPITAL GOODS

Resolution No. 9/2012, published on March 1, 2012, created the Federal Registry of Capital Goods Not Manufactured in Argentina and established the first public consultation to determine the existence of national production of certain goods.<sup>8</sup> This resolution was passed pursuant to Mercosur (*Mercado Común del Sur*) rules, principally Decision No. 34/2003 of the Mercosur's Common Market Council, which created a Common Regime for the Import of Capital Goods Not Manufactured within Mercosur. The goods included in this Common Regime are subject to reduced import tariffs. For a State to include any goods in the Common Regime, it must file an application with Mercosur's Trade Commission, following a procedure by which other member States may object to such request.

#### F. NEW REGULATIONS CONCERNING THE PURCHASE OF FOREIGN CURRENCY

Communication A 5318 of the Argentine Central Bank (effective as of July 6, 2012), and Communication A 5330 (effective as of July 27, 2012) restrict — indefinitely — companies and individuals from purchasing foreign currency or accumulating funds in such currency.<sup>9</sup> Consequently, residents are no longer capable of obtaining foreign currency for savings, but can for the purpose of travelling abroad.

Before the issuance of such regulations, Communication A 5236 of the Argentine Central Bank permitted legal entities and individuals to purchase foreign currency for the following purposes: purchase of travelers' checks, loans granted to non-residents, foreign direct investments made by residents, foreign portfolio investments made by individuals or legal entities, foreign investments made by residents, and for savings.<sup>10</sup>

As a result of the new regulation commercial relationships between private parties have been affected. In particular, the main concern is how to enforce contractual clauses which contemplate the performance of obligations in foreign currency.

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7. See Regulation 3276/2012, Feb. 22, 2012 (Arg.), available at <http://www.infoleg.gov.ar/infolegInternet/anexos/190000-194999/194242/texact.htm>.

8. See Resolution 9/2012, Mar. 1, 2012 (Arg.), available at <http://www.infoleg.gov.ar/infolegInternet/anexos/190000-194999/194428/norma.htm>; *Federal Registry of Non-Manufactured Goods*, MARVAL NEWS (Mar. 30, 2012), <http://www.marval.com.ar/Publicaciones/MarvalNews/ArticuloMN/tabid/96/language/en-US/Default.aspx?ItemID=2223>.

9. See Communication A 5318/2012, July 5, 2012, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/200000-204999/200258/norma.htm>; Communication A 5330/2012, July 26, 2012, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/200000-204999/201213/norma.htm>.

10. See Communication A 5236/2011, Oct. 27, 2011, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/190000-194999/190253/norma.htm>.

## II. Bolivia

The Bolivian Legislature passed Law 300, the Mother Earth and Integral Development for Living Well Framework Law (Mother Earth Law) on October 15, 2012.<sup>11</sup> Its objective is to establish the “foundation for integral development in harmony and balance with Mother Earth to live well, ensuring the continuity of the regenerative capacity of the components and systems of life of Mother Earth, . . . [and] the basis for the planning, management, and public investment.”<sup>12</sup> The Mother Earth Law is a follow-up to the Rights of Mother Earth Law of 2010, which recognizes Mother Earth as a collective subject of public interest with protected rights.<sup>13</sup>

The Mother Earth Law lays the groundwork for significant regulation in the following sectors:

- (1) Agriculture. The Law prohibits the introduction, production, use, release into the environment and commercialization of seeds genetically modified in Bolivian territory.<sup>14</sup> The Law also calls for the development of procedures for phasing out existing cultivation of such seeds.<sup>15</sup>
- (2) Forestry. The Law prohibits the development of forests unless such development projects are for the “national interest and national benefit.”<sup>16</sup>
- (3) Mining/Hydrocarbons. The Law calls for the establishment of measures requiring companies conducting mining and hydrocarbons projects to restore ecosystems and mitigate damages.<sup>17</sup> It also calls for the establishment of procedures to hold such companies liable for any irreversible environmental damage they have caused.<sup>18</sup>
- (4) Water. The Law provides that all industrial and extractive activities involving the use of water must implement processes to minimize contamination.<sup>19</sup> In addition, water cannot be privately appropriated or commoditized.<sup>20</sup>
- (5) Energy. The Law sets forth a requirement that a percentage of the energy used in the national grid come from renewable alternative energy sources.<sup>21</sup> The Law also

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11. Emily Achtenberg, *Earth First? Bolivia's Mother Earth Law Meets the Neo-Extractivist Economy*, N. AM. CONGRESS ON LATIN AM. (Nov. 16, 2012), <https://nacla.org/blog/2012/11/16/earth-first-bolivia%E2%80%99s-mother-earth-law-meets-neo-extractivist-economy>.

12. Ley Marco De La Madre Tierra y Desarrollo Integral Para Vivir Bien [Mother Earth and Integral Development for Living Well Framework Law], Law No. 300, 15 de Octubre de 2012, art. 1 (Bol.) [hereinafter Mother Earth Law]. The Law defines “Living Well” as the “cultural alternative to capitalism and modernity” that is rooted in the worldview of indigenous communities. *Id.* art. 5. “It is achieved collectively, complementarily and in solidarity, in its implementation integrating, among other aspects, the social, cultural, political, economic, ecological and emotional, to allow a harmonious encounter between all beings, components and resources of Mother Earth.” *Id.*

13. Ley de Derechos de Madre Tierra [Rights of Mother Earth Law], Law 071, 21 de Diciembre de 2010 (Bol.).

14. Mother Earth Law art. 24.

15. *Id.*

16. *Id.* art. 25. The Law does not define “national interest and public interest.”

17. *Id.* art. 26.

18. *Id.*

19. *Id.* art. 27.

20. *Id.*

21. *Id.* art. 30. The Law does not specify the percentage.

calls for renewable alternative energy development, and incentives for its production and domestic use, with priority on solar, wind, and micro-hydroelectric energy.<sup>22</sup>

The precise parameters of this framework will not be clear until implementing regulations are enacted. No timeline currently exists for such enactment. It is possible that the Law will be modified before such regulations are drafted, particularly with regard to the ban on genetically modified (GM) seeds. Soy farmers have been especially vocal critics of the Law, as soy is one of Bolivia's main exports, and the majority of soy grown in Bolivia uses GM seeds.

### III. Brazil

#### A. EQUAL PAY FOR WOMEN

In March 2012, the Brazilian Senate approved Bill No. 130/2011, which seeks to assure equal opportunities and treatment of men and women in employment.<sup>23</sup> The World Bank has reported that Brazilian women are paid only 70 percent of what men earn for equivalent work.<sup>24</sup> Brazil's Institute of Geography and Statistics has likewise found that a woman is compensated 28 percent less than a man.<sup>25</sup> In 2011, the monthly median income of female workers was US \$735.20 for women, compared to US \$1,016.30 for men.<sup>26</sup>

The Bill would add a new section to article 401 of Brazil's Consolidation of the Laws of Work, subjecting an employer violating Subsection III of Article 373-A regarding wages, to a fine of five times the wage difference accrued through the woman's engagement. Subsection III prohibits consideration of sex, age, color, and family status in the determination of wages, professional education opportunities, and job promotion.

The Bill's imposition of an employer penalty for unequal wages is seen as an important and positive step towards closing the gender wage gap. But lawyers advise that the burden of proof will fall on women who will be required to produce evidence of wage discrimination in court. Before issuing a ruling, labor judges would need to analyze a series of factors — including differences in qualification and levels of technical expertise, productivity, and performance — that employers will likely present to justify wage differences. Some employers have asserted that the Bill would have the perverse effect of reducing employment opportunities for women.

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22. *Id.*

23. Diego Pero Ovalle & Juan Pablo de la Maza Guzman, *Newsletter Legal Developments in Latin America*, ABA SECTION OF INT'L LAW, 4 (Feb.-Mar. 2012), available at <http://meetings.abanet.org/webupload/com-mupload/IC830000/newsletterpubs/LALDFeb-Mar2012.pdf>.

24. WORLD BANK, *ENGENDERING DEVELOPMENT* 56 (2001).

25. *Monthly Employment Survey - PME - New Methodology*, INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA [BRAZ. INST. GEOGRAPHY & STATISTICS] (Jan. 26, 2012), [http://www.ibge.gov.br/english/pressidencia/noticias/noticia\\_visualiza.php?id\\_noticia=2074&id\\_pagina=1](http://www.ibge.gov.br/english/pressidencia/noticias/noticia_visualiza.php?id_noticia=2074&id_pagina=1).

26. *Id.*

## B. INTERPRETATION OF PRECEDENT NO. 435

On July 12, 2012, Brazil's Superior Tribunal de Justiça (STJ) revisited the substance of its Súmula no. 435 of April 14, 2010, which states: "An enterprise that ceases to function at its tax domicile, without communication to the competent authorities, is presumed irregularly dissolved, justifying the redirection of tax enforcement to the managing shareholder."<sup>27</sup> Súmula no. 435 is binding precedent.

In its current interpretation of Súmula no. 435, however, the STJ finds that simple failure of an enterprise to notify the competent authorities of the cessation of its operations at its registered address is not by itself sufficient to presume the enterprise's irregular dissolution and hence the transfer of its tax liability to the managing shareholder. Rather, STJ Judge Napoleão Nunes Maia Filho observed in analyzing an appeal filed by the Federal Revenue Department, that such a transfer would require the Revenue Department to provide evidence of a culpable act or omission of the shareholder in connection with the activity giving rise to the tax liability.<sup>28</sup>

## C. NEW ANTITRUST LAW IMPROVES M&amp;A REVIEW PROCESS

Although the CADE has existed for almost half a century, it was not until the implementation of the Real Plan in 1994 and the adoption of Lei No. 8884 that Brazil developed effective antitrust laws.<sup>29</sup> But, even after 1994, the process for obtaining approval for M&A transactions remained burdensome and highly inefficient. The new antitrust law (Lei 12.529/11) has corrected several of these inefficiencies.<sup>30</sup>

One major improvement is the consolidation of the agencies responsible for reviewing potential antitrust violations. In the past, each transaction subject to review required the approval of three separate agencies.<sup>31</sup> Under the new law, the process of obtaining approval for M&A transactions has been streamlined by delegating the power of review to CADE alone.

Transactions are subject to CADE review if either: (1) the transaction consolidates 20 percent or more of a given market<sup>32</sup> or (2) one party to the transaction has prior year sales in excess of R\$400 million while the other party has prior year sales in excess of R\$30 million.<sup>33</sup>

Another positive change is the timeframe for companies to provide notification to CADE and for the agency to issue a ruling. Companies previously had to provide notification to CADE either before or within fifteen days after entering into their first binding

27. S.T.F., No. 435, 14.4.2012, 218 REVISTA DO SUPERIOR TRIBUNAL DE JUSTIÇA [R.S.T.J.], 13.5.2010, 703 (Braz.).

28. S.T.F., AgRg No. 1.268.993, Reator: Napoleão Nunes Maia Filho, 08.05.2012 (Braz.), available at [https://ww2.stj.jus.br/revistaeletronica/Abre\\_Documento.asp?sLink=ATC&sSeq=22026222&sReg=201101823684&sData=20120511&sTipo=5&formato=PDF](https://ww2.stj.jus.br/revistaeletronica/Abre_Documento.asp?sLink=ATC&sSeq=22026222&sReg=201101823684&sData=20120511&sTipo=5&formato=PDF).

29. Claudio Monteiro Considera, *Uma Breve História da Economia Política da Defesa da Concorrência [A Brief History of Political Economy of Antitrust]* 3 (Secretariat for Econ. Monitoring, Working Paper No. 20, Nov. 2002) (document in Portuguese).

30. Lei No. 12.529, de 30 de Novembro de 2011, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 1.12.2011 (Braz.).

31. Considera, *supra* note 29, at 19.

32. Lei No. 12.529 art. 36(2).

33. *Id.* art. 88(I)-(II).

contract.<sup>34</sup> Due to the short period allowed for CADE to issue a ruling, transactions would occasionally be denied after the parties had already begun to act upon their merger or acquisition agreements. As a result, the involved companies would be required to halt and unwind the actions already taken in furtherance of the transaction.

Under the new law, CADE is granted a 240-day window to review transactions.<sup>35</sup> During this period, the parties contemplating the merger or acquisition are prohibited from entering into any binding agreements. If CADE does not object within the 240-day period, the parties are free to enter into the transaction. But the period allowed for CADE to review the transaction may be extended by sixty days at the request of the parties, or by ninety days per decision of the Administrative Tribunal.<sup>36</sup> The penalty for companies entering into binding agreements before the review period lapses ranges between R\$60,000 to R\$60 million.<sup>37</sup>

#### D. INCREASED THRESHOLDS FOR ANITITRUST REVIEW

Competition Law No. 12,529 entered into effect on May 29, 2012.<sup>38</sup> Unlike the old law that contemplated post-closing review, the new law requires submittal of a transaction to Brazil's antitrust regulator, the *Conselho Administrativo de Defesa Econômica* (CADE), for prior review.

On May 30, Ministerial Directive No. 994, signed by the Minister of Finance and Minister of Justice raised the thresholds of revenue that would mandate submittal to CADE for review.<sup>39</sup> Proposed transactions must now be submitted for CADE review to analyze the potential for adverse effects on Brazilian markets when one of the economic groups involved has gross annual revenues in Brazil of at least R\$750 million (about US \$375 million) and any other group involved has gross annual revenue of at least R\$75 million (about US \$37 million).<sup>40</sup>

#### E. THE ENERGY SECTOR

Three changes had a significant impact upon the energy sector. First, Normative Resolution 484/2012 provides procedures and defines the circumstances under which shareholders are required to seek the approval of ANEEL (the regulatory agency for electric energy) to purchase shares or effectuate corporate reorganizations leading to changes of

34. Lei No. 8884, de 11 de Junho de 1994, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 12.6.1994, art. 54, § 40 (Braz.).

35. Lei No. 12.529 art. 88, § 2.

36. *Id.* art. 88, § 9.

37. *Id.* art. 88, § 3.

38. Eduardo Molan Gaban, *Brazil: Merger Control*, in *THE ANTITRUST REVIEW OF THE AMERICAS* 2013 383, 384 (2012), available at <http://www.globalcompetitionreview.com/reviews/46/sections/158/chapters/1812/brazil-merger-control/>.

39. Walter Stuber, *Brazil: The New Parameters for Submission of Concentration Acts to the Brazilian Antitrust Agency*, MONDAQ (June 7, 2012), <http://www.mondaq.com/x/180578/Mergers+Acquisitions/The+New+Parameters+For+Submission+Of+Concentration+Acts+To+The+Brazillian+Antitrust+Agency>.

40. *Id.*

corporate control.<sup>41</sup> ANEEL now provides prior approval of certain specific cases such as wind farm sales, thereby expediting such transactions.

Second, Provisional Measure No. 577/2012 establishes the procedures and measures that the government must take in the event a public concessionaire becomes insolvent.<sup>42</sup> It also prohibits concessionaires from using business and in-court restructuring procedures, thus affecting the final options that concessionaires have to prevent them from becoming bankrupt.

Finally, Provisional Measure 579/2012 presents a real bump in the road for the entire sector. Since 2008, private investors and the government have known that a significant number of power production, transmission, and distribution utilities would see their concession agreements end after 2015. The utilities and investors expected the government to renew concessions under the same conditions under which they were already operating. By Provisional Measure 579/2012, the government allowed renewal, but under such strict conditions that companies most directly affected — many controlled by the state or federal government — lost up to half of their market value on the São Paulo Stock Exchange.<sup>43</sup>

#### IV. Chile

##### A. AMENDMENTS TO CONSUMERS RIGHTS LAW

In coordination with Sernac (the National Consumers Service), regulators and public agencies that supervise compliance for the financial industry developed platforms to receive and process consumer claims.<sup>44</sup> Yet consumer complaints against financial institutions have increased 147 percent.<sup>45</sup> Law No. 20,555<sup>46</sup> was therefore enacted to strengthen Sernac's authority to better protect financial consumers.

Law 20,555 amends the Consumers Rights Law<sup>47</sup> and provides Sernac with new powers and authorities, most notably: (1) information rights for consumers of financial products and services;<sup>48</sup> (2) strict requirements for and prohibitions to financial standard-form contracts;<sup>49</sup> (3) a "Sernac Seal" that shall be granted to standard-form contracts that meet certain requirements provided in the Law, to officially certify compliance with the Con-

41. See Resolução Normativa No. 484, de 17 de Abril de 2012, DIÁRIO OFICIAL [D.O. ], 149 (79, st.1): 34, de 19.4.2012 (Braz.); see also Lei No. 8.987, de 13 de Fevereiro de 1995, art. 27, COL. LEIS REP. FED. BRAZIL, 187 (2): 553-830, art. 27, 553830, Fevereiro 1995 (Braz.).

42. See Resolução Normativa No. 484, *supra* note 41, art. 6.

43. See, e.g., Eletrobras Perde 58% de Seu Valor desde a MP 579 [Eletrobras Loses 58% of Its Value from MP 579], O GLOBO ECONOMIA (Nov. 21, 2012, 10:11 AM) (Braz.), <http://oglobo.globo.com/economia/eletrobras-perde-58-de-seu-valor-desde-mp-579-6784779#ixzz2E7oaEDMc>.

44. For example, the Central Bank Act, Corporations Act, Banks General Act, Insurance Act, and Credit Loans Operations Act.

45. *Reclamos en el Sector Financiero Bancos y Retailers*, SERNAC GOV'T CHILE, [http://www.sernac.financiero.cl/cargador2/#/Manual del Crédito/0](http://www.sernac.financiero.cl/cargador2/#/Manual%20del%20Crédito/0) (last visited Mar. 1, 2013).

46. See Law No. 20555, Noviembre 28, 2011, DIARIO OFICIAL [D.O.] (Chile), available at <http://bcn.cl/4vp1>.

47. See Law No. 19496, Marzo 7, 1997, DIARIO OFICIAL [D.O.] (Chile), available at <http://bcn.cl/4v63>.

48. Law No. 20555 art. 1(1).

49. *Id.* art. 1(3).



sumers Rights Law;<sup>50</sup> and (4) certain mediation and arbitration procedures applicable to disputes regarding financial products and services certified by Sernac.<sup>51</sup>

## B. TAX INCENTIVES FOR R&D INVESTMENTS

According to the Ministry of Economy's report on private company research and development (R&D) expenditures, only 0.5 percent of Chilean GDP in 2010 was invested in R&D.<sup>52</sup> Furthermore, private companies financed only 41 percent of total R&D investment.<sup>53</sup> Law No. 20,570 (amending Law No. 20,241<sup>54</sup>) was enacted in 2012 to increase private investment in R&D.<sup>55</sup>

Law No. 20,570 raises the statutory cap on tax credit to 35 percent of the total cash payments made under research and development contracts (approximately US \$1.26 million).<sup>56</sup> The law provides that the deductibility of R&D investments as expenses does not depend on whether the relevant investments are necessary to produce revenues of said tax period and that such expenses could be deducted for up to ten fiscal years.<sup>57</sup> It is worth noting that Law No. 20,570 extended the tax benefits described above not only to R&D contracts developed by external R&D centers registered at Corfo (*Corporación de Fomento de la Producción*),<sup>58</sup> but also to R&D projects developed by the company itself.<sup>59</sup>

## C. ENVIRONMENTAL COURTS

On June 28, Law No. 20,600,<sup>60</sup> creating Environmental Courts and making the Environmental Bureau operative,<sup>61</sup> was published. The Law created three Environmental Courts with jurisdiction over different zones of the national territory. The First Court will start its operations on December 28,<sup>62</sup> and the others will start six months later.

Environmental Courts will function as "unique instance" courts because their decisions are subject to appeal only in exceptional cases, and their final rulings are only subject to nullity actions before the Supreme Court.<sup>63</sup>

50. *Id.* art. 1(6).

51. *Id.*

52. Gov't Chile, Ministerio de Economía Fomento y Turismo [Ministry Econ. Dev. & Tourism], *Informe de Resultados Encuesta de Gasto en Investigación y Desarrollo 2009-2010* [Survey Results Report Research and Development Expenditures 2009-2010], at 2 (July 2012), <http://www.economia.gob.cl/wp-content/uploads/2012/07/Bolet%C3%ADn-2%C2%B0-Encuesta-Nacional-de-Gasto-y-Personal-en-It.pdf>.

53. *Id.*

54. Law No. 20570, Marzo 2, 2012, DIARIO OFICIAL [D.O.] (Chile), available at <http://bcn.cl/4u0g>.

55. *Id.*

56. *Id.* art. 8.

57. *Id.*

58. See CORFO: THE CHILEAN ECON. DEV. AGENCY, <http://www.english.corfo.cl/> (last visited Mar. 1, 2013). *Corporación de Fomento de la Producción* or "CORFO" is the Chilean Innovation Agency in charge of execution, enterprise, and innovation of governmental policies.

59. Law No. 20570 art. 12.

60. See Law No. 20600, Junio 18, 2012, DIARIO OFICIAL [D.O.] (Chile), available at <http://bcn.cl/p9ll>.

61. The Environmental Bureau is a decentralized public entity in charge of implementing, organizing, and coordinating supervision and sanctioning infringement of Environmental Approval Resolutions, plans of prevention and decontamination, and standards of quality and emission, among other responsibilities.

62. Law No. 20600 arts. 1-2.

63. *Id.* art. 19.

The main competence of the Environmental Courts is related to: (1) actions to restore the damaged environment; (2) reclamations against the National Bureau of Environment's decisions; (3) authorization of measures and sanctions by the Environmental Bureau; and (4) reclamations against decisions taken by the environmental authorities regarding the Environmental Impact Assessment System.

The creation of specialized courts to decide environmental matters is a milestone in Chile. But affected communities may also use other legal remedies in order to avoid the technical discussions held before the Environmental Courts. For example, the *recurso de protección* allows any citizen to promote litigation against any filed project or activity, based on an alleged violation of constitutional rights.<sup>64</sup>

## V. Colombia

### A. THE FREE TRADE AGREEMENT (FTA) NETWORK

Colombia has signed FTAs with the United States, Canada, Switzerland, Liechtenstein, Honduras, Guatemala, El Salvador, Chile, Argentina, Brazil, Uruguay, Paraguay, Mexico, the countries of the Andean Community of Nations (Ecuador, Peru, and Bolivia), and Venezuela. Treaties with the European Union, Costa Rica and South Korea will soon be a reality. The FTAs contain provisions to increase market access, reduce tariffs, establish rules of origin for eligible products, and provide for trade remedies such as antidumping measures in appropriate cases.

### B. COMMERCIAL AGENCY AGREEMENT

#### 1. *Before the FTA with the United States*

According to Colombian Commercial Code, Article 1324, an agent is entitled to a payment upon the termination of a commercial agency agreement, commonly known as the "commercial severance payment."<sup>65</sup> This sum is payable whether there is a breach of the agreement by the agent or not.

Since 1980, the Supreme Court has held that a commercial severance payment was not susceptible to disposition or waiver before or during the execution of the agreement because it was considered a matter of public policy and its provision was intended to protect the weak party to the contractual relationship.<sup>66</sup> The court permitted disposition only upon termination of the agreement and for payments in advance only if previously agreed to by the parties.

In an October 2011 case, the court changed its approach to Article 1324 rights and determined that the commercial severance payment was a matter of contractual right that only concerns the private interests of the parties to the agreement, basing its decision on

64. Marcos Pincheira Barrios, *Recurso de protección* [Resource Protection], DUDALEGAL, <http://www.dudalegal.cl/recurso-de-proteccion.html> (last visited Mar. 1, 2013).

65. CÓDIGO DE COMERCIO [C. COM.] art. 1324 (Colom.).

66. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala de Casación Civil, 2 de diciembre de 1980, M.P.: Germán Giraldo Zuluaga, Gaceta Judicial [G.J.] (No. 166, p. 239) (Colom.).

the principles of contractual freedom and private autonomy. The court also considered that, in current circumstances, the agent is not necessarily the weaker party.<sup>67</sup>

## 2. *Under the FTA with the United States*

The U.S.-Colombia FTA entered into force on November 15, 2012.<sup>68</sup> Under the FTA, Colombia has six months to present and approve amendments to its Commercial Code regarding the commercial agency agreement.

In keeping with this commitment, Legislative Initiative No. 146 to amend the Commercial Code to regulate the commercial agency agreement of goods was presented to the Colombian Congress.<sup>69</sup> The initiative, which would eliminate the provision of exclusivity in favor of the agent and the commercial severance payment, was already approved in the first debate in the Chamber of Representatives on October 23, 2012.<sup>70</sup>

## 3. *Strengthening of Colombian Bank Capital*

According to Gerardo Hernandez, the Colombian Financial Superintendent, with the presence of new agents in the local market and the expansion to foreign markets, the financial sector has been evolving towards an internationalization process — a process that reinforces the need to update the Colombian legal framework to international standards.<sup>71</sup>

To achieve internationalization, the Colombian government enacted Decree 1771, 2012, under which financial institutions must adjust to international standards.<sup>72</sup> The Decree introduces a new classification of the regulatory capital consisting of the following elements: the Ordinary Basic Equity, the Additional Basic Equity, and the Additional Equity. The Ordinary Basic Equity are fully paid shares with the greatest capacity to absorb losses, not holding any preferential rights on dividends or at liquidation; Additional Basic Equity allow shares with non-conventional dividend payments such as mandatory payment or preferential dividend rights. The Additional Equity allows fully paid subordinated debt instruments with a minimum 5 year holding period. The new definition for Ordinary Basic Equity, Additional Basic Equity and Additional Equity was based on the recommendations of the Basel Committee in connection with the strengthening of the regulatory capital through improvements in the quality of the instruments that are part of

67. U.S.-Colombia Free Trade Agreement, ch. 18, Nov. 22, 2006, available at [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset\\_upload\\_file644\\_10192.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file644_10192.pdf).

68. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Civ. octubre 19, 2011, M.P.: William Namén Vargas, Expediente 11001-3103-0322001-00847-01 (Colom.).

69. El Congreso de Colom., Texto aprobado en la Comisión Primera de la Cámara de Representantes en Primer Debate del Proyecto de Ley No. 146/12 “Por medio del cual se regula la agencia comercial de bienes” [Text adopted at the First Committee of the House of Representatives in the First Debate of Bill No. 146/12 “Through the agency which regulates trade in goods”], available at [http://www.amchamcolombia.com.co/docs/texto\\_aprobado\\_explicacion.pdf](http://www.amchamcolombia.com.co/docs/texto_aprobado_explicacion.pdf) (last visited Mar. 1, 2013).

70. *Id.* art. 38.

71. *Confidencial Colombia, Gobierno quiere fortalecer capital de los bancos* [Government Wants to Strengthen Banks' Capital], CONFIDENCIALCOLOMBIA.COM (Aug. 25, 2012), <http://confidencialcolombia.com/es/1/301/1380/Gobierno-quiere-fortalecer-capital-de-los-bancos-gobierno-nacional-medidas-componentes-fortalecer-capital.htm>.

72. Press Release, Superintendencia Financiera de Colom., The Government Takes Actions to Strengthen Capital of Credit Institutions (Aug. 24, 2012), <http://www.superfinanciera.gov.co/>.

it.<sup>73</sup> The Decree maintains that a nine percent minimum level of total solvency is the ratio that must exist between the capital and the assets, calculated as the value of the technical equity divided by the value of the credit and market risk weighted assets.<sup>74</sup>

The Decree revised definitions for credit, market and operational risks to calculated solvency ratios. The Decree allows one year for compliance with the requirements, but each credit institution must file its new compliance plan with the Colombian Financial Superintendent before January 31, 2013.

## VI. Cuba

### A. NEW TAX ON IMPORTED NON-COMMERCIAL GOODS

On July 2, 2012, the Cuban government published new resolutions that sharply increased the taxes on imports of non-commercial goods, such as clothes, foods, bathroom products, and other personal-use products.<sup>75</sup> Below are some of the principal features of the new laws, which took effect on September 3:

- All passengers must pay a tax of 10 Cuban Pesos (CUP) or Cuban Convertible Pesos (CUC)<sup>76</sup> per extra kilogram (kg).<sup>77</sup> Personal baggage of 25 kg (44 lbs.), plus 5 kg (11 lbs.) of miscellaneous goods will remain exempt from the tax.<sup>78</sup>
- All passengers, regardless of resident status, may bring up to 10 kg of medication duty free, if the medication is in a separate container.<sup>79</sup>
- All passengers, regardless of resident status, must pay customs duties if the non-commercial goods exceed 50.99 CUP.<sup>80</sup>
- All passengers, regardless of resident status, may bring up to 1000 CUP worth of baggage outside one's personal effects.<sup>81</sup>
- For the first import during a calendar year, Cuban nationals or foreigners permanently residing in Cuba will pay customs duties with CUP on imports. Second and subsequent imports in the same calendar year will be calculated using the CUC and paid using the CUP.<sup>82</sup>

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73. *Id.*

74. *Id.*

75. No. 30, julio 2, 2012, GACETA OFICIAL DE LA REPÚBLICA DE CUBA [OFFICIAL GAZETTE OF THE REPUBLIC OF CUBA], EDICIÓN EXTRAORDINARIA [EXTRAORDINARY EDITION] (Cuba); *Aclaraciones a los Usuarios Sobre La Importación por Parte de Pasajeros y a Través de Envíos [Clarifications to Users on the Importation by Passengers and Through Shipments]*, ADUANA GENERAL DE LA REPÚBLICA (2012), [http://www.aduana.co.cu/index.php?option=com\\_jdownloads&Itemid=33&view=finish&cid=53&catid=14&m=0&lang=es](http://www.aduana.co.cu/index.php?option=com_jdownloads&Itemid=33&view=finish&cid=53&catid=14&m=0&lang=es) [hereinafter *Clarifications*].

76. *Exchange Rate: Official Rate of Exchange for Foreign Currencies and Cuban Convertible Peso (CUC) in Relation to the Cuban Peso (CUP)*, BANCO CENTRAL DE CUBA [CENTRAL BANK OF CUBA], [http://www.bc.gov.cu/english/exchange\\_rate.asp](http://www.bc.gov.cu/english/exchange_rate.asp) (last visited Mar. 2, 2013).

77. *Clarifications, supra* note 75, at 2-3.

78. *Id.* at 1.

79. *Id.* at 3-4.

80. *Id.* at 2-3.

81. *Id.*

82. *Id.* at 3.

- Non-residents and Cuban-Americans must pay the excess import fees with CUC at all times, if applicable.<sup>83</sup>
- Shipments containing miscellaneous items (*e.g.*, footwear, apparel, home décor, food items, jewelry, etc.) shipped by air or sea will be valued at 10 CUP per kilogram. But if shipment is by postal service or courier, then it will be valued at 20 CUP per kilogram.<sup>84</sup> The first 30 CUP (or 3 kg) are free, but the shipment limit is 200 CUP.<sup>85</sup>

Opponents of the new measure fear that the tax will negatively affect small businesses that depend on the importation of goods because of the lack of essential capital in Cuba.<sup>86</sup>

## B. NEW MIGRATORY LAW

On October 16, 2012, President Raul Castro announced new migratory laws.<sup>87</sup> Below are some key features of the new laws that will become effective on January 14, 2013.<sup>88</sup>

In order to travel outside of Cuba, Cuban nationals may now present a valid passport with a visa issued by the country of destination. Under the old law, Cuban nationals were required to obtain both an invitation to visit a country and permission from Cuban government officials to travel to that country.<sup>89</sup>

The number of continuous months a Cuban national may stay abroad has been increased from eleven to twenty-four months.<sup>90</sup> If a Cuban national exceeds that period, the government may consider that person as having permanently emigrated.<sup>91</sup>

Despite the modifications, however, tight travel restrictions will still pertain to those considered “human capital,” in order to prevent a potential “brain drain.”<sup>92</sup> Physicians, mid-level technicians, athletes, artists, and other graduate professionals are specifically considered human capital.<sup>93</sup>

Travel restrictions still apply to persons eligible for military draft and persons of public interest, as well as for reasons of “national defense and security.”<sup>94</sup> These restrictions will likely apply to prominent political dissidents, who have been regularly denied permission

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83. *Id.* at 1.

84. *Id.* at 3.

85. *Id.*

86. *Sharp Rise in Customs Duties Spark Controversy in Cuba*, FOX NEWS LATINO (Sept. 4, 2012), <http://latino.foxnews.com/latino/politics/2012/09/04/sharp-rise-in-customs-duties-spark-controversy-in-cuba/>; Andrea Rodriguez, *Travelers Staggered by Cuba's New Customs Taxes*, MIAMI HERALD (Sept. 4, 2012), <http://www.miamiherald.com/2012/09/03/2983514/travelers-staggered-by-cubas-new.html>.

87. No. 44, octubre 16, 2012, GACETA OFICIAL DE LA REPÚBLICA DE CUBA [OFFICIAL GAZETTE OF THE REPUBLIC OF CUBA], EDICIÓN EXTRAORDINARIA [EXTRAORDINARY EDITION] (Cuba) [hereinafter *New Migration Law*].

88. *Id.*

89. *Id.* at 1357; Ley No. 1312, Ley de Migración [Migration Law], septiembre 20, 1976, GACETA OFICIAL DE LA REPÚBLICA DE CUBA [OFFICIAL GAZETTE OF THE REPUBLIC OF CUBA], art. 1 (Cuba) [hereinafter *Old Migration Law*].

90. *New Migration Law*, *supra* note 87, art. 1358.

91. *Id.*

92. *Id.* arts. 1363–64.

93. *Id.*

94. *Id.*

to visit foreign countries; however, some prominent political dissidents have been given the permission to travel abroad, including Yoani Sanchez, an independent journalist and government opponent who was denied permission by the Cuban regime to receive a journalism award from Columbia University in the United States.<sup>95</sup>

The new proposals also allow Cuban nationals living abroad to visit the island for up to ninety days (sometimes up to 180 days) while still retaining their migratory status abroad.<sup>96</sup> These nationals may even request to return as a permanent resident through diplomatic petitions or via petition to Cuba's Ministry of the Interior.<sup>97</sup>

The cost of a passport is 100 CUC (approximately US \$100).<sup>98</sup> It is valid for two years and renewable for six years.<sup>99</sup> The price increases to 150 CUC for those who seek a passport that allows them to live abroad and 100 CUC for those immigrants who live on the island.<sup>100</sup> The purchase of a passport may prove too costly for most Cubans to obtain because the average monthly salary for a Cuban is US \$19.<sup>101</sup>

## VII. Ecuador

### A. CHANGES IN THE LABOR CODE

In September 2012, the Law for the Defense of the Rights of Workers was published.<sup>102</sup> It amends the Labor Code in the following ways.

This law makes several changes to improve the conditions for workers. It establishes a forty-hour, five-day workweek. Saturdays and Sundays are mandatory rest days.<sup>103</sup> For twelve months after the delivery of her child, a nursing mother is entitled to a six-hour workday. Employees and domestic workers enjoy the same benefits as any general laborer.

The government is also focused on improving reporting systems in order to detect any illegal conduct by employers — for example, the lack of a worker registry at the Ecuadorian Institution of Social Security.

A subsection was added to Article 104 of the Labor Code to establish that the processes initiated by the Internal Revenue Service (IRS) for tax collection must be reported to the proper authorities.<sup>104</sup>

95. See Damien Cave, *Yoani Sanchez, Cuban Dissident Blogger, Gets Passport*, N.Y. TIMES (Jan. 31, 2013), available at [http://www.nytimes.com/2013/01/31/world/americas/cuban-blogger-yoani-sanchez-gets-passport.html?\\_r=0](http://www.nytimes.com/2013/01/31/world/americas/cuban-blogger-yoani-sanchez-gets-passport.html?_r=0). See also Gireesh Gupta, *Outrage over Latest Cuban Dissident Arrests*, SALON (Nov. 9, 2012, 6:00 PM), available at [http://www.salon.com/2012/11/10/outrage\\_over\\_latest\\_cuban\\_dissident\\_arrests/](http://www.salon.com/2012/11/10/outrage_over_latest_cuban_dissident_arrests/).

96. New Migration Law, *supra* note 87, art. 1379.

97. *Id.* art. 1383.

98. See *Exchange Rate*, *supra* note 76.

99. New Migration Law, *supra* note 87, art. 1365.

100. *Id.*

101. *Cuban Salaries Rise to \$19 a Month*, AHAM ONLINE (June 5, 2012), <http://english.ahram.org.eg/NewsContent/3/12/43876/Business/Economy/Cuban-salaries-rise-to—a-month-.aspx>.

102. No. 797, Ley Orgánica para la Defensa de los Derechos Laborales [Organic Law for the Defense of the Rights of Workers], septiembre 26, 2012, REGISTRO OFICIAL [OFFICIAL REGISTER] (Second Supp.) (Ecuador).

103. *Id.* arts. 4, 6.

104. *Id.* arts. 2-3.

## B. REGULATION OF CONSULTATION PROCESS

A new regulation concerns the right of indigenous communities to prior, free, and informed consultation under the 2008 Constitution.<sup>105</sup> The Hydrocarbons Secretariat is responsible for carrying out this obligation before the initiation of any hydrocarbon activity on indigenous land. The consultation process should last no more than thirty days from the publication of the announcement by the Hydrocarbons Secretariat, according to the distinct participation mechanisms established in this regulation. The regulation also provides for the creation of a Consultation Office. This process can be appealed with the Hydrocarbons Secretariat in administrative proceedings and in a second and final instance to the Sector Minister.

This regulation closes legal loopholes that have caused some difficulties for the hydrocarbon sector. It also provides indigenous communities with the power to enforce their constitutional right to free, prior, and informed consent with respect to oil and gas activities.

## C. LAW OF DISABILITIES

The Ecuadorian Constitution, international treaties, and other gender, generational, and intercultural laws guarantee the full realization of the rights of persons with disabilities. The Disabilities Law aims to ensure the prevention, early detection, and rehabilitation of disabilities. The Law applies to persons with disabilities and may also apply to relatives and those who care for disabled persons. It also applies to nonprofit organizations dedicated to the care of this vulnerable group.

The Law reaffirms the obligation of government entities with more than twenty-five employees to hire permanently a person with disabilities for a number equal to 4 percent of its workforce.<sup>106</sup> This provision does not apply to work contracts that by their nature do not guarantee job stability.

Finally, persons with disabilities shall enjoy exemptions from taxes on foreign trade, value added tax (VAT), and special consumption taxes, with the exception of port taxes and storage fees.

## D. REDISTRIBUTION OF SOCIAL SPENDING

In November, President Rafael Correa led the National Assembly to pass his proposed Bill of Redistribution of Social Spending. The law provides more resources to fund the national human development bond through increased taxes on the banking sector.<sup>107</sup>

The main provisions of the law include: (1) a 12 percent VAT for financial services; (2) the elimination of the benefit of an income tax reduction for banks; (3) a new method for calculating advances from banks and finance companies, which would be 3 percent of its

105. CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR arts. 57(7), 398 (Ecuador).

106. Alexander Alejandro, *Ecuador to Boost Hiring of Disabled Workers*, INFO SUR HOY.COM (Sept. 3, 2012), [http://infosurhoy.com/cocoon/saii/xhtml/en\\_GB/features/saii/features/main/2012/03/09/feature-01](http://infosurhoy.com/cocoon/saii/xhtml/en_GB/features/saii/features/main/2012/03/09/feature-01).

107. Mercedes Alvaro, *Ecuador's Congress Pass Bill on Higher Taxes for Banks*, WALL ST. J. (Nov. 20, 2012, 7:49 PM), <http://online.wsj.com/article/BT-CO-20121120-716665.html>.

taxable income; and (4) the obligation of financial institutions to deliver information directly to the IRS.<sup>108</sup>

## VIII. Puerto Rico

### A. LEGISLATION TO INCENTIVIZE INTERNATIONAL COMMERCE

During the past decade Puerto Rico has been faced with an economic crisis, leading its government to enact a series of laws to stimulate different sectors within the local economy. One strategy pursued this year was to attract foreign investors with competitive tax benefits.

#### 1. *Act to Promote the Export of Services*

A tax incentive law, Act No. 20,<sup>109</sup> provides certain tax benefits, including: (1) a 4 percent fixed corporate tax rate over the income attributable to eligible activities;<sup>110</sup> (2) a 60 percent municipal license tax exemption;<sup>111</sup> and (3) a 90 percent or 100 percent tax exemption on real and personal property related to eligible activities.<sup>112</sup> Additionally, distribution of dividends or benefits to shareholders, members, or partners attributable to activities of an eligible business that has obtained the tax exemption decree will not be subject to taxes under the Puerto Rico revenue code.<sup>113</sup> Under certain restrictions, an eligible business is an entity with a bona fide office or establishment in Puerto Rico that engages in an eligible service,<sup>114</sup> such as an export or promoter service for non-residents<sup>115</sup> or foreign entities that do not have a nexus with Puerto Rico.<sup>116</sup>

The service provider must request and obtain a tax exemption decree under Act 20. The exemption will have a term of twenty years, and is renewable for ten additional years if certain conditions are satisfied.<sup>117</sup>

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108. Fernando Herrero, *President Correa Proposes a New Tax Reform in Ecuador*, INTER-AM. CTR. TAX ADMIN. (Nov. 12, 2012, 7:40 PM), <http://www.ciat.org/index.php/en/blog/item/88-presidente-correa-propone-nueva-reforma-tributaria-en-ecuador.html?tmpl=component&print=1>.

109. Act to Promote the Export of Services, Act No. 20 of Jan. 17, 2012, as amended, Statement of Purpose, 2012 P.R. Laws 2313 (P.R.), available at <http://www.oslpr.org/2009-2012/leyes/pdf/ley-20-17-Ene-2012.pdf>. For translation of Act 20-2012 in English, see <http://www.puertoricodoesitbetter.com/en/Documents/Act%20No.%2020%20of%202012.pdf>.

110. *Id.* art. 4(a).

111. *Id.* art. 5(a).

112. *Id.*

113. *Id.* art. 6.

114. *Id.* art. 3(k) (listing the following as eligible activities: advertising and public relations; consulting services in economics, environmental, technological, scientific, managerial, marketing, human resources, informatics, and auditing; advice on matter related to any other type of business; professional services such as legal, tax, and accounting; centralized management series that include strategic and budgetary direction or planning carried out by the headquarters or a similar regional office by an entity engaged in such services; and a shared service center).

115. *Id.* art. 3(f), (h)-(i).

116. *Id.* art. 3(k).

117. *Id.* art. 9(a), (c).



## 2. *Act to Encourage the Transfer of Investors to Puerto Rico*

The second was Act No. 22 of January 22, 2012 (Act 22), which grants a tax exemption to individuals that become residents of Puerto Rico no later than the year 2035. The purpose of Act 22 is to attract individuals who have not resided in Puerto Rico for the previous fifteen years to establish their residence in Puerto Rico.<sup>118</sup> Act 22 exempts such individuals from paying taxes on passive income (dividends and interest) earned from their investments in the United States or foreign markets.<sup>119</sup> Also, it offers a tax exemption under the Puerto Rico revenue code for capital gains recognized after becoming a Puerto Rico resident.<sup>120</sup>

The theory behind Act 22 is that, although individual investors will not pay taxes on certain income, they will stimulate the economy with investment in real estate, services, and consumption of other products. In addition, income derived from employment or from services rendered in Puerto Rico will be taxed at the base tax rate.

## 3. *International Financial Center Regulatory Act*

The third was Act No. 273 of September 25, 2012 (Act 273), which is intended to attract foreign investors by providing tax incentives to international foreign entities (IFEs).<sup>121</sup> Under Act 273, IFEs can benefit from a 4 percent corporate tax rate;<sup>122</sup> a 6 percent dividend tax rate for Puerto Rico shareholders,<sup>123</sup> a 0 percent dividend tax rate for non-Puerto Rico shareholders;<sup>124</sup> a 100 percent municipal tax exemption;<sup>125</sup> and a 100 percent property tax exemption.<sup>126</sup> These benefits can be obtained through a tax exemption decree valid for a period of forty-five years.<sup>127</sup>

## B. ALTERNATIVE DISPUTE RESOLUTION

In addition to the tax incentives designed to attract foreign business and investment, Puerto Rico passed Act No. 10 of January 5, 2012 (Act 10).<sup>128</sup> By doing so, Puerto Rico joins over sixty countries that have enacted International Commercial Arbitration (ICA)

118. Act to Encourage the Transfer of Investors to Puerto Rico, Act No. 22 of Jan. 22, 2012, Statement of Purpose, 2012 P.R. Laws 3657 (P.R.), available at <http://www.oslpr.org/2009-2012/leyes/pdf/ley-22-17-Ene-2012.pdf>. For translation of Act 20-2012 in English, see <http://www.puertoricodoesitbetter.com/en/Documents/Act%20No.%2022%20of%202012.pdf>.

119. *Id.* art. 4.

120. *Id.* art. 5(a).

121. International Financial Center Regulatory Act, Act No. 273 of Sept. 25, 2012, Statement of Purpose, 2012 P.R. Laws 3923 (P.R.), available at <http://www.oslpr.org/2009-2012/leyes/pdf/ley-273-25-Sep-2012.pdf>. For translation of Act 20-2012 in English, see <http://www.puertoricodoesitbetter.com/en/Documents/Act%20273%20-%20translation%20of%20law.pdf>.

122. *Id.* art. 6(a).

123. *Id.* art. 6(i).

124. *Id.* art. 6(f).

125. *Id.* art. 22.

126. *Id.* art. 21.

127. *Id.* art. 8(e). The forty-five year terms is based on an initial fifteen-year decree, which provides for two extensions, for a total of forty-five years.

128. International Commercial Arbitration in Puerto Rico Act, Act No. 10 of Jan. 5, 2012, 2012 P.R. Laws 2011, available at <http://www.oslpr.org/2009-2012/leyes/pdf/ley-10-05-Ene-2012.pdf>.

laws based on the UNCITRAL Model Law on ICA of 1985.<sup>129</sup> By passing Act 10, the Legislature hopes to attract business that would otherwise go to other countries. The law specifically references the large number of bilingual attorneys experienced in both civil law and common law in Puerto Rico, its strong history in international law, and its favorable climate and location as inducements.<sup>130</sup>

Puerto Rico also passed Act No. 184 of August 17, 2012 (Act 184).<sup>131</sup> Citing regulations and laws enacted by the United States,<sup>132</sup> Act 184 is intended to reduce the number of residential foreclosures by making the process of mediation mandatory before instituting formal judicial foreclosure.<sup>133</sup> The process is only applicable with respect to a personal residence and does not apply to commercial or investment real estate.<sup>134</sup>

### C. PUERTO RICAN LAW IN U.S. COURTS

The Constitution of Puerto Rico establishes the Supreme Court of Puerto Rico as a “unified judicial system for purposes of jurisdiction, operation and administration.”<sup>135</sup> In defining the Court’s jurisdiction, the Judiciary Act of 2003<sup>136</sup> allowed the Supreme Court of Puerto Rico to answer certified questions sent to it by the federal Article III courts or the highest court of any U.S. state.

The 2003 law limited the powers of the Supreme Court of Puerto Rico to provide the final interpretation of Puerto Rican law. To overcome this limitation, the Legislature passed Act No. 87 of May 17, 2012,<sup>137</sup> which grants the Supreme Court of Puerto Rico the ability to resolve certified questions coming from a lower court of a U.S. state, making it easier for courts to communicate and clarify details of local regulation.

### D. THE U.S. CONSTITUTION’S COMMERCE CLAUSE

The U.S. Constitution is applicable in Puerto Rico in particular controversies, through interpretation by the Supreme Court of the United States or the Supreme Court of Puerto Rico. In *R.C.A. v. Gobierno de la Capital*,<sup>138</sup> the Supreme Court of Puerto Rico held

129. See *Status, 1985 - UNCITRAL Model Law on International Commercial Arbitration, with Amendments as Adopted in 2006*, UNCITRAL, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html) (last visited Mar. 2, 2013).

130. International Commercial Arbitration, Act No. 10, Statement of Purpose (P.R.).

131. Act of Compulsory Mediation and Preservation of Your Home in the Process of Mortgage Foreclosure of a Principal Residence, Act No. 184 of Aug. 17, 2012, Statement of Purpose, 2012 P.R. Laws 1434 (P.R.), available at <http://www.oslpr.org/2009-2012/leyes/pdf/ley-184-17-Ago-2012.pdf>.

132. For example, the Home Affordable Refinance Program (HARP) and the Home Affordable Modification Program (HAMP) created by the Obama Administration, as well as the Foreclosure Mandatory Act of 2009 of Congress. See *id.*

133. *Id.* Statement of Purpose.

134. *Id.* arts. 2(a) and 3.

135. P.R. CONST. art. V, § 2.

136. Judiciary Act of the Commonwealth of Puerto Rico, Act No. 201 of Aug. 22, 2003, art. 3.002, 2003 P.R. Laws 2290, available at [http://www.ramajudicial.pr/leyes/judicatura/Ley\\_Judicatura\\_2003.pdf](http://www.ramajudicial.pr/leyes/judicatura/Ley_Judicatura_2003.pdf).

137. Amendment to the Judiciary Act of the Commonwealth of Puerto Rico, Act No. 87 of May 17, 2012, 2012 P.R. Laws 1196, available at <http://www.oslpr.org/2009-2012/leyes/pdf/ley-87-17-May-2012.pdf>.

138. *R.C.A. v. Gobierno de la Capital*, 91 D.P.R. 416 (1964).

that the Commerce Clause<sup>139</sup> did not apply to Puerto Rico. The decision was challenged in subsequent cases but was upheld.<sup>140</sup>

The Supreme Court of Puerto Rico overruled *R.C.A.* in 2012.<sup>141</sup> Northwestern Selecta challenged an import tax on meat imposed by the government of Puerto Rico, arguing the law was unconstitutional under the Commerce Clause. The trial and appellate courts held that the law was constitutional. The Supreme Court of Puerto Rico overturned *R.C.A.* and declared the Commerce Clause applicable in Puerto Rico in its dormant form *ex proprio vigore*. The Court declared that Puerto Rico is prohibited from imposing economic burdens that affect interstate commerce and, for the same reason the Commerce Clause applies to each U.S. state, it applies to Puerto Rico by reference.<sup>142</sup>

The same issue later came before the First Circuit Court of Appeals in *Coors Brewing Co. v. Mendez-Torres*.<sup>143</sup> The First Circuit cited the Supreme Court of Puerto Rico's earlier case when it rejected Coors Brewing's argument that the dormant Commerce Clause did not apply in Puerto Rico.

## IX. Uruguay

### A. EXPANSION OF DOUBLE TAXATION TREATY NETWORK

In February, the Uruguayan Congress approved a treaty between Uruguay and Switzerland to avoid double taxation.<sup>144</sup> Under the treaty, companies are taxed in their jurisdiction of residence unless they maintain a permanent establishment in the other country, in which case that country may exercise taxation powers. Dividends may be taxed in the country where the contributing company is based. This treaty is part of a broader trend of the administration to align the country with Organisation for Economic Co-operation and Development (OECD) standards concerning international taxation. In recent times, similar treaties have also been entered into with Spain, Mexico, Portugal, Liechtenstein, India, and Germany.<sup>145</sup>

139. U.S. CONST. art. 1, § 8, cl. 3.

140. See, e.g., *S. P.R. Sugar Corp. v. Com. Servicio Pub.*, 93 D.P.R. 12, 15-16 (1966); *Estado Libre Asociado de P.R. v. Supermercados Amigo*, 2007 TSPR 39.

141. *Estado Libre Asociado de P.R. v. Nw. Selecta, Inc.*, 2012 TSPR 56.

142. *Id.*

143. *Coors Brewing Co. v. Mendez-Torres*, 678 F.3d 15, 29 (1st Cir. 2012).

144. Double Taxation Agreement, Uru.-Switz., Jan. 1, 2012, available at <http://www.news.admin.ch/NSBSubscriber/message/attachments/20802.pdf>; see also Press Release, Switz. Fed. Dep't Fin., Double Taxation Agreement with Uruguay Enters into Force (Dec. 29, 2011), <http://www.efd.admin.ch/dokumentation/medieninformationen/00467/index.html?lang=en&mmsg-id=42857>.

145. See, e.g., Mary Swire, *India Signs Tax Agreement with Uruguay*, TAX-NEWS.COM (Sept. 12, 2011), [http://www.tax-news.com/news/India\\_Signs\\_Tax\\_Agreement\\_With\\_Uruguay\\_51375.html](http://www.tax-news.com/news/India_Signs_Tax_Agreement_With_Uruguay_51375.html); Ulrika Lomas, *Liechtenstein, Uruguay DTA in Force*, TAX-NEWS.COM (Sept. 14, 2012), [http://www.tax-news.com/news/Liechtenstein\\_Uruguay\\_DTA\\_In\\_Force\\_57311.html](http://www.tax-news.com/news/Liechtenstein_Uruguay_DTA_In_Force_57311.html); Ulrika Lomas, *Portugal Begins New DTA Negotiations*, TAX-NEWS.COM (June 21, 2011), [http://www.tax-news.com/news/Portugal\\_Begins\\_New\\_DTA\\_Negotiations\\_50005.html](http://www.tax-news.com/news/Portugal_Begins_New_DTA_Negotiations_50005.html).

## B. TAX INFORMATION EXCHANGE AGREEMENT WITH ARGENTINA AND BRAZIL

On April 23, 2012, Uruguay and Argentina entered into a Tax Information Exchange Agreement.<sup>146</sup> Under the Agreement, the State parties would be allowed to request information relevant for tax purposes. To avoid double taxation, the Agreement sets forth that an individual who resides in a State party may deduct the amount of taxes paid to the other State. Uruguay and Brazil entered into a similar treaty in October 2012.<sup>147</sup> Both treaties are yet to be enacted by the Uruguayan Congress.

## C. IDENTIFICATION OF SHAREHOLDERS

On July 4, 2012, the Uruguayan Congress passed the Act 18.930.<sup>148</sup> Under the Act, companies whose capital is expressed in bearer shares are required to provide the Central Bank with the identification details of the owners of the stock certificates issued by the respective companies. Nominative shares are excluded from this regime.

## D. ENACTMENT OF THE HAGUE CONVENTION

In November 2011, the Uruguayan Congress approved law No. 18.836,<sup>149</sup> ratifying the 1961 Hague Convention establishing the *apostille* mechanism for the legalization of documents to render effects abroad. The Convention entered in full force and effect on October 14, 2012, and applies to public documents that have been executed in the territory of one Contracting State and that are scheduled to render legal effects in the territory of another Contracting State.

## X. Venezuela

In 2012, legal developments in Venezuela were characterized by increased economic control under the socialist ideology of President Hugo Chavez.<sup>150</sup>

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146. *H&H New Report About Bearer Shares in Uruguay*, HUGHES & HUGHES (Aug. 9, 2012), <http://www.hughes.com.uy/web/en/informes/314-h-h-new-report-about-bearer-shares-in-uruguay>.

147. Estudio Bergstein, *Uruguay – Tax Information Exchange Agreement with Brazil*, LEXUNIVERSAL (Jan. 2, 2013), <http://lexuniversal.com/en/articles/16336>.

148. Ley No. 18.930, de 17 de Julio de 2012, DIARIO OFICIAL DE URUGUAY [D.O.] 27.07.2012.

149. Ley No. 18.836, de 15 de Noviembre de 2011, DIARIO OFICIAL DE URUGUAY [D.O.] 30.11.2011.

150. See *Divulgación Presidencial 2012*, PODER ELECTORAL, [http://www.cne.gob.ve/resultado\\_presidencial\\_2012/r/1/reg\\_000000.html](http://www.cne.gob.ve/resultado_presidencial_2012/r/1/reg_000000.html) (last visited Mar. 2, 2013).

## A. NEW LABOR LAW

The new Organic Labor Law Decree (LLO, in Spanish)<sup>151</sup> was the most important legal development this year, reflecting the “transition to socialism”<sup>152</sup> and creating a significant impact on private industry.<sup>153</sup>

The LLO provides a variety of labor benefits including: better seniority pay,<sup>154</sup> the reduction of the maximum number of daily work hours,<sup>155</sup> increased mandatory profit sharing,<sup>156</sup> and longer vacations.<sup>157</sup> Dismissal of employees is possible only under limited circumstances and, depending on the case, after notification to a judge or authorization from a labor agency.<sup>158</sup>

The LLO imposes joint liability on company shareholders for the breach of labor benefits obligations,<sup>159</sup> but it is not clear how and to what extent this regulation will be enforced. The section on fines and penalties was modified by incorporating a “tax units” reference to prevent fines from losing value and more importantly, mandating imprisonment of six to fifteen months in cases of violations of the right to strike,<sup>160</sup> obstruction of labor agency act enforcement,<sup>161</sup> and closing a company without justification.<sup>162</sup>

## B. FINANCE AND INVESTMENT

Foreign exchange controls continue with some variations, for example, the limited opportunity for foreign or local companies to maintain accounts in local banks with foreign currency funds.<sup>163</sup> A Venezuelan court<sup>164</sup> confirmed the application of OECD guidelines regarding transfer pricing in Venezuelan Income Tax Law.

151. Decreto No. 8.938, de 7 de Mayo de 2012, Valor y Fuerza de Ley Organica del Trabajo, los Trabajadores y las Trabajadoras [Organic Labor Law Decree], GACETA OFICIAL DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA EXTRAORDINARIO No. 6.076, 7 de Mayo de 2012 (Venez.).

152. *See id.* art. 2 (including the reference to the “fair distribution of wellness”); *id.* art. 16(h) (referencing “Bolívar, Zamora, and Robinson,” historic characters used as symbols of the government party).

153. *See, e.g.,* Jair de Freitas, *Aseguran que Lottt tiene impacto “excesivo” para las empresas [It Is Assured that Lottt Has an Excessive Impact for Businesses]*, EL UNIVERSAL (May 8, 2012, 11:47 AM), <http://www.eluniversal.com/economia/ley-del-trabajo/120508/aseguran-que-lottt-tiene-un-impacto-excesivo-para-las-empresas>.

154. *See* Decreto No. 8.938, *supra* note 151, art. 142.

155. *See id.* art. 173, Transitory Provision No. 3.

156. From fifteen days’ worth of salary to thirty days per year. *See id.* art. 131.

157. From eight to fifteen days a year. *See id.* art. 192.

158. For example, the bar for dismissal of workers after becoming parents was extended to two years. *See id.* art. 420.

159. *See id.* art. 151.

160. *See id.* art. 538.

161. *See id.*

162. *See id.* art. 539.

163. *See* GACETA OFICIAL DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA No. 39.968, 19 de Julio de 2012.

164. Fourth Superior Tax Court of the Judicial Circuit of the Metropolitan Area of Caracas, Aug. 13, 2012, “VENEASISTENCIA, C.A.” (Venez.), available at <http://caracas.tsj.gov.ve/decisiones/2012/marzo/2098-29-AP41-U-2011-000358-027-2012.html>.

After Venezuela joins Mercosur, it will likely adopt a set of regulations and conditions to match those of other members.<sup>165</sup> Finally, Venezuela's withdrawal from the ICSID Convention took effect on June 24, 2012.<sup>166</sup>

### C. PRICE CONTROLS

The Fair Cost and Prices Law Decree to control prices and avoid excessive profits entered into force in 2011. In 2012, the pricing regulatory agency (Sundecop), began implementing the Decree by establishing or freezing the prices of certain foods and beverages as well as personal care, sanitation, and pharmaceutical products.<sup>167</sup> It should be noted that Sundecop's power to control prices is not limited to essential goods or services.

### D. PROMOTION OF MIXED COMPANIES

A new law was enacted to provide incentives for the creation of new associations between the State and the private sector. The law provides a number of benefits for these associations, including access to State-owned distribution and preferential financing.<sup>168</sup>

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165. *Tax Revision Suggested upon Venezuelan Entry into Mercosur*, EL UNIVERSAL (Aug. 13, 2012, 11:55 AM), <http://www.eluniversal.com/economia/120813/tax-revision-suggested-upon-venezuelan-entry-into-mercosur>.

166. Venezuela sent a written notice of denunciation of the Convention to the World Bank on January 24, 2012. See News Release, Int'l Centre for Settlement Inv. Disputes, Venez. Submits a Notice Under Article 71 of the ICSID Convention (Jan. 26, 2012), <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement100>.

167. See GACETA OFICIAL DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA Nos. 39.872, 28 de Febrero de 2012; 39.894, 29 de Marzo de 2012; 39.926, 21 de Mayo de 2012; 39.986, 15 de Agosto de 2012 (Venez.).

168. Decreto No. 9.052, de 15 de Junio de 2012, Valor y Fuerza de Ley que promueve y regula las nuevas formas asociativas conjuntas entre el Estado, la iniciativa comunitaria y privada para el desarrollo de la economía nacional [Law Decree for the Promotion and Regulation of New Legal Entities between the State, the Communitarian and Private for the Development of the National Economy], GACETA OFICIAL DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA No. 39.945, 15 de junio de 2012 (Venez.).