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## Doing Business in Venezuela

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## Doing Business in Venezuela

### Abstract

[Excerpt] Industrial and commercial activities in Venezuela may be carried out in virtually any form, ranging from an individual entrepreneur to all forms of legal entities. Regardless of the form adopted, formalities must be complied with in order to establish a company in Venezuela. Following are the specific formalities for the various forms.

### Keywords

Venezuela, foreign investment, trade, commerce, business, law, imports

### Disciplines

Business | International Business

### Comments

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# Doing Business in Venezuela

Venezuela

BAKER & MCKENZIE



2004

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## **CONSTITUTIONAL LAW**

True to its constitutional tradition, in December 1999 Venezuela approved its 27th Constitution. The first Venezuelan Constitution, which dates back to 1811, was only the world's fourth Constitution. Since then there have been 26 other Constitutions in force in Venezuela. The political instability associated with the continuing change of Constitutions led one political leader of the 19th century to affirm that in Venezuela "the Constitution is a little yellow book that serves any purpose". Since 1961, the Constitution has fathered a number of legal achievements. It has also had a major impact on business planning in Venezuela.

Venezuela is a democratic republic, divided into twenty-three states, one capital district, the federal dependencies and some three hundred municipalities. It is a federal state with several limitations regarding the powers of the states and the municipalities. The main legislative powers lie with the national government and thus are centralized in the capital, the city of Caracas, which is the seat of the government.

The national government consists of a legislative, an executive, a judicial, a citizen, and an electoral branch. The states and the municipalities only consist of a legislative and an executive branch.

The National Legislative Branch or National Assembly consists of Deputies, who are elected every five years by secret ballot. Their powers are not restricted to the approval of laws but also encompass control of the Public Administration. The main political parties are represented there. At times, through special laws, the National Assembly has temporarily empowered the President of the Republic to enact laws on different matters. The state and municipal legislatures exercise basically the same powers at a local level. The ordinances enacted by the municipal governments may have a decisive influence on the structuring of business within a given municipality.

The main political actors are the members of the National Executive, which is made up of the President of the Republic, the Executive Vice-President of the Republic and the ministers. Together they act as the Full Cabinet. The President of the Republic is elected every six years by secret and direct ballot. The President can be re-elected immediately and once only, to an additional term. Among the main powers and duties of the President of the Republic are to declare a state of emergency and order the restriction of constitutional guarantees; to enact extraordinary measures in economic, financial or other relevant matters whenever the public interest so requires and he has been authorized to do so by special law; to issue regulations to the laws; to administer National Public Finances; and to execute contracts in the national interest as permitted by the Constitution. Under the 1961 Constitution, the President of the Republic temporarily suspended or restricted a number of constitutional guarantees in cases of emergency. Under the current Constitution, the constitutional guarantees have not been suspended or restricted. The Vice-President of the Republic is appointed by the President. Among the main duties of the Vice President of the Republic are to cooperate with the President of the Republic in directing the actions of the government, and to coordinate the National Public Administration in accordance with the President of the Republic's instructions.

At the local level, the executive power is vested in state governors and in mayors, who are elected every four years by secret and direct ballot. They can be re-elected immediately and once only, to an additional term.

The National Judicial Branch is vested in a Supreme Tribunal of Justice and several lower level courts. The Supreme Tribunal is, in turn, divided in seven Chambers: Plenary, Constitutional, Political-Administrative, Electoral, Civil Appeal, Criminal Appeal, and Social Appeal. The justices of the Supreme Tribunal of Justice are elected for a single term of 12 years. Constitutional control is exercised by the Supreme Tribunal mainly through its Constitutional Chamber. Interpretations established by the Constitutional Chamber concerning the contents or scope of constitutional rules and principles are binding on the other Chambers of the Supreme Tribunal of Justice as well as on all other courts of the Republic. Both the Constitutional and the Political-Administrative Chambers have played a major role in exercising strict control of the constitutionality and legality of the acts of the Public Administration. These courts are also entrusted with the task of protecting all constitutional rights. The protection of such rights has been increased by way of a procedural remedy known

as Amparo Constitucional (constitutional action for the protection of civil rights). This constitutional remedy is one of the causes of the enhanced significance of constitutional law in Venezuela.

The National Citizen Branch of the Government is exercised by the Republican Ethics Council, and is made up of the Public Defender, the Prosecutor General and the Comptroller General of the Republic. Among the main duties of the Citizen Branch are to prevent, investigate and punish acts that undermine public ethics and administrative morals, to ensure sound management and the legality of the use of public patrimony, and fulfillment and application of the principle of legality in all of the State's administrative activities. The Public Defender's Office is charged with the promotion, defense and oversight of the rights and guarantees established in this Constitution and international treaties on human rights, in addition to defending the legitimate, collective and diffuse interest of the citizens.

The National Electoral Branch is vested in a National Electoral Council as governing body, and several subordinate entities. The main duty of the Electoral Branch is to guarantee the equality, reliability, impartiality, transparency and efficiency of electoral processes in Venezuela.

Probably no other area of law has had a more dramatic impact on the operation of the Venezuelan legal system, and on the daily life of Venezuelan citizens, than Constitutional Law. The reason is the new perception of the meaning of the Constitution and its implementing legislation.

## **ORGANIZING A COMPANY**

Industrial and commercial activities in Venezuela may be carried out in virtually any form, ranging from an individual entrepreneur to all forms of legal entities. Regardless of the form adopted, formalities must be complied with in order to establish a company in Venezuela. Following are the specific formalities for the various forms.

### **CORPORATION (EITHER SOCIEDAD ANÓNIMA OR COMPAÑÍA ANÓNIMA)**

The corporation is the legal entity preferred by commercial enterprises to carry out their projects because its obligations are supported by a stated capital, and the shareholders' liability is limited to the amount of their capital contributions.

Any name available in the Commercial Registry may be used. The words *Sociedad Anónima* or *Compañía Anónima* or the corresponding initials "S.A." or "C.A." must be added. In order to use the name, it must first be reserved in the Commercial Registry.

Although the initial amount of the capital stock of a corporation is unlimited, it must be subscribed to in full, and at least 20% thereof paid in upon incorporation. The capital stock of a corporation must be represented by nominative shares.

At least two shareholders, individuals or legal persons, must sign the articles of incorporation to form a corporation. The company's articles of incorporation are generally drafted with sufficient scope for them to also serve as the company's bylaws. The single document comprising the articles of incorporation and bylaws must be submitted to the Commercial Registry within 15 days of execution by the founding shareholders, together with the bank deposit slips evidencing the payment, in whole or in part, of the par value of the shares, and in the case of foreign investors, the documents evidencing the transfer of foreign exchange or the importation of goods into the country. Once registered with the Commercial Registry, the articles of incorporation must be published in a local daily newspaper. At that time, the company is validly incorporated.

The law does not expressly provide for the establishment of preferential rights to subscribe to new shares resulting from a capital increase or for a right of first refusal in the event of a sale of shares. Normally, companies with two or more shareholders include provisions governing preferential rights in the articles of incorporation.

The supreme authority and control of the corporation is vested in the Shareholders' Meeting, who has the power to appoint the administrators and/or members of the board of directors of the company. The administrators have the powers assigned to them by the articles of incorporation and need not be shareholders of the company.

The profits of the company are distributed pursuant to a resolution adopted by the shareholders' meeting or the board of directors. At least 5% of the net profits of the company must be set aside annually to constitute a legal reserve.

### **LIMITED LIABILITY COMPANY (*SOCIEDAD DE RESPONSABILIDAD LIMITADA*)**

The limited liability company (S.R.L.) is an entity whose capital is divided into participation denominated quotas. Under no circumstances may the quotas be represented by shares or marketable securities. The incorporation of limited liability companies is subject to the same rules as corporations. Any name available in the Commercial Registry may be used, and the words *Sociedad de Responsabilidad Limitada* or the corresponding initials "S.R.L." must be added.

The capital of limited liability companies may not be less than Bs.20,000 nor more than Bs.2,000,000. The capital must be totally subscribed to and at least 50% thereof must be paid in if the payment is in cash, and 100% if in kind. The capital is divided into quotas which are fractions of equal amounts which may not be less than Bs.1,000 and which must always be multiples of Bs.1,000. The transfer of quotas may be subject to specific restrictions which make this type of entity helpful for U.S. income tax planning purposes.

The quotaholders are jointly and severally liable for a term of five years for the veracity of the value assigned to contributions in kind in the articles of incorporation. Each quotaholder has one vote for each quota owned. The profits of the company are distributed among the quotaholders at the end of the fiscal year pursuant to a resolution adopted by the quotaholders' meeting or the board of directors.

The management is subject to the same rules as corporations. The administrators are jointly and severally liable both to the company and to third parties for violations of the law and the articles of incorporation, as well as for any other infringement while in office.

### **GENERAL PARTNERSHIP (*SOCIEDAD EN NOMBRE COLECTIVO*)**

A general partnership is an organization of persons whose obligations are guaranteed by the unlimited liability of the partners. Although the liability of the partners is unlimited, it is of a subsidiary nature, as no action can be taken against any of them personally without first having exhausted remedies against the partnership. The formalities for the organization of a general partnership are governed by the same rules as those for corporations and limited liability companies, although the articles of association are simple and only an extract thereof must be registered and published.

### **SIMPLE LIMITED PARTNERSHIP (*SOCIEDAD EN COMANDITA SIMPLE*)**

In the case of a limited partnership, the company's obligations are guaranteed by the unlimited and several liability of one or more general partners, as well as by the limited liability of the limited partners. The limited partnership is formed in the same manner as a general partnership, and those partners whose liability is unlimited are subject to the same rules as the partners in a general partnership. Partners with limited liability are liable for the company's obligations only up to the amount of their capital contributions and they are prohibited from managing the company.

### **STOCK LIMITED PARTNERSHIP (*SOCIEDAD EN COMANDITA POR ACCIONES*)**

This limited partnership is one in which the ownership of the limited partners is divided into shares. The rules applicable to limited partners are essentially the same as those applicable to corporations and the rules applicable to the general partners are essentially the same as those applicable to general partnerships.

## **BRANCHES**

Establishing a branch of a foreign company in Venezuela is fairly simple and expeditious. The documents required are the articles of incorporation and bylaws of the company; an extract of the corporate law of the country or state where the company is incorporated; a resolution of the board of directors of the company authorizing the establishment of the branch and stating the capital to be assigned to the branch, and a general power of attorney authorizing a person in Venezuela to carry out the steps necessary to establish the branch. The above documents must be duly legalized and translated into Spanish by a Venezuelan certified public translator, registered and published.

## **INDUSTRY LOCATION**

### **INDUSTRIAL DE-CONCENTRATION**

Current regulations on industrial de-concentration prohibit new industrial installation in Caracas, its Metropolitan Area, and in some metropolitan municipalities (Guaicaipuro, Carrizal and Salias in the State of Miranda). The prohibition also covers the zones adjacent to the main roads leaving Caracas.

According to current regulations, location is a relevant factor for an industry to be entitled to benefit from government incentives. The regulations on industrial de-concentration divide the country into zones. These zones and the regional population centers given priority for the installation of new industries are defined by decree. The location of industries in any of these zones theoretically allows them to receive incentives regarding loans, taxes and public utility rates. Industrial buildings that violate the regulations on industrial de-concentration may be demolished and a fine imposed on the investor.

### **PARAGUANÁ INDUSTRIAL FREE ZONE**

Locating an industry in the Paraguaná Industrial Free Zone, which is in the Paraguaná Peninsula in the State of Falcón, has the advantage that imports and exports are free of duties, sales taxes and other restrictions. Furthermore, income from the sale of products abroad is exempt from income taxes for ten years. Interest on loans to fund investments in that zone is also exempt from income taxes.

An industrial installation in the Paraguaná Free Zone requires the authorization of the Free Zone Authority. To obtain the authorization, the industries must comply with water-use restrictions and export 55% of the production volume the first year, 60% the second year, 70% the third year, and 80% thereafter.

## **REGISTRATION REQUIREMENTS AND PERMITS**

### **MUNICIPAL BUSINESS LICENSE (*PATENTE MUNICIPAL*)**

The municipal business license, required by all municipalities in Venezuela, is both a license and a tax upon all commercial, industrial and economic activities conducted within the municipality. As a license, it must be obtained prior to installing any commercial or industrial establishment or prior to starting any commercial, industrial or economic activity. Conducting commercial, industrial or economic activities within a municipality without having applied for the municipal business license is usually penalized by the closing of the establishment. Because the municipal business license is a municipal requirement that varies according to the municipality, it is necessary in each case to refer to the relevant ordinance of the municipality where the activity is to be carried out.

## **CONSTRUCTION PERMIT**

Both urban development projects and construction require prior authorization. The authorization or certificate (Certificate) is granted by the municipal engineering office of each municipality where the development or construction is to take place.

In order to obtain the Certificate, an application must be submitted to the municipal engineering office of the municipality where the project is to be carried out. The application must include the deed to the land, a copy of the plans, and certificates of electricity, water and sewage services. The municipality must decide on the application within 30 calendar days for buildings, and within 90 calendar days for urban development projects. Failure of the municipality to respond to the application within the term provided by law is deemed to be approval to carry out and complete the project.

## **HABITABILITY PERMIT**

The habitability permit is granted by the municipality upon completion of construction. This permit certifies that the work has been completed in compliance with all legal requirements. To obtain this permit, the interested party must file the application together with the Certificate, a certificate of completion and the final plans.

## **CONFORMITY OF USE**

The Conformity of Use is a certificate granted by the municipal authority stating that the intended use of a particular establishment is appropriate for that zone or area. In order to obtain the Conformity of Use, the interested party must file a written application with the municipal authority, together with the Certificate, the habitability permit, the lease or deed to the property, and the plans for the building.

## **SAFETY CERTIFICATE**

The safety certificate is issued by the Fire Department of the locality where the construction project is to be carried out. The certificate states that the project complies with all requirements and standards for fire prevention and protection. In order to obtain this certificate, an application must be filed containing copies of the construction project specifying its safety systems.

## **FOREIGN INVESTMENT REGISTRATION**

All direct foreign investments made in Venezuela must be registered with the Office of the Superintendent of Foreign Investments (SIEX) in order to be entitled to remit dividends or repatriate capital. In order to register, the foreign investor must submit evidence to SIEX that foreign exchange, tangible property or technology has entered the country to be contributed to a local entity. Once the investment has been registered, the foreign investor maintains registration updated with SIEX by giving notice of any modification to the investment. Companies organized in Venezuela are classified as national, mixed or foreign depending upon the percentage of foreign ownership.

## **VENEZUELAN SOCIAL SECURITY INSTITUTE (IVSS) AND NATIONAL INSTITUTE FOR EDUCATIONAL COOPERATION (INCE)**

All employers must register their employees with the IVSS, a public sector agency that provides services and financial assistance to workers in the event of illness, accident, marriage, maternity, disability or old age. Employers must also make contributions to INCE, a public sector agency devoted to the technical training of workers. Failure to comply with the registration requirements is subject to a fine.

## **FISCAL INFORMATION REGISTRY (RIF)**

All persons subject to income tax must be registered in the Fiscal Information Registry (*Registro de Información Fiscal- RIF*) in the Tax Administration Office having jurisdiction over the taxpayer's fiscal domicile. Taxpayers must apply for registration

in the RIF during the first month after incorporation or commencement of activities. Once registration is completed, the taxpayer is given a number that must appear on all of its receipts, bills, invoices and contracts. It must also appear in all communications to official agencies of Venezuela, its states or municipalities; in its accounting books, trademarks, labels, packaging and printed advertising, and in such other documents as required by the Tax Administration.

## **NATIONAL CONTRACTORS REGISTRATION SYSTEM**

The selection of contractors to acquire property or to provide services to government agencies, autonomous institutes or organizations in which the Republic or its agencies own more than 50% of the equity, is made through special procedures for bidding or direct award. To take part in the procedures for bidding or direct award promoted by those agencies, contractors must be registered with the National Contractors Registry System. The National Contractors Registry System is made up of (i) a National Registry that operates at the Central Statistics and Data Processing Office of the Presidency of the Republic; and (ii) Auxiliary Registries created at the request of agencies subject to bidding or direct award procedures.

In order to be registered with the National Contractors Registry System an application must be filed with the relevant Auxiliary Registry, together with documents relating to the applicant's legal, technical and financial data as required by each Auxiliary Registry. The legal information consists of evidence of the applicant's proper incorporation. The technical information consists of evidence of the applicant's special technical qualifications and capacity, its experience and its technical and human resources. The financial information consists of evidence of the applicant's financial condition in order to determine its capacity to perform the contract.

## **HEALTH REGISTRATION**

The health registration is required in order to import, manufacture, store, market and sell products for human or animal consumption. The health registration is mandatory for national and foreign products marketed in Venezuela or used in the manufacture of other products.

Health permits are issued by the Ministry of Health and Social Development to assure that all products consumed in the Venezuelan market meet certain health and quality standards. In this regard, food, pharmaceutical products and cosmetics, as well as containers, packaging and utensils therefor must meet certain quality standards in order to obtain this permit.

## **ENVIRONMENTAL PERMITS**

The Ministry of the Environment and National Resources is the agency empowered to authorize any activity capable of degrading the environment. Companies that develop these type of activities must register with a special registry kept by said Ministry. Failure to comply with such requirements may subject to both administrative and criminal sanctions. Criminal liability may extend to corporate administrators.

## **TAXATION**

### **INCOME TAX**

The Venezuelan income tax system is composed of three main elements. The first element includes the taxpayer's operating income arising from its actual activities in the country, minus the costs and expenses actually or presumably incurred in Venezuela and earned during the given fiscal year. The second element, which is levied on the actual operating income and which is basically a fiction created by law, arises from the adjustments for inflation of the taxpayer's non-monetary Venezuelan assets and liabilities. This system of adjustment for inflation either reduces or increases the taxpayer's operating net income. The third element comprises the taxpayer's operating income arising from its extraterritorial activities, minus the costs and expenses incurred abroad and accrued during the given fiscal year. The combination of these three elements will constitute the taxpayer's net income, to which the relevant tax rates will apply. The applicable deductions and the

income tax the taxpayer pays abroad will be subtracted from the resulting income tax, provided such foreign tax does not exceed the maximum Venezuelan tax rate of 34%.

Foreign source income earned by any company or association organized in Venezuela, whether legal or factual, regardless of its nature or characteristics, will be subject to the worldwide income system.

A foreign legal entity is deemed to be domiciled in Venezuela if it has permanent operations in Venezuela, for which purpose it must be registered with the Commercial Registry in the jurisdiction in which it operates. According to the Organic Tax Code, for tax purposes a corporation incorporated abroad that has a permanent business establishment in Venezuela is considered domiciled in Venezuela with respect to the transactions carried out in the country. This applies even if such corporation is not domiciled in the country according to the Commercial Code

#### *Dividends*

Dividends paid by companies incorporated in Venezuela will be taxed at a flat rate of 34%, regardless of the nationality, country of incorporation, domicile or residence of the corresponding beneficiaries. If the dividends are generated by companies engaged in the exploitation of hydrocarbons and related activities, the tax rate will be 50%, and if the dividends are generated by the exploitation of mines and are paid to individuals, the tax rate will be 60%. The amount of the taxable dividends will be calculated as follows: the amount of the dividend, minus the net taxable income of the company paying the dividend, minus the exempt or exonerated income.

Dividends paid by companies incorporated and domiciled outside of Venezuela or incorporated abroad and domiciled in Venezuela shall be subject to the 34% flat income tax rate. The receiving company may deduct from this tax the income tax paid for the same item outside of Venezuela.

#### *Tax Transparency*

The regime applies to investments held by taxpayers in branches, legal entities, real or personal property, shares, bank or investment accounts, and any form of participation in entities with or without legal capacity, trust funds, partnerships, investment funds or any other similar legal entity located in tax havens. In these cases, the entity is considered to have “transparent” tax purposes and the taxpayer domiciled in Venezuela must declare as its own, on an accrual basis, the income, costs and expenses of the entity and pay the corresponding tax.

#### *Transfer Pricing Rules*

This system allows the Tax Administration to control the manipulation of the import and export price of goods and services, and the consideration for loans among members of the same economic group. The Income Tax Law defines who are related parties and sets forth the method to determine the market price of goods and services among such related parties.

#### *Investment Tax Credit*

The Income Tax Law provides for the following investment tax credits on new investments in:

- fixed assets, other than land, in industrial, agro-industrial, construction, electricity, telecommunications, science and technology activities: 10%;
- tourism activities: 75%;
- agricultural, cattle breeding, fishery or fish-breeding activities: 80%.

An additional investment tax credit of 10% is also established on investments made in assets, programs and activities for improving the environment and the recovery of areas under exploration and exploitation for gas. Taxpayers engaged in the exploitation of hydrocarbons and related activities are entitled to an investment tax credit of 8% of the amount of the new investment.

## **BUSINESS ASSETS TAX**

Individuals and corporations subject to income tax are also subject to the business assets tax (Assets Tax), to the extent that they have tangible or intangible assets which are, or are deemed to be, situated in Venezuela and which are used for the purpose of producing income during the taxpayer's fiscal year. Only those assets used to generate income from commercial, industrial, hydrocarbon, mining, or related activities are taken into account to compute the tax. The tax rate is equal to 1% of the taxable amount for the fiscal year, as calculated above. The amount of the taxpayer's income tax liability under the Income Tax Law for the same fiscal year is credited against the amount of the Assets Tax. The excess, if any, of the latter over the former constitutes the taxpayer's net Assets Tax liability for the current fiscal year. If, in any fiscal year, the amount of income tax liability exceeds the amount of the Assets Tax, the taxpayer will incur no liability for the Assets Tax. The amount of net Assets Tax liability paid in one fiscal year may be carried forward as a credit against the taxpayer's income tax liability for the next three fiscal years.

## **CONVENTIONS FOR THE AVOIDANCE OF DOUBLE TAXATION**

Conventions for the avoidance of double taxation serve to define the scope of the taxing power of the States. This is done by distributing the taxable matters between the two countries, providing the exclusive right to tax for one of the contracting States, in some cases, or on a shared basis, in other cases. The conventions typically contain rules against discrimination between national and foreign persons, and mechanisms for the resolution of controversies through a friendly procedure between the States. These conventions also regulate international cooperation between the two tax administrations in order to fight evasion and tax fraud.

Venezuela has signed broad conventions for the avoidance of double taxation with Cartagena Agreement (Decision 578), Barbados, Belgium, Canada, Czechoslovakia, Denmark, Germany, Indonesia, Italy, Norway, Portugal, Spain, Switzerland, The Netherlands, Trinidad and Tobago, United Kingdom and Northern Ireland, and United States of America. All these conventions are in full force.

## **VALUE ADDED TAX**

All purchases and imports of goods and services are subject to a value added tax (VAT). The lease of real estate to be used as housing is excluded from VAT; however the lease of real estate destined to commercial, industrial or office purposes is deemed to be a service subject to VAT. The actual tax to be paid by each taxpayer is equal to the difference between the taxpayer's fiscal debits (the VAT charged to its clients) and its fiscal credits (the VAT paid by it to providers of goods and services) and is determined on a monthly basis. Currently, the applicable rate is 16% of the gross price, but certain assets and services are subject to a reduced rate of 8%. Also, some goods are subject to an additional luxury tax of 10%.

## **MUNICIPAL TAXES**

All persons performing industrial, commercial or similar activities for profit must obtain a municipal license from, and pay a municipal tax to, the municipal jurisdiction in or from which they perform such activities. The amount of the tax is calculated on the basis of a fixed percentage of the taxpayer's gross receipts from the prior tax year.

Additional municipal taxes include a tax on urban real estate (commonly called Municipal Property Tax), a vehicle circulation tax, a public services tax, a commercial advertising tax, a public performances tax, and a legal games and gambling tax. All of these taxes are expenses which may be deducted from a company's taxable income.

## **FOREIGN INVESTMENTS REGULATIONS**

Venezuela is a party to the Treaty known as the Cartagena Agreement or Andean Pact, effective in Venezuela since January 1, 1974. Today, foreign investments are regulated by Decree 2095 and Decisions 291 and 292 of the Commission of the

Cartagena Agreement. Decree 2095 represents a major step toward the liberalization of foreign investment in Venezuela. Since its enactment, with few exceptions, foreign investors have the same privileges as local investors.

## **THE OFFICE OF THE SUPERINTENDENT OF FOREIGN INVESTMENTS**

The Office of the Superintendent of Foreign Investments, better known as SIEX, is the governmental agency in charge of regulating foreign investment in Venezuela and enforcing the applicable regulations. SIEX is a division of the Ministry of Finance and is headed by a Superintendent, who reports directly to the Minister of Finance. Since the enactment of Decree 2095, SIEX has basically become an agency for the registration of foreign investments, and license and technology transfer agreements. The exceptions to this general rule are explained below.

## **OTHER REGULATORY AGENCIES**

Along with SIEX, there are other governmental agencies which register foreign investments. Foreign investments made in the banking sector must be registered with the Office of the Superintendent of Banks. Foreign investments made in the insurance and reinsurance sector must be registered with the Office of the Superintendent of Insurance. Foreign investments made in the oil, chemical and mining sectors must be registered with the Ministry of Energy and Mines. The procedure for registration with these agencies is similar to that established for registration with SIEX.

## **FOREIGN INVESTMENTS AND FOREIGN INVESTORS.**

According to Decree 2095, a direct foreign investment is:

- A contribution from abroad by foreign persons to the capital of a Venezuelan entity that is made in freely convertible currency or in tangible goods.
- An investment or reinvestment in local currency made by foreign persons derived from profits, capital gains, interest, repayment of loans, participations or other rights which foreign investors would otherwise be entitled to transfer abroad.
- A conversion of public external debt into investment. The conversion of public external debt into foreign investment is regulated by Decree 1217 dated February 14, 1996. Under this alternative, foreign investors holding foreign currency denominated debt securities may swap them with the Venezuelan Central Bank at a discount. Foreign investors will then be entitled to invest the proceeds of the swap in specific areas, such as the construction of hospitals, construction and remodeling of educational, cultural and research centers, and construction and maintenance of ports, bridges, railroads, and highways.
- Intangible technological contributions, such as trademarks, industrial models, technical assistance, or patented or unpatented technological inventions. Registration of this type of contribution requires the prior approval of SIEX, as well as that of the shareholders of the company to which the contribution is to be made.

A Foreign Company is a company incorporated in Venezuela in which less than 51% of the capital stock is owned by Venezuelan citizens.

A National Company is a company incorporated in Venezuela in which more than 80% of the capital stock is owned by Venezuelan citizens.

A Mixed Company is a company incorporated in Venezuela in which more than 49% but less than 80% of the capital stock is owned by Venezuelan citizens.

## **SUB-REGIONAL INVESTMENT**

A sub-regional investment is an investment made by a citizen of a country that is a member of the Andean Pact or by a company incorporated in one of those countries which, according to the foreign investment rules of that country, is considered to be a national company. For purposes of Venezuelan law, sub-regional investments are considered national investments.

## **STEPS TO REGISTER A DIRECT FOREIGN INVESTMENT**

Foreign investors must register direct foreign investments within 60 days of the date the investment was made. The following documents must be submitted to SIEX to register a new direct foreign investment:

- Application to register the direct foreign investment.
- Articles of incorporation/bylaws of the foreign investors or equivalent documents and any amendment thereto, legalized by the corresponding entity and translated into Spanish by a certified translator.
- Evidence that the currency or contribution in kind entered Venezuela.
- Power of attorney empowering one or more persons to represent the foreign investor at SIEX.
- Certified copy of the articles of incorporation/bylaws of the local company that will receive the direct foreign investment.
- Application for classification of the local company.

Once SIEX analyzes the documentation, it will issue a Certificate of Registration of Direct Foreign Investment. The certificate will reflect the amount of the registered direct foreign investment in United States dollars.

Foreign investors must update direct foreign investments annually within 120 days of the end of each fiscal year. For this purpose, the local company must submit the following documents to SIEX: (i) application; (ii) updated classification of the company; (iii) audited financial statements for the corresponding fiscal year; (iv) tax return for the corresponding fiscal year; and (v) minutes of the shareholders meetings that resolved on any capital increase or decrease or payment of dividends.

## **RESTRICTIONS ON DIRECT FOREIGN INVESTMENT**

The following areas are reserved to National Companies: (i) television and radio broadcasting; (ii) Spanish language newspapers; and (iii) licensed professions. Under the new Telecommunications Law, however, the restriction on subscription TV was eliminated. Thus only over-the-air television is subject to this reserve.

In addition, the merchant marine and oil and its derivatives are reserved to National Companies by special laws. However, the Venezuelan Government has opened the oil industry to foreign investment.

## **RIGHTS OF FOREIGN INVESTORS**

Registered foreign investors have the same rights as national investors. Basically, these consist of the rights to remit dividends and repatriate capital. Today there are no limits on the amount of dividends that a foreign investor is entitled to remit abroad as long as the full amount of its foreign investment is registered and updated with SIEX. Foreign investors having a foreign investment registered and updated may repatriate the full amount of the proceeds arising from the liquidation of the local company.

## **LAW FOR THE PROMOTION AND PROTECTION OF INVESTMENTS**

The Law for the Promotion and Protection of Investments (“Promotion Law”) and its Regulations (the “Regulations”) have been issued for the purpose of establishing principles and mechanisms to protect foreign investments in the country. The Promotion Law provides two protection mechanisms: (i) the granting of incentives or benefits, and (ii) execution of juridical stability agreements between the Republic and investors. The Government of Venezuela must define the type of benefits and incentives to be granted and the conditions for granting them, which has not been done as of this date.

Juridical stability agreements may be executed to guarantee the stability of (i) the federal taxes in force on the date of execution of the agreement; (ii) the export promotion rules; and (iii) a specific benefit or incentive granted to an investor according to the Promotion Law. These agreements would be entered into with the Office of the Superintendent for Foreign Investments and must have prior approval from the National Assembly. If the agreements refer to the stability of federal taxes, they require the favorable opinion of the National Treasury. Juridical stability agreements must be entered into before the investment is made and are limited to a maximum term of 10 years.

Venezuela may enter into conventions or treaties relating to the reciprocal promotion and protection of investments, both bilateral and multilateral. These agreements or treaties may contain provisions offering broader protection and different mechanisms for the promotion of investments than those provided for in the Promotion Law. The provisions of the conventions entered into by Venezuelan prevail over the Promotion Law.

To this date, Venezuela has entered into conventions for the reciprocal promotion and protection of investments with Argentina, Barbados, Belgium-Luxembourg, Brazil, Canada, Costa Rica, Cuba, the Czech Republic, Chile, Denmark, Ecuador, France, Germany, Great Britain, Lithuania, the Netherlands, Paraguay, Peru, Portugal, Spain, Sweden, Switzerland, Uruguay.

## **TECHNOLOGY TRANSFER AND PATENT AND TRADEMARK AGREEMENTS**

Trademark and patent license agreements, as well as technical assistance and know-how agreements, do not require prior authorization, but must be registered with SIEX within the 60 days following the date of execution. According to Decree 2095, payments due under those agreements are suspended until registered with SIEX. Agreements concerning any of the following items are specifically subject to registration:

- Licenses to use trademarks and contracts for the distribution of products identified under foreign-owned trademarks.
- Licenses to use patents, industrial improvements, models and drawings.
- Transfer of know-how by means of plans, diagrams, models, instructions, directions, forms, specifications, personnel instruction and training, and the like.
- Delivery of basic or detailed engineering for the construction of facilities, product manufacturing or for the carrying out of industrial and construction projects.
- Technical assistance, in any manner and in any area of business.
- Management consulting.

According to Decree 2095, these agreements, which are generally referred to as Technology Transfer Agreements, must contain the following:

- Identification of the contracting parties.

- Complete description of the technology transferred and/or the patents and trademarks licensed.
- Identification of the terms and conditions for the technology transfer, including the treatment to be given to improvements developed during the term of the agreement.
- Contractual value of each of the items involved in the technology transfer.
- Term.
- Payment terms, currency and place of payment.
- Provisions assuring an effective technology transfer.

Technology Transfer Agreements which contain a clause considered to be restrictive will not be registered by SIEX. The following clauses are deemed restrictive:

- Clauses requiring the licensee to purchase capital equipment, raw materials or components, to acquire technology, or to utilize personnel required by the licensor.
- Clauses entitling the licensor to establish the sales price of the licensee's products.
- Clauses establishing restrictions on the licensee's volume and structure of production.
- Clauses prohibiting the use of competitive technologies.
- Clauses granting the licensor an option to purchase any portion of the licensee's products.
- Clauses which compel the licensee to pay royalties on expired or non-utilized trademarks or patents.
- Other clauses considered by SIEX to be of similar effect.

Decree 2095 does not impose any limitation on the amount of royalties to be paid by a Venezuelan company to the provider of technology or the licensor of patents or trademarks. However, for such payments to be deductible for income tax purposes, they must be normal and necessary for the operation of the local company.

## **INTELLECTUAL PROPERTY**

### **TRADEMARKS**

Trademarks are governed by Decision 486 of the Cartagena Agreement, the Paris Convention and TRIPS. Matters not covered by these treaties are governed by the 1955 Industrial Property Law. Trademarks are registered with the Industrial Property Registry, a Division of the Autonomous Service of Intellectual Property (SAPI) which is part of the Ministry of Production and Commerce.

The right to exclusive use of a trademark in Venezuela is acquired upon registration with the Industrial Property Registry. As explained below, trade names are an exception to this rule. Certain doctrine maintains that the mere use of the trademark vests in the user the right to oppose subsequent applications filed by third parties for identical or similar trademarks and to request the cancellation of a third party's registration on the grounds of the user's superior right; however, this position is debatable.

The trademark registration process begins by filing an application in the appropriate international class and presenting the required documents. The application is reviewed to assure compliance with formal requirements and is then published in the Industrial Property Bulletin in order to allow third parties to oppose. If no opposition is filed, or if an opposition is

dismissed, the application is reviewed for compliance with substantive requirements. If the substantive requirements are met, the trademark is granted. Trademarks are granted for a term of ten years and may be renewed for successive ten-year periods.

Pursuant to Decision 486, it is possible to obtain protection for trademarks, service marks, trade names, slogans, collective marks, certification marks as well as geographical indications (collectively referred to as Trademarks). Trademarks are classified according to the Nice International Classification System.

Decision 486 defines a trade name as any sign that identifies an economic activity, an enterprise or a mercantile establishment. The exclusive rights to a trade name arise out of use in commerce as opposed to registration; such rights terminate upon termination of use. A trade name can be registered with SAPI upon fulfilling certain requirements, as long as the trade name does not fall within the prohibitions established in the Decision.

Notorious trademarks enjoy express protection in Venezuela. Decision 486 prohibits the use and registration of trademarks which are identical to a notorious mark by parties other than the legitimate owner, regardless of the goods or services identified by the mark as long as certain criteria are met. This prohibition allows the legitimate owner of a notorious trademark who has not registered the mark in Venezuela to oppose the registration of the mark by a third party. Pursuant to Decision 486, the Industrial Property Registrar can deny, ex-officio, the registration of a notorious trademark; furthermore, the Registrar can declare the nullity of the resolution granting the registration. Nullity actions of this nature are subject to a statute of limitations of five years from the date of registration of the mark in question.

Trademark rights can be enforced through civil, administrative and criminal actions. As a result of a civil action, the owner of a registered trademark may be entitled to a form of injunctive relief which is discretionary on the part of the judge in order to stop the use of the same or similar trademark; however, the owner of a registered trademark cannot prohibit a third party from using the registered trademark in connection with products that are provided by the trademark owner, a licensee of the trademark owner or other authorized person.

A trademark may be cancelled at the request of any interested third party if it has not been used by its owner or licensee for three consecutive years prior to the filing of the cancellation action. The party winning the cancellation action has a preferential right to register the mark if its application is filed within three months of the final decision. Non-use of a trademark and its subsequent cancellation may also be alleged as a defense in trademark infringement, opposition, or cancellation proceedings. A trademark is deemed in use when the products and services bearing the mark are available on the market in the quantities and manner that correspond to the nature of the products covered by the trademark.

The Industrial Property Registrar, either ex-officio or upon petition by a third party, can declare a registration null and void when it was granted in violation of the law or when the registration was obtained in bad faith.

Trademarks registered and valid in Venezuela may be licensed as well as assigned through written agreements. Trademark license agreements between a Venezuelan and a foreign company must be registered with the Office of the Superintendent of Foreign Investments (SIEX) and with SAPI. Trademark assignments must also be registered with SAPI. If the assignment or license is not registered, the assignee or licensee will not be deemed to be a user and therefore the trademark may be susceptible to cancellation for non-use.

## **PATENTS**

Patents are governed by Decision 486 of the Cartagena Agreement, the Paris Convention, TRIPS and the 1955 Industrial Property Law. Inventions, utility models, integrated circuits and industrial designs are subject to protection in Venezuela. Inventions are deemed to be all products or procedures in all fields of technology that are new, inventive and applicable to industrial activities. Excluded from protection are discoveries, scientific theories, mathematical methods, human beings, natural biological processes, biological material as existing in nature or able to be separated, including genome or germ plasm of any living thing, any other aesthetic creations protected by copyrights, literary, artistic or scientific works, plans,

rules and methods for the pursuit of intellectual activities, playing of games, or economic and business activities, computer software or logic support, methods for presenting information. Also excluded are inventions: to prevent the commercial exploitation of public order or morality within the territory of the respective Member Country; to protect human or animal life and the environment; for plants, animals and essentially biological processes for the production of plants or animals other than non-biological or microbiological processes; for diagnostic, therapeutic, and surgical methods and second use of pharmaceutical products.

A utility model is deemed to be any new form, configuration or arrangement of elements of any device, tool, instrument, mechanism or other object, or any part thereof, that allows for an improved and diverse operation, use or manufacture of the original object, or that provides a technical use, advantage or effect that the object did not have previously. Sculptures, architectural works or objects of a purely aesthetic nature are not deemed utility models.

An industrial design is deemed to be any union of lines or combination of colors or any two-dimensional or three-dimensional external shape, line, outline, form, texture, or material without the intended use or purpose of said product being thereby changed.

Invention patents are granted for a term of twenty years, utility models and industrial designs for ten years as of the application date. The first application validly filed in a Member Country that accords reciprocal treatment to member countries of the Cartagena Agreement shall confer a priority period of one year for inventions and utility models and six months for industrial designs.

Once filed, the patent application is reviewed for compliance with formal requirements and then published in the Industrial Property Bulletin in order to allow third parties to file oppositions. If no opposition is filed or if the opposition is dismissed, the application is reviewed for compliance with substantive requirements such as inventive level, novelty, unity of the invention etc.

The patent vests in the owner the right to prevent third parties from exploiting a patented invention and/or process without authorization. A patented invention must be exploited directly by the owner or by a person authorized by the owner.

Patents may be licensed by their owners in writing. Patent license agreements between a Venezuelan and a foreign company must be registered with SIEX and subsequently with SAPI. Any arrangement that results in the assignment of any rights to the patents or the use thereof must also be registered with SAPI.

Decision 486 contains provisions regarding compulsory licenses. If a patent has not been exploited for three years from the grant or four years following the date of application, whichever is longer, third parties are entitled to request license subject to the payment of royalties, if at the time, the application was not exploited or if the exploitation of the invention is suspended for more than a year.

If a patent has been infringed, the owner may sue for damages. Once the patent has been granted, it is possible to sue for all damages caused between the period when it became public knowledge (the respective application was open to consultation) and the patent grant. In cases where infringement of a patent which consists of a process for obtaining a product is claimed, defendants shall be liable to prove a difference between the procedure they use to obtain the product and the procedure protected by the patent whose infringement is claimed. Any identical product manufactured without the consent of the patent owner shall be presumed, on these regards and unless otherwise proven, to have been obtained through the patented process. The right to action for infringement shall lapse two years counted as of the date the owner learned about the infraction or, in any case, five years after the infringement was committed for the last time.

Venezuela is a member of the Free Trade Agreement entered into with Mexico and Colombia, and of the Marrakech Treaty that created the World Trade Organization.

## **INDUSTRIAL SECRETS**

Industrial secrets are expressly protected in Decision 486 as well as TRIPS, provided the information is secret, it has commercial value and the owner has adopted reasonable measures to maintain its secrecy. Information in the public domain or which is apparent to a person with sufficient technical skills or that may be disclosed by legal provisions or court order is not deemed to be an industrial secret.

## **PLANT VARIETY PROTECTION**

Plant variety is governed by Decision 345. A breeder's certificate is issued to persons who have created plant varieties which are new, homogeneous, distinguishable and stable and have assigned a name which constitutes its generic denomination.

## **COPYRIGHT**

Intellectual property is protected by the Copyright Law of 1993, the Regulations of that Law, Decision 351 of the Cartagena Agreement, the Regulations to Decision 351, the Bern Convention, and the Universal Copyright Convention. The Venezuelan Copyright Law protects the rights of authors of creative intellectual work whatever the type, form of expression, merits or use. Among the creative works protected are literary, artistic and scientific works, including computer software, technical documentation thereof, and user manuals; audiovisual works, including both motion picture and television programs; works to support teaching or research; video-clips; and radio programs, such as dramatic programs, musical productions, special programs and documentaries.

The Copyright Law defines software as the expression in any form, language, notation or code of a set of instructions intended for a computer to perform a given task or function, whatever its form of expression or the hardware in which it has been installed. It is presumed that the authors of computer software have assigned the unlimited, exclusive right to exploit their work to the producer. The law permits the user to make one copy of the program solely for backup purposes, and to feed the software into the internal memory of the computer solely for the user's personal use.

Copyright protection is valid for the life of the author, plus 60 years. The right to exploit a creative work includes the right to communicate it to the public and to reproduce it. Copyrights may be assigned, either for consideration or gratuitously. There is a rebuttable presumption that all assignments are made for consideration.

Copyrights may be licensed for consideration under a non-exclusive and non-transferable license. Where intellectual property is created in the course of employment, the employee is rebuttably presumed to have granted the right of use to its employer.

Creative works and publications of works of third parties are subject to the Copyright Law when one of the authors of the work or publication is Venezuelan or is domiciled in Venezuela, or when the works are published in Venezuela for the first time or within the 30 days following their first publication. Creative works and editions by foreign authors are protected by the provisions of the international conventions signed by Venezuela.

## **MERGERS AND ACQUISITIONS**

### **LEGAL ENVIRONMENT**

Statutory mergers, though provided for by the Venezuelan Commercial Code, have, in practice, been used sparingly, if at all. This is due to the inadequacy and ambiguity of the statutory rules and to the absence, until the amendment of the 1991 Income Tax Law, of any tax rules governing the cost basis of assets acquired through statutory merger. As a result, acquisitions are normally made in Venezuela through either asset or share purchases, which are governed by general principles of contract law. After the amendment to the Income Tax Law, statutory mergers have generally been confined to intra-company transactions and have not been extended to use in arms' length transactions. This is probably due to the fact

that, although the transfer of assets and liabilities in the case of a statutory merger does not generate taxable gain or loss for the transferor and the assets and liabilities are reflected on the books of both the transferee and the transferor on the same basis, there is no tax free treatment granted to the shareholders of the merged corporation upon receipt of shares in the surviving corporation. Besides the Commercial Code rules on statutory mergers, and the rules governing public offers in general, transfer of employment contracts, bulk sales and competition rules prohibiting certain economic concentrations, there is very little legislation governing mergers and acquisitions in Venezuela.

***Shares versus Assets.*** Besides the buyer and seller's specific commercial considerations, the choice between a share transaction and an asset transaction is principally influenced by tax considerations and the need, if any, to avoid the assumption of hidden liabilities by operation of law.

***Share Purchase.*** The seller normally prefers a share purchase since it usually provides more latitude for tax minimization. From the buyer's perspective, a share purchase may be attractive if the target company has significant tax loss carry-forwards. Such losses continue to be available to offset income of the company after the acquisition.

The absence of a value added tax in the case of a share transaction may also be regarded as an advantage by the buyer

***Asset Purchase.*** The buyer will typically find an asset transaction more advantageous. This is because the buyer may obtain a stepped-up tax cost basis for depreciable assets, including goodwill, equal to the purchase price and, through proper use of bulk sales rules, avoid exposure to certain liabilities not otherwise expressly assumed in the purchase agreement. To the extent that the asset transaction has been taxed, there is no tax on dividends. This means that the seller will not have an additional tax burden when ultimately receiving the proceeds of an asset transaction. In the case of an asset transaction, however, the selling company's tax loss carry-forwards are not available to the buyer. Additionally, the selling company may not include the original inflation adjustment to depreciable non-monetary assets in its tax cost basis.

The seller must withhold, at the source, five percent of the purchase price of both asset and share acquisitions unless payment is made in kind, for example in marketable securities. Additionally, in the case of asset acquisitions a value added tax is applicable to the portion of the purchase price allocable to tangible personal property, which may create a cash flow problem for the buyer unless the buyer's existing or projected sales volume is relatively high.

In the absence of statutory publications under the bulk sales regulations, the transferee becomes jointly and severally responsible for all the transferor's liabilities. The responsibilities of the transferee, however, may be limited to those expressly assumed in the asset acquisition agreement, provided that the statutory publications required under the bulk sales regulations have been made. Under no circumstances, however, may the transferee, regardless of the statutory publications, avoid liability for the transferor's income tax bills outstanding on the date of the transaction. Also, and again notwithstanding the statutory publications, the transferee becomes liable for any violations of environmental regulations by the transferor that have not been sanctioned prior to the asset transaction.

## **REGULATORY FRAMEWORK**

***Foreign investment regulations.*** Foreign equity investment in any business activity is unrestricted in Venezuela, except for television and radio broadcasting, Spanish-language newspapers and any of the licensed professions, where foreign equity investment may not exceed 19.9%. Additionally, by special law, foreign equity investment in merchant marine activities may not exceed 19.9%.

Although as a general rule foreign equity investment in the petroleum industry is prohibited, foreign oil companies may engage in certain exploration and production activities through Association Agreements, strategic alliances or service contracts with State-owned oil companies.

### Rules on Competition

The Venezuelan Competition Law prohibits economic concentrations that restrain trade or produce a dominant market position. Although the law contains no definition of economic concentration, it is clear that a normal merger or acquisition would be deemed to qualify as such. The Pro-Competition Agency is empowered to enjoin a prohibited economic concentration and to order its subsequent divestiture and apply substantial penalties.

### Acquisition of a Public Company

The Venezuelan Capital Markets Law contains the rules for the acquisition of stock of public companies. The approval of the National Securities Commission is required when a person or group of related persons intend to acquire, in one or several transactions, a number of shares of a listed company which is deemed to represent a “significant equity participation”. In this case, a public tender offer must be made and all shareholders are afforded an opportunity to sell their shares on a pro rata basis.

The regulations concerning public offerings for the acquisition of shares define a “significant equity participation” as a number of shares representing 10% or more of the listed company’s stock . These regulations cover tender offers made in cash or kind in the context of both hostile and non-hostile takeovers.

### Banks and Financial Institutions

The acquisition of shares of licensed banks or other financial institutions is governed by the Venezuelan Banking Law. Where shares of financial institutions are purchased on the stock exchange, the transaction does not require the prior approval of the Superintendent of Banks, regardless of the percentage of shares involved. These transactions, however, must be reported to the Superintendent within five days.

If, as a result of the purchase, the buyer owns an aggregate of 10% or more of the shares of the capital stock or voting shares of the financial institution, the Superintendent, for cause, may require the buyer to dispose of the shares within 45 days.

If the shares of the financial institution are purchased over the counter, and as a result of the purchase the buyer owns an aggregate of less than 10% of the shares of the capital stock or voting shares of the financial institution, the buyer must simply notify the Superintendent within five days. If, on the other hand, as a result of the purchase, the aggregate shares of the capital stock or voting shares of the financial institution owned by the buyer is 10% or more, the purchase is subject to the prior approval of the Superintendent.

### Labor Law Considerations

In the event of a share purchase, the relationship between the entity and its employees is unaffected. In the event of an asset purchase, the buyer becomes the substitute employer of the employees transferred as a result of the transaction. The buyer in this case becomes liable by operation of law for all pre-existing employment contracts and all consequences of those contracts resulting from the application of the labor law. This includes, among others, all seniority and vested termination indemnities. An employee who resigns as a result of the asset transaction would be entitled to receive the indemnities provided for in the law for unjustified dismissals. The transferor continues to be jointly and severally liable with the substitute employer for all labor benefits that the transferred employees have accrued up to the year in which the transfer takes place and for a term of one year from the date of closing. Thereafter, only the substitute employer continues to be liable. In the event of a transfer of employees incidental to an asset transaction, notice of such transfer must be given to the affected employees, the Labor Ministry and the employees’ union.

### Tax Law Considerations

In structuring a transaction, while income taxes may be minimized in both share and asset acquisitions, special care must be taken to avoid gift tax implications. Because of high levels of inflation, historical cost is significantly lower than market value and, consequently, an asset purchase at market value may result in significant future tax savings based upon inflationary adjustment for tax purposes.

## **BANKING AND FINANCE**

### **FINANCIAL INSTITUTIONS**

The General Law of Banks and Other Financial Institutions (Banking Law), published in Special Official Gazette No. 5.555 dated November 13, 2001, regulates all financial intermediation activities. According to the Banking Law, only duly authorized financial institutions may perform financial intermediation and habitually carry out attraction of funds from the public. The Office of the Superintendent of Banks and Other Financial Institutions (Office of the Superintendent) is the agency responsible for the supervision, regulation and control of banks and other financial institutions. It is also vested with broad powers to issue rules regarding the majority of aspects regulated by the Banking Law.

In order to obtain the appropriate authorization to operate, financial institutions must meet a set of requirements, such as being incorporated as a company with nominative shares of the same class and to have a Board of Directors with at least seven members. Additionally, financial institutions must meet individual minimum capital requirements applicable for each type of financial institution under the Banking Law. All of the requirements must be met and maintained during the term of the authorization granted.

The direct or indirect purchase of shares of financial institutions is subject to specific prior authorization requirements and/or subsequent notification, which vary depending on the nature and magnitude of the purchase. There are no limitations on foreign investment in the financial sector. In effect, non-domiciled foreign financial institutions in Venezuela, having met the requirements set forth in the Banking Law, can constitute branches or subsidiaries, or act through representative offices. Pursuant to the Banking Law, the activities of the latter are very limited.

The financial institutions regulated by the Banking Law are described below:

#### *Commercial Banks*

Commercial banks are financial institutions that, barring certain exceptions, cannot grant loans for periods greater than three years. In general, the purpose of commercial banks is to lend and receive money in the short term. Normally, commercial banks grant short-term commercial and industrial loans, principally documented through promissory notes or discounted negotiable instruments. Commercial banks receive funds through checking accounts, savings accounts and time deposits, the latter being represented by time deposit certificates and other negotiable deposit instruments. Additionally, commercial banks are authorized to provide financial services and carry out related activities, such as mandates and commissions, trust funds, cash transfers and safe deposit box services.

#### *Investments Banks*

Investment banks are financial institutions whose purpose is to participate in the placement of debt securities and shares, project financing and financing of capital market operations. Investment banks may issue deposit certificates and other securities to attract time deposits. Investment banks may not receive savings or demand deposits that may be drawn upon by check, nor grant loans through checking accounts. Investments banks generally participate in medium-term transactions.

#### *Mortgage Banks*

Mortgage banks are financial institutions that grant long term loans guaranteed by mortgages and used for (i) the purchase, improvement or building of real property; (ii) the refinancing of mortgages; and (iii) the financing of city planning and construction industry projects. Mortgage banks may receive funds from the public by issuing mortgage notes. Investment banks may not offer checking account services nor act as guarantors.

#### *Capitalization Companies*

Capitalization companies are financial institutions whose purpose is to enter into capitalization agreements and make investments with the funds obtained through these agreements. Capitalization companies may not carry out investments other than those permitted by the Banking Law or receive demand or time deposits. Nor may they act as guarantors or

carry out operations other than those expressly permitted by the Banking Law. Capitalization companies may obtain loans provided by other financial institutions only when they obtain the respective authorization from the Office of the Superintendent.

#### Financial Leasing Companies

Financial leasing companies are financial institutions whose purpose is to finance the purchase of assets through financial leases which, pursuant to the Banking Law, are distinct from actual lease agreements. Financial lease operations may be short or long term. Financial leasing companies may attract funds from the public through unsecured bonds and savings certificates, but they may not receive demand, savings or time deposits, or act as guarantors

#### *Universal Banks*

These are financial institutions that may carry out any and all of the financial intermediation operations for which the specialized financial institutions described above are authorized.

#### *Development Banks*

These are financial institutions whose principal purpose is to finance, develop and promote economic activities for specific sectors of the country which are compatible with the specific bank's charter. When the funds are provided by the National Executive, second tier operations may be carried out.

#### Second Tier Banks

Second tier banks are financial institutions whose principal purpose is to promote industrial and social development projects in the country which are compatible with the specific bank's charter. Second tier banks may only carry out loan operations through universal banks, commercial banks, development banks and savings and loan entities, except when the loans are granted to micro businesspersons or micro companies. Second tier banks may also carry out other financial intermediation operations compatible with their purpose.

#### Savings and Loan Entities

Savings and loan entities are financial institutions whose purpose is to create, maintain, promote and develop favorable conditions and mechanisms to attract funds, mainly savings, and to channel them in a safe and profitable manner through any type of loan activity for families, cooperatives, artisans, professionals, small industrial and commercial businesses and, especially, for family housing.

### **CAPITAL MARKETS**

The Capital Markets Law (CML), put into force on October 22, 1998, contains the regulatory legal framework for capital markets in Venezuela. Additionally, the agency charged with promoting, regulating and supervising capital markets in Venezuela, the National Securities Commission (NSC), has issued other laws and provisions that contain specific regulations in regard to Venezuelan capital market institutions.

#### Public Offering of Securities

The public offering of securities issued in Venezuela requires prior authorization from the NSC. Previous authorization from the NSC is also required to carry out (i) a public offering in Venezuela of securities issued by international agencies, foreign governments and institutions, companies domiciled abroad and any other similar person; and (ii) a public offering outside of Venezuela of securities issued by persons domiciled in Venezuela.

Publicly-traded companies must meet certain requirements set forth by the CML which are not applied to private companies, such as the distribution of a minimum dividend and limitations with respect to the remuneration that may be granted to members of the board of directors, among others. Additionally, in companies that make public offerings of

securities, any group of shareholders representing at least 20% of the capital subscribed to are entitled to elect a proportional number of members to the board of directors.

#### *Acquisitions*

Acquisitions of significant participation in publicly-traded companies are regulated by the CML and the NSC. These regulations cover tender offers made in cash or kind in the context of both hostile and non-hostile takeovers.

#### *Secondary Market*

Operations in the secondary market in Venezuela are carried out through Bolsa de Valores de Caracas, C.A. In order to carry out secondary operations it is necessary to comply with internal regulations of Bolsa de Valores de Caracas, C.A. All of the operations carried out through said stock exchange are liquidated through the C.V.V. Caja Venezolana de Valores, S.A.C.A.

#### *Privileged Information*

The CML contains provisions regarding the use and handling of privileged information. Companies whose securities are the subject of a public offering must disclose to the public, immediately and following the procedure established for this purpose, all of the information that is considered “privileged” pursuant to existing rules. Additionally, transmittal of privileged information to third parties before disclosure to the market or any acts based on said privileged information in order to obtain economic benefits may be sanctioned with a fine and imprisonment.

#### *Brokerage Companies*

Brokerage activities are subject to prior authorization from the NSC. Brokerage companies must also meet certain requirements and percentages regarding capital, patrimony, indebtedness and other liquidity and solvency conditions set forth in the Law and the provisions issued by the NSC. In addition to the inherent intermediation activities, brokerage companies may carry out other activities, such as guaranteeing the underwriting of securities issued, operate security liquidity funds in the capacity of experts, carry out repurchase transactions (REPOS), issue notices regarding securities that may be offered publicly and other activities, provided that they are referred to in the public offering of securities and have been duly authorized by the NSC.

In addition to the aforementioned institutions, the CML and other special laws and provisions issued by the NSC regulate other capital market institutions, such as collective investment entities and their administering companies, investment consultants, stock exchanges, securities depositories, risk assessment companies and transfer agents, among others.

## **EXCHANGE CONTROL REGULATIONS**

On February 5th, 2003 Exchange Controls were imposed in Venezuela. The Exchange Control regulations (the “Regulations”) established a limited and restricted market for the purchase and sale of foreign currency in Venezuela. In general terms, the Exchange Agreement N°1 entered into between the Central Bank of Venezuela (“CBV”) and the National Executive (“Agreement No. 1”) establishes (i) a system for the mandatory sale of foreign currency to the CBV in certain cases and, (ii) a system for purchasing foreign currency from the CBV in certain cases also expressly established in Agreement No. 1. Additionally, Agreement No. 1 provides that the CBV will centralize the purchase and sale of foreign currency within Venezuela.

Under the Regulations, all purchases and sales of foreign currency must be carried out by the CBV. In substance, the purchase or sale of foreign currency between any two persons other than the CBV constitutes a violation of Agreement N°1. So far, such violation is not characterized as a crime but merely as an administrative fault. In this regard under the Law of the CBV, the purchase or sale of foreign currency in violation of Agreement N°1 is subject to a fine up to the value of the corresponding transaction.

Pursuant to the Regulations, there are two major instances where a private-sector corporation is obligated to sell foreign currency to the CBV: (i) when foreign currency originates from the export of goods, services or technologies made on or after February 5, 2003; and (ii) when, for any reason, foreign currency enters into Venezuela. The difference between the two obligations is that, while the obligation set forth in item (i) requires mandatory repatriation regardless of the place where the exporter receives the foreign currency, the obligation set forth in item (ii) arises only when currency is brought into Venezuela. The Regulations also set forth other additional miscellaneous cases of mandatory sale of foreign currency to the CBV.

On the other hand, the Regulations provide that the access to foreign currency from the CBV is subject to the prior authorization of the Commission of Administration of Foreign Currency (“Cadivi”). For this purpose, companies willing to purchase foreign currency must register with Cadivi, and subsequently, file an application to purchase foreign currency (“AAD”) each time they want to effect a purchase. The Regulations list the specific activities and cases which are entitled to apply for the purchase of foreign currency. Among such activities the Regulations include payment of imports of goods into Venezuela, payments of private foreign debt and payments of amounts arising from foreign investment. Activities other than those expressly recognized by the Regulations, may not have access to purchase foreign currency from the CBV.

As mentioned above, Agreement No. 1 sets forth that local companies recipients of foreign investment duly registered as previously explained in this section, are entitled to apply for AAD in order to acquire foreign currency for the remittance of dividends, profits or interest arising from direct foreign investments, and for obligations contracted by virtue of technology import agreements, royalty agreements and agreements on the use and exploitation of patents, trademarks, licenses and franchises.

In this regard, Order No. 29 issued by Cadivi regulates the procedure that companies recipients of foreign investment duly registered must follow in order to apply for AAD required for the abovementioned concepts. In general terms, the interested party must register with the Registry of Users of the Foreign Administration Registry (“RUSAD”) and, subsequently, file the corresponding application with an exchange operator. Among the requirements provided for in Order 29, applicants must file the “Certificate” of foreign investment issued by the competent agency.

It is important to point out that the granting of an AAD is subject to the availability of foreign currency as set forth by the CBV and the general guidelines set forth by the National Executive. Furthermore, under the Regulations Cadivi is vested with broad discretionary powers. The eventual decision of Cadivi not to grant an AAD to the applicant may not be appealed. Therefore, the Regulations do not create rights to obtain foreign currency. That is, although the applicant may satisfactorily meet all of the requirements set forth therein, there is no certainty that it will actually be able to acquire the foreign currency requested.

Currently, the exchange rate has been set forth by an agreement entered into by the CBV and the National Executive at Bs. 1,915.20/1US\$ for the purchase of foreign currency by the BCV and Bs. 1,920.00/1US\$ for the sale of foreign currency by CBV (the “Current Rate”). However, it is important to note that the Current Rate may be adjusted at any time by means of new agreements entered into between the CBV and the National Executive.

As a consequence of the above, if a company files an application with Cadivi, and, subsequently, it succeeds in obtaining an AAD, the applicable rate of exchange will be that prevailing rate at the time of the actual purchase of the foreign currency. Therefore, even if the application is filed at the Current Rate, there is no guarantee (i) that the application itself would be successful; and (ii) what the applicable exchange rate would be and when the company could actually purchase foreign currency from the CBV.

## **INSURANCE AND RESINSURANCE**

In November 2001 the Decree through which the Law of Insurance and Reinsurance Companies (New Law) became effective. The New Law was issued by the President of the Republic exercising the powers conferred by a special law authorizing the President to legislate on specific topics. The New Law is characterized by including rules tending to:

- Broaden the supervision powers of the control agency
- Establish a new sanctioning system in which the number of activities subject to criminal sanctions is considerably increased
- Establish new requirements to exercise intermediation activities in the insurance market.

The New Law has been the object of an appeal for nullity due to unconstitutionality and illegality. Although the Supreme Court of Justice, on the date of this writing, has not issued an opinion regarding the constitutionality and legality of the New Law, it has, through a decision issued on August 13, 2002, suspended the application of the New Law until it decides on the appeal for nullity. The staying effect of the decision began on November 7, 2002, date of its publication in the Official Gazette of the Bolivarian Republic of Venezuela. Consequently, the application of the New Law was suspended as of that date.

By virtue of the above, insurance activities in Venezuela are presently governed by the Law of Insurance and Reinsurance Companies of 1994, published in 1995 (LESR).

The LESR, among other aspects, is a milestone in the Venezuelan insurance market as regards the opening to foreign participation. In this chapter we will analyze the most significant aspects in reference to foreign investments regulated by the LESR.

### Total Opening to Foreign Investment

Until the LESR became effective, the participation (direct or indirect) of foreign investment in the Venezuelan insurance market was limited to 20% of the capital stock of insurance and reinsurance companies and insurance brokerage companies incorporated or to be incorporated in Venezuela.

Despite the fact that the Banking Law and the LESR share the same philosophy regarding the opening to foreign investment in each of these sectors, their means to arrive at this result is different. The Banking Law permits foreign investment through the purchase of shares in existing financial institutions as well as the establishment of financial institutions owned by banks or foreign investors, branches and representative offices. On the other hand, while the LESR eliminates the 20% maximum limit on the participation of foreign investment in insurance, reinsurance and insurance brokerage companies, it seems that foreign investment through branches is not possible due to its incompatibility with the LESR, which limits the opening of foreign investment by establishing that it must comply with fair participation principles. In summary, despite the fact that both the Banking Law and the LESR permit foreign participation, the insurance sector seems to have more restrictions than the banking sector. The reasons for the different methodology is not explained in the LESR's Legislative History. We assume that the legislature considered that the differences between the markets justifies the use of different methodologies to deal with foreign investment.

The most important limitations on foreign investments or activities is applicable to insurance intermediators. The LESR sets forth that insurance brokers and agents may not enter into associations with other insurance brokers or agents who are not domiciled or reside in the country, nor act on their behalf. Additionally, the LESR provides that the Minister of Finance will not authorize the establishment of agencies or branches of foreign insurance brokers or representations of any kind of brokers or agents that are not domiciled or reside in the country. Lastly, pursuant to the LESR, insurance agents may not directly or indirectly carry out reinsurance intermediation or in any way represent reinsurance, risk inspection, adjustment or appraisal companies, nor may they be members of boards of directors, managers, shareholders or employees of the aforementioned companies.

In matters of foreign reinsurance, the LESR sets forth that foreign reinsurance companies may maintain permanent representation in the country for the acceptance of reinsurance risks; additionally, reinsurance brokers may exercise powers of non-domiciled reinsurance companies in the country for the acceptance of reinsurance risks. The exercise of this representation must be evidenced in a legally granted power of attorney and will be subject to prior authorization from the Office of the Insurance Superintendent, which may limit it, put conditions on it or reject it. If authorized, a guarantee of five hundred thousand bolivars in favor of the Republic must be provided, in the manner set forth in the LESR. Additionally, reinsurance brokers and their authorized attorneys-in-fact must send annual balance sheets of each of the reinsurance companies they represent to the Office of the Insurance Superintendent. Lastly, each quarter they must send a list of the reinsurance premiums collected in execution of their power of attorney, indicating the assigning companies.

#### Insurance contracted abroad

The LESR prohibits contracting insurance abroad. The LESR sets forth that insurance contracts entered into abroad are not valid in the country unless the pertinent premium has actually and effectively been deposited in a company in Venezuela. This provision is applicable to the following cases:

- Insurance for people, if at the time the contract is entered into the insured person is domiciled in Venezuela;
- Insurance of goods located in Venezuela;
- Insurance of vessels, aircraft and other vehicles registered in Venezuela.

Despite the vagueness of this provision, the intention of this rule is to prevent risks located in the country to be insured by insurance companies that are not authorized to operate in Venezuela. Any person who contracts insurance policies in violation of the provisions of this rule is subject to a sanction equivalent to five times the annual premium the person would have had to pay in Venezuela. Additionally, any person who places insurance policies in violation of this provision is subject to imprisonment for a period of three months to three years.

## **TELECOMMUNICATIONS**

Telecommunications is currently one of the most developed sectors in Venezuela. The rapid growth of the telecommunications sector in the country is mainly due to the fact that, concurrent with the sector's world-wide growth, since 1990 the Venezuelan government has adopted a series of measures aimed at the privatization of the telecommunications sector and seeking to make Venezuela a major investment target and a Latin American leader in this field.

One of the most important measures adopted by the Venezuelan government to encourage private investments in this sector was the privatization of Compañía Anónima Nacional Teléfonos de Venezuela (CANTV), which was the only provider of fixed local and national and international long-distance telephone services in Venezuela. Upon privatizing CANTV, the Venezuelan government entered into a Concession Agreement with that company, awarding it the right to continue providing fixed local and national and international long-distance telephony under a modality referred to as "limited concurrence." Therefore, other operators interested in providing services in Venezuela had to focus their activities on other telecommunications services, such as mobile cellular telephony, private networks and value added services.

The Concession Agreement entered into with CANTV provided, however, that the "limited concurrence" system would end on November 28, 2000. Since other operators could begin to compete in the provision of services that were previously reserved to CANTV from that date, it was commonly said that on November 28, 2000 the period of "telecommunications opening" would begin. With a view to the opening process, the Venezuelan government announced its National Telecommunications Plan in order to prepare the necessary conditions for attracting local and foreign investments to this sector. One of the main features of this plan was the amendment of the legal system that governed telecommunications.

The Telecommunications Law had been enacted in 1940, so there was a need for a new law that would be better adjusted to the new technologies developed in the sector and the growth of telecommunications.

## **THE NEW ORGANIC TELECOMMUNICATIONS LAW**

The purpose of the new Organic Telecommunications Law, that became effective on June 12, 2000, is to establish the legal framework for the general regulation of telecommunications. The new law, however, does not regulate the contents of transmissions and communications carried over the telecommunications media. According to the law, to establish and exploit telecommunications networks and provide telecommunications services, operators should first obtain the relevant “administrative authorization”, and in cases that require the use and exploitation of the radioelectric spectrum, a concession has to be obtained.

Even though the administrative authorizations for the provision of telecommunications services and concessions for the use and exploitation of the radioelectric spectrum would only be granted to persons domiciled in Venezuela, the participation of foreign investment in the telecommunications sector is restricted only in connection with radio and over-the-air television broadcasting. With respect to changes in the control of operators, the law provides that the signing of merger agreements between telecommunications operators, total or partial acquisition of these companies by other operators, their division, transformation or the creation of affiliates that exploit telecommunications services that imply a change in their control must be approved by the National Telecommunications Commission (CONATEL).

## **ADMINISTRATIVE AUTHORIZATIONS AND CONCESSIONS**

Administrative authorizations are granted by CONATEL for the establishment and exploitation of networks and the provision of telecommunications services. The specific activities and services that may be rendered under an authorization of this kind are called “attributes of the administrative authorization.” CONATEL will grant only one administrative authorization per operator, which will cover all the attributes requested and that have been granted by CONATEL.

The concession is a unilateral administrative act whereby CONATEL grants or renews the use and exploitation of a given portion of the radioelectric spectrum. The relationships arising from a concession will be governed by special provisions and by the respective concession agreement. The awarding of concessions will be made through a public bid or a direct award.

## **MAIN ENTITIES OF THE PUBLIC ADMINISTRATION**

The Ministry of Infrastructure is the State entity that governs telecommunications and is in charge of establishing the policies and general rules that apply to the telecommunications sector.

CONATEL is an autonomous institute created in 1991 and currently ascribed to the Ministry of Infrastructure. Its main duties are: (i) to establish standards and technical plans for the promotion, development and protection of telecommunications, (ii) to grant, repeal and suspend administrative authorizations and concessions, except in cases that pertain to the Ministry of Infrastructure, (iii) to approve and certify telecommunications equipment, and (iv) to sanction any infringements of the law. The law provides for an active interaction between CONATEL and the Superintendence for the Promotion and Protection of Free Competition (Pro-Competencia) with a view to protecting free competition in the telecommunications market.

## **INTERCONNECTION**

Telecommunications network operators are obliged to interconnect with other public telecommunications networks to establish inter-operative services and uninterrupted services for their users. Any operator may request interconnection with another operator and the parties will have a negotiation period of no more than 60 calendar days. The parties may, by mutual agreement, fix interconnection charges and, failing an agreement within the specified term, CONATEL may order the implementation of the requested interconnection and set the technical and financial conditions therefor. Any

controversies relating to interconnection will be resolved by the parties according to the terms set in the relevant agreements. If a solution cannot be reached, either party may submit the controversy to CONATEL.

## **APPROVAL AND CERTIFICATION OF EQUIPMENT**

Telecommunications equipment is subject to approval and certification. Equipment manufactured or assembled in Venezuela must be approved and certified by CONATEL through the national or foreign certification entities it has recognized for this purpose. Imported equipment that has been approved or certified by an entity of international renown acknowledged as such by CONATEL does not require a new approval or certification in Venezuela. For this purpose, CONATEL will keep a public register of recommended national or foreign entities for the certification and approval of telecommunications equipment. Additionally, CONATEL will publish a list of approved brands and models and the uses for which they are authorized; this equipment shall be automatically approved if used as prescribed.

## **PRICES AND RATES**

Telecommunications services providers are free to fix their prices, with the exception of services rendered in connection with a “universal service” obligation, in which case a proposal for a minimum and maximum rate must be submitted to CONATEL for approval. The law defines “universal telecommunications services” as the defined set of telecommunications services that operators are obliged to provide to users in order to offer the minimum standards of penetration, access, quality and economic access. In the event of one or more companies having a dominant position in the market, CONATEL may determine the maximum and minimum rates for this company, upon hearing the opinion of Pro-Competencia. Crossed subsidies among the various services provided by a sole operator are forbidden, as are the subsidies between services provided through subsidiaries, affiliates or related companies.

## **ADVANCEMENTS**

The new Law has been developed through several regulations. This new national legal framework, together with the country’s international participation in organizations such as the International Telecommunications Union and INTELSAT, purports to offer investors a modern legal platform more in line with the recent advancements in this sector. As part of the telecommunications opening, CONATEL has held auctions of frequency sub-bands for the provision of basic telephony services that use WLL (Wireless Local Loop) technology, and it intends to conduct auction procedures for the use of LMDS (Local Multipoint Distribution Systems), bi-directional paging and third-generation mobile cellular telephony systems.

## **ELECTRONIC COMMERCE**

Through Presidential Decree No.825 dated May 10, 2000, Venezuela declared the Internet’s accessibility and use a priority policy for the cultural, economic, social and political development of the country. This forward-looking public policy, along with both sustained growth of the access to and use of the Internet as well as purchases made through it, make Venezuela an attractive market for electronic commerce of goods and services, whether in the context of business to business transactions (“B2B”) or company to consumer transactions (“B2C”). Evidence of this is the recent formation of the Venezuelan Chamber of Electronic Commerce (Cavecom-e)

## **ON LINE CONTRACTS: EXPRESSION OF CONSENT AND PROOF OF OBLIGATION**

Before Decree No.1.204 with the rank and force of Law on Electronic Data Messages and Signatures (“DML”) was promulgated, the principal legal challenge raised by “dot com” in Venezuela was proof of the existence and validity of the obligations assumed in agreements entered into through the Internet. Consent by “click” did not have the same evidentiary effectiveness as consent expressed through a written signature, and a data message did not have the same validity as a “printed” document. Similarly, the rule to determine the time and place when the consent or contractual intention was expressed (in order to establish the time and place of the contract’s effectiveness) was not easy to apply in the digital world. This raised significant difficulties in proving the existence and scope of the obligations assumed in electronic agreements.

The DML currently regulates all data messages and electronic signatures in Venezuela. The subject matter of this law is (i) to grant and recognize the effectiveness and legal value of electronic signatures, (ii) to grant and recognize the effectiveness and legal value of data messages and all intelligible electronic format information (regardless of supporting material), (iii) to regulate all matters regarding certification service providers, and (iv) to regulate all matters regarding electronic certificates. The DML is closely linked to electronic commerce and on-line transactions as it establishes clear ground rules for the fundamental components of the exchange of goods or services via Internet.

The DML grants legal value and recognizes the effectiveness of “electronic” signatures, not simply “digital” signatures, and by doing so goes beyond certain regulations that limit legal value solely to signatures made using asymmetric encryption technology (“digital” signatures), a technological subtype of electronic signatures, which includes, in addition to digital signatures, symmetric encryption signatures and any other information created or used by the signatory in conjunction with data messages which enables attribution of authorship.

The DML is a significant advance in helping Venezuela join the new digital economy, as it opportunely resolves the principal deficiencies of our legal regulation with regard to this interesting means for business transactions. In particular, the DML facilitates and promotes electronic commerce through the use of legally valid and opposable data messages and electronic signatures, thereby restoring trust, a fundamental factor in this area of commerce which had been seriously affected by the lack of clear ground rules.

Prior to the DML entering into force, there was no regulation or rule to resolve dilemmas inherent to the electronic environment (Who sent this message? Has this message been modified or forged? Has consent been validly expressed?). The DML puts an end to these and other questions by establishing clear rules of progressive interpretation, designed to recognize the validity and effectiveness of data messages and electronic signatures.

Additionally, the DML contains rules supplementing the intention of the parties with regard to establishing the identity of the issuer, the time the message was allegedly sent and received, the place of issuance and reception, acknowledgement of receipt and an express reference with regard to contractual matters that allows the parties to agree that the offer and acceptance are made through data message.

Lastly, the DML contains two very important provisions that reflect the policy of the Venezuelan Government with regard to the Internet. In accordance with Article 3 of the DML, the Venezuelan Government will adopt the necessary measures for public entities to develop the use of the mechanisms described in the DML in their activities, that is, using data messages, electronic signatures and electronic certificates. Additionally, the fourth Final Provision establishes that the Tax and Customs Administration must adopt the measures necessary to exercise their functions using these mechanisms and that taxpayers may use them to comply with their tax obligations.

## **B2B AND B2C ACTIVITIES**

B2B activities on the Internet are subject to the specific rules in the corresponding sector of the economy, as is the case for the banking and insurance sectors, and the general rules on commercial, tax, foreign investment and other matters to the same extent as traditional operations. Additionally, in accordance with the structure adopted for on-line exchange, certain B2B portals would be subject to limitations on matters of dumping and subsidies and practices which are restrictive to free competition.

Additionally, the sale of goods or services to final consumers through the Internet is subject to certain consumer protection provisions regarding warranties of the goods or services, information that should be provided about the goods or services, adhesion contracts and, from a commercial standpoint, in the case of the trade of restricted goods, municipal taxes and protection of minors, among others. Furthermore, the sale of goods and services on-line is subject to sectorial regulations in accordance with the specific economic activity being performed, for example, travel and tourism, banking, insurance or pharmaceutical activities.

An essential part of both B2B and B2C electronic commerce is focused on publicity and the handling of traffic. In Venezuela, publicity through the Internet is subject to certain regulations regarding content and format, in particular cigarettes, alcohol, misleading publicity and comparisons among others. To the extent that Venezuela, within the context of the opening of the telecommunications industry, develops and adapts rules that regulate content, the content of web sites and on-line transmissions will also be regulated.

## **PRIVACY AND INTELLECTUAL PROPERTY**

Although there are no rules in Venezuela to regulate the monitoring of electronic mail or the use of personal information acquired on the net, there are solid constitutional principles that safeguard the honor, confidentiality and private life of people as well as the secrecy and inviolability of private communications in all of its forms. The latter, due to a constitutional and legal provision may only be intercepted by a court order; illegitimate interception of private communications is classified as a crime under our legal system.

There is also a constitutional mandate for the law to limit the use of computer technology so that the honor and privacy of individuals and families are guaranteed. Additionally, habeas data is set forth in our Constitution, which is the right the people have to access and be aware of the use given to any of their personal information in public or private registers.

In matters of intellectual property, Venezuela has very advanced legislation regarding copyrights. In matters of industrial property, a new common system at a sub-regional level (Bolivia, Colombia, Ecuador, Peru and Venezuela) was recently implemented, which for the first time includes provisions regarding dominion names and abuse of trademarks, seeking to favor the legitimate holders of the trademarks over so called cybersquatters. This new common system contains detailed provisions regarding the procedures to register trademarks, patents, and industrial designs and, in general, seeks the defense of industrial property rights over the abuse of form.

## **FOREIGN TRADE**

### **IMPORTS**

In Venezuela, there is generally an open system of imports where no permit or prior license is required from the authorities and importers are not required to be registered in any registry. However, the importation of certain products may require a prior license, permit, certificate of quality, delegation, certificates of origin, such as a health permit from the Ministry of Health and/or from the Ministry of Agriculture, or a license from the Ministry of Defense. The imported goods are classified as: (i) taxable, (ii) non taxable, (iii) prohibited (iv) reserved, and (v) subject to restrictions, registry or other requirements. To determine if a permit or license is required for specific goods, you must refer to the Customs Law and the Customs Tariff.

Importing health products, cosmetics and foodstuffs requires registration of the product with the Ministry of Health. To import products similar to Venezuelan products subject to mandatory quality standards, they must be registered with a special registry maintained by the Ministry of Development.

In order to avoid penalties caused by an improper tariff classification, it is advisable that the importers obtain the product's proper customs tariff classification from the customs authorities prior to importation.

Restrictions may be imposed on the importation of certain products or on products from certain countries as a response to reciprocal treatment. The customs authorities are also empowered to establish reference prices for calculating import duties. Import duties are imposed at 5%, 10%, 15% or 20% on the CIF value of the imported goods, depending on the product's degree of manufacture. Generally, raw materials are subject to 5% duty, capital goods and intermediate products to 10% or 15%, and finished products to 20%. There is a list of certain products which have a 15% surcharge over the duties set forth in the Customs Tariff. Special treatment is granted for imports from certain regions or countries as a result

of international agreements or conventions. Imports from Andean Pact member countries (Colombia, Ecuador and Bolivia), are free of import duties, and imports from the Latin American Integration Association (ALADI) member countries, namely, Argentina, Bolivia, Brazil, Colombia, Chile, Ecuador, Mexico, Paraguay, Peru, and Uruguay, are granted preferential treatment for certain products. Venezuela also applies an exemption plan to products from Mexico and Colombia within the framework of the free trade agreement known as G-3.

Besides import duties, importers must pay 1% of the value of goods as a customs service fee, as well as a luxury and wholesale sales tax, which is currently 16% of the CIF value.

As a consequence of the conclusion of the negotiations of the Uruguay Rounds and the entry into force of the Marrakech Agreement creating the World Trade Organization (WTO), the member countries of the Andean Group apply the new Agreement regarding the application of Article VII of the General Agreement on Trade and Tariffs of 1994 (1994 GATT).

It is possible to import an entire industrial plant under a single tariff. In this case, a special permit must be obtained from the Ministry of Finance by providing information on the components of the plant, the industrial process to be used and a detailed plan of the plant.

## **ANTI-DUMPING AND COMPENSATION DUTIES AND SAFEGUARD MEASURES**

Imported goods subsidized in the country of origin or dumped in Venezuela are subject to anti-dumping or compensatory duties under the Law on Unfair Practices in International Trade (Anti-Dumping Law). Under the Anti-Dumping Law any person that produces similar goods in Venezuela may request an investigation of imported goods by the Anti-Dumping and Subsidies Commission (CASS). Dumping is the practice of selling imported goods at a price lower than the price in the country of origin or at a price lower than cost. A subsidy is when the government of a foreign country grants benefits to a productive sector to promote exports or when it provides any type of assistance that creates an advantage. Both dumping and subsidies are deemed unfair in international trade because they prevent competition under equal conditions.

Anti-dumping and subsidy investigations may last for a maximum of one year. If CASS determines that there is dumping or that subsidies have been granted that cause or threaten to cause a major impairment to domestic production of similar goods, it establishes anti-dumping or compensatory duties. CASS notifies customs, which collects the duties. Anti-dumping or compensatory duties established by CASS expire five years after the effective date. However, a decision may be reviewed after one year if the interested party presents evidence of a change in the circumstances which justifies reopening the process. In both anti-dumping and compensatory duty cases the CASS decisions exhaust the administrative channel, but the affected parties may appeal the Decisions in court.

Imports may also be subject to commercial safeguard measures which are applied pursuant to the provisions set forth in different regional treaties of which Venezuela is a party to, such as the Andean Pact, ALADI, G-3 and especially the WTO Safeguard Agreement. For the eventual application of safeguard measures, the state, through the Ministry of Production and Trade, which in turn delegates in CASS, must initiate an investigation pursuant to the provisions of the Venezuelan Safeguard Law and appropriate International Treaties at the request of the interested party or ex officio. After giving public notice of the initiation of an investigation to this end, the parties interested in the investigation will be given the opportunity to submit evidence and allegations they deem appropriate to defend their interest. Subsequent to this, a temporary decision will be adopted and then a final decision, which will be made public and may be appealed in court.

The effectiveness of a safeguard measure under the Venezuelan law will be 3 years with a one-time 3 year extension.

## **EXPORTS**

The exportation of Venezuelan products is generally free of regulatory requirements. However, there is a limited list of products (certain components of the basic food list, strategic products, radioactive products, and fertilizers) that are subject to prior export license. Certain other products (gold, cocoa, coffee, fruit, vegetables, flowers, and certain drugs, among others) are subject to special permits and/or registrations.

Other requirements for exports include health permits for agricultural products, sanitation permits for animal origin products; fito-sanitation certificate for vegetable products, and a certificate of origin, which documents that the product exported has actually been produced in the country.

The export incentive consisting of export bonds has been eliminated for everything except some agricultural products.

Exports are deemed to be sales for income tax purposes. Although exporters are subject to the Value Added Tax, the applicable rate is zero.

The exporters of capital goods and services of national production have the right to recover the fiscal credits paid for the acquisitions of goods and services related to the exportation. However, in order to obtain said recovery it is necessary for the exporter to register in a special exporters registry created by the Tax Administration.

In Venezuela customs duties are not applied to exports. However, exporters must comply with all administrative customs formalities which require the use of a customs agent. The fee for compliance with the formalities is 1% of the value of the exported merchandise.

## **CUSTOMS**

There are 17 principal custom-houses in Venezuela through which all merchandise for international trade, imported or exported, passes. All custom-houses are assigned to the National Integrated Tax and Customs Administration Service (SENIAT), which administers and controls tax activities in the country. Implementation of an automated system to register, exchange and process data, documents and acts inherent to the arrival, storage and importation of merchandise began on January 21, 2002 at the Maritime Custom-house in La Guaira and will be carried out progressively at the other principal custom-houses. This system tends to decrease customs clearance time and avoid the discretionary powers of administrative officials.

Since 1990, the members of Andean Community, which includes Venezuela, have been governed by the Agreement on Andean Tariff Nomenclature, which is based on the Harmonized System of Customs Tariff Classification used by all OMC member countries to code and designate merchandise. Import duties are 0% for free merchandise, 5% for raw materials and capital goods, 10% for semi-finished products, 20% for finished products and 35% for passenger motor vehicles. Exports are not subject to the payment of taxes.

In certain cases, the importer is obligated to obtain a prior authorization, delegation, registration, permit, license, release or lifting of suspension, depending on whether the merchandise intended for import is reserved, restricted, prohibited or subject to registration or certification of origin.

The value of merchandise is determined pursuant to the evaluation rules provided for in the General Agreement on Tariffs and Trade, GATT, 1994.

The new Regulations on Inspection or Prior Verification of Imports establish that before importing merchandise into Venezuela verification or inspection in the country or origin or of export is obligatory. The verifying company must issue a report with the results of the verification (commercial description, technical description, quality, nature and characteristics, amount, price, customs classification, point of departure and origin), which, except in certain cases set forth in the Regulations, must be submitted by the importers when they file the customs declaration. The only cases where goods can be imported without the prior inspection or verification report are (i) force majeure that prevents the process of inspection or verification; or (ii) goods imported under the following special customs systems, once the importer wishes to nationalize the goods: temporary admissions, temporary admissions for active improvement or In-Bond deposits.

## **MARITIME LAW**

This chapter provides an overview of the principal rules and regulations that govern vessels and maritime activities and commerce. Venezuela has a maritime law that is adjusted to international treaties and international trade requirements. The principal laws on this topic are the General Law of Marine and Related Activities and the Maritime Trade Law, both of which were enacted in 2001, the former having been partially amended in 2002. Together these laws derogated the previous law on this subject, the Maritime Law.

### **VESSELS**

The General Law of Marine and Related Activities defines a vessel as "...any floating construction fit to navigate on water, regardless of its classification and dimensions, that is safe, stable and able to float." Vessels' capacities are measured according to gross tonnage.

The most relevant ways to classify vessels are by nationality and ownership. National vessels are those registered with the Venezuelan Naval Registry, while foreign vessels are those registered with any other country. Likewise, private vessels are those belonging to individuals or private companies, while public vessels are those which are State owned or property of State-owned entities or companies. Vessels may be used as authorized pursuant to the provisions of the vessel's Navigation Patent or Navigation License, commonly known as registration papers.

The entrance of cargo into the country is subject to the reciprocity principle, pursuant to which the access conditions applied by other countries to Venezuelan maritime transportation companies are used as a reference. Maritime carriers whose countries establish total or partial restriction mechanisms for Venezuelan vessels will have these same restrictions applied to them.

Vessels arriving in Venezuelan ports are subject to a health inspection and a visit from the Harbor Master's Office in order to verify the vessel's documentation. Upon leaving port, vessels must obtain an authorization from the Harbor Master and submit the documents required by customs and health authorities.

#### National Vessels

As stated earlier, all vessels registered in the Venezuelan Naval Registry are national vessels. To register with the Venezuelan Naval Registry, vessels must be owned either by Venezuelan citizens; Venezuelan companies duly incorporated and domiciled in the country; foreign investors incorporated and domiciled in the country that abide by the regulations regarding the participation of foreign capital; or, if registered abroad, be under a bareboat charter to individuals or companies as indicated above for a period of one year or more, or given under a financial lease to individuals or companies as indicated above. Additionally, vessels built in national shipyards, regardless of the owner's nationality, may register with the Venezuelan Naval Registry.

#### Foreign Vessels

There are no restrictions regarding foreign vessels entering Venezuelan ports. However, vessels engaged in commercial or merchant activities, regardless of their nationality, must have authorization from maritime authorities in order to anchor or dock at places along the coast of the Bolivarian Republic of Venezuela not legally authorized for commerce.

Vessels under a foreign flag may register with the Venezuelan Naval Registry. To do so they must submit a document, issued by the maritime administration of the country where the vessel was registered, evidencing that the it has been retired, its flag suspended, or that its flag will be suspended on the date of the new registration.

## **PERMITS**

### **Navigation Patents and Licenses**

Vessels with a registered tonnage greater than one hundred fifty tons are required to have a Navigation Patent, which is the document that certifies the vessel is of Venezuelan nationality and authorizes it to navigate under the Venezuelan flag. The patent is valid for five years and must adhere to the applicable rules on this matter. For vessels with a registered tonnage less than one hundred fifty tons, a Navigation License, which is valid for two years, is required. Navigation Patents and Licenses are terminated upon the sale of the vessel.

## **CONTRACTS**

The provisions in the maritime trade law related to merchandise and passenger water transportation contracts cannot be relaxed by mutual agreement of the parties. Bareboat lease contracts and freight contracts are governed by the intentions of the parties, with the Law's provisions being complementary.

If fulfillment by one of the parties under a lease or freight contract is more onerous than that foreseen, the party providing the service may demand termination of the contract, a reduction in the services to be provided or a modification in the mode of execution.

The Maritime Trade Law establishes mechanisms to calculate the amount of damages caused by maritime trade, subject to a maximum limit. This limit is calculated through Special Drawing Rights (SDR), the accounting unit used by the International Monetary Fund which follows worldwide fluctuations and inflation rhythms. The Maritime Trade Law contains the SDR calculation procedure and sets forth that the Central Bank of Venezuela is responsible for the conversion of the SDR into the national currency.

Forfeiture of vessel in kind is replaced by the limited liability system. This system permits the creation of a fund which may be made available to the creditors, thus extinguishing the shipowner's debts which exceed those protected by the limited fund system.

The provisions of the Maritime Trade Law are applied regardless of the nationality of the carrier, the actual carrier, the shipper, the consignee or any other interested party.

The Maritime Trade Law contemplates the following contracts:

### **Bareboat Charters**

Bareboat charters are contracts through which one party undertakes to allow another party to use a vessel for a certain period of time through the payment of a rental fee, with all the nautical and commercial operations of the vessel being transferred to the interested party. For this contract to be valid before third parties it must be evidenced in writing and registered with the Venezuelan Naval Registry.

### **Charter Contracts**

Time Charter: this is a contract for a fixed period of time through which a shipowner, for a charter fee and conserving the nautical operations of their vessel, makes the vessel available to a third party in order for them to carry out the activities indicated within the terms stipulated in the contract.

Voyage Charter: this is a contract through which a shipowner, for a charter fee, makes cargo space available to the charterer for specific voyages. It is considered total when the entire cargo space is made available, and partial when only a predetermined portion of the cargo space is made available.

### Contracts for the Transportation of Merchandise by Water

Contracts for the transportation of merchandise by water are where the carrier, for payment of a charter fee, undertakes to transport merchandise from one port to another. They are evidenced by a bill of shipment or any other document evidencing that the carrier has taken charge of the merchandise, by virtue of which they commit to deliver it upon presentation of the corresponding document to a specific person or to the bearer. The signature on the bill of shipment may be mechanical, electronic or in writing.

The carrier and the shipper may agree upon setting liability limits superior to those set forth in the Law, but any clause that exonerates or reduces the carrier, owner and/or vessel builder's liability for damages to the merchandise or modifies the burden of proof is absolutely null and void.

The carrier may not retain the merchandise on board as a credit guarantee. Notwithstanding the above, with a judicial order it is possible to deposit merchandise with a third party in order to guarantee the payment of freight, demurrage, expenses and particular and general average bonds, as well as to guarantee signing of the average agreement.

### Passenger Transportation Contract

Passenger transportation contracts are entered into with carriers, or on their behalf, for the transportation of people and their luggage by water, through the payment of a consideration. The carrier must deliver a ticket to the passenger as evidence of the contract and a document duly listing the luggage that is not kept in the cabin.

If there is a delay in setting sail from the port of departure or the transportation is definitively interrupted, the contract is rescinded and the carrier must return the cost of the ticket at the passengers request.

The rights that are set forth in the Maritime Trade Law in favor of the passenger are unwaivable. Any stipulation that purports to exonerate or reduce the carrier's responsibility or to invert the burden of proof is considered not written and in no way affects the existence and validity of the contract. The carrier may not withhold luggage as a guarantee for the cost of the ticket.

### Towing Contracts

Towing is a contract by virtue of which the owner of a tugboat undertakes to apply the vessel's force to improve propulsion or to allow the moving of another vessel in exchange for remuneration.

### Maritime Insurance Contracts

Maritime insurance contracts are contracts through which the insurer agrees, in exchange for the payment of a premium, to indemnify the insured party against maritime losses in the form and to the extent agreed upon in the insurance policy. The indemnity extends under its terms or by commercial use to cover all losses suffered during maritime travel or during accessory land operations. All interests in the vessel, cargo or charter may be insured against any navigation risk. The insuring party must have an interest in the insured subject at the time of the loss.

Maritime insurance contracts are understood to be perfected by simple consent of the parties, as of the moment in which the insurer declares its acceptance of the insured party's proposal to enter into the agreement. Once the contract is perfected, the insurer is obliged to immediately issue the insurance policy, coverage sheet and other documents that indicate its acceptance of the insurance conditions.

The insurer is entitled to the entire premium, provided that the contract is annulled for reasons not directly the insurer's fault, act of God or force majeure and that the insured goods are at risk.

## **LIENS AND MORTGAGES**

The Maritime Trade Law sets forth special regulations for liens and mortgages on vessels as follows:

## Liens on vessels

Liens are legal guaranties established for loans specifically defined in the Law. For example, loans for wages and other amounts owed to the Captain, officers and other members of the vessel's crew resulting from their onboard services or indemnity for death or injuries occurring on land, on board or in the water, and directly related to the vessel's operation.

Maritime liens encumber the vessel without the need for public registration, and, except in the case of forced sale of the vessel, remain intact although the vessel may change owner, registration or flag. Maritime liens are accessories to the loans they guarantee, thus they arise and end with the loan.

## Naval Mortgage

Vessels may be the subject of a naval mortgage, provided that they are registered with the Venezuelan Naval Registry and the mortgage is constituted through this registration.

For a naval mortgage constituted abroad to be effective in Venezuela, the mortgage document must be registered in the Venezuelan Naval Registry, contain the information required by the Maritime Trade Law and signed by the grantors and the notary or public official who authenticated the document. It also must be legalized by the Venezuelan Consul or duly apostilled.

In the event of default on the mortgage, the mortgage holder may proceed with the direct sale of the mortgaged vessel as agreed to when the obligation was constituted. This implies that the judicial proceeding for the execution of the mortgage may be omitted when the contract sets forth the possibility of selling the mortgaged vessel directly.

## PREVENTIVE MEASURES

Plaintiffs may request the attachment of a vessel as a preventive measure before filing a principal claim. In these cases, the anticipated preventive measure will be suspended if the respective claim is not filed within ten consecutive days of the measure's implementation. The preventive measures set forth in the Maritime Trade Law do not exclude the exercise of preventive measures of general law.

The preventive measures that may be declared against a vessel pursuant to the Maritime Trade Law are: (i) attachment, which consists of a resolution issued by a Court of the competent Special Water Jurisdiction immobilizing or restricting the departure of a vessel, and is imposed as a precautionary measure to guarantee a maritime loan. This measure may be applied to the vessel referred to in the loan or any other vessel owned by the person who is liable for the maritime loan; and (ii) prohibition of departure, through which the holders of a maritime loan or lien may appear before a competent court to request that the vessel not be permitted to set sail for the purpose of guarantying the exercise of the maritime loan or lien. This measure does not have to be registered with the Venezuelan Naval Registry and the Harbor Master may be notified of it by electronic means.

## NATURAL RESOURCES

### OIL ACTIVITIES

The legal system governing oil activities in Venezuela underwent a substantial change in 2002. In fact, on January 1, 2002, the Organic Law of Hydrocarbons (OLH) came into effect, derogating the following laws: the Hydrocarbons Law of March 13, 1943, partially reformed by the Laws for the Partial Reform of the Hydrocarbons Law of August 10, 1955 and August 29, 1967; the Law on Property Subject to Reversion in Hydrocarbons Concessions of August 6, 1971; the Law that Reserves the Exploitation of the Internal Market of Hydrocarbons Byproducts of June 22, 1973; the Organic Law that Reserves the Industry and Trade of Hydrocarbons to the State of August 29, 1975; and the Organic Law for the Opening

of the Internal Market for Gasoline and other Hydrocarbon-based Fuels for Use in Automotive Vehicles of September 11, 1998.

Following we note two major aspects posed by the new legal system contained in the OLH.

*New Limits on the Reserve on Hydrocarbons-Related Activities*

The OLH structurally changed the State's reserve over hydrocarbons-related activities. In fact, Article 1 of the Organic Law that Reserves the Industry and Trade of Hydrocarbons to the State (the Hydrocarbons Industry and Trade Law), that was in force until December 31, 2001, provided that "all matters" pertaining to activities related to the industry of hydrocarbons was reserved to the State, from the exploration to the final internal and external marketing of both raw materials and byproducts. The Hydrocarbons Industry and Trade Law established this reserve in broad terms, without differentiating the so-called "upstream" activities (such as exploration and exploitation) from the so-called "downstream" activities (that include refining, industrialization and marketing, both internal and external.)

The OLH offers a different juridical proposal, maintaining the reserve for some activities and eliminating it for others, in which private participation and investments are now allowed without the State's participation being required. The OLH is intended to regulate all hydrocarbon-related activities, for which it differentiates four types of activities: (i) primary, (ii) refining of natural hydrocarbons, (iii) industrialization of refined hydrocarbons; and (iv) marketing.

Primary activities include the exploration for natural hydrocarbon reservoirs, the exploitation or extraction of hydrocarbons in their natural state as well as their initial collection, transportation and storage.

The OLH defines refining as distilling, purification and transformation activities of natural hydrocarbons for the purpose of increasing their value. Article 10 of the OLH removes refining from the activities typically reserved to the State under the Hydrocarbons Industry and Trade Law. Consequently, private persons are now allowed to engage directly in refining activities, provided they obtain a license from the Ministry of Energy and Mines (MEM). It should be noted, however, that although Article 10 of the OLH allows private persons to engage in the refining of natural hydrocarbons, said Article maintains the State's reserve on the facilities and works existing as of January 1, 2002 that are owned by the State or State-owned companies and are used for (i) natural hydrocarbons refining activities in the country, and (ii) the main transportation of products and gas. Also maintained under the State's reserve are any expansions and improvements made to such facilities and works. However, there does not seem to be any legal impediment to private investors using refining facilities owned by the State's oil companies to carry out these activities.

The industrialization of refined hydrocarbons, which includes the separation, distilling, conversion, mixture and transformation of refined products, has also been removed from the State's reserve. These activities may be carried out by private persons, provided they obtain permits from MEM.

The OLH also establishes that activities related to the external and internal marketing of natural hydrocarbons, as well as products set forth by the National Executive, will remain reserved to the State by means of a Decree. These activities may be performed by the State or by State-owned oil companies. By virtue of this provision, private persons who obtain refining licenses may market byproducts obtained from their refining activities which are not included in the Decree. The State's reserve of marketing activities was made through Decree No. 1648 of January 15, 2002.

Decree No. 1648 temporarily reserves activities related to the import and export of hydrocarbon byproducts until the National Executive determines which byproducts will be excluded. Because the Decree does not regulate activities for the internal trade of hydrocarbon byproducts, one may conclude that they are not within the State's reserve of marketing activities. Consequently, said internal trade activities may be freely carried out by private companies that obtain the relevant permits from MEM.

### *Income Tax*

The new Income Tax Law reduced the income tax rate applicable to companies engaged in the exploitation of hydrocarbons and related activities from 67.7% to 50%. Companies that engage in oil-related activities in Venezuela pursuant to association agreements entered into when the Hydrocarbons Industry and Trade Law was still in force, and companies that engage in the exploitation of non-associated natural gas and the processing, transportation, distribution, storage and marketing of natural gas, as well as companies already established and domiciled in Venezuela that engage in integrated activities for the production and emulsification of natural bitumen will continue to pay taxes at the corporate rate of 34%.

### *Royalties and Additional Taxes*

Article 44 of the OLH provides that the State is entitled to receive a royalty equivalent to 30% of the hydrocarbons volume extracted from any reservoir. The National Executive may reduce this royalty to: (i) 20% for extra-heavy crude oil projects in the Orinoco Oil Belt and the exploitation of mature oil fields; and (ii) 16 2/3% for projects for the extraction of bitumen mixtures in the Orinoco Belt. These reductions are for the purpose of guaranteeing the economic viability of the projects. Furthermore, although the OLH does not contain any provision that expressly allows reducing the royalty in other cases, it would seem that such a reduction is legally possible because the National Executive is authorized to demand only a portion of the royalty due by the holder of the license. The royalty may be paid to the State both in cash and in kind.

In addition to the royalty, the OLH establishes the following taxes:

- Surface Tax, equivalent to 100 tax units per square kilometer, or fraction thereof, of area granted that is not exploited, per year, to be increased by 2% annually for the first five years, and by 5% annually in the following years.
- Specific Excise Tax, equivalent to 10% of the value of each cubic meter of hydrocarbon byproducts produced and consumed as fuel in their own operations, calculated on the basis of the final consumer price of such products. If such products are not marketed in the local market, MEM will set the price for the purpose of calculating this tax.
- General Excise Tax, varying from 30% to 50% of the price paid by the final consumer per liter of hydrocarbon byproducts sold in the internal market. The specific rate shall be set each year in the Budget Law. This tax must be withheld at the source of supply and paid each month to the National Treasury. The National Executive may exonerate this tax, in whole or in part, for the purpose of promoting public interest activities, and also may restore it when the circumstances that gave rise to the exoneration cease to exist.

## **OPENING OF THE GASEOUS HYDROCARBONS SECTOR**

The Organic Law on Gaseous Hydrocarbons (Gas Law) and its Regulations (Regulations) became effective on September 23, 1999 and June 5, 2000, respectively. The Regulations contain a great deal of substantial rules that, together with the Gas Law, govern the gaseous hydrocarbons industry. One of the main purposes of the Gas Law was to separate the production of natural gas from the production of oil, thus releasing non-associated gas exploration and production and natural gas processing and refining from the ties of the Hydrocarbons Industry and Trade Law. Hence, non-associated gas may be produced free of the limitations set by OPEC and or any other limitations that affect the production of crude oil. One of the main benefits of the Gas Law is that it opens the entire industry to national and international private investment.

The Gas Law purports to create a competitive environment for the development of the industry. To do this, it orders the functional separation of production, transportation and distribution activities, it establishes a regulatory entity to be named the National Gas Entity (*Ente Nacional del Gas*) and allows other operators access, under equal conditions, to the facilities for storage, transportation and distribution.

### *Exploration and Production of Non-Associated Gas*

The exploration and exploitation activities of non-associated gas may be undertaken directly by the State or indirectly through State-owned companies, either alone or with the participation of national or foreign private investors, or by national or foreign private investors on their own. Private investors who wish to engage in exploration and exploitation activities, whether on their own or with the State's participation, must obtain a license issued by the MEM.

Licenses may be granted for a maximum term of 35 years, extendable for a term that may not exceed 30 years. The license confers upon its holder the exclusive right to engage in exploration and exploitation activities pursuant to the terms established therein. The rights conferred through the licenses are not subject to encumbrances or foreclosures, but may be assigned with the prior approval of MEM.

According to the Gas Law, all assets and facilities related to exploration and exploitation activities performed during a license are subject to reversion. This is the right of the Republic to acquire title to all the assets and facilities used by the license holder to achieve the purpose of the license on the date it expires for whatever reason. In this case, title to the assets and facilities is transferred to the Republic free of liens and without any indemnification.

Controversies between the Republic and the license holder may be resolved by arbitration. If the parties agree to submit the controversy to arbitration, Venezuelan courts will not have jurisdiction. However, the courts may provide assistance in the arbitration proceedings if, for example, the arbitration panel issues precautionary measures of attachment or any similar measure.

### *Natural Gas Processing and Refining*

The rules pertaining to processing and refining activities apply to all gaseous hydrocarbons, without distinction regarding their origin. Private investors who wish to invest in processing or refining projects must obtain a permit from MEM. According to the Gas Law, permits for processing and refining activities will not have a term and the operating assets will not be subject to reversion.

### *Storage, Transportation, Distribution and Marketing*

The Gas Law orders the separation of production, transportation and distribution activities. To this end, it establishes that MEM must divide the country into several geographic regions and sets forth that a person, whether an individual or a company, may not own or control more than one production, transportation or distribution activities within the same region. Pursuant to the Regulations, control means the capacity of one person to decide, positively or negatively, over the activities or decisions of another person. The Gas Law granted vertically integrated companies existing on the date it became effective a 24-month period to complete the separation of the aforementioned activities. It must be noted that the period expired and PDVSA Gas, S.A., the company affected by the rule, did not comply with the obligation to separate its production, transportation and distribution activities. This may be the consequence of a lack of political willingness by the National Executive to have PDVSA Gas, S.A. divest its methane gas transportation and distribution assets.

In limited cases where it can be proved that the separation is not possible from an economic standpoint, MEM may grant an exception, provided each activity is treated as a separate business unit whose accounting is kept separately.

Private investors who wish to engage in storage, transportation, distribution and marketing activities must obtain a permit from MEM. According to the Gas Law, the term of all these permits, except those for the marketing of liquid petroleum gas (LPG), is limited to 35 years with a one-time extension of 30 years. Although the Gas Law does not limit the term for LPG marketing permits, the Regulations do. According to the Regulations such permits are subject to the same limitations as the permits for other activities. In addition, the Gas Law states that all permits subject to a time limit are also subject to reversion.

In accordance with the Gas Law, the sales price of gaseous hydrocarbons to be charged by producers and processors at production and dispatch centers was set by MEM based on "equity principles." These prices were fixed through Resolution No. 33 of March 12, 2001. Additionally, MEM and the Ministry of Production and Commerce (MPC) jointly set the prices

(called “rates”) to be applied to final consumers. These were fixed through Joint Resolution No. 34 of MEM and No. 111 of MPC, dated March 12, 2001.

#### *Tax Treatment of Activities subject to the Gas Law*

The Gas Law provides that the holders of licenses for the exploration and exploitation of non-associated gas must pay a 20% royalty on all the natural gas extracted from any reservoir and not reinjected. MEM, at its sole discretion, may demand the royalty in cash or in kind. Although neither the Gas Law nor the Regulations contain any provision that allows the royalty to be reduced, it would seem that such a reduction is legally possible because the National Executive is authorized to demand only a portion of the royalty due from the license holder.

The income tax rate applicable to the profits arising from the sale of non-associated natural gas is 34%.

#### *Business Opportunities*

##### Exploration and Exploitation of Non-Associated Gas

As of this date, MEM has opened the exploration and exploitation of non-associated gas to private investment through the 2000 Gas License Round (which ended in July 2001). Six exploration and exploitation licenses were granted through this round. MEM has indicated that it intends to hold a new round of gas licensing through which it will offer the areas not allocated in the first round to private investors.

##### Exploration of Non-Associated Gas in Offshore Areas

PDVSA is also considering creating associations with private investors for vertically-integrated projects for the exploitation of offshore gaseous hydrocarbon reservoirs and the export of liquefied natural gas (LNG). The first of these projects is the Mariscal Sucre project, in which PDVSA Gas, Shell and Mitsubishi will participate.

Currently, PDVSA is holding a competitive selection procedure to choose the companies that will be granted exploration and exploitation licenses for areas 3 and 5 of the Deltana Platform.

## **WATER**

In Venezuela, potable water and sanitation services are governed by the provisions of the Organic Law for the Provision of Potable Water and Sanitation Services (the Water and Sanitation Law).

The Water and Sanitation Law includes various provisions to regulate potable water and sanitation services, to establish an inspection, control and assessment system for these services and to promote their development for the general benefit of citizens, in the interests of public health, and for the preservation of water resources and the protection of the environment in accordance with sanitation and environmental policies issued by the National Executive and plans for the economic and social development of the nation. These provisions prevail over all other legal provisions in any matters affecting the operations of the public services regulated by this law.

The provisions of the Water and Sanitation Law apply to all potable water and sanitation service providers, whether public, private or mixed, as well as to all subscribers and users of these services in Venezuela. Rural aqueducts are subject to a specific administration system for which a special regulation has been issued.

The Water and Sanitation Law declares potable water service and sanitation services, along with the works required for or related to the provision of these services to be of social benefit and in the public interest. It is also established that the facilities and equipment used for the production, distribution, collection or disposal of the water in order to provide these services are part of the public domain.

Various entities have been created to ensure regulatory compliance of the systems for providing potable water and sanitation services. The National Office for the Development of Potable Water and Sanitation Services (the Water and Sanitation

Development Office) was created as an autonomous entity under the supervision of the Ministry of the Environment and Natural Resources, with responsibility for the preparation of sector policies, strategies, objectives and goals to guide the provision of the services nationally, and to provide technical and financial assistance to service providers. The National Office of the Superintendent of Potable Water and Sanitation (the Superintendent's Office of Water and Sanitation) was created as an autonomous entity under the supervision of the Ministry of Production and Trade for regulatory purposes and to provide administrative control over the provision of potable water and sanitation services. Also created was The National Management Company (Empresa de Gestion Nacional, "EGN"), reporting to the Ministry of Production and Trade, to produce and sell raw water or potable water, and to treat residual water in the systems specified by the Water and Sanitation Development Office.

The legislature made an initial definition of the responsibilities of the national public entities in relation to potable water, all of which are to manage their responsibilities in a coordinated manner. The agencies of the National Executive will have, among others, the following roles: (i) to approve policies, general strategies and sectorial plans in accordance with the objectives for the economic and social development of the country, (ii) to approve the general rules for provision of the services; (iii) to inspect, control and sanction the behavior of agents, (iv) to promote cooperation between the National, State and Municipal Executives, (v) to promote the transfer of services, currently provided by agencies of the National Executive, to the municipalities, in accordance with the provisions of the laws that regulate this matter, (vi) to design and implement a financing policy to assist with the achievement of coverage and quality goals established in the sectorial plans, (vii) to promote sustainable development of the sectors through an economic system that will guarantee the stability of service providers, (viii) to design and finance a subsidy system in accordance with the provisions established in the respective regulations, (ix) to contribute, in whole or in part, the financial resources for the construction or installation of hydraulic or sanitation infrastructures as required in development plans, (x) to provide technical assistance to improve the provision of services, and (xi) to promote private participation as a complementary instrument for achieving the sectors' objectives.

The states may: (i) provide technical, administrative and financial assistance for the operation, maintenance, expansion, administration and commercialization of potable water and sanitation systems to metropolitan districts and municipalities, jointly with other municipalities, cooperatives, community organizations and organized neighborhood groups, (ii) participate in the financing of investment programs to provide services, (iii) contribute, in whole or in part, the financial resources for the construction or installation of the hydraulic or sanitation infrastructure required in the development plans for the sector in the corresponding state, (iv) contribute to the development and management of the services in rural areas and in areas of uncontrolled development, and (v) contribute to the financing of the subsidy system in accordance with the provisions of the respective regulations and in accordance with the policies set forth by the National Executive.

The provision and management of potable water and sanitation services is the responsibility of the metropolitan districts and municipalities. These bodies must: (i) provide potable water and sanitation services, directly or through third parties, in both an efficient manner and in accordance with the policies, strategies and rules of the National Executive, (ii) participate with the National Executive in the preparation of sectorial plans and strategies in accordance with the guidelines, instructions and other mechanisms provided for by the Water and Sanitation Development Office and the Superintendent's Office of Water and Sanitation, (iii) submit investment programs for the development of the services to local communities via open municipal council meetings, (iv) request a concession for the use and collection of untreated water and for the respective sewage discharge from the National Executive, (v) establish the specific terms and conditions for the provision of the services in accordance with the Water and Sanitation Law, its Regulations and the criteria established by the Superintendent's Office of Water and Sanitation, (vi) regulate the provision of potable water and sanitation services in their respective ordinance, based on the Water and Sanitation Law and on instructions established by the Superintendent's Office of Water and Sanitation, (vii) select the appropriate administrative approach and the specific terms and conditions for the provision of services in accordance with the general rules approved by the National Executive, (viii) select service providers for potable water and sanitation services in accordance with the Water and Sanitation Law and other laws governing this matter, (ix) approve tariffs calculated by the service provider based on the tariff model prepared by the Superintendent's Office of Water and Sanitation and the proceedings established in the Water and Sanitation Law and its Regulations, (x)

contribute financial resources, in whole or in part, for the construction of hydraulic or sanitation infrastructure facilities as required in local development plans for the sector, (xi) promote and support educational programs regarding the efficient use of water and the timely payment of tariffs for the services, (xii) promote public participation in the supervision, inspection and control of the services through Technical Water Committees, (xiii) promote the organization and training of rural and native communities, defining the joint approach for the administration of potable water and sanitation systems, (xiv) impose sanctions on service providers for breaches of the conditions for providing the services as established in the respective agreement, (xv) budget for the necessary funds to finance investments included in the respective investment plans, (xvi) contribute to the financing of the subsidy system in accordance with the provisions of the respective regulations, and (xvii) develop separate administrative and accounting systems for cases where it is decided to provide services directly, in order to allocate the assets, liabilities, income, costs and expenses related to the service.

In accordance with the Water and Sanitation Law and its Regulations, municipalities may, as appropriate, establish associations or unions with other municipalities via technical, economic or regional cooperation in order to provide potable water and sanitation services.

Potable water and sanitation services may be provided: (i) directly by the metropolitan districts or municipalities, (ii) jointly with other municipalities or delegated autonomous municipal institutes, (iii) by companies, civil associations and other decentralized municipal agencies, by means of an inter-administrative agreement, (iv) by national or state companies, by means of an inter-administrative or concession agreement, or (v) by private companies, by means of (a) a concession for a definite period of time for all or some of the activities to provide the services, or (b) a concession for the construction of infrastructure and subsequent exploitation, in whole or in part, of the processes or activities related to the provision of the services. For technical, strategic and economic reasons, metropolitan districts or municipalities may use whichever of these approaches they consider most appropriate, provided that sustainability and economic equilibrium are ensured.

The financial system provided for in the Water and Sanitation Law is orientated towards creating conditions to guarantee the economic sustainability of the provision of potable water and sanitation services in the country, and avoiding harmful, unbalanced conditions. This aim is supported by three basic strategies: (i) a tariff system that guarantees economic balance for service providers operating efficiently, (ii) a subsidy system that ensures access to services for poor communities without risking the sustainability of the service providers, (iii) a financing system that encourages and requires contributions from public funds at the national, state and municipal level, together with contributions from service providers and the private sector.

The basic principles of the financial system for the provision of potable water and sanitation services are as follows: (i) economic efficiency, which avoids the transference of inefficiencies to subscribers and promotes the efficient use of funds in the provision of the services, (ii) economic balance, which makes possible the total recovery of operating, maintenance, replacement and expansion costs, as well as the obtainment of a fair and reasonable profit, (iii) equality, which assures the subscribers the right to receive the same treatment as any other subscriber in the same category, (iv) solidarity, through instruments that guarantee low-income subscribers access to services, (v) fairness, which allows the redistribution of costs so that tariffs and subsidies take into account subscribers' ability to pay, (vi) transparency, making the finances of service providers public information, and (vii) simplicity, ensuring that the tariff system is easily understood, applied and controlled.

The service providers, under efficient operating conditions, will be entitled to a fair and reasonable income from their activities, taking into account the risk of similar activities in the country and the necessary level of private investment.

The Water and Sanitation Law establishes a tariff system comprised of: (i) a tariff policy, (ii) a tariff model including the tariff basis, the methodology and tariff structure of the services, and (iii) the tariffs resulting from the application of the tariff model.

Metropolitan districts, municipalities and service providers must comply with the tariff regulations and tariffs set by the Superintendent's Office of Water and Sanitation, which may be revised every five years. This procedure must define, among

others: (i) the tariff model for calculating tariffs related to specific levels of coverage and quality of services, (ii) the response time for public authorities in order to guaranty the continuation of the services, and (iii) the arbitration procedures for the resolution of conflicts between service providers, municipal authorities and the Superintendent's Office of Water and Sanitation. The approved tariffs will have an effective period of five years, unless the service provider, the municipal authority and the Superintendent's Office of Water and Sanitation agree to extend this for another equal period before the five years elapse. In exceptional cases and by mutual agreement of these parties, the tariffs may also be modified before the effective period lapses when reason exists due to changes in the conditions of the service or in the tariff model. New tariffs will be in force for five years as of the date of their approval.

The tariff for the provision of potable water and sanitation services will consist of two elements: (i) a fixed charge reflecting the cost of ensuring the availability of the services to subscribers, regardless of consumption levels, and (ii) a variable charge reflecting the volume of potable water consumed and, in the case of sewage, the volume of water discharged and treated.

Individuals or companies with illegal connections, or carrying out any activity that may cause the loss of water or affect the service providers' activities, will be penalized with fines between 100 T.U. and 1,000 T.U. Given proof of such incursions, the service providers may take security and corrective measures to eliminate the illegal activities, including the temporary occupation or confiscation of the items used to make illegal connections. The service provider may also demand in-court or out-of-court payment for the illegal consumption of water in accordance with the rules in force, as well as the repair of damages caused to facilities.

The Bid Law and the Decree with the rank and force of the Organic Law to Promote Private Investment under the Concession System will govern all matters not provided for in the Water and Sanitation Law. Until the Water and Sanitation Development Office and the Superintendent's Office of Water and Sanitation commence operation, their functions will be undertaken by Compañía Anónima Hidrológica Venezolana (HIDROVEN). HIDROVEN will be the entity responsible for the transfer of services, presently provided by the National Executive, to the metropolitan districts or municipalities. This transfer must take place within five years of the publication of the Water and Sanitation Law.

## **THE ELECTRIC SECTOR**

Venezuela has one of Latin-America's most developed electrical service infrastructures. According to official figures, near 94% of its inhabitants have electric service. Venezuela's electric sector installed capacity is approximately 19,000 Mw, of which approximately 12,500 Mw come from hydroelectric facilities.

The highly developed electric infrastructure, the growth potential of the installed capacity and the number of users has attracted international private investments, as evidenced by the acquisition of C.A. La Electricidad de Caracas by AES Corporation through a public offering. In turn, the National Government has implemented an opening policy through privatizations of State-owned companies, such as Sistema Eléctrico de Nueva Esparta (SENECA), which was bought by CMS Corporation, and the future privatizations of Enelven, which supplies electricity to Maracaibo, a city in the western region of the country, and Semda, which provides electricity to the State of Monagas. Enelven, together with its subsidiary Enelco, which serves the eastern coast of Lake Maracaibo, have an installed capacity of approximately 1,200 MW, while Semda is simply a distributor as it lacks generation facilities. The National Government announced the privatization of Enelven for the first half of 2001 and the privatization of Semda for the second half of 2001. However, the privatizations did not occur and no new dates have been set.

### ***Regulation of the Electric Sector***

On September 21, 1999, the Decree having Rank and Force of the Law of Electric Service (the Electric Service Law) was published in Official Gazette No. 36,791. This legal instrument, issued pursuant to the Law that Authorizes the President of the Republic to issue Economic and Financial Measures required by the Public Interest, dated April 26, 1999, was the first integrated legal text for regulating the electric sector in Venezuela. The law was modified by the National Assembly on December 31, 2001, to extend the terms originally granted for creating the new regulatory entity for electricity, and

to enact the special regulations to which the law refers (operation of the electric system, wholesale market, emergency situations, etc.).

The Law is divided into 10 Titles that include rules for competition and activities and even a rate system and penalties. Following is a review of some of the most relevant provisions:

### Fundamental Provisions and Competition

The purpose of the Law is to establish the provisions that will govern electric service in the National Territory, which is subdivided into generation and transmission activities, management of the National System, electric power and energy distribution and marketing. Likewise, the Law regulates the actions of the agents that take part in each of these activities and establishes rights and mechanisms for the protection of users. The activities that make up electric service are deemed to be of public interest.

Among the new provisions of the Law, it is worth noting Article 6, which provides that the same company may not engage in two or more of the following activities: (i) generation, (ii) transmission, (iii) management of the National Electric System, and (iv) distribution. However, marketing may be carried out by generators, distributors or directly by marketing companies. It is important to note that the preceding provision only establishes that the activities may not be performed by the same legal entity, without limiting a company from directly or indirectly controlling several companies that engage in various activities. Thus, it would seem perfectly possible that a holding company be the owner of a generation company, a distribution company and a marketing company. This seems to be the purpose of the Law, especially in light of Article 108, which establishes that it is mandatory for existing companies that are vertically integrated to separate their activities into several companies without demanding that they be sold afterwards. .

The regulation, supervision, assessment and control of the activities that make up electric service are charged to a new entity named *Comisión Nacional de Energía Eléctrica* (National Electric Energy Commission), which has functional, administrative and financial autonomy and is assigned to the MEM. The Law also created the *Centro Nacional de Gestión del Sistema Eléctrico* (National Center for the Administration of the Electric System), responsible for the coordination and management of generation and transmission resources which have been made available to the National Electric System, proposal of contingency plans for emergencies, evaluation of the capacities of generating companies, coordination of the use of international interconnections and coordination of the National Electric System's maintenance plans.

The Law, in agreement with the Constitution and the Organic law of the Municipal System, also sets forth rules regarding the municipalities competency on electric issues.

### Regulated Activities and Tariffs

Energy and electric power generation, transmission, distribution and marketing activities are open to private participation, without discrimination whatsoever to the nationality of the investor, while the management of *Centro Nacional de Gestión del Sistema Eléctrico* will be operated by a state-owned company which will be created especially for this purpose.

The Law also sets forth that the State will encourage competence and promote private participation in activities that constitute electric services; however, the Law does not contain express provisions to this end, thus, it is possible that these incentives will be set forth in separate laws.

A special authorization from the *Comisión Nacional de Energía Eléctrica* must be obtained in order to carry out generation and marketing activities, while transmission and distribution activities are subject to a concessions system granted by MEM. Neither the Electric Service Law nor the Regulations of the Law, published in Special Official Gazette No. 5,510 dated December 14, 2000, establish limits on the term of the authorizations to engage in generation and marketing activities, while the Electric Service Law expressly establishes that concessions for transmission and distribution activities are limited to a maximum of 30 years, extendable for up to 20 additional years.

Regarding rates, the Electric Service Law makes a differentiation based on the type of market. On the one hand, it establishes that there will be free competition on the wholesale electric market, understood as that in which the power and electric energy blocks are traded within the National Electric System, while, on the other hand, it establishes the existence of a Market for the various activities established by Law with rates regulated by MEM.

#### Infractions and Penalties

Finally, the law also has a Title especially devoted to categorizing infractions and setting penalties for them. The pecuniary penalties, which are independent from civil or criminal liability, vary from 200 tax units for minor infractions committed by users, to penalties equivalent to 10% of the gross income during the 12 months preceding the infraction for serious infractions committed by agents that take part in electric service activities.

### **MINING**

Venezuela has had a new Mining Law since September 28, 1999 (the Mining Law). Title I of the Mining Law provides the fundamental principles as to the scope of application and the general conditions that govern mining in Venezuela. Thus, in addition to the statement that all mines and minerals existing within national territory are regulated by the Mining Law, it also covers the exploration, exploitation, usufruct, holding, circulation, transportation and internal or external marketing of the extracted substances. Also, mines and mineral deposits are declared inalienable and non-expiring property of the Republic, and mining is declared to be a public interest activity.

Another fundamental provision is the typical declaration of jurisdiction of the Ministry of Energy and Mines (MEM) over all matters related to mining and foreign investments in this sector.

#### *Acquisition of Mining Rights*

##### Modes

Although the Mining Law establishes five modes for exercising mining activities (Directly by the National Executive, Concessions for Exploration and Subsequent Exploitation, Exploitation Authorizations for Small Miners, Mining Communities and Artisan Mining), the only one having commercial and industrial importance is the mining concession.

##### Who may Acquire Mining Rights? Limitations

Any individual or legal entity, national or foreign, capable according to law and domiciled in Venezuela may obtain mining rights in the country, excluding rights for small mining carried out individually or in communities, which is reserved for Venezuelan citizens or Venezuelan legal entities, or artisan mining, which is reserved for Venezuelan citizens only. The exceptions to the foregoing general rule for acquiring mining rights are applicable to Venezuelan public officials and certain relatives of theirs, as well as foreign governments and companies dependent on such governments or controlled by them.

##### *Registration of Companies with MEM*

Mining companies formed in Venezuela must register their establishment with MEM within 30 days or their applications may not be processed. If there are foreign investment and/or technology transfer agreements, use of patents or trademarks, and technical assistance coming from abroad, they must also be registered with the respective department of MEM.

##### *Mining Concessions*

##### Concessions for Exploration and Subsequent Exploitation

The Mining Law adopted a sole type of mining concession. Consequently, as of the enactment thereof, the only mining concessions available are the concessions for exploration and subsequent exploitation.

### Limits

The concessions for exploration and subsequent exploitation will be awarded for plots of land that must be divided into lots with an area that may vary from a minimum of 493 hectares to a maximum of 513 hectares, with a total extension not exceeding 6,156 hectares, that is, 12 lot units. The maximum number of lots that may be granted to the same holder is 2, that is, 24 lot units.

### Concessions as an Actual Right

The right arising from the mining concession is a real property right. However, MEM must first authorize and grant a permit in order to alienate, encumber, lease or subcontract the property for exploitation. To obtain this authorization, the concessionaire must have carried out the prior activities and required investments for presentation of the development and exploitation program, which should be filed 30 days before the commencement of exploitation.

### Limits of Areas for Exploitation

Another characteristic of concessions is that the concessionaire is entitled to select from its explored lot up to a maximum of six adjacent lots (not more than half of the original extension) for exploitation purposes.

### Terms of Concessions

The term for concessions may not exceed 44 years. Concessions provide for an exploration term of no more than three years, with a sole extension of one year. The exploitation term may not be more than 20 years as of the date of publication of the respective Exploitation Certificate, with a maximum of two ten-year extensions granted at the discretion of MEM.

### Substances Granted

Concessions confer upon their holder the exclusive right to explore and exploit the mineral substances granted that are found within the area awarded (tailings are included in the mineral granted).

### *Special Advantages*

Private persons may be required to offer special advantages, stipulated by MEM, to the Republic whenever requesting a concession. These advantages normally refer to aspects such as the supply of technology, internal supplies, provision of infrastructure, social endowment, and obligations to train and specialize in geology-mining, among others.

### *Tax System*

The holders of mining rights must pay:

1. Surface tax for each hectare, starting on the 4th year of the concession, payable quarterly in arrears. The amount is calculated in tax units per hectare, depending on the number of hectares and the year of the concession, based on a table that goes, in the case of gold and diamonds, from 0.14 tax units within the first four years of the concession for extensions no greater than 513 hectares, up to 0.38 tax units in years 17 to 20 of the concession for extensions of 12,312 hectares. Once the exploitation is started, the exploitation tax will be deducted from the surface tax pertaining to the same period until concurring with the former.
2. Exploitation Tax
  - 3% of the commercial value, in Caracas, of the refined material, regarding gold, platinum and metals associated with platinum.
  - 4% of the commercial value in Caracas, regarding diamonds and other precious stones.

- 3% on the commercial value, at the mine, for other minerals, which includes costs until the extracted mineral, whether or not crushed, is deposited in the vehicle that is to carry it outside the limits of the area awarded or to a plant for refining.

#### *Extinguishment of Mining Rights*

Mining rights may be extinguished:

- Due to expiration of the term for which they were awarded;
- By express waiver of the authenticated document by the private person; or
- Due to causes for expiration:
  - Failure to carry out the exploration within the legal term.
  - Failure to submit the drawings (plans) within the legal term;
  - Failure to start-up exploitation within the legal term;
  - Unjustified paralyzation of the exploitation for a term longer than that allowed by law;
  - Failure to pay any mining tax for one year;
  - Failure to submit the feasibility study;
  - Failure to comply with the special advantages;
  - Incurring infractions to the Mining Law (more than 3 in 6 months)
  - Other special causes provided for in the mining title.

#### *Reversion of Assets*

The land, permanent works, facilities, accessories and equipment that are an integral part thereof and all the real and personal property, tangible or intangible, acquired to be used in the mining activities must be maintained and preserved in proven operating conditions according to technical advances, during the term of the concession and full title thereto shall pass on to the Republic, without liens, charges, or indemnification, upon the extinguishment of the rights for whatever cause.

## **ENVIRONMENTAL LAW**

The 1999 Constitution of the Bolivarian Republic of Venezuela recognizes the existence of environmental rights and establishes general principles that govern the performance of activities that may cause environmental damage. These principles are that everyone has the individual and collective right to enjoy life in a safe, healthy and ecologically balanced environment; the State must protect the environment, biological diversity, genetic resources, ecological processes, national parks, natural monuments and other areas of special ecological importance; and environmental and social/cultural impact studies must be made previous to all activities that may cause damage to the ecosystem. The Constitution reserves the right for the National Assembly to legislate on matters related to the preservation, development and exploitation of mountains, water and other natural resources of the country, as well as that of agriculture, animal husbandry, fishing and forestry activities.

Violations of the regulations regarding the conservation, defense and improvement of the environment or of the authorizations granted by the Ministry of the Environment and Natural Resources (MARN) to carry out activities that cause

environmental damage are subject to the application of administrative sanctions pursuant to the Organic Law of the Environment (OLE) and to criminal sanctions pursuant to the Criminal Law of the Environment (CLE). Additionally, the liable party may be ordered to pay monetary damages regardless of whether or not the cause of the damages constitutes a sanctionable crime.

The basic principles that govern the conservation, defense and improvement of the environment are provided for in the OLE, which is the governing rule on environmental matters. The OLE allows MARN to authorize, on a case by case basis, the performance of activities which are susceptible to damaging the environment, provided that these activities produce economic or social benefits for the country and the damages caused are repairable. The conditions, limitations and restrictions applicable to this activity, along with the guarantees, procedures and regulations for repairing the damages, must be set forth in the authorizations granted by MARN.

In addition to the administrative sanctions provided for in the OLE, parties responsible for environmental damages may be criminally sanctioned pursuant to the CLE. The CLE is a law that classifies actions or omissions that violate the provisions regarding the conservation, defense and improvement of the environment as crimes and, additionally, sets forth the applicable sanctions. Furthermore, the CLE establishes that directors and managers of companies which perpetrate environmental crimes may be held criminally responsible, provided that they participated in the actions or omissions which constitute the crime.

The CLE divides criminal offenses into two groups. The first group is that of crimes which are integrally defined in the CLE. The second group is that of crimes that are not integrally defined in the CLE, but are supplementary regulations established in laws put into force by the National Assembly or by decrees or regulations of the President in a Council of Ministers. The supplementary regulations are provisions of a technical nature that set forth the basic principles, limits for tolerance, requirements and procedures applicable to specific activities that may cause environmental damage.

#### Supervising Agencies and Authorities

MARN, in addition to being the competent agency to authorize the performance of activities that are susceptible to damaging the environment, also monitors and controls compliance with environmental regulations. The Environmental Police, formed by MARN officials and national, state and municipal law enforcement officers, is its watchdog and enforcement arm.

The Environmental Police Force was created because criminal judges needed the support of highly-specialized officers who could properly enforce the CLE. The duties of the Environmental Police include taking preventive measures to avoid environmental crimes; ex officio procedures, resulting from a formal claim or request from a judicial authority, to determine the events of a criminal investigation and confirm criminal actions; and to take alleged violators into custody.

#### Criminal and Administrative Sanctions; Civil Liability

Criminal sanctions for environmental damage may only be imposed by criminal judges upon conviction. The sanctions for individuals pursuant to the CLE are imprisonment, arrest, fines and community service. The sanctions for companies are fines and, depending on the degree of damage, temporary suspension of the activity that caused the damage. Moreover, depending upon the circumstances of the crime, criminal judges may also impose additional sanctions. For example, the convicted party may be required to publish the decision at its own expense; the permit or authorization granted to the convicted party may be temporarily suspended; the convicted party may be temporarily prohibited from entering into contracts with the public sector; and it may be ordered to destroy, neutralize or treat the substances, materials, manufactured instruments or objects, imported or sold that have caused health and environmental damages.

MARN may impose administrative sanctions, independent of the fact that the person responsible for the environmental damage may also be criminally sanctioned. In fact, MARN may impose temporary or permanent injunctions in order to prevent or reduce the harmful consequences of the sanctioned event, even at the beginning of an administrative procedure. The injunctions include taking control of the contaminating sources; temporary or permanent closure of plants or facilities;

temporary or permanent prohibition from performing the activity that gave rise to the contamination; modification or demolition of buildings; and any other measure intended to remedy and compensate for the damages caused. Within the latter measure, MARN has the power to demand that the liable party restore the affected area to its original state.

MARN authorizations to perform activities that may damage the environment set forth the parameters within which the contaminating activity is allowed. Therefore, damages caused during the performance of activities duly authorized by MARN do not constitute an infraction, provided that they have been performed within the parameters of the appropriate authorization. Additionally, because the authorizations constitute a license to the party responsible for the environmental damage they are a strong defense when facing criminal or administrative complaints arising from environmental damages.

Lastly, persons who cause environmental damages may be ordered to pay pecuniary damages to third parties, including the Republic. This responsibility is governed by general rules of civil liability and is applicable regardless of the fact that the events causing the environmental damages do not constitute a crime pursuant to the CLE.

#### Permits Required to Install and Operate Projects that Damage the Environment

Persons interested in developing programs or projects that imply the occupation of territory (Interested Parties) must submit a Document of Intent to MARN, who, in turn, has 30 consecutive days to establish the methodology applicable to the program or project. The methodology is established pursuant to the characteristics and potential effects of the program or project, and to the specific environmental conditions that will be affected. It may consist of preparing and submitting Environmental Impact Studies (EIS); Specific Environmental Assessments (SEA) or documents required for the assessment.

MARN will require an EIS for activities related to mining, hydrocarbon exploration or production, forestry, agro-industry, power generation, industry, transportation, waste disposal, development of tourism infrastructure or residential works, development of other infrastructure works and other activities that require an EIS pursuant to the Document of Intent's technical assessment.

MARN may order that an SEA be submitted for activities that do not call for an EIS, but are subject to environmental assessment pursuant to the analysis made of the relevant Document of Intent. If the programs or projects have minimum environmental impact and, therefore, do not require an EIS or an SEA, MARN will issue a resolution setting forth the documents that the Interested Party must submit in order to obtain the relevant approval or authorization. The EIS, SEA or specific documents must be submitted at the time of filing the application for approval or authorization to occupy the territory.

MARN should notify the Interested Party of the results of the analysis of the EIS, SEA or submitted documents within 60 continuous days from the date of the application for approval or authorization to occupy the territory. In its authorization or approval, MARN must determine the compatibility of the proposed activities with the area's physical, natural, social and economic potential and restrictions.

Once the authorization to occupy the territory has been granted, the Interested Parties must obtain an authorization to impact the respective renewable natural resource prior to starting their activities. To such end, all the documents set forth in the respective authorization or approval to occupy the territory must be filed with MARN.

The authorization to impact renewable natural resources will establish the conditions applicable to all of the stages of the program or project. For this purpose, the impact authorization must comply with all of the measures and conditions set forth in the authorization or approval to occupy the territory.

#### Permits Required to Carry Out Damaging Activities

In order to lawfully carry out activities that generate liquid discharges, atmospheric discharges and/or solid waste, certain registrations authorizations and/or permits must be granted by MARN. These registrations, authorizations and/or permits are governed by various decrees that constitute, supplementary regulations or technical regulations to the CLE.

### Liquid Discharges

Parties responsible for activities which generate liquid discharges into rivers, lakes (such as lakes Maracaibo and Valencia) and/or sewage networks, must adjust their discharges to comply with the quality parameters set forth in the technical regulations. Companies whose discharges are not adjusted to these parameters may request authorization to comply with a gradual adjustment process, defined in a MARN approved program. Granting of authorization for these cases is at MARN's discretion.

### Gases and Particle Emissions

Parties responsible for activities that emit gas and particles into the air must also obtain authorization from MARN. The air-quality limits for atmospheric contaminants are established by decree and vary depending on whether the emission of contaminants already exists, or if it constitutes a new activity.

### Solid Waste

A constitutional provision expressly prohibits entry of toxic and hazardous waste into the country, as well as the manufacture and use of nuclear, chemical and biological weapons. Additionally, the Constitution provides for a special law that to regulate the use, handling, transportation and storage of toxic and hazardous substances. In executing this constitutional provision, the Law of Substances, Materials and Hazardous Waste was enacted in February 2002. Among the principal activities regulated by this Law are operations involving the handling of hazardous substances, materials and waste, including their generation, use, gathering, storage, transportation, treatment and final disposal; and activities for production, formulas, imports, exports, distribution and marketing of pesticides for agricultural, industrial or domestic use. The Law sets forth that the Executive must issue the provisions that regulate these activities and that, in the meantime, the technical regulations issued through decrees and resolutions that are not inconsistent with the provisions of the law will remain in force. Since these provisions have not yet been issued, the technical regulations prior to the Law remain in force. Pursuant to these technical regulations, parties responsible for activities that generate or require handling of hazardous waste must be registered with MARN. This registration is considered a control mechanism that allows for information requests, assessments, inspections and samplings conducted by officials of both MARN and the Ministry of Health and Social Development.

### Noise Pollution

Parties responsible for creating noise must adjust it to the limits established by the applicable technical regulations. There are technical regulations for noise pollution produced by both fixed and mobile sources. MARN does not keep records of the responsible parties as in the case of other contaminating activities, but may conduct visits and inspections to verify compliance with the applicable technical regulations. MARN's authority does not include control over noise generated by commercial, domestic and social activities or by land transportation vehicles, as municipalities should issue their own ordinances on this matter; and noise generated by aircraft, as this is controlled by the Ministry of Infrastructure.

## **LABOR LAW**

Venezuelan labor legislation conceives of labor as a social concept and of labor regulations as a set of rules whose main purpose is the protection of workers in a dependent relationship. The rules also include employers' rights and prerogatives and, in certain aspects, protect independent workers who are defined as persons who customarily earn a living from work performed without being subordinate to one or more employers. Following is a general summary of this system.

### **PRIMARY ELEMENTS**

The Venezuelan labor system is made up of the following primary components: (i) a set of rules that regulate its principles (for example, protection or guardianship of workers, rights that may not be waived, territoriality, etc), the sources that gave

rise to labor rules (for example, the law, collective bargaining agreements), the parties who compose it (worker and employer), the most important rights of these parties (salaries and benefits, establishment and variations of certain labor conditions), and the distinction between various types of workers, and among employers' representatives, the labor intermediary, contractors and companies offering temporary work; (ii) a set of rules that regulate issues that may arise during the employment relationship (such as probationary periods, employee transfers and suspensions, inventions or improvements and employer successorships); (iii) a set of rules that regulate the reasons for termination of an employment relationship (for example, dismissal, retirement, mutual agreement, reasons beyond the control of the parties); (iv) a set of rules that regulate work conditions (for example, vacations, rest days and holidays, work days, health and safety); (v) a set of rules that regulate special labor systems or establish special protection for certain workers (protection for female workers, pregnant working women and new mothers, work by minors and apprentices, domestic workers, janitors, repairmen, rural workers, professional athletes, land, water and air transportation workers, messengers, actors, musicians, folklorists and other intellectual and cultural workers, and work performed by handicapped people); (v) a set of rules to regulate collective labor matters (such as collective bargaining agreements, collective conflicts, strikes, incorporation of unions, union federations and confederations); (vi) a set of rules to regulate work health and safety issues as well as the consequences and eventual liabilities of the employer in cases of work-related accidents and illnesses; and (vii) a set of rules to regulate the social security system's coverage for old age, disability, incapacity, health, maternity, labor risks, housing and other areas that the State considers should be covered by the system.

## **SOURCES OF LABOR REGULATIONS**

Pursuant to the Organic Labor Law (OLL), labor regulations may derive not only from the Constitution, laws and regulations, but also from collective bargaining agreements or arbitration awards, individual employment agreements, principles set forth in conventions or recommendations from the International Labor Organization, decisions on habits and customs, principles universally accepted by Labor Law, rules and general principles of Law, and equity.

## **PRINCIPLE OF PREFERENCE OF REALITY**

Pursuant to the Constitution and the Regulations to the OLL, and reiterated in decisions issued by the Labor Courts, reality of the facts prevails over form in the Venezuelan labor system. In this way, for example, if one person provides services under the subordination and control of another, and is unaware of the inherent risks and benefits, the labor judges, when hearing a claim from the service provider for payment of labor benefits, may consider that in reality he was a worker and, therefore, is entitled to payment of the pertinent labor benefits, regardless of whether a civil or commercial agreement had been signed which, for example, stipulated that he was an independent contractor.

## **PRINCIPLE OF NON RENOUNCEABILITY**

Pursuant to the Constitution, the OLL and its Regulations, labor rights may not be waived and any agreement or convention that diminishes them is null and void. Workers are, however, allowed to sign settlement agreements after the employment relationship has been terminated.

## **PRINCIPLE OF PROTECTION OR GUARDIANSHIP OF WORKERS**

Pursuant to the Constitution, the OLL and its Regulations, when there are doubts regarding the application of two or more rules or in the interpretation of a rule which is susceptible to diverse interpretations, the one that is most favorable to the worker will be applied.

## **PRINCIPAL LABOR BENEFITS**

Pursuant to the OLL, workers are entitled to a salary and the payment of profit sharing, vacations, vacation bonuses, seniority benefits, rest days and holidays, a surcharge for overtime or night work and indemnities in the event of unjustified dismissal. Pregnant working women are entitled to special protection and may not be dismissed during the pregnancy or

for a year after childbirth without a justified cause previously proven before the jurisdiction's Labor Inspector. Pregnant working women are also entitled to maternity leave (pre- and post-natal) as well as to nursing leaves.

### **EMPLOYEE SUSPENSION AND EMPLOYER SUCCESSORSHIP**

An employment relationship may be suspended for reasons which are generally not directly imputable to the worker or by mutual agreement between the worker and the employer. During the suspension, the worker is not obliged to provide services or the employer to pay a salary, unless otherwise agreed. During the suspension, the worker may not be dismissed without justification previously proven before the relevant jurisdiction's Labor Inspector. When an employer successorship occurs, in principle, the employment relationship continues and the new employer assumes the labor obligations which arose prior to the employer successorship. If the affected workers consider that the successorship is not in their best interest, they may retire from the company and claim payment of indemnity for unjustified dismissal. In this situation, the previous employer and the new employer shall be jointly and severally liable for the obligations which arose prior to the successorship for a maximum period of one year as of the date of the successorship or of its written notice to the workers (if this notice is subsequent to the successorship).

### **TERMINATION OF THE EMPLOYMENT RELATIONSHIP**

Employment relationships may terminate due to dismissal, retirement, mutual agreement or reasons beyond the control of either party. Dismissal may be justified or unjustified and retirement may be voluntary or forced .

### **INDUSTRIAL HEALTH AND SAFETY**

Both parties to employment relationships must promote a healthy and adequate work environment. This is, however, mainly the duty of employers. Employers must send written notice to their workers about the risks involved in the work and the mechanisms for the prevention of these risks. Failure to comply with the applicable rules may result in severe civil, administrative and even criminal liabilities and sanctions against the employer.

Under certain conditions, the employer and the worker must contribute economically to social security, the housing policy and the educational and worker training system developed by the State through the National Institute of Educational Cooperation ("INCE").

### **COLLECTIVE AFFAIRS**

Pursuant to the OLL, workers and employers are entitled to organize and incorporate unions. The workers may exercise their right to negotiate collective bargaining agreements and to resort to collective conflicts, including strikes.

### **LABOR PROCESS**

The Organic Procedural Labor Law ("OPLL") entered into effect on August 13, 2003. The new labor trial will be predominantly oral, governed by the principles of immediacy (the judge is present at the debate and the furnishing of evidence), concentration (the debate is carried out in one sole hearing, although it may be extended for several days) and speed of process (briefness of the trials), among others. The OPLL has certain particularities, such as the early presentation of evidence (before the debate between the parties is carried out) and intends to promote reconciliation by initial participation of a mediator judge (different from the judge who will decide on the trial) and encouraging the use of alternate means to resolve conflicts, such as arbitration.

Other innovations of the OPLL are the following: (i) extension of the judge's powers to weigh evidence and issue decisions. The judge may order payment of items other than those claimed-when these have been discussed and duly proven at the trial-and to order the payment of amounts greater than those claimed, provided that the worker's claims are for less than that which the worker is entitled to pursuant to the law and those that were alleged and proven in the process; (ii) establishment of the employer's responsibility for burden of proof regarding the reasons for dismissal of the worker as well

as payment of the obligations inherent to the labor relationship; and (iii) setting forth that when doubts arise “about the interpretation of the events or evidence” the judges will apply that which is in the best interest of the worker.

## **FUTURE REFORMS**

Due to the the new Constitution entering into effect, various reforms to the Venezuelan labor system are foreseen. Their scope is not yet fully clear, but will at least include: (i) the termination benefit system or indemnity due to the termination of an employment relationship; (ii) work hours; (iii) the maximum period workers have to claim payment of their termination benefits or indemnities; and (iv) social security. The reforms will probably include many other aspects. It is prudent, therefore, to remain vigilant and to follow up on any reforms that may occur in these areas.

## **IMMIGRATION LAWS AND PRACTICES**

Venezuelan immigration laws are an increasingly important consideration when planning an investment in the country. Contrary to international trends towards greater flexibility in the granting of visas and working permits as part of the globalization of modern business, legislation in Venezuela continues to set more stringent requirements for visas and to entrust the powers for granting visas with disparate governmental entities. The enforcement of immigration regulations and the imposition of sanctions provided for in the law is now a reality for companies and/or individuals who violate the law.

Despite the Government’s anti-privatization stance and protectionist measures, the exploitation and commercialization of Venezuela’s natural resources and the development of economically advantageous sectors such as oil and gas, telecommunications, agriculture and technology continues. The involvement of foreign companies is a key element in this, and most of these companies will need to transfer key technical and executive staff to Venezuela to work on a temporary basis.

The careful planning of employees’ transfer to Venezuela is a key element of a successful business venture in Venezuela. Strict adherence to Venezuelan immigration law will safeguard companies from sanctions or disqualification by the various governmental bodies which investors must deal with. Early legal advice is highly recommended in order to: (i) plan ahead the type of visa most appropriate for the applicant, (ii) review and prepare the documentation required for the appropriate visa, and (iii) ensure proper processing of the application

When it is necessary for an investor to transfer key personnel to Venezuela, including executives, there are a number of visas for consideration under Venezuelan Law. As a general rule, Venezuelan Consulates and the Office of Identification and Foreign Citizens (DIEX), under the Ministry of Internal Affairs and Justice, are the competent governmental authorities to process and approve visas. The Labor Ministry is also entrusted with the power to approve Temporary Working Visas, commonly known as TR-L.

### **TEMPORARY VISA AND TEMPORARY WORKING VISA (TR-L)**

Both visas grant the holder the right to a continued stay in the country for an extendable one-year term, renewable for the same term, and authorize the holder to work in Venezuela as well as to enter into and depart from Venezuelan without restrictions.

The requirements for granting a Temporary Working Visa are as follows:

- A passport valid for at least six months;
- A complete copy of the passport and each member of his or her family;
- Three photographs of the applicant and each member of his or her family;

- If accompanied by a spouse and children, proof of marital status and relationship of the applicant to each member of the family. (this means that the applicant must present his or her birth certificate and that of each member of his or her family, duly legalized or “apostilled” in accordance with The Hague Convention);
- If citizenship is not original, the applicant must file the document proving nationalization;
- Notarized employment contract or offer of employment describing the applicant’s future position, salary, and responsibilities. This contract must contain a repatriation clause that states that the company will cover the expenses for return of the employee and his or her family to his or her base country if the employee ceases to render services to the company;
- Copy of the corporate authorization issued by the employer in favor of the person who signed the employment contract or offer of employment, as well as the Venezuelan Identity Card or passport of such authorized person;
- Original of the employer’s last income tax return;
- A copy of the employer’s Articles of Incorporation/Bylaws;
- Original of solvency certificate of the employer issued by the National Social Welfare Institute, together with original receipts evidencing the payments made during the last three months;
- Original of solvency certificate of the employer issued by the National Institute of Educational Cooperation;
- Original of business license permit granted to the employer by the Municipality where such company operates its business; and
- Original of certificate of inscription of the employer in the nearest Employment Agency of the Labor Ministry.

In addition to the above and as a condition precedent to the granting of the Temporary Working Visa, the applicant must also obtain a labor authorization from the Labor Ministry. To obtain this authorization the applicant must submit the following to the Labor Ministry:

- Complete copy of the applicant’s passport;
- Professional certificate evidencing the academic qualifications of the employee, duly legalized before a Venezuelan Consulate or “apostilled” according to the Hague Convention;
- Curriculum vitae of the employee;
- Notarized authorization to carry out the procedure to obtain the visa; and
- Original of the most recent Declaration of Employment Form filed with the Labor Ministry;

The aforementioned list may be amended from time to time by the Venezuelan governmental authorities whenever they may deem convenient or necessary. The Labor Ministry will analyze the application and evaluate the need for a foreign worker taking into consideration the situation of the work force in Venezuela, the unemployment rate, and other factors. The more specialized and unique the qualifications and abilities of the worker, the more likely it is that the authorization will be granted.

After receipt of the Labor Ministry authorization, and once the visa application has been approved by DIEX, DIEX approval is sent in the form of a “radiogram” from the National Telecommunications Office to a Venezuelan Consulate in his or her base country as mentioned by the applicant in his or her application will issue the visa. The applicant must travel with his or her family to such Consulate in order to get their visa stamped in their passports. Each Venezuelan Consulate is autonomous in determining its own procedure to stamp the visa, as well as in terms of the documentation to be submitted

for said purposes. Generally, the employee and its family will be subject to medical examination at the Consulate; also a certification of police records, a certification of good behavior and a cash deposit may be required. The applicant will have six months to appear in the Consulate and have the visa stamped in his or her passport.

### **TEMPORARY BUSINESS VISA (TR-N)**

This visa is granted to foreign citizens traveling to Venezuela to conduct business or to take part in commercial, technical, advisory, scientific, or cultural activities. It is primarily designed for brief stays in the country and is valid for one year from the date of issue, renewable for the same term, entitling the holder to multiple entries during that term. However, under this type of visa the holder is limited to a maximum length of stay in the country of not more than six months. Venezuelan Consulates are authorized to grant this visa, based on the following documents:

- A passport valid for at least six months from the date of issue;
- Application for the visa stating the purpose of the visit. In the event that his or her services are to be provided to a company, the applicant must also submit evidence that the company will be responsible for the applicant's expenses during the visit and provide the corresponding corporate address and contact information;
- A certificate of commercial registration or equivalent documents of the company to which the services will be provided; and
- A letter from the Commercial Bureau or Association of the corresponding industry of the company responsible for the applicant's expenses during the visit. This document may be waived by the Consulate.

### **OTHER WORKING VISAS**

There are other types of working visas which are not commonly used but which are worth noting in this article. These are:

- The Temporary Visa for Entrepreneurs and Industrialists (TR E-I). This visa is granted to persons who can demonstrate their interest in companies or industries located in the place of his or her domicile and which have affiliates in Venezuela. This visa is valid for two years with a maximum length of stay of four months;
- Temporary Visa for Investors (TR-I). This visa is granted to individuals or company representatives who have established business in Venezuela and an investment in Venezuela recognized and registered by the competent foreign investment authority such as the Superintendent of Foreign Investments. This visa is valid for three years with no limitations on the length of stay;
- Temporary Visa for Persons of Independent Means (TR-RE). This visa is granted to individuals who can demonstrate that they receive a monthly income from abroad equivalent to US\$1,200. This visa is valid for one year with no limitations on the length of stay.

### **OTHER VISAS**

Finally, Venezuelan law also contains provisions to regulate non-working visas such as tourist visas, student visas, religious visas for ministers and priests, and visas in accordance with bilateral or multilateral commercial treaties.

In recent years, the Government (via DIEX) has permitted tourist visas to be exchanged for temporary working visas through a procedure referred to as a "Change of Visa." This procedure, however, has now been suspended and it is uncertain when it will be reinstated.

## **COMPETITION REGULATION**

Because any agreement, understanding, act or conduct which violates the Law to Promote and Protect the Free Exercise of Competition (Competition Law) is void and unenforceable, potential entrants to Venezuelan markets should carefully consider the way the rules set forth in the Competition Law will affect and sometimes limit their business decisions.

The Competition Law became effective on January 13, 1992. To a very large extent, the Venezuelan Competition Law was modeled upon Articles 81 and 82 of the Treaty of Rome and the body of rules subsequently developed that comprise the competition law of the European Union (EU). For this reason, subject to certain caveats, EU competition law may be looked to as a primary source of precedent for the application and interpretation of the Venezuelan Competition Law. However, the singular characteristics of the Venezuelan market, and the differences in legal method as applied in Europe and Venezuela must always be taken into account. To a much lesser extent than European law, elements of United States antitrust laws were also reflected in Venezuelan competition legislation, and may, therefore, serve as a guide to the development of Venezuelan rules on the subject.

The Competition Law is intended to create an environment where free competition may prosper and abusive practices are eliminated. As in other countries which have adopted an approach based on the EU's competition law, the underlying purpose is to create efficiency of allocation, reduce costs for the benefit of consumers and promote innovation and technological development. For this reason, the Competition Law gives the Antitrust Agency authority to exempt certain agreements or practices which *prima facie* are uncompetitive when applying the prohibitions set forth in the Competition Law.

### Scope of Application

The Competition Law applies to persons or groups of persons conducting economic activities within Venezuela. It expressly provides, however, that it is subordinated to the Andean Pact competition rules (i.e., Decision No 285) in those cases where the activity in question has the effect of restraining trade in the Andean sub-regional market, which includes Venezuela. The possibility for ambiguity inherent in the application of this hierarchy is certain to cause conflict, particularly in cases where the offending agreement is made in another Andean Pact country (Colombia, Peru, Ecuador or Bolivia) and the offending conduct occurs within Venezuela or vice-versa. The fact that Decision No 285, by its own terms, is inapplicable to conduct which only affects the market of one signatory country does not provide a total solution to this dilemma. Unfortunately, to date, it is not clear how the Antitrust Agency, and subsequently the Venezuelan courts, will apply the Competition Law and the competition rules of the Andean sub-regional market in cases where the conduct in restraint of trade extends beyond the boundaries of Venezuela to affect other Andean Pact members.

So long as the economic activity occurs within Venezuela, the Competition Law makes no distinction as to the nature or characteristics of the person or enterprise subject to its jurisdiction. Thus, the domicile, residence, nationality or place of incorporation are all irrelevant to the application of the law, as is the type of business and whether it is non-profit or in the private or public sector. Provided that the person, whether an individual or a *de jure* or *de facto* entity, has the capacity to have legal rights and assume legal duties, they will be subject to the Competition Law.

### Substantive Rules

The substantive rules of the Competition Law are divided into three principal categories: certain activities in restraint of trade; abuse of a dominant market position; and unfair competition.

### The Omnibus Provision

The Competition Law contains an omnibus provision covering, in broad terms, both restraint of trade and the abuse of a dominant position, as well as particular provisions considering specific violations under both categories. The omnibus provision prohibits conduct, practices, agreements, covenants, contracts or decisions which prevent, restrict, distort or limit free competition.

The omnibus provision prohibits the three following distinct types of behavior:

#### *Agreements*

Agreements are determined by reference to the Venezuelan law of contracts, and result from a mutual and binding commitment made either orally or in writing, between two or more parties. The contractual arrangements for these purposes may be either horizontal or vertical.

#### *Decisions*

This is not a term of art under Venezuelan law. By reference to its European model, this term is intended to refer to the rules of a trade association or decisions adopted under those rules.

#### *Conduct or practice*

This appears to consider unilateral, as well as bilateral or multilateral conduct. Where the conduct or practice relates to two or more parties, the behavior must involve concerted efforts, a concept which has no counterpart in Venezuelan law. By reference to the EU model, concerted effort in this sense means interdependent and co-operative activity falling short of contract. The evidential burden in this case is severe because, other than broad subpoena powers vested by the Competition Law in the Antitrust Agency, there are no discovery procedures in Venezuelan litigation. Experience has shown that the Antitrust Agency has relied heavily upon assumptions and inferences drawn from objective conduct to find that parties have engaged in concerted practices in restraint of trade.

Any behavior which falls within the broad sweep of the omnibus provision is penalized, even if the behavior in question is not specifically included under a particular provision. The language of the omnibus provision would seem to prohibit behavior which has the effect of restraining trade without regard to intent and does not appear to punish behavior which has the intent of restraining trade without accomplishing the result. This is in contrast with the language of some of the specific prohibitions under which intent alone is sufficient. The Antitrust Agency has used this contrast to take the position that certain conduct is illegal per se. Consequently, it has limited its investigations to determining if the challenged behavior falls within the factual situation considered in the specific prohibition, refusing to analyze if the behavior has, in practice, actually affected free competition.

It appears that the Antitrust Agency's position is related to the oligopolistic structure of almost all Venezuelan markets. This greatly complicates proving that particular behavior actually results in the prevention, restriction, distortion or limitation of competition. However, if the test is made by reference to the effect of a specific behavior on the absolute freedom of choice of a businessman under workable competitive conditions, then virtually any restriction will amount to a violation unless a rule of reason is adopted. A strict interpretation of the Competition Law in most cases would lead to impractical or even counterproductive results. For this reason, the Antitrust Agency must consider if specific behavior is actually injurious or if its benefits outweigh its disadvantages. In this regard, Regulation No 1, which specifically states that the conduct and practices set forth in the specific prohibitions of the Competition Law must prevent, restrict, distort or limit free competition in order to constitute a violation of the law provides the basis for the application of a rule of reason.

#### Specific Violations

Most of the specific violations relate to restraint of trade and are based upon comparative law models, but there are also several purely Venezuelan innovations. The types of behavior which the Competition Law treats as uncompetitive based upon foreign law models are the following:

#### *Predatory practices*

Predatory practices consist of acts or conduct intended to prevent or inhibit entry or permanence in a given market. The acts or conduct may be unilateral or the result of a concerted effort. Conduct based upon a legally protected right, such as a patent or trademark, even if inhibiting or preventing market entry, is excluded.

### *Collective Restraints*

Collective restraints consist of agreements or covenants made directly or through unions, associations, federations, cooperatives or other similar groups or shareholders or partnerships' resolutions or decisions, restricting or preventing competition among members.

### *Agreements, collective decisions or recommendations and concerted practices*

Agreements, collective decisions or recommendations, and concerted practices which:

- directly or indirectly fix purchase or selling prices, or other trading conditions;
- limit production, distribution, technical development or investment;
- share markets, territories or sources of supply (such as exclusive dealing agreements);
- apply dissimilar conditions to equivalent transactions with different trading parties, thereby placing some at a competitive disadvantage; and
- include tying arrangements making the closing of contracts subject to the acceptance of additional obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The experience available indicates that some activities are more likely to invite scrutiny by the Antitrust Agency and possibly result in liability. Agreements among competitors regarding prices or other trading conditions have been considered illegal per se by the Antitrust Agency. On the other hand, where the relationship between the parties is vertical (as in the case of manufacturer-distributor), the Antitrust Agency has applied a rule of reason analysis and examined their specific effects on a particular market or the business justification for the restriction.

In addition, the Competition Law proscribes the following types of behavior which are not found expressly in foreign legislation:

### *Inciting Anti-competitive Conduct*

Inciting anti-competitive conduct consists of any act intended to induce third parties to refuse delivery or inhibit the acquisition of goods or services, or to refuse to sell raw materials or supplies or render services to others, all for the purpose of restraining trade.

### *Market Manipulation*

Market manipulation consists of conduct tending to manipulate factors of production, distribution, technological development or investment in restraint of trade.

The ambiguity of these two provisions, combined with the absence of precedents in foreign law, makes proper application difficult.

### Acquisitions, Mergers and Joint Ventures

The Competition Law prohibits any act resulting in an economic concentration which has the effect of restraining trade or creating a dominant market position. The actual legal form of the economic concentration, including a simple joint venture agreement, is irrelevant. The resulting economic concentration may be either horizontal or vertical.

Regulation No 2 of the Antitrust Law establishes the procedures for evaluating and controlling economic concentrations by the Antitrust Agency, indicating that they were to establish guidelines for this evaluation and control. The Antitrust Agency issued these Guidelines on June 9, 1999. Regulation No 2 also allows the Antitrust Agency to establish a threshold for control of economic concentrations. The threshold was established by Resolution No 14-96 at 120,000 tax units. Because this threshold is quite low, the Antitrust Agency has the power to control a significant number of economic concentrations.

### Abuse of Dominant Position

The Competition Law prohibits the abuse of a dominant market position by one or more persons or entities. The abuse can take a number of forms, but the law is directed at curbing the following in particular:

- the imposition of discriminatory purchase or selling prices or trading conditions
- the limiting, without justification, of production, distribution or technical development, thereby prejudicing enterprises and consumers
- unjustifiable refusal to satisfy demand for products or services
- the application of dissimilar conditions to equivalent transactions with different parties, thereby placing some at a competitive disadvantage
- the conditioning of contracts with additional obligations that, by their nature or according to commercial usage, have no connection with the subject of said contracts

The particular cases, however, are not exhaustive, and, unlike the related examples of restraint of trade, some of the particular cases expressly provide for examination under the light of the rule of reason.

A dominant position by related persons is deemed to exist where a single person or group is the sole provider of goods or services within a particular market, or where, despite a multiplicity of persons conducting the activity in that market, there is no effective competition.

The holding of a dominant market position does not in itself constitute a violation. In order for the dominant position to constitute a violation, it must be coupled with a specific abuse that, in substance, requires injurious conduct which could not have occurred if there were effective competition in the market concerned.

### Exemptions

Certain limited categories of activities are exempted from the application of the Competition Law. The conditions for granting exemption are patterned wholly on Article 81(3) of the Treaty of Rome. The Competition Law allows exemptions in relation to a limited number of activities. These are:

- the direct or indirect fixing of purchase or selling prices;
- discriminatory trading practices; and
- distributor or agency agreements with exclusive territorial limitations or restrictions relating to product representation.

The principal condition set forth in this enabling provision is that the exemptions must result in an improvement in the production or distribution of goods or services, promote technical innovation, or create advantages for consumers.

Regulation No. 1 of the Competition Law, among other things, provides certain rules relating to exemptions. Thus, the Antitrust Agency is prohibited from granting exemptions for agreements, decisions, collective recommendations or concerted practices among competitors to:

- fix prices or other trading conditions;
- set quotas or production levels;
- induce third parties to refuse delivery of goods or services;

- participate in bidding procedures; and
- share markets, territories or sources of supply.

Additionally, the Antitrust Agency may not grant exemptions allowing the abuse of a dominant position.

To date, the Antitrust Agency has issued two global exemptions. The first global exemption, Resolution No. 4-93, became effective on July 1, 1993 and applies to collective restraints on trade arising from the fixing of prices and trading conditions of agricultural products by cooperatives and other associations of agricultural producers. The second global exemption became effective on September 21, 1995 pursuant to Resolution No 36-95. This Resolution grants a block exemption for certain categories of exclusive distribution and exclusive purchase agreements executed for periods of five years or less. For the purpose of this exemption, exclusive distribution agreements are agreements between a supplier and distributor in which the supplier agrees to supply and sell certain products for resale within a defined territory exclusively to the distributor. Exclusive purchase agreements are agreements between a supplier and distributor in which the distributor agrees to buy certain products for resale exclusively from the provider.

Resolution No 36-95 was modeled after Regulations 1983/83 (concerning exclusive distribution agreements) and 1984/83 (concerning exclusive purchase agreements) issued by the Commission of European Communities. Therefore, the foregoing Regulations, and the Guidelines issued by the Commission in connection with the Regulations, will most certainly influence the Antitrust Agency when reviewing exclusive distribution and exclusive purchase agreements to be performed in Venezuela. The Antitrust Agency may authorize, on an individual basis, exclusive distribution and exclusive purchase agreements that fail to meet the tests for block exemption set forth in Resolution No 36-95.

Although the Antitrust Agency has not issued a global exemption in respect to franchise agreements, on July 9, 1999 it issued guidelines for the evaluation of franchise agreements. Pursuant to these guidelines, franchise agreements that are in line with the spirit of the guidelines will not be deemed to violate Article 10 of the Pro-Competition Law, even though they may contain one or more of the restraints of trade described therein.

#### Unfair Competition

Article 17 of the Competition Law prohibits the development of marketing policies which tend to eliminate competitors through disloyal competition, specifically the following:

- Misleading or false advertising intended to prevent or limit free competition
- Promotion of products and services based on false statements concerning the disadvantages or risks of any other product or service from the competitors
- Commercial bribery, violation of industrial secrets, and simulation of products.

Article 17 has been subject to a considerable number of decisions rendered by the Antitrust Agency. Following these decisions, an Article 17 violation will have occurred if an unfair conduct described therein has occurred; such unfair conduct produces an actual or potential damage to the relevant market; a cause-effect relationship between the unfair conduct and the damage is demonstrated; and the offending party has the power to affect the market through the unfair conduct.

#### Penalties and Private Right of Action

Conduct in restraint of trade, abuse of a dominant market position and unfair competition may be penalized by the Antitrust Agency with fines of up to 20% of sales during the fiscal year prior to the Antitrust Agency's decision. The penalty may be doubled in the event of recurring offenses.

Any party affected by a violation of the law is granted a civil cause of action to recover damages suffered as a result of the violation. Except in the case of unfair competition violations, a civil claim for damages may only be brought after the

Antitrust Agency has determined that a violation has occurred. Parties affected by unfair competition may file civil claims for damages without resorting to the Antitrust Agency. If, however, the affected party chooses to file an administrative claim with the Antitrust Agency, such party may only file a civil claim for damages after the Antitrust Agency has determined that a violation of Article 17 has occurred.

## **DISPUTE RESOLUTION**

The Constitution of the Bolivarian Republic of Venezuela establishes that the power to administer justice arises from the citizens and is exercised through the System of Justice, formed by, among others, the Supreme Court, other courts provided by the law, alternative means of justice (arbitration and mediation), auxiliaries participating in the administration of justice and lawyers authorized to practice law in the country.

Furthermore, the Constitution establishes that justice must be free, accessible, impartial, suitable, transparent, autonomous, responsible, equitable and expeditious, without undue delay, and without undue bureaucracy, with the right to due process and the right to defense being inviolable principles in all stages of the process.

The Constitution also guarantees the right of all people to be protected by the courts in the enjoyment and exercise of constitutional rights; in the event of violation of these rights, the constitutional relief procedure has been established. This procedure is oral, public, brief, free and without undue bureaucracy. In these cases, the competent authority is empowered to reestablish a violated juridical situation. Thus, if during the course of a lawsuit a constitutional right is violated, the injured party may resort to another judge to order the judge hearing the case to reestablish the violated constitutional right.

### **Public Treaties**

Venezuela has signed the following treaties in the area of dispute resolution. It is important to mention that public treaties have priority over laws of the Republic.

- The Code on International Private Law (*Bustamante Code*) (Cuba).
- The Protocol on Uniformity of Powers of Attorney which are to be Utilized Abroad (Washington Protocol).
- The Inter-American Convention on the Legal Regime of Powers of Attorney to be Used Abroad (Panama).
- The Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards. (Uruguay Convention).
- The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).
- The Convention on the Settlement of Investment Disputes between States and Nationals of other States (Washington Convention).
- The Inter-American Convention on International Commercial Arbitration (Panama Convention).
- The Inter-American Convention on Letters Rogatory (Panama).
- The Inter-American Convention on the Taking of Evidence Abroad (Panama).
- The Inter-American Convention on Proof and Information on Foreign Law (Uruguay).
- The Inter-American Convention on Conflicts of Law Concerning Commercial Companies (Uruguay).

### Commercial Dispute Resolution Procedure

The procedure for commercial dispute resolution in Venezuela is governed by the Code of Civil Procedure along with some special rules in the Commercial Code. It is a written procedure in which the judge must rely only on what was alleged and proved in the court proceedings.

The court hierarchy for dispute resolutions begins with Commercial Courts, which are trial courts that hear the cases, followed by Superior Courts of the commercial jurisdiction, which are appellate courts, and finally the Supreme Court of Justice, the highest court of the Republic, which is divided into six divisions: Civil, Criminal, Social, Political-Administrative, Constitutional and Electoral. Judges are not required to follow judicial precedents (case law). Therefore, decisions of a judge in a particular lawsuit only affect the parties of that lawsuit and are not applicable in the resolution of other similar cases. The one exception to this is that the case law of the Constitutional Division of the Supreme Court can be binding.

Commercial lawsuits are tried in two instances, trial and appeal. In lawsuits exceeding five million bolivars, the decisions of the superior court judges (second instance) may be appealed before the Supreme Court, but only when the superior court judge, in his decision, has failed to apply or has misinterpreted a legal rule or when the form of the procedure has been violated. In these cases, the Supreme Court may void the decision of the superior court judge and order that another superior court judge issue a new judgment. The Supreme Court does not hear the merits of the action (although there may be some exceptions).

### Enforcement of Foreign Judgments

Judgments of foreign courts can only be enforced in Venezuela after obtaining the corresponding exequatur from the Supreme Court. The Supreme Court may deny the exequatur in the event the judgment deprived Venezuelan courts of jurisdiction or when any of the reasons to deny it provided for in the Code of Civil Procedure are present, for instance, if such judgment is contrary to Venezuelan public policy, if process was not served on the defendant or if the defendant's right to defense was not guaranteed.

### Court Costs

Pursuant to the Constitution, justice is free. Therefore, there are no direct court costs. However, losing parties are sentenced to reimburse lawyers' fees and expenses for an amount that may not exceed 30% of the amount involved in the litigation.

### Arbitration

Pursuant to the Constitution, arbitration is one of the alternative means for resolving conflicts allowed by the Venezuelan justice system. Commercial Arbitration is ruled by the Commercial Arbitration Law and may be institutional or independent. Institutional arbitration is carried out before or through an arbitration center with its own regulations while in independent arbitration there is no intervention by an arbitration center.

Additionally, arbitration may be at law or in equity and the place of arbitration may be chosen by the parties. If arbitration at law is carried out in Venezuela, the arbiters must be Venezuelan lawyers.

Among the more experienced and prestigious arbitration centers of Venezuela are the Arbitration Center of the Caracas Chamber of Commerce and the Arbitration Center of the Venezuelan-American Chamber of Commerce.

### Enforcement of Foreign Arbitral Awards

Foreign arbitral awards are enforceable in Venezuela without need for an exequatur. Enforcement may only be denied for the reasons provided for in Article 49 of the Commercial Arbitration Law, for instance, if they are contrary to Venezuelan public policy, if the parties have not been notified of the appointment of the arbitrators or if the parties right to defense has not been guaranteed.

### Product Liability

Despite the fact that there are no special regulations on product liability in Venezuela, the possibility exists of filing claims for damages against manufacturers under extra-contractual civil liability for an illegal event or under contractual civil liability derived from the sale of damaged goods. It is also possible to institute a criminal action when a person suffers damages caused by a manufacturing defect. Furthermore, the Law for the Protection of Consumers contains rules whose infringement may give rise to administrative liability.

## CRIMINAL LAW

### CRIMINAL SYSTEM

The Venezuelan system of criminal law is based upon the European code system, which has been evolving since the beginning of the independent republic of Spain. The characteristics of Venezuelan legislation are unique and vary according to the nature of the proscribed criminal conduct.

Besides the Criminal Code, Venezuela has many other criminal laws (67 in total.) The most important of these are the Criminal Law of the Environment, the Foreign Exchange System Law, the criminal provisions for money laundering in the Organic Law on Stupeficient and Psychotropic Substances, and the criminal provisions in the Organic Tax Code, the Banking Law and the Consumer and User Protection Law. Additionally, Venezuela recently approved the Informatics Crimes Law, the Rome Statute of the International Criminal Court, the United Nations Convention against Transnational Organized Crime and its Protocols, and the International Convention for the Suppression of the Financing of Terrorism.

The basic procedures for criminal actions are set forth in the Constitution of the Bolivarian Republic of Venezuela, International Treaties on Human Rights and the Code of Criminal Procedure.

***Criminal Law of the Environment.*** The criminal provisions of this law may be generally classified as rules that protect the air, land and water. This legislation is also closely related to the Law for the Protection of Wildlife. Jointly, the provisions of these laws aim at a balance between environmental preservation and economic development.

The Criminal Law of the Environment contains technical rules within its framework that define the acceptable levels of contamination. These rules, however, are not yet in effect.

***Foreign Exchange System Law.*** This administrative law contains criminal sanctions for violations of exchange control rules.

***Bank Crimes.*** The General Law of Banks and other Financial Institutions provides criminal sanctions for certain economic crimes, like unlicensed conduct of banking business, fraudulent approval of unlawful loans, misappropriation of funds, forgery or false documentation, presentation of false information, publication of fraudulent balance sheets, fraudulent certification of the existence or value of mortgaged realty, fraudulent offers of securities, fraudulent representations to the Superintendent of Banks.

***Money Laundering.*** The Organic Law on Stupeficient and Psychotropic Substances considers the crime of money laundering an offense different from other crimes relating to unlawful drug trafficking. The law formulates a series of preventive rules to keep companies from handling laundered funds.

***Consumer Protection.*** In addition to the administrative rules set out in the Consumer and User Protection Law, the statute contains criminal sanctions for the following prohibited conduct: hoarding, speculation, usury, false information, import or sale of items deemed deleterious to health, unlawful export of essential goods, alteration of goods or services, destruction of goods and use of confidential information.

## CRIMINAL PROCEEDINGS

The structure of Venezuela's criminal procedure is also based on the code system. It is accusatory, oral and public, following the German model, but with indigenous adjustments that include international standards. The criminal procedure is based on the presumption of innocence and an open trial. The Constitution of the Bolivarian Republic of Venezuela and International Treaties on human rights issues are directly applied in matters of procedural guarantees, as well as matters concerning the rights and principles of the victims and the accused, under equal terms.

In the same way, Venezuela has approved various International Treaties that have substantially modified and modernized its criminal law, the most important of which is the Rome Statute of the International Criminal Court. By adopting the crimes provided for within this statute in internal legislation individuals who act in, are accomplices to or aid and abet such events may be held criminally liable.

Additionally, Venezuela has ratified the International Convention for the Suppression of the Financing of Terrorism and the United Nations Convention against Transnational Organized Crime and its Protocols, which are the Protocol against the Smuggling of Migrants and the Protocol against Trafficking in Persons (a third Protocol, dealing with the illicit manufacturing of and trafficking in firearms, parts and components, and ammunition, remains under discussion.)

*Habeas Corpus*, sanctioned in the Constitution of 1961, confirmed in the new Constitution of 1999, and developed in the Organic Law on Constitutional Rights and Guaranties, serves the purpose of guaranteeing fundamental human rights vis-à-vis arbitrary arrests.

## PRIVATIZATION

For the past three years no significant steps have been taken to advance the privatization process in the country. During the first quarter of 2001, Corporación Venezolana de Guayana (CVG), the official agency responsible for the development of the Guayana region, carried out an international bid process to select a private partner for its subsidiary Bauxilum, which is engaged in the mining of bauxite and production of aluminum oxide. Pechiney, the company that was awarded the bid, is currently providing technical assistance to increase aluminum oxide production to at least 2 million metric tons per year and to reduce the environmental impact of Bauxilum's activities.

Although the intention to privatize certain companies in the electricity sector (ENELVEN in the State of Zulia and SEMDA in the State of Monagas) was announced and the Electrical Services Law was put into force in order to promote private investment in the electrical sector, no steps have yet been taken to indicate that these projects will be carried out in the near future.

From a legal point of view, the only significant change has been the entering into force of the Law for the Transformation of the Fondo de Inversiones de Venezuela into the Banco de Desarrollo Económico y Social de Venezuela ("BANDES"), published in Official Gazette No. 37.228 dated June 27, 2001, which sets forth that the functions assigned by the Privatization Law of 1997 to the Fondo de Inversiones de Venezuela will be assumed by BANDES ([www.bandes.gov.ve](http://www.bandes.gov.ve)).

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