Non-Income Tax Legislation Across Latin America: An Effective Policy to Raise Revenues?

Nicolás José Muñiz Arias

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NON-INCOME TAX LEGISLATION ACROSS LATIN AMERICA: AN EFFECTIVE POLICY TO RAISE REVENUES?†

Nicolás José Muñiz Arias*

ABSTRACT

In the past decades, there has been a proliferation of non-income levies throughout Latin America designed to stimulate collections. Tax administrators favor them for being easier to enforce as compared to traditional taxes on net income, as well as harder to evade.

To make sense of the rather dysfunctional conglomeration of levies, this Article proposes a classification into three broad categories: (1) taxes on revenues; (2) alternative levies on income and assets, whether on a gross or net basis, along with taxes on net equity; and finally (3) transactional-type levies such as stamp taxes, export duties, remittance taxes, and registration assessments, not to mention the wide spectrum of solidarity contributions. Not only are non-income taxes sanctioned at the national or federal level covered, but also those implemented by provincial, state, or municipal governments.

Limitations as to the creditability and deductibility of these diverse levies increase the overall tax burden multinationals frequently face. Constitutional challenges raised by taxpayers, especially those surrounding alternative taxes on assets and temporary contributions, provide insight as to why judges often hold that the principles of fiscal equity and/or taxpayers’ economic capacity to pay are violated.

The Article concludes by calling for an overhaul of tax systems in Latin America by abolishing most of the cumbersome and ineffective levies on

† A detailed Table of Acronyms for this Article can be found online at https://scholarlycommons.law.emory.edu/eilr.

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revenues, assets, and wealth. In exchange, policymakers should focus on framing a simpler and more robust national corporate income tax regime with less exemptions, deductions, and credits, which fully embraces the financial capability of taxpayers.

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Countries throughout Latin America have historically reported relatively low fiscal revenues to gross domestic product (GDP) ratios when compared to other regions of the world, despite widespread enactment of taxes on net income and value-added.\(^1\) According to the World Bank, the Latin American and Caribbean region reported a 13.6% tax revenue to GDP ratio in 2019, as compared to 15.3% for the world and 19.9% for the European Union.\(^2\) Part of the reason may lie in the prominent role played in the local marketplace by small and medium-sized companies, commonly referred to as \textit{pymes} in Spanish, that routinely fail to formally register as taxpayers and consequently deprive national and local governments of critical funding. Perhaps a more plausible explanation is connected to the never-ending myriad of non-income assessments continuously embraced by governments across Latin America (irrespective of political ideology) over the past five decades, many of which started as temporary measures.

To make sense of the rather dysfunctional conglomeration of levies, this Article proposes a classification based on three broad categories: (i) taxes on revenues, receipts, or sales; (ii) alternative levies on income and assets, whether on a gross or net basis, along with taxes on net equity; and finally (iii) transactional-type levies such as stamp taxes, export duties, remittance taxes and foreign exchange fees, in addition to registration duties and temporary solidarity contributions. Not only are non-income taxes sanctioned at the national or federal level covered, but also those implemented by provincial or state governments, as well as by municipal authorities. Constitutional challenges brought by taxpayers over the past two decades, especially those revolving around certain minimum taxes on assets and transitory contributions, provide insight as to why judges ultimately affirmed that violations of the principles of fiscal equity and/or taxpayers’ economic capacity to pay tax took place.

\(^1\) To the extent value-added tax (VAT) collected on sales exceeds VAT paid on purchases, the difference is remitted on a monthly basis to the fiscal authority, providing in principle a steady flow of revenues for the national government’s coffers throughout the calendar year.

\(^2\) Tax Revenue (% of GDP), \textit{WorldBank}, \url{https://data.worldbank.org/indicator/GC.TAX.TOTL.GD.ZS} (last visited Feb. 10, 2022). Tax revenue to GDP ratios reported by individual nations in Latin America and the Caribbean for 2019 (unless otherwise indicated) are as follows: Argentina 10.6%, Bahamas 16.2%, Barbados 27.5% (2016), Brazil 13.7%, Chile 17.8%, Colombia 15.1%, Costa Rica 13.5%, Dominican Republic 13.3%, El Salvador 18.1%, Guatemala 10.5%, Honduras 17.3% (2015), Jamaica 27.5%, Mexico 13.1%, Nicaragua 17.5%, Panama 9.9% (2018), Paraguay 10.0%, Peru 14.5%, Trinadad and Tobago 20.0% (2018), and Uruguay 18.2%. \textit{Id}. No data was provided for Cuba, Ecuador, Puerto Rico, and Venezuela. \textit{Id}. 
Excluded from this analysis are assessments that have gained prominence among government representatives in charge of formulating fiscal policy. These assessments are designed to raise revenues quickly, are relatively easy to administer, and are difficult to evade. These include national taxes on value-added in conjunction with state taxes imposed in Brazil on commerce and services (ICMS); \(^3\) excise taxes; payroll taxes with mandatory corporate distributions to fund employee profit sharing (PTU); \(^4\) real estate taxes; and (ever-present in Latin America) financial transaction taxes; \(^5\) along with the various income taxes withheld on outbound payments made to non-residents such as dividends, interest, royalties, management fees, and technical services.

Our journey takes us through Mexico and six Central American republics, a selection of Caribbean Island nations, as well as the bulk of the South American continent. This Article examines tax legislation adopted in over twenty different jurisdictions throughout the Americas, primarily during the past four decades.

Legislation enacted in the larger American jurisdictions is examined in great detail. This includes Brazil, not surprisingly, with its multiplicity of levies on revenues and imports at the federal and municipal levels; Peru with its varying taxes on assets that have mutated over time; Colombia with its somewhat inconsistent attempts to raise revenues rapidly by assessing tax on net equity;

\(^3\) Officially adopted with the elaborate name \textit{Imposto sobre Operações Relativas à Circulação de Mercadorias e Prestação de Serviços de Transporte Interestadual e Intermunicipal e de Comunicação} [Tax on Operations Related to the Circulation of Goods and Provision of Interstate and Intermunicipal Transport and Communication Services] in Portuguese. Each of the twenty-six states that make up the Federative Republic of Brazil impose ICMS on the movement of goods, transportation, communication services, and supply of goods. Rates fluctuate by state, depending on the product sold. As with VAT, ICMS acts as a non-cumulative tax assessed on the value added. \textit{See Constituição Federal} [C.F.] [CONSTITUTION] art. 155 (Braz.) (enabling states to enact levies); \textit{see also} \textit{Lei Complementar 87/1996, de 13 de Setembro de 1996, Diário Oficial da União} [D.O.U.] de 16.09.1996 (Braz.) (instituting the ICMS system).

\(^4\) Officially called \textit{Participación de los Trabajadores en las Utilidades} [Employee Participation in Profits] in Spanish, PTU was enacted amidst the Mexican Revolution during the presidency of Venustiano Carranza. \textit{See Constitución Política de los Estados Unidos Mexicanos} [CPEUM], Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014 (Mex.). Companies conducting activities in Mexico are required, pursuant to Article 123 of the Constitution, to distribute annual PTU of up to 10% of adjusted taxable income to their employees. \textit{Id.} Other Latin American jurisdictions enacting similar legislation are Chile, Ecuador, Peru, and Venezuela. \textit{See Managing Corporate Taxation in Latin American Countries – An Overview of Main Corporate Taxes in Selected Jurisdictions 2021, LATIN AM. TAX & LEGAL NETWORK, https://lewinywills.com/wp-content/uploads/2021/05/LtxN-2021_5-Corporate-Tax-Overview-2021.pdf.}

\(^5\) Argentina, Bolivia, Brazil, Colombia, Peru, and Venezuela are amongst the countries in the region which have instituted some form of financial transaction tax under varying names. For instance, the name of the Colombian levy is straightforward: \textit{Gravamen a los Movimientos Financieros} [Tax on Financial Transactions]. \textit{See L. 624/89, Estatuto Tributario, marzo 30, 1989, DIARIO OFICIAL} [D.O.] art. 870 (Colom.). In Argentina, though, the name is rather long and cumbersome: \textit{Impuesto sobre los Créditos y Débitos en Cuentas Bancarias y Otras Operaciones} [Tax on Credits and Debits in Bank Accounts and Other Operations]. \textit{See Law No. 25453, July 31, 2001, [I] BOLETÍN OFICIAL} [B.O.] 29700 (Arg.).
and Argentina with its ever-increasing number of levies on revenues, assets, net worth, exports, and other transactions. Smaller jurisdictions are scrutinized to a lesser extent. These include Costa Rica and Uruguay with their corporate registration duties, and Puerto Rico and Paraguay with their municipal license taxes on gross receipts and adjusted assets, respectively.

I. HISTORICAL PERSPECTIVE

The famous nineteenth-century Danish philosopher, Søren Kierkegaard, once wrote that “life must be understood backwards; but … it must be lived forwards.” The same can perhaps be said as it pertains to tax legislation. Let us therefore begin our journey, back in time, on the island nation of Cuba. This Article will explore which types of levies were most prevalent for nearly four centuries under European domination, through the first six decades of the twentieth century in an independent republic, right up to the socialist-inspired revolution led by Fidel Castro that continues to this day. The Cuban experience associated with the evolution of tax legislation reflects, to a large degree, what was occurring elsewhere in the Americas.

A. Colonial Era

Non-income levies have been present in the Americas ever since the dawn of the Spanish and Portuguese empires in the early sixteenth century. Tax policy back then was aimed primarily at extracting as much revenue as possible from the colonies. Some of the first levies enforced within the vast confines of Spanish colonial rule include: the avería, assessed on the value of goods transported between the mainland and its colonies to fund the costs of operating the imperial fleet; the quinto real, a levy initially equal to one-fifth of the value of products extracted from gold and silver mines, based on the notion these sites were owned by the royal crown; and since 1640, an early version of the stamp tax (papel sellado), consisting of a fee charged on all sorts of public instruments and private contracts.

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8 LEVI MARRERO, HISTORIA ECONÓMICA DE CUBA: GUÍA DE ESTUDIO Y DOCUMENTACIÓN 146 (1956).
9 Ramón de la Sagra, Historia Económico-Política y Estadística de la Isla de Cuba 256 (1831); see Suchlicki supra note 7, at 443.
Notwithstanding these, three more prevalent levies were in place in the “ever-faithful” island of Cuba for nearly four hundred years, right up to the transfer of sovereignty from Spain to the United States in 1898. These were, in order of importance, the _almojarifazgo_, _alcabala_, and to a lesser extent, _diezmo_.

The first levy, _almojarifazgo_, was essentially a customs duty assessed on the importation and exportation of goods overseas. Implemented in Cuba in 1515, it represented by far the main source of fiscal revenues as most commercial transactions originated overseas. Initially, all Spanish goods entering the island were assessed a 7.5% ad valorem tax, while goods exported were charged a 2.5% tax. By 1762, a 15% ad valorem tax was assessed on such products as wines, oils, and fabric imported from Europe, while goods exported from the island to the Spanish mainland paid no tax.

The second levy, _alcabala_, was originally formulated as a sales tax during the Roman Empire, kept in place by Arab traders during the Middle Ages, and finally brought over by Spain to its American colonies starting in 1571. Amounts paid were ascertained by applying a fixed percentage to proceeds generated from the sale or exchange of goods and property, including farms, stores, cattle, and, for a period of time, even slaves. Tax was collected primarily at customs upon importation. First introduced to the island in 1758 at an initial rate of 4% on imports, its scope and rate varied over time. The tax proved to be especially burdensome as it was charged at each production and distribution stage, thus constituting a primitive version of a tax on revenues replicated later throughout the Americas well after independence.
The third and final levy, diezmo, represented a tithe equal to one-tenth of the value of goods, often paid in-kind, principally on cattle or agricultural products. First established in Cuba in 1522, only two-ninths of the tax collected was remitted to the State, with the remainder destined for ecclesiastical funds.

Municipalities entered the fray as well by ordaining temporary contributions to raise funds for specific projects. The capital city of La Habana (Havana), case in point, instituted a levy during the second half of the sixteenth century called sisa de la zanja to maintain and expand a ditch supplying water for the city. It assessed three reales per head of cattle entering the city, one real per pig, and four reales for each shipment of soap originating from the Mexican port city of Veracruz. Under constant threat of pirate attacks, another assessment designated sisa de la muralla was promulgated two centuries later to fund construction of the city’s walls. It charged at twenty-five pesos per barrel of wine or brandy entering the city from the Spanish Canary Islands.

Remnants of the colonial era persist even today in Peru, one of the crown jewels of the Spanish empire, as well as in neighboring Ecuador, where virtually all transfers of real property, however denominated or implemented, are subject to a levy denominated impuesto de alcabala. Tax is assessed on the value recorded in the land registry (valor catastral), at a rate of 3% in Peru and 1% in Ecuador, amounts paid are collected by the municipal tax administration where the property is located, with the purchaser solely responsible for...
payment.29 By the same token, stamp taxes currently in place in Chile, Costa Rica, and Argentina can justifiably be considered modern-day versions of the colonial papel sellado.

B. Post-Independence Era

The many republics that eventually arose in the nineteenth century from the demise of European colonial rule continued this trend by enacting a multitude of taxes, contributions, duties, and fees. Predictably, comprehensive coordinated fiscal regimes failed to emerge in the now-independent Latin American nations. Instead, levies were promulgated across the region to suit specific needs as they arose, oftentimes with picturesque designations.

Returning to Cuba, shortly after its independence was secured in 1902 and throughout the next decades, levies and special funds were established to guarantee payment on foreign loans and other extensions of credit granted to the newly-sovereign nation. Barely one year after independence, for instance, the Cuban government headed by its first president, Tomás Estrada Palma, negotiated a USD $35 million loan with New York-based Speyer & Co.30 The Cuban Congress approved legislation to assess a special permanent tax on the production and importation of alcoholic beverages, tobacco, and sugar to pay back the loan.31 What eventually emerged in the Republic of Cuba was a complex fiscal panorama, not only in terms of the number of levies in force, but also in terms of collection.

Two decades later, a 1% national sales and gross receipts tax (impuesto sobre la venta y las entradas brutas) was promulgated in Cuba to service a USD $50 million loan granted by J.P. Morgan & Co.32 Under the dictatorship of Gerardo Machado, major infrastructure projects involving the island’s central highway and national capitol building required financing.33 The resulting 1925 law called

29 Id. arts. 530–31; Decreto Supremo No. 156-2004-EF arts. 23, 29, Diario Oficial El Peruano p. 280366, Nov. 15, 2004 (Peru).
31 Ley sobre el Empréstito de Treinta y Cinco Millones de Pesos en Moneda de Oro de los Estados Unidos [Law on the Loan of Thirty-Five Million Pesos in United States Gold Coin] art. 3, Gaceta Oficial, Feb. 28, 1903, (Cuba); see also Roswell Magill & Carl Shoup, The Cuban Fiscal System: A Study Made at the Request of the Secretary of the Treasury 12 (1939); El Emprestito de Speyer de $35,000,000 [Speyer’s Loan of $ 35,000,000], 19 CUBA ECONÓMICA Y FINANCIERA, No. 215, 15 (1944). Loan proceeds were used mainly to finance the Cuban Army of Liberation; the loan was completely paid off by 1944. Id.
32 Ley de 9 de Octubre de 1922, Gaceta Oficial Extraordinaria, Oct. 9, 1922, (Cuba); see also José M. PÉREZ CUBILLAS, IMPUESTO DEL UNO Y MEDIO SOBRE LA VENTA Y ENTRADAS BRUTAS 17 (1937); TRIBUNAL DE CUENTAS, RECOPILACIÓN Y ANÁLISIS DE LOS INGRESOS PRESUPUESTALES DE CUBA 141 (1953).
33 HARRY SWAN MENCIÓ ET AL., LA ENCICLOPEDIA DE CUBA: GOBIERNOS REPUBLICANOS 377–78
for a 0.25% tax on exportation of funds (impuesto a la exportación de dinero o su equivalente) that effectively acted as a general export duty.\footnote{Stated differently, tax was withheld on practically all withdrawals of monies or its equivalent from Cuban territory.} taxes on gasoline and real estate, in addition to an increase in the sales and gross receipts tax rate to 1.5%.\footnote{Ley de Obras Públicas [Public Works Law], Gaceta Oficial Extraordinaria, July 16, 1925, (Cuba); see also MAGILL & SHOUP, supra note 31.} A separate fund was set up to collect revenues generated by these levies.\footnote{S WAN MENCIÓ, supra note 33, 358. The special fund was called Fondo Especial de Obras Públicas [Special Fund for Public Works]. Id.} Raising the latter levy’s rate entailed eliminating a 4% tax on business profits established just a few years earlier; from a fiscal policy perspective, substituting a direct tax in favor of an indirect tax was rather unfortunate, as it made Cuba’s tax system less flexible to address future economic downturns.\footnote{G RUPO CUBANO DE INVESTIGACIONES ECONÓMICAS, UN ESTUDIO SOBRE CUBA: COLONIA, REPÚBLICA, EXPERIMENTO SOCIALISTA 409 (1963).}

During the 1930s, indirect-type levies in the form of customs duties, along with taxes on consumption and sales, accounted for well over half of all fiscal revenues raised for the government’s coffers, a legacy of the colonial era;\footnote{During the first three decades of the twentieth century, receipts from customs duties accounted for well over 70% of Cuba’s budget. See COMISIÓN DE ASUNTOS CUBANOS, PROBLEMAS DE LA NUEVA CUBA 389 (Herminio Portell-Vilá trans., 1935), https://ufdc.ufl.edu/UF00075370/00001/1x.} this reliance on indirect taxation was still prevalent at the start of the subsequent decade.\footnote{FRANCIS ADAMS TRUSLOW ET AL., REPORT ON CUBA: FINDINGS AND RECOMMENDATIONS OF AN ECONOMIC AND TECHNICAL MISSION, INT’L BANK FOR RECONSTR. & DEV., (1951), https://documents1.worldbank.org/curated/en/509231468770694282/pdf/multit0page.pdf. According to the World Bank report, approximately two-thirds of total tax yield at the start of the 1940s originated from consumption and import duties, while direct taxes represented less than 10% of total tax revenues. Id.} In this sense, Cuba’s tax system back then was comparable to those in force elsewhere in other Latin American nations.\footnote{COMISIÓN DE ASUNTOS CUBANOS, supra note 38, at 387.} Moreover, most receipts collected in Cuba emanated from levies which failed to properly calibrate a taxpayer’s ability to pay, with the burden resting heavily on consumption, rather than on income and accumulated wealth.\footnote{M AGILL & SHOUP, supra note 31, at 8.}

In 1934, the chaotic nature of Cuba’s socioeconomic framework prompted government officials to invite experts from the U.S.-based Foreign Policy Association to analyze the situation and offer recommendations.\footnote{COMISIÓN DE ASUNTOS CUBANOS, supra note 38, at v–vii.} A detailed report was issued the succeeding year essentially advocating for a radical...
simplification of the island nation’s tax system by abolishing special-purpose contributions, consolidating levies, and improving collection efforts; more importantly, the report emphasized that tax should be assessed on net income, based on the capacity to pay (capacidad de pago) principle. As demonstrated later in this Article, this last proposition has proven to be extremely insightful with long-term impact, as judges all across Latin America have consistently acknowledged this same principle, many decades later, when issuing a ruling on the constitutionality of a particular levy.

The Foreign Policy Association’s guidance, at least with respect to tax matters, was not necessarily heeded by those in charge of formulating tax legislation, despite being widely disseminated. Quite the opposite. A flurry of new and amended non-income levies, in fact, were enacted shortly thereafter in 1943 by the government of President Fulgencio Batista. These included annual assessments on corporate entities doing business within Cuban territory based on the value of their capital (impuesto sobre el capital) and bearer shares (impuesto sobre las acciones al portador), along with yet another increase in the sales and gross receipts tax rate to 2.75%. By the end of the 1950s, just prior to the socialist-inspired revolution led by Fidel Castro, the Cuban tax regime remained an entangled web characterized by an excessive number of levies, each with varying scopes, exemptions, and procedures; in short, a fiscal kaleidoscope.

Possible reasons for this multiplicity of levies range from inheritance of Spain’s lethargic colonial bureaucracy, to establishment of specific levies to service foreign bank loans, to formation of special funds with different extra-budgetary goals, to issuance of emergency mechanisms to combat budget

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43 Id. at 411–12. The Foreign Policy Association report was issued based on the premise that a national tax system’s success is largely dependent on the efficiency of its administration. Id.
44 Id. at 412. Ideally, an income tax system assessed at graduated rates should not exceedingly burden taxpayers, provided it properly considers one’s ability to pay. Id.
45 PORTELL-VILA, supra note 30, at 614.
46 Ley No. 7 de Ampliación Tributaria de 5 de Abril de 1943, Gaceta Oficial, Apr. 6, 1943 (Cuba).
47 Id. art. 14. Tax was calculated at a rate of 3 pesos per 1000 pesos (tres por mil), or fraction thereof, of declared capital. Id.
48 Id. art. 21. Tax was assessed at a rate of 0.15% on the value of bearer shares issued. Id.
49 Id.; see DIRECCIÓN GENERAL DE RENTAS E IMPUESTOS DEL MINISTERIO DE HACIENDA, La Vigencia de los Nuevos Tributos, 18 CUBA ECONÓMICA Y FINANCIERA, No. 205, 9 (1943); Ley de 9 de Octubre de 1922, Gaceta Oficial Extraordinaria, Oct. 9, 1922 (Cuba) (establishing the initial national sales and gross receipts tax rate of 1% in 1922).
50 Nicolás Muñiz Rodríguez, Los Impuestos Inútiles, 31 CUBA ECONÓMICA Y FINANCIERA, No. 360, 17 (1956). Taking into account national, provincial, and municipal levies, along with special funds, there were probably well over 200 levies in existence in Cuba by the mid-1950s. See TRUSLOW ET AL., supra note 39, at 676.
deficits.\textsuperscript{51} Despite partial efforts at reform, the Cuban tax system manifested important structural deficiencies in the sense of its continued reliance on indirect taxes (mainly sales and gross receipts taxes, and import duties),\textsuperscript{52} lack of proper enforcement,\textsuperscript{53} and occasional prompting of double taxation on the same items of income.\textsuperscript{54} As in the colonial period, indirect taxes were historically favored as they facilitated collection, even at the expense of burdening the working class, potentially igniting social unrest.\textsuperscript{55}

Not surprisingly, given the pervasive multiplicity of levies and inherent complexity, taxpayers in Cuba were often not certain as to the precise amount of tax they owed to the government, quite conceivably encouraging some to evade tax altogether.\textsuperscript{56}

When compared to other regions of the world, indirect taxes enjoy, even to this day, a prominent role in raising funds for governments all over Latin America; in fact, close to half of all tax revenues reported in the region for 2019 originated from value-added tax (VAT) and other consumption taxes (such as customs duties and excise), compared to slightly less than one-third for Organization for Economic Cooperation and Development countries.\textsuperscript{57} For good measure, government officials persist in endorsing countless levies and contributions to complement traditional taxes on net income, unfortunately with little or no success. Much-heralded levies enacted over the past decade, such as the flat-rate business tax (IETU) in Mexico\textsuperscript{58} or the equality income tax (CREE)
in Colombia, turned out to be short-lived remedies. They were administratively burdensome and inefficient in raising funds, and in the case of CREE, was ultimately judged not to take into consideration the taxpayer’s ability to pay.

II. TAXES ON REVENUES

As noted in the introductory remarks, multinationals doing business across Latin America face a plethora of non-income levies, including those assessed on revenues, receipts, or sales; alternative taxes on gross income, assets and net equity; and duties and contributions imposed over a wide range of transactions. In relation to taxes levied on revenues, assessments are carried out at the national or federal, provincial or state, or municipal level.

Turnover-type levies tend to be reported by corporate entities on their financial statements, not as an expense to arrive at operating margins, but rather as a direct cost impairing gross margins. Transactions qualifying as an exportation of goods and/or services may be excluded from taxable base, as occurs with municipal taxes on services and gross receipts in Brazil and Colombia, respectively, both of which are explored later in more detail. Tax burden arising from these levies is somewhat alleviated to the extent domestic law allows taxpayers to claim amounts paid as (1) a credit, as in two federal taxes on receipts in Brazil; or (2) a deductible income tax expense, as in the provincial turnover tax in Argentina, discussed further below.

A. National/Federal Level

This Article first analyzes the two federal contributions assessed by the Brazilian federal government on corporate revenues, various rates applied, claiming credits, interaction with income tax, and incentives granted, including those favoring exportations. Next, levies on gross receipts in force in Bolivia and the Caribbean nation of Trinidad and Tobago are explored, ending with the more recent legislation adopted in Ecuador tailored to certain microenterprises.

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59 IMUESTO SOBRE LA RENTA PARA LA EQUIDAD [INCOME TAX FOR EQUITY], enero 1, 2013, pursuant to L. 1607, diciembre 26, 2012, DIARIO OFICIAL [D.O.] No. 48.655, repealed by L. 1819, diciembre 29, 2016, D.O. (Colom.); see infra Section III.B. Curiously, both enactment and abolishment of CREE transpired during the presidency of Juan Manuel Santos. Id.
1. The Brazilian Experience

Businesses operating in Brazil are required to fund two federal social programs which deliver unemployment insurance and social security benefits to those sectors of the population with less financial means. These social levies are formally known as contributions for social integration program (PIS) and social security financing (COFINS). PIS and COFINS are assessed at 1.65% and 7.6% of monthly gross receipts, respectively, for a combined rate of 9.25%. These social contribution rates ordinarily apply to companies which pay tax on net income (lucro real).

Corporations paying income tax on a net basis can claim credits for PIS and COFINS levied against qualified purchases of goods and services (aquisições de bens e serviços), pursuant to a mechanism often referred to as the non-cumulative regime (regime não-cumulativo) which is somewhat akin to VAT. Brazilian law, though, is rather vague as to what constitutes an input credit; specifically, PIS and COFINS paid to suppliers can potentially be claimed by the local company as an input credit, but, in contrast to VAT, only with regards to those costs directly tied to the production of goods or delivery of services.

By way of illustration, an advertising agency should be able to fully claim credits for PIS and COFINS paid to produce a campaign for its client, but not necessarily with regards to professional fees charged by an accounting or law firm. Those costs likely do not qualify as an acquisition of services, as they indirectly relate to the agency’s core business. Taxpayers, as expected, have taken issue with the government’s stance, via administrative and judicial proceedings, in a mostly-futile attempt to broaden the definition of input credits to include those costs that are necessary and customary to conduct commercial activities. The Brazilian tax authority, for instance, rejected a local toy manufacturer’s argument in 2020 that royalties paid pursuant to a licensing contract for the use of a trademark qualified as an input credit, asserting the

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60 Contribuição para o Programa de Integração Social [PIS] [Contribution to Social Integration Program], pursuant to Lei Complementar No. 7, de 7 de Setembro de 1970, D.O.U. de 10.9.1970 (Braz.). PIS was promulgated in the early 1970s by the military dictatorship governing Brazil at that time. Id. The law itself is signed off by Emílio Garrastazu Médici, military leader who was President when the law was enacted. Id.

61 Contribuição para o Financiamento da Seguridade Social [COFINS] [Contribution for the Financing of Social Security], pursuant to Lei Complementar No. 70, de 30 de Dezembro de 1991, D.O.U. de 30.12.1991 (Braz.). COFINS was promulgated in the early 1990s by the government of Fernando Collor de Mello. Id.


63 Id. art. 1.

64 Id. art. 3(II).
royalty payments did not constitute an acquisition of services, as defined in the applicable PIS and COFINS legislation.65

Small- and medium-sized companies reporting annual revenues of less than seventy-eight million reais may elect to pay income tax on presumed profits (lucro presumido),66 as opposed to net income. This lowers the combined PIS and COFINS rate to 3.65%,67 but with no tax credits available.68 The decision to pay tax on presumed profits is filed annually and could affect a company’s income tax burden,69 as tax is applied to a fixed percentage of operating revenues (receita bruta) which varies according to the company’s predominant activity. For instance, the taxable base is 8% of revenue for sales of goods or products, or real estate activities.70 Regarding service activities, the taxable base is 32% of revenue,71 resulting in an overall effective income tax rate of 10.88% (by imposing a 34% levy on the apportioned base), versus a maximum 34% rate applicable to companies that pay regular tax on net income.72 The presumed profit method is available solely for operating revenues; in other words, non-operating income, such as interest from bank deposits and foreign exchange gains, continues to be taxed on a net income basis, even if the company invokes this tax method.73

Various incentives have been granted over the years by the federal government to promote employment in particular sectors of the economy. Most

66 Until 2002, corporations in Brazil could elect to be taxed on presumed profits provided their annual revenues were less than 24 million reais, pursuant to Article 14(I) of Lei No. 9.718. 27 de Novembro de 1998. D.O.U. de 28.11.1998. From 2003 to 2013, the threshold increased to 48 million reais, pursuant to Article 46 of Lei No. 10.637. D.O.U. de 31.12.2002. Starting in 2014, the threshold was raised to 78 million reais, pursuant to Article 7 of Lei No. 12.814. 16 de Mayo de 2013, D.O.U. de 17.05.2013. This alternate mechanism is frequently referred to as the cumulative regime (regime cumulativo).
67 A combined rate of 3.65% is composed of PIS at 0.65% and COFINS at 3%.
69 Companies in Brazil are generally subject to two separate levies on net income—(1) an income tax for legal entities (Imposto de Renda de Pessoas Jurídicas, or IRPJ) assessed at a rate of up to 25%; and (2) a 9% social contribution on net profits (Contribuição sobre o Lucro Líquido, or CSLL) enacted in 1988 to fund the nation’s federal social security system—for a combined maximum income tax rate of 34%. See Lei No. 9.249, de 26 de dezembro de 1995, art. 3, D.O.U. de 27.12.1995 (Braz.) (regarding IRPJ); Lei No. 7.689, de 15 de dezembro de 1988, D.O.U. de 16.12.1988 (Braz.) (regarding CSLL).
70 Lei No. 9.249 art. 15, de 26 de Dezembro de 1995, D.O.U. de 27.12.1995 (Braz.).
71 Id. § 1(III)(a).
72 By way of illustration, if a Brazilian service company reports gross receipts from business activities of one million reais, the resulting income tax paid, under the presumed profits regime, equals 108,800 reais: $1,000,000 x 32% x (25% IRPJ + 9% CSLL) = $108,800.
notably, a lower 3.65% combined rate of PIS and COFINS applies to revenues derived from information technology services, irrespective of whether the company pays income tax on a net basis or on presumed profits.74

Finally, the importation of goods and services from abroad became subject to PIS and COFINS starting in 2004.75 Conversely, no PIS or COFINS should be collected on exportations of goods and services, provided payment is made by a non-resident resulting in a flow of foreign currency into Brazil that is duly registered through the Central Bank.76 This is a mechanical test that sharply contrasts with VAT legislation elsewhere in the region, which routinely requires effective use and enjoyment of the goods sold or services rendered to have taken place or materialized outside the respective national territory to benefit from a 0% rate.

2. Other Jurisdictions

Distinct national levies on revenues are also in force in Bolivia, as well as Trinidad and Tobago. As a jurisdiction with a territorial system of taxation, the Plurinational State of Bolivia has promulgated a 3% transaction tax on monthly gross income generated from commercial activities within the national territory (IT), offset by income tax paid during the year.77 Income derived from exports, interest on bank deposits, and sale of shares is exempt from IT.78 The Republic of Trinidad and Tobago, in turn, has ratified not one, but two national taxes on gross sales and receipts: a 0.6% business levy,79 and a 0.3% green fund levy (GFL) to support environmental projects.80 The first levy, intended to generate a steady flow of revenue throughout the year irrespective of whether the

74 Lei No. 10.833 art. 10, de 29 de Dezembro de 2003, D.O.U. de 30.12.2003 (Braz.). Income derived from services associated with information technology and software development is excluded from the non-cumulative regime when determining the amount of PIS and COFINS assessed. Id. Companies benefitting from this incentive cannot claim any credits for PIS and COFINS paid to suppliers. See id.
75 Lei No. 10.865, de 30 de Abril de 2004, D.O.U. de 30.04.2004 (Braz.).
76 Medida Provisória No. 2.158-35 art. 14(III), de 24 de Agosto de 2001, D.O.U. de 27.8.2001 (Braz.).
77 Law No. 843, Impuesto a las Transacciones [Transaction Tax], May 20, 1986, Gaceta Oficial de Bolivia No. 1463, May 28, 1986 (Bol.). Payment of taxes to the Bolivian tax authority under Article 77, Impuesto sobre las Utilidades de las Empresas (Business Income Tax), during the year constitutes prepayment of IT. Id.
78 Id.
79 Corporation Tax Act, L.R.O Ch. 75:02, Dec. 31, 2012 (Trin. & Tobago). Companies operating in Trinidad and Tobago are liable to pay the higher of corporation income tax or business levy. Id.
80 Miscellaneous Taxes Act of 2000 pt. XIV, L.R.O. Ch. 77:01, Dec. 31, 2016 (Trin. & Tobago). As the official name suggests, GFL is primarily intended to raise funds for maintenance, restoration, and conservation activities to safeguard the nation’s environment. Id. Initially the GFL rate was set at 0.1%, and increased to 0.3% in January 2006. Id. It is payable irrespective of whether the local company is exempt from the business levy. Id.
company reports taxable loss, is creditable against corporate income tax,81 while the second assessment is payable even if the company is exempt from the business levy.82

At the end of 2019, Ecuador formally established a special regime for microenterprises called Régimen Impositivo para Microempresas (RIM), in regard to taxes on income, value-added, and consumption.83 RIM’s stated purpose is to reduce the administrative costs of doing business, including tax compliance, primarily for small family-owned companies.84 For these purposes, the term “microenterprise” is defined as a company reporting annual revenues of less than USD $300,000 and employing up to nine workers.85

Beginning 2021, qualified micro-companies are obligated to determine their annual income tax liability by applying a 2% rate on gross income derived from business activities, irrespective of whether they report taxable income or loss; by contrast, other income continues to be taxed on a net basis of 25%.86 The COVID-19 pandemic’s devastating impact on small businesses forced the Ecuadorian tax authority (Servicios de Rentas Internas) to postpone deadlines to pay income tax with respect to fiscal years 2020 and 2021 for those entities registered under RIM, to the extent they recorded financial losses.87 To reignite the nation’s economy, President Guillermo Lasso spearheaded a law in November 2021 which abolishes RIM, replacing it with a new regime called Régimen Simplificado para Emprendedores y Negocios Populares (RIMPE) which imposes, starting 2022, an annual tax on most microenterprises reporting gross income of less than USD $300,000, assessed at rates oscillating between 0% and 2%.88

81 Corporation Tax Act, L.R.O Ch. 75:02, Dec. 31, 2012 (Trin. & Tobago).
83 Ley Orgánica de Simplificación y Progresividad Tributaria [Organic Law of Tax Simplification and Progressivity] art. 38, R.O. No. 111, Suplemento, de 31-12-2019 (Ecuador). Concerning VAT, companies subject to tax on net income file returns monthly, while qualified microenterprises can file returns quarterly, thus decreasing compliance costs. See id.
84 Id.
85 SERVICIO DE RENTAS INTERNAS [SRI], RESOLUCIÓN NO. NAC-DGERC20-00000060 art. 4 (Sept. 29, 2020) (Ecuador).
86 Ley Orgánica de Simplificación y Progresividad Tributaria, R.O. No. 111, Suplemento, de 31-12-2019 (Ecuador).
87 Decreto Ejecutivo No. 1240, R.O. No. 395, Tercer Suplemento, de 22-02-2021 (Ecuador).
88 Ley Orgánica para el Desarrollo Económico y Sostenibilidad Fiscal tras la Pandemia COVID-19 [Organic Law for Economic Development and Fiscal Sustainability After the COVID-19 Pandemic] arts. 65–66, R.O. No. 587, Tercer Suplemento, de 29-11-2021 (Ecuador). Per Article 66 of the new law, the term gross income (ingresos brutos) is defined as taxable income, less discounts and rebates. Id.
B. Provincial/State Level

During the military junta led by President Jorge Videla in the late 1970s, Argentina began imposing taxes at the provincial level on gross receipts, whether derived from goods or services. In fact, all provinces which make up the Argentine Republic, not to mention the Autonomous City of Buenos Aires (CABA), institute a turnover tax (IIBB) on revenues generated by enterprises which undertake commercial, industrial, agricultural, and financial activities, as well as professional services. Rates of tax vary depending on the province and type of activity, but tend to hover between 3% and 5%.

The proliferation of IIBB laws eventually necessitated the intervention of the federal government to delegate taxing authorities amongst the various provinces in an orderly fashion, pursuant to a multilateral treaty. Accordingly, a company undertaking commercial endeavors in more than one province should, under most circumstances, divide its total gross receipts into two: one half is allocated in proportion to gross income derived from each jurisdiction. The other half distributed in proportion to expenses incurred in each jurisdiction.

Akin to the two Brazilian federal levies (PIS and COFINS) addressed previously, IIBB paid or accrued is typically reported by local Argentine companies as a direct cost of production or delivering services for financial reporting, thus altering gross margins. Amounts derived from the exportation of services are exempt from IIBB, on the condition that use and enjoyment (utilización y explotación) of said services is demonstrated to have effectively transpired outside Argentine territory. Based on the notion that these levies are

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89 In Spanish, Ciudad Autónoma de Buenos Aires (CABA), the official title of the city of Buenos Aires, Argentina.
92 Comisión Arbitral del Convenio Multilateral del 18/08/77 [Arbitration Commission of the Multilateral Treaty of August 18, 1977] (Arg.). The various Argentine provinces, including the City of Buenos Aires, entered into a multilateral agreement for the stated goal of avoiding multiple taxation on gross receipts. See id.
93 Id. art. 2.
94 CÓDIGO FISCAL DE CIUDAD AUTÓNOMA DE BUENOS AIRES [FISCAL CODE OF THE AUTONOMOUS CITY
enacted by provincial authorities, they usually cannot be credited against national income taxes; instead, amounts paid ordinarily constitute a deductible expense for income tax purposes.95

C. Municipal Level

Municipal authorities throughout Latin America have acknowledged the convenience of establishing taxes on revenues (gross income or sales) as a way to combat chronic budget deficits, given the lack of reliable funding received from their respective national or even provincial governments. What follows is an overview of municipal legislation adopted across the Americas, starting with the complexities arising from local taxes assessed on revenues generated from the rendering of services in Brazil, moving to the Andean nations of Colombia and Venezuela, and concluding with Central America and the Caribbean Basin.

1. Brazilian Tax on Services

Case in point, municipalities throughout the Federative Republic of Brazil—not to mention São Paulo, the largest city in Latin America and by far the country’s economic engine, as well as the Federal District in Brasília—have promulgated meticulous laws enabling taxes to be charged on gross income derived from the rendering of a broad spectrum of services (ISSQN), including those imported from abroad.96 In general, ISSQN applies to the extent the service rendered is specifically listed in the annex to the applicable federal law enacted in 2003 under the administration of President Luiz Inácio Lula da Silva.97 The wide breadth of ISSQN becomes quite evident in that it is assessed even with regards to services that do not constitute the renderer’s predominant activity (atividade preponderante).98

ISSQN is owed, typically on a monthly basis, to the municipality where the service provider’s place of establishment is located, and is assessed at a maximum rate of 5%.99 To prevent municipalities from further engaging in a
“fiscal war” amongst themselves via enactment of incentives to attract investments, a minimum rate of 2% was established in 2016 by the federal government. Rates of ISSQN vary depending on the municipality, as well as upon the nature of the specific service rendered: For instance, in the city of São Paulo, the general rate is 5%101 with a reduced 2.9% rate granted to information technology services.102 In the municipality of Rio de Janeiro, a 3% rate applies to advertising services, with a general 5% rate applied to services not otherwise assigned a specific rate.103 Curitiba, the main commercial city located in the southern State of Paraná, grants a reduced 2% rate for call centers (unidade de central de atendimento).104

As opposed to Brazil’s federal PIS and COFINS which are potentially creditable, the amount of municipal ISSQN paid by a local company is not creditable but can be claimed as a deductible item for income tax purposes. Therefore, from a financial reporting perspective, it is fair to contend that ISSQN constitutes a cumulative levy, potentially impacting a company’s gross margin and budget forecasts.

Furthermore, in relation to whether a particular transaction qualifies as an exportation of services not subject to ISSQN, municipal authorities have repudiated the mechanical test adopted by the federal tax authority as to PIS and COFINS. Instead, municipal fiscal agents throughout Brazil embrace a more subjective test, not unlike provincial tax inspectors in Buenos Aires and elsewhere in Argentina with regards to IIBB. Agents routinely assess ISSQN on all amounts invoiced by local companies to foreign recipients, unless their effective use and enjoyment takes place solely outside Brazilian territory and adequate contemporaneous documentation is furnished to support such an assertion.106

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100 Lei Complementar No. 157, de 29 de Dezembro de 2016, D.O.U. de 30.12.2016 (Braz.).
102 Lei No. 16.757, de 14 de Novembro de 2017, Diário Oficial da Cidade de São Paulo [D.O.C.S.P.] No. 214 de 15.11.2017 (Braz.).
104 Lei Complementar No. 40 art. 4, de 18 de Dezembro de 2001, Diário Oficial do Município de Curitiba [D.O.M.C.] No. 96 de 18.12.2001 (Braz.).
105 Solução de Consulta COSIT No. 27 [COSIT Consultation Solution No. 27] § 1, p. 23, de 16 de Janeiro de 2017, D.O.U. de 25.01.2017 (Braz.).
106 Lei Complementar No. 116 art. 2(1), de 31 de Julho de 2003, D.O.U. de 1.8.2003 (Braz.).
2. Andean Region

Andean nations such as Colombia and Venezuela have likewise endorsed municipal turnover-type taxes on business activities. Many municipalities in the Republic of Colombia assess a tax on monthly gross receipts (ICA), with rates alternating from 0.2% to 1%, the latter being the prevalent rate in the capital city of Bogotá. Although a subnational levy, taxpayers can claim 50% of ICA paid in any given year as a credit against national income tax; alternatively, the full amount can be claimed as a deductible expense for income tax purposes to the extent attributable to the business’s economic activities.

In the same manner as provincial IIBB in Argentina and municipal ISSQN in Brazil, ICA is not assessed on amounts invoiced to non-residents, provided the underlying transaction duly qualifies as an exportation of services. Moreover, companies operating in the neighboring Bolivarian Republic of Venezuela are subject to municipal tax on gross income derived from commercial activities conducted during the fiscal year, with rates fluctuating up to 10%.

3. Central America

In Central America, there has been a marked preference for municipal tax on revenues to raise critical funds to combat the decades-long economic malaise caused by civil wars and resulting unrest. The names of these levies vary wildly: the commercial license tax in the Republic of Costa Rica, the municipal income tax (IMI) in the Republic of Nicaragua, and the industry, commerce

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111 Officially called Impuesto de Patentes de Actividades Lucrativas [Tax on Licenses for Profitable Activities] in Spanish. Ley No. 5694, Ley de Impuestos de Patentes de Actividades Lucrativas, June 9, 1975 (Costa Rica). The license tax on commercial activities was first established in the capital city of San José during the mid-1970s. Id. at Transitorio I.
and services tax (ICS) in the Republic of Honduras.\footnote{Decreto No. 134-90 del 29 de octubre de 1990, Ley de Municipalidades [Municipalities Law], LA GACETA, DIARIO OFICIAL [D.O] No. 26,292 del 19 de noviembre de 1990 (Hond.). Officially called Impuesto Sobre Industrias, Comercio y Servicios in Spanish.} Tax base tends to cover a wide spectrum of commercial activities: in Nicaragua, for instance, income derived by companies and individuals from the sale of goods and rendering of services, whether on a habitual or isolated basis, is subject to IMI.\footnote{Decreto No. 455, 5 July 1989, Plan de Arbitrios art. 11, L.G., 31 July 1989 (Nicar.).}

Generally speaking, gross income is taxed on a monthly basis and is paid to the municipality where goods are sold or services are rendered, not to the municipality where the invoice is issued. Rates range from as low as 0.03\% in Honduras\footnote{Decreto No. 134-90, D.O. No. 26,292 del 19 de noviembre de 1990 (Hond.).} to as high as 1\% in Nicaragua,\footnote{Decreto No. 455, 5 July 1989, Plan de Arbitrios, L.G., 31 July 1989 (Nicar.).} while companies conducting business in Costa Rica’s capital city of San José are obligated to pay a maximum license fee equal to 0.35\% of annual sales or gross income.\footnote{Ley No. 5694, Ley de Impuestos de Patentes de Actividades Lucrativas [Tax Law for Profitable Activities Licenses] art. 14, June 9, 1975 (Costa Rica). Within the municipality of San José (Municipalidad del Cantón Central de San José), the rate is 0.25\% during the first year of business activities, 0.30\% during the second year, and 0.35\% starting the third year and thereafter.} To the extent a particular company engages in commercial activities in more than one municipality in Puerto Rico, it must break down the volume of business

4. Caribbean Basin

Within the Caribbean Basin, some municipalities also look favorably on generating revenues via promulgation of business licenses or their equivalent. This occurs whether the jurisdictions have fully adopted capitalist ideologies, such as the U.S. Commonwealth of Puerto Rico, or are wholly immersed in socialist ideologies, such as Cuba over the past six decades.\footnote{Since the revolution led by Fidel Castro toppled the military dictatorship under Fulgencio Batista.}

Take, for example, Puerto Rico, where companies engaged in the rendering of services, sale of goods, or any other commercial activity are subject to an annual municipal license (patente municipal) on their gross receipts (volumen de negocios), unless otherwise stipulated.\footnote{Industrias y Negocios Sujetos a Patentes [Industries and Businesses Subject to Patents], P.R. LEYES AN. tit. 21, § 8163 (2020) (P.R.).} Tax rates oscillate from 0.5\% on operating revenue up to 1.5\% on revenue derived from financial business.\footnote{Id. § 8164 (Tipos de Patentes [Types of Patents]).} To
attributable to each location; payment of the municipal license tax is deductible for income tax purposes.121

Elsewhere, in the largest Caribbean island of Cuba, municipalities have been gradually assessing a territorial contribution on gross income reported by companies from the sale of goods and rendering of services since 2013.122 The stated purpose of the levy is to stimulate the sustainable development of the locality, mainly in the form of infrastructure projects and is fixed at a rate of 1%.123 In practice, essentially all economic activity should remit the tax to the relevant municipality.124 Payment is remitted to the administrators of the Cuban municipality where the company operates, irrespective of where the principal place of business is located.125

III. ALTERNATIVE MINIMUM TAXES

A. Background and Features

In addition to taxes on revenues discussed previously, legislators across Latin America have enacted a series of alternative minimum taxes over the past decades to guarantee a steady flow of fiscal revenues—controversially, even under circumstances where corporations report a financial loss. That is, these levies are purposely designed to generate a minimum amount to be paid, irrespective of whether they adhere to constitutional principles of tax fairness or economic capacity. Moreover, tax administration officials favor these alternative assessments for being easier to implement and enforce, and harder to evade, than traditional taxes on net income.

121 Id. § 8162(h) (Operaciones llevadas a cabo en varios municipios, o ventas occasionales para las que se mantenga un lugar temporero de negocios [Operations carried out in several municipalities, or occasional sales for which a temporary place of business is maintained]).

122 Ley del Sistema Tributario, No. 113 de 23 de julio de 2012, Contribución Territorial para el Desarrollo Local [Territorial Contribution for Local Development] arts. 305–15, GACETA OFICIAL ORDINARIA No. 053, Nov. 21, 2012 (Cuba).

123 Id. art. 305; see Yamylé Fernández Rodríguez, Contribución Territorial Permite en Nuevitas, Camagüey, Impulsar Obras de Impacto Social, CADENA AGRAMONTE (June 5, 2017), https://www.cadenagramonte.cu/articulos/ver/70617:contribucion-territorial-permite-en-nuevitas-camaguey-impulsar-obras-de-impacto-social. Funds raised by the 1% territorial contribution in Nuevitas, a small town located in the province of Camagüey in central Cuba, were to be utilized to build a 700-meter boardwalk along the bay, repair streets, and clean facades on surrounding houses. Ley del Sistema Tributario, No. 113 de 23 de julio de 2012, GACETA OFICIAL ORDINARIA No. 053, Nov. 21, 2012 (Cuba).


125 Ley del Sistema Tributario, No. 113 de 23 de julio de 2012 arts. 311, GACETA OFICIAL ORDINARIA No. 053, Nov. 21, 2012 (Cuba).
Although the majority of levies are dictated at the national level, local governments have also recognized their relevance. The two largest cities in the Republic of Ecuador, Guayaquil and Quito, impose a tax on adjusted net assets (ISAT)\textsuperscript{126} at a rate of 0.15%.\textsuperscript{127} Taxable base equals total assets reported the previous calendar year minus current liabilities; where a taxpayer is engaged in business activities in several municipalities, tax is apportioned according to levels of turnover generated by each of the taxpayer’s establishments.\textsuperscript{128}

Elsewhere, cities across the Republic of Chile have sanctioned a 0.5% license on so-called taxable equity (capital propio tributario), commonly referred to in Spanish as patente municipal, which is determined by applying certain adjustments to the local company’s net equity as reported on its financial statements.\textsuperscript{129} The amount of business levy due annually is apportioned to each municipality based on the number of employees located in each establishment.\textsuperscript{130}

Often, these alternative taxes were initially designed to be short-lived, lasting only a few years to overcome a particular budget crisis. The temporary nature of these levies is sometimes reflected by the unique names assigned to them: For instance, the Republic of Guatemala enacted a 2004 levy with the somewhat cumbersome name, the Extraordinary and Temporary Tax in Support of the Peace Agreements (IETAAP),\textsuperscript{131} replaced five years later by a solidarity tax (ISO).\textsuperscript{132} In the Republic of Peru, legislators ratified a supposedly temporary tax on net assets in 2004, the fourth reincarnation of a minimum tax,\textsuperscript{133} that

\begin{itemize}
\item \textsuperscript{126} Ley de Control Tributario y Financiero No. 006, Impuesto sobre los Activos Totales [ISAT] [Tax on Total Assets], R.O. No. 97, de 29-12-1988 (Ecuador) (regulated pursuant to COOTAD arts. 552–55). ISAT applies to companies and individuals engaged in economic activities that are obligated to maintain accounting records. \textit{Id.}

\item \textsuperscript{127} Id. art. 30. ISAT is calculated by multiplying net asset base by a factor of 1.5, divided by one thousand (1.5 por mil). \textit{Id.}

\item \textsuperscript{128} COOTAD art. 553, R.O No. 303, Suplemento, de 19-10-2010 (Ecuador).

\item \textsuperscript{129} Law No. 3.063 arts. 24–25, Establece Normas Sobre Rentas Municipales [The Establishment of Rules on Municipal Income], Diciembre 29, 1979, \textit{DIARIO OFICIAL} [D.O.] (Chile). The patente municipal was first implemented during the military rule of Augusto Pinochet. \textit{Id.}

\item \textsuperscript{130} Id. Shareholdings in domestic companies are excluded from taxable base, per Article 24. \textit{Id.} Rates vary depending on the municipality. \textit{See id.}

\item \textsuperscript{131} Decreto del Congreso No. 19-04, Impuesto Extraordinario y Temporal de Apoyo a los Acuerdos de Paz [IETAAP] [Extraordinary and Temporary Tax to Support the Peace Accords] art. 1, June 29, 2004, (Guat.). IETAAP was in force from 2004 until 2008, replacing an even earlier version of an alternative minimum tax. \textit{Id.}

\item \textsuperscript{132} Decreto del Congreso No. 73-2008, Impuesto de Solidaridad [Solidarity Tax], Dec. 9, 2008 (Guat.).

\item \textsuperscript{133} Resolución de Superintendencia No. 071-2005-SUNAT, Impuesto Temporal a los Activos Netos [Temporary Tax on Net Assets] art. 1, Apr. 1, 2005 (Peru). The current version of Peru’s net asset tax succeeds three prior levies: Impuesto Mínimo a la Renta (revoked in 1997), Impuesto Extraordinario a los Activos Netos (revoked in 1999), and Anticipo Adicional del Impuesto a la Renta (revoked in 2004). \textit{Infra Section III.C.2.c.}
remains in force seventeen years later.\textsuperscript{134} By contrast, in the United Mexican States, the tax on net assets (IMPAC) was abolished in 2008 and has not re-emerged since,\textsuperscript{135} while the Argentine tax on gross assets (IGMP) was repealed in the beginning of 2019.\textsuperscript{136} Nonetheless, the overall trend is that these alternative levies inevitably become a permanent and indispensable tool in the arsenal for government policymakers to hedge their bets against uncertain economic forecasts, highlighted recently by falling commodity prices, social disturbances, and the worldwide pandemic.

Some alternative levies may be credited against income tax, as is the case with Peru’s temporary tax on net assets.\textsuperscript{137} Others may be claimed as a deduction for income tax purposes, a prime example being the municipal patent in Chile.\textsuperscript{138} Uniquely in Guatemala, taxpayers can elect to credit ISO against income tax, or vice versa.\textsuperscript{139} Unfortunately, there are a few levies that are neither creditable nor deductible for income tax purposes, such as the Argentine personal property tax,\textsuperscript{140} the Colombian tax on equity,\textsuperscript{141} or the Venezuelan tax on high net wealth,\textsuperscript{142} all three discussed in more detail later.

Investors residing in jurisdictions which have adopted a foreign tax credit system to reduce or eliminate international double taxation can benefit from an overall lesser fiscal burden, provided the amount of income tax paid by the local subsidiary in any given year is creditable against that same year’s alternative tax liability. In the Dominican Republic\textsuperscript{143} and Honduras,\textsuperscript{144} the respective levies on

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\textsuperscript{134} See infra Section III.C.2.c.
\textsuperscript{135} Impuesto al Activo de las Empresas [Corporate Asset Tax] cap. V, DOF 31-12-1988 (Mex.). This law entered into force during the government headed by President Carlos Salinas de Gortari. Id. Subsequently, the official name was modified to Impuesto al Activo [Asset Tax], and the law was eventually repealed, effective January 1, 2008. Ley del Impuesto Sobre la Renta art. 3(III), DOF 01-10-2007 (Mex.). IMPAC was replaced unsuccessfully by IETU. Infra Section III.C.2.b.
\textsuperscript{136} Infra III.C.2.b.
\textsuperscript{137} Decreto de Supremo No. 417-2020-EF, Modifican el Reglamento del Impuesto Temporal a los Activos Netos [Modifying the Regulations for the Temporary Tax on Net Assets], Diario Oficial El Peruano No. 15081, Dec. 30, 2020 (Peru).
\textsuperscript{138} Law No. 21.210, Febrero 24, 2020, D.O. (Chile).
\textsuperscript{139} Decreto del Congreso No. 73-2008, Impuesto de Solidaridad [Solidarity Tax] art. 11 (Acreditación), Dec. 9, 2008 (Guat.).
\textsuperscript{140} Decreto No. 824/2019, art. 86(a), Dec. 6, 2019, [IV] B.O. 34255 (Arg.). Under limited circumstances, personal property tax paid may be deductible in Argentina for income tax purposes if payment is associated with an asset that generates taxable income. Id.
\textsuperscript{141} L. 624/89, marzo 30, 1989, D.O. (Colom.).
\textsuperscript{142} El Impuesto a los Grandes Patrimonios [Tax on Large Assets] ch. V, art. 1, Gaceta Oficial No. 41.667 del 3 de julio de 2019, reimpresa en Gaceta Oficial No. 41.696 del 16 de agosto de 2019 (Venez.).
\textsuperscript{143} Ley No. 557-05 art. 19, Impuesto sobre Activos [Asset Tax], Dec. 13, 2005 (Dom. Rep.).
\textsuperscript{144} Decreto No. 51-2003, Impuesto al Activo Neto, Ley de Equidad Tributaria [Net Asset Tax, Tax Equity Law] art. 5, D.O No. 30,059 del 10 de abril de 2003 (Hond.).
\end{flushleft}
net assets essentially act as alternative minimum taxes, in the sense that they are paid only to the extent they exceed income tax in any given year. The Uruguayan net worth tax, discussed later, is yet another illustration of a levy offset by income tax credits.\textsuperscript{145}

\textbf{B. Taxes on Income}

Broadly speaking, alternative minimum taxes can be divided between those measured by income, as in Puerto Rico and Panama, and those based on non-income items such as assets or net equity. Puerto Rico has adopted a regime comparable to that set forth under U.S. federal law, whereby tax is determined on an alternative income taxable base that only comes into play where the alternative minimum tax in any given year exceeds regular income tax.\textsuperscript{146} In a similar fashion, the Republic of Panama imposes a 25\% tax over the greater of domestic source net taxable income, or 4.67\% of gross taxable income (defined as revenue less exempt and foreign source income).\textsuperscript{147}

Other alternative minimum levies on income have on occasion been successfully contested and subsequently amended or abolished. Take, for instance, the case of Honduras, where the Supreme Court declared an alternative tax assessed on gross income unconstitutional in 2012.\textsuperscript{148} The tax was promulgated by legislative decree barely a year before.\textsuperscript{149} The decree in question amended Article 22 of the Income Tax Law whereby resident companies were obligated to pay a 1\% tax on gross income, irrespective of whether they suffered losses during the fiscal year.\textsuperscript{150} The court ruled that the alternative levy violated the taxpayer’s economic capacity (\textit{capacidad económica}) established under

\textsuperscript{145} Decreto No. 30/015, Ministerio de Economía y Finanzas [Ministry of Economy and Finance] art. 7 (Abatimiento), DIARIO OFICIAL [D.O.] No. 29.141, de enero 29 de 2015 (Uri.).

\textsuperscript{146} Contribución Alternativa Mínima Aplicable a Corporaciones [Alternative Minimum Tax Applicable to Corporations], P.R. LEYES AN. tit. 13, § 30073 (2022) (P.R.); see Tax Changes for the 2019 Income Tax Alternative Basic Tax, TORRES CPA GROUP (Dec. 11, 2019), https://torrescpa.com/growing-together/tax-changes-for-the-2019-income-tax-alternative-basic-tax (stating the Contribución Alternativa Mínima rate in Puerto Rico is currently set at 18.5\%, or 23\% for companies reporting business volumes exceeding USD $3 million).

\textsuperscript{147} CÓDIGO FISCAL DE LA REPÚBLICA DE PANAMÁ [FISCAL CODE OF THE REPUBLIC OF PANAMA] art. 699 (Pan.); see Panama, Corporate: Taxes on Corporate Income, WORLDWIDE TAX SUMMARIES (July 20, 2021) https://taxsummaries.pwc.com/panama/corporate/taxes-on-corporate-income. The alternative calculation available to corporate taxpayers in Panama to determine their income tax, is referred to in Spanish as cálculo alternativo del impuesto sobre la renta [alternative calculation of income tax]. Id.

\textsuperscript{148} Constitucional No. RI-540-11 de Corte Suprema de Justicia [Constitutional No. RI-540-11 of the Supreme Court of Justice], 1 de febrero de 2012, https://hn.vlex.com/vid/777290205 (Hond.).

\textsuperscript{149} Id.

\textsuperscript{150} Id.; see also Decreto Legislativo No. 42-2011 del 12 de abril de 2011, D.O. No. 32,529 del 31 de mayo de 2011 (Hond.).
Article 351 of the Constitution. The Court even went so as far to describe its application as absurd and approaching “fiscal terrorism,” such assertion applying especially in instances where the company is obligated to pay tax without having generated any income and, even worse, where losses are recorded for financial reporting purposes.

The Honduran legislature subsequently amended the Income Tax Law to comply with constitutional principles of proportionality and equity, keeping in mind the taxpayer’s financial ability to pay this levy. Consequently, starting in fiscal year 2020, companies reporting gross income in excess of ten billion lempiras the previous fiscal year are required to pay a minimum tax equal to 1% of gross income, but only if it exceeds regular tax on net income. However, entities reporting amounts below this gross income threshold are subject to tax solely on net income. Moreover, companies recording losses in Honduras as a result of a natural disaster, war, or other force majeure event are not subject to the 1% minimum tax on gross income for a period up to two fiscal years, provided said losses are duly certified by a professional audit firm.

The Colombian CREE, briefly mentioned earlier, provides another instance of a levy based on a modified income base that was disputed by taxpayers and ultimately abolished. Beginning in 2013 and lasting four years, CREE was computed by applying a 9% rate on annual adjusted net income, to which a surcharge was added its last two years in operation. Although not intended to act as an alternative minimum tax, CREE was paid in addition to regular income tax, effectively increasing the combined rate of corporate income tax in Colombia to as high as 40% in its final year in effect. All this took place at a

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151 Id.; see also CONSTITUCIÓN DE LA REPÚBLICA DE HONDURAS [CONSTITUTION], Decreto No. 131, Jan. 11, 1982, art. 351. Article 351 of the Constitution states that the nation’s tax system shall be governed by principles of legality, proportionality, generality, and equity, in accordance with the economic capacity of the taxpayer. Id. (emphasis added).

152 Id. The term used by the Honduran Supreme Court was terrorismo tributario. Constitucional No. RI-540-11 de Corte Suprema de Justicia, 1 de febrero de 2012, https://hn.vlex.com/vid/777290205 (Hond.).

153 Decreto Legislativo No. 31-2018 del 21 de marzo de 2018, D.O. No. 34,620 del 20 de abril de 2018 (Hond.). This decree amended Article 22-A of the Income Tax Law (Ley de Impuesto sobre la Renta). Id. art. 1(3).

154 Id.

155 Id.

156 Id. art. 1(4)(d).

157 L. 1607/2012, diciembre 26, 2012, D.O. art. 23 (Colom.). CREE taxable base was calculated by taking annual net revenues, excluding tax-exempt income and capital gains, less ordinary and necessary expenses, interest, and depreciation. Id.

158 L. 1739/2014, diciembre 23, 2014, D.O art. 22 (Colom.). A CREE surcharge (sobretasa) of 5% and 6% was in effect for fiscal years 2015 and 2016, respectively. Id.

159 L. 1607/2012, diciembre 26, 2012, D.O. art. 24 (Colom.). Combined income tax rates in Colombia during the four-year period that CREE was in force, consisting of income tax (impuesto a la renta, IR) plus
time when a global trend in favor of reduced rates was encouraged to attract foreign investments.

One could justifiably classify CREE as an income tax surcharge intended to promote formal employment, with funds raised destined for social programs in education and primary care. Despite its characterization as a levy akin to an income tax, companies were not initially allowed to compensate losses against income reported in future years to determine taxable base, due primarily to an omission by legislators when drafting the law,\textsuperscript{160} nor to compensate CREE overpayments against income tax liabilities.\textsuperscript{161}

In two separate appeals, the Constitutional Court of Colombia held that both restrictions violated the principle of tax equality or fairness (equidad tributaria) contained in Articles 95.9 and 363 of the constitution\textsuperscript{162} by disregarding the company’s ability to pay.\textsuperscript{163} The magistrates reaffirmed the notion that the authority of legislators to enact laws is not limitless and should carefully consider the rights of taxpayers.\textsuperscript{164} Indeed, denying taxpayers the right to offset future taxable income with losses or to request a refund for taxes overpaid in favor of funding social programs promoted under CREE, was neither reasonable nor proportional.\textsuperscript{165} Nonetheless, rather than proclaiming the two articles unconstitutional, the court instead limited the breadth of their decisions by declaring them unenforceable (inexequible).\textsuperscript{166}

CREE, were as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Formula</th>
<th>Rate</th>
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<tbody>
<tr>
<td>2013 and 2014</td>
<td>25% IR + 9% CREE = 34%</td>
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</tr>
<tr>
<td>2015</td>
<td>25% IR + 9% CREE + 5% CREE surcharge = 39%</td>
<td></td>
</tr>
<tr>
<td>2016</td>
<td>25% IR + 9% CREE + 6% CREE surcharge = 40%</td>
<td></td>
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\textsuperscript{160} Id. art. 22.
\textsuperscript{161} L. 1739/2014, diciembre 23, 2014, D.O art. 20 (Colom.).
\textsuperscript{162} CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.]. Pursuant to Article 95.9, all Colombian citizens are required to contribute funds to cover expenses and investments made by the State, in line with notions of justice and equity. Id. Pursuant to Article 363, Colombia’s tax system is founded on principles of equity, efficiency, and progressivity. Id.
\textsuperscript{164} C.C., mayo 20, 2015, M.P.: G.S. Ortiz Delgado, Sentencia C-291/15, Expediente D-10473, G.C.C. (Colom.).
\textsuperscript{165} Id.
\textsuperscript{166} Id.; see also L. 1739/2014, diciembre 23, 2014, D.O art. 13 (Colom.). To remedy legislative silence surrounding utilization of tax losses, the 2012 law establishing CREE was amended in 2014 to enable companies to compensate losses against future income, starting with losses generated in 2015. Id.
C. Taxes on Assets

Having completed a survey of alternative minimum taxes measured by income, this Article now turns to alternative levies based on assets, whether ascertained on a gross or net basis.

1. Policy and Categories

The intended goal of the legislature in Latin America when promulgating a tax on assets is to encompass those profits potentially generated by assets, either owned or leased, which are utilized by the taxpayer to conduct business. By way of illustration, a company reporting one million pesos worth of assets is typically expected to report a minimum return of 6%, or income of at least 60,000 pesos. Applying a rate of 30% against these 60,000 pesos results in a hypothetical levy equal to 18,000 pesos, or 1.8% of assets. Mexico imposed this precise rate under IMPAC for most of the law’s years in operation.¹⁶⁷

Taxable base varies amongst jurisdictions and even within the same jurisdiction over the course of time—the prime examples being Guatemala and Peru, the latter extensively analyzed in a separate section. Mexico’s IMPAC was initially assessed on a net basis—gross assets less certain liabilities—but eventually mutated in its final year into an assessment on the gross value of average annual assets.¹⁶⁸

Asset-based alternative levies tend to manifest in three broad categories in Latin America. The first category is assessed on assets on a gross basis, an example being the recently abolished IGMP in Argentina. Despite the levy’s official name referring to presumed minimum income, IGMP was computed at 1% of the value of worldwide gross assets exceeding 200,000 pesos, excluding certain specified assets.¹⁶⁹

Second, a more common are asset taxes imposed on a net basis: assets less certain liabilities. One example is the Peruvian temporary levy, imposed on

¹⁶⁷ Ley del Impuesto al Activo art. 12-A, DOF 31-12-1988 (Mex.). The rate of the Mexican IMPAC, pursuant to Article 2, was initially set at 2% in 1989, decreased to 1.8% in 1995, and settled at 1.25% in 2007—its final year. Id.

¹⁶⁸ Id. art. 1o. In exchange for reducing the rate in its final year in operation (2007), IMPAC’s tax base, per Article 2, was expanded to deny taxpayers certain deductions with respect to bank loans and other liabilities. Id.

¹⁶⁹ Officially called Impuesto a la Ganancia Mínima Presunta [Minimum Presumed Income Tax] in Spanish, IGMP was abolished in 2016, pursuant to Law No. 27260, effective the fiscal year starting on January 1, 2019. July 22, 2016, 33424 B.O. 1 (Arg.). Income tax paid during the year was creditable against IGMP; excess IGMP paid in a given year could be carried forward ten years to offset income tax. Id.
companies reporting net assets exceeding one million nuevos soles as of December 31 of the preceding year.\textsuperscript{170} Another is the municipal business license tax in the Republic of Paraguay, computed based on the value of assets disclosed by the company on its balance sheet at the end of the prior calendar year duly filed with the local tax authority, less deductions for losses and depreciation of property located in the municipality.\textsuperscript{171}

Two other levies computed on a net asset basis, at a rate of 1%, embody those currently in place in the Dominican Republic and Honduras.\textsuperscript{172} The starting point to determine taxable base for companies undertaking business activities in the island nation of the Dominican Republic is total assets, determined by taking gross assets recorded on the balance sheet, unadjusted for inflation, less depreciation, amortization and, bad debts; investments in shares of other Dominican entities are excluded.\textsuperscript{173} In Honduras, tax base is calculated by taking total assets less reserves for accounts payable and accumulated depreciation; companies reporting net assets below three million lempiras are not obligated to file or pay tax.\textsuperscript{174} Taxpayers in both countries reporting losses on their annual income tax return may request a temporary exemption from asset tax for that same period, to the extent their inability to pay is justified due to force majeure or other extraordinary factors.\textsuperscript{175}

Finally, a third category embraced by local governments compares two different parameters, charging tax on the higher amount. The Guatemalan ISO, by way of example, establishes a 1% tax equal to the greater of net assets or gross income.\textsuperscript{176}

The fleeting Mexican IETU\textsuperscript{177} is in a unique category in that it is computed by taking into account cash inflows from the sale of assets and services rendered,

\textsuperscript{170} See infra Section III.C.2.c.
\textsuperscript{171} Officially called Impuesto sobre Patentes Comerciales e Industriales in Spanish, the municipal commercial patent was first sanctioned pursuant to Ley No. 620/76 del 24 de diciembre de 1976, Publicación Oficial 0 (Para.), during the thirty-five-year military dictatorship of Alfredo Stroessner, and modified subsequently by Ley No. 135/92 del 6 de febrero de 1992, Gaceta Oficial 9 (Para.).
\textsuperscript{172} See supra Section III.A.
\textsuperscript{173} Ley No. 557-05, Impuesto sobre Activos [Asset Tax], Dec. 13, 2005 (Dom. Rep.).
\textsuperscript{174} Decreto No. 51-2003, Impuesto al Activo Neto, Ley de Equidad Tributaria [Net Asset Tax, Tax Equity Law], D.O No. 30,059 del 10 de abril de 2003 (Hond.).
\textsuperscript{175} Id. Honduran tax law refers to caso fortuito o fuerza mayor in Spanish. Id. Suspension of constitutional guarantees by the government of Honduras over the past two years, as a result of the pandemic, may conceivably offer companies the possibility to invoke this tax benefit. In any event, operating losses must be certified by a registered audit firm. Id.
\textsuperscript{176} Decreto del Congreso No. 73-2008, Impuesto de Solidaridad [Solidarity Tax] arts. 7, 8 (Base Imponible; Tipo Impositivo [Tax Base; Tax Rate]), Dec. 9, 2008 (Guat.).
\textsuperscript{177} Supra Section I.B.
and cash outflows from the purchase of assets and payment for services.\textsuperscript{178} The resulting taxable base was subject to an initial rate of 16.5\textpermil,\textsuperscript{179} with certain credits available.\textsuperscript{180} In force since 2008, IETU replaced in practice an earlier tax on assets (IMPAC) and acted essentially as an alternative minimum tax, whereby companies paid each fiscal period the higher of their income tax or IETU liability. Tax analysts questioned IETU’s fairness as it denied businesses the ability to claim deductions for employee salaries, interest paid on loans, and most royalty payments, not to mention its steep administrative compliance costs.\textsuperscript{181} As expected, IETU was ultimately abolished six years later by the government headed by President Enrique Peña Nieto.\textsuperscript{182}

2. \textit{Constitutional Challenges}

The constitutionality of alternative minimum taxes computed on assets has often been successfully denounced by taxpayers throughout Latin America over the course of the past two decades. What follows is an overview of judicial developments, with sections focused on Central America; Argentina and Mexico; and finishing with Peru, where several permutations of an alternative minimum tax on assets have been evaluated in detail by local magistrates over the past twenty-five years.

\textit{a. Central America}

In Guatemala, IEMA assessed a minimum 3.5\textpermil rate on net assets or 2.25\textpermil on gross income, which could be credited against annual corporate income tax.\textsuperscript{183} IEMA was instituted in 1999, but was declared unconstitutional in 2003 by the Constitutional Court.\textsuperscript{184} The magistrates issued their decision based on

\begin{itemize}
\item \textsuperscript{178} Impuesto Empresarial a Tasa Única arts. 2, 5, DOF 01-10-2007 (Mex.).
\item \textsuperscript{179} \textit{Id.} arts. 1, Cuarto (Transitorio). When ratified in 2008, the rate of IETU was initially set at 16.5\textpermil, increased to 17\textpermil in 2009, and finally settled at 17.5\textpermil from 2010 to 2013. \textit{Id.}
\item \textsuperscript{180} \textit{Id.} ch. III. Credits pertaining to losses, payroll, and income tax paid were allowed to offset IETU liability. \textit{Id.}
\item \textsuperscript{181} \textit{Id.}
\item \textsuperscript{182} IETU was abolished, effective January 1, 2014, by the center-leaning government of President Enrique Peña Nieto. Decreto por el que se Reforman, Adicionan y Derogan Diversas Disposiciones de la Ley del Impuesto al Valor Agregado; de la Ley del Impuesto Especial sobre Producción y Servicios; de la Ley Federal de Derechos, se Expide la Ley del Impuesto sobre la Renta, y se Abrogan la Ley del Impuesto Empresarial a Tasa Única, y la Ley del Impuesto a los Depósitos en Efectivo, DOF 11-12-2013 (Mex.).
\item \textsuperscript{183} This former version of Guatemala’s alternative minimum tax was officially called \textit{Impuesto a las Empresas Mercantiles y Agropecuarias} [Tax on Commercial and Agricultural Companies] in Spanish. IEMA was in force pursuant to Decreto No. 99-98. Impuesto a las Empresas Mercantiles y Agropecuarias [IEMA] [Tax on Commercial and Agricultural Companies], Dec. 23, 1998 (Guat.). It was abolished five years later and replaced by IETAAP, pursuant to Decreto No. 19-04. IETAAP art. 1, June 29, 2004 (Guat.).
\item \textsuperscript{184} Corte de Constitucionalidad [CC] [Constitutional Court], Dec. 15, 2003, Sentencia de Corte de
the premise that the tax base and rate failed to consider the company’s actual financial capacity to pay. IEMA violated Article 243 of the Constitution requiring the nation’s tax system to be just and equitable (justo y equitativo). To be just and equitable, taxpayer contributions to fund the nation’s public expenditures should take into account the actual economic results reported by each taxpayer during the fiscal period under review. In other words, imposing a levy on corporate assets, irrespective of whether the company in fact generated profits during the year, disregarded the taxpayer’s real capacity to pay (real capacidad de pago), in breach of constitutional principles.

Similarly, in the neighboring Republic of El Salvador, the Supreme Court declared in 2015 that the minimum income tax, calculated based on a percentage of net assets, was unconstitutional as it violated the principle of tax equity or fairness. The levy disallowed taxpayers the opportunity to deduct all costs and expenses associated with maintaining those assets, abating their economic ability to pay tax.

At that time, a company’s annual income tax in El Salvador was equal to the higher of 30% of net income (or 25%, if taxable income was equal to or less than USD $150,000), or 1% of net assets. The alternative tax base was computed by taking gross assets less certain specified items, such as accumulated depreciation and amortization, non-operating assets, foreign-based assets, shares in local companies, and loans directly linked to operating assets. In considering jurisprudence emanating from prior Supreme Court decisions, the magistrates asserted that Article 131(6) of the Constitution calls for the legislature to structure a tax system in which the obligation of the country’s citizens to contribute to the sustainment of the state is carried out in proportion to their economic capacity.
b. Argentina and Mexico

Along the same lines as El Salvador, the Argentine Supreme Court called into question the constitutionality of IGMP in 2010. \(^{191}\) This levy was created under the basic premise that a company’s assets generate a minimum level of income. \(^{192}\) Based on testimony rendered by an accounting expert \((\text{pericia contable})\), the taxpayer, a hotel chain operating in Argentina, was able to demonstrate that the corporation reported losses in years 1995, 1996, and 1998. \(^{193}\) The majority of judges acknowledged that a taxpayer’s ability to pay is severely hampered when losses are reported in any given year; consequently, forcing payment of IGMP under circumstances where liabilities are disregarded in determining the company’s taxable asset base could reasonably be characterized as confiscatory in nature, and therefore constitutionally invalid. \(^{194}\)

Reinforcing this notion, the same tribunal held in a subsequent case several years later that the taxpayer need not necessarily prove that its assets were incapable of generating a certain amount of income presumed under the law, but simply demonstrate that no income was reported during the fiscal period under review. \(^{195}\) The taxpayer, in fact, was able to certify recording losses not only on its financial statements for 1998 and 1999, but also on its 1998 annual income tax return filed with the Argentine federal tax authority \((\text{Administración Federal de Ingresos Públicos}, \text{AFIP})\). \(^{196}\) The magistrates concluded by emphasizing that the law should not be interpreted to allow a disconnect between the taxable event and the taxable base. \(^{197}\) Accordingly, the court ordered AFIP to reimburse the company the amount of estimated income tax payments made by the company in those years. \(^{198}\)

Even the relatively short-lived IMPAC in Mexico was mired in controversy as court challenges to its constitutionality were constantly filed by taxpayers in the form of petitions for injunctive relief \((\text{amparos})\). By way of background, the

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\(^{192}\) Id.

\(^{193}\) Id.

\(^{194}\) Id.


\(^{196}\) Id.

\(^{197}\) Id.

\(^{198}\) Id.
average value of net assets was generally subject to a 1.8% tax, per Article 2 of
the IMPAC law. Most debts acquired by Mexican companies from domestic
lenders were taken into consideration to determine net assets, pursuant to Article
5 of the law.\textsuperscript{199} By contrast, deductions claimed with respect to loans borrowed
from foreign lenders were disallowed. There was, in fact, no justifiable reason
for making this rather artificial distinction between foreign and domestic lenders
to calculate taxable base, nor did the legislation under review grant any
consideration as to whether those debts indeed reduced the company’s ability to
pay tax. Based on these findings, Mexico’s Supreme Court issued an influential
thesis in 2004 affirming that Article 5 of the IMPAC law violated the tax equity
principle set forth under Article 31(IV) of the Mexican Constitution.\textsuperscript{200}

c. The Peruvian Experience

The Andean nation of Peru offers a singular perspective in that the highest
judicial tribunal has examined the constitutionality of four variations of an
alternative minimum tax levied on net assets.\textsuperscript{201} All occurred within the last
three decades.

Some background on the rather turbulent history of the alternative minimum
tax in Peru is warranted. The first levy, officially denominated \textit{Impuesto Mínimo
a la Renta} (IMR), was enacted in 1992. Although its name in English literally
makes reference to a minimum tax on income, IMR was assessed on assets on a
net basis, initially at a rate of 2%.\textsuperscript{202} IMR was revoked in 1997 and replaced
shortly thereafter by the \textit{Impuesto Extraordinario a los Activos Netos} (IEAN).
As the Spanish name suggests, IEAN imposed an \textit{extraordinary} tribute on net
assets at a fixed rate of 0.5%, and expired at the end of 1999.\textsuperscript{203}

\textsuperscript{199} Debts contracted with permanent establishments of foreign residents located in Mexican territory were
also allowed as a deduction from gross assets to arrive at taxable base. \textit{Impuesto al Activo de las Empresas}, DOF 31-12-1988 (Mex.).
\textsuperscript{200} \textit{Activo. El Artículo 5o., Párrafo Primero, de la Ley del Impuesto Relativo, en cuanto exceptúa de la
autorización para deducir deudas, a las contratadas con empresas residentes en el extranjero que no tengan
establecimientos permanentes en México, transgrede el Principio de Equidad Tributaria, Suprema Corte de
Justicia [SCJN], Semanario Judicial de la Federación y su Gaceta, Novena Época, Tomo XX, Noviembre de
\textsuperscript{201} The first two levies were enacted during the presidency of Alberto Fujimori during the 1990s, while
the latter two were promulgated during the presidency of Alejandro Toledo in the 2000s. See \textit{infra} notes 202–03 (for levies enacted during the Presidency of Alberto Fujimori) and notes 204–05 (for levies enacted during the Presidency of Alejandro Toledo).
\textsuperscript{202} IMR was in force pursuant to Decreto Legislativo No. 774 from 1992 until 1997, initially at a rate of
2% and subsequently at 1.5%. \textit{Ley del Impuesto a la Renta [Income Tax Law]} arts. 109–16, Dec. 8, 2004 (Peru).
\textsuperscript{203} IEAN was promulgated pursuant to \textit{Ley No. 26777} and was in force from 1997 to 1999. \textit{Diario Oficial
El Peruano} p. 148977, May 3, 1997 (Peru).
Three years later, the legislature passed yet another version of a minimum tax on net assets called Anticipo Adicional del Impuesto a la Renta (AAIR) at graduating rates of up to 1.25%. AAIR established an obligation to make advance payments of income tax.\(^{204}\) AAIR was revoked in 2004 in favor of the Impuesto Temporal a los Activos Netos (ITAN). Currently, ITAN is levied at 0.4% on net assets exceeding one million nuevos soles, as reported in the prior year’s ending balance sheet.\(^{205}\) Although the levy’s title suggests it was intended to be purely a temporary measure, ITAN has now become the longest-serving alternative net asset tax that Peruvian companies have encountered.

All four levies share some features in common: they all (1) apply to taxpayers engaged in business activities subject to income tax on a net basis \(\text{(rentas de tercera categoría)}\); (2) assess tax as a percentage of net assets reported on the balance sheet as of December 31st of the previous year, despite some of them adopting misleading names; (3) could be claimed as a credit against income tax; and (4) were drafted with the intended goal of rendering a certain minimum level of fiscal revenues, even when companies report losses for income tax purposes. The varying and contrasting nature of these levies has inevitably led corporate and individual taxpayers to dispute their constitutionality.

The first alternative levy, IMR, was held to infringe on constitutional precepts by the Constitutional Court in 1996.\(^{206}\) It was viewed primarily as a prepayment of income tax, rather than a tax on the company’s patrimony, even though IMR was assessed on a percentage of net assets.\(^{207}\) Moreover, the fabric manufacturer filing the claim was obligated to pay the minimum tax even though no income was reported in the fiscal period under review, highlighting the schism that existed between the obligation to pay tax and the taxable event \(\text{(generation of income)}\).\(^{208}\) This led the court to declare IMR confiscatory in nature, as the law was originally formulated to tax income, but in practice levied a tax on the source of income \(\text{(net assets)}\).\(^{209}\) The magistrates went on to hold that assets alone cannot reliably measure the capacity to pay on the part of

\(^{204}\) AAIR was in force pursuant to Ley No. 27804 from January 1, 2003 until it was declared unconstitutional in November 2004. Ley No. 27804, Diario Oficial El Peruano p. 227557, Aug. 2, 2002 (Peru).

\(^{205}\) ITAN entered into force pursuant to Ley No. 28424 starting fiscal year 2005 and imposed a 0.6% tax on net assets over 5 million nuevos soles. Diario Oficial El Peruano p. 282806, Dec. 21, 2004 (Peru). Effective 2009, the rate decreased to 0.4% pursuant to Decreto Legislativo No. 976. Diario Oficial El Peruano p. 341565, Mar. 15, 2007 (Peru).

\(^{206}\) Tribunal Constitucional [T.C.] [Constitutional Court], October 28, 1996, Dossier No. 0646-1996-AA/TC, 1 (Peru).

\(^{207}\) Id.

\(^{208}\) Id.

\(^{209}\) Id.
taxpayers, when confronted with what is, in essence, a minimum tax on income.\footnote{Id.}

The second levy, IEAN, was enacted in response to IMR being declared unconstitutional. A mining company, reporting losses for both financial and income tax purposes, filed an appeal in 2002 with the Constitutional Court.\footnote{T.C., December 19, 2003, Dossier No. 2727-2002-AA/TC, 1 (Peru).} The magistrates acknowledged that IEAN duly complied with the constitutional principles that must be met when framing tax legislation, as it was specifically enacted as a short-term extraordinary initiative imposed at a reasonably low rate.\footnote{Id. at 3.} Moreover, ownership of assets is considered a valid parameter to ascertain the economic capacity of taxpayers, to the extent it pertains to an autonomous non-income levy such as IEAN.\footnote{Id. at 5.}

The third minimum assessment, AAIR, was ruled to be unconstitutional by the tribunal following similar arguments made previously in relation to IMR.\footnote{T.C., September 28, 2004, Dossier No. 0033-2004-AI/TC, 10 (Peru).} In one particular case, a total of 5,087 citizens filed a petition against the application of Article 125 of the Income Tax Law, claiming AAIR violated their contributive capacity, or ability to pay (capacidad contributiva).\footnote{Id. at 1.} The magistrates recognized that the economic capacity principle is implicitly derived from Article 74 of the Constitution when it refers to equality (igualdad) in matters of taxation.\footnote{Id. at 4; see also CONSTITUCIÓN POLÍTICA DEL PERÚ DE 1993 Dec. 29, 1993, art. 74.} In particular, the tribunal determined that prepayments of AAIR were part of a mechanism set up within the framework of an income tax.\footnote{T.C., September 28, 2004, Dossier No. 0033-2004-AI/TC, 5 (Peru).}

By its very nature, AAIR played a subservient role by simply offering a means to prepay tax on income. This direct link with income tax ultimately caused AAIR’s demise from a constitutional viewpoint. The judges held that a levy should always maintain a close relation with the financial capability of taxpayers.\footnote{Id. at 6.} This was not the case with AAIR; that is, even though it was designed to facilitate income tax prepayments, it was not connected to the taxable event (generation of income), but rather to the source of income (net assets). This disconnect proved to be fatal for the survival of AAIR as the
capacity to pay principle was not met, prompting judges to declare its unconstitutionality.  

To avoid a similar fate, legislators immediately formulated a fourth minimum tax, ITAN, ensuring its mechanism was fully segregated from that of income tax. ITAN is specifically designed to measure the economic capacity of taxpayers solely in reference to net assets, not linked with the generation of income. Therefore, ITAN is an autonomous tax on patrimony (impuesto patrimonial autónomo) similar in nature to its predecessor IEAN, not a prepayment of income tax as was AAIR. In fact, the Constitutional Court’s first chamber rejected an appeal filed in 2007 by a retail fuel seller calling into question ITAN’s constitutionality. So far, the strategy adopted by Peruvian tax policymakers has worked, as ITAN is still in operation well over a decade after entering into force.

Summarizing the Peruvian tribunal’s reasoning emanating from these cases, the constitutionality of IEAN and ITAN was validated as they act fundamentally as autonomous assessments on patrimony, separate and apart from income tax. Both levies contemplate net assets, as opposed to net income, as an effective barometer to appraise the economic capacity of companies to pay tax. That is not the case with IMR and AAIR: although the amount to be paid was calculated based on a percentage of net assets, they were enacted primarily as another means to pay income tax. This inevitably led to a decoupling of the tax liability from the underlying taxable event (generation of income), resulting in these two alternative levies ultimately being proclaimed unconstitutional.

**D. Taxes on Net Equity**

Some countries in Latin America have adopted taxes on net equity, analogous to those levied on assets analyzed previously, that are identified by diverse labels: in Uruguay it is denominated as net worth tax (IPAT), in

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219 Id. at 10.
221 Id.
222 Id.
223 Id. at 16.
224 Officially called Impuesto al Patrimonio in Spanish. IPAT was first promulgated during the 1960s, pursuant to Ley No. 13.637, Ley No. 13.637 de 21 de diciembre de 1967 arts. 40–57, D.O. No. 17.744, de diciembre 21 de 1967 (Uru.).
Panama it is called notice of operations, and in Argentina it is formally called tax on personal property (ISBP). Some of these levies have been in place for many decades. For example, in Uruguay, net equity reported by individuals and companies has been continuously assessed since 1967.

Taxable base can also vary to some extent by jurisdiction, with regards to determining net equity. In the Oriental Republic of Uruguay, for instance, IPAT is generally applied annually at a rate of 1.5% on net assets located or economically utilized within national territory, in line with the country’s overall territorial system of taxation. Financial institutions and banks are subject to net worth tax at an increased rate of 2.8%. Moreover, Panama has instituted an annual commercial license levy on net equity, assessed generally at a rate of 2% topped at USD $60,000, or 1% for companies operating in free trade zones topped at USD $50,000.

Originally established in 1991 for a nine-year period as part of an emergency measure, ISBP has since become a reliable arsenal for the Argentine government to collect funds. Taxable base along with the applicable rate can differ when dealing with residents versus non-residents. Starting in 2021, individual residents pay tax at rates of up to 0.75% on the value of personal property (such as real estate, automobiles, and bank deposits) located in the country exceeding three million pesos, or up to 2.25% on the value of foreign-based property exceeding eighteen million pesos, reported as of the end of the prior fiscal year; meanwhile, foreign entities and individuals residing abroad are subject to a 0.5% tax over the value of shares held in the capital of local companies (effectively, assets less liabilities), as reported on the previous year’s ending balance sheet. For these purposes, shares, quotas and other participations in

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225 Officially called Aviso de Operaciones in Spanish, this levy was promulgated pursuant to Ley No. 5 de 11 de enero de 2007, and replaced an earlier tax called Impuesto sobre Patentes Comerciales e Industriales: Ley No. 5 de 11 de enero de 2007, Gaceta Oficial No. 25709, Jan. 12, 2007 (Pan.).


227 Ley No. 13.637 art. 57, D.O. No. 17.744, diciembre 21 de 1967 (Uru.).

228 Id. arts. 40, 55.

229 Ley No. 18.083 art. 48, D.O. No. 27.163, de enero 18 de 2007 (Uru.).

230 Decreto Ejecutivo No. 539 del 30 de noviembre de 2011 art. 5, Gaceta Oficial Digital No. 26925, Dec. 5, 2011 (Pan.).


232 See Law No. 27667, Impuesto Sobre los Bienes Personales, arts. 3–4, Dec. 31, 2021, 34826 B.O. 6 (Arg.). The 2021 update increased the maximum ISBP rate for residents from 1.25% to 1.75% on domestic-based assets exceeding 300 million pesos. Id.

233 See also Law No. 27541, art. 31, Dec. 23, 2019, 34268 B.O. 1 (Arg.), which set the ISBP rate at 0.5%, starting fiscal year 2019, with regards to the value of shares held by non-residents.
the capital of local Argentine entities, held by nonresident corporations, are presumed to be indirectly owned by foreign individuals, and thus subject to ISBP. 234 This tax is paid by the local Argentine entity, in its capacity as substitute taxpayer, on behalf of its non-resident shareholders.235

Andean nations have also shown a keen interest in net equity taxes. Colombia has, over the years, ordained an almost continuous series of taxes on equity, under varying names, to support the nation’s economic resurgence from the devastation and isolation caused by the decades-long strife between the government and guerilla forces. The latest iteration, in effect for 2020 and 2021, mainly imposed upon individuals and, to a lesser degree, foreign entities. The levy was set at 1%, and was triggered to the extent net worth equaled or exceeded five billion pesos as of January 1, 2020.236 Taxable base was ascertained by taking gross assets less certain debts reported as of the first day of each calendar year; for non-resident companies, assets located in Colombia were taken into account, excluding the value of shares in local companies.237

Venezuela followed its Andean neighbor’s lead in 2019 by implementing an annual 0.25% tax on high net wealth (IGP)238 reported by special taxpayers (sujetos pasivos especiales). This tax is calculated by taking total assets less certain liabilities, to the extent exceeding 150 million tax units.239 Taxable base for residents covers potentially all assets irrespective of their location, but is restricted to assets located within Venezuelan territory for non-residents.240 Tax applies to both individuals and companies. In contrast to comparable levies

234 Id. art. 29.
235 The local Argentine company may seek, afterwards, reimbursement for ISBP remitted to the government from its foreign-based shareholders. Id.
236 Officially called Impuesto al Patrimonio in Spanish, this levy was promulgated pursuant to L. 2010/2019, art. 86, diciembre 27, 2019, D.O. art. 86 (Colom.), replacing an earlier 1% equity tax by the same name in effect in 2019, enacted pursuant to L. 1943/2018, diciembre 28, 2018, D.O. (Colom.). The latter, in turn, replaced an even earlier net worth levy called Impuesto a la Riqueza, which was in force from 2015 to 2018 at varying rates. Ley 1739 de 2014, Diciembre 23, 2014, D.O (Colom.).
237 L. 624/89, marzo 30, 1989, D.O. arts. 295(1) [Base Gravable], 261 [Patrimonio Bruto], 265 [Bienes Poseídos en el País] (Colom.).
238 Officially called Impuestos a los Grandes Patrimonios in Spanish. IGP was promulgated in 2019 pursuant to El Impuesto a los Grandes Patrimonios [Tax on Large Estates]. Gaceta Oficial No. 41.667 del 3 de julio de 2019, reimpresa en Gaceta Oficial No. 41.696 del 16 de agosto de 2019 (Venez.).
239 A tax unit (unidad tributaria, UT) is currently fixed at 20,000 bolívares. Tributos Internos [Internal Taxes], SERVICIO NACIONAL INTEGRADO DE ADMINISTRACIÓN ADUANERA Y TRIBUTARIA [NATIONAL INTEGRATED SERVICE FOR THE ADMINISTRATION OF CUSTOMS DUTIES AND TAXES], http://declaraciones.seniat.gob.ve/portal/page/portal/PORTAL_SENIAT (Venez.).
240 El Impuesto a los Grandes Patrimonios ch. V, art. 4, Gaceta Oficial No. 41.667 del 3 de julio de 2019, reimpresa en Gaceta Oficial No. 41.696 del 16 de agosto de 2019 (Venez.).
adopted in Colombia and elsewhere, the fiscal period ends on September 30th rather than at the end of the calendar year.241

IV. TRANSACTIONAL & TEMPORARY LEVIES

There are a series of other non-income levies, in addition to revenue taxes and alternative levies on assets and net equity, which have been validated over the past few decades that multinationals need to consider when undertaking commercial activities in Latin America. Relevant archetypes include stamp taxes; certain cross-border transaction levies on exportations and importations; corporate registration assessments; and recently enacted solidarity contributions imposed on large taxpayers and on net wealth, mostly on a transient basis.

A. Stamp Taxes

Governments, whether at the national, provincial, or municipal level, assess stamp tax on specified undertakings by companies and individuals.

An example is Chile, where the current version of the stamp tax (ITE)242 is exacted over the value of official documents granting a cash loan.243 This levy is assessed on the value of the loan contract at the rate of 0.066% per month, or a fraction of this rate between issuance and maturity of the loan, up to a ceiling of 0.8%.244 Alternatively, if the document is payable on demand or fails to specify a maturity date, the rate is 0.332%.245 To the extent the loan is granted in a foreign currency, stamp tax is assessed on the loan amount converted into pesos at the exchange rate in effect at the time it was granted.246 From a practical perspective, tax liability normally arises upon the issuance of the loan document or when executed by all parties involved in the transaction; however, in the case of an undocumented loan granted from abroad, stamp tax is due once the Chilean-based debtor records the loan payable on a local balance sheet for accounting purposes.

241 Id. arts. 11, 24. In Colombia, the value of equity is measured at the end of the calendar year. L. 624/89, marzo 30, 1989, D.O. art. 261 [Patrimonio Bruto] (Colom.).
242 Officially called Impuesto de Timbres y Estampillas in Spanish.ITE was first ordained in 1980 during the military dictatorship of General Augusto Pinochet, pursuant to Ley No. 3.475. Law No. 3.475, Septiembre 4, 1980, D.O. (Chile).
243 Impuesto a los Actos Jurídicos (de Timbres y Estampillas), SERVICIOS DE IMPUESTOS INTERNOS [SII], https://www.sii.cl/ayudas/aprenda_sobre/3072-6-3079.html (Chile).
244 Id.
245 Id.
246 Law No. 3.475 art. 6, Septiembre 4, 1980, D.O. (Chile).
Stamp taxes have been in place in jurisdictions such as Costa Rica and Argentina since the nineteenth century. At present, all private documents signed within Costa Rican territory are subject to an assessment (ITF) equal to 5 colones per every 1000 colones, or 0.5%, of its economic value or price set forth under the terms of the instrument.247

Most provinces in Argentina have enacted some form of stamp tax, currently regulated pursuant to a decree issued in 1986.248 All parties to the contract are joint and severally liable for payment of tax.249 The Autonomous City of Buenos Aires has instituted a stamp tax whereby written contracts and other instruments executed or “producing effects” (“produzcan efectos”) within the municipality are generally subject to a 1% levy on their economic value, while those agreements calling for transfers of real estate are assessed at 3.6%.250 Corporate matters transpiring within the Municipality of Buenos Aires—such as incorporations, capital increases, mergers, and dissolutions—are exempt, as well as checks and bank transfers. By comparison, Colombia had imposed a stamp tax for many decades at varying rates, but it is now fixed at 0% since 2010.251

B. Levies on Exports and Imports

Amounts invoiced or paid to foreign recipients offer an attractive means for local authorities to boost fiscal revenues, while lessening the ire of resident taxpayers. Two mechanisms commonly integrated into local domestic legislation entail (1) duties levied on exportations, as is presently the case in Argentina; along with (2) remittance and foreign exchange levies arising from the importation of goods and services, as currently enforced in several countries across South America as well as the Caribbean islands of Barbados and Jamaica.

Concerning duties arising from exports, Argentina offers a highly visible example as it continues to struggle to contain the relentless decline of the peso versus foreign currencies. Argentina assessed a 5% levy on all services exported

247 Officially called Impuesto de Timbre Fiscal in Spanish. ITF was first promulgated in 1885, pursuant to Ley No. 8 de 31 de octubre de 1885, and is currently regulated under Article 272 of the Tax Code (Código Fiscal) enacted within this legislation.
249 Id. arts. 16, 18.
251 Stamp tax, or Impuesto de Timbre in Colombian Spanish, was imposed on the value of public and private documents pursuant to Ley 1111 de 2006. L. 1111/2006, diciembre 27, 2006, D.O. art. 72 (Colom.). The rate of stamp tax gradually declined from 1.5% in 2007, to 1.0% in 2008, to 0.5% in 2009, finally settling at 0% in 2010. Id.
by local residents from January 2019 until December 2021.\textsuperscript{252} Local residents were able to claim duties paid for income tax purposes as a deductible expense. Argentina is, curiously, the only country in the world that applied an export duty on services, impacting its attractiveness to foreign investors.\textsuperscript{253} From a fiscal policy perspective, duties paid on exports curtail, to some degree, the 0% VAT benefit the federal government has granted for many years to local companies engaged in exporting services. To correct this anomaly, the Ministry of Economy issued a communiqué announcing a decline in the levy rate to 0% starting in 2022. This thereby promotes the exportation of value-added services rendered within national territory but effectively utilized and enjoyed abroad, with the stated goal of generating employment while bolstering foreign currency reserves.\textsuperscript{254}

On the flip side, the dollarization of Ecuador’s currency beginning in 2000 highlighted the need to curb imports to ensure a steady stream of U.S. dollars circulates within its borders.\textsuperscript{255} This eventually led to an imposition of a remittance tax (ISD) eight years later by the socialist-inspired government headed by President Rafael Correa, an economist by training.\textsuperscript{256} ISD applies to most transfers of funds overseas, even if not mediated through the banking system.\textsuperscript{257} Amounts paid are deductible for income tax purposes.\textsuperscript{258} Dividends are generally exempt from ISD, unless distributed to tax-haven entities owned directly or indirectly by Ecuadorian residents.\textsuperscript{259} Rather than being withheld on the outbound transfer, ISD is debited from the local payer’s bank account, irrespective of whether the cross-border payment is subject to an income withholding tax.\textsuperscript{260}

\textsuperscript{252} Decreto 99/2019, B.O. 28/12/2019 (Arg.). Officially called Derechos de Exportación in Spanish, these duties first came into effect in 2019, pursuant to Decreto 1201/2018. Dec. 28, 2018, 34025 B.O. 13 (Arg.). Prior to 2020, export duties were levied at a rate of 12%, capped at four Argentine pesos per each U.S. dollar of the amount invoiced. \textit{Id.}


\textsuperscript{254} \textit{Id.} Services pertaining to information technology, consulting, and design are viewed by the Argentine government as providing added value to the nation’s economic wellbeing. \textit{Id.}

\textsuperscript{255} Impuesto a la Salida de Divisas [ISD] [Foreign Currency Outflow Tax], LA LEY REFORMATORIA PARA LA EQUIDAD TRIBUTARIA EN EL ECUADOR [The Reform Law for Tax Equity in Ecuador], R. O. No. 242, de 29-12-2007 (entering into force in 2008).

\textsuperscript{256} \textit{See generally id.}

\textsuperscript{257} \textit{Id.}

\textsuperscript{258} \textit{See \textit{id.}; Ley de Fomento Ambiental y Optimización de los Ingresos del Estado [Law of Environmental Promotion and Optimization of State Income] art 19, R.O. No. 583, Suplemento, de 24-11-2011 (Ecuador)}.

\textsuperscript{259} \textit{See id.}

\textsuperscript{260} \textit{See \textit{id.} Local banks act as withholding agent. \textit{Id.}}
Initially set at 0.5% in 2008, the ISD rate escalated to 1% in 2009, 2% in 2010, and 5% in 2012. It is no coincidence that since the last rate increase took effect in 2012, ISD raises more revenue for the government of Ecuador, only surpassed by VAT and income tax. Over time, ISD has become a fundamental tool of fiscal policy, perhaps at the expense of disincentivizing foreign investments. President Guillermo Lasso, a pro-business advocate and former banker, officially announced a gradual reduction in the rate of ISD to 4% over the course of 2022. A further decline in the ISD rate or its eventual elimination may, however, prove difficult to attain as government administrators would have to fill the budgetary gap that undoubtedly would ensue in the absence of this levy, even if imports and exports were to experience a spike.

It comes as no surprise that Brazil, a country enjoying the dubious distinction of reporting perhaps the highest number of levies in the world, has always shown a keen interest in collecting tax revenues from importations. Outbound payments linked to the rendering of technical services can trigger, in addition to a withholding of income tax (IRRF), the two federal levies on revenues, PIS and COFINS, and the municipal tax on services, ISSQN. Also coming into play is a federal contribution (CIDE) equal to 10% of the amount remitted overseas. CIDE is paid by a Brazilian company utilizing services rendered by

261 See Reformas a la Ley Orgánica de Régimen Tributario Interno y a la Ley para la Equidad Tributaria del Ecuador [Reforms to the Organic Law of Internal Tax Regime and the Law for Tax Equity of Ecuador] art. 8, R.O. No. 497, Suplemento, de 30-12-2008 (Ecuador); Reformas a la Ley Orgánica de Régimen Tributario Interno y a la Ley para la Equidad Tributaria del Ecuador art. 42, R.O. No. 094, Suplemento, de 23-12-2009 (Ecuador); Ley de Fomento Ambiental y Optimización de los Ingresos del Estado art 19, R.O. No. 583, Suplemento, de 24-11-2011 (Ecuador).

262 See generally SRI, ESTADÍSTICAS GENERALES DE RECaudación [GENERAL STATISTICS COLLECTION] (2020) (Ecuador). Since fiscal year 2013, the Ecuadorian tax authority has been compiling data on revenues raised by the various national levies. Id.

263 El Presidente Guillermo Lasso Anunció la Disminución Progresiva del ISD desde el 1 de Enero, Secretaría General de Comunicación de la Presidencia, Boletín Oficial 364 (Dec. 21, 2021), https://www.comunicacion.gob.ec/el-presidente-guillermo-lasso-anuncio-la-disminucion-progresiva-del-isd-desde-el-1-de-enero; see also Decreto Ejecutivo Segundo Suplemento No. 604 del 23 de diciembre de 2021, art 1 (Ecuador), https://www.registroficial.gob.ec/index.php/registro-oficial-web/publicaciones/suplementos/item/15916-segundo-suplemento-al-registro-oficial-no-604. Pursuant to the Presidential Decree, the ISD rate is scheduled to decrease by 0.25% on a quarterly basis during 2022 starting January 1, until it settles at 4% effective October 1. Id.

264 See Instrução Normativa RFB No. 1.455, de 6 de Março de 2014, D.O.U. de 07.03.2014 (Braz.). Officially called Imposto sobre a Renda Retido na Fonte [Income Tax Withheld at Source] in Portuguese, IRRF is generally equal to 15% of the outbound payment, unless paid to a resident of a low tax jurisdiction, in which case the rate of withholding increases to 25%. Id.

265 C.F. art. 149 (Braz.). CIDE (Contribuição para Intervenção no Domínio Econômico [Contribution for Intervention in the Economic Domain]) applies broadly to outbound payments of royalties, as well as to administrative and technical services rendered by non-residents, but not to software licenses. See Lei No. 11.452,
a non-resident; consequently, amounts paid are not creditable in the foreign jurisdiction. Regrettably, invocation of treaties to avoid double taxation tends to be a rather fruitless endeavor, as their restricted scope fail to specifically address the impact of all these non-income levies on outbound payments. This, in turn, represents an incremental cost for multinationals doing business with their Brazilian-based customers.

The national government of Argentina established an emergency solidarity levy affecting purchases of foreign currencies (PAIS), effective December 23, 2019 and initially set to expire in five years. This was done to maintain the Central Bank’s current levels of foreign currency reserves and protect the value of the local peso, especially in relation to the U.S. dollar. The tax equals 30% of the value of foreign currency accumulated in bank accounts or elsewhere (atesoramiento), or utilized to acquire goods and services via debit and credit cards. The rate is reduced to 8% for purchases of digital services, such as Netflix or Spotify. PAIS is assessed on all Argentine residents, whether individuals or corporate entities. Intermediaries located in Argentine territory, such as financial institutions, travel agencies, and credit card issuers, are obliged to act as collection agents. This solidarity levy will arguably, over the short term, take its toll on multinationals engaged in the sale of products or rendering of services in Argentina.

In a similar vein, the Central Bank of Barbados was pressured to stabilize the island’s foreign reserves and local currency’s value. Accordingly, beginning July 17, 2017, remittances made from a domestic bank account requiring a purchase of foreign currency are generally subject to a 2% foreign exchange fee (FXF). Wire transfers and bank drafts, as well as credit card transactions, are
subject to FXF. Another jurisdiction in the Caribbean, Jamaica, charges a 0.5% environmental protection levy (EPL) on the sales price of goods manufactured locally, as well as on the cost, insurance, and freight value of almost all goods imported to the island nation. In contrast to the green fund levy imposed on gross receipts in neighboring Trinidad and Tobago, manufacturers based in Jamaica can claim EPL paid at ports as an input credit when the raw materials imported are utilized in the manufacturers’ production processes.

C. Registration Taxes

A uniquely Latin American phenomenon involves dissemination of registration-type levies applied to corporate entities. Taxable base varies widely across the region. A corporate control tax (ICOSA) was launched two decades ago in Uruguay, whereby local corporations are obligated to pay tax on a notional amount currently set at 578,428 index units. Tax is assessed at a rate of 1.5% upon incorporation of new entities, including those arising from transformations, mergers, or spin-offs. Thereafter, the rate is reduced to 0.75% upon the closing of each fiscal year. Amounts paid can be credited against net worth tax (IPAT), but any excess is not eligible for a refund, as ICOSA acts as a minimum IPAT payment.

Another case involves Costa Rica, where a so-called tax on legal entities (IPJ) is assessed on active local companies and branches of foreign companies duly enrolled with the national registry. The rate is equal to 25% to 50% of

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274 Id. § 1.
275 See Everald Dewar, Expanded Environmental Levy Added to Panorama of Taxes, JAM. GLEANER (June 16, 2015), https://jamaica-gleaner.com/article/business/20150617/expanded-environmental-levy-added-panorama-taxes (taking effect in Jamaica starting June 1, 2015, EPL is charged on 75% of the selling price of goods manufactured locally, before any general consumption tax and special consumption tax is applied).
276 See supra Section II.A.2.
277 See Technical Note, Imposition of Environmental Levy on Sales by Local Manufacturers and on Imports, TAX ADMIN. JAM., Apr. 28, 2015. An input credit is not, however, available for EPL paid at the port for imports of equipment; instead, EPL paid on imported equipment can be claimed by the Jamaican-based manufacturer as an expense on its income tax return. Id.
278 See Ley No. 17.502, Impuesto de Control de las Sociedades Anónimas, Ley de Estabilidad Financiera [Control Tax of Limited Public Companies, Financial Stability Law], D.O. No. 26019 de mayo 31 de 2002 (Uru.).
280 See Ley No. 17.502 art. 12, D.O. No. 26019 de mayo 31 de 2002 (Uru.).
281 Id.
282 Id.
monthly base salary, depending on prior year gross income. Inactive companies are subject to a tax equal to 15% of base salary, while duly registered small and medium-sized companies are exempt. Amounts paid are not deductible for income tax purposes, nor can they be credited against another national tax given their condition as a specially-designated contribution. Non-payment of the levy can lead to fines and non-issuance of certifications by, or non-recording of documents with, the national registry. Failure to pay altogether during three consecutive periods can result in dissolution of the legal entity.

An earlier version of IPJ, established in 2011, was declared unconstitutional four years later. The Costa Rican Supreme Court based its decision mainly on procedural matters surrounding public disclosure of the final text (principio de publicidad). Some magistrates, nevertheless, asserted that the prior IPJ law also violated the principle of contributive capacity. This principle emanated from the 1949 Constitution, and the prior IPJ law violated this principle by imposing a single rate equal to 50% of monthly base salary on all companies registered with the tax authority, irrespective of whether they were actively engaged in commercial transactions or dormant. Although not expressly stipulated under the Constitution, members of the highest tribunal

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285 Ley No. 9428, IPJ arts. 3(b)-(d) [Tarifa], Diario Oficial La Gaceta No. 58, Mar. 22, 2017.

286 Id. art. 3(a) [Tarifa].

287 Id. art. 16 [Exención].

288 Id. art. 8 [No deducibilidad del impuesto].

289 Id. arts. 9 [No compensación del impuesto], 11 [Destino del impuesto]. Over 90% of monies collected by IPJ is designated to fund police infrastructure projects, increase security measures, and combat crime. Id.

290 Id. art. 5 [Sanciones & multas].

291 Id. art. 7 [Disolución y cancelación de la inscripción].


293 See Sala Constitucional de la Corte Suprema de Justicia [Constitutional Chamber of the Supreme Court of Justice], Resolución No. 01241, Jan. 28, 2015 (Costa Rica). Three articles contained in the law were subsequently declared unconstitutional, mainly due to discrepancies surrounding approval of the law’s final text. Id.

294 Id. (abolishing the law in 2017 and replacing it with the IPJ currently in force).

295 See generally CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA Nov. 7, 1949. In its opinion, the Supreme Court held that the principle of contributive or economic capacity (capacidad contributiva o económica) of taxpayers constitutes a general principle of constitutional tax law which should guide members of the judiciary, and in particular legislators, when exercising their tax authority (potestad tributaria) pursuant to Article 121(13) of the Constitution. Allegations were also made that the IPJ law violated the principle of proportionality and reasonableness (proporcionalidad y razonabilidad), but the magistrates did not specifically address this matter.
acknowledged that the economic capacity principle can reasonably be inferred from a plain reading of its text, together with pertinent jurisprudence.296

D. Solidarity Contributions

Volatile economic conditions prevalent throughout the region have prompted legislators to raise urgent funds by means of specifically targeted levies, many of which were enacted initially on a temporary basis. A number of these schemes are focused primarily on corporate taxpayers with abundant financial resources reporting amounts in excess of certain thresholds, oftentimes referred to as “large taxpayers” (grandes contribuyentes). Still other initiatives are directed at high-net-worth individuals, measured by the amount of net patrimony recorded on their balance sheet as of a certain date. These initiatives are levied mostly against residents but also occasionally against non-residents.

1. Taxes on Large Taxpayers

Widespread instability and criminally-inspired violence in El Salvador over the past decades ultimately led the national government to promulgate a special contribution on large taxpayers in 2015, valid for a five-year period, to raise funds to protect its citizens.297 The 5% assessment applied to corporate entities to the extent net gains (ganancias netas) exceeded USD $500,000.298 Taxable base was determined by taking into account the company’s annual net income plus any amounts excluded or exempted for income tax purposes, less associated costs.299

In 2019, the Supreme Court of El Salvador rejected a petition filed by a local company arguing the law violated principles of legality (legalidad) and economic capacity.300 The magistrates held that the law clearly defined all essential elements of the levy, including the term net gains, by referring to financial net income rather than taxable net gain.301 In addition, government advocates were able to establish that the levy was in essence a contribution, not a disguised tax on income, containing a narrowly tailored purpose: to raise funds

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296 Id.
297 See Decreto Legislativo No. 161, Ley de Contribución Especial a los Grandes Contribuyentes para el Plan de Seguridad Ciudadana [Law on Special Contribution of Large Taxpayers for the Citizen Security Plan], 29 octubre 2015, D.O. No. 203, vol. 409, de 05-112015 (El Sal.).
298 Id. art. 4.
299 Id.
300 See CSJ, Sentencia No. 156-2015, Aug. 19, 2019 (El Sal.).
301 Id.
to combat crime and increase public security for the nation’s citizens. The taxable event was not linked to economic capacity, and consequently, double taxation over the same income item was absent.

In contrast to what occurred in the Central American nation of El Salvador, governments in the South American countries of Ecuador, Chile and Colombia have largely been unsuccessful in their respective attempts to enact levies impacting large taxpayers, as described next.

Facing a dire economic outlook caused by the pandemic and declining oil prices, the principal export of Ecuador, President Lenín Moreno issued an executive decree on July 27, 2020 requiring certain large taxpayers to make anticipated income tax payments. For these purposes, large taxpayers were identified as those companies reporting revenues in excess of USD $5 million the previous year and that were profitable during the first half of 2020. Business leaders at that time criticized the measure as removing liquidity from precisely those companies that are most able to generate formal employment.

 Barely a few weeks later, a slim majority of magistrates that make up the Constitutional Court of Ecuador declared the decree unconstitutional, asserting the government failed to justify that funds raised were exclusively destined to cover costs associated with combating the pandemic. In other words, the executive branch is not authorized to collect general funds to meet the government’s annual budget in reaction to an economic crisis. Instead, funds attached to an extraordinary scheme must be previously earmarked for a narrowly-tailored purpose: overcoming the health crisis created by the pandemic. Having declared the decree invalid (insubsistente), the court held that companies that already made payments can seek a refund, claim a tax credit, or reassign amounts paid as a voluntary prepayment of income tax.

In 2021, the Chilean government proposed a temporary increase in the rate of corporate income tax (impuesto de primera categoria) from 27% to 30% for so-called “mega companies” to fund emergency payments to those individuals

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302 Id.
303 See Decreto Ejecutivo No. 1109 del 27 de julio de 2020, R.O. No. 258, Suplemento, de 31-07-2020 (Ecuador).
304 Id. art. 4.
305 See Corte Constitucional del Ecuador [CCE] [Constitutional Court of Ecuador] Aug. 10, 2020, No. 3-20-EE/20A (Ecuador). Five out of nine magistrates held in favor of declaring the executive decree unconstitutional. Id.
306 Id.
most affected by the pandemic.\textsuperscript{307} The term “mega company” (\textit{mega empresa}) is defined, for these purposes, as an entity reporting average revenues in excess of one million development units (\textit{unidades de fomento}),\textsuperscript{308} or approximately USD $41 million, during the three-year period prior to the reform’s publication in the Official Gazette. The rate increase was scheduled to take effect for a relatively short period of time: the remainder of 2021 and all of 2022.\textsuperscript{309} The proposal, however, was ultimately dropped in May 2021 by the House of Representatives, as it failed to meet the quorum necessary to amend the Constitution.\textsuperscript{310}

Another pandemic-induced initiative was promulgated in neighboring Colombia in the form of a solidarity tax (\textit{impuesto solidario por el COVID 19}) in effect for a mere three months in 2020.\textsuperscript{311} The levy was assessed at varying rates of up to 20\% for individuals in the public sector who received salaries, fees or pensions in excess of ten million pesos per month.\textsuperscript{312} Amounts collected were designed to assist vulnerable members of the middle class and those individuals who work in the informal sector. Several months later the Constitutional Court, by a simple majority, held the decree unenforceable, in violation of the principle of tax generality (\textit{generalidad del tributo}) per Article 95.9 of the Constitution. The Court found that the decree assessed tax solely on public servants, when it should have considered all individuals who reported monthly income exceeding ten million pesos.\textsuperscript{313} The Court reasoned that the tax burden should have been distributed among all persons with the ability to pay, and not exclude individuals working in the private sector without justification. Amounts withheld from salaries prior to the court’s decision were ordered to be reassigned as a prepayment of income tax for fiscal year 2020.\textsuperscript{314}


\textsuperscript{309} See Schüller Gamboa, supra note 307.


\textsuperscript{311} See L. 568, abril 15, 2020, D.O. (Colom.). The levy was in force from May 1, 2020 until July 31, 2020.

\textsuperscript{312} See \textit{id.} arts. 5–6.

\textsuperscript{313} See C.C., agosto 5, 2020, M.P.: G.S. Ortiz Delgado, Sentencia C-293/20, Expediente RE-293 (Colom.).

\textsuperscript{314} \textit{Id.}
Colombia’s Minister of Finance subsequently advanced a comprehensive tax reform bill calling for, amongst other matters, the imposition of yet another temporary solidarity tax on those individuals reporting over ten million pesos per month in salaries; fees for services rendered; and passive income, encompassing interest, dividends, royalties, and rents (impuesto temporal y solidario a los ingresos altos).\textsuperscript{315}

In contrast to the previous year’s levy, this variant targeted individuals belonging to both public and private sectors. The tax was to be assessed at a rate of 10% and collected on a monthly basis via withholding at source during the second half of 2021.\textsuperscript{316} Amounts paid could be claimed as a credit for income tax purposes.\textsuperscript{317} This latest rendition of the solidarity tax was arguably more aligned with principles of tax generality and economic capacity. However, it fell victim to the widespread protests, held in the spring of 2021, against the comprehensive tax reform initiative, particularly surrounding expansion of the scope of VAT, leading to its withdrawal by the Colombian government.\textsuperscript{318}

2. Taxes on Wealth

Latin American governments have increasingly relied on wealth taxes (impuestos a la riqueza), albeit focused on individuals, not only to overcome shortfalls from income tax revenues caused by the continuous decline in commodity prices and the slowdown of economic activities due to the pandemic, but also to bridge the widening income inequality gap.

This is quite evident from the rising number of recently-sanctioned “solidarity” measures aimed at redistributing funds from the relatively few wealthy individuals to those most susceptible in the middle and working classes. Critics point out these levies on high-net-worth individuals are costly to administer and may trigger capital flight to other countries, in addition to possibly leading to double taxation. Despite these drawbacks, Argentina and Bolivia have already enacted legislation in 2020.

In Argentina, a presumably one-time extraordinary solidarity contribution (aporte solidario), commonly referred to as the “millionaire’s tax” by the local press, was adopted at the end of 2020 by the center-left controlled government

\textsuperscript{315} See PROYECTO DE LEY NO. 594 DE 2021 [DRAFT LAW NO. 594 OF 2020] art. 92, Congreso de Colombia (Apr. 15, 2021) (Colom.).
\textsuperscript{316} Id. arts. 96–97.
\textsuperscript{317} Id. art. 92(2).
to address the economic downturn caused by the pandemic. The levy assessed individual residents based on their worldwide assets, and non-residents based on their assets located in national territory, to the extent declared amounts exceeded 200 million pesos, or approximately USD $2.2 million as of December 31, 2020.\footnote{The wealth tax in Argentina, officially called Aporte Solidario y Extraordinario para Ayudar a Morigerar los Efectos de la Pandemia in Spanish, came into effect in January 2021. Law No. 27605, Dec. 18, 2020, 34544 B.O. 3 (Arg.). The law stipulates proceeds are to be applied to purchase medical equipment and supplies, subsidize small and medium sized companies to maintain workers on payroll, and fund student scholarships and social programs. Id.} Assets were to be valued according to the rules set forth for ISBP.\footnote{Id. art. 2(a).} Progressive tax rates up to 3.5% applied to assets located within the Argentine territory,\footnote{Id. art. 4.} and up to 5.25% for assets located abroad.\footnote{Id. art. 5.} AFIP expected just over 10,000 individuals to be impacted, out of a total population of 45 million, with nearly 80% filing returns and paying tax as of the end of April 2021.\footnote{Aporte Solidario: Pagaron 10.000 Personas y AFIP Ya Recaudó $ 223.000 Millones, EL ECONOMISTA (May 2, 2021), https://eleconomista.com.ar/2021-05-aporte-solidario-pagaron-10-000-personas-y-afip-ya-recaudo-223-000-millones. AFIP estimates 2000 individuals failed to comply with their obligations concerning this solidarity tax. Id.}

Enforcement of the contribution was first contested in March 2021 by a company executive who was granted a temporary court injunction (\textit{medida cautelar}) by a federal judge in the City of Buenos Aires, ordering the local tax authority to stop any collection proceedings. The individual successfully argued that the new wealth tax duplicated the existing assessment on personal property, causing concrete economic damage (\textit{perjuicio económico}).\footnote{Juzgado Contencioso Administrativo Federal 8 [Federal Administrative Dispute Court 8], 19/3/2021, “Scannapieco, Alejandro Raúl c. EN-AFIP / Amparo,” (Arg.); see also Juzgado Federal de San Juan 2 [Federal Court of San Juan 2], 14/4/2021, “Rosenzvit, Dario Javier c. Estado Nacional - Ministerio de Economía - AFIP/Acción Meramente Declarativa de Inconstitucionalidad” (Arg.). The judge agreed the new levy, when combined with ISBP, could be considered confiscatory under certain facts and circumstances, resulting in an injunction being granted. Rosenzvit, Juzgado Federal de San Juan 2, 14/4/2021.} In fact, when combining ISBP with this transitory levy on wealth, individuals residing in Argentina could end up paying up to 7.5% on the value of their equity for fiscal year 2020, by far the highest rate worldwide.

Nonetheless, in another hearing held that same month, a judge in the province of Córdoba rejected a protective order in favor of an entrepreneur, as that individual failed to demonstrate that payment of the solidarity tax would cause irreparable or imminent damage to his patrimony.\footnote{Juzgado Federal de Bell Ville [Federal Court of Bell Ville], 23/3/2021 “Prado Lardizabal, José Luis c. AFIP-DGI / Acción Meramente Declarativa de Inconstitucionalidad” (Arg.).}
By April 2021, nearly a hundred high-net-worth individuals requested injunctive relief against payment of this solidarity contribution. This included, ironically, the well-known footballer Carlos Tévez, who played for the most popular local team, Boca Juniors, but grew up in one of the poorest neighborhoods in Buenos Aires.326 Eight months later, a federal tribunal rejected Tévez’s request by arguing that the grant of a preliminary injunction—that is incompatible with the nation’s public administration—requires a petitioner to demonstrate that executing the assessment is manifestly arbitrary.327 Another legendary footballer who is now retired, Gabriel Omar Batistuta, has sought a similar reprieve claiming imposition of this levy would force him to sell assets belonging to his agribusiness, eroding its net worth.328

Most court filings call into question the constitutionality of this one-time levy by arguing that it is essentially another tax on equity and thus, confiscatory in nature as the same item is effectively being taxed twice. This violates the right to property (derecho a la propiedad) established under Article 17, in conjunction with Article 4, of the Constitution of the Argentine Nation.329 A second, less compelling, argument states it arbitrarily makes a tax rate distinction between property owned in Argentina versus property located abroad. Ultimately, the Supreme Court will have to rule on the constitutionality of this transitory tax on wealth, but that could take several years. In the meantime, taxpayers who have failed to attain a favorable court injunction are prone to audit examinations and perhaps even property seizures.

A tax on large fortunes (IGF) was adopted in Bolivia at the end of 2020 by the left-leaning government headed by President Luis Arce. In contrast to the

329 Arts. 4, 17, Constitución Nacional [Const. Nac.] (Arg.). Article 17 states “Only Congress imposes those contributions that are expressed in Article 4.” Id. In turn, Article 4 states “The Federal Government provides for the Nation’s expenditures with funds from the National Treasury, composed of proceeds from export and import duties, sale or lease of lands owned by the Nation, Post Office revenues, other contributions equitably and proportionally levied on the population by Congress, and loans and credit transactions that Congress may decree for national emergencies, or for enterprises of national interest.” Id. (emphasis added).
Argentine model, IGF ended up as a permanent fixture, even though it was originally envisioned by the opposition as a two-year emergency measure tailored to tackle the pandemic’s effect on the economy. Specifically, IGF imposes an annual tax on individuals who report fortunes in excess of 30 million bolivianos, as of December 31st of the previous year, with rates ranging from 1.4% to 2.4%. The tax base equals the value of personal and real property, less bank loans and certain goods used for personal use, such as clothing and household appliances.

The Bolivian tax authority (Servicio de Impuestos Nacionales) announced that a total of 206 individuals, both residents and non-residents, have formally registered to pay this assessment, collecting well over 240 million bolivianos, or approximately USD $35 million, during the first five months of 2021. Funds raised are presumably destined to improve the nation’s healthcare, education system, and infrastructure.

A potentially controversial feature of this net worth levy is that despite Bolivia’s general territorial system of taxation, assets reported by resident individuals, whether located in the country or abroad, are taken into account when determining the taxable base. Non-residents, by contrast, are obligated to pay tax with regards to property located solely within Bolivian territory. What’s more, several taxpayers have recently taken the step to contest IGF at the Constitutional Tribunal, arguing that its interaction with local real property assessments could lead to conflicts of law between national and municipal jurisdictions, and conceivably trigger instances of double taxation. Other plausible areas of future contention revolve around the levy’s worldwide scope and indefinite term.

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330 Officially called Impuesto a las Grandes Fortunas in Spanish. Law No. 1357, Gaceta Oficial de Bolivia No. 1347NEC, Dec. 28, 2020 (Bol.).
331 Id. art. 5.
332 Id. art. 9.
333 Decreto Supremo No. 4436, Reglamenta la Ley No. 1357, de 28 de diciembre de 2020, Impuesto a las Grandes Fortunas [Tax on Large Fortunes] art. 6, Gaceta Oficial de Bolivia No. 1349NEC, Dec. 30, 2020 (Bol.).
334 Impuesto a las Grandes Fortunas Superó la Recaudación con Bs 240,1 Millones Hasta Mayo, AGENCIA BOLIVIANA DE INFORMACIÓN (July 1, 2021), https://www.abi.bo/#/noticia/7011. As of May 31, 2021, a total of 206 individuals formally registered to pay IGF, of which 200 are Bolivian residents. Id.
335 Decreto Supremo No. 4436 art. 13, Gaceta Oficial de Bolivia No. 1349NEC, Dec. 30, 2020 (Bol.).
336 Id. art. 3.
337 Vence Plazo Para Pagar El IGF y Hay Cuatro Recursos Ante El TCP, PÁGINA SIETE (Mar. 31, 2021), https://www.paginasiete.bo/economia/2021/3/31/vence-plazo-para-pagar-el-igf-hay-cuatro-recursos-ante-el- tcp-289227.html. As of March 2021, the highest court in Bolivia (Tribunal Constitucional Plurinacional) received at least four appeals by taxpayers against the implementation of IGF but has yet to issue a formal ruling. Id.
Neighboring countries are likely to follow Argentina and Bolivia in the coming years. In fact, as part of an overall tax reform package in Colombia, a bill was sent to Congress in April 2021 advocating a temporary solidarity wealth tax (*impuesto temporal y solidario a la riqueza*) effective for 2022 and 2023, primarily focused on individuals and, to some extent, foreign entities. The tax was to be triggered if net assets exceeded 134,000 tax value units, or approximately 4.9 billion pesos, as of January 1, 2022.

Presumably in line with principles of justice and fiscal equity, the taxable base considered gross assets, less certain debts, as of the first day of each calendar year, with rates ranging from 1% to 2%. The net value of shares in, and accounts receivables recorded with, domestic companies were to be excluded from the taxable base for non-residents. The proposed levy essentially replicated the 1% equity tax which expired at the end of last year. However, the bill was eventually withdrawn by President Iván Duque in May 2021 in reaction to fierce opposition to the tax reform bill, voiced by large sectors of the population.

By the same token, Chile’s House of Representative introduced an initiative earlier this year, spearheaded by the left-wing opposition, which called for a wealth tax on individuals who are domiciled or reside in the country, and who reported net patrimony greater than USD $5 million, as of December 31, 2021. This presumably permanent levy on high-net-worth individuals, referred to by the local press as “tax on the super-rich” was intended to fund in part the national pension scheme, in harmony with the government’s long-
term goal of narrowing the country’s persistent income inequality. The taxable base contemplated all assets located in Chile and abroad less liabilities incurred to acquire said assets. Tax was to be assessed at 1.5% on net worth between USD $5 million and USD $22 million, and 2.5% on amounts above that range. Unique among net worth taxes elsewhere, assets reported by close relatives (including spouses and minor children) would have formed part of an individual’s total patrimony. Payment would be neither deductible nor creditable for income tax purposes.

The government headed by President Sebastián Piñera, himself a millionaire and highly successful entrepreneur, publicly announced its willingness to file a petition with the Constitutional Tribunal challenging the enforceability of this bill (had it been approved by the Senate), by arguing that tax matters are within the sole prerogative of the executive branch, in violation of the principle of tax legality (principio de legalidad tributaria). Thirteen months earlier, in fact, the Constitutional Tribunal reaffirmed that Article 65 of the Political Constitution of 1980 assigns exclusive competence to the President of the Chilean Republic, as co-legislator, to propose tax measures.

The Senate ultimately ratified a pension-funding bill that does not call for a patrimony tax, favoring instead a 2% annual assessment on certain luxury goods—yachts, helicopters, airplanes, and automobiles—located within national territory, which was fully endorsed by the Minister of Finance Rodrigo Cerda and presumably easier to administer, thus removing the impetus for the

346 Id. art. 6(3).
347 Id. art. 6(1).
348 Id. art. 6(6).
351 T.C., December 30, 2020, Sentencia Rol No. 9797-20-CPT (Chile); see CONSTITUCION POLITICA DE LA REPUBLICA DE CHILE [C.P.], amended by Supreme Decree No. 100, Septiembre 17, 2005, D.O. (Chile). Article 65, paragraph 4, number 1 of the Constitution states “The President of the Republic shall also have the exclusive initiative for imposing, suppressing, reducing or approving taxes of any type or nature, establishing exemptions or amending those in existence, and determining their form, proportionality or progression.” Id. (emphasis added).
Executive branch to challenge its constitutionality. Notwithstanding this, the possibility that a tax on the net worth of the super-rich may eventually be adopted in the near future in Chile cannot be ruled out, especially in light of the triumph of the left-leaning Gabriel Boric in last 2021’s presidential elections.

To further boost the post-pandemic recovery in Ecuador, President Guillermo Lasso recently mandated into law a tax reform bill assessing a temporary contribution on companies with net equity in excess of USD $5 million, as of December 31, 2020. This corporate solidarity levy is to be paid over a two-year period (2022 and 2023), at a fixed rate of 0.8%. Individual residents disclosing net equity in excess of USD $1 million as of January 1, 2021 are also subject to this temporary levy at graduated rates up to 1.5%; however, tax is to be paid in just one single-year period. For individuals residing in Ecuador, the tax base is determined by the value of worldwide net assets, while non-residents are liable to pay tax solely on net assets within the country. Moreover, the proportional equity value (valor patrimonial proporcional) of shares and other participations in companies is excluded from an individual’s tax base, provided said companies are obligated to pay this contribution. Contribution amounts paid cannot be claimed as a credit, nor as a deduction, when determining other taxes to be paid in Ecuador.

CONCLUSION

We now conclude our journey by recapitulating the various obstacles government officials across Latin America inevitably will face when attempting...
to overhaul tax legislation. For these purposes, a comprehensive simplification of current law is recommended. This can be achieved by eliminating inefficient and temporary levies in favor of a more permanent, transparent, and easy-to-enforce direct tax on corporate net income, based primarily on one’s ability to pay. This, in turn, should further expand the tax base, generating adequate funds to address the pervasive income inequality that unfortunately plagues large portions of the region’s population.

Let’s get into the details. First, uncoordinated efforts undertaken by national and subnational governments over the course of the last few decades have been designed to stimulate fiscal revenues. Not surprisingly, these efforts have led to a proliferation of non-income-type levies assessed over revenues, assets, net worth, and other parameters. These often trigger costly and time-consuming constitutional challenges as well as widespread consternation of foreign investors, irrespective of political affiliation. Limitations as to the creditability and/or deductibility of these diverse levies increase, unnecessarily, the overall complexity and tax burden multinationals frequently face when conducting business in the region. Moreover, treaties designed for the avoidance of double taxation are rendered somewhat ineffective, as many of these levies fall outside their scope.

Complicating matters even further, the sudden drastic decline in fiscal receipts reported over the past two years, resulting from the devastating effects of the pandemic and decline in commodity prices, along with the continued involvement of small businesses in the underground economy, have led some Latin American nations to resort to temporary populist initiatives, such as assessments on net wealth, which may be questionable from a long-term fiscal policy perspective. To put it simply, the temptation for governments to raise tax rates on corporate income and/or value-added, while safeguarding all other non-income levies, is highly appealing yet probably ineffective to stimulate the economy, especially in times of uncertainty where the purchasing power of most members of the local population has been severely depleted.

In the spring of 2021, massive street protests were held all over the Colombian territory against proposals to expand the breadth of personal income and value-added subject to tax, widely viewed as disproportionally afflicting those individuals with less financial resources.\footnote{Colombia Withdraws Controversial Tax Reform Bill After Mass Protests, supra note 318.} In response, the center-right government of Iván Duque redirected its focus by instead advocating measures
to combat tax evasion and control government expenditures.\textsuperscript{360} Spearheaded by the newly appointed Minister of Finance, José Manuel Restrepo, the recently enacted law relies on solidarity contributions from the business sector to generate revenues on a permanent basis. This occurs primarily by means of an outright increase in the rate of corporate income tax to 35\%,\textsuperscript{361} while discontinuing temporary levies on net equity which tend to be arduous to implement and inefficient.

Similarly in Argentina, the left-leaning government led by Alberto Fernández increased the maximum rate of corporate income tax back up to 35\%,\textsuperscript{362} which translates into an effective rate of 39.55\% upon repatriation.\textsuperscript{363} This rate is one of the highest in the world, thus reversing the prior administration’s pro-business stance which called for gradually lessening costs for companies. Regrettably in both cases, the anticipated surge in revenues collected from taxes on income was not accompanied by an abolishment or even a curtailment of non-income levies. This further increases the overall fiscal burden multinationals will inevitably have to confront when carrying out business in these two particular South American nations.

Against this background, an overhaul of the tax systems in Latin America is warranted entailing a radical simplification of domestic legislation. This can be accomplished by abolishing the mostly short-term and relatively ineffective levies on revenues, assets, and other contributions described previously, as well as the numerous taxes on financial transactions which tend to disproportionately overwhelm low-income sectors of the population. In exchange, government administrators in charge of formulating fiscal policy should focus their attention on framing a simpler and more robust national corporate income tax regime with less exemptions, deductions, and credits. In addition, consistent with the goal of a more equitable redistribution of wealth, so-called “solidarity” taxes could be raised on capital income (interest, dividends, and capital gains), as wealthier

\textsuperscript{360}L. 2155/2021, septiembre 14, 2021, D.O. (Colom.).

\textsuperscript{361}\textit{Id.} art. 7. The increase in corporate income tax rate is effective starting fiscal year 2022. \textit{Id.} Furthermore, financial institutions are subject to an additional 3\% surcharge effective fiscal years 2022 through 2025, to the extent taxable income exceeds 120,000 tax value units. \textit{Id.}

\textsuperscript{362}Law No. 27.630, June 16, 2021, B.O. (Arg.). The top-35\% corporate rate applies to annual taxable income in excess of 50 million pesos, starting fiscal year 2021. \textit{Id.}

\textsuperscript{363}For instance, 100 million pesos of taxable income would be subject to total tax of 39,550,000 pesos in Argentina upon repatriation, as follows:

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[100,000,000 \times 35\% \text{ income tax}] + [65,000,000 \times 7\% \text{ dividend withholding tax}] = 39,550,000 \text{ pesos}
\]

\textit{Id.}
individuals tend to rely more heavily on this type of income to cover daily expenses versus their working-class counterparts.

For these purposes, any holistic fiscal reform should fully embrace principles of fiscal equity, as well as the taxpayer’s economic capacity to pay. Accordingly, corporate income tax should be computed based on the greater of net income or a percentage of net assets (referred to as presumed income) assessed over a certain minimum threshold at varying rates depending on the taxable base, with the result essentially constituting a tax on net income. This mechanism should ensure that tax paid in any given year not only more fully takes into account the local company’s actual economic ability, but also enables its counterpart abroad to claim the amount paid locally as a foreign tax credit, minimizing instances of double international taxation.

Along with streamlining tax on corporate income, a properly implemented VAT applied to the sale of most goods and services, with targeted exemptions granted for qualified exports and reduced rates assigned to certain basic foods and supplies, should serve as the foundation for a vigorous system of taxation which ensures a steady stream of proceeds throughout the calendar year. Policymakers around the region thus face a strenuous task ahead of them. But this is nothing compared to their Brazilian peers who must overcome many obstacles to dismantle the country’s incoherent web of levies at the federal, state, and municipal levels, starting with the replacement of federal PIS and COFINS in favor of a proposed unified national levy on goods and services, known as contribuição sobre bens e serviços.

Following standards set by Mexico and Chile, more bilateral tax treaties should be entered into. These will provide a much sought after, yet highly elusive, degree of fiscal certainty and stability in connection with cross-border transactions, something multinationals operating in Latin America often found lacking in the past. Clear and concise rules are ultimately valued by foreign investors. And finally, government administrators in charge of formulating fiscal policies should endeavor to secure more comprehensive exchange of information agreements with the goal of discouraging tax evasion, especially as it pertains to taxes on corporate and personal income, a chronic problem that has lingered across the region for too many years. Implementing these initiatives should somewhat erode the pervasive role the informal economy has historically played in Latin America, ultimately making the region more attractive for capital investments while diminishing income inequality.