LATIN AMERICA REPORT 2012: THE WINNERS AND THE LOSERS

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As Iberian companies look abroad to balance the Eurozone crisis, they are increasingly turning to Latin America in the hopes of capitalising on its growth and opportunities. But while some regions are booming, others are still battling with legal risk and domestic distress. The question of where, and where not, to invest is back at the top of Iberian agendas.

Despite the European crisis and the slowdown of the US economy, much of Latin America continues to experience economic growth. Many of its countries now have long-term stable economic conditions, and expropriation and political risk, aside from one or two notable exceptions, seem to be a thing of the past.

The high credit ratings of many has opened them up to large, long-term foreign investors, and significant investment opportunities exist, with the development of projects in a wide array of sectors, crying out for funding.

Latin American countries currently have common needs, says Manuel Galicia Romero, a Founding Partner of Galicia Abogados in Mexico. “All our economies are growing and you cannot sustain that growth without energy and infrastructure, so there is a need, and therefore opportunities, for foreign investors.”

Many Iberian companies have already invested huge amounts in the region over the years, most notably Spain´s Santander, BBVA, and telecoms giant Telefónica, and Portugal’s EdP, Galp Energia and Portugal Telecom. And law firms also have not been shy in their efforts in coming forward, with

the likes of Garrigues and Uría Menéndez with well established relations in the region, and the Portuguese, of course, with close contacts in Brazil, for example, PLMJ and Vieira de Almeida. And beyond the largest of firms, most lawyers have strong referral relationships across Latin America.
But while the region is clearly on a better economic path than Europe, dig a little deeper, and there are clear winners and losers in the opportunity stakes. And investors had better beware of putting every Latin American country in the same basket, say lawyers.

Down and out

Argentina, once one of the highest receivers of foreign investment in Latin America, after Brazil, is now in sixth place behind some that have a far lower GNP, says Máximo Luis Bomchil, Managing Partner of M. & M. Bomchil in Argentina. “Things are very slow, and there’s practically no foreign investment.”
Since 2003, the Government has not been very friendly towards investors, according to lawyers, closing the economy and frightening any potential ones in the process. “Since 2011, the Government administration has tightened capital controls to prevent Argentines from moving their savings overseas,” says Santiago Carregal, a Partner at Marval, O’ Farrell & Mairal, “and has nationalised Spain’s oil company YPF and tapped central bank reserves to finance spending”.
The economy is in disarray and the current trade war with Spain has not done any favours to its international image. What investment there is comes from neighbouring countries such as Brazil and Mexico, and there has been practically none from Europe or the US. Investment as a whole is falling strongly, with its contribution to GNP going from a previous high of 22% to around 14%, say lawyers.
But while the overall outlook is not good, there are still some opportunities to be found for brave, and clever, investors among them technology and tourism. Mining (gold, silver, potassium, copper) is definitely one of the sectors with potential, says Carregal at Marval, O’ Farrell & Mairal. “The regulations for this sector are quite stable, therefore the industry will continue to grow. The Federal Government and provinces are eager to receive royalties and dividends in hard currency so they will maintain these policies.”
Venezuela is another example of a fallen jurisdiction, being perceived as less and less attractive for foreign investment. Its political and economic regime is closed and protectionist, and for a long time it has been leaning further towards an economic crisis. This reflects a lack of economic policies that do not allow for the promotion of economic development, say lawyers.
But while it is close to the edge, all is not lost. Foreign investment in Venezuela in traditional industries has been lacking for several years, says Fernando Peláez Pier, the highly respected former President of the IBA and a Partner at Hoet Peláez Castillo & Duque. “The oil sector, however, is still of interest to foreign investors mainly from China, Russia and other Asian countries, with companies implementing major infrastructure projects.”
While this side of Latin America is less likely to make the headlines, others are firmly in the spotlight – the region’s winners. A group of economies that are defying the odds, growing and prospering.

Rising star

While Latin America is imperfect, and Colombia is part of that imperfection, it is known as one of the better jurisdictions to invest in, says Glenn Faass, Managing Partner of Norton Rose Colombia. It has never had any nationalisations or expropriations, has the highest regard and respect for contracts, and is rapidly shedding its unsavoury civil war history and drug-trading reputation.
The country is also increasingly opening up to foreign investment, with a significant amount in recent months, says Jaime Herrera, a Founding Partner of Posse, Herrera & Ruiz Abogados, especially in the energy, mining, infrastructure and engineering sectors. Tourism, financial and pharmaceuticals are also active, while European interest is primarily in telecommunications, finance and consumer products.
The energy and mining sector, however, remain the most dynamic, with a National Development Plan for investment between 2010 and 2014 calling for additional funds for development, expansion

and modernisation projects. In the telecommunications sector, the Colombian Government is also currently looking for strategic partners for Computers for Education, 472 (the Governments Post Office) and Vive Digital Plan (internet connections), adds Herrera at Posse, Herrera & Ruiz Abogados. While notorious for its security risks, and a reputation for corruption, these have largely diminished over the past 10 years due to a huge effort by the Government. And a push has seen a high number of Free Trade Agreements being executed over recent years, with the agreement between Colombia and the EU expected to be in place by the end of the year.

Legal proceedings are also transparent and open, by Latin American standards, but that doesn't mean they are effective, fast or cheap, says Faass at Norton Rose Colombia. "While the right person ultimately wins in litigation, it takes time, but at least you have the prospect of transparent justice."

Bureaucracy is still a problem, however, and the Government is making serious attempts to resolve it, he adds. But by its very nature, bureaucracy is very resilient to attempts to remove it.

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Hoet Peláez Castillo & Duque, Venezuela

Battling for the top spot

Over recent years, Chile has consistently offered an economic and political stability not seen in most of its neighbours, say lawyers, and foreign investment has been growing, in particular from US, Europe and now Asia.

With an excellent track record in terms of transparency, rule of law, democratic regulations and a responsible political class, says Jorge Carey, Chairman of Carey y Cía in Chile, the country is particularly well positioned to receive international investments.

The energy sector is booming, as is the mining sector, copper in particular, and while infrastructure has improved it continues to need funds for projects ranging from roads and ports to water treatment plants and hospitals. Some years in the pipeline, the building of a new bridge connecting mainland Chile to the Island of Chiloé has finally been confirmed by the Government, with bidding for the project to start by the end of the year, and to cost around a billion dollars.

With various trade and double taxation agreements in place, the Government is actively promoting legal safety and certainty. Specifically, there is a regime of 'foreign investor contracts', signed with the Government that grants certain rights to foreign investors, including non-discrimination and tax stability.

The system in Chile tries to assure them that they can repatriate their investments and that they will receive the same economic treatment as a local investor, says José Miguel Carvajal, a Partner at Morales & Besa in Chile . "You should not have surprises when investing in Chile."

However, while some say that investors could still face the risk that the country returns to the bad economic policies of the past or populist and protectionist measures, lawyers say this is highly unlikely.

A close second

This year, it is expected that Mexico's economy will grow more than four percent, which is higher than in other Latin American countries, says Juan Francisco Torres Landa, a Partner at Barrera, Siqueiros y Torres Landa in Mexico, particularly Brazil, which is one of Mexico's top competitors.

The US remains Mexico's main investor, while Spain continues to be very active in the financial services, energy and infrastructure sectors – Spanish banks Santander and BBVA being clear examples of the potential for diversification in the region, with significant success. And there is also a growing trend within Latin America for inter-regional investments, says Galicia Romero at Galicia

Abogados ,with Brazil, Colombia and Peru, for example, becoming active investors in Mexico.
The auto industry has also become essential to Mexico's growth over the past two years, as salary increases in China have meant that Mexico, with its lower labour costs, has become a much more attractive place to base plants and manufacturing facilities.
While the volatility of the Mexican Peso is one potential risk for investors, explains Torres Landa at Barrera, Siqueiros y Torres Landa, the reality is that Mexico's lack of foreign exchange restrictions gives investors a level of certainty associated with the ability to covert funds without registration or regulatory hurdles.

Leading the way

Brazil is still top of the class, and seen as one of the safest destinations for foreign investors, with its sophisticated capital markets, favourable laws and equal treatment of domestic and foreign capital. Huge projects are being implemented, despite the global crisis, particularly in infrastructure, renewables and the oil & gas supply chain. "2012 will see various infrastructure projects and public procurement proceedings carried out by the Federal Government," says José Luis Freire, Managing Partner at TozziniFreire Advogados in Brazil, including airports, highways, ports, railways, power, telecommunication and, in particular, oil and gas. Spanish companies are key players here and also in the energy sector, with companies such as Iberdrola and Abengoa topping the investment stakes. The discovery of a new area of 1,6 trillion cubic metres of reserve in the pre-salt layers has the potential to be five times bigger than the country's current oil and gas reserves. Due to difficulties extracting from those layers, Brazil will need a high level of new technologies, equipment and processes that it currently doesn't have, says Albert Castelló, Spanish & Latin American Desk Manager at Felsberg e Associados in São Paulo. "There are therefore many opportunities for local and foreign investors in this area."

"We now see companies from all continents looking for opportunities in Brazil."
Rafael Dutra,
Partner, Dias Carneiro Advogados

The first privatisations of Brazilian airports, for example, drew much investor interest, and the Government is expected to launch a second round soon, which will include the airport of Rio de Janeiro. And, with events such as FIFA 2014 World Cup and the Rio 2016 Olympics, the tourism sector is thriving.
Lawyers, however, say that investors must look carefully at currency risk to ensure that variations in the Real will not affect their expected returns. And while Brazil's position at the head of Latin America's leaderboard remains strong, the country is starting to feel the effects of the crisis in Europe. The IMF forecasts for its economic growth are being revised downwards, and are now at 2.5 percent, down from higher than three at the start of the year.
The country is not without problems, however, with uncertainty on taxes and a biased and slow judiciary, says Luis Antonio Semeghini de Souza, a Partner at Souza, Cescon, Barrieu e Flesch. Foreign investors may therefore face some red tape in obtaining approvals and licences, especially because they have three levels of government – federal, state and municipal. "Furthermore," says Freire at TozziniFreire Advogados, "specific regulatory agencies may also need to approve the transaction, depending on the sector."
Brazil's tax burden in 2011 was also one of the highest in the world representing 36% of the GDP, hindering its national economic development and competitiveness, and discouraging investment. Reforms have been promised for the past 15 years, say lawyers, but so far none has been forthcoming. And its Commercial Code dates back to 1850, and is still applies to businesses with no specific legislation, such as e-commerce. While a new law is with the National Congress, its track record for efficiency is not great according to lawyers – the current Civil Code took 30 years to negotiation in the Senate and Congress.
"The Government is always saying that the country needs more investments in infrastructure, and this is a top priority," says Pedro Aguiar de Freitas, Managing Partner of Veirano Advogados in Brazil.

"However, there is a great deal of bureaucracy and inefficiency, which is hindering precisely the investment we need."

Beat the competition

While Iberian companies may wish to capitalise on the potential opportunities in Latin America to mitigate the global crisis, they are of course now facing stiff competition from their Latin counterparts. "There are so many opportunities here in Brazil," says Aguiar de Freitas at Veirano Advogados, "that unless it is for very strategic reasons or benefits their domestic operations, Brazilian investors are not looking abroad".

With lawyers across parts of the region echoing similar statements, and the growing trend for inter-regional investment, one cannot deny that those closest to Latin America are already taking advantage of what is seemingly one of the more resilient regions in the face of the global crisis. While one needs to be sure to carefully assess the risks before attempting to reap the rewards, Iberian companies would be wise to act now. There are reasons why winners win the race, and those in second place lose.