



Managing Environmental Issues in the Face of Expropriation

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Planning for and Dealing with Environmental Issues in the Face of Expropriation

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EXISTENCE OF AN ENVIRONMENTAL LAW REGIME IN VENEZUELA – its application in normal times

- How serious is environmental legislation in Venezuela?
- Enforcement of environmental regulations
- Importance to the investor

LEGAL FRAMEWORK: BODY OF VENEZUELAN LAWS

- National Constitution
- International Treaties
- Acts (National Assembly)
- Laws and Codes (National Assembly)
- Executive decrees (Acts of the National Executive: The President of the Republic with the Cabinet)
- Ministerial Resolutions (one or more ministers)
- State laws (State governors and legislatures)
- Municipal resolutions

LEGAL FRAMEWORK: BODY OF VENEZUELAN LAWS

- The National Constitution sets forth:
 - The right to a safe, healthy and ecologically balanced environment
 - The fundamental obligation of the government, with the active participation of society, to guarantee a pollution-free environment where the air, the water, soil, climate, ozone layer and living species are awarded special protection under the law
 - The obligation to submit environmental impact and social and cultural studies

LEGAL FRAMEWORK: BODY OF VENEZUELAN LAWS

- **Environmental Act Dec. 2006**
 - The purpose of this Act is to establish the provisions and principles governing environmental management, within the framework of sustainable development, as a fundamental right and duty of the State and society, for the purpose of contributing to safety and achieving the maximum well-being of the population and the preservation of the planet, for the sake of mankind
 - Liability for environmental damages is objective

LEGAL FRAMEWORK: BODY OF VENEZUELAN LAWS

- **Environmental Crimes Act (1992)**
 - Supplements the Environmental Act and its main purpose is to determine what must be considered environmental offenses, generally defined as actions that violate the provisions concerning the conservation, defense and improvement of the environment, and establishes criminal penalties for those offenses. Punishment for negligent or imprudent conduct is provided for

NATIONALIZATION, EXPROPRIATION AND CONFISCATION

- **The 1999 Constitution of the Bolivarian Republic of Venezuela** (in force), sets forth several provisions with regard to private property and expropriations/confiscations:
 - The right to own property is guaranteed
 - The confiscation of property shall not be decreed or executed except in those cases listed in this Constitution, by way of exception and **by means of a final court decision**

NATIONALIZATION, EXPROPRIATION AND CONFISCATION

- **Law Governing Expropriations for Reasons of Public or Social Use, 2002**
- Decree No. 356, with Rank and Force of Law to Establish the System for the **Promotion and Protection of Investment** –1999; and
- **Bilateral Agreements for the Reciprocal Promotion and Protection of Investments** (“BITs”) between Venezuela and some twenty-five countries (not with the USA)
- NOTE: These legal instruments guarantee the right to own private property and to be justly indemnified in case of expropriation or measure with a similar effect

LEGAL ASPECTS AFFECTING PRIVATE PROPERTY AND PRIVATE ENTREPRISE IN VIOLATION OF THE VENEZUELAN NATIONAL CONSTITUTION

- In January 2007 the President of the Republic announced a socialist project
- An Enabling law granting the President the power to legislate was passed in January 2007 and was in force for eighteen months
- Takeover by the State of areas of the economy considered to be either strategic or of social interest
 - oil industry, mining, energy, telecommunications, housing, essential foods, banking

RECENT LAWS THAT ADVERSELY AFFECT PRIVATE PROPERTY

- **The Urban Lands Act**
 - The purpose of this law is to regulate the use and the holding of urban lands suitable for the development of social housing and habitat projects in order to establish the bases for urban development and the progressive satisfaction of the right to a worthy dwelling place in urban areas

RECENT LAWS THAT ADVERSELY AFFECT PRIVATE PROPERTY

- The basic and grave aspects of the Urban Lands Act are the following:
 - Idle urban lands are declared to be of public use
 - The State has a right of first refusal on all urban lands
 - Urban lands are defined as those that are idle, are located in the downtown areas of cities and municipalities, and are serviced by utilities, among them:
 - Urban lands **abandoned** by their owners
 - **Undeveloped** urban lands; and
 - **Any other as may be determined by the National Executive**

OTHER RECENT LAWS THAT ADVERSELY AFFECT PRIVATE PROPERTY

- LAW PARTIALLY AMENDING THE LAW TO DEFEND PEOPLE'S ACCESS TO GOODS AND SERVICES
- On the one hand, the amendment largely expands the government's control over distribution, manufacture, importing, storage and marketing activities of **all types of goods and services** and, on the other,
- It highlights the penalizing nature of the law (**where expropriation is a penalty**)

Recent Nationalizations

- The *Modus Operandi* of recent nationalizations breaches all the preceding provisions and creates a state of total absence of the rule of law. They more resemble confiscation than expropriation or nationalization
- The occupation of farms, has been occurring for several years now, governed by a different procedure, one that consists of recovery of land by the Lands Institute (INTI) – environmental damages

Recent Nationalizations

- By means of a public, surprising and usually hostile announcement by the President of the Republic on his program *Aló Presidente* or at any other event
- According to the mood or the circumstances, a hostile occupation may take place right away or the occupation may be carried out, usually in 60 days, by taking over the facilities and operations in a firm but less hostile manner

Recent Nationalizations

- Carried out by means of a law, either issued by the President when he has been authorized to do so, or by the National Assembly—which enacts the law at once—nationalizing the companies or a given sector, declaring it to be for the public use or of social interest
- Or by means of various resolutions that list the companies and assets being affected and the committees that will take control

Recent Nationalizations

- In some cases, the affected parties are called to negotiate the pertinent indemnification, which usually does not turn out to be satisfactory. In other cases, silence prevails and the affected party must resort to other means. If protected by a BIT, the affected party may go to international arbitration
- Venezuelan citizens have to submit themselves to the Venezuelan jurisdiction. Unless otherwise exempted, Venezuelans are not entitled to arbitration

Main companies nationalized in several sectors of economic activity - Examples:

- Telecommunications: CANTV
- Energy: La Electricidad de Caracas and the other power companies
- All oil-related agreements (except for those with Exxon-Mobil and Conoco-Philips) were converted into mixed companies where the government owns at least 60%
- Sidor – steel sector

Main companies nationalized in several sectors of economic activity - Examples:

- Ruedas de Aluminio (RUALCA)– Aluminum wheels
- Cement companies: Cemex, Holcim and Lafarge. Cemex was taken over at midnight on August 18, 2008 by the National Guard in the presence of high level authorities, and a mob
- Several dairy companies
- Éxito and Cada: Supermarket chain

Main companies nationalized in several sectors of economic activity - Examples:

- Around 75 companies in two days, under the law enacted on May 7, 2009 where part of the assets of and companies engaging in oil industry services were nationalized, especially in the gas sector. Some of the companies were taken over before the law was published, at midnight, by the National Guard and groups of protestors
- **Note: This law provides that the value will be the book value and that indemnification may be paid for with securities issued by any State-owned company**
- **Environmental contingencies reduce the value**

Main companies nationalized in several sectors of economic activity - Examples:

- Banco de Venezuela
- Several metalworking companies, according to the President's announcement in a nationwide broadcast in the afternoon of Thursday, May 21, 2009
- There are several smaller companies that have been taken over, in addition to farms such as "Hato El Frío" (the largest environmental reservoir) and others

Main companies nationalized in several sectors of economic activity - Examples:

- Payment (total or partial) has been received, to date, in the following cases:
- La Electricidad de Caracas
- CANTV
- Ternium-Sidor (partially, the larger portion of payment will be made in promissory notes)
- Banco de Venezuela (the same as above)
- Note: In the cases of Sidor and Banco de Venezuela the negotiations were held between friendly countries and governments

INTERNATIONAL ARBITRATION

- At this time eight arbitration proceedings have been filed under BITs with the International Center for Settlement of Investments Disputes (ICSID) in Washington, D.C.
 - Vanessa Ventures Ltd. (mining)
 - Vestley Group Enterprises (farming-livestock)
 - Mobil Corp. and others (oil industry)
 - Conoco Philips and others (oil industry)
 - Brandes Investment Partners (Telecommunications)
 - Cemex (cement)
 - Holcim Ltd. (cement)
 - Gold Reserve Inc. (mining)

Measures to be taken during these times

- Keep a low profile
- Comply with all environmental laws and regulations to avoid justification to take control
- Perform social responsibility activities in the community where the company/plant is located
- Perform environmental audits in order to keep an accurate record of the condition of the facilities
- As needed, have a judicial inspection of the plant and an appraisal of the assets performed in order to keep an accurate record of the condition of the facilities and the value of the assets

Measures to be taken during these times

- Avoid labor conflicts that might lead to the suspension of activities
- Make and keep at the parent company or the law firm offices, back-ups of all important documents such as property titles, stock ledger, financial statements, records of inventories, operations, accounting, technology, information systems, etc.
- Have a transition plan in case anything should happen and take certain steps to protect your rights under international law (Plan B)

Conclusion

- In conclusion, as regards private property and economic activity, in violation of the guarantees set forth in the National Constitution—the amendment of which was rejected by a popular referendum held in December 2007—and BITs, the official policy being implemented by executive and legislative means, without further deliberation, is cornering private entrepreneurship, and minimizing private property
- The above requires that investors take all measures to comply with the laws—in our field the environmental regulations—as to avoid triggering a cause to justify an expropriation

THANK YOU!!!

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PRELIMINARY REMARKS

- The new reality of L.A.
 - “BRINGING THE STATE BACK IN . . . AGAIN”
 - The new ideology and new political landscape
- Types of expropriation
 - Administrative expropriation
 - Politic expropriation



The new role of the state

- It's a new ideology?
- It's a new reality?
- Is necessary the state in L.A?
- The constitution in face a new state
- The natural resources and the society
- The free trade and expropriation
- The use of natural resources in face of the new society and new state: Perhaps the government will disappear but the new state will continue
- Conflict and Natural Resources



Types of expropriation

- The political expropriation: the state has the legal instrument for put the condition of expropriation.
- The expropriation depend on the government
- Indirect expropriation
 - The restriction to access to the natural resources
 - The restriction to develop the activity for environmental reason
 - The restriction to the activity for authority
 - Land use restriction
 - Protect area



The case of Colombia

- We have a government that support the private investment and doesn't have any sympathy for the intention to restrict the property
- Constitution: The property has both, a social and an environmental function
- The autonomy of local authority and environmental authority