# Latin America and Caribbean

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## I. Argentina

### A. MANDATORY PRE-COURT MEDIATION

A new mandatory Pre-Court Mediation Law was enacted in May 2010.[1] New are the following provisions:

- The mediator may be assisted by relevant non-legal professionals by prior agreement of the parties;[2]
- A specific regime is established for both for patrimonial and non-patrimonial family mediations;[3] and

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1. *See* Law No. 26589, May 6, 2010, [31,898] B.O. 1 (Arg.). Law No. 26589 revokes Law No. 24573, Oct. 27, 1995, [28,258] B.O. 1 (Arg.), Law No. 25287, Aug. 24, 2000, [29,468] B.O. 1 (Arg.), and Law No. 26094, May 9, 2006, [30,901] B.O. 1 (Arg.) on this matter.

2. *See* Law No. 26589, art. 10.

3. *See id.* art. 31.

- A free pre-litigation mediation procedure is provided for those lacking financial resources.[4]

This law also modifies sections of the Argentine Civil and Commercial Procedural Code[5] in the following matters:

- Judges may refer parties to mediation as they deem appropriate, including at the preliminary hearing stage or by suspending proceedings;[6]
- Judicial costs shall also include the mandatory pre-court mediation procedure expenses;[7]
- Commencement of the mandatory pre-court mediation procedure shall suspend the applicable statute of limitations;[8]
- The agreement, as recorded by the mediator, shall constitute a binding and enforceable document, with some exceptions listed by law;[9] and
- The amounts payable by virtue of decisions in alimony cases, and judicial costs and expenses, shall be paid as of the date when the mediation is commenced.[10]

### B. Implementation of Media Communications Services Act

In 2009, the Argentine Congress enacted a new law on Audiovisual Communication Services[11] that replaced the former Broadcasting Law of 1980,[12] and regulations followed in August 2010 with Decree No. 1225/2010.[13] The most significant regulatory provisions related to advertising and mandatory carriage of signals are:

- Regulation of the Public Registry of Advertisers. The decree extends the registration requirement imposed on Advertising Agencies and Producers, to advertisers. Only those enrolled in the Registry will be allowed to advertise directly to media licensees.[14]
- Foreign advertisement. Foreign advertisement can be aired provided an international treaty or reciprocity exists with the subject country.[15]
- Advertisement regulations. Paid satellite licensees cannot insert ads, whether or not those ads are local.[16]
- Mandatory carriage of signals. Paid satellite licensees shall incorporate the signals according to a priority order established by the pertinent authority. They shall include all public broadcasting stations; State-owned or participated signals, such as national news signals and those generated by the provinces; and the City of Buenos Aires and the national universities.[17]

4. *See id.* art. 36.
5. *See* Law No. 17454, Nov. 7, 1967 [21,308] B.O. 1 arts. 34, 77, 207, 500, 644 (Arg.).
6. *See* Law No. 26589, art. 55.
7. *See id.* art. 53.
8. *See id.* art. 18.
9. *See id.* art. 30.
10. *See id.* art. 57.
11. *See* Law No. 26522, Oct. 10, 2009, [31,756] B.O. 1 (Arg.).
12. *See* Law No. 22285, Sept. 10, 1980, [24,499] B.O. 1 (Arg.).
13. *See* Decree No. 1225/12010, Aug. 31, 2010 [31,977] B.O. 2 (Arg.).
14. *See id.* art. 61.
15. *See id.* art. 81(a).
16. *See id.* art. 81(c).
17. *See id.* art. 65(3b).

Although this Decree has been issued, certain judicial decisions still limit the full application of the Media Communication Services Act.[18]

### C. Minimum Presumed Income Tax

The Argentine Supreme Court of Justice declared in *Hermitage S.A.* that under specific circumstances, the Minimum Presumed Income Tax (MPIT) is unconstitutional.[19]

The MPIT is levied on the gross value of corporate taxpayers' total assets at a rate of one percent, regardless of their actual earnings. The corporate income tax paid by the Argentine taxpayer may be credited against its MPIT liability. If the MPIT liability is greater, the excess MPIT must be paid. This tax may be carried over and credited against the taxpayer's income tax liabilities for ten years.[20]

In the *Hermitage* case, brought by a taxpayer, the Court highlighted that the MPIT was aimed at taxing a minimum taxable gain that was presumed to exist if a taxpayer held certain income-producing assets. This presumption was an absolute presumption, and the taxpayer did not have the opportunity to prove to the contrary. In the opinion of the Court, the unfairness of this type of presumption was evident in the case under review, as the taxpayer demonstrated that the minimum taxable gain presumed by law did not actually exist.[21]

The Court held that, under these circumstances, application of the MPIT breached the reasonableness principle, which requires an adequate selection of the means to reach the intended purpose. The Court opined that, given the facts and circumstances of the case, the application of the MPIT was a mechanism inconsistent with the goal intended by Congress of collecting tax proceeds and therefore was unconstitutional.[22]

### D. Protection of Glaciers

Pursuant to the 1994 amendment to the Argentine Constitution, the power to legislate on environmental matters is vested in the provinces.[23] Nevertheless, the federal government has the power to establish minimum standards to be met throughout the country.[24]

In October 2010, the National Congress approved a law (the "Glacier law") regulating the minimum environmental protection standards for the preservation of glacial and periglacial zones.[25] This law is very similar to a bill that passed in the Argentine Congress in

18. *See, e.g.*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 5/10/2010, "Grupo Clarín y otros S.A.," La Ley [L.L.] Law no. 26.522 arts. 46, 61 (2010) (Arg.); Juzgado Civil y Comercial Federal No. 1 [Jugz. Fed.], 9/11/2010, "Grupo Clarín SA y otros s/medidas cautelares," (Arg.), *available at* http://www.elDial.com-AA65EF.

19. Corte Suprema de Justicia de la Nación [CSJN], 15/6/2010, "Hermitage S.A.," Fallos 333:993 (Arg.), *available at* http://www.mpf.gov.ar/biblioteca/newsletter/n225/fallo_h_442.pdf.

20. *See* Section 13 of the Minimum Presumed Income Tax Law as amended. This Law was enacted by Law No. 25063, Dec. 30, 1998, [29,053], B.O. 1 (Arg.); and later modified by Laws No. 25082, Jan. 20, 1999, [29,067], B.O. 1 (Arg.); Law No. 25123, July 28, 1999, [29,196], B.O. 1 (Arg.); Law No. 25239, Dec. 31, 1999, [29,305], B.O. 6 (Arg.); and Law No. 25360, Dec. 12, 2000, [29,544], B.O. 3 (Arg.).

21. *See Hermitage*, items 10, 14, and 15 of the judgment.

22. *Id.*, item 16 of the judgment.

23. *See* Law No. 24430, Jan. 10, 1995, [28,057] B.O.1 (Arg.).

24. *See id.* art. 41.

25. *See* Law No. 26639, Oct. 28, 2010, [32,016] B.O. 7 (Arg.).

October 2008[26] and was vetoed in November 2008 by the Argentine President,[27] defining "glacier" to include periglacial zones;[28] prohibiting certain new activities in glaciers or periglacial zones, including mining and hydrocarbon exploration and exploitation activities;[29] altering the rules for assessing environmental impacts upon glaciers and periglacial zones from human activity;[30] and creating a National Inventory of Glaciers under the auspices of the *Instituto Argentino de Nivología, Glaciología y Ciencias Ambientales.*[31]

Prior to the enactment by National Congress of this law, some provinces (such as Santa Cruz, San Juan and La Rioja) enacted their own provincial laws protecting glaciers, aiming to protect their competent jurisdiction and full exercise of their constitutional powers.

Lately, some legal actions against the constitutionality of the Glacier Law have been filed in the province of San Juan by different interested parties. One party obtained an injunction suspending the law's effects in the province of San Juan, pending a final judicial decision on the law's constitutionality. Similar lawsuits are expected in other provinces.

## II. Bolivia: Judicial Reform Under the New Constitution–More Power to Indigenous Communities?

The new Bolivian constitutional order came into effect on February 7, 2009.[32] One of the most relevant reforms relates to the judiciary. As part of the implementation of the general rules under the Constitution, two laws on the judicial system were approved during 2010: Law No. 25 of June 24, 2010,[33] relating to the new legal order of the Judicial Branch; and Law No. 27 of July 6, 2010,[34] relating to the new Plurinational Constitutional Court.

The law of the Judicial Branch regulates the organization and powers of the ordinary judiciary, comprised of the Supreme Tribunal of Justice, nine Departmental Justice Tribunals, and several lower-level ordinary and specialized judges similar to the past. In parallel and with identical hierarchy, the organization and powers of a specialized new agro-environmental jurisdiction and of the controversial indigenous aboriginal jurisdiction have now become regulated by law.[35]

The indigenous aboriginal jurisdiction is to be exercised "through its authorities" which are to "apply principles, cultural values, rules and procedures of [their] own."[36] This jurisdiction is founded on the "plurinational" character of the State, on the rights of indigenous aboriginal nations and peoples to self-determination, autonomy, and self-government, and rights generally recognized by the Constitution, International Labor

26. The bill was approved by the National Congress on October 22, 2008 under Law No. 26418, *available at* http://www1.hcdn.gov.ar/dependencias/dsecretaria/Leyes/26418.pdf [hereinafter Glacier Bill].

27. *See* Decree No. 1837/2008, Nov. 11, 2008, [31,529] B.O. 4 (Arg.).

28. *See* Glacier Bill, art. 2.

29. *See id.* art. 6.

30. *See id.* arts. 7, 15.

31. *See id.* art. 3.

32. *See* Adrián L. Furman et al, *Latin America and Caribbean*, 44 INT'L LAW. 1117 (2009).

33. *See* Law No. 25, GACETA OFICIAL DE BOLIVIA, Special Edition No. 0145, June 24, 2010.

34. *See* Law No. 27, GACETA OFICIAL DE BOLIVIA, Special Edition No. 0149, July 6, 2010.

35. *See* Law No. 25, GACETA OFICIAL DE BOLIVIA, Special Edition No. 0145, June 24, 2010.

36. *Id.*

Organization Convention 169, and the United Nations Declaration on Rights of Indigenous Peoples.[37]

Indigenous aboriginal jurisdiction is to apply based on the special link between individual members of the respective indigenous aboriginal nation or peoples and covers relationships of a personal, material, or territorial nature. Members of the nation are subject to the jurisdiction when acting either as plaintiffs or defendants. Such jurisdiction is to be applied so as to respect the rights to life and defense as well as other general guaranties established in the Constitution.[38]

Implementation will be required in the form of a "law of jurisdictional delimitation," to delineate which specific matters or cases will fall within indigenous jurisdiction.[39] For instance, indigenous aboriginal jurisdiction may not apply to certain criminal offenses such as homicide, rape, and corruption, which would remain under the jurisdiction of the ordinary criminal courts, with "minor" offenses falling under the indigenous aboriginal jurisdiction. These and other important issues must be discussed before a supplemental law is approved.[40]

This matter is of utmost importance for the Bolivian judicial system, because indigenous communities and nations are the majority in the country and they physically occupy large territories, which themselves are not yet clearly identified for purpose of application of the law.

The Law of the Plurinational Constitutional Tribunal regulates its organization and powers, such as the extent of judicial constitutional control over all sorts of resolutions, rulings, decisions, and judgments, whether judicial or administrative.[41] An open issue is the degree of control which the Tribunal will have over the decisions of the indigenous jurisdiction which, in principle, are treated as final and binding.

Both laws will come into full effect only when, under the Constitution and new electoral rules enacted during 2010, all of the magistrates of the tribunals are elected by popular vote, probably by April 2011.[42] For the first time Bolivians will vote to elect magistrates, which some citizens perceive as a threat to judicial independence.

## III. Brazil

### A. Clean Record Law

On July 4 2010, Complementary Law No. 135/2010,[43] popularly known as the "Clean Record Law," was enacted, changing Complementary Law No. 64/1990[44] and dictating

37. *Id.*

38. *Id.*

39. For example, during September of 2010, thirty-six forums held all over the country with participants of civil society worked on proposals and recommendations presented to the Committee on Aboriginal Indigenous Peasants' Nations and Peoples of the Chamber of Representatives of the Bolivian Congress. *See La Paz*, La Gaceta Juridica, Sept. 21, 2010.

40. *See La Paz*, La Razon Daily Newspaper, Nov. 17, 2010.

41. *See* Law No. 27, Gaceta Oficial de Bolivia, Special Edition No. 0149, July 6, 2010.

42. *See* Transitory Provisions Nos. 2 and 4, Bolivian Political Constitution, Gaceta Oficial de Bolivia, Official Edition, Feb. 9, 2009.

43. Lei No. 135, de 4 de junho de 2010, Diário Oficial da União [D.O.U.] de 07.06.2010 (Braz.).

44. Lei No. 64, de 18 de maio de 1990, Diário Oficial da União [D.O.U.] de 21.05.1990 (Braz.).

new parameters for the ineligibility of public elective offices in Federal, State, and Municipal spheres, aiming to protect the administrative probity and morality in the performance of public functions.[45]

This law resulted from the Clean Record Project, a Brazilian campaign that intended to improve the quality of the candidates in public elective offices. The law, which was signed by over 1.3 million Brazilian voters–representing more than one percent of the total Brazilian voters–was delivered to the Brazilian National Congress on September 29, 2009.[46]

Law No. 135/2010 has made ineligible State and Federal District Governors and Vice-Governors, as well as Mayors and Vice-Mayors who have lost their mandates for infractions to State, Federal District, and Municipal Constitutions, respectively, including those who have resigned from their mandates to avoid impeachment.[47]

This law further deems ineligible individuals who have been convicted by Electoral Justice in final decision or by decisions issued by a collegiate Electoral Tribunal, including those charged with infractions involving abuse of economic or political powers, crimes against the national economy or public administration, crimes involving the stock market, racism, money laundering, drug trafficking, and electoral matters, among others.[48]

Candidates who performed public functions in direct or indirect administration or foundations and who have benefited themselves or others by abusing economic or political powers, or who have had their accounts relating to the performance of the public office or functions rejected by an intentional act of administrative improbity are also ineligible.[49]

The main innovation presented by Law 135/2010 is the possibility of determining the ineligibility of candidates based not only on final decisions, but also by decisions issued by collegiate tribunals. This alternative was created to escape from the problems caused by the delay of Brazilian justices' issuance of final decision in such cases, a process that may last for many years due to the great number of appeals.[50]

Moreover, of great importance was the extension of the ineligibility period; formerly three years from the end of the mandate or condemnation, the period is now extended to eight years.[51]

In deciding the applicability of the Law to a senatorial candidate, Jader Barbalho, the Federal Supreme Court's justices divided five to five, because there is one vacant seat. Subsequently, the Justices decided by seven votes to three that the deadlock meant that the lower decision should be upheld.[52] Three hundred and eighty candidates to the Brazilian Senate and the House of Representatives have had their candidatures rejected by the Superior Electoral Court since the Clean Record Law.[53]

45. *See* Lei No. 135, *available at* http://www.planalto.gov.br/ccivil_03/Leis/LCP/Lcp135.htm.

46. *See id.*

47. *Id.*

48. *See id.*

49. *See id.*

50. *Id.*

51. *Id.*

52. *See* Supremo Tribunal Federal Jurisprudência, Extraordinary Appeal (RE) 631102.

53. *See* Lista Candidatos 2010, *available at* http://www.tse.gov.br/internet/eleicoes/estatistica2010/arquivos_para_download/candidatos.html.

## B. Associations Between Brazilian and Foreign Law Firms

On September 16th, the Ethics and Discipline Tribunal of the Brazilian Bar Association defined the ethical limitations on the cooperation between Brazilian and foreign law firms.[54] This determination is only an opinion and not a ruling, because it resulted from a consultation and not a specific case, but it indicates the position of the majority of the Brazilian Bar Association on this matter.

The Board decided that no corporate association between Brazilian and Foreign Law Firms is legally possible in accordance with Provision 91/2000 of the Federal Council of the Brazilian Bar Association, which establishes rules for the activities of consultants in foreign Law and foreign Law Firms in Brazil.[55]

The opinion stated that although there is no restriction regarding cooperation or professional partnerships between Brazilian and foreign law firms in the execution of legal work for foreign clients, neither one may interfere with the professional activities of the other which could cause the loss of their respective professional independence or individuality.[56] Thus, any Brazilian lawyer or Brazilian law firm that enters into a joint venture with foreign lawyers or foreign law firms, presenting the combination as a single entity, may be charged with an ethical violation and the foreign lawyers may be charged with the unauthorized practice of law.

The opinion determines that foreign lawyers may only practice in Brazil as consultants in foreign law and must register before the Brazilian Bar Association, being precluded from practicing as lawyers or consulting on Brazilian law. Foreign law firms must only be comprised of foreign lawyers and must register before the Bar. In parallel, Brazilian law firms cannot keep foreign lawyers as members.[57]

## C. Changes to Divorce Law

After great resistance from conservative sectors of Brazilian society, on July 13, 2010, Constitutional Amendment No. 66 was approved, extinguishing the one-year period of legal separation or the two-year period of actual separation previously required to obtain a divorce.[58] This measure, jointly with Law No. 11.441,[59] made possible the extrajudicial consensual divorce of couples who have no children under eighteen years old and have changed entirely the legal framework existent since 1977, when the existing Divorce Law was enacted, which also required that both separation and divorce be subject to judicial proceedings.[60]

54. *See* 535th Section of Sept. 16, 2010, *available at* http://www2.oabsp.org.br/asp/tribunal_etica/pop_ementas.asp?tipoEmenta=1&ano=2010&id_sessao=7&sequencial=3.

55. *See* Provision 91/2000, *available at* http://www.oab.org.br/msProvimentoPrint.asp?idt=91/2000.

56. *See* 535th Section of Sept. 16, 2010, *supra* note 54.

57. *See id.*

58. *See Emenda Constitucional* No. 66, de 13 de julho de 2010, Diário Oficial da União [D.O.U.] de 14.07.2010 (Braz.).

59. *See* Lei No. 11.441, de 4 de janeiro de 2007, Diário Oficial da União [D.O.U.] de 05.01.2007 (Braz.).

60. *See* Lei No. 6.515, de 26 de dezembro de 1977, Diário Oficial da União [D.O.U.] de 27.12.1977 (Braz.).

## IV. Chile

### A. Reform to Capitals Market Regulations

On August 13, 2010, Law No. 20.448[61] was enacted, amending several capital market regulations, regarding, *inter alia*, collective investment schemes, securitization, income tax, and banks (the "Capital Markets Reform Law").

1. *Mutual Funds Act.*[62] The Capital Markets Reform Law recognized for the first time in Chile domestic exchange-traded funds ("ETFs"). These funds are structured as closed-end funds and, thus, their quotas will be traded in the secondary market on a market price basis.[63] The Capital Markets Reform Law also widens investment limits in derivatives,[64] high risk securities,[65] and other securities (not included in the Mutual Funds Act) that the Chilean Securities and Insurance Authority (*Superintendencia de Valores y Seguros*, or "SVS") authorizes funds to invest in.[66]

Seeking to reduce approval process costs and the time required for placement of fund quotas, the Capital Markets Reform Law eliminated a prior SVS approval by allowing funds to offer quotas to investors upon registration of the fund's bylaws with the SVS.[67]

2. *Foreign Venture Capital Investment Funds Act.*[68] The Capital Markets Reform Law reduced from five to three years the period required to maintain foreign invested capital prior to repatriation.[69] In addition, foreign venture capital investment funds are now authorized to issue debt instruments and to obtain local or foreign loans.[70]

3. *Capital Markets Act.*[71] Shelf registration of asset-backed securities is authorized. Additionally, different issuances under the same program may be backed by assets held by a single vehicle, without the need to organize different specific purpose vehicles for each issuance as in the past.[72]

On the other hand, the Capital Markets Reform Law aims to promote local trading of foreign securities by allowing their denomination in Chilean pesos, which may be payable in an authorized foreign currency or, with the prior approval of the Chilean Central Bank, in Chilean pesos.[73]

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61. Law No. 20,448, Aug. 13, 2010, Diario Oficial [D.O.] (Chile), *available at* http://www.leychile.cl/N?i=1016177&f=2010-09-30&p=.

62. Decree Law No. 1,328, Dec. 19, 1976, Diario Oficial [D.O.] (Chile), *available at* http://www.svs.cl/sitio/legislacion_normativa/marco_legal/dl_1328_agosto2010.pdf.

63. *See id.* art. 2.

64. *See id.* art. 13(10).

65. The limit shall be determined by the fund's bylaws. *See id.* art. 13(8).

66. *See id.* art. 13(10).

67. *See id.* art. 8.

68. Law No. 18,657, Sept. 29, 1987, Diario Oficial [D.O.] (Chile), *available at* http://www.svs.cl/sitio/legislacion_normativa/marco_legal/ley_18657_agosto2010.pdf.

69. *See id.* art. 14(b).

70. *See id.* art. 10.

71. Securities Market Law, Law No. 18,045 (1981) (Chile), *available at* http://www.svs.cl/sitio/english/legislacion_normativa/marco_legal/Ley%2018045%20-%20ingles.pdf.

72. *See id.* tit. 18, art. 132.

73. *See id.* tit. 24, art. 184.

4. *Income Tax Act.*[74] The Capital Markets Reform Law broadened tax exemption of capital gains on the sale or transfer of certain securities, by including capital gains obtained by foreign institutional investors on the sale or transfer of quotas of domestic collective investment schemes (*e.g.*, ETFs) and debt instruments issued by the Chilean Central Bank, the Republic of Chile, or domestic companies, provided that certain conditions are met.[75]

5. *Banking Act.*[76] Representative offices of foreign banks may now advertise in Chile the products or financing services offered by its parent company,[77] and local banks are now authorized to issue bonds to finance housing loans secured with mortgages.[78]

### B. Amendment to Environmental Framework Law

Law No. 20,417,[79] which entered into force on January 26, 2010, modified the Environmental Framework Law, Law No. 19,300.[80] Among other matters, the amendment creates: (i) the Ministry of the Environment,[81] which is in charge of designing and applying environmental policies and programs; (ii) the Council of Ministries for Sustainability, in charge of proposing policies for the sustainable management of renewable natural resources; (iii) the Environmental Assessment Agency ("SEA"), in charge of managing the environmental impact assessment system; and, (iv) the National Bureau of the Environment ("SMA"), in charge of overseeing compliance with environmental laws.

One of the most remarkable amendments made by this law is the incorporation of extended citizen participation mechanisms into the environmental impact evaluation process.[82] The provisions regarding citizen participation will be enforceable when current regulations are modified.[83]

This law also increases the fines applicable to certain environmental violations from US$39,000 for each breach, to up to US$9,300,000.[84] The SMA's new sanctioning authorities will be operative when Environmental Courts start functioning.[85]

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74. Income Tax Act, Law No. 824 (1974) (Chile), *available at* http://www.sii.cl/pagina/jurisprudencia/legislacion/basica/dl824.doc.

75. *See id.* tit. 6, art. 106.

76. General Banking Act, Law No. 35,944 (1997) (Chile), *available at* http://www.sbif.cl/sbifweb/internet/archivos/ley_551.pdf.

77. *See id.* tit. 2, art. 33.

78. *See id.* tit. 8, art. 69.

79. Environmental Framework Law, No. 20,417 (2010) (Chile), *available at* http://www.munitel.cl/Actualidad_Legislativa/Ley_20.417.pdf.

80. Environmental Framework Law, No. 19,300 (1994) (Chile), *available at* http://www.leychile.cl/Navegar?idNorma=30667.

81. Functions of Ministry of the Environment, http://www.mma.gob.cl/1257/w3-propertyvalue-16002.html.

82. *See* Law No. 19,300 of Mar. 9, 1994, tit. 2, art. 29, 30 bis (Chile). Projects and activities subject to environmental impact assessment refer to energy generation, mining, and industrial activities and, in general, to projects that entail relevant environmental impacts whether by reason of their magnitude or hazardous nature. Environmental assessment is based on an environmental impact study or environmental impact statement, which informs and/or analyzes the environmental impacts of a project or activity. *See* Law No. 19,300 of Mar. 9, 1994, tit. 1, art. 2.

83. *See id.* art. 74.

84. *See* Law No. 20,417 of Jan. 26, 2010, tit. 3, art. 38 (Chile).

85. *See id.* transitory art. 9.

## C. New Mining Tax Law

After the February 27, 2010 earthquake, the Chilean government proposed several measures and legal amendments to Congress[86] with the aim to finance reconstruction and repair efforts in various regions, including an amendment to the specific mining tax (the "SMT"). On October 21, 2010, the Official Gazette published Law No. 20,469 (the "Mining Tax Law"), which amends the Income Tax Law with regard to the taxation of the mining industry.[87] Prior to the entry into force of the Mining Tax Law, the SMT rate levied on each mining company was based on the company's annual sales, measured in copper metric tons per annum.[88] Mining companies were subject to up to a five percent tax rate according to their sales in tons per annum.[89] The new law replaces the five percent fixed rate with a variable rate ranging from five percent to fourteen percent, depending on the mining operational margin. The mining operational margin is determined by dividing the taxpayer's mining operational net income over mining operational gross income during a fiscal year. Higher international prices of mining products and the subsequent rise in profits will therefore increase SMT rates.

The Mining Tax Law extends tax invariability regimes to companies that currently have a foreign investment contract with the State of Chile pursuant to Decree Law No. 600 and that accept this new tax regime. In order to encourage such acceptance, the Mining Tax Law (i) extends tax invariability for an additional six-year period and (ii) provides preferential SMT rates ranging from four percent to nine percent, depending on their mining operational margin, between 2010 and 2013.[90]

Additionally, the Mining Tax Law provides that one third of the funds collected by the State through this tax will be directly allocated into the mining regions,[91] as determined by one or more Finance Ministry decrees. The remaining two thirds will be distributed among the remaining regions of the country.[92]

The Government expects to collect approximately US$1 billion over the next three years by means of this amendment to the Income Tax Law, which will partly finance the reconstruction efforts.[93]

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86. Creating the National Fund for Reconstruction and Establishing Incentive Mechanisms, No. 20,444 (2010) (Chile), *available at* http://www.leychile.cl/Navegar?idNorma=1013716&idParte=&idVersion=2010-05-28 (Showing other measures that have been approved by Chilean Congress).

87. Mining Tax Law, No. 20,469 (2010) (Chile), *available at* http://www.leychile.cl/Navegar?idNorma=1018335&r=1.

88. Units defined annually based on copper international prices.

89. Mining Tax Law, No. 20,026 tit. 4, art. 64 bis (2005) (Chile), *available at* http://www.leychile.cl/Navegar?idNorma=239219.

90. Law No. 20,469 of Oct. 21, 2010, transitory art. 3 (Chile).

91. *Id.* transitory art. 5.

92. *Id.* art. 3.

93. *Royalty: Senado aprobó y proyecto pasa a Cámara Baja* [Royalty: The Senate Approved and the Project Passes Lower House], Nación (Chile), Oct. 13, 2010, http://www.lanacion.cl/noticias/site/artic/20101012/pags/20101012221351.html.

## V. Colombia

### A. Insolvency Laws

In January of 2010, Law No. 1,380 was enacted, establishing the insolvency regime for persons who are not merchants. The law permits these persons to have recourse to a legal procedure that allows them to celebrate a payment agreement with their creditors to fulfill pending obligations. The agreement may not include parents' alimentary obligations to their children, nor does it include related executory proceedings. This law aims to benefit more than fifteen million citizens.[94]

### B. Judicial Reform

In July 2010, Law No. 1,395 came to establish some actions to improve the congestion of the Colombian Judicial System by amending the Civil, Labor, and Criminal Procedure Codes, as well as modifying some regulations related to administrative and electoral law.[95] Some of the most relevant aspects of this reform can be summarized as following:

(a) The creation of a new category of judges to decide small causes and multiple jurisdictions to rule over a wide range of proceedings;[96]
(b) The creation of new rules to determine the category or importance of claims;[97] and
(c) The determination of a fixed limit of time for judges' rulings, including one year for trial and six months for appeals. If the judge does not rule within the stipulated period, that judge loses jurisdiction over the case.[98]

### C. Financial, Insurance, and Securities Markets

The Colombian National Government enacted Decree 2,555 of 2010 to unify the regulation for the financial, insurance, and securities market sectors.[99] The importance of this Decree relies on the fact that it compiles most of the regulations issued between the years of 1986 and 2010 for these sectors. The decree was issued to facilitate the understanding of the financial regulation in Colombia by eliminating approximately 160 decrees issued by the Government and six resolutions of the Financial Superintendence.[100]

### D. Antitrust Law

In the year of 2009, Law No. 1,340 was issued to update the Colombian antitrust regime.[101] In order to develop this law, the Colombian government issued, among others, Decree No. 2,896 of 2010, which defines the general conditions under which the Superintendents of Industry and Commerce may grant leniency programs and benefits to those

94. L. 1,380, Jan. 25, 2010, Diario Oficial [D.O.] (Colom.).
95. L. 1,395, July 12, 2010, Diario Oficial [D.O.] (Colom.).
96. *Id.* art. 2 (creating art. 14A of the Civil Procedure Code of Colombia).
97. *Id.* art. 1 (modifying art. 14 of the Civil Procedure Code of Colombia).
98. *Id.* art. 6.
99. L. 2,555, July 15, 2010, Diario Oficial [D.O.] (Colom.).
100. *Id.*
101. L. 1,340, July 24, 2009, Diario Oficial [D.O.] (Colom.).

persons or companies who participate in illegal agreements that restrict competition within a market, and afterwards collaborate with the investigation, in order to detect and deter all such actions affecting the market.[102]

The Decree defines, among other aspects, who may have access to the leniency programs and the benefits involved, as well as the conditions and mechanism that must be carried out in order for the Superintendents of Industry and Commerce to exonerate or reduce the applicable fines assessed as consequence of the restriction to the competition within the Colombian market.[103]

### E. Free Trade Agreement

The Free Trade Agreement (hereinafter the "FTA") between the Republic of Colombia and the European Free Trade Area (EFTA), composed by Liechtenstein, Iceland, Norway, and Switzerland, was approved by Law No. 1,372, enacted in January of 2010.[104] The law also approved some specific agreements related to the agricultural sector.[105]

Through the issuance of Decrees No. 585 and 2051 of 2010, the Colombian National Government enacted the FTA and its instruments, celebrated between Colombia, El Salvador, Guatemala, and Honduras.[106]

### F. Double Taxation Agreement

In an effort to avoid tax evasion by Colombian and Chilean nationals, the governments of each country reached an agreement to avoid double taxation and to prevent fiscal evasion with respect to taxes on income and capital. The agreement was enacted though Decree No. 586 of 2010.[107]

## VI. Ecuador

### A. Changes in Oil and Gas Regulations

In July 2010, several reforms to the Hydrocarbons Act were enacted after a controversial process of approval in the National Assembly.[108] This law changed several points of the oil industry, including activities of state agencies, role of the government in the operations of the fields, and the contract model to be signed with foreign companies.[109]

102. L. 2,896, Aug. 5, 2010, Diario Oficial [D.O.] (Colom.).
103. *Id.*
104. L. 1,372, Jan. 7, 2010, Diario Oficial [D.O.] (Colom.).
105. Some of the agreements approved by L. 1,372 of 2010 are: (i) the FTA; (ii) the Memorandum of Understanding on the FTA; (iii) the Agreement on Agriculture, between Colombia and Switzerland; (iv) the Agreement on Agriculture, between Colombia and Iceland; and (v) the Agreement on Agriculture, between Colombia and Norway. *Id.*
106. *See* L. 585, July 8, 2010, Diario Oficial [D.O.] (Colom.); L. 2051, July 8, 2010, Diario Oficial [D.O.] (Colom.).
107. *See* L. 586, Feb. 24, 2010, Diario Oficial [D.O.] (Colom.).
108. Reform Act to the Hydrocarbons Act, July 27, 2010, Registro Oficial Suplemento 244 (Ecuador).
109. *Id.* arts. 5, 6, 7.

First, the model of a state owned company (SOC) that, at the same time, represents the national government in contracts with private companies, was terminated.[110] Petroecuador, the SOC that had such dual role, is now merely an operator and is in charge of the areas where it has some kind of direct operation. The activity of administrator of contracts, as well as administration of hydrocarbons resources and information, is now reserved to the Secretary of Hydrocarbons.[111]

Also, the law confirms the mandate included in the Ecuadorian Constitution establishing the non-renewable resources should be exploited by the SOCs, and only in the event they do not have technical or economic capacity, the government may sign contracts with private companies.[112]

Finally, the contract to be signed with private companies was modified. The new law privileges the services contract model, under which the private company shall receive a U.S. dollar payment per barrel of oil extracted, irrespective of its cost in the international market.[113]

Today, there is a process of renegotiation of current contracts, which are about to (or have already) expired. If such renegotiation process is not successful, the government shall terminate the contracts and indemnify the companies for the non-amortized investments.[114]

### B. New Rules for Universities

The priority of the new rules, contained in the Organic Universities Act, is to give the government strict control over the development process of the universities in the country.[115] The newly-created authorities will have strong influence on the curricula taught in universities, which will have to be related to the National Plan of Development. The law also requires most of the professors to have full-time tenure and to devote a high percentage of time to research projects, both of which are characteristics that are absent in the current Ecuadorian university system.[116]

A controversial point in the law is related to the universities' autonomy. The new rules are said to undermine universities' autonomy, but it is hoped that the government will intervene mainly to preserve academic quality.[117] Finally, both state and privately-owned universities are required to be accredited by a governmental body in order to continue operating. This process requires the reinforcement of areas such as infrastructure, research, and administrative services.[118]

110. *Id.* art. 18.

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

112. Ecuadorian Constitution art. 316.

113. Reform Act to the Hydrocarbons Act, *supra* note 108, at art. 7.

114. *Id.* at First Transitory Order.

115. *See* Organic Universities Act, Oct. 12, 2010, Registro Oficial No. 298 (Ecuador).

116. *Id.* art. 109.

117. *See id.* arts. 17, 18.

118. *Id.* art. 95.

### C. Changes in Rules for Public Servants

Through the Organic Public Service Act, the government aimed at creating a legal framework to renew the public service sector.[119] Arguably, that will be the main objective, since most of the rules are still the same that were included in the repealed Organic Law of Civil Service and Administrative Career.[120]

The newly-enacted law created several rules related to:

- Mandatory retirement for public servants older than seventy;[121]
- No promotions for public servants older than sixty-five;[122]
- Access to public work only through merits contest;[123] and
- Retirement bonus may be paid with national bonds.[124]

In a different sphere, the law tries to reach fairness in the whole sector, through salary homogeny. The same wage scale will be applied to all public servants, no matter which institution they work in. But they will be able to improve their salaries through a variable salary scale, which can be paid based on performance, both of the servant and the institution.[125]

### D. New Act For Regional And Territorial Governments

The Territorial Organic Code intends to achieve two main goals. First, the Code intends to provide a framework that clarifies the scope of work for regional and local governments in Ecuador. Further, the Code creates a system to regulate the distribution of the national budget amongst these governments.[126]

With respect to its first purpose, the Code establishes the attributions of each level of the autonomous and decentralized governments. Each authority will have well-defined attributes of and limitations on the exercise of their respective powers.[127] For instance, the Code determines how the local governments can regulate taxes, organize the properties registry, and have control over environmental issues, among other areas.

Regarding the national budget, the Code creates a more complex formula that is supposed to allow the distribution of the national resources in a manner that involves greater equality.[128] The formula has been criticized by some groups, especially large cities that feel their economic resources will be diminished.

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119. *See* Organic Public Service Act, Oct. 6, 2010, Registro Oficial Segundo Suplemento No. 294 (Ecuador).

120. *See* Organic Law of Civil Service and Administrative Career, May 12, 2005, Registro Oficial 16 (Ecuador).

121. Organic Public Service Act, *supra* note 119, at art. 81.

122. *Id.*

123. *Id.* art. 5.

124. *Id.* art. 129.

125. *Id.* art. 3-4.

126. *See* Organic Territorial Code, Oct. 19, 2010, Registro Oficial Suplemento No. 303 (Ecuador).

127. *See id.* art. 3.

128. *See id.* art. 215.

## VII. Venezuela

In the elections for the representatives to the National Assembly held in September 2010, although the opposition to the government garnered fifty-two percent of the popular vote, it captured only forty-one percent of the seats in the Assembly.[129] President Chávez used the supermajority he still controls in the Assembly until the new members were seated in January 2011, to gain greater central control over the country's financial sector, both public and private, and to create parallel legislative structures based on a communal concept of organization that is largely controlled by the President, who would have the authority to allocate a substantial portion of public revenue away from the traditional states and municipalities to such communal organizations.[130]

Also, in just the first ten months of 2010, the Venezuelan government expropriated or nationalized almost 200 private sector companies.[131] In addition to the aforementioned events, the following are some salient examples of legislative amendments from 2010.

### A. Financial Sector

The government's policy of centralizing control and use of the financial system has resulted in major changes to financial sector laws and regulations, including those related to the Central Bank, and foreign exchange and capital markets.

The Venezuelan Central Bank is now authorized to engage in additional credit transactions with the central government and state companies, including the state-owned oil company Petróleos de Venezuela, S.A. (PDVSA).[132] As a result, the Central Bank can now directly participate in the foreign exchange market,[133] and grant loans to the State and state companies, which are guaranteed by bonds issued by the borrowers.[134]

Additionally, and of greater significance for the private sector, amendments to foreign exchange regulations have caused the closure of the free exchange market, complicating exchange controls in the country. The exchange market had essentially functioned on the basis of government bond swaps, mainly denominated in U.S. dollars, and operated freely through private stock brokerage firms. In May 2010, the government ordered brokerage firms to cease dealing in these government bonds, and some days thereafter the National Assembly amended the Criminal Exchange Law to expressly criminalize the exchange of such bonds for hard currency other than through the Central Bank at the official exchange rate.[135] This legislative change, plus the aggressive prosecution of various brokerage firms that the government alleged had engaged in illicit financial activities, caused a major shock

129. *See, e.g.*, Robert Bottome, *September 26: The Day After*, 27 VenEconomy Monthly 12, at 4 (Sept. 2010).

130. *See, e.g.*, *The National Assembly Leaves Imposing the Bases for the Communal State*, El Universal. Nov. 14, 2010, at 1-4; *see also The Assembly Created the Structure of the Socialist Financial System*, El Universal, Nov. 15, 2010, at 1-8.

131. *See The Month in Review*, 28 VenEconomy Monthly 1, at 1 (Oct. 2010) (the count was 195 companies in the first ten months of 2010).

132. Law to Partially Reform the Central Bank Law, May 7, 2010, Official Gazette No. 39,419 (Venez.).

133. *See id.* art. 7(7).

134. *See id.* art. 49(6).

135. Law to Partially Reform the Law Against Illegal Exchange Activities, May 17, 2010, Official Gazette, Extraordinary, No. 5,975 (Venez.).

to the free exchange market, practically freezing the operations of the brokerage industry and of the national stock market.[136]

As a result of this major policy shift, the government attempted to create a new, albeit limited, currency market managed by the Central Bank through the commercial banks, but excluded brokerage firms: the System for Transactions in Securities Denominated in Foreign Currency (*Sistema de Transacciones con Títulos en Moneda Extranjera*, or "SITME").[137] SITME gives limited access to foreign exchange solely for imports, provided that companies cannot obtain foreign exchange by means of the principal exchange control system, i.e. the Commission for the Administration of Foreign Exchange (*Comisión para la Administración de Divisas*, or "CADIVI").

The other thrust of the government into the financial area was the substantial modification of the Capital Markets Law.[138] This new law replaced the National Securities Commission with the *National Securities Superintendency*, which is vested with broad and flexible authority to regulate all aspects of the capital markets, create a new public stock exchange,[139] and prohibit stock brokerage firms from dealing in bonds issued by public sector entities.[140]

It is expected that before the end of 2010, a new General Banking Law will be enacted, effectively nationalizing the banking industry.[141]

### B. EXPROPRIATIONS

The Assembly again modified the Consumer Protection Law[142] to declare "all goods necessary for the development of the activities of production, manufacture, importation, storage, transportation, distribution and commercialization of goods and services" to be "of public utility and social interest." As a consequence, the National Executive may initiate the expropriation of assets . . . without requiring the National Assembly's prior declaration of such assets as being of public utility and social interest." Additionally, it empowers the "State to implement occupation, temporary operation and sequestration measures, during the expropriation procedure through the immediate possession, opera-

136. Given the negative investment climate in Venezuela due to the government's economic policy, the stock market is reduced to minimal activity. The main activity of the brokerage firms became currency trading, so the closure of the free currency market has severely impacted brokerage firms. As for the currency market, however, it may be noted that new schemes for swapping debt instruments were developed. But this market is minor compared to the previous one.

137. The Central Bank's Resolution, Oct. 1, 2010, Official Gazette No. 39,522 (Venez.) (providing the basic regulations of its role regarding the SITME market); *Operations for the Purchase of Securities Denominated in Foreign Exchange Through [SITME]*, Central Bank (June 14, 2010), http://www.bcv.org.ve/c7/pdf/lineasitme jun10.pdf (containing the principal regulations for access by companies and individuals to the SITME market. With the creation of the SITME exchange market Venezuela had as many as five different exchange rates, two under the CADIVI scheme, the SITME rate, the new variation of the commercial swap rate, and the black market rate).

138. Capitals Markets Law, Nov. 5, 2010, Official Gazette No. 39,456 (Venez.).

139. Ley de la Bolsa Pública de Valores Bicentenaria, Nov. 13, 2010, Official Gazette, Extraordinary, No. 5.999 (Venez.) (law creating the so-called Bicentennial Public Stock Exchange).

140. *See* Capitals Markets Law, *supra* note 138, at art. 2.

141. *Banking Law Bill Duplicates Fines to Entities*, EL UNIVERSAL, Nov. 16, 2010, at 1-8. Most significantly, this bill declares that the banking sector is of public utility and, thus, subject to expropriation.

142. Law to Partially Reform the Law for the Defense of Persons Regarding Access to Goods and Services, Feb. 1, 2010, Official Gazette No. 39,358 (Venez.).

tion, administration and use of the [assets] by . . . the National Executive, in order to guarantee the availability of said goods and services for the general population."[143] Moreover, the new law further elaborates the concepts of prohibited commercial practices by merchants and service providers, as well as the sanctions applicable thereto. This law allegedly aims to protect "the people" against alleged abusive practices of private sector providers.

143. *See id.* art. 6.