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Venezuela: A Perspective on Risk Analysis

By Jaime Martínez Estévez

When evaluating a proposed investment, an assessment of the associated risks is undertaken. Although the array of risks varies depending on the investment, there are some categories customarily included. The names and components of some of these risks may change, depending on the classification used. They may be referred to using broader or more specific listings, such as political risks and commercial risks; economic risks, financial risks and operational risks; expropriation, nationalization, convertibility and transferability risks; credit, market, interest rate and currency risks; environmental and social risks. To a large extent, there is a legal perspective to all those risks, in as much as the legal framework may define or condition their occurrence and consequences. An inadequate understanding of the legal elements of the risk may result in distortions and mistakes in their assessment and the computation of the

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Argentina: Privatized Public Utilities and International Arbitration

By Fabiana Zonis

Argentina, as many Latin American countries, adhered to the Washington Consensus, consisting of a set of policies designed in order to promote economic growth in the developing world. These policies called for free trade, fiscal austerity, and reduced government intervention in the economy. Consequently, and to reverse decades of political instability and economic decline, Argentina adopted programs of structural economic reforms which have included deregulation, privatization of state-owned enterprises and trade liberalization. This process in Argentina was accompanied by a greater opening to foreign investment.

As an integral part of these new policies, in the early 1990s Argentina signed numerous Bilateral Treaties for the Promotion and Reciprocal Protection of Foreign Investment—known as Bilateral Investment Treaties (BITs)—with several countries, receiving at the same time significant foreign investments.

Background

BITs have been conceived basically as the legal framework within the scope of the investment climate of a country, in order to give protection to the private property invested, and to offer to the investor the minimum guarantees necessary to perform the economic activity that encouraged the investment. The economic basis of BITs is to confer upon investors trustworthy protection through a legal tool that cannot be modified unilaterally by a capital-importing country.

BITs grant to the investor a series of substantive guarantees and minimum procedures that are clearly identifiable. Likewise, subscription to these international instruments is a requirement for the

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corresponding discount factors for the investment decision. On the other hand, there may be opportunities and means to work within the relevant legal framework to reduce some of the uncertainties. Legal structures and agreements could be used to improve the levels of predictability for a desired investment. They may allow for possible further fine tuning that may cause a favorable decision, including an award in a bidding process.

Legal Perspective of the Risks

The financial angle of the risk issue is that an investment is made based on some expected returns, adjusted based on the corresponding risks. The legal angle will be that a contract is entered into in consideration of the covenants and agreements of the other party, where one expects to get what was bargained. The outcome of the contract may differ from what was expected due to political risks (nationalization, expropriation, exchange controls or other governmental decisions) or commercial risks (market changes, exchange rate fluctuations or financial difficulties of the counterparty). The contract outcome, the actual extent of the rights and obligations, that is the benefits and costs, may also differ from what a party expected because of changes in the construction, interpretation, performance or enforcement thereof. A misunderstanding of the actual extent of the rights and obligations under a contract, which will cover the comprehension of the performance and enforcement possible difficulties, may cause erroneous amounts of expected costs or returns. A generalization of some of the risks associated with the legal aspects of the transaction may produce false assessments.

The legal framework sets the parameters for some of the risks. The likelihood of a nationalization, expropriation, exchange control and government interference, as well as the reorganization or liquidation of a counterparty or the resizing of rights and obligations under a contract by way of relief, will vary depending on whether the applicable legal system contemplate any such possible action and what the conditions, procedures and effects thereof. The legal system is a dynamic subject and, consequently, it must be analyzed considering its fundamentals and taking into account its possible evolution.

A continued surveillance of the legal environment allows the possibility of early adjustments to mitigate risks or at least permits one not to be taken unawares with respect to forthcoming changes in elements that were taken into consideration when measuring the risks. Furthermore, the ongoing analysis of the legal environment may also help in identifying business opportunities that may improve the expected returns. A proper understanding of the relevant legal systems and local culture will be key to an adequate appraisal of the transaction.

A significant portion of the legal framework will depend on the particularities of the corresponding structure and agreements. The selection of the applicable law and the submission to particular jurisdictions or dispute settlement procedures and the form and content of the covenants and agreements of the transaction documents will be determinative of the legal system and the predictability of the performance scenarios.

The Venezuelan Legal System

The Venezuelan legal system could be qualified as a harmonious and stable system, if seen from the perspective of the statutory law. However, when considering the interpretation and application of the law by governmental authorities and the courts, the evaluation does not produce such a positive result.

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The harmony and stability of the Venezuelan legal system stems from its long period in which codes and a network of international conventions, agreements and treaties have been in effect.

Venezuelan law is built around the Civil Code (last amended in 1983 and with strong similarities to the 1865 Italian Civil Code), the Commercial Code (last amended in 1955 and strongly influenced by the 1882 Italian Commercial Code), the Penal Code (last amended in 1964 and similar to the Italian Code of 1890) and the Civil Procedure Code (last significantly amended in 1985).[1] These Codes are the core of Venezuelan law and have been supplemented and partially superseded by statutes directed at regulating specific matters.

In the past decade the Venezuelan legal system has undergone substantial changes in a movement towards international integration. Venezuela has signed and ratified myriad international conventions and treaties. In combination with these higher-ranking sources of law, further adjusting legislation has been enacted. Examples of this are Venezuela's becoming a member of GATT and later subscribing to the Marrakech Agreement, giving rise to the subsequent enactment of antidumping, customs and safeguards legislation; ratifying the Inter-American Convention on the General Rules of International Private Law[2] and later enacting the International Private Law Act;[3] ratifying the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards and thereafter approving the Commercial Arbitration Act;[4] and, entering into treaties to avoid double taxation, which resulted in changes in the year 2000 of the tax law, providing for a global taxation system. The obligations and commitments arising from all these conventions and treaties tend to further stabilize the local legal system, given that a departure therefrom could entail grave complications.

Despite the numerous legislative changes made during the last five years, the concerns regarding lack of legal predictability are to be focused on the interpretation and administration of the statutes rather than in the amendment thereof. In the recent past, motivated by political reasons advanced by the current President, there has been a revision of some legal structures. A new Constitution was enacted in 1999 and thereafter new statutes issued on insurance, maritime commerce, land ownership, consumer protection, citizenship, telecommunications, electricity, gas, civil aviation, expropriation, public debt and public bidding, among others. Laws governing important institutions have also been revised, including the Central Bank, the Attorney General and the Supreme Court. Notwithstanding the obvious queries that the broad range of the changes justify, the new legislation has not significantly deviated from the general guidelines included in the superseded statutes, except when acknowledging variations that were demanded by modernity and had already been assimilated by the international commercial practice.

Mitigating Factors

Legal risks may be attenuated or restricted by proper structuring, negotiation and documentation of the project. Since the majority of problems related to the legal aspects of a project come from the interpretation and enforcement of the contracts and applicable laws, the corresponding risks may be diminished by structuring the transactions and drafting the agreements in a manner that is less prone to discussion or argument. The Venezuelan legal system provides flexibility by recognizing freedom of contract, including the possibility of selecting foreign governing law, submitting to foreign jurisdictions and of submitting disputes to international or domestic arbitration.

To reduce the associated legal risks, the structuring of the transactions must be made based on the specifics of the project and the participants, and it should include features that will induce voluntary performance, sanctions to deter breaches and flexibility to adjust to new circumstances.

As in any international transaction, negotiation of a project connected to Venezuela must take into account the peculiarities of the counterparty, evaluating the local and corporate cultural aspects, and include detailed discussions of all foreseeable events, using multiple scenarios and addressing issues that may otherwise run the risk of being left out because of their apparent obviousness. Along these lines, when documenting the transactions, it is advisable to make a special effort to have the documents being clear and specific, not relying unnecessarily on principles of law or common practice, that is, not taking basic matters for granted.

The possibility of using a vehicle from a foreign jurisdiction must be explored in an effort to benefit from existing investment or tax treaties. Venezuela has signed income tax and investment treaties with,

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[1] http://www.natlaw.com/venez/primary/primary.htm

[2] http://www.oas.org/juridico/english/treaties/b-45.htm

[3] *Ley de Derecho Internacional Privado*, http://www.natlaw.com/venez/topical/ga/stvega/stvega13.htm

[4] *Ley de Arbitraje Comercial*, http://www.natlaw.com/venez/topical/ad/stvead/stvead1.pdf

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among others, the Netherlands, France, Belgium, Sweden, the United Kingdom, Switzerland and Canada.[5]

The possibility of submitting one or more of the contracts to a foreign governing law should also be studied. If in doubt as to the possible changes of Venezuelan law, the parties may agree that their contract be governed by the law of a foreign jurisdiction and such selection will be valid except with respect to assets located in Venezuela and public policy matters. With the governing law being Venezuelan law or a foreign law, the parties may, except for few public policy restrictions, submit their disputes to the jurisdiction of a foreign court or arbitration, whether administered by a local body (there are several privately run arbitration centers in Venezuela) or an international entity. Agreements to lock the applicable tax rates could also be considered. Problems of enforcement and remedies may be reduced to a minimum by elaborating a good structure and allowing for submission to foreign jurisdiction and/or alternate dispute settlement arrangements, such as international or domestic arbitration. ■

[5] See also http://www.natlaw.com/venez/topical/tx/smvetx.htm

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authorization of insurance against non-commercial risks extended by the insurers of the capital-exporting countries to the investments abroad by its nationals.

A BIT is an instrument of international law that provides investors with certain protections with respect to their investments in a foreign state, and in most cases a right to seek direct redress against governmental action which causes them a loss. This redress is available in the form of international arbitration against the host state, often under the auspices of the International Centre for the Settlement of Investments Disputes (ICSID), an arm of the World Bank.[1]

Among other stipulations, BITs establish a semi-autonomous scheme of regulation for the foreign investment. Basically, they provide investor's rights and State's obligations, incorporate a dispute resolution mechanism between the State and the investor, determine the applicable law and provide recognition and execution of the award. The dispute resolution mechanisms allow the foreign investor to submit a dispute to an international arbitration proceeding, in case the investor considers itself damaged by a measure adopted by the host country.

[1] http://www.worldbank.org/icsid/cases/pending.htm and *Boletín Oficial*, Sept. 2, 1994 http://www.natlaw.com/argentina/topical/sc/starsc/starsc5.htm.

Current claims against the Argentine Republic

Argentina signed more than fifty BITs, and to-date there are 32 international claims against the Argentine State before the ICSID. Four kind of disputes can be differentiated:

a) those based on the contractual rescissions as the cases of water services concessions, *Compañía de Aguas del Aconquija* (in the province of Tucumán) and Azurix Corp. (in the province of Buenos Aires) and the contract of Siemens AG relative to the provision of national identification documents;

b) those based on violations of the tax stability clause as in the complaint of Enron Corp. stemming from the stamp taxes applied in the provinces of Río Negro and Neuquén;

c) those presented by companies that invoke a claim of finding themselves affected in their contractual relations with the National State (such as the case of Unisys Corp. for services and supplies to the Judicial Power of the State) or with a legal person (as is the case of Metalpar S.A.); and

d) those originated in public utilities contracts.

Foreign investors base their claims on: the suspension and the subsequent repeal of the tariff adjustments (i.e., adjustments of rates

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charged for public utility services) through price indexes in accordance with what was contemplated in the public utilities contracts, the elimination of tariffs in dollars—stemming from Law 25.561, the Emergency Law (*Emergencia Pública y Reforma del Régimen Cambiario*)[2]—and the restrictions on transfers of funds abroad.

Of the 32 claims brought against Argentina, 76% are related to public services concession-holders. Investors argue citing the alteration of the contracts, the suspension of the clauses concerning adjustments of tariffs and "*pesification*" of those tariffs. Privatized companies are demanding, altogether, 16 billion dollars for compensation, an amount that exceeds the total social expenditure budgeted for 2004 by the National Government. This article examines the main aspects of the BITs under which public services companies seek protection in order to sue the national State and the grounds invoked by them.

Applicable legal regime

BITs exhibit a certain pattern of uniformity in their structure and content. Elements common to virtually all such treaties are the use of a broad definition of the term "investment," the inclusion of certain general standards of treatment of foreign investment, such as fair and equitable treatment and constant protection and security, and more specific standards of protection regarding expropriation and compensation, transfer of funds, and the protection of foreign investment in case of civil strife.

Although the guarantees provided to foreign investment can vary depending on the treaty, the following investor protections are common to most of the International Investment Agreements (IIA), whether bilateral or multilateral:

- Fair and equitable treatment
- National treatment and non-discrimination
- Most Favored Nation (MFN) treatment
- Free transfer of investments and returns;
- No expropriation or measures equivalent to expropriation without prompt, adequate and effective compensation.

Those standards of treatment are generally provided in all IIAs. In essence, national and MFN treatment are contingent or relative standards. Thus, in the case of national treatment, in determining the content of the standard as it applies to foreign investment, reference must be made to the treatment of nationals of the country concerned; similarly, in determining the content of the MFN standard in any particular case, reference must be made to the treatment granted to investments from the "most favored nation." In contrast, fair and equitable treatment denotes a non-contingent or absolute standard. This means that the fair and equitable treatment standard applies to investments in a given situation without reference to standards that are applicable to other investments or entities; it may apply also to other investments or entities, but its content does not vary according to how other investments or entities are treated. Thus, for example, the North American Free Trade Agreement (NAFTA) provides National Treatment (NT) in article 1102, Most-Favored Nation (MFN) Treatment in article 1102 and Fair and Equitable Treatment in article 1105.[3]

National and MFN Treatment are the two most important standards of treatment enshrined in IIA. Both seek to ensure non-discrimination,

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[2] *Boletín Oficial*, Jan. 7, 2002, http://www.natlaw.com/argentina/topical/bs/starbs/starbs9.htm. Law 25561 authorizes the Executive to renegotiate contracts celebrated by the National Public Administration under public law norms, including for public works and public services, establishing criteria which must be met in contracts which have for their object the rendering of public services. See also Decree 293/2002, *Boletín Oficial*, Feb. 14, 2002, http://www.natlaw.com/argentina/topical/ga/dcarga/dcarga16.htm concerning the role assigned to the Economy Ministry.

The provisions of the Emergency Law with most impact on foreign investments are mainly those connected with the situation of economic, financial and social emergency which arose in late 2001 and early 2002 and which led to the adoption of changes in the exchange. This legislation brought to an end the regime of convertibility and parity of the Argentine peso with the United States dollar which had been enacted by Law 23.928 in effect since 1991. Most of the foreign and domestic investments in the public utilities sector were made under that regime in the 1990s. The new legislation mandated the restructuring and renegotiation of public and private contracts made in foreign currency, extinguished the right of the licensees in the regulated public sector to link tariffs to U.S. price indices and redenominated rates and tariffs into pesos at the exchange rate of one peso per dollar. A process of renegotiation which is still under way followed the "*pesification*" and related measures. (Other measures restricted certain transfers to the exterior.)

[3] Walker, Herman Jr., "Modern treaties of friendship, commerce and navigation", *Minnesota Law Review*, (1957-1958) vol. 42 (April), pp. 805-824; http://www.natlaw.com/treaties/nafta/naftaeng/ch11.htm

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—in the first case between foreign and national investors and, in the second, among foreign investors from different countries. It is a matter of host-State obligation to offer, in general, a treatment "not less favorable" than that granted to national investors or those of other countries. These standards are analyzed below.

Absolute standard

Fair and Equitable Treatment: This concept comes from customary international law and is considered an absolute obligation whose fundamental purpose is to offer to the investment a minimum standard of protection in accordance with the international law principles. Basically, the fair and equitable standard provides a yardstick by which relations between foreign direct investors and Governments of capital-importing countries may be assessed.

It also acts as a signal from capital-importing countries, for it indicates, at the very least, a State's willingness to accommodate foreign capital on terms that take into account the interests of the investor in fairness and equity.

From the perspective of the investor, the fair and equitable component provides a fixed reference point, a definite standard that will not vary according to external considerations, because its content turns on what is fair and reasonable in the circumstances. The fair and equitable standard will also prevent discrimination against the beneficiary of the standard, where discrimination would amount to unfairness or inequity in the circumstances. Simultaneously, national and MFN treatment, as contingent standards, protect each beneficiary of these standards by ensuring equality or non-discrimination for that beneficiary vis-à-vis other investments.

Relative standards

National Treatment: The national treatment standard might be the most important standard of treatment enshrined in IIA. National treatment can be defined as a principle whereby a host country extends to foreign investors treatment that is at least as favorable as the treatment that it accords to national investors in like circumstances. In this way the national treatment standard seeks to ensure a degree of competitive equality between national and foreign investors. This raises difficult questions concerning the factual situations in which national treatment applies and the precise standard of comparison by which the treatment of national and foreign investors is to be compared.

National treatment typically extends to the post-entry treatment of foreign investors. However, some BITs and other IIAs also extend the standard to pre-entry situations.

National treatment interacts with several other investment issues and concepts. Most notably there are strong interactions with the issues of the MFN and the fair and equitable treatment standards. The main effect of such combinations is to emphasize the close interaction between the various standards of treatment.

National treatment is a contingent standard based on the treatment given to other investors. Thus, while MFN seeks to grant foreign investors treatment comparable to other foreign investors operating in the host country, national treatment seeks to grant treatment comparable to domestic investors operating in the host country.

MFN Treatment:[4] This standard is a core element of IIA. It means that a host country treats investors from one foreign country no less favorably than investors from any other foreign country. The MFN standard gives investors a guarantee against certain forms of

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[4] The recent ICSID case of *Emilio Agustín Maffezini v Kingdom of Spain*, concluded that parties may seek to rely on more favorable dispute resolution provisions contained in other BITs concluded by the host state of the investment, since such provisions usually fall within the scope of the "most favored nation" treatment contained in the original treaty. This groundbreaking decision may enable investors to avoid some of the onerous preconditions contained in some earlier BITs if they can show that the host state has not included such conditions in its later treaties.

Mr Maffezini was an Argentine investor who had a dispute with the Government of Spain arising out of an investment he had made in Spain. He submitted his dispute to ICSID arbitration under the investment protection treaty between Argentina and Spain, which required him to pursue his remedies for eighteen months before local courts as a precondition. He invoked the "most favored nation" clause of the Argentina-Spain treaty in order to rely on the more favorable dispute settlement clause of *another* investment protection treaty concluded by Spain with Chile. This treaty provided for access to international arbitration after a six-month negotiation period. The "most favored nation" clause of the Argentina-Spain treaty obliged a Contracting State to treat investors of the other contracting state no less favorably than third party investors.

On the facts of the case, the ICSID tribunal held that the "most favored nation" clause of the Argentina-Spain treaty embraced the

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discrimination by host countries, and it is crucial for the establishment of equality of competitive opportunities between investors from different foreign countries.

These "standards" apply, generally in the period following the admission of the investment; however, in Argentina's agreement with the United States, they apply also to the admission of the investment. Further, a United Nations report holds that, absent a clause to the contrary, an MFN clause entitles the beneficiary to more favorable treatment agrees with third parties before or after the entry into force of the treaty in which it is included. However, the parties may agree that the clause should apply *pro futuro* only (i.e. some of the treaties concluded by Sweden provided that the host country shall be free to grant more favorable treatment stipulated in bilateral investments treaties concluded "before the date of the signature" of the agreement).[5]

Principle of non-discrimination: An act is discriminatory when two circumstances occur:

a) The measure must result in an actual harm for the investor.

b) The act must have been done with the intention to harm the investor.

Principle of good faith: In international jurisprudence, this principle is violated when the host State fails to meet its commitment to submit the dispute to an arbitration.

The IIA, as BITs, stipulate certain specific standards of treatment.

Stabilization clauses: This type of clause specifically seeks to secure the agreement against future government actions or changes in law, either legislative or regulatory. Moreover, a stabilization clause is a specific commitment by the foreign country not to alter the terms of the agreement by legislation or any other means, without the consent of the other contracting party.

Transfer of Foreign Currency: This clause guarantees the transfer of all types of payments related to the investment.[6]

The transfers would be made in the terms and with the limitations imposed by national legislation, as long as the transfers are directly related to an investment as, for example, repatriation of funds relating to dividends, interest, profits, or other yield, capital produced from the total or partial sale or liquidation of an investment, the sums representing compensation, fees, salaries, payment of loans, etc. These will be carried out freely, without delay in freely convertibility currency and at the exchange rate effective on the day in which the transaction is made.

Compensation for Losses: In accordance with international law, compensation for losses caused by war or civil disturbances are not obligatory. However, many BITs have included this protection.

Expropriation: One of the principle reasons that motivates this type of agreement has been to establish guarantees against arbitrary expropriations. Agreements generally prohibit expropriation of investments, unless a series of requirements are met.

The IIAs use broad language that covers nationalization or expropriation and equivalent measures i.e., indirect expropriation. Regarding expropriation, it is important to differentiate the concept utilized to *define* what is an expropriation from the *conditions* that this kind of agreement requires in order to be accepted.

Definition

BITs generally do not themselves define the act of expropriation; normally, they make explicit reference to the term "expropriation,"

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dispute settlement provisions of that treaty. Therefore, relying on the more favorable arrangements contained in the Chile-Spain treaty and, *inter alia*, the legal policy adopted by Spain with regard to the treatment of its own investors abroad (whereby it generally tried to secure for them the right to access international remedies without first exhausting local remedies), Mr. Maffezini had the right to submit the dispute to international arbitration without first accessing the Spanish courts.

[5] United Nations Centre of Transnational Corporations "Bilateral Investment Treaties," UN, New York, 1988, pp. 33-34.

[6] This clause is provided, for example, in Article 1109 of NAFTA. Argentina's BIT with Chile, in Article 5.3, states "A transfer is considered carried out without delay when it is effected within the period normally necessary to comply with the formalities of transfer [...] that in no case shall exceed two months..." http://www.natlaw.com/treaties/latam/latam/latam76.htm Article 5.1 of Argentina's BIT with the U.S. states that "Each Party will permit all transfers related to an investment that are sent to its territory of that leave from it to be carried out freely and without delay." And Article 6 of the Franco-Argentina BIT has this provision: "Each Contracting Party, in whose territory or maritime zone the investors of the other Contracting Party have effected investments, will authorize for said investors free transfer of their liquid assets ..."

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generally adding the formula "whatever other act has equivalent effects" as, for example, the hypothesis of "*de facto* expropriation." Modern BITs started to widen the types of takings to include indirect takings so that any diminution in the value of property due to Government action would be caught up in the definition of takings. The treaty practice, however, still refers to "nationalization" or "expropriation" as the benchmark of takings and refers to indirect takings as "measures tantamount to nationalizations" or "measures having effect equivalent to nationalization or expropriation." It indicates a reluctance to move away from the paradigm of the law that was developed in the context of direct takings, despite the fact that the legal form of takings has now undergone a change.

It is not the physical invasion of property that characterizes nationalizations or expropriations that has assumed importance, but the erosion of rights associated with ownership by State interference. So, methods have been developed to address this issue. The tendency in some cases has been to analogize the infringement of any right of ownership with nationalization or expropriation. This is the position adopted by the World Bank Guidelines on the Treatment of Foreign Direct Investment (1992) and the Energy Charter Treaty (1994),[7] both of which seek to widen the definition of nationalizations or expropriations to include any measures producing effects akin to those of nationalization or expropriation. Article IV(1) of the World Bank Guidelines ties indirect takings to nationalizations or expropriations by referring to nationalizations or expropriations and then stating "or take measures which have similar effects." Similarly, Article 13 (1) of the Energy Charter Treaty, reads: "Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "Expropriation") except where ..." (UNCTAD, 1996, vol. II, p. 558). The alternative strategy is to give examples of the type of measures that could amount to takings so as to illustrate the extent of the concept. Thus, for example, article 3 of the United States model BIT (1982) refers to "any other measure or series of measures, direct or indirect, tantamount to expropriation (including the levying of taxation, the compulsory sale of all or part of an investment, or the impairment or deprivation of its management, control or economic value) ...." Canadian treaties have adopted yet another strategy to deal with specific acts of regulatory interference by addressing the issues as to circumstances in which such interference could be regarded as takings.

[7] http://www.encharter.org/upload/1/TreatyBook-en.pdf

IIAs recognize that it is lawful for a host country to take alien property provided four requirements are met. These four requirements (outlined below) are stated in almost all investment agreements, though terminology varies. There is considerable similarity among IIAs as to the provisions on public purpose and non-discrimination. It is as to the requirement relating to the standard of compensation that there is variation. As for due process, there remains some uncertainty about the meaning of the term.

Expropriation conditions

Each country has discretion, according to general principles of law, to exercise its legal State authority to expropriate any private good with the object of satisfying a public interest. Regardless, they must meet a series of minimum conditions in order for the expropriation to be considered legitimate. According to international law these conditions are:

a) For a Public purpose – This is according to the laws of each country, so expropriation is done on a non-discriminatory basis. Example of this is article 1110 (1) (a) of the NAFTA.

b) On a non-discriminatory basis – This requirement is relevant with regard to takings, as it affects the legality of a taking, and therefore the quantum of compensation. Examples of the formulation of this requirement in IIAs are article 5 of the United Kingdom model BIT (1991) and article 1110(1)(b) of the NAFTA.

c) In accordance with due process of law – The view that a taking must be reviewed by appropriate, usually judicial, bodies (especially in relation to the assessment of compensation) finds expression in the practice of a large number of States and is indeed found in many national constitutional provisions.

d) Upon payment of compensation – A core element of provisions on expropriation/nationalization in IIA are rules on the amount and timing of the payment of compensation, the currency in which compensation must be paid and the right to transfer any payment of compensation. References to "prompt, adequate and effective" compensation can be found in, for example, the 1994 Energy Charter Treaty (Article 12 in Part III) and numerous BITs.

Privatized public services companies

To combat the economic crisis, the government embarked on a path of trade liberalization, deregulation, and privatization. In 1990,

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it implemented radical monetary reforms which pegged the peso to the US dollar and limited the growth in the monetary base by law to the growth in reserves. Inflation fell sharply in subsequent years. The 1991 convertibility law established a quasi-currency board, which has been a pillar of price stability. The government privatized most state-controlled companies, opened the economy to foreign trade and investment, improved tax collection, and created private pension and workers compensation systems. As a result of these policies, Argentina experienced a boom in economic growth in the early 1990s, followed by a period of somewhat more erratic growth in the second half of the decade when the country was hit by a series of external economic shocks.

At the end of 2001, a financial crisis broke out and led the National Government to restrict the withdrawal of bank deposits[8] which, together with a high index of poverty, and unemployment, caused a series of popular protests that created a short- state of siege, and resignations of the Minister of the Economy and the President of the Nation.

In this context and with the purpose of facing the emergency, the national congress passed a law of public order abandoning the type of exchange rate fixed to the dollar and authorizing the Executive Branch to adopt an exchange rate policy. A free floating exchange rate with state intervention in the foreign exchange market was adopted. All of the obligations expressed in dollars were fixed to the same quantity of pesos, doing the same with the tariffs of the public services. In the contracts between private parties, the principle of renegotiation between the parties was stipulated as a form of adapting the loans, which would be submitted for a judicial decision in case of disagreement and the national state was authorized to renegotiate the public services contracts in order to adapt them the new economic scene. To such end, it was established "that they must take into consideration the following criteria: 1) the impact of the rates on the competitiveness of the economy and the distribution of incomes; 2) the quality of services and the investment plans, to the extent they were provided for in applicable contracts; 3) the interests of the users and the accessibility of the services; 4) the reliability of the systems included; and 5) the profitability of the businesses." The national currency was immediately depreciated arriving in a few months at its current exchange rate, which implied a devaluation of 300 percent in nine months, giving evidence of the previous overvaluation of the Argentine peso.

With the end of convertibility and the subsequent devaluation of the peso, the legal framework was modified. Arrangements on account of urgent necessity carried out by the national government as a result of the economic emergency set forth a series of measures that affected the public services companies. The impacts originate from the above mentioned Emergency Law.

Arguments invoked by privatized companies

Several pending cases before ICSID seek to contest a series of emergency measures put into effect by the Argentine Republic in response to its financial crisis. In 2001 and 2002, the Argentine Government instituted a series of emergency measures which have affected foreign investors, these include a repeal of the parity between the US Dollar and the Argentine Peso, and a 25% tax levied on the exportation of oil and gas. These and other measures have had serious implications for investors operating under earlier-negotiated concession contracts.

The privatized companies base their claims before the ICSID, arguing that: the Emergency Law is an arbitrary measure and together with the rest of the measures adopted by the national government have a similar effect to expropriation, i.e., constitute indirect expropriation. The foreign investors alleged that they suffered expropriation of their investments without the adequate compensation, breaching fair and equitable treatment standard.

In the framework of the modifications imposed in the macroeconomic context described above, the Executive Branch initiated a round of negotiations with privatized companies with the goal of analyzing the impact of this situation upon the performance of the companies.

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[8] On December 1st, 2001, the Argentine government imposed the *corralito*. Its literal translation is 'a playpen or little fence' in Spanish, but it has taken on a new meaning specific to the freezing of people's saving accounts. The *corralito* was imposed in order to prevent bankruptcy in the banking sector once capital flight occurred and the Argentine public realized the crisis was setting in. The *corralito* as well as contractionary policies imposed by former President De La Rua allowed Argentina to preserve at least some of its banking sector and would have allowed the country to make payments on its external debt. However, the *corralito* has blocked people from getting to their money to pay for their basic needs. When Fernando de La Rua proposed increased cuts in public spending in December 2001, the Argentine public 'hit the streets' with the infamous *cazeralazo* (pots and pans) protests that resulted in his being removed from the Presidency.

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Arguments invoked by the National Government

The National government maintains that these measures have included both, national and foreign investors, in the same way. For this reason companies cannot allege discrimination.

Furthermore, Government has demonstrated its goodwill to maintain balance, national peace, and public order, with the constitution of the "Commission for Renegotiation of Contracts *(Comisión de Renegociación de los Contratos)* whose main purpose is to negotiate services public contracts. It was also indicated that, in this economic and social crisis, which has included national and foreign investors, it is appropriate to apply the "Doctrine of the Community of Fortune" *(Doctrina de la Comunidad de Fortuna)*, formulated by Dr. Luis A. Podestá Costa in the year 1922, which affirms that the investor acts by a personal decision, freely adopted, when he himself, or his goods are situated in another State. Upon adopting this determination, he (the investor) knows which are the advantages and the foreseeable drawbacks in the new milieu and begins to participate in this environment in which he has decided to work. As other citizens of this State, he should enjoy the benefits they enjoy and cannot remove himself from the misfortunes that they endure. A tacit pact is, therefore, between the State and the foreigner, a relation of coexistence that creates a bond of reciprocal solidarity, a true community of fortune.

In July, the French utility corporation Suez launched three cases against Argentina for alleged breaches of a France-Argentina BIT arising from three separate water concessions in Cordoba, Buenos Aires, and Santa Fe. The Spanish company Telefonica has also brought a claim against Argentina, and CMS Gas Transmission Co. is suing Argentina under the U.S.-Argentina BIT for US$265 million.

In August 2004, Argentina faced the first defence before the ICSID; CMS Gas Transmission is the claimant. The request concerns the alleged suspension by Argentina of a tariff adjustment formula for gas transportation applicable to an enterprise in which CMS has an investment. Claimant alleged that Argentina had expropriated its minority shareholding in a local gas transportation company *(Transportadora de Gas del Norte* – TGN) by dismantling its tariff regime. Argentina had committed under the operating license and other relevant documents concerning TGN´s privatization that the licensee´s tariffs were to be calculated in U.S. dollars, expressed in local currency at the applicable exchange rate at the time of billing and be adjusted semi-annually in accordance with the United States Producer Price Index (PPI). CMS claimed that, starting in late 1999, Argentina had expropriated its investment under the terms of the applicable BIT by eliminating such assurances.

It could become a leading case, which marks the way for the remaining cases brought against the country.

Argentina maintained that the complaint that this firm formulated seeking compensation for its losses due to the *pesification* should be dismissed. The Minister of Justice tried to prove that during the past four years Argentina lived in an extenuating circumstance, *"estado de necesidad,"* that made the *pesification* an inevitable consequence of a very serious financial collapse. He also declared that the change of the currency value did not substantially affect the profitability of the companies. Furthermore, he indicated that the State is currently renegotiating the contracts with the privatized companies; therefore; there is no place for a trial parallel to those negotiations.

Conclusion

The arguments, for the privatized companies as well as for the National State, merit certain observations. Common sense would indicate that it is quite certain that the economic situation affected everyone in the same way, therefore there were not discrimination between foreign and national investors. However is also true that the State produced damage for which it should respond. Notwithstanding one of the most controversial issues that these agreements raise relates to protection reach to the foreign investors in face of general economic policy measures or monetary policy measures that the investment-host-State may adopt. In theory, measures of general economic policy and monetary policy constitute legitimate measures in the exercise of the sovereign power of the State. Consequently, it does not fit under the principle that they can be considered as measures of an expropriation character, i.e., of indirect expropriation, or as contrary to the obligation of fair and equitable treatment that BITs impose, unless the measures turn out to be discriminatory, abusive, or arbitrary. Majority of doctrine as well as jurisprudence is of this view. For example, the Federal Appellate Court in the U.S, in its January 6, 1987, decision in the case of *West v. Multibanco Comermex*[9] rejected the view that a redenomination into Mexican pesos of banking deposits made in dollars in Mexican entities could be classified as a measure of indirect expropriation.

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[9] *West v. Multibanco Comermex, S.A.*, 807 F.2d 820 (9th Cir. 1987)

ARGENTINA:
PRIVATIZED PUBLIC UTILITIES AND INTERNATIONAL ARBITRATION

continued from previous page

It is doubtful, however, that the complex system of "asymmetric *pesification*" of bank loans and deposits imposed by the Argentine authorities can be considered as a simple measure of monetary policy, since it caused a lack of balance in the contractual relations between financial entities and their clients as well as the contracts celebrated with the Public Administration.

On the other hand and in reference to the above-cited "doctrine of the community of fortune," it is known that the profitability of an economic activity has, among other factors, a direct relation to the business risk assumed (the greater the risk involved, the greater the margin of expected benefits). This distinctive characteristics of the privatized public services (monopolies, with captive demand and legal market reserves) suppose a lesser business risk than that which would be derived from almost any other economic activity. And this is also what is "offered" to the foreign investor in order to "invite and entice him" to invest in the country, with the signing of more than fifty BITs.

The "legal chaos" added to the imprecision due to the difficulty of classifying specific situations and types of conduct brings a complex situation.

It would seem that the objective of the privatized companies bringing out such claims before the ICSID is to situate themselves in a better situation vis-à-vis the National State, i.e., the Argentine government, in order to achieve a more beneficial negotiation. ICSID is an organization of the World Bank group and that assistance via loans that this institution can grant is not a matter of indifference for the National State.

What is certain is that the quantity of claims initiated against the National State generate a deep concern within the government as well as in the general population in view of the sums at risk and the fact that renegotiation of these contracts undoubtedly will incite a rise in the tariffs charge for public services. International Monetary Fund requires that the Minister of Economic move forward with implementation of tariff increases as a condition for moving forward with approval of a third revision of the agreement between this organism and Argentina. The President, however, is conditioning such negotiations and tariff increases upon the companies dropping these legal actions before the ICSID.

Although the National State expressed its willingness to renegotiate the agreements, the privatized companies insist that there exists a lack of political will on the part of the Government to arrive at a definitive agreements, particularly with respect to public services.

The government faces a true challenge. On one hand, this past January it "promised" the IMF to complete renegotiation of 54 contracts with privatized companies before the end of the year. On the other hand, any tariff increase translates into an increment in the cost of living, negatively impacting the real income of the population. Crucial moments approach, in which the government will have to respond to the challenge by strategically negotiating a tariff re-composition at the same time satisfies the privatized companies and does not imply an significant jump in inflation. ■

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RECENT DEVELOPMENTS

AGRICULTURE

MEXICO: Animal Products and Animal Medicines

Mexican Official Norm NOM-194-SSA1-2004 establishes sanitary specifications related to animal products and procedures in their production. The NOM provides sanitary specification that animal product establishments should meet for the supply, storage, transport, and sale of their products. These establishments are defined as installations in which animals for the food market are slaughtered, cleaned, stored, or sold. Separately, Accord *(Acuerdo),* issued in July by the minister of agriculture *(Secretario de Agricultura, Ganadería, Desarrollo Rural, Pesca y Alimentación)*, classifies veterinary pharmaceuticals products by the level of risk in their active ingredients; three Groups are established, Group I requiring prescription and administration by a qualified veterinarian, Group II requiring a veterinarian's prescription, and Group III freely available for sale.
Diario Oficial, Sept. 18 and July 12, 2004
http://natlaw.com/tsmxmd/tsmmd169.htm
http://www.natlaw.com/acmxag/acmxag36.htm

BANKING & CREDIT

PANAMA: Reporting to the Banking Supervisory Authority

Resolution No. 1-2004 of Panama's Superintendency of Banks sets new requirements for banks concerning the form, assigned codes and reporting periods for information that the banks must send to the Superintendency. This Resolution replaces a May 2002 resolution on this subject. The new Resolution refers to the responsibility of the Superintendency to establish programs for knowing in a timely way a bank's financial situation and verifying the accuracy of information received. *Gaceta Oficial*, Sept. 24, 2004
http://www.natlaw.com/panama/topical/bk/rspnbk/rspnbk1.pdf

COMMUNICATIONS

ARGENTINA, BRAZIL: Provision of Space Capacity

Brazil's Decree 5.118, published in June, enacted the Agreement for the Provision of Space Capacity entered into by Brazil and Argentina on May 8, 2001. The Agreement references the Radiocommunications Regulation of the International Telecommunications Union (ITU or, in the Portuguese acronym, UIT). The Decree defines the following terms:

Space Capacity or satellite facilities: orbit and radioelectric spectrum resources offered, respectively, in Brazil, by satellite operators to concessionaires, permit holders or authorized parties or, in Argentina, by the provider of satellite facilities to licence holders, permit holders or authorized parties;

Space Station: a station located in an object situated, to be situated or formerly situated beyond the greater part of terrestrial atmosphere;

Terrestrial Station: a station located on Earth's surface or within the terrestrial atmosphere which communicates with one or more space stations or with one or more stations of the same kind, through one or more reflector satellites or other objects in space;

Licence: the right or the authorization to provide Space Capacity;

Provider of satellite facilities or satellite operator: the holder of the Licence from an Application Authority to provide Space Capacity;

Satellite network: a satellite system or part of a satellite system which consists of a single satellite and associated terrestrial stations;

Satellite: a Space Station which provides Space Capacity;

Argentine satellite: geostationary satellite with Argentine licence, whose procedure for coordination and notification together with the International Telecommunications Union is performed by Argentina;

Brazilian satellite: geostationary satellite with a Brazilian Licence, whose procedure for coordination and notification together with the International Telecommunications Union is performed by Brazil;

Satellite system: space-based system including one or more artificial satellites of Earth;

Fixed satellite service (SFS): any Radiocommunications signal transmitted and/or received by terrestrial stations, located at specific fixed positions or any point fixed in a specific area, using one or more satellites; includes feed links for other space radiocommunication services;

Direct to Home (DTH): encoded unidirectional radiocommunications signals transmitted by Brazilian or Argentine satellites for direct reception by subscribers. In Brazil, it refers to distribution of television and audio signals by subscription via satellite. In Argentina, it refers to a supplementary radiodiffusion service.

The agreement's objectives are to facilitate reciprocal provision of satellite services in Brazil and Argentina through commercial Brazilian or Argentine satellites, in accordance with the ITU Radiocommunications Regulation and to establish conditions and technical criteria for the provision of space capacity for fixed satellite service, including Direct-to-Home, through Brazilian and Argentine satellites. Under the Agreement, commercial satellite operators with Brazilian or Argentine licences may be established with public or private participation in accord with legal and regulatory provisions of each country.

SFS and DTH signals may be transmitted and/or received between one of the parties and third-party countries through Brazilian and Argentine satellites. Transmission and/or reception of such signals to or from third-party countries shall be subject to pertinent laws and regulations of each party, applied in a non-discriminatory and transparent manner. No provision of this agreement shall affect the rights and obligations of a party with respect to technical coordination of frequencies and associated orbital positions of satellites of the other party or third-party countries not covered by this agreement, in accord with the ITU Radiocommunications Regulation. This agreement does not require any duly licensed satellite operator or provider, with a licence from any Application Authority, to alter current operations and technical characteristics to accommodate new Argentine or Brazilian SFS and DTH satellites for the provision of space capacity.

Separately, in late August, Argentina's president announced that a new firm would be launched to construct two communications satellites,

with an investment of US$226 million expected to come mostly from the private sector, but with the Argentine government holding a "golden share." Financing is envisaged via a combination of a public stock issue, another class of stock held by entities that would manage the new firm and that would bid for that class of stock, plus issuance of negotiable debt with the debt accounting for some 60 percent of the funding. *Diario Oficial*, June 29, 2004 (Brazil)
http://www.natlaw.com/brazil/topical/cm/dcbrcm/dcbrcm25.htm
www.natlaw.com/argentina/topical/cm/smarcm/smarcm1.htm
http://www.itu.int/ITU-R/

CUSTOMS

Argentina: Tariffs Reduced 1.5 Percent

Ministry of the Economy and Production *(Ministerio de Economía y Producción)* Resolution 607/2004 implements a December 2002 Decision (no. 21) of Mercosur's Common Market Council *(Consejo Mercado Común* – CMC) by removing the last 1.5 percent of a three percent extra tariff that had been imposed under the Mercosur Common External Tariff *(Arancel Externo Común* – AEC) as protection against excess imports from outside the Mercosur zone during the 1997 Asian crisis. The three percent was then reduced, so that 1.5 percent remained as an additional charge on items covered under the AEC. CMC Decision 21 called for removing this 1.5 percent charge at the start of 2004, which was done by the other Mercosur members, Brazil, Paraguay and Uruguay. The president of Argentina's Chamber of Importers *(Cámara de Importadores de la República Argentina)* stated that importers could claim a refund for the extra amount paid since the beginning of 2004 with a good chance of success, but probably obtainable only after procedures that would take about two years.
http://www.natlaw.com/argentina/topical/cu/rsarcu/rsacu228.htm
La Nación, Sept 14, 2004

Mexico: Foreign Trade Rule Adjustments

The Third Resolution of Modifications to the Rules of General Character for Foreign Commerce Material for 2004 *(Tercera Resolución de Modificaciones a las Reglas de Carácter General en Materia de Comercio Exterior para 2004)* introduces several reforms and additions to the first resolution that was published March 29, 2004. The new Resolution provides for regularization of certain items by assembly plants operating under a *maquiladora* or Pitex program that cannot prove legal importation of those items, pending an importation request, provided certain conditions are met. Changes also affect advanced electronic signatures for dealings relating to customs and foreign commerce and information relating to passengers, crews, and means of transportation. *Diario Oficial*, Sept. 20, 2004
http://natlaw.com/rsmxfi/rsmxfi3.htm

Paraguay: New Customs Code

Paraguay's Law 2422 of July 5, 2004, enacts a new customs code, replacing the former 1985 customs code. The new law seeks to incorporate principles developed in international fora, to include provision for information technology and to improve control over customs obligations.
http://www.natlaw.com/paraguay/topical/cu/stprcu/stprcu6.htm

Andean Community: MFN for Pact Members From Other FTAs

Decision 598 of the Commission of the Andean Community, dated July 11, 2004, holds that, if a Member Country negotiates bilaterally with a non-Member, the Member Country should inform the Commission before signing a bilateral trade agreement. After signing such an agreement, it should apply most-favored-nation status to the other Member Countries, if the new agreement grants the non-Member status in respect to goods or other commercial matters that is more favorable than what has existed previously among Members.
http://www.natlaw.com/treaties/coman-decision598.htm

E-COMMERCE

Mexico: Regulations for Certification Service Providers

A recent regulation establishes norms that will govern Certification Service Providers *(Prestadores de Servicios de Certificación* – CSP) in relation to electronic signatures and the issuance of certificates for commercial acts. The regulation is based upon the 2003 Amendment to the Code of Commerce dealing with electronic signatures and creating CSPs. The regulation states that, while any method or system for creating electronic signatures, advanced electronic signatures and certificates is acceptable, the government encourages those that will work with different computing equipment and programs. Also included in the regulation are the requirements and application process for those wishing to gain accreditation as a CSP, including the documents applicants must provide as well as the human, material, technological and economic resources they must possess. Finally, the regulation lists the infractions CSPs may commit as well as their accompanying sanctions, which range from a one-to-two-month suspension to a definitive suspension. Such infractions include, *inter alia*, a CSP's failure to inform a user of the price, precise conditions and use limitations of a Certificate before its issuance, and failure to remit a copy of each Certificate it generates to Mexico's economy ministry *(Secretaría de Economía)*. Such copies are to be sent on-line in accordance with rules issued by the *Secretaría de Economía*.
Diario Oficial, July 19, 2004, and Aug. 29, 2003
http://www.natlaw.com/rgmxec/rgmxec1.htm
http://www.natlaw.com/dcmxec/dcmxec1.htm

ENERGY

Panama: Hydroelectric and Geothermal Power Incentives

Panama's Law No. 45 establishes an incentive regime to foster hydroelectric generation systems and sets forth other provisions. This law results from the merger of three bills proposed in 2002, all of which provided tax incentives for the establishment of mini and small hydroelectric power plants in Panama. This law also is a result of Resolution No. 04002 of Feb. 19, 2004, whereby the

Energy Policy Commission approved Energy Policy guidelines for promotion of sources of Hydroelectric Energy. The aim is cleaner, more economic energy. The law defines central systems as including their plants, lines, substations and distribution and/or transmission systems necessary for the due connection to the distribution and/or transmission system. The law applies to four types of systems: hydroelectric systems with under 10 megawatts (MW) of installed capacity; such systems with 10 to 20 MW; such systems with 20MW and above; and systems that use resources from geothermal sources.

These entities are granted the right to enter into direct power purchase contracts with the distributing companies, subject to the restrictions imposed upon the distributing companies by law. For sales in the occasional market, the under-10 MW systems will not be subject to such charge for the first 10 MW of installed capacity during the first 10 years of commercial operation. Tax exemption is granted from all taxes and duties that may be caused due to the importation of equipment, machines, materials, spare parts and others necessary for the construction, operation and maintenance. Corporations that develop new projects or increase the capacity of production of energy can choose to obtain from the State a tax incentive equal to up to 25% of the direct investment in the project, based on the reduction of tonnage of carbon dioxide emissions equivalent for a year calculated by the term of the concession or license; this credit can be used to pay up to 50% of income tax due for the activity in a determined fiscal period, during the first ten years as of the entering into effect of the commercial operation of the project (for installed capacity under 10 MW, the credit that can be used is not limited to 50%). A tax credit for a maximum of 5% of the total value of the direct investment for "works," that after the construction of the plants will be converted into infrastructure of public use, such as highways, streets, bridges, sewages, schools, health centers and others of similar nature. This credit cannot be assigned, transferred or used as compensation. *Gaceta Oficial*, August 10, 2004
http://www.natlaw.com/panama/topical/eg/stpneg/stpneg3.htm
Pardini & Asociados, http://www.padela.com

GOVERNMENT ADMINISTRATION

ARGENTINA: Promotion of the Software Industry

Argentina's Law 25.992 provides for the creation of the Fiduciary Fund for the Promotion of the Software Industry *(Fondo Fiduciario de Promoción de la Industria del Software* – FONSOFT). The fund is to be in effect for a term of ten years. The fund will provide economic incentives for individuals or businesses in the field of creation, design, development, production, and implementation of software development for use in items such as game consoles, central telephone exchanges, cellular telephones, machines, and other devices. Such entities must consist of businesses constituted in Argentina, entered in a register designated for that purpose and pursuing activities in Argentina for their own account. The entities covered will be awarded fiscal stability, by means of tax and bond incentives, for a term of ten years. They will also be exempt from any import restrictions on information technology hardware devices necessary for their activities. The Secretary of Productive Science, Technology and Innovation *(Secretaría de Ciencia, Tecnología e Innovación Productiva)*, through the National Agency of Scientific and Technological Promotion *(Agencia Nacional de Promoción Científica y Tecnológica)*, will act as the fiduciary administrator. FONSOFT will give priority to universities, research centers, and new entrepreneurs that dedicate themselves to the development of software. FONSOFT's budget will be determined annually in the National Budget. *Boletín Oficial*, Sept. 7, 2004
http://www.natlaw.com/argentina/topical/ec/starec/starec5.htm

MEXICO: Development of the Software Industry

Mexico's National Development Plan (2001-2006) states that development of information technologies through the Support Fund for the Development of the Software Industry and Related Services (PROSOFT Fund) is crucial to the competitiveness of the Mexican economy. The Secretary of the Economy has issued an Accord *(Acuerdo)* to ensure that the PROSOFT Fund not conflict with other governmental programs or actions. It denotes the type of assistance offered and indicates guidelines to be followed in order to receive funds. Software development and software-related services are covered. Firms in the Information Technology Sector legally constituted in accordance with Mexican legislation, enterprisers of Mexican nationality, and academic institutions are eligible to be considered for access to the PROSOFT Fund. In addition, on Sept. 24, 2004, rules were published concerning the creation of an inter-departmental committee for the application of fiscal stimulus to the expenditures and investment in research and development of technology. The Committee will be comprised of representatives from the National Council of Science and Technology *(Consejo Nacional de Ciencia y Tecnología)* and from the ministries for the economy, for finance and public credit and for education (respectively *Secretaría de Economía*, *de Hacienda y Crédito Públic*, and *de Educación Pública)*. The fiscal stimulus will consist of a fiscal credit of 30% of the costs and investments in project development, materials and processes of production, and research and development of technology. Those interested must apply to the Technical Secretary of the Committee. *Diario Oficial*, Sept. 3 and 24, 2004
http://natlaw.com/acmxec/acmxec4.htm
http://natlaw.com/smmxga/smmga151.htm

LABOR

BRAZIL: Suing Contractor and Not Subcontractor

The Fourth Division of Brazil's Superior Labor Tribunal *(Tribunal Superior do Trabalho* – TST) reversed a lower court decision and held that a driver employed by a subcontractor may bring an action against the principal contractor without bringing either a prior or joint action against the subcontractor, which was his direct employer. The worker stated incapacity of the subcontractor as the reason for claiming only against the principal contractor. The

mid-level, regional labor tribunal had dismissed the case on grounds that responsibility of the principal contractor was only subsidiary and the contractor, thus, could not be deemed as the principal in respect to worker obligations of its subcontractor. The TST decision cited article 455 of the labor code and indicated that the article indicates that, in sub-contracts, the subcontractor is responsible for fulfilling obligations to workers, but also gives employees the right to claim against the principal contractor.

Subsequently, a large financial institution, *Caixa Econômica Federal* (CEF), announced that it would desist from over 700 appeals that it had pending before the TST, many of these representing work that was contracted from third parties. Some 50,000 of CEF's 110,000 workers were reportedly contracted in this manner, but CEF is now seeking to (a) reduce this type of hiring and (b) to require, when it does do so, that a firm providing services post a bond and provide monthly evidence to CEF of having met all obligations to such firm's employees.
http://www.natlaw.com/brazil/topical/lb/spbrlb31.htm

TAXES

Paraguay: Extensive Tax Changes

Paraguay's Law 2421 (the Administrative Reorganization and Fiscal Adjustment Law – *De Reordenamiento Administrativo y Adecuación Fiscal)* has effective dates regulated by Decree 2939 and makes major changes in Pargauy's tax regime. The Law:

- Eliminates exemptions to the profit tax on businesses, while reducing the tax rate over time from 30 percent to 10 percent, with 20 percent established as the rate for 2005;
- Contains provisions for small business and sets a rural agribusiness tax of 10 percent.
- Introduces for the first time in Paraguay a personal income tax *(Impuesto a la Renta del Servicio del Carácter Personal)*, effective (according to Chapter VII, Final and Transition Dispositions, Article 38) in 2006.
- Eliminates exemptions to the VAT (more gradually for agricultural products), maintaining the rate at 10 percent;
- Introduces a tax on the value of automobiles *(patente fiscal)*, which is a tax that is scheduled to expire in two years.

Registro Oficial, Jul. 5, 2004
http://www.natlaw.com/paraguay/topical/tx/stprtx/stprtx3.htm
http://www.natlaw.com/paraguay/topical/tx/dcprtx/dcprtx2.htm

TRANSPORTATION

Argentina: New State Role in Inter-Province Rail Lines

Argentine Decree 1261 establishes the State takeover of long-distance, inter-province rail passenger branch lines throughout Argentina. This Decree nullifies Decree 1168 of 1992, issued by former Pres. Menem with the purpose of deregulating the rail system. The new Decree states that the rail system has decayed causing economic and social isolation and deterioration of many interior cities. The Decree assigns to Argentina's Secretary of Transportation responsibility for proposing measures to rehabilitate service and for determining the use of rolling stock and of railway-related real estate and buildings.

The reported plan is to rehabilitate some 7000 kilometers of track over the next two years, using a combination of public and private financing totaling US$400 million—including loans from the World Bank (US$100 million) and Inter-American Development Bank (US$200 million)—and offering operating concessions to be under controls by the State, but run by private investors or by those provincial governments that may be interested. Decree 1261 also allows Provincial governments to take over passenger rail lines within their territories if they so choose. *Boletín Oficial*, Sept. 27, 2004
http://www.natlaw.com/argentina/topical/tr/dcartr/dcartr36.htm

Mexico: Controlling Transport of Hazardous Materials

Mexico's Undersecretary for Transportation (*Subsecretario de Transporte)* has issued Procedures for evaluating conformity, by shippers, carriers and recipients, with Mexican official norms concerning transport of hazardous materials and hazardous waste. Mexico's original statute from 1993 regarding hazardous materials transport did not include a specifical required procedure for determining whether or not those carrying out transportation of such materials and their equipment were keeping up to official Mexican standards. These standards include accurate testing, calibration, certification and verification of materials and transport as well as documented samples of those materials being moved. The stated aims include making the regulations clearer and conforming to the international standards. Use of verification units and test laboratories (certified by the certification entities for the affected product) is required. Treatment plants and test laboratories that handle these hazardous materials and waste are also subject to the provisions in these Procedures. *Diario Oficial*, July 15, 2004
http://www.natlaw.com/smmxtr/smmxtr44.htm

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