International Investment and Development

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Developments concerning cross-border international investments took place in a number of jurisdictions in 2009. This article reviews important developments in Argentina, Bolivia, Brazil, Canada, India, Ireland, Peru, Spain, and Ukraine.

I. Argentina*

A. Promotion Regime for Electricity Production from Renewable Energy Sources

In recent years, the Argentine Government has promoted the development of electricity from clean or renewable sources through legislative enactments and collaboration in the implementation of projects. As part of this effort, in May 2009, National Decree No. 562/09[1] was passed, regulating Law No. 26.190[2] and granting certain tax incentives to generators of electricity who use renewable sources to supply electricity to public services (*i.e.*, special income tax treatment–the accelerated depreciation of assets, and special Value Added Tax treatment–the accelerated reimbursement of the VAT). By means of this Promotion Regime, Argentina set forth the goal to produce eight percent of its total electricity from renewable sources within the next ten years.

B. Judicial Opinions Regarding Tax Stability for Mining Investments

There are two noteworthy decisions in this area. First, in *Cerro Vanguardia v. DGI*,[3] the Argentine Supreme Court clarified the scope of the Fiscal Stability Benefit created by Law

* Contributed by Diego Parravicini, associate at Estudio Beccar Varela in Buenos Aires, Argentina.

1. Decree No. 562/09, May 20, 2009, 31,657 B.O. 1, *available at* http://www.infoleg.gov.ar/infolegInternet/verNorma.do?id=153580.

2. Law No. 26190, Jan. 2, 2007, 31,064 B.O. 1, *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/120000-124999/123565/norma.htm.

3. Corte Suprema de Justica [CSJN], 30/06/2009, "Cerro Vanguardia v. DGI," La Ley [L.L.] (2009 C. 3378 XLII) (Arg.).

No. 24.196 (Mining Investment Law).[4] Under this law, mining companies are encouraged to submit feasibility studies to the Mining Authority for approval, and the federal government is precluded for thirty years from raising the tax burden on companies who obtain these approvals. The thirty-year term is triggered when the beneficiary submits the feasibility study before the Mining Authority.

The *Cerro Vanguardia* case arose when the Federal Tax Authority (AFIP) tried to impose the equalization tax (Impuesto de Igualación)[5] on dividends distributed by Cerro Vanguardia, even though the company had already obtained the Fiscal Stability Benefit. The Supreme Court decided that the application of the equalization tax on shareholders' dividends was not compatible with the Fiscal Stability Benefit created by the Mining Investment Law because the effect of the equalization tax was similar to an increase in the nominal rate of income tax.

The Federal Stability Benefit was addressed in a different context in August 2009. In *Minera del Altiplano S.A. v. Estado Nacional*, the Salta Federal Court of Appeals disavowed the federal government's intention to levy federal export taxes against mining projects protected by the fiscal stability regime created by the Mining Investment Law.[6] This unpublished decision, which is the first issued by a Federal Court of Appeals on this matter, found that the export taxes created by Commerce Secretary and Mining Secretary Resolutions were inapplicable to the plaintiff's project because these Resolutions were passed after the company had obtained the Fiscal Stability Benefit created by the Mining Investment Law.

C. Bilateral Mining Investment Treaty

The governments of Argentina and Chile agreed on the taxation regime for transnational mining services at Pascua Lama, Barrick's major gold and silver project located on the border between Argentina and Chile.[7] The agreement on the taxation regime for transnational mining services (an aspect that was not originally regulated by the Bilateral Mining Investment Treaty[8] and its Protocols) allowed Barrick to announce in May 2009 the development of Pascua Lama, which is the first bi-national mining project in the world.[9] Notification of the Protocol implementing the two governments' agreement already has been sent to the Chilean and Argentine Commissions that administer the Treaty. The Protocol's implementation will provide Pascua Lama with a comprehensive

4. Law No. 24196, May 24, 1993, 27,645 B.O. 1, *available at* http://www.infoleg.gov.ar/infolegInternet/verNorma.do?id=594.

5. In 1998, Congress passed Law 25,063, which amended the Profit Tax Law creating the equalization tax on dividends of shareholders. *See* Law No. 25063, Dec. 30, 1998, 29,053 B.O. 1, *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/55000-59999/55190/norma.htm.

6. The case was not published.

7. In 1998, Congress passed Law 25.063, which amended the Profit Tax Law creating a withholding tax on dividends of shareholders. *See* Law No. 25.063, *Official Gazette*, Dec. 30, 1998, *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/55000-59999/55190/norma.htm.

8. Treaty between the Republic of Chile & the Argentine Republic Concerning Mining Integration and Complementation, Chile-Arg., Nov. 29, 1984, *available at* http://www.minmineria.cl/574/propertyvalue-1952.html.

9. The meeting was held April 28, 2009, in Buenos Aires, Argentina. *See* Press Release, Chilean Tax Service, Chile y Argentina Logran Acuerdo Acerca de Aspectos Tributarios de Pascua Lama (Apr. 28, 2009), http://www.sii.cl/pagina/actualizada/noticias/2009/280409noti02jo.htm.

legal framework for the project's development, and also will constitute an important precedent for the development of other projects located on the border between Argentina and Chile (*i.e.*, El Pachón, Amo Andres, and Vicuña).

II. Bolivia*

A. Nationalizations

Following the nationalization of oil and telecom companies, the Bolivian government in 2009 expanded its nationalization activity to other areas of the economy. For example, it acquired all shares issued by AIR BP BOLIVIA S.A.-ABBSA, the company in charge of supplying aviation fuel to airports around the country.[10] The government also ordered[11] that shares issued by electricity companies Corani S.A., Valle Hermoso S.A., and Guaracachi S.A.[12] to all Bolivian citizens under the Capitalization of State Companies[13] be transferred, free of any compensation, to ENDE, the State-owned electricity company. Although this transfer did not involve the stake that private companies hold in the electricity companies, this action is seen as the initial step toward a future nationalization.

B. New Constitution

Bolivia enacted a new constitution on February 7, 2009.[14] The new constitution[15] incorporates new national symbols, like the controversial Wiphala,[16] and thirty-six official languages,[17] at least two of which shall be spoken in every public institution. It also recognizes aboriginal indigenous communities and their cultural identity, principles, rules, cultural values, and right to self-determination.

In addition, the new constitution reaffirms the active role of the State in the economy by promoting more participation and control in areas such as energy, hydrocarbons, and mining. It declares that the Bolivian State is the only one to trade hydrocarbons in Bolivia, and all income derived from such commercialization shall be the exclusive property of the Bolivian State.

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10. *See* Supreme Decree No. 0111, G.O. No. 26 (May 1, 2009) (nationalizing ABBSA).

11. Supreme Decree No. 0289, G.O. No. 59 (Sept. 9, 2009).

12. These shares were held under administration by pension fund managers Futuro de Bolivia S.A. AFP and BBVA Previsión AFP S.A.

13. The capitalization was performed during the government of Gonzalo Sanchez de Lozada to promote foreign investment and inject capital into strategic companies. It consisted of the sale of fifty-one percent of the share package of key State companies to international investors, and the remaining package was transferred in favor of all Bolivian citizens twenty-one years of age or older as of December 31, 1995. *See* Law No. 1554, G.O. No. 1824 (Apr. 15, 1994).

14. The State was renamed "Plurinational State of Bolivia." *See* Constitution of the Plurinational State of Bolivia, art. 1 (2009).

15. The new Constitution has 411 Articles and ten transitory provisions, compared to the 234 Articles of the former Constitution. *Compare* Constitution of the Plurinational State of Bolivia *with* Political Constitution of the Republic of Bolivia.

16. A flag said to have Aymara and Inca origins but attributed to the indigenous people of Los Andes.

17. Many native languages are now considered official languages such as Aymara, Quechua, Chimán, Weenhayek, and others. Constitution of the Plurinational State of Bolivia, art. 5.

In this context, private investors may execute contracts to participate in hydrocarbons activities, however, they can do so only under a services regime, that is, they undertake hydrocarbons activities on behalf and in the name and representation of the Bolivian State and are to receive compensation for such activity. This means that private investors no longer have a property interest in hydrocarbons or the concessions to exploit such an interest.

The new constitution also allows the Bolivian State to form public-private companies to undertake certain activities in the hydrocarbons sector, provided that the Bolivian State oil company (YPFB) holds more than a fifty-one percent participation interest in such entities. Any conflicts arising from such contracts cannot be submitted to international arbitration or diplomatic claims. Finally, while it expressly states that private investment is promoted, respected, and protected, it gives priority to Bolivian investment over foreign investment.

In the area of international relations, the new Bolivian constitution provides that international treaties are to be entered into as long as they protect the sovereignty and interests of the Bolivian people and are subject to review by the Constitutional Tribunal, which shall exercise constitutional control. Moreover, it provides that within four years from the presidential election, which was held on December 6, 2009, the Executive Power shall renegotiate or renounce any international treaties that may be contrary to the Constitution.

III. Brazil*

A. New Policy of the Central Bank of Brazil Regarding Opening Representative Offices of Foreign Banks

According to the current (and unwritten) policy recently adopted by the Central Bank of Brazil (Bacen), the opening and operating of representative offices of foreign banks[18] continues to be subject to the prior approval of Bacen, but now is restricted to those international financial institutions that do not have a branch or subsidiary in Brazil but would like to explore the local market more closely.

Up to this point, supervision and inspection by Bacen was more rigorous in the case of branches and subsidiaries of foreign banks than it was for representative offices. The Brazilian regulatory authorities, however, ascertained that many of the representative offices also had been carrying out private banking activities without being authorized to do so, thereby violating the current regulations. In addition, all of the foreign banks that already have Brazilian branches and subsidiaries and also maintained representative offices were induced to close their representative offices and concentrate their activities in the respective branches or subsidiaries.

* Contributed by Walter Stuber, and Adriana Maria Gödel Stuber, attorneys with Walter Stuber Consultoria Jurídica in São Paulo, Brazil.

18. The opening and functioning of representative offices of foreign banks in Brazil is regulated by the Brazilian Monetary Council (Conselho Monetário Nacional or CMN). *See* Res. No. 2.592, de 25 de fevereiro de 1999, D.O.U. de 26.02.1999 (Braz.); Circular No. 2.943, de 21 de Outubro de 1999, D.O.U. de 21.10.1999 (Braz.).

These actions prompted Bacen to issue new rules for representative offices. Under these rules, the business that a representative office can undertake in Brazil is now severely restricted. At no time may it act as a bank or carry out banking business.[19] It may, however, promote the services and facilities that the foreign bank offers, and thereby solicit clients for the bank. Furthermore, the representative office may obtain and supply the foreign bank with information regarding a variety of matters and act as a point of contact between the principal place of business and its clients. Failure to comply with this restriction entitles Bacen to cancel the license granted to the representative office.

In addition, from this point forward, any foreign financial institution that intends to open a representative office in Brazil will be required to present a long-term business plan showing its viability. The business plan must disclose its operational strategy, detail the short- and medium-term activities to be performed, and justify its intended entry into the Brazilian market.

IV. Canada*

A. Amendments to the Investment Canada Act

The most significant development affecting foreign investment review in Canada in 2009 was the enactment of a series of amendments to Canada's *Investment Canada Act* (the ICA) in March 2009.[20] The amendments involved (1) changes to the ICA's review thresholds and (2) the establishment of a new process for reviewing transactions on national security grounds.

1. *Review Thresholds*

The acquisition of control of a Canadian business by a non-Canadian is subject to review under the ICA if the following prescribed thresholds are exceeded: CDN$5 million for direct investments and CDN$50 million for indirect transactions.[21] The current thresholds for review are based on the value of the assets of the Canadian business being acquired, and vary depending on the ownership of the investor and vendor, the type of business being acquired, and the structure of the acquisition.

Higher thresholds apply in the case of direct acquisitions of Canadian businesses where either the investor or vendor is controlled by a WTO Investor.[22] These transactions are

19. Although the Brazilian Banking Law does not define the term "bank" or "banking activity," it does define the term "financial institutions" as "public or private corporations whose principal or secondary business is the collection, brokerage, or investment of financial resources belonging to themselves or to third parties, in domestic or foreign currency, and the custody of assets belonging to third parties." Furthermore, individuals who undertake any such business, either regularly or sporadically, are regarded as financial institutions for the purposes of the Brazilian Banking Law. The term "private banking activity" is not limited to wealth management but comprises the rendering of other financial services. Therefore, private banking activities in Brazil must be performed exclusively by banks duly authorized to operate in the country and cannot be carried out by representative offices. *See* Lei No. 4.595 art. 17, de 31 de Dezembro de 1964, D.O.U. 31.1.1965 (Braz.), *available at* http://www.planalto.gov.br/ccivil/leis/L4595.htm.

* Contributed by Mark Katz and Jim Dinning of Davies Ward Phillips & Vineberg LLP.

20. Investment Canada Act, R.S.C., ch. 28 (1985) (1st Supp.), amended by 2009 S.C., ch. 16 (Can.).

21. *Id.* pt. IV 14(3)(b).

22. *Id.* pt. IV 14.1.

subject to review by Industry Canada if the book value of the assets of the Canadian business being acquired (plus the value of any other assets in Canada, the control of which is being acquired as part of the transaction), exceeds the current threshold of CDN$312 million. Indirect investments by WTO investors are not reviewable but will continue to be subject to post-closing notification.

Significant changes were made pursuant to the March 2009 amendments, which will come into effect on a date to be determined by the federal Cabinet (expected shortly). Under the new rules, the review threshold for direct acquisitions involving WTO Investors will be based on the "enterprise value" (to be defined by forthcoming regulations) of the assets of the Canadian business, rather than its book value.[23] Moreover, review will be required only if the enterprise value is equal to, or greater than CDN$600 million in the case of investments reviewable during the first two years after the thresholds come into force; CDN$800 million for investments made in the next two years; and CDN$1 billion and beyond for investments made in subsequent years.[24] The "indirect" acquisition of Canadian business by WTO Investors will continue to be subject to post-closing notification only, not review.

2. *National Security Review*

The March 2009 amendments also introduced a new review process for investments that "could be injurious to national security."[25] The review process can take up to 130 days, depending on the circumstances, and can be invoked either before or after closing. At the end of the review process, the federal Cabinet may take any measures that it considers advisable to protect national security, such as prohibiting a non-Canadian from implementing a proposed investment or requiring divestiture if the transaction already has been completed.

The national security review process has the potential for wide-scope application. The term "national security" is not defined, and there are no monetary thresholds that must be exceeded to trigger review.[26] Moreover, there is no requirement that there be an acquisition of control of a Canadian business – the review may occur even where there has been an acquisition in part of the Canadian business.

The new national security provisions appear already to have affected the fate of at least one transaction. In August 2009, Forsys Metals Corp. (Forsys) terminated its proposed acquisition by George Forrest International Afrique S.P.R.L. (GFI) based on what were apparently national security concerns raised by Industry Canada, the governmental department responsible for administering the ICA.[27] Although none of the parties would

23. Industry Canada, Regulations Amending the Investment Canada Regulations and National Security Review of Investments Regulations, http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk50926.html (last visited Feb. 5, 2010).

24. *Id.*

25. Investment Canada Act, pt. IV.1.

26. Industry Canada, *supra* note 23.

27. *See* Press Release, Forsys Metals Corp., GFI Investment Update (Aug. 19, 2009), *available at* http://www.forsysmetals.com/News_2009/NR%20081909.pdf; Press Release, Forsys Metals Corp., Forsys Terminates Arrangement Agreement with GFI (Aug. 25 2009), *available at* http://www.forsysmetals.com/News_2009/NR%20082509.pdf.

comment publicly on why Industry Canada objected to the transaction, it appears that the objections related to the fact that Forsys is developing a uranium mine, albeit in Namibia.

National security was also an issue in the proposed acquisition by Ericsson of Nortel's wireless unit, which was announced in July 2009. Opponents of the transaction attempted to persuade the Canadian government to prevent the acquisition because it would "jeopardize Canada's national interests."[28] The federal government, however, announced on September 16, 2009 that it would not challenge the transaction and that there was no basis for concern on national security grounds.[29] Although the Ericsson/Nortel transaction ultimately was approved, the experience demonstrates how determined opponents can use the national security review process to hamper completion of a transaction.

B. ICA Undertakings

In 2009, the Canadian government grappled with the recession's impact on the ability of foreign investors to meet commitments (undertakings) provided to obtain ICA approval. These undertakings are a common part of the ICA process. The Canadian government took the unprecedented step of commencing court proceedings to enforce a set of undertakings obtained from a foreign investor, U.S. Steel.[30] This marked the first time that the Canadian government had gone to court for such an order. U.S. Steel has responded by challenging the constitutionality of the ICA. The matter is still pending.

V. India*

A. Computation of Foreign Ownership Levels

The Indian government has sought to clarify the rules for computation of direct and indirect foreign ownership levels. The goal is to bring "clarity, uniformity, consistency[,] and homogeneity into the exact methodology of calculation across sectors/activities for all direct and indirect foreign investment in Indian companies."[31] But, the new rules lead to anomalies in certain cases, as explained below.

There are several key changes brought about by the revised rules:

- For purposes of computing foreign ownership levels, the distinction between various types of foreign investment (such as direct, portfolio, foreign depository receipts, and convertible instruments) has been eliminated.[32] Henceforth all modes of foreign ownership are to be considered together.

28. Chris Sorensen, *Ericsson's $1.13B Bid Wins Nortel Wireless*, Toronto Star, July 25, 2009, http://www.thestar.com/business/article/671833.

29. *E.g.*, Matt Hartley and Paul Vieira, *Ottawa backs Nortel wireless sale to Ericsson*, Fin. Post, Sept. 16, 2009, http://www.financialpost.com/news-sectors/story.html?id=2000811.

30. Press Release, Industry Canada, Industry Minister Clement Takes Further Steps to Hold U.S. Steel to Its Investment Canada Act Commitments (July 17, 2009), http://www.ic.gc.ca/eic/site/ic1.nsf/eng/04836.html.

* Contributed by Anand Dayal, partner, and Rakesh Kumar, associate with Koura & Company, Advocates and Barrister, in New Delhi, India.

31. Press Note No. 2 (2009 Series), Dep't of Indus. Pol'y & Promotion, Guidelines for Calculation of Total Foreign Investment *i.e.* Direct and Indirect Foreign Investment in Indian Companies (Feb. 13, 2009).

32. *Id.*

- The total foreign investment will be the sum total of direct and indirect foreign investment. Direct foreign investment is "all investment directly by a non-resident entity into the Indian company."[33]
- Downstream investment through an investing Indian company will not be considered for calculation of the indirect foreign investment in the case of Indian companies that are owned and controlled by resident Indian citizens or Indian companies that are owned and controlled by resident Indian citizens. These downstream investments will be treated as indirect foreign investment if either more than fifty percent of the equity interest in the investing Indian company is owned beneficially by non-residents, or if non-residents have the power to appoint a majority of its directors.[34]
- In all industry sectors for which foreign investment caps apply, the balance equity (*i.e.*, beyond the sectoral foreign investment cap) should be owned beneficially by resident Indian citizens and/or Indian companies, owned and controlled by resident Indian citizens.[35]
- There is, however, one exception to generalizing the rules above. In the case of a wholly-owned subsidiary (WOS) of an investing Indian company, the Indian and foreign investment in the holding company are deemed to be mirrored into the WOS irrespective of the actual equity holding.[36]

Certain anomalies have arisen in applying the rules above, which the government has yet to rectify:

- The inclusion of foreign depository receipts in computing foreign ownership levels results in converting several Indian banks into non-domestic (foreign) banks. This may not have been intended.
- The revised rules have permitted, perhaps unwittingly, foreign investment into prohibited sectors, such as retail and real estate. This is because the downstream investment of an Indian holding company with minority foreign stake is treated as a domestic investment, although it would result in an indirect foreign investment in prohibited sectors.

B. Further Liberalization of Foreign Investment

The sectors open to foreign investment continue to be expanded, as noted below.

- 100 percent foreign ownership of facsimile editions of foreign newspapers and 26 percent in Indian editions of foreign news and current affairs magazines are now allowed.[37]
- The restriction has been removed on the issuance of Participatory Notes (PN) to Foreign Institution Investor (FII) sub accounts to the extent of forty percent of an FII's net assets.[38] Further, FIIs may invest in debt instruments *viz.*, commercial pa-

33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. Press Note No. 1 (2009 Series), Dep't of Indus. Pol'y & Promotion, Foreign Investment in Print Media Dealing with News and Current Affairs (Jan. 14, 2009).
38. Foreign Institutional Investors (2nd Amendment) Regulations, 2008, Notification No. LAD-NRO/GN/2008/25/142800.

per, perpetual debt (giving the creditor right to interest until redemption), and debt capital subject to the limits specified by RBI and SEBI.[39]

- Registered Indian trusts and societies may invest abroad in the same sector (manufacture, hospital, or education) in a joint venture or wholly-owned subsidiary.[40] In the past, only companies, not trusts and societies, could acquire foreign securities.
- Ceilings on payments toward royalties, technology transfers, use of trade marks, or brand names have been eliminated.[41]
- The Insurance Laws (Amendments) Bill, 2008, introduced in Rajya Sabha (Parliament) on December 22, 2008, proposes to raise the foreign ownership level in the insurance sector from twenty-six to forty-nine percent.

C. Further Liberalization of Foreign Currency Loans (FCB)

The External Commercial Borrowing (ECB)[42] policy provides the regulatory framework for corporations to raise loans from international capital markets for investment in industries, infrastructure, and specified service sectors. The tight liquidity conditions in India have induced the government to encourage and streamline such borrowings.[43] Accordingly, this eased conditions on the availability of such loans, as noted below.

- The infrastructure sector has been widened to include activities related to mining, exploration, and refining;[44] development of integrated townships;[45] and infrastructural facilities related to the development of Special Economic Zones.[46]
- Certain conditions have been removed upon the use of ECBs by non-banking finance companies.[47]
- "All-in-cost" ceilings on ECBs have been dispensed with until December 31, 2009.[48]
- ECB limits for banks from correspondents abroad have been enhanced retrospectively (as of October 15, 2008) from twenty-five to fifty percent of their unimpaired Tier I capital (equity plus free reserves) or USD$10 million, whichever is more.[49]
- The buy-back limits on Foreign Currency Convertible Bonds (FCCB) have been raised from USD$50 million to USD$100 million until December 31, 2009, provided such buy-back is at a minimum prescribed discount.[50]

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39. Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) (Second Amendment) Regulations, 2008, Notification No. FEMA 179/2008-RB.
40. Foreign Exchange Management (Transfer or Issue of any Foreign Security) (Second Amendment) Regulations, 2008, Notification No. FEMA 181/RB-2008.
41. Press Release, Press Information Bureau, Review of Policy on Foreign Technology Collaborations (Nov. 5, 2009).
42. Master Circular on External Commercial Borrowings and Trade Credits, 2009, Master Circular No. 7/ 2009-10.
43. Press Release 2008-2009/842, Reserve Bank of India, RBI's Growth Stimulus (Dec. 6, 2008).
44. External Commercial Borrowings (ECB) Policy-Liberalization, 2008, A.P. (DIR Series) Circular No. 20.
45. ECB Policy-Liberalization, 2009, A.P. (DIR Series) Circular No. 46.
46. ECB Policy, 2009, A.P. (DIR Series) Circular No. 71.
47. *Id.*
48. ECB Policy-Liberalization, 2009, A.P. (DIR Series) Circular No. 64.
49. Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) (Amendment) Regulations, 2009, Notification No. FEMA 182/ RB-2009.
50. Buyback/Prepayment of Foreign Currency Convertible Bonds (FCCBs), 2009, A.P. (DIR Series) Circular No. 65.

D. Pre-merger Notification Requirements

The Competition Act of 2002[51] has largely come into effect as most of its provisions have been notified in the Official Gazette. But the pre-merger notification requirement under Section 6 has not. In the meantime, the following developments have occurred.

- The Competition Commission of India (CCI) has been formed, as well as the Competition Appellate Tribunal.
- The Monopolies and Restrictive Trade Practices Commission, which preceded the CCI, has been abolished, and the cases pending before it have been transferred in part to the Competition Appellate Tribunal and in part to the National Consumer Disputes Redressal Commission, as of October 14, 2009.[52]

E. LLP ACT, 2008, Goes Into Effect

The Limited Liability Partnership Act of 2008[53] (LLP Act) has come into force, except for certain provisions dealing with winding up and the constitution of the appellate tribunal. The government has clarified that LLPs will be taxed as general partnerships at the level of the firm and the share of profits will be tax exempt in the hands of the partners.[54]

LLPs have been recognized in India for the first time. As they are distinct legal entities with perpetual succession, unlimited number of partners, simplified compliances, and are subject to lower tax rates compared to companies, LLPs will be better suited for professional firms and for businesses not requiring public funds. The LLP Act allows the conversion into LLPs of existing limited liability companies.

Significant gaps remain, however, on the use of LLPs as vehicles for foreign investment in India. While Section 5 of the LLP Act permits non-resident persons to become partners in LLPs, the foreign direct investment policy of the government and the related Reserve Bank of India regulations do not accommodate general foreign investments in such entities. As of this date, only resident Indians and persons of Indian origin are permitted to invest in a partnership firm, subject to the satisfaction of prescribed conditions.[55] In addition to the LLP Act, further (conforming) changes are required in the regulatory framework to accommodate foreign investments in LLPs.

F. Direct Taxes Code

A new Direct Taxes Code to replace the Income Tax Act of 1961 is scheduled to be introduced in the 2009 Winter Session of the Parliament.[56] The Direct Taxes Code seeks to improve the efficiency and equity of the Indian tax system by eliminating distortions in the tax structure, introducing moderate levels of taxation, and expanding the tax base.

51. The Competition Act, 2002, No. 12 of 2003; India Code (2003).
52. The Competition (Amendment) Ordinance, No. 6 of 2009, Acts of Parliament, 2009.
53. The Limited Liability Partnership Act, 2008, No. 6 of 2009; India Code (2009).
54. Press Note 1/16/2007-CL.V, Ministry of Corporate Affairs, Taxation of Limited Liability Partnerships (July 10, 2009).
55. Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000, Notification No. FEMA 20/2000.
56. Pranab Mukherjee, Finance Minister, Foreword to Direct Taxes Code (Ministry of Finance, Proposed Draft Aug. 2009).

The goal is to simplify the language, remove ambiguity, provide stability, and adopt best international practices.[57]

The Direct Taxes Code is proposed to take effect April 1, 2011. When implemented, the proposed Direct Taxes Code will go a long way in streamlining the existing complex tax structure. As it includes international best practices, its adoption will place the Indian tax structure on par with global standards.[58]

G. Vodafone Controversy

The controversy involving the taxation in India of foreign (off-shore) transactions has not been laid to rest. The controversy arose out of a tax demand issued to Vodafone International Holdings B.V., a foreign purchaser, for failing to withhold tax from payments made to Hutchison Telecommunication International Limited, a foreign seller of its indirect equity holding in Hutchison Essar Limited, an Indian company. The Bombay High Court viewed the share transfer as a transfer of a capital asset in India, thus rendering it subject to tax in India.[59] The Supreme Court has dismissed Vodafone's appeal, but it allowed Vodafone to contest the applicability of Indian tax laws before the income tax authorities with the right to appeal against an adverse order.[60] Though the final verdict is awaited, the judgments have been criticized as bringing uncertainty to private equity funds and to cross-border mergers and acquisitions.

VI. Ireland*

The economic and fiscal challenges faced by Ireland in 2009 were familiar territory for most of the developed world during the same period. In an unprecedented economic environment, the Irish government was forced to act swiftly in several instances to introduce initiatives and measures in order to maintain Ireland's attractiveness and related reputation as an investment location in the international business world. The past year also has seen important developments in a number of areas.

A. Stabilizing Measures

Stabilizing the Irish financial market was a top priority for the Irish government in 2009. A number of schemes and initiatives were introduced, including the Deposit Protection Scheme,[61] designed to protect retail and small business depositors by offering 100% protection of deposits up to €100,000, and the Irish State Guarantee Scheme,[62]

57. *Id.*

58. *Id.*

59. Vodafone International Holdings B.V. v. Union of India, 175 Taxmann 399 (Bombay H.C. 2008).

60. Vodafone International Holdings B.V. v. Union of India, 179 Taxmann 129 (S.C. 2009).

* Contributed by Robert O'Shea, Partner and Pat English, U.S. Resident Counsel at the Dublin and New York Offices respectively of Matheson Ormsby Prentice.

61. For further detail, *see* Department of Finance, http://www.finance.gov.ie (last visited Feb. 5, 2010).

62. The Credit Institutions (Financial Support) Act 2008 (Act 18/2008) introduced the State Guarantee Scheme.

introduced to guarantee the liabilities of certain financial institutions until September 29, 2010.[63]

The Irish government also announced the formation of the National Asset Management Agency (NAMA), the purpose of which is to purchase certain bad assets (*i.e.*, land and property loans) from Irish banks in order to restore the banks to a position that will allow them to resume lending to viable businesses.[64]

The Irish government, and Ireland's position generally in Europe, was aided by the resounding "Yes" vote in the national referendum on the Lisbon Treaty in October 2009. This positive result was acknowledged widely to have stemmed from a recognition that being a central part of the European Union is key in allowing Ireland to maintain a strong, confident and stable economy for its international investors.

B. Tax

The Irish government has reaffirmed its commitment to maintaining Ireland's low corporate tax rate of 12.5%. Building on this commitment, the Finance Act of 2009[65] was enacted in May 2009, which introduced, among other things, a new amortization scheme for intangibles. Under the new regime, effective May 7, 2009, capital expenditure incurred on intangible assets can now be amortized (the aggregate amount of relief in any one year is eighty percent of trading income derived from intangibles) in line with the accounting life of the relevant asset up to a maximum of fifteen years.

A report published by the Irish Commission on Taxation in September 2009 reiterated its commitment to the low tax rate, and also recommended a number of further tax incentives to support international companies doing business in and through Ireland.[66]

C. Company Law

The Companies (Amendment) Act of 2009[67] came into force in Ireland on July 12, 2009, and introduced a number of changes to the existing company law regime. Most notably, the legislation amended the requirement that all Irish companies must have at least one Irish resident director, or alternatively post a bond with the Irish Companies Registration Office. Now, the requirement will be satisfied if at least one of the directors is resident in a member state of the European Economic Area (EEA).[68] If this requirement is not met, a bond must be posted.[69]

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63. *Id.*

64. The Credit Institutions Act of 2008 introduced the State Guarantee Scheme. Credit Institutions (Financial Support) Act 2008 (Act No. 18/2008) (Ir.), *available at* http://www.finance.gov.ie/documents/publications/legi/creditinstsupp08.pdp.

65. Finance Act 2009 (Act No. 12/2009) (Ir.) *available at* http://www.finance.gov.ie/documents/publications/other/2009/Finact2009.pdf (last visited Jan. 30, 2010).

66. Commission on Taxation, Report 2009 (2009) *available at* http://www.taxcommission.ie/downloads/Part%201.pdf.

67. Companies (Amendment) Act 2009 (Act No. 20/2009) (Ir.) *available at* http://www.irishstatutebook.ie/2009/en/act/pub/0020/index.html.

68. The European Economic Area includes the EU Member States and Iceland, Liechtenstein, and Norway.

69. The new requirement was introduced in response to a concern that the previous requirement potentially breached the Freedom of Establishment principle under applicable European Community law.

In 2009, the Shareholders' Rights Regulations of 2009[70] (the Irish Regulations) were introduced to implement EU Directive 2007/36/EC[71] on the exercise of certain rights of shareholders in listed companies (the Shareholders Directive). The core objective of both the Shareholders Directive and the Irish Regulations is to strengthen shareholder rights in listed companies.

The concept of the "cross-border merger" was introduced in Ireland, in May 2008, under the European Communities (Cross-Border Mergers) Regulations of 2008.[72] During the course of 2009, Ireland has seen, for the first time in an Irish private company context, the implementation of a number of cross-border mergers between Irish limited liability companies and limited liability companies in other EEA Member States.[73]

D. Redomestications

The past year also has seen a number of re-domestications to Ireland of certain U.S.-listed companies previously headquartered in Bermuda and the Cayman Islands. Examples have included Warner Chilcott, Ingersoll-Rand, Covidien, Accenture, Cooper Industries, and TBS. Ireland quickly has become a jurisdiction of choice in that context for listed holding companies seeking to exit the traditional haven jurisdictions.

Ireland's attractiveness for such companies also will be bolstered by the Companies (Miscellaneous Provisions) Bill of 2009 (the Bill) when it becomes law.[74] The primary purpose of the Bill is to enable certain Irish parent undertakings (U.S.-listed entities) to use U.S. GAAP accounting standards for a transitional period. These entities would otherwise, as Irish parent undertakings, be bound by the applicable Irish GAAP and IFRS standard from the date of their establishment in Ireland. The Bill's purpose was to remove that practical difficulty in the transitional period following re-domestication up to a maximum of four years (with the arrangement having a close-off date of December 31, 2015).

E. Competition Law

In 2009, there was a continued focus on the proposed amendment of Ireland's competition laws. The Report of the Advisory Group on Media Mergers was published in January 2009,[75] which recommended significant changes to the rules and procedures governing media mergers in Ireland. The Irish government has also announced plans to combine the Competition Authority, the National Consumer Agency, and the consumer informa-

70. Shareholders' Rights (Directive 2007/36/EC) Regulations 2009 (S.I. No. 316 of 2009) (Ir.), *available at* http://www.entemp.ie/publications/sis/2009/si316.pdf.

71. Council Directive 2007/36/EC, 2007 O.J. (L 184/17).

72. European Communities (Cross-Border Mergers) Regulations 2008 (S.I. No. 157 of 2008) (Ir.), *available at* http://www.entemp.ie/publications/sis/2008/si157.pdf.

73. As the cross-border merger process becomes more settled in Ireland and the EEA generally, it is expected to become a more useful restructuring tool.

74. Companies (Miscellaneous Provisions) Bill 2009 (S.I. No. 69 of 2009) (Ir.), *available at* http://www.entemp.ie/publications/commerce/2009/companiesbill2009.pdf.

75. *See* Press Release, Department of Enterprise, Trade and Employment, Tánaiste publishes Report of the Advisory Group on Media Mergers (Feb. 1, 2009), *available at* http://www.entemp.ie/press/2009/20090102.htm. A copy of the report is available on the website.

tion function of the Financial Regulator into a single body. New legislation to affect some or all of these changes is now expected during the course of 2010.

The first appeal against the prohibition of a merger under the Competition Act of 2002[76] also was decided in 2009, with the High Court overturning the Competition Authority's decision to block the proposed acquisition by Kerry Group PLC of rival consumer foods company Breeo Foods.[77]

VII. Peru*

A. Free Trade Agreements and Double Taxation Agreements

The Free Trade Agreement that Peru entered into with Singapore on May 29, 2008 came into effect on August 1, 2009, following its ratification by the President.[78] A few days later, the Free Trade Agreement entered into with Canada,[79] and the Agreement on the Environment,[80] also entered into with Canada, were ratified and approved to enter into effect on August 1, 2009.

In addition, the Agreement to Avoid Double Taxation and Prevent Income Tax Evasion, which was entered into with Brazil, entered into effect on August 19, 2009 following its ratification by the Brazilian government. This agreement was signed on February 17, 2006, and was ratified by the Peruvian government in June 2008.[81] The Agreement with Brazil adds to the double taxation treaties that Peru already has with Canada, Chile, and the Andean Community countries.

B. Maximum Fishing Quotas Entered Into Effect

On June 28, 2008, the Peruvian government approved a law[82] establishing a new set of regulations for the fishing of anchovy for purposes of fish meal production. Peru stands among the largest fish meal producers in the world and, as such, needed to introduce new parameters for the exploitation of this natural resource in order to ensure the modernization and efficiency of the activity and the preservation of the environment. Thus, it intro-

76. Competition Act, 2002 (Act No. 14/2002) (Ir.), *available at* http://www.irishstatutebook.ie/2002/en/act/pub/0014/print.html (last visited Jan. 30, 2010).

77. At the time of writing, the Competition Authority's appeal to the Supreme Court is pending.

* Contributed by Jean Paul Chabaneix, partner at Rodrigo, Elías & Medrano Abogados in Lima, Peru.

78. Acuerdo de Libre Comercio entre el Gobierno de la República del Perú y el Gobierno de la República de Singapur [Free Trade Agreement between the Government of the Republic of Peru and the Government of the Republic of Singapore], El Peruano, D.S. 043-2009-RE, July 26, 2009.

79. Tratado de Libre Comercio entre Canadá y la República del Perú [Free Trade Agreement between Canada and the Republic of Peru], El Peruano, D.S. 044-2009-RE, July 31, 2009.

80. Acuerdo sobre Medio Ambiente entre Canadá y la República del Perú [Agreement on the Environment between Canada and the Republic of Peru], El Peruano, D.S. 045-2009-RE, July 31, 2009.

81. "Convenio entre el Gobierno de la República del Perú y el Gobierno de la República Federativa del Brasil para Evitar la Doble Tributación y para Prevenir la Evasión Fiscal en relación con el Impuesto a la Renta" [Agreement on prevention of Double Taxation and Fiscal Evasion Relating to Income Tax], El Peruano, 019-2008-RE, June 6, 2008.

82. Law on the Maximum Limits of Catch per Vessel, Leg. Decree No. 1084, El Peruano, 25977, June 28, 2008.

duced a maximum limit for the fishing of anchovy in each fishing season, based on ship tonnage capacity, as determined by the Ministry of Production.

This new legislation came into effect in May 2009, when the first of two annual fishing seasons were opened, and has so far proven to be a successful measure to attain the aims that were initially proposed for it.

VIII. Spain*

A. Companies for Investment in the Real Estate Sector (SOCIMI)

A new law has been enacted to allow listed companies to purchase real estate and make use of it as lessors.[83] The main objective of the new law is the promotion and development of the lease market in Spain, which is much less advanced than in other European markets. The main requirement is that at least eighty percent of the company's assets must be in leasable real estate.

This new model has significant tax implications, with a lower tax rate and special tax deductions. The intention of the regulator is to grant economic effects to the SOCIMI companies similar to those of traditional Real Estate Investment Trusts (REITS) regimes existing in other countries.

B. Regulation of the Structural Modifications of Companies

A new law has been enacted that establishes a procedure for structural modifications in companies, such as transformations, mergers, spin-offs, and splits.[84] The law also regulates cross-border mergers within the European Community, the global transfer of assets and liabilities, and the international transfer of a registered office.

C. New Regulation of Payment Services

A new law on payment services establishes important modifications affecting some of the most common means of making payments, such as transfers, credit, and payment cards.[85] It establishes the requirements that must be met in order to receive an authorization to become a payment services provider, as well as the controls required to be carried out by companies performing that activity. The law also regulates which activities can be externalized by service providers and the controls and other requirements that such externalization requires. The rendering of payment services in Spain, by companies validly authorized in another country of the European Union, generally does not require an authorization, but merely a proper notification to the Bank of Spain.

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* Contributed by Daniel Marín and Andrea Montes, attorneys, Gómez-Acebo & Pombo, Barcelona (Spain).

83. Law 11/2009 (B.O.E. 2009, 259). Passed on October 26, 2009, to Regulate Joint Stock Listed Companies For The Investment In The Real Estate Market.

84. Law 3/2009 (B.O.E. 2009, 82). Passed on April 3, 2009, dealing with structural modification of companies.

85. Law 16/2009 (B.O.E. 2009, 275). Passed on November 13, 2009, on Payment Services.

IX. Ukraine*

The following laws and regulations, which are of great importance to foreign investors, have been enacted in Ukraine during the past year.

A. Joint Stock Companies Law

The new Joint Stock Companies Law[86] entered into force on April 29, 2009, and introduced many changes that affect the establishment, management, operation, and termination of Ukrainian joint-stock companies. In particular, all existing open and closed joint-stock companies created before this Law came into force must be transformed into public and private joint-stock companies, respectively. The transformation entails bringing the company's charters and internal regulations into compliance with the Law, all of which must be completed by April 29, 2011.

B. Public-Private Partnerships

A PPP Law[87] was enacted, but later annulled, by the Ukrainian Parliament[88] on the grounds that it was not in full compliance with the international standards for PPP legislation, and would not rectify the current unsatisfactory state of the PPP regulation. Notwithstanding this, the Law was viewed by many stakeholders as an important policy document that could have triggered the launching of a pilot PPP project.

C. Work Permits

The newly-adopted governmental Resolution No. 322,[89] which replaces the work permit procedure of 1999,[90] creates stricter rules for the issuance, extension, and annulment of work permits to foreigners working in Ukraine. Among other measures, this Resolution imposes additional notification requirements on Ukrainian employers, including sending a copy of the work permit to the respective Ukrainian Consulate in the country of permanent residence of a foreign employee concerned.

* Contributed by Svitlana Kheda, counsel at Sayenko Kharenko Attorneys at Law in Kyiv, Ukraine.

86. "On the Joint Stock Companies," The Law of Ukraine No. 514-VI (2008) (Ukr.).

87. "On the General Framework for the Public Private Partnership," The Law of Ukraine No. 3447-_/_ (2009) (Ukr.), *available at* http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=34998.

88. "On Annulment of the Law on the General Framework for the Public Private Partnership," Resolution of the Verkhovna Rada of Ukraine No. 1643-VI (2009) (Ukr.), *available at* http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?pf3511=35686.

89. "On Approval of the Procedure for Issuance, Extension and Annulment of the Work Permits for Foreign Employees," Resolution of the Cabinet of Ministers of Ukraine No. 322 (2009) (Ukr.). This Resolution came into force as of May 15, 2009.

90. "On Approval of the Procedure for Issuance, Extension and Annulment of the Work Permits for Foreigners in Ukraine," Resolution of the Cabinet of Ministers of Ukraine No. 2028 (1999) (Ukr.).

D. IMMIGRATION

On May 6, 2009,[91] the Cabinet of Ministers of Ukraine adopted amendments to paragraph 2 of item 19 of its Resolution 1074,[92] thereby requiring foreigners who do not enter Ukraine with a work visa to remain in Ukraine for no more than ninety days within a 180-day term from the date of their first entrance. This creates a significant problem for foreign employees of Ukrainian representative offices of foreign companies because such persons are excluded under Ukrainian law from the list of foreigners that need work permits. As a result, these persons do not have a legal basis to apply for work visas, which would allow them to remain in the country from one to three years.

91. "On Amendments to the Rules and Entry of Foreigners, Stateless Persons in Ukraine, Their Departure from Ukraine and Transit Through its Territory," Resolution of the Cabinet of Ministers of Ukraine No. 445 (2009) (Ukr.).

92. "On Approval of the Rules of Entering/Exiting Ukraine by Foreigners and Transit Travel Through its Territory," Resolution of the Cabinet of Ministers of Ukraine No. 1074 (1999) (Ukr.), *available at* http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=1074-95-%EF&c.