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HIGHLIGHTS

Brazilian Industrial Property Law Ten Years On

There is little doubt that Brazil's industrial property laws - and the application of them - have changed dramatically over the past decade. But just how have they changed? And has this change been for the better? *Page 3*

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Brazilian Industrial Property Law Ten Years On

By David Merrylees (Dannemann, Siemsen, Bigler & Ipanema Moreir)

The awareness of intellectual property that swept through the world with the creation of the World Trade Organization (WTO) and the signing of the Trade-Related Aspects of Intellectual Property Rights concordat (TRIPS Agreement) at the beginning of 1995 did not pass unnoticed in Brazil. If the present intellectual property (IP) law in Brazil can be said to have only come into force in 1997, first having passed through Congress the previous year, its origin lies in the final years of the eighties.

At that time, chemical products were not patentable in Brazil. Today, there is probably not a single person to be found in a city like Rio de Janeiro or São Paolo – or for that matter, almost anywhere in urban Brazil - who is not aware of the fact that buying a counterfeited CD or investing in a look-alike ladies' handbag is a crime against at least the rights of some legitimate copyright owner, and may perhaps even feel a spasm of guilt. And the Brazilian population now knows that there is patent protection as well, particularly in the pharmaceutical field. Undoubtedly, the awareness is there and ten years after the present IP law was passed it seems that it has come to stay.

The patent provisions of the Brazilian legislation have their origin in the WIPO Patent Harmonization Treaty that, while never adopted, nonetheless provoked the modernization of the patent law in a number of regions. It was more from the draft treaty, abandoned in 1991, than on the terms of the TRIPS Agreement itself that Brazil modeled the bill that several years later became IP Law N∞ 9279/96. The new law served as a message of promise to those who defend intellectual property: finally Brazil, a founding member of the Paris Convention in 1883 and of the Patent Cooperation Treaty in 1970, would be blessed with a modern industrial property legislation.

Since the new law was passed on May 14, 1996, but only became fully effective a year later, the immediate result was the implementation of some transitory provisions that permitted the filing of "pipeline" applications designed to ensure the immediate grant of Brazilian patents for the same term as corresponding patents still in force abroad that claimed previously unpatentable subject matter not yet worked on in Brazil.

Such inventions would otherwise only become patentable in Brazil a year later, upon entry into full force of the new law, provided that they were still to meet the basic requirements of novelty and inventive activity. Such subject matter included all chemical products as well as pharmaceutical and foodstuff products and processes. A heavy filing fee was imposed. Although the interpretation and application of the pipeline provisions led to a considerable number of cases being questioned in the courts, it is also a fact that they resulted in the grant of a number of patents, mostly in the pharmaceutical field, for which applications had not previously been filed in Brazil due to the prohibitions of the previous legislation.

As from May 15, 1997, however, the provisions of the new law came fully into force and with them the number of patent filings in Brazil increased in the region of 25%, not only on account of the removal of most of the more restrictive patentability prohibitions, but also because of the increased credibility in the policy of the Brazilian government, which had not only adhered to the TRIPS Agreement, but also passed - at last - modern IP legislation. This was accompanied by an increase in foreign investment in Brazil, once more primarily in the pharmaceutical area.

The new law also included important provisions that include a one-year grace period for patent filings, a specific recognition of the fact that he who contributes to an infringing act is technically also an infringer, and a broad definition of equivalence in the interpretation of patent claims for infringement purposes.

One important change brought about by the new law was the extinction of industrial design and industrial model patents that previously were granted for a fixed term of ten years after a full examination identical to that applied to patents of invention and utility model patents, and the introduction of design protection by means of industrial design registrations. Such registrations are granted almost immediately on filing and have a term that can be extended up to 25 years from the date of registration (which is the same as that of filing). Industrial design registrations, which are also benefited by a grace period - of 180 days - may, on request, be examined as to novelty and originality after registration. Such examination nowadays is also rapid, and an applicant can expect to have his design both registered and examined within about one year from filing.

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Industrial Property Law (from page 3)

The owner of an examined design registration facing a clear copy now has a strong weapon to take to the courts with a real possibility of obtaining a very rapid preliminary cease and desist injunction pending final first instance decision.

Ten years on from the passing of the present Brazilian Industrial Property Law, there have been many developments and, most important, public awareness of patent rights is finally becoming a fact.

The last ten years under the auspices of the "new" industrial property law have seen a noted increase in patent related court actions. Many of these actions have been TRIPS-related or have concerned pipeline patents. Many also have been provoked by the growth in the pharmaceutical generics industry throughout the world. And many result from the fact that an improved IP legislation has brought more investment to the country.

Such actions largely have been with a view to ensure the obtainment of owner's rights, seeking interpretations from the courts of rights guaranteed by TRIPS and/or by the national IP law. However, there also has been an increase in actions involving patent and design enforcement, and it is perhaps here that one should note the cautionary awareness mentioned at the beginning of this comment.

In particular, there have been a number of interesting interlocutory decisions involving patents in the state courts, which have granted preliminary injunctions, both in favor of the patentee and of the alleged infringer. Where a strong *prima facie* case of infringement has been established, interlocutory cease and desist orders have been given, with relatively heavy fines being applied should they be disrespected. On the other hand, where an alleged infringer has a strong *prima facie* argument of nullity of the patent or design registration, on requesting nullity in the federal courts, he has been able to obtain an interlocutory suspension of the patent or design rights (at least with regard to him), pending decision in the first instance.

Indeed, ten years on from the passing of the present Brazilian Industrial Property Law, there have been many developments and, most important, public awareness of patent rights is finally becoming a fact. ❏

Argentina: The Trend is Your "Only" Friend

By Walter Molano (BCP Securities)

"The trend is your friend," is a common rule of thumb. Behavioral economists formalized the concept into 'herd behavior'. Nevertheless, many economic agents make investment decisions on directional trends, rather than fundamental concepts. Traders, particularly flow traders, only follow directional indicators, eschewing fundamental factors as something that only complicates their observations. Wall Street researchers operate along a similar track, justifying directional tendencies with fundamental explanations. Given the financial sector's incentive structure, the trend is the Wall Street analyst's "only" friend. If he or she were right, they are considered to have been lucky. If they were wrong, they could lose their bonuses-or even worse, their jobs. That is why standard deviations around most Wall Street projections are so tight. Unfortunately, the same thing is happening with Argentina.

Three years ago, Argentina was the pariah of the emerging markets. GDP Warrants were considered to be worthless script. Given that valuations were mired in the mid-single digits, elegant Monte Carlo regressions were constructed to demonstrate that current valuations were correct - never mind that the methodology was totally inadequate due to the compounding effect of the warrants. However, the subsequent rise in warrant prices led to a reassessment of the model. The same analysts, who hated the warrants at 5, were now calling for valuations of 8 or 9. As the price momentum gathered in 2006, there was a foot race to see who could make the most outlandish forecast. By the start of this year, several analysts were calling for year-end warrant prices in excess of US$21. Unfortunately, the optimism broke two months ago when the trend's direction reversed.

The onset of the Argentine winter, the lack of investment in energy infrastructure and the concerns over global liquidity, due to the problems in the U.S. sub-prime market, quickly brought the momentum to a halt. With more than 120 billion units in circulation, the warrants are extremely liquid and volatile. They are vulnerable to any change in sentiment — positive or negative. Therefore, it was not surprising when the warrants fell from their highs two months ago when domestic and international factors turned sour. Unfortunately, the research also changed to reflect the trend. A prime example occurred last month, when the Argentine government released the May GDP estimates, reflecting an 8.5% y/y growth rate and an acceleration of 1.4% m/m on a seasonally-adjusted basis. Nevertheless, the conclusion was to sell GDP Warrants!

The reality is that, while the short-term picture may not be pretty, the internal and external picture bodes well for Argentina and the warrants. The severity of the energy crisis and President Kirchner's decision to launch his wife as his successor suggest that major changes are underway for the energy sector. The new president will be politically free to implement the much-needed changes that will allow a major expansion of the energy sector. This is confirmed by the share price of the Argentine company that is acting as the consolidator of the energy sector. While there may be a dip in economic activity during the third quarter, the new tariff structure will bring in a wave of investment by the end of the year or in 2008 that will boost Argentina's level of economic activity.

More important, most analysts are hung up on the GDP growth component of the warrants, but the higher payoff comes from the deflator. Under the instrument's methodology, the government agrees to pay only 5% of the excess GDP. However, when converting the excess real GDP into current pesos, the government multiplies it by the deflator. Under the Purchasing Power Parity (PPP) assumption, the deflator should be negated by an equal depreciation of the currency. However, the warrants were issued when the peso was grossly undervalued. Therefore, the deflator turns out to be a real gain. In reality, the energy crisis was a blessing in disguise for warrants holders. The expected increase in the deflator will boost the payout more than the moderation of GDP growth. Moreover, the liberalization of the energy sector after the elections will trigger a deluge of foreign investment, improving the outlook for growth, the direction of the currency and the value of the GDP Warrants. The trend may be your friend, when you are doing transactionally motivated marketing (a.k.a. Wall Street research), but it should not be the basis for profit-maximizing investment. ❑

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New Developments in Insurance and Reinsurance in Brazil

By Walter Stuber and Adriana Maria Gödel Stuber (Walter Stuber Consultoria Jurídica)

At the beginning of this year, the Brazilian government decided to open the reinsurance market[1] and adopted a new policy for the reinsurance[2] and retrocession[3] business, through the enactment of Supplementary Law No. 126, of January 15, 2007. Following this policy, on June 28, 2007 the Brazilian Council of Private Insurances (*Conselho Nacional de Seguros Privados* – CNSP) resolved to issue certain provisions which are of particular interest to all the international insurance and reinsurance companies that want to expand their activities or start doing business in Brazil. These provisions are outlined and commented on below.

The matters referred to herein are governed by CNSP Resolutions Nos. 164 and 165, both dated July 17, 2007, and the transitory provisions just announced will prevail until the enactment of the definitive rules, which are still being drafted and depend on further analysis and discussion. It is expected that the proposed definitive rules will be in force in 2008.

Resolution 164 establishes the provisions for reinsurance and retrocession transactions of IRB-Brasil Re (IRB), for contracting either directly or through reinsurance brokers and for contracting reinsurance in foreign currency.

This Resolution confirms again that IRB shall continue to carry out its normal activities as local reinsurer, regardless of any application and governmental authorization, following its own operational procedures and criteria in doing reinsurance and retrocession transactions.

The reinsurance and retrocession can be contracted in foreign currency in Brazil when any of the following situations is verified: (i) the insurance has been contracted in foreign currency in Brazil; (ii) the reinsurance or retrocession has been accepted abroad (i.e., outside Brazil); or (iii) there is a majority participation of foreign reinsurers, exclusively in the case of non-proportional reinsurances. The rules to be issued by the Brazilian Monetary Council (*Conselho Monetário Nacional* – CMN) in this regard shall also be obeyed.

While the definitive rules are not announced, the reinsurance transactions shall be made with a local reinsurer. In the event that the reinsurance coverage is not accepted by a local reinsurer, following its operational procedures and criteria, the assignors[4] can contract reinsurance transactions abroad. The Brazilian Superintendency of Private Insurances (*Superintendência de Seguros Privados* – SUSEP) may request, at any time, the information it deems necessary regarding the contracting of the reinsurance with a local reinsurer.

For the purposes of formation of reserves and calculation of minimum capital, the assignor can only consider as risk transfer the assignments made with reinsurers headquartered abroad. These reinsurers need to comply with the following cumulative minimum requirements:

1. The chosen reinsurer must have an adjusted net worth value equal to at least US$100,000,000.00 (one hundred million United States Dollars);
2. The reinsurer shall be the bearer of a solvency evaluation classification corresponding to, at least, two levels above the minimum required for investment grade (or equivalent concept) by a rating agency recognized by SUSEP. In this regard SUSEP is authorized to issue additional rules imposing a more restrictive classification, considering the methodology of each of these rating agencies;
3. The reinsurer will have to forward to the assignor copies of its balance sheets and financial statements of the three latest fiscal years, together with the corresponding reports of the independent auditors, and the assignor shall keep these documents in its files.

If there is any change in the information contained in any of the documents mentioned in items 1 and 2 above, such change must be immediately conveyed to SUSEP.

The foreign reinsurer cannot be headquartered in a "tax haven" jurisdiction (*paraíso fiscal*) comprising any country or dependence which does not impose any taxation on income or where the applicable rate is below 20% or whose legislation requires secrecy about the capital stock of the legal entities or their ownership[5].

If the foreign reinsurer, at any time, ceases to comply with the above-mentioned requirements, the new transactions made with such foreign reinsurer will be disregarded and cannot be deemed as risk transfer by the assignor to the reinsurer.

The placement of reinsurance abroad shall be made by means of direct negotiation between the assignor and the foreign reinsurer or through an authorized reinsurer brokerage house. While the new specific regulations are not published, a reinsurer brokerage house will be deemed authorized if it presents the minimum documen-

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tation which is required for the reinsurers headquartered in Brazil and representatives in the register of reinsurer brokers of IRB. In addition, the foreign reinsurer must have an insurance policy or certificate of professional civil liability for errors and omissions, in its name, with a minimum insured amount of BRL $10,000,000.00 (approximately US$5,334,756) and with a maximum franchise clause of ten percent of the insured amount, and shall deliver to SUSEP a copy of the respective documentation.

Whenever requested and within the term established by SUSEP, the assignor must present to SUSEP all the documents which evidence the reinsurance transactions made by the assignor and supply the required information. SUSEP can request to IRB the technical information, a copy of the relevant data filed at IRB or any other documents or registries which SUSEP deems necessary to inspect the insurance, co-insurance, reinsurance and retrocession transactions, including IRB's registry of Brazilian reinsurer brokers and representatives.

Resolution 165 establishes provisions for contracting insurance in foreign currency in Brazil and for contracting insurance abroad.

The contracting of insurance in foreign currency in Brazil can be effected when the risk belongs to any of the following branches, sub-branches or modalities:

(i) credits to export.
(ii) aeronautical for air international travels;
(iii) nuclear riks;
(iv) satellites;
(v) international transport;
(vi) marine hull, in the case of long course vessels or vessels owned by shipping line companies and registered in the Brazilian Special Registry (*Registro Especial Brasileiro* – REB);
(vii) oil risks (petroleum);
(viii) civil liability, comprising (a) responsibility for acts performed by Counselors, Directors and/or Administrators (D&O – Directors & Officers), when the insurer has shares or debt instruments certificates of deposit issued abroad; (b) green letter (*carta verde*)[6]; (c) civil liability transport for international travels (RCTR-VI)[7]; (d) general for export products; (e) general for air international travels; (f) general for long course vessels or vessels owned by shipping line companies and registered in the REB;
(ix) diversified risks' insurances related to (a) equipment leased or assigned to third parties, when the lessor or assignor is an insured legal entity incorporated abroad; (b) machines of vessels owned by shipping line companies and registered in the REB; (c) construction, reform and replacement of vessels, aircraft, as well as their components, executed in Brazil for account and order of an individual or a legal entity resident or domiciled abroad or by a Brazilian company, provided that in this latter case there is an overseas finance agreement with an insurance clause in foreign currency;
(x) port operators' insurance pursuant to the normative act issued by SUSEP in force at the time of the contracting[8];
(xi) engineer risks' insurance, regarding Civil Works in Construction and Industrial Facilities, executed in Brazil for account and order of an individual or a legal entity resident or domiciled abroad or by a Brazilian company, provided that in this latter case there is an overseas finance agreement with an insurance clause in foreign currency;
(xii) hydroelectric plant Itaipu Binacional's insurances, when included in the Convention for equal distribution between Brazil and Paraguay.

SUSEP may request, at any time, any information and/or documents that it deems necessary regarding the contracting of any of the insurances listed above.

However, this list is not exhaustive. The issuance of an insurance in foreign currency in Brazil may be effected in any other branch, sub-branch or modality of insurance, provided that its contracting be justified in function of the insured asset or the purpose of the insurance. In any such case, the insurance company will have to inform SUSEP, within 30 calendar days counted as from the first day of validity of the policy, the issuance of the respective insurance, accompanied of the necessary justification, by means of a correspondence in the form attached to Resolution 165 as Exhibit I, containing the following information: name of the insurance company, name of the offeror/insured; number of registration of the offeror/insured with the Brazilian Federal Revenue Service (CNPJ for legal entities or CPF for individuals); branch of the insurance and respective code of identification; a brief description of the risk to be covered and insured asset (maximum of three lines); the coverage to be contracted; the number of the process of the product submitted to SUSEP; the insured amount; the franchise clause, if any; the total amount of premium (net of the tax on insurance premiums – IOF); the term of validity of the policy; and the justification for the issuance in foreign currency, indicating the currency to be used in the transaction.

The supplementary rules issued by the CMN and the Central Bank of Brazil (*Banco Central do Brasil* – Bacen)[9] in this regard shall also be followed and duly complied with.

The contracting of insurance abroad by individuals resident in Brazil or by legal entities domiciled in the Brazilian territory is limited to the following situations:

(i) coverage of risks when there is no insurance offer in Brazil, provided that its contracting does not represent a violation of the legislation in force. This situation will be evidenced by means of a consultation

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made to at least three Brazilian insurance companies duly authorized to operate in the branch of insurance covered by such risk, which shall refuse to issue the policy or certify that the policy will only be given with safeguards (restrictions). The content of these three consultations should be exactly the same and they should be sent with an interval not exceeding 10 calendar days;

(ii) coverage of risks abroad in which the insured is an individual resident in Brazil, provided that the validity of the contracted insurance has been exclusively restricted to the period in which the insured is abroad;

(iii) insurances which are contracted under the terms of international agreements ratified by the Brazilian Congress; and

(iv) insurances that, according to the legislation in force at the time of publication of Supplementary Law 126[10], have already been contracted abroad.

Beyond the four situations identified above, legal entities domiciled in Brazilian territory can contract insurance abroad to cover overseas risks, informing SUSEP of the contracting of such insurance within 30 calendar days counted as from the first date of validity of the policy, by means of a correspondence in the form attached to Resolution 165 as Exhibit II, containing the following information: name of the offeror/insured; number of registration of the offeror/insured with the Brazilian Federal Revenue Service (CNPJ); branch of the insurance and respective code of identification; type of insurance (designation); a brief description of the risk to be covered and the insured asset (maximum of three lines); the coverage to be contracted; the insured amount; the total amount of premium (net of IOF); the franchise clause, if any; the term of validity of the policy; the name of the foreign insurance company to be contracted abroad; the country of origin of the foreign insurance company; the term (date, month and year) of validity for the quotation (price); and the justification for the contracting of insurance abroad.

Resolution 165 is not applicable to the contracting of insurance abroad by persons resident abroad, even when they are paid, by force of a service agreement, by individuals resident in Brazil or legal entities domiciled in Brazilian territory.

Both Resolutions contain in common the following provisions:

- Unless otherwise authorized by such Resolutions, the insured amounts, premiums, indeminities and all the other values related to reinsurance and retrocession transaction shall be expressed in Brazilian currency.
- All the public or private documents requested by SUSEP, originated from any foreign country, shall be duly consularized (i.e. legalized at the competent Brazilian consulate or embassy), except for those documents produced from countries with which Brazil has entered into international treaties waiving such consularization (this is the case of France and Argentina, for example) and shall be accompanied, when written in another language, by a Portuguese translation made by a sworn public translator (who must be registered with the Brazilian Commercial Registry), in the form of the legislation in force.
- SUSEP has been expressly authorized by CNSP to issue the supplementary rules which may be deemed necessary for the execution of any of the provisions of both Resolutions. ❑

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1 This represents the end of the ancient reinsurance and retrocession monopoly granted to Brasil Resseguros S.A. (IRB), the state-controlled Brazilian reinsurance company created in 1939. The regulatory functions formerly attributed to IRB have now been transferred to the Brazilian Council of Private Insurances (CNSP) and the inspection of the insurance companies, reinsurers, insurance brokers and the like is made by the Brazilian Superintendency of Private Insurances (SUSEP). CNSP establishes the guidelines that are implemented by SUSEP.

2 Reinsurance is the transaction whereby the risks are transferred from the assignor to the reinsurer.

3 Retrocession is the transaction whereby the reinsurance risks are transferred from the reinsurer to other reinsurer(s) or from the reinsurer to local insurance company(ies).

4 The assignor is the insurance company that contracts the reinsurance or the reinsurer that contracts the retrocession transaction.

5 This definition was already contemplated in Supplementary Law 126 and is repeated in Resolution 164.

6 The so-called “green letter insurance” (*seguro carta verde*) is a civil liability insurance which is mandatorily required from all Brazilian owners or drivers of automobiles, either private or leased, which conduct their vehicles in a Mercosur country during an international trip. The matter is regulated by SUSEP Circular No. 73, of November 21, 1966 and was subsequently extended to Paraguay as well (which originally was excluded) by means of SUSEP Circular No. 153, of March 23, 2001.

7 The acronym RCTR-VI means Responsabilidade Civil do Transportador de Viagens Internacionais, which can be translated into English as civil liability transport for international travels.

8 Presently, the insurance comprising port operators should be contracted using the standard clauses set forth pursuant to the terms of SUSEP Circular No. 291, of May 13, 2005.

9 These supplementary rules have not yet been announced by the CMN and Bacen.

10 Supplementary Law 126 was published in the *Official Gazette of the Union* on January 16, 2007.

News on Brazilian Trademark Filings

By Attilio Gorini and Rodrigo Borges Carneiro (Dannemann, Siemsen, Bigler & Ipanema Moreir)

The landscape of trademark practice in Brazil is changing rapidly, with the Brazilian Patent and Trademark Office (BPTO) constantly adopting measures to try to improve trademark prosecution - often with mixed results - and various state and federal bodies moving up a few gears in the fight against counterfeiting.

Industrial Property Law 9279/96, which was enacted on May 15 1996, made significant changes to trademark practice in Brazil. In a nutshell, the most important changes were the express incorporation into the Industrial Property Law of the protection for well-known marks provided by the Paris Convention for the Protection of Industrial Property; the abolition of the special registration of a mark as notorious; and the introduction of the incidental declaration of high reputation of a mark, which, once obtained, confers special protection to the mark in all classes for five years. These changes, with some exceptions, helped to build a framework for strong trademark protection in Brazil.

The courts also have been active in dealing with trademark infringements - an example is the recognition that infringement of a famous mark can lead to indemnification for moral damages as well as economic damages.

Another important development has been the introduction of specialized courts to deal with industrial property matters, at both federal and state court levels. The Brazilian Federal Court of Appeals for the Second Region, which covers the states of Rio de Janeiro and Espírito Santo, has implemented specialized panels and a section for the judgment of cases involving industrial property and IP matters. Specialization of the courts follows the creation in 2000 of federal courts of first instance to decide cases involving industrial property rights. It is hoped that specialization of the courts will increase both the quality and speed of decisions in the field of industrial property.

Despite the statutory, case law and court system improvements described above, one black cloud obscures the horizon for trademark owners and practitioners in Brazil: the backlog of trademark applications at BPTO has dramatically increased in the past ten years, to the point where it now takes more than five years to register a trademark. The situation has deteriorated due to a lack of investment and sufficient human resources in the face of a significant increase in trademark filings. In addition, BPTO has taken on a number of projects in the past few years without putting the requisite structures in place. For example, it adopted the Nice Classification in 2000 without providing for a reasonable transition period, which contributed to the creation of a backlog of 600,000 pending applications! These delays undermine the advantages stemming from the adoption of a modern law and threaten the whole system of trademark protection in Brazil. BPTO's plans to clear the backlog include the following measures: recruiting more staff - some 60 new trademark examiners have been hired this year; examining applications filed prior to 2000 under the provisions of the old Brazilian classification system; the same classification system is also being used for renewals filed after January 2000 which have not yet been decided; and suspending the paper publication of the weekly Official Gazette - all decisions are now published electronically only.

In addition, oppositions are now published almost instantaneously. In order to achieve this, BPTO publishes only the minimum information required for the applicant to know that an objection has been raised.

Because docketing and the management of physical files were singled out as major causes of delay, BPTO has decided to no longer accept paper filings. Aiming to become a completely paperless office, it now handles electronic filings only. In September of 2006, BPTO rolled out a new online trademark application filing system called E-marcas. While the possibility to file trademark applications electronically is positive, BPTO's decision to forgo paper applications entirely after the briefest of transition periods has proved controversial. Luckily for applicants, various difficulties in implementing E-marcas mean that the transition period has been extended several times so far.

What makes the transition to electronic filing difficult for applicants is the selection of the products or services relevant for each application. E-marcas enables applicants to select only products and services listed in the Nice Classification; applicants wishing to claim products and services that do not specifically feature in the classification need to consult the BPTO committee in charge of classification questions, which involves additional costs and a delay of approximately seven days per application. Therefore, applicants are strongly advised to claim only products and services specifically listed in the Nice Classification, but the limitation to the description of products and services does not apply to applications filed under a Paris Convention priority claim.

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The decision to abandon paper filings led the Brazilian Association of Industrial Property Agents to file a court action against BPTO on November 8, 2006 in the Federal Courts. In January 2007, the 3rd Panel of the Federal Court of Appeals prohibited the mere substitution of the traditional filing system due to several reasons, the most important of them being the fact that the electronic filing would restrict access to the trademark system to those with Internet access, thus hurting the Federal Constitution.

In the most recent decision, BPTO decided to maintain the simultaneous coexistence of both the paper and the on-line systems until July 1, 2007. Although this date now has passed, which system eventually will win out over the other is still unclear.

In fact, the simultaneous maintenance of the two systems, as it occurs in the United States and in the European Union, would have two main objectives: to guarantee full access to the trademark filing system and to allow the user to become acquainted with the on-line system which.

These changes are, overall, very positive to the Brazilian trademark filing system and, if they are properly implemented, should result in a streamlined service that will expedite the grant of trademark registrations. ❑

Brazilian Economic Overview

By Edwin Taylor

Trade

Rising imports lowered Brazil's trade surplus in July in the first indication that the second semester will be marked by declining surpluses.

The month's surplus of US$3.34 billion was 40% below that of July 2006 and also less than this June's surplus of US$3.8 billion. Exports continued strong at US$14.1 billion, an all-time monthly record, but imports jumped to US$10.73 billion, also a record.

On a daily average, imports rose 28.7% versus July 2006 while exports declined 1.3%. For the year through July, imports expanded 27.1% and exports climbed 16.1% versus the same period in 2006.

The surplus for the year through July was US$23.98 billion, down from US$25.19 billion for the same period last year. In the first semester, thanks to the strong performance of exports the period's surplus exceeded that of 2006 by 5.7%. This increase, however, was not expected to be maintained in the second semester and July's results confirmed that.

In the first seven months of the year, raw materials and intermediate goods accounted for 50% of Brazil's imports, capital goods 20.9% and consumer goods 13.2%. Imports of consumer goods, however, registered the largest increase over this period, rising 32.5%. Imports of raw materials and intermediate goods increased 28.4% and capital goods 24.7%.

The Ministry of Development and Trade also announced that in the first semester, Brazil's exports increased 10.1% in the quantity exported while the average price rose 9.2%. In 2006, prices climbed 12.5% in the first semester but the quantity exported increased by only 3.2%.

Based on the results through July, the ministry said that it is raising its projection for this year's export total from US$152 billion to US$155 billion.

Foreign Accounts

Brazil is enjoying another boom in foreign investment as shown by June's figures released by the Central Bank.

Foreign Direct Investment (FDI) in the month totaled US$10.3 billion, a monthly record. This raised FDI in the first semester to US$20.8 billion, already in excess of the total for all of 2006, US$18.78 billion. The semester result also exceeded the totals for every year since 2000.

June's record was made possible by two major operations, US$5.4 billion resulting from a share offer made by steel giant ArcelorMittal for shares of Arcelor Brasil, and US$1 billion paid by Ireland's Experian for the Brazilian bank credit information firm Serasa. Another US$495 million was paid by Deutsche Bank for a share in the investment arm of Brazil's Unibanco.

But even without these major operations, FDI in June reached the impressive figure of US$3.4 billion. Central Bank officials said they expect this pace to continue in July and projected the month's FDI at US$3.5 billion.

The foreign capital now pouring into Brazil is being attracted by the positive numbers coming out of the domestic economy—inflation is under control, consumer spending is expanding and the economy is expected to grow by at least 4.5% this year. Another factor is the still high level of international liquidity which has made investment funds abundantly available.

Not since the late 1990s has Brazil seen FDI as high as this year. At that time, however, the investment funds entered the country to buy state companies as the government privatized entire sectors led by energy and communications. This time there are no privatizations and much of the money is going for new investments in in-

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Edwin Taylor is a Latin American Law & Business Report special correspondent based in Rio de Janeiro.

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dustry. According to the Central Bank, 47% of the semester's FDI went to industry.

Brazil in June also registered a current account surplus of US$696 million. This left the first semester's surplus at US$4.3 billion, 60% more than for the same period last year.

Monetary Policy

The Central Bank in July continued its easing of monetary policy, lowering the Selic rate by a half-point to 11.5% a year.

Brazil no longer has the dubious distinction of possessing the world's highest real interest rate. With the July rate cut, the 17th consecutive, Brazil's real rate, discounting inflation, fell to 7.7% and now trails that of Turkey which is 8.2%.

This was the second straight half-point cut and as in June, the bank's Monetary Policy Committee (Copom) was divided. Four members voted for a half-point reduction while three opted for a quarter-point. The division in June was five to three and the reduced margin led financial market analysts to predict that at Copom's next meeting in September, if there is a rate cut it will not exceed a quarter-point.

Since Copom began lowering the Selic in September 2005, the base interest rate has declined by 8.25 points.

Business leaders who have criticized the slow pace of the Central Bank's reduction of the Selic, expressed satisfaction with the latest rate cut.

"With this, industry can maintain its schedule for investments in the economy. We expect the Selic to fall to 10% by the end of the year," said Edgar Pereira, head economist of the Institute for Industrial Development Studies (Iedi).

Public Accounts

Brazil's public sector posted a primary budget surplus of R$71.6 billion (US$38 billion) in the first semester, the highest since the Central Bank began keeping these records in 1991.

The annualized surplus at the end of June was equal to 4.3% of GDP, well above this year's target of 3.8%. The primary surplus does not include interest payments which totaled R$78.8 billion (US$42 billion) in the semester, the lowest level since 2004. This left a nominal deficit for the period of R$7.1 billion (US$3.7 billion), the lowest since 1993.

Government interest payments have been in decline because of the reduction in the Selic rate which adjusts 34% of the domestic public debt. This has also contributed to a reduction in the debt which in June was equal to 44.3% of GDP, down from 44.7% in May.

In the semester, the central government's primary surplus rose 15% from the same period last year while the surplus of state and local governments expanded by 69%. The surplus of the federal state companies increased by 13%.

In addition to falling interest rates, the year's positive numbers for public accounts are due to increased tax collections at the federal and state levels. Federal tax collections climbed 13.5% in the semester and state collections improved 9%.

In June, the public sector registered a primary surplus of BRL$10.97 billion (US$5.8 billion) which permitted a nominal surplus of BRL$677 million (US$360 million), the second surplus in three months.

Inflation

Inflation in Brazil as measured by the Market General Price Index (IGP-M), the inflation index of the financial market, rose slightly in July, moving from 0.26% in June to 0.28%.

Wholesale prices increased 0.26% led by a 1.75% increase in farm prices. Consumer prices rose 0.34%, also pushed by food prices which climbed 1.23%.

Construction costs, which had jumped 1.67% in June, increased by only 0.21% in July.

Business

Industrial activity in S„o Paulo slowed in June but ended the first semester with a strong expansion, according to the state's federation of industry, Fiesp.

The Fiesp industrial activity indicator (INA) in June fell 0.3% from May. Versus June 2006, however, it expanded by 3.1% and in the first semester rose 4% compared with the same period last year. The reduction from May was caused mainly by a 0.6% decline in industrial sales for June.

Fiesp analysts, though, said they were not concerned with June's figures which they described as a momentary adjustment by companies following May's 1.6% expansion.

Brazil's auto industry ended the first semester with a series of records, according to numbers presented by the National Association of Auto Manufacturers (Anfavea).

In the semester, production rose 6.3% to 1.38 million vehicles, an all-time record for the period. In June, auto production totaled 246,400 units, an increase of 9.6% versus June 2006 although the total was down 4.2% from this May.

Domestic sales also set a semester record, expanding 25.7% over the same period last year to 1.08 million vehicles. June's sales rose 34% compared with June 2006 to 198,800 units.

Based on these numbers, Anfavea announced that it is raising its outlook for this year's production to 2.87 million vehicles, an increase of 10% over 2006. Sales were expected to increase by 14.5% but this has now been raised to 22%, signifying sales of 2.35 million vehicles for the year.

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Exports in the semester rose 2% in revenues but declined 10.8% in the number of vehicles exported. For the year, Anfavea expects exports to repeat last year's result of US$12.1 billion in revenues but units exported are projected to decline by 11%.

Industrial production expanded by a surprisingly strong 1.3% in May from April and by 4.9% versus May 2006, according to the government's statistics bureau, IBGE.

With May's result, production for the year expanded by 4.4% versus the same period in 2006, up from 4.3% in April.

The month's increase was led by capital goods which posted a 5.1% expansion in output from April. Production of consumer goods rose 1.5% and intermediate goods 0.6%.

Compared with April, output in May expanded in 15 of the 23 sectors surveyed by IBGE, led by the pharmaceutical industry, up 8.3%, the auto industry, 3.7%, machinery and equipment, 3.1% and food, 1.2%. May was also the eighth consecutive month to register an expansion in industrial production.

"It is a sustained growth, permanent without being explosive. And we haven't seen this since 2004" said IBGE economist Silvio Sales. "What you are seeing is a generalized expansion led by capital goods which is preparing the way for a future increase in demand and shows a continued increase in the country's productive capacity."

Industrial sales fell in May for the second straight month, declining 0.5% from April, according to the National Confederation of Industry (CNI). Compared with May 2006, however, sales rose 0.9% and for the year through May were up 4% versus the same period last year. CNI blamed the month's decline on the appreciation of the real against the dollar.

Most other indicators, though were positive for May. The level of industrial employment expanded for the 18th straight month, increasing 3.5% compared with May of last year. This left the increase for the year at 3.4%.

Industrial payroll rose 0.9% from April and 2.7% year-on-year. Through May, payroll was up 5.5% compared with the first five months of 2006.

Average capacity utilization also improved in May, moving from 82.5% in April to 82.7%. In May of last year, capacity utilization was 80.8%.

Retail sales rose again in May, the fifth consecutive month to register an increase.

Sales volume expanded 0.5% from April and 10.5% compared with May 2006, according to the government's statistics bureau, IBGE. May's result left sales for the year up 4.6% versus the same period in 2006.

Semi-durable goods led the month's numbers, increasing 7.6% from April. Durable goods rose 3.1% and non-durables 0.1%. The sales volume of fuels declined 1.2%. Durable goods led the year-on-year comparison, expanding 10.4% while non-durables increased 8.2%, accounting for 38% of all retail sales.

In a note, IBGE said that "this performance continues to reflect the increased purchasing power of the public."

Reflecting the improving economy and the increased availability of financing, the volume of mergers and acquisitions rose significantly in the first semester.

According to a survey of announced M&A operations in the semester conducted by PricewaterhouseCoopers, the total rose 32% from last year to 334. A similar survey by KPMG showed a 16% increase from 229 in the first half of 2006 to 266.

PwC said that in its survey, 67% of the M&As were initiated by Brazilian firms and 33% by foreign companies. The sectors that attracted the most interest were food, mining, retail, construction, technology, chemicals and public services which together accounted for 52% of the semester's operations.

The announced total value of the period's M&A was US$15.6 billion compared with US$13.9 billion for the same period last year.

Labor

Unemployment in June fell for the first time this year, according to the government's statistics bureau, IBGE.

The rate in Brazil's six largest metropolitan areas declined from 10.1% in May to 9.7%. Unemployment, however, is still above where it started the year at 9.3% in January.

June's decline was made possible by a surge in hiring in S„o Paulo which accounted for 68% of the 268,000 jobs created in June. The first semester ended with an average unemployment rate of 9.9% but economists expect the rate to continue to decline in the second half of the year.

IBGE also announced that the average salary in June fell 0.5% from May. Versus June 2006, however, it rose 2.7%.

Employment in the formal economy set a new record in the first semester, according to the Labor Ministry.

In the semester, 1.09 million new jobs were created, an expansion of 18.5% versus the same period in 2006. This was the first time since these statistics began to be kept in 1992 that the number of new jobs in the formal economy totaled 1 million in the first six months of the year.

Most categories registered expressive increases in the semester with industrial jobs increasing by 39.4%, the retail sector by 35.4%, services 24.5%, the agriculture sector 24.5% and construction 23.6%. The only areas to record declines were mineral extraction and public administration.

In June, formal economy employment expanded by 16.8% with 181,667 new jobs created. ❑

Arbitration Proceedings Enjoined in *Chevron v. Ecuador*: Setback for Chevron

By C. MacNeil Mitchell (Winston & Strawn)

Introduction

On June 19, 2007 the United States District Court for the Southern District of New York permanently enjoined American Arbitration Association (AAA) arbitration proceedings in New York initiated by ChevronTexaco Corporation (Chevron) and its predecessor Texaco Petroleum Company (Texaco) against the Republic of Ecuador (Ecuador) and PetroEcuador, Ecuador's government-owned oil company. The decision put an end to a crucial chapter in a fifteen-year battle relating to Chevron's potential financial liability in connection with environmental damage allegedly caused by Texaco's oil operations in the Ecuadorian Amazon region.[1]

Chevron filed its demand for arbitration against PetroEcuador for total or partial indemnification in the event that Texaco is found liable in a court action now pending in Lago Agrio, Ecuador. In the so-called *Lago Agrio* action, 30,000 members of Ecuador's indigenous population brought suit against Chevron and Texaco alleging that Texaco had failed to adhere to even minimum international environmental norms during its thirty years of petroleum exploration and drilling on Ecuadorian soil. The *Lago Agrio* plaintiffs are asking the Ecuadorian court to order Texaco to pay in the neighborhood of $6 billion for the clean-up of their environment and to compensate all of those who have suffered illness as a result of the petroleum contamination of their land and waters.

Chevron filed its arbitral claim on June 11, 2004, and while Chevron's liability remains to be resolved by the Lago Agrio court, the U.S. District Court's recent decision stands as a major setback to Chevron's efforts to pass on to Ecuador Texaco's responsibility for the environmental damage caused to Ecuador's Amazon region.

Factual Background — Thirty Years of Oil Operations

Stage One: 1964-1970. Original 1964 Concession and the 1965 JOA

The case recently decided by the U.S. District Court (and now being appealed by Chevron to the Second Circuit Court of Appeals) and the underlying *Lago Agrio* litigation both find their origins in an oil concession that Ecuador granted to Texaco[2] and Gulf[3] on March 5, 1964 (the 1964 Concession). The 1964 Concession granted Texaco and Gulf rights to conduct operations for the exploration and exploitation of hydrocarbons in the Oriente [Eastern] region of Ecuador (then known as the Napo Province).[4]

On October 2, 1965, in Coral Gables, Florida, Texaco and Gulf executed a joint operating agreement (the 1965 JOA), wherein the two concessionaires agreed to ground rules for conducting their joint operations under the 1964 Concession. Under the 1965 JOA, Texaco was named the Operator of what was then known as the Texaco-Gulf Consortium.

The 1965 JOA contained three provisions particularly pertinent to the case before the U.S. District Court, namely: (a) an arbitration clause requiring Texaco and Gulf, the two concessionaires, to submit their disputes under the JOA to arbitration to be conducted in New York pursuant to the rules of the American Arbitration Association; (b) an indemnification clause in which the interest holders (Gulf and Texaco) according to their percentage interests were to hold the Operator (Texaco) harmless from all claims and demands that might be made against the Operator by third parties; and (c) a choice-of-law clause stating that the agreement and the relationship between the concessionaires would be governed by the laws of New York, except for those matters necessarily governed by the laws of the Republic of Ecuador.

Stage Two: 1971-1977. Termination of the 1964 Concession and Execution of the 1973 Concession

On January 28, 1971, the Republic created *Compañía Estatal Petrolera Ecuatoriana* (CEPE), a state oil and gas company (later replaced by PetroEcuador as its successor in interest). By law, CEPE was to own, explore, produce, process, transport and market all hydrocarbon resources within the territory of Ecuador.[5] In September 1971, the Republic enacted a new law of hydrocarbons (the 1971 Hydrocarbons Law) which, among other things, introduced new forms of contracts by which private companies could conduct oil exploration and exploitation in Ecuador as concessionaires. These new contracts were to substitute for and supersede all existing concession contracts entered into prior to the effective date of the 1971 Hydrocarbons Law (such as the 1964 Concession).

Texaco and Gulf entered into the new oil exploration and exploitation contract with Ecuador on August 6, 1973 (the 1973 Concession). The 1973 Concession by its terms was to expire on June 6, 1992. Significantly, the 1973 Concession contained an option for CEPE to acquire

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by 1977 up to a 25% participation interest in the 1973 Concession. This latter provision responded to requirements set forth by the OPEC, which Ecuador had just recently joined.

On June 19, 2007 the United States District Court for the Southern District of New York permanently enjoined American Arbitration Association (AAA) arbitration proceedings in New York initiated by ChevronTexaco Corporation (Chevron) and its predecessor Texaco Petroleum Company (Texaco) against the Republic of Ecuador (Ecuador) and PetroEcuador, Ecuador's government-owned oil company.

CEPE's acquisition of an interest in the 1973 Concession, however, would not wait until 1977. On January 10, 1974, Ecuador's new military government issued Supreme Decree No. 9 which mandated that CEPE's 25% participation in the 1973 Concession begin in 1974. Six months later, Ecuador and CEPE, on one hand, and Texaco and Gulf, on the other, executed a 1974 Agreement formalizing CEPE's acquisition of a 25% participation in all of the 1973 Concession's operations, including proportional parts of all investments, operations, costs, obligations, royalties and sales of crude oil for internal consumption.

Three years later, Gulf decided to sell its remaining 37.5% interest in the 1973 Concession to CEPE. CEPE and Gulf executed the purchase and sale agreement on May 27, 1977 (the 1977 Gulf Agreement).[6] Following this sale, CEPE owned a 62.5% interest in the 1973 Concession and Texaco the remaining 37.5% interest. Texaco, however, remained as Operator.

Stage Three: 1977-1992. Negotiations for a New JOA, Change of Operator and Expiration of the 1973 Concession

The 1974 Agreement contained no mention of the 1965 JOA, but rather provided that henceforth all the activities to be performed in the Joint Operation "shall be ruled by an Operation Agreement to be subscribed by the parties." Negotiations for a new joint operating agreement began shortly after the execution of the 1974 Agreement. Over the next several years the parties exchanged multiple drafts of a proposed new JOA. In July of 1990, by a separate negotiated agreement PetroEcuador (CEPE's successor) replaced Texaco in the role of Operator of the Consortium, and on March 25, 1991 PetroEcuador and Texaco finally entered into an operating agreement ("the 1991 Operating Agreement"). The 1991 Operating Agreement did not contain any reference to the 1965 JOA, and its dispute resolution clause exclusively invoked the exclusive jurisdiction of the courts of Ecuador.

On June 7, 1992, all oil exploration and exploitation rights granted by the 1973 Concession expired, and Texaco's 37.5% interest (as well as PetroEcuador's 62.5% interest) in the Texaco-PetroEcuador Concession reverted to PetroEcuador in its capacity as residual owner of all Ecuador's hydrocarbons.

The New York Litigation and the Lago Agrio Action

In 1993, soon after Texaco had exited Ecuador, 30,000 members of various Ecuadorian indigenous communities instituted a lawsuit against Texaco before the United States District Court for the Southern District of New York, seeking to compel it to remediate the environmental damage allegedly caused to their lands and waters by its oil operations in the region. This claim would come to be known as the *Aguinda* litigation, named after the first-named plaintiff.[7]

After nearly ten years of litigation, in 2001 the District Court dismissed the *Aguinda* claim at the behest of Chevron (now Texaco's owner) on the grounds of *forum non conveniens*. In 2002, the U.S. Court of Appeals for the Second Circuit affirmed under the condition that Chevron consent to personal jurisdiction in Ecuador for a renewed suit.[8] In 2003 the Ecuadorian indigenous communities renewed their claim against Chevron in Lago Agrio, Ecuador, by way of the *Lago Agrio* litigation.

Seeking indemnification for this potential multi-billion liability, on June 11, 2004 Chevron instituted arbitration proceedings in New York against PetroEcuador on the basis of the arbitration clause contained in the 1965 JOA. Although CEPE had never executed the 1965 JOA (or ever been asked to do so), Chevron claimed that the provisions of the JOA were nonetheless binding on PetroEcuador under theories of estoppel and the allegedly similar notion of Ecuadorian law known as the doctrine of *actos propios* (own acts). On October 15, 2004, PetroEcuador filed a petition before the New York Supreme Court seeking to permanently enjoin the arbitration proceedings. On October 22, 2004, Chevron removed the case to the U. S. District Court for the Southern District of New York.

The U.S. District Court sought to resolve competing claims regarding the validity and enforceability of the 1965 JOA against PetroEcuador, and in particular the 1965 JOA's dispute resolution clause providing for arbitration of disputes to be conducted in New York pursuant to the rules of the American Arbitration Association.

As Judge Sand later remarked in his opinion, "The parties agree that neither CEPE nor PetroEcuador ever

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signed the 1965 JOA at this point [in 1974 when CEPE first acquired an interest], or at any other point going forward. Therefore PetroEcuador can only be held to the terms of the JOA through the operation of law."

"Where the law is unsettled or unclear, an American court must determine how a court in Ecuador would rule on the law upon which the defendant seeks to rely," the Court explained. Accordingly, "The question before this Court is whether an Ecuadorian Court would find that CEPE had assumed Gulf's rights and obligations under the JOA in 1974 so that arbitration before the AAA in New York sought in 2004 would be mandated."

Having examined voluminous expert testimony on the substantive content of Ecuadorian public and private contracting law, the Court concluded that in 1974 extensive political, military and administrative approvals would have been required under Ecuadorian law before binding an instrumentality of Ecuador to a hydrocarbons exploration contract such as the 1965 JOA: "Because the formalities were not complied with, an Ecuadorian court looking back to 1974 would likely rule that the JOA was not binding on PetroEcuador." The Court further noted that "[e]ven if formalities were not to be required in this instance by an Ecuadorian court, there is substantial disagreement amongst the experts as to whether the JOA, even if completely valid procedurally, would be constitutional." The Court at this juncture, however, found it unnecessary in light of its alternate holding grounded in the "reasonable expectations" of Texaco, to base its ruling on the unconstitutionality of the arbitration clause.

The Court further examined quasi-contractual alternatives under Ecuadorian law to a signed contract that could bind PetroEcuador (or its predecessor, CEPE) to the 1965 JOA or to its arbitration clause. It found none. On the issue of CEPE's alleged estoppel to deny the 1965 JOA's validity, the Court noted in the first place that the uncontested facts in the record showed that Texaco had never in fact relied on any belief that CEPE was bound by the 1965 JOA. But Judge Sand went even further. Even assuming *arguendo* that such reliance could be established, the Court stated that "[b]efore an American court could hold that plaintiffs are estopped from denying that they are bound to the 1965 JOA it would have to find any reliance by defendants on the laws of Ecuador (by whose operation it seeks to bind a nonsignatory to a contract) was reasonable." The Court found that, given the state of the law in force in Ecuador at the relevant periods of time, an Ecuadorian court would find no "reasonable expectation" on Chevron's part that the JOA would bind CEPE in 1974 or afterwards. The Court also rejected the applicability of the Ecuadorian doctrine of *actos propios* because that doctrine also "require[s] an analysis of reasonable expectations of the parties, however, which reliance the Court finds lacking here." The Court based its conclusions of law in large measure on the cross-examination concessions made by Chevron's own expert witnesses on Ecuadorian law.

The Court ultimately held that an Ecuadorian court would today find that the 1965 JOA in its entirety is neither binding nor enforceable against PetroEcuador (nor would have been binding on CEPE). "Because an American court applying federal law would not require arbitration if under Ecuadorian law this was not an available remedy, there is no genuine issue as to the material fact of whether the JOA serves to bind PetroEcuador," Judge Sand concluded. As a result, in a partial ruling on Ecuador's and PetroEcuador's motion for summary judgment, the Court granted Ecuador's motion for a permanent stay of arbitration, and denied Chevron's motion for summary judgment dismissing plaintiffs' petition to stay arbitration.

The Republic of Ecuador and PetroEcuador were co-represented by the law firms of Winston & Strawn and Arnold & Porter. Arnold & Porter appeared by partner Raul R. Herrera and associates Cristina Sorgi and A. Manuel Garcia, while Winston & Strawn appeared by partners Eric W. Bloom and C. MacNeil Mitchell, associates Tomas Leonard, Karen S. Manley, Nicole Y. Silver, Sarah M. Hall and Lynn O. Rosenstock, and contract attorney Carolina Romero Acevedo.

ChevronTexaco and Texaco Petroleum were represented by Thomas F. Cullen, Jr., Gregory A. Castanias, Louis K. Fisher, Michael L. Kolis and Thomas E. Lynch of Jones Day. ❑

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1 Texaco operated in Ecuador from 1964 until it exited the country in 1992. It merged with Chevron in 2001.

2 Texaco parent and subsidiary companies operating in Ecuador are herein referred to jointly as "Texaco".

3 Gulf parent and subsidiary companies operating in Ecuador are herein referred to jointly as "Gulf".

4 The 1964 Concession thus came to be known as the "Napo Concession". The 1964 Concession was later amended by an agreement entered into on June 27, 1969 between the Republic of Ecuador, on the one hand, and Texaco and Gulf, on the other hand.

5 CEPE was PetroEcuador's predecessor. CEPE ceased to exist in 1989 pursuant to Special Law No. 45, under which PetroEcuador and its subsidiaries were created. The creation of PetroEcuador resulted in the dissolution of CEPE, whose resources, rights and obligations were transferred to PetroEcuador.

6 This agreement was made effective December 31, 1976.

7 See *Aguinda v.. Texaco, Inc.*, 202 F.3d 470 (2d Cir. 2002).

8 *Id.* While the *Aguinda* litigation was pending, in 1995 Texaco, the Republic of Ecuador and PetroEcuador entered into an agreement wherein Texaco agreed to perform certain remedial actions in the Ecuadorian Amazon region (the "1995 Settlement"). The Republic of Ecuador and PetroEcuador, in turn, agreed to release Texaco "from any liability and claims by the Government of the Republic of Ecuador, Petroecuador and its Affiliates, for items related to the obligations assumed by TEXPET in" the 1995 Settlement. The 1995 Settlement was declared by the Ecuadorian government to be fully performed and concluded in 1998.

Hutchinson Launches Showcase Container Terminal in Manta

By Maria Acosta (Ecuador Asesor Dacosta S.A.)

Hutchison Port Holdings, which is part of the Hutchison Whampoa Company, has been granted permission by the Manta Port Authority to build and operate Terminales Internacionales de Ecuador (TIDE), a new container terminal at the Port of Manta, Ecuador. Hutchison Port Holdings is considered by many as the best global port operator in the world, and its involvement in TIDE is widely seen in Ecuador as providing a boost to the country's economic and transportation infrastructures.

With the completion of this project, the city of Manta will become the centre of timely transfers between Asia and South America, and also, in the near future, the entrance door of the Pacific-Atlantic transoceanic corridor.

This view is seconded locally as well, according to the president of the Manta's Chamber of Commerce, Lucía Fernández, who was quick to point out that the port has excellent facilities that put it on track for success in the competitive port development arena.

The new terminal is scheduled to be operational later this year. TIDE will be equipped with a quay length of more than 4100 feet, depths alongside of nearly 50 feet, and a total area of 158 acres when all phases have been completed. The project will allow the entrance of supersize fifth-generation vessels.

TIDE is situated in the Port of Manta, Ecuador's only natural deep-water port with minimal dredging requirements. The location and available infrastructure made permission from the Ecuadorian government all but a foregone conclusion. The port is approximately one hour from international shipping routes. Manta is Ecuador's closest port to Asia, which assures it primacy of place as the first port of call for global shipping lines. In addition, the city has an international airport located less than 3 miles from the port's facilities. The airport is rated as one of the best landing strips in South America, making it possible for the arrival of heavy freight planes. Finally, Manta also has two free trade zones (Zoframa and Zomanta) that are close to the port on the main routes into the city.

These free trade zones allow the existence of huge areas for warehousing, and are managed with special investment and tax regulations according to Ecuador's liberal Free Trade Zones Law provisions. Some of these incentives include income tax exemption, exemption from patent and license use and technology transfers, and free repatriation of capital and profits.

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On the other hand, Ecuador's legal framework also includes laws that are important for a potential investor to consider before setting up shop in the country. For example, foreign investors must register with the Central Bank of Ecuador (BCE) after making an initial investment (e.g., after the payment of the assigned capital). Investors should also register with the BCE following each increase in capital, although there is no legal obligation to do so.

Registering with the BCE permits the option of benefiting from certain financial advantages if the interest rate is within the limits established by the BCE (presently around 10% annually) as well as the exemption from the payment of interest on the retention tax (presently 25% per payment) as long as the interest rate is within the limits established by the BCE.

This registration with the BCE also opens up other benefits and guarantees for the investor, specifically those granted by the Law of Investment Promotion and Guarantee of 1997 (Law No. 46, OR/219 of December 19), which covers the following benefits, which include:

- liberty to repatriate benefits
- liberty to reinvest benefits
- rights of access to the Ecuadorian financial market without limitations

From a taxation perspective, Ecuador has a long list of agreements it has issued to avoid double taxation, as well as a list of bilateral/multilateral agreements issued for the promotion and reciprocal protection of investments. A further advantage to the international business community in Ecuador is the Arbitration and Mediation Law of 1997, inclusive of its reform of 2005 (Law No. 48, OR/532, February 25). This provides for international arbitration provisions and declares that it shall be applied to national as well as international arbitration, without prejudice of the provisions established in the treaties subscribed and ratified by the Republic of Ecuador.

On May 18, 2004 the Law of Transparency and Free Information Access (Law No. 2000-34, OR/337) was published, and the regulations of the original law later were published on January 19, 2005 (Executive Decree No. 2471, OR/507). These regulations encourage the legal security and transparency of the country and provide a procedure to demand all the rights established in the main law.

Transparency issues, which have plagued Ecuador in the past, have been addressed in non-traditional ways as well. TIDE marks the first time that the government

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has initiated an “e-Government” project: There are provisions in the law that state that all the government’s acts and contracts are public information and can be accessed and read on the government’s Web sites.

There are also plans between the Ecuadorian and Brazilian governments for granting permission for the opening of a direct Manta-Manaus route for direct access from Asia to Brazil. The main goal of this “Manta-Manaus” project is to encourage the inter-oceanic Asia-Pacific route (Andean-Brazilian zone), which involves bringing goods from Asia to Manta, then by airplane to the port of Francisco de Orellana, and finally, through the Amazon River or by airplane again to Manaus in Brazil. Under this scenario, tiny Ecuador would become one of the largest suppliers to all of South America for goods coming from Asia. ❑

EL SALVADOR

El Salvador: CAFTA and Intellectual Property

By Gilberto Fajardo (Romero Pineda & Asociados)

The Free Trade Agreement between Dominican Republic, Central America and United States of America (CAFTA) has resulted in substantial amendments to the intellectual property field in El Salvador. Generally the amendments, which affect most of Central America, are focused mainly on the copyrights field.

CAFTA incorporates into the Salvadoran internal laws the following treaties into Salvadoran law: The Patent Cooperation Treaty (1970); The Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (1980); The WIPO Copyright Treaty (1996); and The WIPO Performances and Phonograms Treaty (1996). El Salvador is expected to ratify the following treaties before January 1, 2008: The International Convention for the Protection of New Varieties of Plants (1991); The Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974); and The Trademark Law Treaty (1994). El Salvador also has also agreed to make reasonable efforts to ratify The Patent Law Treaty (2000); The Hague Agreement concerning the International Registration of Industrial Designs (1999); and the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (1989).

As far as trademarks are concerned, the CAFTA treaty establishes innovations including the laws the collective trademarks, certification, sound, smelling trademarks and trademarks that at the same time can be geographical indicators. It also eliminates mandatory registration of license of use recordings at the Intellectual Property Register, and only requires a license agreement contract between the parties to make valid the licensed rights. Most importantly, the treaty establishes the possibility of cancellation of a registered trademark because of lack of use of during the five years preceding the initial date of the cancellation action. These changes the “attributive system of inscription” that El Salvador had before in which it was not necessary that a trademark be in use to defend it either on the administrative or judicial level. A registration also can be cancelled partially, but only for those products that the inscription covers but are not in use. Cancellation can also be used as a defense against existing similar trademarks not currently in use.

In this last case, the owner of a trademark can prove the use of the trademark through mechanisms such as commercial invoices, accounting documents, advertising promotions or any type of publicity, no matter if the trademark is being used inside El Salvador or not. On the other hand, CAFTA introduces serious amendments to the Penal Code for violation of distinctive signs. The punishment is from two to four years imprisonment for copying, imitating, modifying, or in any way using a distinctive sign property of a third party or the product protected by the distinctive sign.

As far as copyrights, the protection has been extended from fifty to seventy years after the author dies. The treaty guarantees the protection of authors, artists, execution interpreters and producers of phonograms in the digital area, establishing effective actions against the violation of copyrights in the audiovisual and software fields. Furthermore, it establishes equal treatment among authors, artists and performers. Additionally, the manufacturing, assembling,

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modification, importation, exportation, sale, leasing or distribution of decoders of satellite signals will be penalized. The penal code amendments impose two to four years of imprisonment for infringement on a commercial scale, defined as "the distressing infringement

The treaty emphasizes that any infraction to an intellectual property, as well as the importation or exportation of goods that constitute infringement, can be prosecuted without the consent of the right holder in order to preserve the proof and to prevent continuing infringement.

meaningful of copyrights and connected rights, with the objective of obtaining a commercial advantage or private economic profit, as well as the distressing infringement that does not have a direct or indirect economic profit, if it causes a larger economic harm to an infraction of less value." Finally, it establishes the punishment of aggravated offenses of copyright violation at four to six years of imprisonment.

In the patents field, the treaty reiterates the protection of inventions, being those products of procedures, maintaining the requirements of international registration: inventive levels, novelty and industrial application. Novelty is represented by the term of protection to the patent, to compensate "unreasonable delays" in the granting of the patent, establishing as unreasonable delay a period of more than five years since the filing date of the application, or three years counted from the date of the request of the test. The test data will be protected against unfair commercial use for a period of five years for pharmaceutical products and ten years for agricultural chemistry products, periods counted from the approval date for the commercialization in Salvadoran territory.

Finally, the treaty emphasizes that any infraction to an intellectual property, as well as the importation or exportation of goods that constitute infringement, can be prosecuted without the consent of the right holder in order to preserve the proof and to prevent continuing infringement. This is a radical change in regard to the traditional way to prosecute an infringement against intellectual property violations, which was based on the accusation of the rights holder in order to proceed. ❑

The Application of the New Antitrust Law in the Energy Industry in Mexico

By Alejandro López Velarde (López Velarde, Wilson, Abogados, S.C)

Introduction

As part of Mexico's new international economic policy, based in part on free trade and foreign investment, and with the purpose to protect the competition process in the Mexican market by eliminating and regulating monopolies, monopolistic practices, concentrations and other acts that may affect the free flow of goods and services, the Mexican Congress promulgated the Federal Economic Competition Law (*Ley Federal de Competencia Económica* — the "Antitrust Law") in December, 1992.[1] On June 28, 2006, the Mexican Congress approved and enacted the reforms and modifications to the Antitrust Law in the Official Gazette of the Federation (*Diario Oficial de la Federacion*).[2]

The general purpose of the Antitrust Law is not only to guarantee that investors who wish to participate in the Mexican market will encounter a market free of monopolistic practices, but also that the Mexican government allows the participation of the private sector in the so-called strategic areas established in Article 28 of the Constitution (i.e., energy industry) through clear legal ordinances which prohibit absolute and relative monopolistic practices and concentrations.[3]

General Legal Framework Applicable to the Antitrust Legal System

To understand the legal regime behind the Mexican antitrust legal system, it is necessary to consider a variety of existing legal ordinances. The most important legal ordinances applicable to this regime are described below:

(i) Mexican Constitution;[4]
(ii) Antitrust Law;
(iii) International Treaties such as the North American Free Trade Agreement (NAFTA);[5]
(iv) Antitrust Law Regulations (*Reglamento de la Ley Federal de Competencia Económica);*[6]
(v) Antitrust Commission Internal Regulations (*Reglamento Interior de la Comisión Federal de Competencia*);[7] and
(vi) Legal ordinances applicable to the case or sector involved in the transaction.[8]

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Personal Scope and Application of the Antitrust Law

The reach of the Antitrust Law is purposefully broad. According to Article 3, all economic agents shall be subject to the provisions of the Antitrust Law. The same article 3 defines "economic agents" as:

> *"ARTICLE 3 - All economic agents are subject to the provisions of this law, whether individuals or corporations with or without lucrative purposes, agencies or entities of the federal, state of local administration, associations, corporate chambers, professional groups, trusts or any other form of participation in economic activities."*[9] *[Emphasis added]*

From construction of the Antitrust Law and in accordance with Mexico's private international law rules, the Federal Competition Commission (*Comisión Federal de Competencia* —"Antitrust Commission") has personal jurisdiction over any economic agent regardless of its nationality, location, principal place of business or nature. Therefore, the nationality of the parties and the place where the transaction was/is carried out do not necessarily matter. What do matter are the economic effects that such a transaction exerts on the Mexican market. Accordingly, the Antitrust Law could have extraterritorial application to acts occurring abroad but having a substantial effect on the Mexican market.

Further, it is important to mention that the above-mentioned definition includes agencies and entities of the Mexican government in its three levels: federal, state and municipal. That is to say, a public agency such as *Petroleos Mexicanos* (Pemex) and its subsidiaries; or *Comisión Federal de Electricidad* (CFE — Federal Electricity Commission); or *Compañía de Luz y Fuerza del Centro* (CLyFC — Central Light and Power Company) or any other public agency or entity shall observe the terms and conditions of the Antitrust Law since this legal ordinance is a stringent public policy-based law, which cannot be avoided by the public instrumentalities above-mentioned dealing with administrative contracts through public tender proceedings; licenses; concessions; authorizations; registrations; and further administrative proceedings which grant the possibility to participate in the energy market.[10] Without the inclusion of the governmental agencies and entities, the application of the Mexican Antitrust Law could have been useless since public agencies and entities really determine the participation of a

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lot of economic agents in markets such as the energy one.

Material Scope and Application of the Antitrust Law

The Antitrust Law is applicable to any economic sector in Mexico including the energy one.[11] Nevertheless, there are some *jure-monopolies* which are not within the reach and scope of the Antitrust Law such as the so-called strategic areas established in the Mexican Constitution such as the energy sector.[12]

> *"Mexican foreign investment policy has carefully limited both foreign and domestic private investment within certain economic sectors that have had a political, historical and/or an economical significance for the Mexican nation. Industries such as oil, gas, petrochemical, power generation, spectrum and transportation all fit into this category. During the last two decades, however, Mexican policy has responded to sustainable economic growth and national development by adopting a more open approach to private investment within these key sectors, which were previously subject to substantial restrictions."*[13]

Article 4 of the Antitrust Law expressly dictates that: *"For the purposes of this law, the powers exercised exclusively by the state in the strategic areas described in the fourth paragraph of Article 28 of the Political Constitution of the Mexican United States do not constitute monopolies."*[14] [Emphasis added]

Paragraph fourth of Article 28 of the Mexican Constitution dictates that:

> *"...The State's exclusive function and control over the following strategic activities shall not constitute monopolies: ... petroleum and further hydrocarbons, basic petrochemical, electricity, nuclear energy; ..."*[15]

Without question, the above-mentioned strategic areas that are exclusively reserved to the Mexican government represent the most resistant areas to free market liberalization.

With the purpose of clarifying the Antitrust Law's scope of applicability, the amendments carried out to the Antitrust Law on June 28, 2006, state that acts which are not expressly considered as realized within the strategic sectors defined in Article 28 of the Mexican Constitution are subject to scrutiny of the Antitrust Law. Neither the Constitution nor the Foreign Investment Law establishes the scope and phases of the energy sector. Article 28 of the Constitution only establishes that additional activities set forth in the laws enacted by Congress should also be considered strategic areas. Consequently, it is the Regulatory Law to Article 27 of the Mexican Constitution in the Petroleum Sector (the "Petroleum Law")[16] which dictates that the oil and gas industry encompasses:

(i) the exploration, exploitation, refining, transportation, storage, distribution and first-hand sale of petroleum, and its by-products obtained through the refining process;
(ii) the exploration, exploitation, production, and first hand sale of gas; and
(iii) production, storage, transportation, distribution, and first-hand sale of by-products that can be used as basic industrial materials, as well as the following basic petrochemicals: (a) ethane; (b) propane; (c) butane; (d) pentane; (e) hexane; (f) heptane; (g) naphtha; (h) the raw material for smoke lampblack; and (i) methane when such product comes from Mexican source hydrocarbons and is used as a basic industrial material in petrochemical industrial processes.[17]

In sum, all aspects of the oil and gas industry have been exclusively reserved to the Mexican government, which is in charge of the petroleum industry through Pemex and its subsidiaries, excluding the secondary petrochemical industry and the storage, transportation and distribution of natural gas. Moreover, the Mexican Congress, in observance of the Constitution, crafted the Petroleum Law to place the exclusive control and management of the basic petrochemical industry (BPI) in the hands of the Mexican government as part of the petroleum industry.

On the other hand, Article 27, paragraph 6 of the Mexican Constitution reads as follows:

> *"...In the cases to which this article refers ... the Nation shall be exclusively in charge of generating, conducting, transforming, distributing, and supplying electric energy the objective of which is public service. In these maters there will be no concessions to individuals and the Nation will take full advantage of the goods and natural resources required to accomplish these objectives..."*

At the same time, the Electric Power Public Service Law (LSPEE — *Ley del Servicio Público de Energía Eléctrica*) dictates that any acts related to the public service of electricity are considered public policy[18], establishing at the same time in an express manner which acts are not considered public policy, as follows:

(i) Self-supply;
(ii) Co-Generation;
(iii) Independent Power Production;
(iv) Small Scale Production for Sale to the CFE or the CLyFC;
(v) Generation of Electric Power for Export Purposes, when Co-Generated or Generated via an Independent or Small Scale Power Production;

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(vi) Imports by Individuals or Corporations for their Exclusive Use; and
(vii) Generation for Emergency Cases of Energy Interruption.[19]

Monopolistic Practices

The Antitrust Law prohibits the so-called "absolute monopolistic practices". In general terms, absolute monopolistic practices involve agreements among competitors to join forces to (i) fix prices; (ii) restrict production and distribution of goods and services; (iii) divide markets; or (iv) rig bids on contracts.[20]

On the other hand, the Antitrust Law allows most vertical agreements among non-competitors, except those made by a dominant firm for the purpose of unfairly driving its competitors from the market. However, in order to determine the existence of a relative monopolistic practice it is necessary to prove the substantial power that the economic agents involved have in the relevant market and that the purpose or effect of the acts, contracts, agreements or cartels executed by said companies is or could be to wrongfully displace other agents from the market, substantially impede their access thereto or to establish exclusive advantages in favor of one or several entities, in the following cases: (i) vertical allocation of markets; (ii) restrictions on sale and price maintenance; (iii) tying agreements; (iv) exclusive dealings; (v) unilateral refusal to deal; (vi) boycott; (vii) predatory pricing; (viii) exclusive discounts; (ix) cross subsidies; (x) discrimination on price and sale conditions; (xi) increase of the costs and the possibility to impede the production process or reduction of demand to competitors.[21]

With the purpose to clarify the application for the Antitrust Law in the energy sector we will use as an example the oil and gas industry.

First Hand Sale of Oil and Gas Products

The upstream activities of the oil and gas industry (exploration and production) are considered a *jure-monopoly* based on Articles 27 and 28 of the Mexican Constitution and Article 3 of the Petroleum Law. The Constitution dictates that the State has direct dominion over the subsoil as well as the exclusive right of exploitation and development of petroleum and gas. Stated in other words, the ownership of such natural resources is a constitutional right that is inalienable and imprescriptible. Therefore, it is not possible for the State to concede oil exploration and exploitation rights to private parties.

Despite the fact of the above-mentioned prohibition, private parties either national or foreign may be able to participate in the upstream activities through the terms and conditions of the Petroleum Law and the Public Acquisitions, Leases and Service Law (*Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público*)[22] and the Public Works and Related Services Law (*Ley de Obras Públicas y Servicios Relacionados con las Mismas*)[23] (jointly referred as the "Procurement Laws") through bidding processes and the direct awarding of administrative contracts such as exploration contracts, drilling service agreements, and turn key agreements, among others. In these participations, both Pemex and its subsidiaries and the economic agents may be subject to the application of the Antitrust Law if the administrative contract, the authorization, the permit, the concession, or the registration is not granted in accordance with the terms and conditions established in the Procurement Laws; the applicable rules of the market and any other technical and economic consideration which was not observed during the bidding process in favor of one or two potential suppliers. In other words, potential suppliers that participate in a bidding procedure cannot fix prices; coordinate proposals between competitors or with Pemex and its subsidiaries. By the same token, Pemex and its subsidiaries cannot guide public tenders in favor of one economic agent or limit the participation of other potential suppliers who have the requested materials, equipments, products or services.

As it can be noted, regardless of the fact that Pemex and its subsidiaries are in charge of the oil and gas industry, the same entities may be subject to the scope and application of the Antitrust Law since neither the Constitution nor the Antitrust Law have authorized them to limit or constrain the participation of economic agents in the energy market. Consequently, the Antitrust Law tries to prevent, prohibit, and in its case, apply economic and administrative sanctions in public tenders and administrative contracts related to upstream activities that are not followed or granted according to applicable laws (e.g., Procurement Laws) and the rules of the market.

Finnaly, it is important to mention that many economic agents in Mexico have their economic viability primarily from their participation in the market for supplying services, equipment, works, leasings, and further materials only to one bidder: Pemex.[24]

Refying

As previously mentioned, the development and marketing of the refining industry is entrusted to the State, including the industrial process through which hydrocarbons are converted into the following basic generic products: (i) combustible liquids or gases; (ii) lubricants; (iii) grease; (iv) parafin; (v) asphalts and solvents; and (vi) by-products generated by such processes.[25]

Pemex-Refying is exclusively in charge of the national industrial refining, manufacturing of petroleum products, and by-products which can be used as industrial basic raw materials as well as in the storage, transportation, distribution, and first-hand sale of the same.[26]

Despite the above-mentioned *jure-monopoly*, since the beginning of the Antitrust Commission, Pemex-Refying

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has been subject to investigation and sanctions on the (i) franchasing agreements executed by Pemex-Refying and the franchisees for the retail sale of gasoline; (ii) sale of oils and lubricants in gasoline stations other than those trademarked as "Mexlub"; (iii) division and distribution of markets for the transportation and distribution of hydrocarbons.

The Petrochemical Industry

As previously established above, the basic petrochemical industry ("BPI") encompases (a) ethane; (b) propane; (c) butane; (d) pentane; (e) hexane; (f) heptane; (g) naphtha; (h) the raw material for smoke lampblack; and (i) methane when such product comes from Mexican source hydrocarbons and is used as a basic industrial material in petrochemical industrial processes.[27] This industry is exclusively developed by the Mexican state through Pemex-Gas and Basic Petrochemical (Pemex-Gas & BP — *Pemex-Gas y Petroquímica Básica*).[28]

On the other hand, the secondary petrochemical industry (SPI) is understood as the subsequent transformations of basic products with which is obtained a large diversity of intermediate-use petrochemical products. In the SPI sector, said secondary products may be obtained from the Mexican State and private parties of Mexican or foreign nationality. The Mexican government develops this industry through Pemex-Petrochemical (*Pemex-Petroquímica*) developing the processing of products that are not part of the BPI, as well as the storage, distribution and marketing of such products.[29]

In view of the foregoing, the Antitrust Law is applicable in the following cases: (i) BPI when Pemex-Gas & BP goes beyond its normal operations to a *jure-monopoly* when the same determines who participates in the market through the granting of administrative contracts to economic agents; (ii) SPI without any limitation regardless of the participation of Pemex-Petrochemical since it is not considered a strategic area in terms of the Constitution and the Petroleum Law.

Mergers and Acquisitions in the Energy Sector

The Antitrust Law regulates mergers and acquisitions under the term of "concentrations". As in many industrialized countries, Mexico's Antitrust Law establishes a notification requirement for any concentration that reaches the monetary thresholds established in Article 20 of the Antitrust Law. However, once said thresholds apply, only those concentrations which have a market effect in Mexico must be reported to the Antitrust Commission for their authorization prior to their consummation. Pursuant to Article 16 of the Antitrust Law, a "concentration" is a:

> *"[M]erger, acquisition of control or any act whereby companies, partnerships, shares, equity, trusts or assets in general are concentrated among competitors, suppliers, customers or any other business entity..."*

In the event that a foreign or national investors want to participate, directly or indirectly, in an existing energy company in Mexico they must obtain a favorable resolution from the Antitrust Commission in the event of three different scenarios established by the Antitrust Law:

(a) When an act or succession of acts gives rise in the Republic (i.e., Mexico), directly or indirectly, to an amount more than the equivalent of 18 million times the daily minimum general wage ("MGW") prevailing in the Federal District (approximately US$51,903,881 where the MGW is $46.80 and applying an exchange rate of MXP $10.82/US $1);[30]

(b) When an act or succession of acts directly related with the transaction, results in the accumulation of 35 percent or more of the assets or shares of an economic agent, whose annual assets in the Republic or annual sales originated in the Republic reach an amount more than the equivalent to 18 million times the MGW prevailing in the Federal District (approximately US$51,903,881); or

(c) When an act or succession of acts directly related with the transaction the accumulation in the Republic of assets or capital stock in excess of 8.4 million times the MGW prevailing in the Federal District (approximately US$20,761,552); and the concentration involves the participation of two or more economic agents whose assets or annual volume of sales, joint or separately, total more than 48 million times the MGW prevailing in the Federal District (approximately US$207,615,526).[31]

The Natural Gas Industry

The Natural Gas Regulation (Gas Regulation) provides the guidelines for the participation of the private sector in the distribution, transportation and storage of natural gas,[32] Pursuant to the Gas Regulation, foreign investors who wish to participate in this industry need to obtain a permit which will be granted by the Regulatory Energy Commission (CRE — *Comisión Reguladora de Energía*). Such permits are granted to Mexican or foreign entities for 30-year terms, renewable for additional 15-year periods.[33] The Gas Regulation provides that for each application, or bid proposal, private investors must notify the Antitrust Commission. This notification will take place by providing the Commission with a copy of their application for a permit or their bid proposal.[34] It also will be necessary to notify the Antitrust Commission in case of a transfer of an existing permit.[35]

Despite the fact the Gas Regulation appears only to require notification, in practice, and according to the statement of purpose of the Antitrust Law, private investors also must obtain the favorable resolution of the Antitrust Law before proceeding with the contemplated

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investment. The Antitrust Law will grant a favorable resolution after a review of the purpose of the investment and the effect that such investment will produce on the Mexican natural gas market. For such determination, the Antitrust Commission will take into consideration the substantial power of the investor in the relevant market.[36]

Exceptions to the Notification Requirement

Based on the petitions made by several economic agents as to the application of Article 20 of the Antitrust Law, the Antitrust Law Regulation establishes the concentrations that will not be necessary to report to the Antitrust Commission. For example, it will not be necessary to report, in terms of Article 20 and 21 of the Antitrust Law on:

> *Transactions concerning shares and ownership interests in foreign companies when the economic agents involved in such transactions do not acquire control of Mexican companies nor acquire in Mexico, shares, ownership interests, trust interests, or assets in general, additional to those which directly or indirectly they had before the transaction."*

Conclusion

Without any question, three of the largest present-day monopolies in the energy sector are found in Mexico through Pemex and its subsidiaries, CFE and CLyFC. These monopolistic strongholds have been subject to the application to the Antitrust Law when these public agencies have gone beyond to the express *jure-monopoly* granted to them.

Mexico has modified its economy and legal system since the last year of President Miguel de la Madrid's administration through the present Calderon administration.[37] Today, Mexico has opened up its economy based on national and foreign capital passing from a mixed economy to an open market economy. Thus, the Mexican government is trying to avoid passing from a public monopoly to a semiprivate monopoly through the application of the Antitrust Law. Nowadays, the energy sector in each of the phases of the oil and gas industry (i.e., exploration, exploitation, refining, transportation, distribution, storage, and first-hand sale of national petroleum and hydrocarbons); the power generation industry (in the independent generation, tenders related with the conducting, transforming, distributing, and supplying electric energy as well as construction services); as well as the participation of Pemex and its subsidiaries, CFE and ClyFC, in granting administrative contracts, franchise agreements, license, concessions, permits, authorizations, registrations to any economic agent who wishes to participate in the energy sector is subject to the scrutiny to the Antitrust Law. ❑

1 See Mex. *Ley Federal de Competencia Económica* (Federal Economic Competition Law) [hereinafter cited as the "Antitrust Law"], published in *Official Gazette of the Federation* [hereinafter cited as "D.O."] Dec. 24, 1992.
2 See Antitrust Law, D.O. June 28, 2006.
3 Id. Arts. 2, 4.
4 See Mex. Constitución Política de los Estados Unidos Mexicanos, (Political Constitution of the United Mexican States) [hereinafter cited as "Const."), published in D.O., Feb. 5, 1917.
5 See Mex. *Decreto de Promulgación del Tratado de Libre Comercio de América del Norte* (Promulgation Decree of the North American Free Trade Agreement) [hereinafter cited as "NAFTA"], published in D.O. Dec. 20, 1993.
6 See Mex. *Reglamento de la Ley Federal de Competencia Económica* (Antitrust Law Regulations), published in D.O. Mar. 4, 1998.
7 See Mex. Reglamento Interior de la Comisión Federal de Competencia (Antitrust Commission Internal Regulations), published in D.O. Oct. 12, 1993.
8 In this case it is the energy sector. As an example the most important legal ordinances applicable to the oil and gas industry are the followings: (i) Regulatory Law to Article 27 of the Mexican Constitution in the Petroleum Sector (*Ley Reglamentaria del Artículo 27 Constitucional en el Ramo del Petróleo*) (the "Petroleum Law"); (ii) the Organic Act of Petróleos Mexicanos and Subsidiary Entities and its Regulation (the "Pemex Charter"); (iii) the Foreign Investment Law; (iv) the Regulations to the Regulatory Law to Article 27 of the Mexican Constitution in the Petroleum Sector (the "Regulations to the Petroleum Law"); (v) the Regulations to the Regulatory Law to Article 27 of the Mexican Constitution in the Petrochemical Sector; (vi) the Natural Gas Regulation; (vii) the Regulation of Distribution of Liquefied Natural Gas; among others.
9 See the additions made to Article 3 in the reforms and modifications made to the Antitrust Law in the D.O. on June 28, 2006.
10 See Antitrust Law, art. 1.
11 Id. Arts. 1-3.
12 Id. Art. 4.
13 See Alejandro López Velarde, "North American Free Trade & Investment Report", Vol. 16, No. 20, Nov. 15, 2006, p. 4.
14 See Antitrust Law, art. 4.
15 In 1983, Article 28 of the Constitution was modified to include the so-called *strategic areas*, among which the public service of electricity is deemed to be strategic activity in which private participation, either national or foreign has been clearly prohibited.
16 See Mex. Ley Reglamentaria del Artículo 27 Constitucional en el Ramo del Petróleo (Regulatory Law to Article 27 of the Mexican Constitution in the Petroleum Sector) [hereinafter cited as the "Petroleum Law"`], published in D.O. Nov. 29, 1958, amended in D.O., May 22, 1995.
17 Id. Art. 3. Notably, should the production of secondary petrochemicals also result in the generation of basic petrochemicals by private investors, such basic petrochemical products may be used by the investors in their own operations or sold to Pemex or its subsidiaries. In any event, private investors are obligated to notify the Ministry of Energy (*Secretaría de Energía*) as to the generation of such basic petrochemical products. Id. Art. 4.
18 See Mex. *Ley del Servicio Público de Energía Eléctrica* (The Electric Power Public Service Law) (hereinafter cited as "LSPEE"), published

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in D.O. Dec. 22, 1975, amended several times.
19 Id. Art. 3.
20 See Antitrust Law, art. 9.
21 Id. Art. 10. In order to determine whether a relative monopolistic practice or a non-solicitation, non-competition or other exclusivity clauses could be illegal under the terms of the Antitrust Law, it is necessary to analyze whether or not the economic agents participating in the transaction will exert "substantial power" in the relevant market. Id. Arts.12-13.
22 See Mex. *Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público* (Public Acquisitions, Leases and Service Law), published in D.O. Jan. 4, 2000, amended July 7, 2005.
23 See Mex. *Ley de Obras Públicas y Servicios Relacionados con las Mismas* (Public Works and Related Services Law), published in D.O. Jan. 4, 2000, amended July 7, 2005.
24 As an example to prevent monopolistic practices in public tenders issued by Pemex, the Antitrust Commission has carried out different
exprofeso investigations such as the case of Baramin, S.A. de C.V.; Baricosta, S.A. de C.V.; Minerales y Arcillas, S.A. de C.V.; Barita de Sonora, S.A. de C.V.; and Barita Santa Rosa, S.A. de C.V. whereby the above-mentioned companies fix their proposals in a process published by Pemex-Exploration and Production breaching Article 9 Sections I and IV of the Antitrust Law. See *Informe De Competencia Económica, 1995-1996 De La Cofeco*, p. 68.
25 See Petroleum Law, art. 3; Regulations to the Petroleum Law, arts. 23-24.
26 See Pemex Charter, art. 3 (II).
27 See Petroleum Law, art. 3.
28 Pemex-Gas &BP processes natural gas, liquefied natural gas, and synthetic gas; engages in storage, transportation, distribution, and marketing of hydrocarbons and the by-products that may be used as basic industrial raw materials. Consequently, it is the subsidiary that exercises the monopoly over the BPI. See Pemex Charter, art. 3 (III).
29 Id. Art. 3 (IV).
30 The monetary threshold might be increased or decreased depending upon the MGW and the exchange rate applicable at the time of notification.
31 See Antitrust Law, arts. 16, 20.
32 See Mex. *Reglamento de Gas Natural* (Natural Gas Regulation) [hereinafter cites as the "Gas Regulation"], published in D.O. Nov. 8, 1995, arts. 1, 14. See also Mex. *Ley de la Comisión Reguladora de Energía* (Energy Regulation Commission Law) [hereinafter cited as "CRE Law"], published in D.O. Oct. 31, 1995, arts. 2 (VI)-(VII), 3 (XII).
33 See Gas Regulations, Arts. 19, 53.
34 Id. Arts. 18, 32 (j), 41 (III) (c).
35 Id. Art. 49.
36 See Antitrust Law, arts. 12-13.
37 Under President Miguel de la Madrid, in 1983, México began the process of reforming its import substitution-oriented economy to an open market economy by opening up to foreign competition.

China Blocks United States' and Mexico's WTO Panel Requests in Subsidies Complaint

By Ashle Baxter and James J. Shea (White & Case LLP)

On July 24, 2007, China blocked the United States' and Mexico's World Trade Organization (WTO) dispute panel requests to determine whether China's subsidies violate WTO rules. The United States and Mexico can renew their panel requests at the next meeting of the WTO Dispute Settlement Body (DSB), scheduled for August 21, 2007. Under WTO rules, China cannot block the second request and the DSB must automatically accept the US and Mexican requests and establish a dispute settlement panel to rule on their complaints.

In its decision to block the panel requests, China argued that its new "Enterprise Income Tax Law" addresses some of the concerns raised by the United States and Mexico in their complaints. Chinese officials also argued that several of the programs cited in the US and Mexican dispute panel requests do not exist or are not applicable to the complaints. Chinese officials expressed dissatisfaction at the United States' and Mexico's decisions to move forward with their complaints and request the WTO DSB to create a panel.

The US request for a WTO dispute settlement panel challenges several Chinese subsidy programs that the United States believes violate WTO rules (DS358). The Mexican request for a WTO dispute settlement panel (DS359) echoes the US complaint. According to the United States and Mexico, subsidies conditioned either on a firm's use of domestic over imported products or on exports are prohibited by the WTO Agreement on Subsidies and Countervailing Measures, and are inconsistent with other WTO obligations, including specific commitments undertaken by China as part of its WTO accession agreement before it joined the WTO on December 11, 2001. Both complaints also allege violations of the 1994 General Agreement on Tariffs and Trade (GATT) and the Agreement on Trade-Related Investment Measures (TRIMs). In particular, the US and Mexican panel requests state that China's subsidy programs violate GATT Article III:4 , TRIMs article 2 and paragraphs 1.2, 7.2-7.3, and 10.3 of China's WTO Accession Protocol.

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The United States initiated the dispute over China's allegedly prohibited subsidies by requesting consultations with China on February 2, 2007. Mexico requested consultations with China on the same measures on February 26, 2007. Prior to joint consultations on March 20, 2007, China eliminated one of the subsidy programs challenged by the United States and Mexico. At the same time, China adopted a new income tax law providing additional tax breaks for qualifying firms. The United States and Mexico requested additional consultations with China to clarify whether these new tax breaks constituted new prohibited subsidies; the parties held consultations on this matter on June 22, 2007. On July 12, the United States announced that these consultations had failed and requested WTO panel formation. Also on July 12, Mexico filed its own request for the establishment of a WTO panel against Chinese subsidies. Mexico claims that the subsidies violate China's WTO obligations because they distort trade conditions for Mexican manufacturers and provide an unfair advantage to Chinese exports. Mexico also expects that the DSB will combine both complaints and carry out one investigation.

In early July, EU Trade Commissioner Peter Mandelson stated that the European Commission would not exclude the possibility of a WTO dispute settlement request if the EU and China failed to make "significant progress" on intellectual property protection through dialogue.

The United States and Mexico will likely request panel formation at the August 21 DSB meeting. For the United States, this dispute represents one of four WTO disputes against China (the other three involve automobile parts, market access, and intellectual property). This is the first WTO complaint that Mexico has filed against China. The US and Mexican decision to join forces against China indicate that both countries

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are no longer following the "quiet diplomacy" route when dealing with China's allegedly WTO-inconsistent trade practices. The move could set a precedent for other WTO Members, which may have questioned the WTO-consistency of China's trade practices but withheld a dispute settlement request due to concern that such a request could upset bilateral economic relations with such a large trading partner as China. In early July, EU Trade Commissioner Peter Mandelson stated that the European Commission would not exclude the possibility of a WTO dispute settlement request if the EU and China failed to make "significant progress" on intellectual property protection through dialogue. The recent rise in the number of WTO cases filed against China suggests that China faces a new era of direct confrontations with WTO Members regarding its trade practices. Although the Chinese government has expressed dismay at such confrontations, most WTO Members accept regular use of WTO's dispute settlement mechanism as common practice. A number of US trade officials have opined that China's growing involvement as a respondent to WTO disputes is indicative of the country's integration as a regular member of the organization. ❑

The recent rise in the number of WTO cases filed against China suggests that China faces a new era of direct confrontations with WTO Members regarding its trade practices.

US Congress Blocks Funding for Cross-Border Trucking Pilot Program

By Ana Leroy (White & Case LLP)

On July 24, 2007, the House of Representatives approved H.R. 3074 (the *"Transportation, Housing and Urban Development, and Related Agencies Appropriations Act of 2008"),* which includes an amendment that prohibits the use of funds to be used to establish or implement a cross-border motor carrier pilot program *(Demonstration Project on NAFTA Trucking Provisions")* that would Mexican motor carriers to operate beyond the commercial zones on the US-Mexico border. H.R. 3074 will now move to the Senate floor for a vote.

On May 25, 2007, President Bush signed H.R. 2206 (the "U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007"), which included various provisions that restricted the access of Mexican trucks to US highways and delayed the implementation of the US-Mexico cross-border trucking pilot program by July 15, 2007.

US and Mexican officials did not issue statements on the new restrictions approved by Congress. Mexico and the United States expected to implement the pilot program in July 2007 but have not announced a new implementation date. ❑

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Fitch Upgrades Bolivia and Uruguay Issues

By Geoffrey A. P. Groesbeck (WorldTrade Executive)

The leading global ratings company Fitch Ratings recently gave a boost to two small Latin American sovereign issuers, the Republic of Bolivia and Republic of Uruguay, respectively. Bolivia, by far the more volatile issuer, saw its long-term foreign and local currency sovereign issuer default rating (IDR) move from negative to stable, while Uruguay's foreign currency sovereign IDR inched up to BB minus (stable) minus from B+.

Fitch justified the increase in Bolivia because of the country's effort at public debt reduction and improved macro outlook and adherence to the Multilateral Debt Relief Initiative provisions. In the case of Uruguay, the improved ratings were attributed to the country's lower financing needs and improving public debt scenario, coupled with higher economic growth, conservative fiscal policy, and good overall debt management.

Bolivia is not out of the woods yet, however: the agency warned that political, social and policy challenges will continue to weigh on the country's overall ratings. Its public debt/GDP ratio declined to 32% by year-end 2006 from 60% at year-end 2004. Further debt relief from the IDB will cut the public debt/GDP ratio to below 20% of GDP this year. Fitch estimates that the general government's financing needs for 2007 have declined to 5.4% of GDP, almost half of last year's estimate of 10.6%.

In Uruguay's case, it has to deal with external solvency weaknesses and liquidity indicators, as well as the level and composition of its public debt. The solution? "Improvements in currency composition of public debt as well as faster reduction in public and external indebtedness would be positive for Uruguay's credit profile," says Fitch. ❑

VENEZUELA

Venezuelan Legal and Business Developments

By Vera de Brito de Gyarfas (Travieso Evans Arria Rengel & Paz)

The Central Planning Commission was created as per Presidential Decree published in the *Official Gazette* of June 22, 2007. The purpose of this commission is to prepare, coordinate, follow up on and evaluate the strategic guidelines, policies and plans to be implemented pursuant to the Nation's Economic and Social Development Plan. The main purposes of this commission are to (i) promote the transition to a centralized integration planning model; (ii) promote the establishment of a socialist state; (iii) preserve the national sovereignty; and (iv) promote international alliances. For such purposes, all entities of the Public Administration (ministries, autonomous services, state-owned companies, etc.) will not be autonomous regarding their organization or financial-administrative planning and will be subject to the guidelines, policies and plans of the Central Planning Commission, duly approved by the President of the Republic despite their nature and organization set forth in the laws that created them.

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PDVSA announced that Chevron Texaco, Statoil, Total, BP, ENI, Sinopec, and Ineparia agreed to migrate from Association Agreements (Strategic Associations for upgrading of extra heavy crude in the Orinoco Basin and Profit Sharing Agreements) to mixed-company structures. The incorporation of the new mixed companies will require the prior approval of the National Assembly. Reportedly, the resulting mixed companies will have the following stock distribution:

1) La Ceiba - CVP 100%
2) Gulf of Paria West GOPW - CVP 74% / ENI 26%
3) Gulf of Paria East GOPE - CVP 60% / SINOPEC 32% / INEPARIA 8%
4) Petrozuata - CVP 100%
5) Sincor - CVP 60% / TOTAL 30.3% / STATOIL 9.7%
6) Ameriven - CVP 70% / CHEVRON 30%
7) Cerro Negro - CVP 83.37% / BP 16.67%

Energy

ExxonMobil, ConocoPhillips and Petrocanada announced that as of mid-July they had not yet reached an agreement with the Venezuelan government regard-

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ing the migration, and are continuing negotiations regarding compensation for their investments.

The National Assembly approved the incorporation of Petrozumano, S.A., a mixed company where CVP and CNPC will each hold 60% and 40% of its corporate capital, respectively, as per "Acuerdo" published in the *Official Gazette* of June 1, 2007. Petrozumano, S.A., is the first mixed company under the Organic Hydrocarbons Law that will be incorporated to carry out primary activities (exploration and exploitation of crude) in a new area, not subject to a migration process.

The National Assembly approved the amendment of the "Acuerdos" authorizing the creation of the mixed companies Petrodelta, S.A. and Lagopetrol, S.A., in the case of Petrodelta, S.A., to increase the number of areas where said mixed company will operate and in the case of Lagopetrol, S.A., to increase the participation of the private companies and the size of the assigned area. The new "Acuerdos" were published in the *Official Gazette* of June 15, 2007.

PDVSA announced the certification of 28.65 billion barrels of Original Oil In Place (OOIP) in the Carabobo 3 block of the Orinoco Basin.

An Addendum to the Energy Treaty for the creation of the Organization of South American Gas Producing and Exporting Countries (Organización de Países Productores y Exportadores de Gas de Suramérica — Oppegasur) was published in the *Official Gazette* of June 5, 2007. The purpose of the addendum was to establish that one of the objectives of this treaty was to carry out joint exploration and production of the gas blocks of the area and clarify that the development of LNG projects would be based on the interests and decisions of each of the parties to the treaty.

Exchange Control

As per resolution No. 07-06-01 issued by the Venezuelan Central Bank and published in the *Official Gazette* of June 7, 2007, the channeling of payments through the Payment and Credits Reciprocal Agreements executed by the central banks of the Latin American Integration Association (Asociación

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Latinoamericana de Integración — ALADI), and the central banks of the Dominican Republic and Malaysia will be voluntary and regulated by said resolution. The resolution establishes the manner how foreign currency payments into and out of Venezuela will be processed through ALADI and repeals Resolution 04-03-01, published in the *Official Gazette* of April 13, 2004. The new resolution entered into effect on June 18, 2007.

ExxonMobil, ConocoPhillips and Petrocanada announced that as of mid-July they had not yet reached an agreement with the Venezuelan government regarding the migration, and are continuing negotiations regarding compensation for their investments.

Finance

Resolution 038-2007 of the National Securities Commission, published in the *Official Gazette* of June 20, 2007, approves the Instructions regarding Procedures for Purchase of Shares of Brokerage Firms. Said instructions' main object is that all participants in the Venezuelan capital market are fully and timely informed of all issues regarding the sale or assignment of shares that represent the corporate capital of brokerage firms as well as the individuals that are the members of their boards of directors.

Resolution No. 07-06-02 of June 21, 2007 of the Board of Directors of the Venezuelan Central Bank was published in the *Official Gazette* of June 22, 2007. This resolution establishes the "Norms which Govern the Currency Revalorization and Rounding" issued in execution of the Decree with the Status, Value, and Force of Currency Revalorization Law. The said norms regulate, among other aspects, those referred to the re-denomination of the prices of goods and services due to the revalorization, and the rounding of figures in the case of fuels for automotive vehicles, liquefied petroleum gas, water, electricity, methane gas, telephony and internet services, shares quoted in the stock market, exchange currencies, and tax units. Likewise, said norms refer to the application of the revalorization in the accounting and in the financial statements of the companies.

An Addendum to the Memorandum of Understanding (MOU) between Venezuela, Bolivia and Argentina for the incorporation of the Bank of the South (Banco del Sur) was published in the *Official Gazette* of June 5, 2007. The purpose of this addendum was to establish that an office of the bank would be opened in Bolivia and that the Planning and Development Ministry of Bolivia would also be a member of the committee in charge of drafting the norms for regulation of this bank.

Telecommunications

CONATEL announced on its Web site that the List of Certified Trademarks, Models of Equipment and Apparatus has been updated and is available on its Web site (www.conatel.gob.ve).

On June 19, 2007, CONATEL held the public hearing of the draft administrative ruling containing the Referential Values for Determination of the Interconnection Use Charges for Mobile Telephony.

The Certification Authority for Electronic Passports was created as per Administrative Ruling No. 17 issued by the Superintendent of Electronic Certification Services (*Official Gazette* of June 8, 2007) which in turn is supervised by the Telecommunications and Information Technology Ministry. This Authority was created because as of this date there is no accredited provider of electronic certification services in Venezuela and the issue of Venezuelan electronic passports will be carried out pursuant to technical norm ICAO Document 9303 of the International Civil Aviation Organization, which requires that passports be electronically signed by the entity that issues them.

Competition

By means of a resolution dated June 4, 2007, the Pro-Competition Superintendency penalized Diageo Venezuela, C.A. and Pernod Ricard Venezuela, C.A. with fines of VEB 6,942,150,209 (US$3,237,037) and VEB 3,046,213,875 (US$1,420,411), respectively. Procompetencia determined that Diageo had incurred in the restrictive practice contained in Article 13 of the Procompetition Law (abuse of a dominant position) and in the case of Pernod Ricard, the conduct prohibited by Article 6 (exclusionary practices), all of that in relation with certain clauses of the contracts with the places authorized to commercialize alcoholic beverages under a Class C License, referred to exclusivity in promotions and events, exhibition of products of the portfolio, prices and conditions of commercialization. Likewise, the entity imposed upon them a series of orders to cease those practices.

In the administrative procedure opened as a consequence of the denunciation filed by Corporación Digitel, C.A. against CANTV in July 2005, due to the presumed performance of the practices prohibited by

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Articles 6 (exclusionary practices) and 13 (abuse of a dominant position) of the Procompetition Law, the antitrust agency decided by means of a June 7, 2007 resolution that there was not sufficient evidence in the administrative file to prove the performance of said practices. As stated by Digitel, the case was related to the discrimination of CANTV with respect to the calls originated in its Communication Centers.

Another of the fines imposed by the Procompetition Superintendency this month was of VEB 1,016,857,540 (US$474,077) on CANTV.NET C.A. due to its conduct against a company named ALGA, C.A. According to the resolution dated June 1, 2007, it was evidenced in the administrative procedure that CANTV.NET incurred in an exclusionary practice prohibited by Article 6 of the Procompetition Law, by blocking the IP of the party filing the denunciation, thus depriving the user of its right to choose. Likewise, it ordered CANTV.NET: (i) to immediately cease this practice; (ii) to refrain from unilaterally blocking IP addresses, alerting as to its possible classification as spam, leaving to the users the option of deleting or not the emails that according to the company could be risky as per its norms of use, and (iii) to send an e-mail message to all CANTV.NET users, in which it informs them that the Superintendency has considered the blocking of ALGA, C.A.'s IP addresses (INFOAQUI.com) as a practice which restricts competition.

The Presidential Decree which contains the designation of José Antonio DiCésare Monasterio as Assistant Superintendent of Procompetencia was published in the *Official Gazette* of June 19, 2007.

Environmental

The new Organic Environmental Law (*Official Gazette* of December 22, 2006) came into effect on June 22, 2007, date on which the six-month period provided in its Final Provision for the law to become effective, expired. Among its new provisions, it is important to mention: (i) the incorporation of the activities related to environmental management as norms of compulsory compliance; (ii) the granting to states, municipalities and community councils (*consejos comunales*) of direct jurisdiction over environmental matters; (iii) the development of the concept of community and indigenous participation in all matters related to the environment; (iv) the development of the principles of environmental control, previously set forth in the National Constitution, such as the obligation to file an environmental and sociocultural study in any project that may affect the environment; (v) the creation of the environmental compliance certificate; (vi) the granting of economic and tax incentives for activities aimed at protecting the environment; (vii) the increase of the

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monetary and criminal sanctions for violations of environmental norms and regulations; (viii) the introduction of the concept of objective (strict) civil and criminal liability in environmental matters; (ix) the elimination of the statute of limitations for environmental claims, and (x) the creation of the criminal environmental courts of law.

Miscellaneous

The National Contracting Service announced on its Web page (http://www.snc.gob.ve) the extension of the duration of the certificates it has issued and that expire on June 30, 2007. For the so-called "Large Companies", the certificates will expire on July 31, 2007, for small- and medium-sized companies on August 31, 2007 and for cooperatives the certificates will expire on September 30, 2007.

The technical procedures and norms regarding the guidelines for the maintenance, management and utilization of road infrastructure were published in the *Official Gazette* of June 28, 2007. These norms include technical aspects for maintenance and management of highways as well as the parameters for establishment of tolls.

We have been informed by the Ministry of the Popular Power for Science and Technology that starting on June 18, 2007 the Ministry initiated audits of compliance of the contributions and investments to be carried out as per the Science, Technology and Innovation Law. These audits will be made by the Ministry of Science and Technology with the support of SENIAT's tax authorities auditors, and could cover formal obligations (filing of the yearly return, maintenance of special accounting records, etc.) as well as the review of the internal technology investments or contributions made to third parties.

The amounts charged during the school period 2006-2007 by private schools for tuition and monthly payments shall remain the same for the next school year, as provided by a joint resolution of the Ministries of Light Industries and Commerce and Education.

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The National Comptroller's Office has issued certain norms for verification of the sworn patrimony statement that needs to be made by all individuals that are considered public officers (including the directors of mixed companies where the State owns more than 50% of their corporate capital).

The creation of a state-owned company called Bolivariana de Puertos, S.A., was authorized as per Presidential Decree published in the *Official Gazette* of June 12, 2007. The main purpose of this company is to modernize, recover, equip and construct ports in Venezuela and in Cuba. The creation of another state-owned company called Bolivariana de Gestión para la Reparación y Construcción de Embarcaciones, S.A. was also authorized in said Official Gazette for purposes of financing with national and international entities, the repair and construction of ships and the upgrade in technology capacity of Venezuelan and Cuban shipyards.

The following treaties were approved by the National Assembly and published in the *Official Gazette* of June 15, 2007: (i) Treaty on Air Transport between the States that are Members or Associated entities of the Association of Caribbean States; (ii) Tourism Cooperation Treaty between Venezuela and Dominica; and (iii) Supplementary Treaty to the Basic Technical Cooperation Agreement between Venezuela and Bolivia on Scientific, Technological and Innovative Cooperation.

The MOU between Venezuela and Brazil regarding infrastructure was published in the *Official Gazette* of June 4, 2007. The Air Transport Agreement executed between Venezuela and Uruguay was also published in the *Official Gazette* of said date.

The Treaty for the Establishment of a Joint Commission for Bilateral Cooperation between Venezuela and the Lao People's Democratic Republic was published in the *Official Gazette* of June 5, 2007. ❏