

Latin America and Caribbean*

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I. Argentina

A. INCOME TAX ON FINANCIAL TRUSTS AND CLOSED MUTUAL FUNDS

Decree No. 1,207 to eliminate financial trusts and end the ability of mutual funds to deduct distributed earnings from the income tax taxable base was published in the *Official Gazette* on August 1, 2008.¹ Financial trusts related to infrastructure works for public services will continue to benefit, however, in accordance with provisions previously in force.² Likewise, the exemption as to the taxation applicable to banking transactions (deb-

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1. Decree No. 1207/08, July 30, 2008, art. 1, [31.459] B.O. 4, *available at* www.boletinoficial.gov.ar.

2. Decree No. 1344/98, Nov. 19, 1998, art. 70.2 (as amended in 1997), [29030] B.O. 2.

its and credits)³ of bank accounts opened by financial trusts and closed mutual funds is still in force.⁴ This elimination of fiscal benefits will be effective for financial trusts that are constituted from August 1, 2008.⁵

B. AMENDMENT TO CONSUMERS' DEFENSE LAW

On April 7, 2008, the *Official Gazette* published law No. 26,361,⁶ amending the Consumers' Defense Law (No. 24,240)⁷ to enhance the powers of enforcement agencies. The most relevant amendments are those making the Consumers' Defense Law applicable to the purchase of rights in timeshare properties, country clubs, private cemeteries, and other rights in real estate, as well as those granting certain rights to consumers' associations.⁸ New legal concepts, such as punitive damages and direct damages, were included in the Consumers' Defense Law by Law No. 26,361 to allow judicial imposition of civil fines and compensation at an administrative stage in favor of the affected consumer of up to AR\$5,000 (approximately US\$1,515).⁹ Other rules introduced by Law No. 26,361 refer to: the documentation that a seller must deliver to a buyer in a sale transaction; a purchaser's broader rights to reject ordered merchandise or to revoke an order or acceptance; extension of warranties; national treatment for foreign consumers; termination of consumption agreements;¹⁰ application and adjustment of penalties; and specifications on certain mandatory provisions in consumer agreements with public utilities or financial entities.¹¹ The maximum amount of fines allowable under the Consumers' Defense Law was also increased from approximately US\$135,135 to approximately US\$1,351,351.¹²

Law No. 26,361 further provides that the Secretariat of Domestic Trade, independent from the National Ministry of Economy and Production and the City of Buenos Aires, shall be the enforcement agency for the Consumers' Defense Law and that the relevant provincial government entities shall act as local enforcement authorities.¹³ Finally, Law No. 26,361 provides that the three-year statute of limitation in the Consumers' Defense Law shall not apply if different legislation sets forth terms more favorable to the consumer.¹⁴

3. This tax is levied on credits and debits generated in bank accounts in financial institutions located in Argentina, at the general rate of 0.6 percent on each credit and debit. Though the taxpayer is the holder of the account, the bank is responsible for payment of such tax. There are reduced rates for certain cases and exemptions (e.g. credit on banks loans).

4. Decree No. 380/2001, Mar. 29, 2001, art. 10(c); National Tax Authorities, External Note No. 9/2008, B.O. 31.511, at 34.

5. Decree No. 1207/08, art. 1(d); National Tax Authorities, External Note No. 1/2009, B.O. 31,581, at 26.

6. Law No. 26,361, Apr. 3, 2008, [31.378] B.O. 1, *available at* www.boletinoficial.gov.ar.

7. Law No. 24,240, Oct. 13, 1993, [27.744] B.O. 4, *available at* www.boletinoficial.gov.ar.

8. *Id.* art. 1, *amended by* Law No. 26,361, art. 1.

9. *Id.* art. 40 bis.

10. Agreements between consumers and providers.

11. Law No. 24,240, art. 1, *amended by* Law No. 26,361, arts. 25, 30 bis, and 31, Apr. 3, 2008, [31.378] B.O. 1, *available at* www.boletinoficial.gov.ar.

12. *Id.* art. 47. Please note that the currency exchange rate applied is US\$1=AR\$3.70.

13. *Id.* art. 41.

14. *Id.* art. 50.

C. TERMINATION OF THE DOUBLE TAXATION TREATY BETWEEN ARGENTINA AND AUSTRIA

Argentina decided to terminate its double taxation treaty with Austria, effective as of January 1, 2009.¹⁵ The treaty, originally signed in 1979, exempted Argentine residents holding Austrian bonds from (i) tax on income over such bonds and (ii) the application of tax on personal assets (a tax that levies certain assets held by an individual as of December 31 of each year).¹⁶ These tax-advantaged bonds fostered a significant market for Austrian debt securities in Argentina. The termination of the treaty will reduce that market, while increasing the Argentine tax authority's revenue in connection with such bonds.

D. ENVIRONMENTAL POLLUTION OF THE MATANZA-RIACHUELO RIVER

In July 2008, the Argentine Supreme Court decided *Mendoza Beatriz Silvia v. Argentina*, a case on damages from the environmental pollution of the Matanza-Riachuelo River.¹⁷ This case deals with a claim filed by Ms. Beatriz Silvia Mendoza and others against the National Government (National Executive Branch), the Province of Buenos Aires, the City of Buenos Aires, fourteen municipalities, and forty-two companies carrying out their industrial activities near the Matanza-Riachuelo basin. Some of the defendants are part of the Matanza-Riachuelo Basin Authority (ACUMAR), headed by the Secretariat of Environment and Sustainable Development.

Although the claim did not clearly set forth its causes of action, the Supreme Court distinguished two different complaints: (i) "the restoration and prevention of damages to the environment"¹⁸ and (ii) "the repair of collective damage," which is still being debated before the Supreme Court and "does not refer to the future but to the pecuniary liability derived from past conducts."¹⁹ Upon resolving the issue of restoration and prevention of damages to the environment, the Supreme Court ordered ACUMAR to comply with a program to regulate various environmental matters including disposing of waste, cleaning river banks, enlarging the drinking water network, installing rainwater drainpipes, improving sewage conditions, instituting an emergency health plan, controlling and preventing industrial pollution, and publishing environmental information. According to the court decision, ACUMAR must: (a) improve the life quality of the basin's inhabitants; (b) restore all components of the basin environment (water, air, and soil); and (c) prevent damages with a sufficient and reasonable degree of foreseeability. The case is still pending against all defendants with respect to collective damages.

15. The Treaty provides that notice of its termination must be given through diplomatic channels at least six months before the end of any calendar year.

16. Law No. 22,589, May 18, 1982, [24.925] B.O. 1.

17. Corte Suprema de Justicia [CSJN], 8/7/2008, "Mendoza Beatriz Silvia v. Argentina/danos y perjuicios," La Ley [L.L.] (2008-M-11) (Arg.).

18. In its decision, the Supreme Court stated expressly that this matter is "future-oriented." *Id.* at 14.

19. *Id.*

II. Bolivia

A. NATIONALIZATION POLICIES

The year 2008 was President Evo Morales' third year in power. In January 2006, he was inaugurated to head a nationalistic government, with strong ideological components from indigenous peoples' movements and traditional socialist groups.²⁰ One of President Morales' key policies is the nationalization of the oil and gas industries and, to a lesser extent, telecommunications and mining companies. These governmental policies advanced during 2008, accompanied by continued controversy and political unrest over a new constitution approved by the Constitutional Assembly, which is subject to popular vote approval through a national referendum.²¹

After much controversy and difficult negotiation, the Government regained control of certain equity participations in the formerly state-owned oil and gas company that had been privatized during the 1990s, when it was mostly held by foreign investors such as Repsol YPF, British Petroleum, Ashmore, Shell, and others.²² Nationalization is pending as to a smaller refining venture of German and Peruvian ownership.²³ On the mining front, negotiations with Glencore of Switzerland over nationalization of the largest Bolivian tin-processing plant located in Vinto finally resulted in settlement.²⁴

Negotiations for settlement of a controversy with the Italian company Telecom, as a result of the nationalization of Telecom's equity participations in the largest telecommunications company of Bolivia, have not progressed, though efforts to settle the claim continue.²⁵ In 2007, Telecom filed an arbitration claim for compensation with the International Centre for Settlement of Investment Disputes (ICSID), pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).²⁶ By the end of 2008, the *Telecom* arbitration panel was in the process of organizing for resolution of the jurisdictional defense filed by the

20. See Adrian Lucio Furman, et al., *Latin America and Caribbean*, 42 INT'L LAW. 1033, 1034 (2008).

21. See *infra*, Section B.

22. *Hasta el 30 de Abril YPF Retomará Capitalizadas*, LA PRENSA (Buenos Aires), Mar. 27, 2008, at 14a; *El Presidente Celebrará Hoy la Nacionalización en la Plaza Murillo*, LA PRENSA (Buenos Aires), May 1, 2008, at 15a; *YPFB Acusa a CLHB de Pagar Beneficios por Adelantado*, LA PRENSA (Buenos Aires), May 8, 2008, at 13a; *Nacionalización Petrolera Constará US\$ 383 Millones*, LA PRENSA (Buenos Aires), June 5, 2008, at 20a; *Evo Nacionaliza TRANSREDES y YPFB Tendrá 97% de Acciones*, LA PRENSA (Buenos Aires), June 31, 2008, at 14a-15a; *La Nacionalización Avanza, Bolivia Cambia, Evo Si Cumple*, CON ENERGIA PROPIA (Yacimientos Petrolíferos Fiscales Bolivianos, La Paz, Bolivia), July 2008, at 3.

23. *El Presidente Celebrará Hoy la Nacionalización en la Plaza Murillo*, LA PRENSA (Buenos Aires), May 1, 2008, at 15a; *Evo Nacionaliza CLHB, Chaco y TRANSREDES Y Pacta con Otrra*, LA PRENSA (Buenos Aires), May 2, 2008, at 6a-7a; *CLHB Será YPFB Logística S.A. y Perú Pide Una Compensación*, LA PRENSA (Buenos Aires), May 6, 2008, at 14a; *Los Dueños de CLHB Rebaten los Argumentos de la Intervención*, LA PRENSA (Buenos Aires), May 15, 2008, at 13a.

24. *El Grupo Suizo GLENCORE Desiste de Arbitraje por Vinto*, EL DEBER (Santa Cruz de la Sierra, Bolivia), Feb. 16, 2008, available at www.eldeber.com.bo/2008/2008-02-16/vernotanacional.php?id=080215232229; *See Gobierno Avanza en Negociación con Glencore por Nacionalización de Vinto*, EL DIARIO (La Paz, Bolivia), Sept. 30, 2008, available at http://www.eldiario.net/noticias/2008/2008_09/nt080930/3_08ecn.php.

25. *El Gobierno Recupera ENTEL y Policias Cercan sus Oficinas*, LA PRENSA (Buenos Aires), May 2, 2008, at 4a; *El Estado Enfrenta Cuatro Litigios por US\$ 925 Millones*, LA PRENSA, July 15, 2008, at 10a; *ETI Rechaza Pausa de 45 Días y Pide Conformar Tribunal Arbitral Este Mes*, LA PRENSA (Buenos Aires), Sept. 4, 2008, at 9a.

26. *Telecom v. Republic of Bolivia*, ICSID Case No. ARB/07/28, <http://icsid.worldbank.org/ICSID/Front-Servlet> (last visited Apr. 3, 2009).

Bolivian Government.²⁷ Other than one older case pending resolution at ICSID for some years now,²⁸ the *Telecom* claim is the only pending ICSID case against Bolivia. No further ICSID claims against Bolivia are expected because of Bolivia's denunciation of the Washington Convention in 2007,²⁹ and no other investor claims against Bolivia are currently pending before other international arbitration panels or forums.

B. CONSTITUTIONAL REFORM

In October 2008, the Bolivian Congress approved holding a national referendum in early 2009 to approve or reject the new proposed constitution. This agreement was achieved after much difficulty, including eight prior failed negotiations, social unrest and protests in the eastern regions of the country, regional strikes, clashes between government and opposition supporters (resulting in casualties and injuries and in the declaration of a state of siege in Pando), a state claiming autonomous rights, the arrest of a Governor, and other legally-questionable actions against civic leaders.

While the Bolivian Congress debated the referendum law, the political parties represented in Congress—including President Morales' supporters and the opposition—negotiated amendments to the proposed text of the new constitution. Numerous changes were made to the originally proposed text, both material and formal, until they agreed upon the final draft constitution for the 2009 Referendum.³⁰

III. Brazil

A. CHANGES IN THE CRIMINAL PROCEDURE CODE

The year 2008 in Brazil was marked by profound changes in the Criminal Procedure Code. The reform sought to bring more agility, efficacy, simplicity, and credibility to the rules of criminal procedure by, among other things, modifying the procedures for bench and jury trials.³¹ In light of the long legislative process involved in the approval of a new code, however, specific legal amendments were passed through the enactment of special laws. Three laws are already in force, while others are still pending legislative approval.³²

27. *Id.*

28. *Química e Industrial del Borax Ltda. v. Republic of Bolivia*, ICSID Case No. ARB/06/2, <http://icsid.worldbank.org/ICSID/FrontServlet> (last visited Apr. 3, 2009); see also *El Gobierno y la Minera Quiborax Negocian Pacto en Proceso Arbitra*, EL DEBER (Santa Cruz de la Sierra, Bolivia), Aug. 14, 2008, available at www.eldeber.com.bo/2008/2008-08-14/vernotaeconomia.php?id=080813221736. In June and July of 2008 both parties agreed to suspend the procedure pending negotiations.

29. See Press Release, ICSID, *Bolivia Submits a Notice Under Article 71 of the ICSID Convention* (May 16, 2007), <http://icsid.worldbank.org/ICSID/StaticFiles/Announcement3.html>.

30. Ley No. 3942, de 21 de Oct. 2008, *Gaceta Oficial de Bolivia*, Oct. 24, 2008 (containing both the law for the Referendum and the agreed negotiated Constitutional text).

31. Lei No. 11.689, de 9 de junho de 2008, D.O.U. de 10.6.2008 (Brazil), available at www.planalto.gov.br/ccivil_03/_Ato2007-2010/2008/Lei/L11689.htm; Lei No. 11.690, de 9 de junho de 2008, D.O.U. de 10.6.2008 (Brazil), available at www.planalto.gov.br/ccivil_03/_Ato2007-2010/2008/Lei/L11690.htm; Lei No. 11.719, de 20 de junho de 2008, D.O.U. de 23.6.2008, available at www.planalto.gov.br/ccivil_03/_Ato2007-2010/2008/Lei/L11719.htm.

32. See *supra* note 31.

One of the most significant innovations is the possibility to obtain a summary acquittal when the court examines the preliminary defense.³³ It is no longer necessary to conduct an entire trial before being able to summarily acquit a defendant and thus avoid unnecessary and long procedures.³⁴

No less important is the new institution of summons (or subpoena) by pre-scheduled appointment, a concept borrowed from the rules of civil procedure,³⁵ applicable where the defendant is intentionally evading court summons (or subpoenas).³⁶ As of the effective date of this reform, whenever a defendant is summoned (or subpoenaed) by pre-scheduled appointment and fails to appear at the relevant hearing, the court shall appoint a public defender and resume proceedings in the defendant's absence.³⁷

Also of great importance is the new rule with regard to damage compensations arising from criminal convictions. The relevant amendment provides that when issuing its decision, the court must set a minimum amount that the convicted defendants must pay as compensation for damages caused to the victims. This facilitates enforcement of damages, as now a civil court need not previously determine the damages arising from a criminal act, although the parties may later dispute them in civil court.³⁸

Other significant innovations brought by the reform include the single-trial hearing and the timing of the defendant's testimony. Under the amended procedure, there is one sole hearing, applicable to bench and jury trials, where the entire production of evidence, witness interrogations, and party hearings must take place.³⁹ In addition, the order of some procedural stages has also been modified, such that now, under the new procedure, the defendant shall only be heard at the end of trial, after all evidence has been produced and all witnesses have been heard.⁴⁰

In cases involving a jury trial, the act of reading the trial record (which was common practice prior to this reform) is now restricted to the evidence gathered from other jurisdictions and evidence that cannot be revisited.⁴¹ If parties wish to read other portions of the record, they must do so within the time allocated for the respective party's argument.

Finally, the right to request a *de novo* trial through an appeal remedy, a right that guaranteed an automatic review by a new jury of decisions involving a sentence of at least twenty years imprisonment, has been abolished.⁴²

Although the criminal procedure reform (including lesser material amendments not discussed here) seeks to reduce bureaucracy in the Brazilian criminal procedure system, only time and practical application of these new rules will show if they accomplished the goals they were set out to achieve.

33. CODIGO DE PROCESSO PENAL [C.P.P.] arts. 396, 396-A (1941), amended by Lei No. 11.719.

34. C.P.P. art. 397.

35. CODIGO DE PROCESSO CIVIL [C.P.C.] arts. 227-29 (1973).

36. C.P.P. art. 362, amended by Lei No. 11.719.

37. *Id.*

38. *Id.* art. 387 ¶ IV.

39. *Id.* art. 400.

40. *Id.*

41. *Id.* art. 473 ¶ 3.

42. *Id.* arts. 607, 608 (addressing the appeal for a *de novo* jury trial), repealed by Lei No. 11.689.

B. WIDER DEFINITION OF TAX HAVENS

In 2008, Law 11,727 expanded the definition of a tax haven⁴³ to include jurisdictions that do not permit “access to the shareholding structure of legal entities, their ownership or identification of the beneficial owner of income earned by non-residents.”⁴⁴ This law further introduced the concept of “operations” carried out under a “privileged tax regime,” a regime that essentially does not tax income earned by non-residents who conduct no business in the jurisdiction.⁴⁵ The definition of a “privileged tax regime” will only apply in the context of transfer pricing rules.⁴⁶

When this new law was enacted, it was widely understood that the Brazilian tax authorities would produce new lists of jurisdictions and entities to which it would apply the new definitions. As of December 1, 2008, no such list or additional clarification has been forthcoming. While Delaware and Uruguay are widely seen as targets of the new legislation, many doubts remain as to the practical consequences of the new law, and many international structures commonly used in Brazil will be open to possible objections or challenges as of January 1, 2009, when this law becomes effective.⁴⁷

C. NEW TAX INCENTIVE FOR EXPORTS

In 2008, Brazil enacted a Joint Administrative Rule that introduced the special customs regime known as “Drawback *Verde-Amarelo*” (Green and Yellow Drawback), an approach that stimulates the internal market growth by reducing the tax burden on the domestic party in certain export transactions.⁴⁸ According to this rule, a company that wishes to benefit from such special customs regime must file its application using a specific tool provided by the Integrated Foreign Trade System (SICOMEX).⁴⁹ The Foreign Trade Secretary (SECEX) shall evaluate this application and shall, in turn, determine whether to grant the relevant benefit.⁵⁰

Unlike other types of drawbacks, the new rule allows the exporting company to purchase parts, raw materials, and packaging directly from the internal market free from taxes that would otherwise be levied upon such purchases (e.g., IPI, PIS, and COFINS) and that are suspended until the exporter finalizes manufacturing process.⁵¹

43. Before the passage of this new law, Law 9,430, which introduced transfer pricing legislation in Brazil, essentially defined a tax haven as a jurisdiction that does not tax income or that taxes income at a maximum rate of 20 percent. See Lei No. 9.430, de 27 de dezembro de 1996, D.O.U. de 30.12.1996 (Brazil), available at <http://www.receita.fazenda.gov.br/legislacao/leis/ant2001/lei943096.htm>. Normative Instruction SRF 188 provided a full list of tax haven jurisdictions. See Instrução Normativa SRF No. 188, de 6 de agosto de 2002, D.O.U. de 9/8/2002, available at <http://www.receita.fazenda.gov.br/Legislacao/ins/2002/in1882002.htm>.

44. See Lei No. 11.727, de 23 de junho de 2008, D.O.U. de 24/6/2008, available at <http://www.receita.fazenda.gov.br/legislacao/Leis/2008/lei11727.htm>.

45. See *id.* arts. 22-23 (which included § 4 of art. 24 and arts. 24-A and 24-B to the previous law). See Lei No. 9.430, art. 33.

46. See *id.*

47. See *id.* art. 41, ¶ VI.

48. See Portaria Conjunta RFB/SECEX No. 1.460, de 18 de setembro de 2008, D.O.U. de 19/9/2008, available at <http://www.receita.fazenda.gov.br/legislacao/portarias/2008/portariaconjunta/portconjuntarfbsecex1460.htm>.

49. See *id.* art. 2, ¶ 1.

50. See *id.* art. 2.

51. See *id.* art. 1.

To benefit from the regime, the exporting company must acquire products, parts, and raw materials from abroad, meaning that the exporter is prohibited from conducting its operation exclusively with materials from the internal market.⁵² Some transactions are excluded from the Drawback *Verde-Amarelo*, requiring the company to carefully evaluate the benefits before applying.

D. PLAIN LANGUAGE AND LARGER FONT SIZES REQUIRED FOR ADHESION CONTRACTS

Federal Law No. 11,785 amended the Brazilian Consumer Defense Code by providing that the terms in adhesion contracts must be written in at least a twelve-point font⁵³ in clear and legible terms.⁵⁴ The new law also facilitates the reading and comprehension of adhesion contract clauses, thus enabling the consumer to better evaluate the contents of the relevant adhesion contract and contributing to the equitable conditions of such contractual relationship. The law entered into effect on September 23, 2008, but it does not affect valid contracts signed in accordance with the previous law.⁵⁵

IV. Chile

A. NEW TAX AND CUSTOMS COURTS

On September 30, 2008, the Chilean Congress submitted a bill on Tax and Customs Courts for review and approval by the Constitutional Court.⁵⁶ The bill creates new specialized Tax and Customs Courts and removes tax and customs matters and procedures from the jurisdiction of the Chilean Tax Authority (*Servicio de Impuestos Internos*, or SII) and Customs Service (*Servicio Nacional de Aduanas*, or SNA).

Laws and regulations currently in force provide that certain first-instance tax and customs claims must be filed with and decided by SII or SNA, who review and decide the case as a trial-level court.⁵⁷ As a consequence, a person's claim against either such administrative agency is decided by the agency itself (albeit in its jurisdictional rather than administrative capacity). This creates an unfair bias at the trial court level and, hence, increases the need to appeal to the higher, unbiased courts.

When approved by the Constitutional Court, this new law will improve some procedural rules by providing that tax and customs hearings before the Court of Appeal will have

52. See Portaria SECEX No. 21, de 24 de setembro de 2008, art. 1(a), D.O.U. de 25/12/2008, available at http://www.desenvolvimento.gov.br/arquivos/dwnl_1222367516.pdf.

53. See Lei No. 11.785, de 22 de setembro de 2008, art. 1, D.O.U. de 23/9/2008 (altering Lei No. 8.078, de 11 de setembro de 1990, art. 5, ¶ 3, D.O.U. de 12/9/1990).

54. See Lei No. 8.078, art. 54, ¶ 3.

55. See Lei No. 11.785, art. 2.

56. See Bill on Tax Jurisdiction, Message of the Executive to Cámara de Diputados, No. 3,139-05, Nov. 20, 2002 [hereinafter Cámara de Diputados]. After the Constitutional Court approves this law, it will enter into force gradually throughout the Chilean territory; its full force and effect in the entire country must be accomplished within three years.

57. For example, claims against resolutions of a local tax authority are filed with the Regional Director corresponding to the jurisdiction of the relevant local authority, and the SNA decides fines applied as penalties for breach of the customs regulations.

priority over other cases.⁵⁸ The bill also provides an administrative reconsideration remedy that the claimants will be entitled to file with the SII or SNA before initiating judicial remedies.⁵⁹ The purpose of this remedy is to avoid excessive or unnecessary litigation on taxation and customs matters.

B. AMENDMENTS TO PENSION FUNDS

Law No. 20,255⁶⁰ amends the private pension funds system created in 1980.⁶¹ The main amendments of this law include the following:

1. Independent or self-employed workers⁶² must make monthly payments or contributions to, and become a member of (i) a private social security entity called *Administradora de Fondos de Pensiones* (“AFP”) to provide retirement and disability pensions⁶³ starting in 2012; and (ii) a workers’ compensation insurance entity for protection from employment-related accidents and diseases.⁶⁴
2. The amendments create certain “basic solidarity pensions” for persons who have made insufficient or no contributions to private pension accounts.⁶⁵ The beneficiaries of these minimum pensions include persons within the 40% lowest-income segment in Chile, as well as housewives who do not have their own individual accounts.⁶⁶
3. The amendments also create a collective voluntary pension savings plan (APVC) and broaden the scope of tax benefits formerly applicable to voluntary pension savings (APVs). They create a subsidy for persons earning a monthly income of approximately US\$600 to US\$2,230, consisting of the provision by the State, at the time of retirement, of an amount equivalent to 15% of the beneficiaries’ savings.⁶⁷
4. Fixed commissions formerly charged by AFPs in the case of a beneficiary’s change of AFP membership are eliminated.⁶⁸

58. See Cámara de Diputados, *supra* note 56.

59. See *id.*

60. See Ley No. 20.255, de 11 de Marzo de 2008, D.O. 6: 39,014 (Chile).

61. See Decreto No. 3.500, de 29 de Noviembre de 1980, D.O. 4819: 30,828 (Chile). The Chilean retirement funds and pensions system relies on individual capitalization—i.e., individuals’ monetary payments into their own individual pension “capitalization accounts.” All employees must contribute to their personal pension account, managed by a private social security entity called *Administradora de Fondos de Pensiones*.

62. Contractors and other independent service providers are not included under the definition of “dependent employees.” See *infra* note 66.

63. AFP invests the funds provided by their members and provides individual retirement and/or disability pensions by utilizing the funds contributed and the revenues obtained from the investment thereof.

64. Currently only “dependent employees” (i.e., persons providing services under a relationship of subordination and dependency with an employer, whether or not a written employment contract exists, pursuant to Articles 3, 7, and 8 of the Labor Code) are obligated to be a member of such entities and make such monthly contributions. Ley No. 20.255.

65. Ley No. 20.255, art. 92(f) (setting forth these basic solidarity pensions).

66. See BCN.cl, Preguntas frecuentes sobre: Reforma Previsional (I), <http://www.bcn.cl/guias/reforma-previsional-i> (last visited Apr. 3, 2009).

67. See BCN.cl, Preguntas frecuentes sobre: Reforma Previsional (II), <http://www.bcn.cl/guias/reforma-previsional-ii> (last visited Apr. 3, 2009).

68. See Ley No. 20.255, art. 20.

C. NEW LABOR COURTS AND PROCEDURE

New labor courts were created and new labor procedural rules entered into force on March 31, 2008.⁶⁹ Under the new labor court and procedural system, all judicial labor and employment proceedings shall be (i) oral, (ii) public, and (iii) concentrated in a single hearing.⁷⁰ This new system includes more direct contact of the judge with the litigants, increases the court's *ex officio* powers to move the case forward, and provides more equal participation of the parties.⁷¹

The new labor courts may resolve disputes regarding individual or collective employment agreements; unions and collective bargaining matters; health and social security laws; and administrative resolutions on labor, health, and social security matters.⁷² The new procedures include general procedures applicable to most labor disputes,⁷³ a constitutional protection procedure applicable to alleged violations of employees' constitutional rights,⁷⁴ a special procedure for small claims⁷⁵ or claims regarding dismissals during maternal privilege protection,⁷⁶ and a special procedure to oppose certain administrative fines and decisions.⁷⁷

D. NEW LAW REGARDING ACCESS TO PUBLIC INFORMATION

On August 20, 2008, Law No. 20,285 on access to public information was enacted.⁷⁸ This law obligates governmental entities to disclose material information to the general public, thus increasing the general public's knowledge of and oversight on governmental actions. The law is based on constitutional principles of transparency of public office

69. See Ley No. 20.022, de 30 de Mayo de 2005 (Chile), available at <http://www.bcn.cl/leyes/pdf/actualizado/238321.pdf>; Ley No. 20.023, de 31 de Mayo de 2005, D.O. No. 38,173, available at <http://www.bcn.cl/leyes/pdf/actualizado/238347.pdf>; Ley No. 20.252, de 15 de Febrero de 2008, D.O. No. 38,988 (Chile), available at <http://www.bcn.cl/leyes/pdf/original/269265.pdf>; Ley No. 20.087, de 3 de Enero de 2006, D.O. No. 38,353 (Chile), available at <http://www.bcn.cl/leyes/pdf/actualizado/245804.pdf>; Ley No. 20.260, de 29 de Marzo de 2008, D.O. No. 39,023 (Chile), available at <http://www.bcn.cl/leyes/pdf/original/270178.pdf>. The new labor court and procedural system will gradually enter into force throughout Chile; its full implementation must occur no later than October 30, 2009. See First Transitory Article of Ley No. 20.087, de 3 de Enero de 2006, D.O. No. 38,353 (Chile), available at <http://www.bcn.cl/leyes/pdf/actualizado/245804.pdf>.

70. See Ley No. 20.087, de 3 de Enero de 2006, D.O. No. 38.353, art. 15 (new art. 425 § 1 of Labor Code) (Chile), available at <http://www.bcn.cl/leyes/pdf/actualizado/245804.pdf>.

71. See *id.*

72. See LABOR CODE, Ley. No. 20,087, art. 420, available at <http://www.legadigital.cl/doc/leyes/20087%20ley%20sustituye%20procedimiento%20laboral.pdf>.

73. See Ley No. 22.087, art. 15 (new Ch. II, ¶ 3 of LABOR CODE), available at <http://www.legadigital.cl/doc/leyes/20087%20ley%20sustituye%20procedimiento%20laboral.pdf>.

74. See Ley No. 22.087, art. 15 (new Ch. II, ¶ 6 of LABOR CODE), available at <http://www.legadigital.cl/doc/leyes/20087%20ley%20sustituye%20procedimiento%20laboral.pdf>.

75. "Small claims" are those not exceeding ten minimum wages (currently approximately US\$2,360). See Dirección del Trabajo.cl, ¿Cuál es el valor del ingreso mínimo mensual?, <http://www.dt.gob.cl/consultas/1613/article-60141.html> (last visited Apr. 3, 2009).

76. See Ley No. 20.087, art. 15 (new Ch. II, ¶ 7 of LABOR CODE), available at <http://www.legadigital.cl/doc/leyes/20087%20ley%20sustituye%20procedimiento%20laboral.pdf>.

77. In these cases, the general procedure is applicable. See Ley No. 20.087, art. 15 (new Ch. II, ¶ 3 of LABOR CODE), available at <http://www.legadigital.cl/doc/leyes/20087%20ley%20sustituye%20procedimiento%20laboral.pdf>.

78. See Ley No. 20.285, de 20 de Agosto de 2008, D.O. No 39,142 (Chile), available at <http://www.bcn.cl/leyes/pdf/original/276363.pdf>.

functions and public access to information pertaining to or held by governmental and administrative entities.

Law No. 20,285 defines the principle of transparency of the public function as “the respect and protection of the publicity of actions, resolutions, procedures and documents pertaining to or held or issued by administrative entities and agencies, and of their underlying grounds, in order to facilitate public access to such information.”⁷⁹ Governmental entities must publish certain information on their respective websites, including internal structure, actions and resolutions, personnel, acquisitions, transfers of public funds, budgets, and audit results. This information must be updated monthly.⁸⁰

Information currently existing in the government’s power is deemed public, and any person has the right to receive such information by requesting it pursuant to a special procedure.⁸¹ A request for information may be entirely or partially denied, however, if the relevant disclosure negatively affects the relevant entity or agency’s functions, third party rights, national security, or the general interest, or if the requested information has been declared confidential by means of another law.⁸²

The law also creates a four-member Transparency Council,⁸³ with the purpose of promoting and guaranteeing access to public information. The President of Chile with the agreement of two-thirds of the Senate appoints the Council’s members.⁸⁴ The Transparency Council may impose fines on governmental authorities who unjustifiably refuse access to public information, do not timely disclose the relevant information when ordered by a subpoena, or persist with any such noncompliance.⁸⁵ Private parties have a cause of action before the Transparency Council for protection of their right to access public information.⁸⁶ The Transparency Council’s decisions are subject to a special remedy (*recurso de ilegalidad*) filed before a Court of Appeals.⁸⁷

79. *See id.* art. 4.

80. *See id.* art. 7.

81. *See id.* arts. 12-20.

82. *See id.* art. 21.

83. *See id.* art. 31.

84. *See id.* art. 36.

85. *See id.* art. 49.

86. *See id.* art. 24.

87. *See id.* art. 28, 30.

V. Colombia

In an effort to attract foreign investment,⁸⁸ the Colombian Government enacted Decree No. 3913 of 2008, eliminating the non-remunerated six-month 50% deposit that had been established for foreign capital portfolio investments to control market speculators.⁸⁹

Other legal developments for 2008 included Law No. 1175—enacted on December 27, 2007, but effective in 2008, establishing a tax benefit consisting of special payment conditions and interest reductions granted to national and municipal taxpayers owing amounts accrued in 2005 and previous years.⁹⁰ Taxpayers who paid such accrued and unpaid amounts, fully or in part, by June 27, 2008, received a 70% reduction in their late-payment interest.⁹¹ If the taxpayer could not pay all of back-taxes plus interest and fines, he or she could agree to pay the principal amount owed in cash by June 27, 2008, and then have up to three years to pay the interest and fines.⁹²

Civil procedural law underwent a change with the creation of the tacit abandonment figure (*desistimiento tácito*), mainly characterized by the dismissal of a judicial claim due to party inaction.⁹³ This newly created figure is intended to be a sanction against the lack of diligence by either party in litigation when a party must comply with a procedural act necessary to continue a lawsuit or complaint. A previous order from a judge requiring compliance is, however, required.⁹⁴ If the tacit abandonment is declared more than once against the same party for the same reason, that party's claim will be dismissed.⁹⁵

Law No. 1231, enacted in July 2008, modified the existing Commercial Code by eliminating the differences between commercial invoices and trade bills.⁹⁶ As of October, when the law entered into effect, all invoices shall be considered to be credit instruments.⁹⁷ This change will facilitate the negotiation of these instruments and will expedite judicial proceedings originating from these instruments.

In a precedent-setting ruling, the Constitutional Court determined that the governmental entities that regulate and supervise the Colombian Healthcare System have been ineffective in protecting the fundamental constitutional right of access to healthcare services to which every Colombian citizen is entitled.⁹⁸ In the first constitutional action of its

88. Direct foreign investment during the first part of 2008 grew 26% as compared to the same period in 2007. PROEXPORT COLOMBIA, FOREIGN INVESTMENT IN COLOMBIA (2008), <http://www.proexport.com.co/VBeContent/library/documents/DocNewsNo7011DocumentNo8069.PDF> (last visited Apr. 3, 2009). While investors are showing caution, in part as a response to the global economic recession, Colombia's recent and unprecedented economic stability, healthy GDP growth, and solid financial system are likely to continue to foster a favorable foreign investment environment. See CAROLINA RENTERÍA, DEPARTAMENTO NACIONAL DE PLANEACIÓN, AVANCES EN COMPETITIVIDAD: LOGROS DE 2008 Y RETOS PARA 2009 (2008), www.dnp.gov.co/PortalWeb/Portals/0/archivos/documentos/GCRP/Presentaciones_Renteria/Presentacion_CR_Consejo_Privado_de_Competitividad.pdf (Apr. 4, 2009).

89. See Decreto No. 3913, 8 de Octubre de 2008, D.O. 47.136 (Colom.).

90. Ley No. 1175, 27 de Diciembre de 2007, D.O. 46.854 (Colom.).

91. *Id.*

92. *Id.*

93. Ley No. 1194, 9 de Mayo de 2008, D.O. 46.984 (Colom.).

94. CÓDIGO DE PROCEDIMIENTO CIVIL art. 346 (Colom.).

95. *Id.*

96. Ley No. 1231, 17 de Julio de 2008, D.O. 47.053 (Colom.).

97. CÓDIGO COMERCIAL art. 772 (Colom.).

98. Corte Constitucional de Colombia, 31/7/2008, "Sentencia T-760/2008" (July 31, 2008) (issued by Justice Manuel José Cepeda Espinosa).

kind, the Constitutional Court ordered the correction of the inadequate regulation of this highly complex system.⁹⁹

VI. Ecuador

A. NEW CONSTITUTION

Ecuadorian voters approved a new constitution on September 28, 2008, that considerably expands the powers of the President and establishes the basic legal principles that allow the President to implement what the present President, Rafael Correa, calls "21st century socialism."¹⁰⁰ It also opens the door to allow the President to run for two consecutive four-year terms¹⁰¹ and institutes a transitional regime that will govern until general elections can be held in 2009.¹⁰² The country's new Magna Carta authorizes the chief executive to plan, execute, and evaluate public policy that he believes to be necessary¹⁰³ to implement a balanced economic, political, social, cultural, and environmental development program.¹⁰⁴

The President will have the power: (i) to abolish the National Assembly once during the first three years of each Presidential term (although doing so will engender an immediate presidential election);¹⁰⁵ and (ii) to appoint, through a Citizens' Council, the Attorney General,¹⁰⁶ District Attorney,¹⁰⁷ and the members of the state-controlled institutions.¹⁰⁸ The new Constitution has stripped the formerly autonomous Central Bank of Ecuador of its control over monetary and lending policies, transferring this control to the President.¹⁰⁹

The new Constitution also revamps the Country's election laws by prohibiting candidates from directly advertising in the press or media.¹¹⁰ Instead, it requires the Ecuadorian State to guarantee the "just and equitable" promotion and dissemination of the candidates' proposals through publicly financed spots and publicity.¹¹¹

Ecuador's new constitutional law framework substantially re-organizes the Judiciary Branch by abolishing the former thirty-one-member Supreme Court¹¹² and replacing it with a new Constitutional Court comprised of nine justices who shall be appointed to nine-year terms.¹¹³ The Court's decisions are binding and cannot be appealed.¹¹⁴ Al-

99. *Id.*

100. Joshua Partlow & Stephan Kuffner, *Voters in Ecuador Approve Constitution: New Document Would Enhance Presidential Powers, Allow Consecutive Terms*, WASH. POST, Sept. 29, 2008, at A14.

101. Constitución de la República del Ecuador, art. 144.

102. *Id.* at Transitional Provisions, arts. 1-30.

103. *Id.* art. 141.

104. *Id.* art. 275. The Constitution's drafters adopted this "life balance" concept from the Quichua language phrase "*sumak kawsay*." Roughly translated, it means "good living."

105. *Id.* art. 148.

106. *Id.* art. 236.

107. *Id.* art. 208(10).

108. *Id.* arts. 208(10)-(12).

109. *Id.* art. 303.

110. *Id.* art. 115.

111. *Id.*

112. *Id.* art. 429.

113. *Id.* art. 432.

though a civil law constitution, the new Ecuadorian constitution partially adopts two common law principles: *stare decisis* and *certiorari*.¹¹⁵ The former will require the Court to adhere to precedents that have been established in prior cases, whereas the latter will give it discretionary power to choose the cases it will hear.¹¹⁶ The new Magna Carta also grants indigenous communities the right to implement their own justice systems within their territories provided that their practices do not violate the Constitution or international human rights law.¹¹⁷

B. LABOR LAW MANDATE

On April 30, 2008, Ecuador's Constituent Assembly issued its Labor Law Mandate (Mandate 08) that outlaws outsourcing, employment intermediation,¹¹⁸ and hourly contracting.¹¹⁹ This law requires employers to take direct employment responsibility for previously outsourced workers¹²⁰ but permits outsourcing for certain specified complementary services (e.g. security, catering, cleaning, and messenger services).¹²¹ The mandate imposes joint and several liability on the complementary service provider and the user company for the former's labor obligations.¹²² It also gives employees of complementary service providers the right to proportional profit sharing in the user company's net profits.¹²³

Notwithstanding the above, Mandate 08 allows public sector companies to hire specialized technical service providers, although it does not specifically define what types of services classify under this rubric.¹²⁴ It does, however, stipulate that private sector companies may contract accountants, advertising agencies, consulting firms, information services providers, and law and auditing firms under the specialized technical service modality.¹²⁵

C. NEW PUBLIC PROCUREMENT SYSTEM

The Constituent Assembly has approved the National Public Contracting System Law¹²⁶ in order to close the old loophole-filled system and to create uniform streamlined procurement procedures for all government institutions and public companies.¹²⁷

The new law requires all providers of goods and services to the government- or state-owned companies to register with the Unified Registry of Suppliers before they can par-

114. *Id.* art. 440.

115. *Id.* art. 436(6).

116. *Id.*

117. *Id.* art. 171.

118. Mandato No. 8, 6 de Mayo de 2008, Registro Oficial 330-S, art. 1.

119. *Id.* art. 2.

120. *Id.* art. 1.

121. *Id.* art. 3.

122. *Id.* art. 4.

123. *Id.*

124. *Id.*, First General Provision.

125. *Id.*, Second General Provision.

126. Ley Organica del Sistema Nacional de Contractacion Publica, 4 Agosto de 2008, Registro Oficial 395-S (Ecuador).

127. *Id.* art. 9.

ticipate in procurement contracts.¹²⁸ It also eliminates the requirement of pre-contractual reports from the offices of the Attorney General and the Comptroller General, although it still obligates these two public offices to carry out control procedures after the contract signing.¹²⁹

D. MINING MANDATE

The Mining Mandate ordered a temporary moratorium on medium- and large-scale mining activities until a new mining law is enacted to regulate the industry.¹³⁰ It also cancelled all mining concessions that did not comply with the law's environmental impact and community consultation requirements,¹³¹ as well as concessions for which conservation patents had not been paid.¹³²

The new mining law must be issued within 180 days of the enactment of the new Constitution¹³³ and establish a new framework to minimize the environmental, social, and cultural impact of mining.¹³⁴ The new mining law must also authorize the creation of a state mining company to participate in mining projects.¹³⁵

E. TAX REFORMS

The Constituent Assembly enacted the Equitable Tax Law¹³⁶ on December 28, 2007, to restructure the Tax Code and make it more equitable.¹³⁷ The law's main reforms include stiffened sanctions for tax evasion¹³⁸ and the institution of a restructured progressive income tax with rates ranging from 0 to 35%.¹³⁹ The tax reform act also establishes a 0.5 percent tax on remittances abroad (*Impuesto a la Salida de Divisas*).¹⁴⁰

F. TOURISM AND CONSERVATION OF THE GALÁPAGOS ISLANDS

In an attempt to balance tourist access to and conservation in the Galápagos Islands, President Correa issued an Executive Decree¹⁴¹ that modified the Special Regulations for Tourism in Natural Areas to include more rigorous qualification and licensing requirements (including annual renewals) for Galápagos tour operators.¹⁴²

128. *Id.* art. 16.

129. *Id.* art. 15(3).

130. *See* Mandato Minero [Mining Mandate], 23 de Abril de 2008, Registro Oficial 321, art. 6, (Ecuador).

131. *Id.* art. 1.

132. *Id.* art. 2.

133. *Id.* art. 9.

134. *Id.*, Preamble.

135. *Id.* art. 11.

136. Ley Reformatoria para la Equidad Tributaria [The Equitable Tax Law] 29 Diciembre de 2007, Registro Oficial 242, (Ecuador).

137. *Id.*, Preamble.

138. *Id.* arts. 20-51.

139. *Id.* at art. 82.

140. *Id.* art. 155.

141. Decreto Ejecutivo 1130 [Executive Decree 1130] 20 de Junio de 2008, Registro Oficial 364, (Ecuador).

142. *Id.* art. 6.

VII. Mexico¹⁴³

A. CRIMINAL PROCEDURE

A constitutional amendment to ten articles of the Constitution—seven of them in the chapter on constitutional rights—established the Criminal Procedure Accusatory System that shall govern all criminal procedures within a maximum of eight years.¹⁴⁴ The System includes these innovations:

- (i) the basis are found in the principles of orality, as the way to conduct all trials (before passage of the Amendments, a criminal proceeding was conducted in writing); publicity; contradiction; concentration; continuity; and immediacy;¹⁴⁵
- (ii) the introduction of the principle of presumption of innocence to the Constitutional text;¹⁴⁶ and
- (iii) the creation of Judges for Control, who shall supervise and rule the proceedings undertaken between the parties prior to trial in order to guarantee due process and equity.¹⁴⁷

B. ENERGY LAW

After seventy days of a specific forum for discussions at the Mexican Senate, as well as the presentation of five bills by the President of the Republic and the main political parties, the Federal Congress finally approved Energy Amendment on October 28, 2008.¹⁴⁸

Highlights of the recent amendment are:¹⁴⁹

1. *Corporate Governance*: The Amendment creates enhanced corporate governance with the inclusion of four professional advisors to the Board of Directors of Petróleos Mexicanos (PEMEX), the Mexican state-owned oil Company, who would be ratified by the Congress;

143. An additional year in review update on Mexico can be found in this issue of THE INTERNATIONAL LAWYER. See *infra* Alejandro Suarez Mendez et al., *Mexico*, 43 INT'L LAW. 1139 (2009).

144. See Constitución Política de los Estados Unidos Mexicanos [Const.], as amended, Diario Oficial de la Federación [D.O.], arts. 16, §§ 2 and 13; 17, §§ 3, 4, and 6; 19; 20; and 21, 5 de Febrero de 1917 (Mex.), available at www.diputados.gob.mx/LeyesBiblio/doc/1.doc. The Constitutional Amendments were published in the *Diario Oficial de la Federación*. See Diario Oficial de la Federación [D.O.], 18 de Junio de 2008, available at www.dof.gob.mx.

145. See Constitución Política de los Estados Unidos Mexicanos [Const.], as amended, Diario Oficial de la Federación [D.O.], art. 20, subparagraph A, 5 de Febrero de 1917 (Mex.).

146. See *id.* art. 20, subparagraph A, § I.

147. See *id.* art. 16.

148. *Ley de Petróleos Mexicanos [L.P.M.] [Mexican Petroleum Law]*, Diario Oficial de la Federación [D.O.], 28 de Noviembre de 2008 (Mex.). See also Carole Simonnet et al., *Aprueban diputados ruta a nuevo Pemex*, 5, 427 REFORMA 4 (Oct. 29, 2008), available at www.reforma.com/libre/acceso/acceso.htm?urlredirect=/nacional/articulo/469/936245/.

149. See Press Release, Boletines de Prensa, La reforma energética, un paso fundamental para fortalecer a PEMEX, Bulletin 185 (Oct. 29, 2008), available at www.pemex.com/index.cfm?action=news§ionid=8&catid=40&contentid=19055.

2. *Transparency*: The Amendment sets out control and audit mechanisms for PEMEX by creating within the Board of Directors a Transparency and Accountability Committee;
3. *New tax regime*: It allows PEMEX to explore, with profitability, the most complex and expensive oilfields, on land and in deep waters;
4. *Acquisitions, leases, public works, and services*: It creates a dual system, divided into substantive industrial activities (drilling of wells, maintaining oil platforms, etc.) and the other activities (purchasing office equipment, constructing administrative buildings, etc.), which will improve the implementation capacity of PEMEX;
5. *Implementation capacity*: Regarding work and service agreements, the Government shall maintain the public domain over hydrocarbons. It will not grant rights over oil reserves, and it may not agree on production rates. Production sharing arrangements or strategic alliances pursuant to the sale value of the hydrocarbons or the profits derived from PEMEX are prohibited, and in any service agreement, the payment to the supplier must always be made in cash.

C. COMMERCIAL LAW

On September 24, 2008, the Commission on Commerce and Industrial Development of the Mexican Senate approved the Opinion to the Bill Decree Draft that amends and supplements the *Ley General de Sociedades Mercantiles* (General Corporation and Partnership Law),¹⁵⁰ which was, in turn, approved by the House of Representatives.¹⁵¹ The commented Draft proposes to incorporate into the Mexican legal system “one partner business corporations,” called Sole Proprietorship Corporations or Enterprises.¹⁵² The purpose of the Bill Decree Draft is to create spaces for people who want to start a business on an individual basis and, at the same time, limit their potential personal liability.¹⁵³ If approved by the Mexican Senate in plenary session, this new measure could be a great advantage to foreign and Mexican investors.

VIII. Venezuela

Again in 2008 most legal developments were primarily political. The year began on December 2, 2007, when President Chavez lost the referendum to amend 69 of the 350 articles of Venezuela’s constitution. The essence of these amendments would have greatly expanded the central authority of the state, especially in the person of the national execu-

150. See *Ley General de Sociedades Mercantiles* [General Corporation and Partnership Law], Diario Oficial de la Federación [D.O.], 4 de Agosto de 1934 (Mex.), available at www.diputados.gob.mx/LeyesBiblio/doc/144.doc.

151. See *Oficio con el que Remite Minuta Proyecto de Decreto que Reforma y Adiciona Diversas Disposiciones de La Ley General de Sociedades Mercantiles* [Reforming Provisions of the General Corporation and Partnership Law], 218 GACETA DEL SENADO, Apr. 1, 2008, available at www.senado.gob.mx/gace.php?sesion=2008/04/01/1&documento=7.

152. See *id.* (including the Bill Decree Draft).

153. See *id.*

tive, and would have permitted President Chavez to perpetuate himself in power through indefinite re-election.¹⁵⁴

A. USE OF DECREE-LAW AUTHORITY

With the rejection of the constitutional amendments, President Chavez then proceeded to nevertheless enact most of the fundamental changes oriented toward creating the bases for the Chavez politico-economic model of "21st Century Socialism" through the promulgation of twenty-six decree laws,¹⁵⁵ all on July 31, 2008, the final day of Chavez's extraordinary decree-law authority,¹⁵⁶ none of which had been previously announced or subjected to public discussion.

The areas covered by the twenty-six decree laws include 1) the economic and financial sectors, 2) social security and related programs, 3) the public administration, 4) the agro-industrial sector, 5) certain specific sectors (national water spaces and navigation, tourism, and railways), 6) the armed forces, and 7) housing. Only six of the twenty-six decree laws are reforms of existing laws, whereas the other twenty are entirely new laws. The principal features common to all of these new laws are a) increased participation by the state in the economy; b) new, enhanced powers for the national executive; c) the declaration of various economic activities as of public interest, and some goods and activities as of public use and social interest; d) the involvement of citizen community organizations (the "communal councils"); and e) significantly increased obligations and penalties. All of these decree laws are now the subject of constitutional challenge before the Supreme Tribunal of Justice. Among the more controversial of the new decree laws are those relating to access to goods and services,¹⁵⁷ security and sovereignty of food stuffs,¹⁵⁸ and the armed forces.¹⁵⁹

154. For a summary of the referendum, see *Review of the Month: Close Call*, VENECONOMY MONTHLY (ECONOMIC AND FINANCIAL INDICATORS), Vol. 25, No. 3, December 2007, p. 1. It is believed that the amendments were rejected by a plurality of six percent to eight percent, although the only official announcement, supposedly based on some ninety-two percent of the vote, showed a margin of just over one percent. Tellingly, in terms of Venezuela's democracy, as of the end of 2008 the National Electoral Council still had not made public the final vote tally in the referendum.

155. See Decretos Nos. 5.889-5.992, Gaceta Oficial de la Republica Bolivariana de Venezuela [Official Gazette] No. 38.984, 31 de Julio de 2008.

156. *Ley que Autoriza al Presidente de la Republica para Dictar Decretos con Rango, Valor y Fuerza de Ley, en las Materias que se Delegan* [Law Authorizing the President of the Republic to Promulgate Decrees with the Rank, Value and Force of Law in the Areas Delegated], Gaceta Oficial de la Republica Bolivariana de Venezuela [Official Gazette] No. 38.617, 1 de Febrero de 2007. See also Adrian Lucio Furman et al., *Latin America & Caribbean*, 42 INT'L LAW. 2, 1044 (2008) (background of this decree-law authority).

157. Decreto No. 6.092, with Rank, Value and Force of Law for the Defense of Persons Regarding Access to Goods and Services, Gaceta Oficial de la Republica Bolivariana de Venezuela [Official Gazette] No. 38.984, 31 de Julio de 2008.

158. Decreto No. 6.071, Rank, Value and Force of Organic Law for Food Security and Sovereignty, Gaceta Oficial de la Republica Bolivariana de Venezuela [Official Gazette] No. 38.984, 31 de Julio de 2008.

159. Decreto No. 6.239, with Rank, Value and Force of Organic Law of the Bolivarian National Armed Forces, Gaceta Oficial de la Republica Bolivariana de Venezuela [Official Gazette] No. 38.984, 31 de Julio de 2008.

1. *Access to Goods and Services*

The new law on defense of persons regarding access to goods and services goes considerably beyond the previous consumer protection law and also incorporates the provisions of the previous law on hoarding and similar offenses.¹⁶⁰ The new law covers all of the assets and items related to the provision of goods and services, especially those declared by the national executive as being of basic necessity, including the activities of production, manufacturing, importation, storage, transportation, distribution, and marketing. In the case of basic necessity goods and services, these are to be provided in a continuous, effective, and efficient manner. The law provides that all such activities and assets are declared to be of public utility and social interest, and expressly stipulates that the national executive may expropriate them without requiring the National Assembly to declare them as such, as generally required by the law on expropriation.¹⁶¹ The newly created institute charged with the administration of this law (INDEPABIS) has draconian authority of inspection, confiscation, and intervention; thus, it can seize and resell goods, temporarily or permanently take over or close establishments, and impose substantial fines.

2. *Foodstuffs Security and Sovereignty*

The law on the security and sovereignty of foodstuffs applies to all assets and activities related to food security and sovereignty, such as production, distribution, storage, and importation and exportation, as well as all inputs related to foodstuffs and agricultural products and services. This law is deemed to be of public order, and all assets related to the availability of and timely access to foodstuffs, including those in relation to quality and quantity, are declared to be of public utility and social interest. Moreover, the law provides that the national executive, for reasons of food security, can decree the "forced acquisition," with just indemnification and timely payment, of all assets related to this objective.¹⁶²

3. *Bolivarian National Armed Forces*

Lastly, the new Bolivarian National Armed Forces law establishes a number of changes in the institution of the armed forces, several of which are contrary to the current constitu-

160. See *Ley de Protección al Consumidor y al Usuario* [Law for the Protection of the Consumer and User], *Gaceta Oficial de la República Bolivariana de Venezuela* [Official Gazette] No. 37.930, 4 de Mayo de 2004; Decreto No. 5.835, Partially Reforming Decreto No. 5.197, with Rank, Value and Force of Special Law for the Popular Defense Against Hoarding, Speculation, Boycotts and Any Other Conduct that Affects the Consumption of Foodstuffs and Products Declared of Basic Necessity or Subject to Price Controls, *Gaceta Oficial de la República Bolivariana de Venezuela* [Official Gazette] No. 38.862, 31 de Janiero de 2008.

161. See *Ley de Expropiación por causa de Utilidad Pública o Social* [Law on Expropriation for Reasons of Public or Social Utility], *Gaceta Oficial de la República Bolivariana de Venezuela* [Official Gazette] No. 37.475, 1 de Julio de 2002. Art. 13 requires such a prior declaration by the National Assembly, in the case of an expropriation by the national government, or by the state or municipal legislatures in the cases of state or municipal expropriations, with certain exceptions related to national defense and security, and others as specified in art. 14.

162. See Decreto No. 6.071, art. 3. "[J]ust indemnization and timely payment," however, have not characterized previous government expropriations, especially in the agricultural sector. It may also be noted that the coverage of the laws on access to goods and services, food security, and sovereignty are purposefully broad and vague, which gives the executive wide latitude with respect to their enforcement.

tion.¹⁶³ The new law furthers the incursion of the military in civilian activities by investing the armed forces with the task of preparing and organizing the populace for the defense of the nation and propagating military values. The law abolished the prior prohibition on military involvement in political activities and institutions. The role of the president of the republic as Commander in Chief has been established as a military rank, thus giving the president direct operational authority over military actions. Further, the president may now create new Strategic Defense Regions to be governed by presidentially-appointed Major Generals who are to have ascendancy over elected civilian officials in their regions. Additionally, the new law creates the Bolivarian National Militia and incorporates this body as part of the armed forces. The new militia consists of the previously civilian Military Reserve and Territorial Militia and is under the direct and exclusive command of the President of the Republic.

B. INELIGIBILITY FOR PUBLIC OFFICE

In the months before the November 23, 2008, gubernatorial and municipal elections, the Controller General of the Republic ruled that 260 mainly opposition candidates were ineligible to run for public office in these elections and a number of years into the future. The decision was based on a provision of the Law of the Controller General,¹⁶⁴ recently upheld by the Constitutional Chamber of the Supreme Tribunal of Justice¹⁶⁵ notwithstanding a contrary precept of the current constitution.¹⁶⁶ As a consequence, various of the more popular opposition politicians in the country, many of whom were favored for electoral victory, were required to withdraw their candidacies.¹⁶⁷

163. For example, the constitutional name of the armed forces is the National Armed Forces (art. 328); the military establishment is to be institutional and apolitical (art. 328); the status of the president of the republic as commander in chief is expressly a non-military position (art. 236); the armed forces consist only of the army, navy, air force, and national guard (art. 329); and the constitutional authority of state and municipal elected officials is not subservient to the national executive or to any military authority (Title IV, Chapters III and IV). See *Constitucion de la Republica Bolivariana* [Const. of the Bolivarian Republic of Venezuela], *Gaceta Oficial de la Republica Bolivariana de Venezuela* [Official Gazette] No. 5.453, 24 de Marzo de 2000.

164. See Organic Law of the Controller General of the Republic and the National System of Fiscal Control, *Gaceta Oficial de la Republica Bolivariana de Venezuela* [Official Gazette] No. 37.347, 17 de Diciembre de 2001. Article 105 of this law provides that the Controller General, without any other proceeding, can declare a person who has held public office and allegedly committed some act of public corruption while in office ineligible to hold a new public office for up to fifteen years, depending on the Controller General's appreciation of the gravity of the fault.

165. See *Atencio v. Contraloria General*, El Tribuno Supremo de Justicia Sala Constitucional [Constitutional Chamber of the Supreme Tribunal of Justice], Case No. 06-0494, (Aug. 2008), available at www.tsj.gov.ve/decisiones/scon/Agosto/1266-060808-06-0494.htm.

166. See *Constitucion de la Republica Bolivariana*, *Gaceta Oficial de la Republica Bolivariana de Venezuela* [Official Gazette] No. 5.453, 24 de Marzo de 2000, art. 65 (providing that a person must be tried and convicted in a court of law in order to be prohibited from running for public office). None of the 260 candidates have been indicted, much less tried.

167. See generally Herbert Koeneke, *Declared Ineligible: Anything Goes, As Long As It's for the Revolution*, *VENECONOMY MONTHLY (GOVERNMENT & POLITICS)*, Vol. 25, No. 11, Aug. 2008, p. 1.

C. MORE NATIONALIZATIONS

Continuing with the statization of the Venezuelan economy, more major nationalizations were effected in 2008. Among the principal of these was the takeover in April of the three largest cement companies, owned respectively by Cemex of Mexico, Lafarge of France, and Holcim of Switzerland,¹⁶⁸ followed by the nationalization of the previously privatized Siderúrgica del Orinoco (SIDOR), principally owned by the Techint Group of Argentina. Also, in July President Chavez announced his intention to purchase Banco de Venezuela, one of the country's three largest private banks owned by the Santander Group of Spain.¹⁶⁹

168. The cement industry was declared to be of strategic interest to the nation. See Decreto No. 6.091, with Rank, Value and Force of Organic Law for the Ordering of the Companies that Produce Cement, Gaceta Oficial de la Republica Bolivariana de Venezuela [Official Gazette] No. 5.886, 18 de Junio de 2008.

169. See 26 VENECONOMY MONTHLY 35, Aug. 6, 2008, at 1 (commenting on the Banco de Venezuela announcement). For summaries of the Chavez government's statization policies, see Ana Maria Di Leo, *Forensic Report: The Destruction of Productive Capital*, VENECONOMY MONTHLY (INDUSTRY & COMMERCE), Vol. 25, No. 8, May 2008, p. 1; and John Sweeney, *Chavez Sends Steelmaker Sidor Back to the Stone Age*, VENECONOMY MONTHLY (INDUSTRY & COMMERCE), Vol. 25, No. 8, May 2008, p. 11. For comments on the Banco de Venezuela announcement, see VENECONOMY WEEKLY, Vol. 26, No. 35, Aug. 6, 2008, p. 1.

