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XV. Venezuela

A. Foreign investment in Latin American countries

i. Authorisations versus limitations or prohibitions

Foreign investment is regulated by the Constitutional Law of Productive Foreign Investment, published in the Official Gazette of the Bolivarian Republic of Venezuela No 439,407 of 29 December 2017 (the 'Foreign Investment Law'). Under said law, foreign investment is defined as productive investment made through contributions from foreign investors, of tangible and intangible resources, intended to form part of the net worth of foreign investment recipients in the national territory. The Foreign Investment Law distinguishes two types of foreign investment:

1. direct foreign investment is a productive investment made through contributions from foreign investors, of tangible and financial resources, destined to be part of the net worth of foreign investment recipients in the national territory in order to generate added value to the productive process in which it is inserted. These contributions must represent participation greater than or equal to ten per cent of corporate capital; and
2. foreign investment in portfolio is the acquisition of shares or corporate interests in all types of companies that represents a level of participation in the corporate equity of less than ten per cent.

Participation in both forms of foreign investment, may be:

- a financial investment in foreign currency and/or any other medium of exchange or compensation established within the framework of Latin American and Caribbean integration;
- physical or tangible capital goods, such as industrial plants and machinery;
- non-material or intangible goods, such as trademarks, product brands and invention patents; and
- reinvestment.

According to Article 301 of the Constitution of the Bolivarian Republic of Venezuela (the 'Constitution'), foreign investment is subject to the same conditions as domestic investment. Consequently, foreign business corporations, agencies or individuals shall not be granted any conditions that may be more favourable than those established for Venezuelan nationals.

a. Authorisations

Although in Venezuela no prior authorisation is required to make an investment provided said investment conforms to the laws that are in effect in the relevant sector, the Foreign Investment Law provides that foreign investment shall be registered with the National Foreign Trade Centre (Centro Nacional de Comercio Exterior ('CENCOEX')), and that said registry must be updated annually. The rights of foreign investors provided under the Foreign Investment Law, such as the guarantee of

repatriation of profits, remittance of dividends, reinvestment of dividends and legal certainty, shall only become effective after CENCOEX registry has been granted.

The formal requirements for foreign investment registration are:

- a minimum amount of €800,000 or the equivalent thereof in other currency, at the official exchange rate; however, CENCOEX may establish a different minimum amount depending on the sector's interest for the promotion of small and medium-sized industries, and any other forms of productive organisation, provided said minimum amount is not less than ten per cent of the aforementioned minimum amount established under the Foreign Investment Law; and
- such investment shall remain in the national territory for a minimum term of two years, counted from the date on which the foreign investment registry is granted.

Nonetheless, the national bodies or agencies that have competence for hydrocarbons, banking, securities and insurance matters are concurrent with CENCOEX with regard to the analysis, study and issuance of the foreign investment registry. In cases in which the foreign investment shall be destined to the hydrocarbons, petrochemical, carboniferous and mining sectors, the registry shall be granted by the Ministry of People's Power for Oil and Mining (the 'Ministry of Oil and Mining').

In view that the Foreign Investment Law has only recently been enacted, the regulations thereof have not yet been issued and the specific procedure for foreign investment registration has not yet been established, which leaves this matter in a legal vacuum.

B. Limitations and prohibitions

With reference to investment limitations and prohibitions, the Foreign Investment Law provides that foreign investment may be made in any area, sector or activity allowed by national legislation. In this regard, the state reserves for itself the development of certain strategic fields according to the national interest, and the provisions under the Constitution and the national legal framework. Currently, these restrictions only apply to certain sectors, such as hydrocarbons, open television, radio and press in Spanish.

ii. Treatment of foreign investment in infrastructure initiatives and PPP projects

According to Article 299 of the Constitution, the state, jointly with private initiative, shall promote the harmonious development of the national economy. In this regard, the decree on Rank, Value and Force of Organic Law for the Promotion of Private Investment under the Concessions Regime of 25 October 1999 (the 'Organic Law for the Promotion of Private Investment under the Concessions Regime'), establishes incentives and guarantees, with the aim of promoting private investment and the development of infrastructure and public services, which are the responsibility of the national government.

In this sense, the Organic Law for the Promotion of Private Investment under the Concessions Regime constitutes the basis for the grant of concessions, which refer to agreements entered into between the competent public authority and a private company, for the construction and exploitation

of new works, systems or infrastructure facilities; or the maintenance, refurbishment, modernisation, expansion and exploitation of said pre-established infrastructure, or public services.

Moreover, the Foreign Investment Law establishes the rights and obligations of foreign investors in those cases where no bilateral agreement has been entered into between Venezuela and the country of origin of the foreign investor. Consequently, as stated in the Constitution, international investors have the right to fair and equal treatment under international law and principles, and shall not be subject to any arbitrary or discriminatory measures. Thus, foreign investors have the same rights and obligations as domestic investors under similar circumstances, the sole exception being any applicable provisions under special laws, and the limitations set forth in the Foreign Investment Law.

Finally, it must be noted that Venezuela has entered into bilateral agreements for the promotion and protection of investments with the following countries: Argentina, Barbados, Belarus, Belgium-Luxembourg, Brazil, Canada, Chile, Costa Rica, Cuba, the Czech Republic, Denmark, Ecuador, France, Germany, Iran, Lithuania, the Netherlands, Paraguay, Peru, Portugal, Russia, Spain, Sweden, Switzerland, the UK and Vietnam.

iii. Treatment of foreign investment in oil and gas and mining activities

Pursuant to the provisions under Articles 150 and 151 of the Constitution, the prior approval of the National Assembly is necessary to enter into municipal, national or state public interest agreements with foreign governments, as well as with foreign companies not domiciled in Venezuela. At present, hydrocarbon and mining laws provide for said requirement to participate in certain activities relating to such areas, even requiring, in some cases, the approval of the National Assembly for the incorporation of companies intending to participate in certain activities.

In this regard, in the following, we indicate the possibilities for foreign investment in oil, gas and mining activities, according to the provisions under each of the applicable laws.

A. The Organic Hydrocarbons Law

The Organic Hydrocarbons Law regulates all matters in connection with the exploration, exploitation, refining, transport, storage, marketing and preservation of hydrocarbons, and such refined products and works as may be required for the performance of said activities.

The Organic Hydrocarbons Law regulates five activities.

1. Primary activities

Primary activities are defined under Article 9 as those activities relating to exploration in search of those hydrocarbon deposits referred to in the Organic Hydrocarbons Law, the extraction of hydrocarbons in their natural state, their initial collection, transport and storage.

Primary activities, as well as those relating to such works as their management may require, are reserved to the state upon the terms set forth under said Organic Hydrocarbons Law.

These types of activities may only be carried out by the state, either directly by the National Executive, through wholly state-owned companies, or through companies in which the state may have control

over their decisions, by virtue of holding a stake exceeding 50 per cent of the capital stock. These types of companies are known as operating companies.

The prior approval of the National Assembly shall be required for the incorporation of mixed companies and the establishment of the terms governing the conduct of primary activities, and the National Assembly may modify the terms or establish such terms as it may deem pertinent, with any subsequent modification to also be approved by the National Assembly.

2. Refining and marketing activities

Pursuant to the provisions under Article 10, refining and marketing activities are those relating to the distillation, purification and transformation of natural hydrocarbons regulated under the law, carried out for purposes of adding value to said substances and marketing any products obtained. According to the provisions under Chapter VIII of the aforementioned law, these activities may be carried out by the state and private individuals, either jointly or separately.

In order to engage in natural hydrocarbon refining activities, a license issued by the Ministry of Oil and Mining must be obtained. The ministry may grant said license after definition of the appropriate project and pursuant to the provisions under this law and its regulations.

The assignment, transfer or encumbrance of any licenses shall require the prior approval of the Ministry of Oil and Mining, without which said licenses shall have no effect. In the case of mandatory transfers resulting from execution, the state may substitute the executor after payment of the amount of the execution order.

3. Industrial activities

Industrial activities are those defined under Article 49 as the Industrialisation of refined hydrocarbons, comprising activities relating to the separation, distillation, purification, conversion, mixing and transformation of the same, carried out for the purpose of adding value to said substances through the obtainment of oil specialties or other hydrocarbon by-products.

These activities may be carried out directly by the State, by its wholly state-owned companies, by mixed companies having private and state capital participation, in any proportion, and by private companies.

In this case, private companies must obtain a permit to be granted by the Ministry of Oil and Mining.

4. Marketing activities

Marketing activities refer to the domestic and offshore commercialisation of natural hydrocarbons and their by-products.

In this case, any activities in connection with the commercialisation of natural hydrocarbons, as well as that of such by-products as may be indicated by the National Executive, by decree, may only be carried out by wholly state-owned companies, created for such purposes. For their part, mixed companies carrying out primary activities may only sell any natural hydrocarbons produced by them to said state-owned companies.

Any by-products' commercialisation activities that may be excluded from the reserve decrees issued by the National Executive may be carried out directly by the state, its wholly state-owned companies or mixed companies without regard for their capital stock interest.

5. Activities of supply, storage, transport, distribution and sale of hydrocarbon by-products for purposes of domestic commerce

These types of activities may be carried out by individuals or corporations, with a prior permit from the Ministry of Oil and Mining.

B. The Organic Law for the Development of Petrochemical Activities

The purpose of the Organic Law for the Development of Petrochemical Activities is to regulate petrochemical activities carried out in the country, including those industrial activities causing the chemical or physical transformation of raw materials based on gaseous hydrocarbons, liquid hydrocarbons and mineral substances used as an input for said activities, whether by themselves or mixed, or in combination with other substances and input. Said law also governs any intermediate products deriving therefrom in products of a different physical-chemical nature and of higher added value, as determined by this law and its regulations.

Petrochemical activities are understood as the transformation of initial petrochemical products originated from hydrocarbons, which is conducted through the separation, purification, conversion and combination of the products, through chemical or physical methods, as well as the transformation of the products obtained in subsequent, intermediate or final industrial processes.

Pursuant to Article 5 of the law, basic and intermediate petrochemical activities, as well as such works, assets and facilities as may be required for the management thereof, are reserved to the state. Said reserve shall be exercised either directly by the National Executive or through mixed companies where the National Executive shall have a controlling interest and a stake of not less than 50 per cent of its capital stock.

The incorporation of mixed companies is subject to the prior authorisation of the National Assembly.

C. The Organic Law on Gaseous Hydrocarbons

The Organic Law on Gaseous Hydrocarbons regulates all matters in connection with non-associated gaseous hydrocarbon deposit exploration and exploitation activities, as well as the collection, storage and use of both non-associated natural gas, resulting from said exploitation, and gas produced in association with oil or other fossil fuels; and the procedure, industrialisation, transport, distribution, and domestic and offshore commerce of said gases. Such activities may be exercised either directly by the state or through state-owned entities or national or foreign private persons, with or without the participation of the state, upon the terms set forth under said law.

Also included within the scope of the Organic Law of Gaseous Hydrocarbons are those matters referring to liquid hydrocarbons and non-hydrocarbonated components contained in gaseous hydrocarbons, as well as gas resulting from the oil refining process.

The Organic Law on Gaseous Hydrocarbons makes a distinction between the types of activities in this matter:

- activities in connection with the exploration and exploitation of non-associated gaseous hydrocarbons: the law provides that any national or foreign private persons who may wish to carry out these types of activities, with or without the participation of the state, must obtain the appropriate licence from the Ministry of Oil and Mining;
- activities other than exploration and exploitation: a permit from the Ministry of Oil and Mining is required to carry out these activities; and
- gaseous hydrocarbons industrialisation activity: with reference to this area, the law provides that any national or foreign private persons who may wish to carry out gaseous hydrocarbon industrialisation activities, with or without the participation of the state, must obtain the appropriate permit from the Ministry of Oil and Mining, after the definition of the project is registered with and approved by the ministry.

D. The Mining Law

The Mining Law regulates those matters in connection with mines and minerals existing in the national territory, whatever the origin or presentation thereof, including the exploration and exploitation, as well as the extraction, processing, storage, holding, circulation, transport and commercialisation, whether domestic or offshore, of the extracted substances, except as provided under other laws.

The exploration, exploitation and use of mining resources may only be carried out through the following modalities:

- directly by the National Executive;
- concessions for exploration and subsequent exploitation;
- authorisations for exploitation for the exercise of small-scale mining;
- mining communities; and
- artisanal mining.

Under Article 17, the law provides that any person, whether an individual or corporation, national or foreign, legally competent and domiciled in the country may obtain mining rights to carry out the activities provided thereunder, except for certain exceptions.

Any companies or corporations that may be organised for the exploration or exploitation of mines shall be incorporated in accordance with the provisions under the Commercial Code and shall be civil in nature.

Pursuant to Article 19, in order to engage in mine exploration or exploitation activities, foreign companies shall meet the requirements provided under the Commercial Code and other applicable provisions and shall have a Venezuelan or foreign legal representative, domiciled in the country.

Pursuant to Article 22, foreign governments may not hold mining rights within the national territory. In the case of entities depending on any such governments or companies where said foreign governments may have an interest, which, by virtue of the capital or by-laws, shall confer control over the company upon them, said entities shall require the approval of the National Assembly to be granted mining rights.

In any case, pursuant to the provisions under the law being commented on, foreign companies may only be granted a mining concession for exploration and subsequent exploitation, inasmuch as activities for the exercise of small-scale mining, mining communities and artisanal mining, are reserved, in the first case, to Venezuelan individuals or corporations, who, upon gathering in various areas surrounding the same deposit or several thereof, form the so-called mining communities, and in the third case, only Venezuelan individuals may engage in artisanal mining.

e. The Organic Law Reserving to the State Gold Exploration and Exploitation Activities as well as Related and Ancillary Activities

This law reserves to the Venezuelan state all primary, related and ancillary activities in connection with gold mining, where primary activities are understood (Article 6) to be the exploration and exploitation of gold mines and deposits; and related and ancillary activities, such as the storage, holding, extraction, processing, transport, circulation, and domestic and foreign commercialisation of gold, to the extent that the latter activities shall contribute to the conduct of primary activities.

Article 9 of said law provides that the aforementioned activities may only be carried out by the Bolivarian Republic of Venezuela or through its public agencies, or wholly state-owned companies, or affiliates thereof, as well as through mixed companies in which the Bolivarian Republic of Venezuela, its public agencies, wholly state-owned companies or affiliates thereof shall control 55 per cent of the capital stock, and strategic alliances entered into between the Bolivarian Republic of Venezuela and any corporations or other forms of association permitted by law for the conduct of small-scale mining.

For the conduct of activities characterised as primary activities, mixed companies shall be governed by this law, and in each specific case, by such terms and conditions as may be approved through an agreement issued by the National Assembly, as well as such provisions as may be dictated by the National Executive through the Ministry of People's Power having competence for mining matters.

iv. Treatment of foreign investment in real estate (rural and urban properties)

The real estate sector has been restricted over the past years in Venezuela, therefore, the lease, construction and sale of housing are regulated by the national government. However, such limitations are not specially designed for foreign investors, but as a matter of government policy. In this regard, foreign investors shall be subject to special laws on this matter.

v. Treatment of foreign investment in agribusiness activities

There are no special regulations with reference to foreign investment in agribusiness activities. Therefore, as was established in the Constitution, foreign investment is subject to the same conditions as domestic investment in all agribusiness activities.

vi. Treatment of foreign investment in the rendering of public services

As to the provision of public services, the Public Contracting Law provides that national companies must have priority over foreign companies in contracting processes. In effect, Article 9 of the Public Contracting Law states that for the selection of bids whose prices, in respect of one another, shall not exceed five per cent of the price of the company obtaining the best evaluation, the company to be preferred shall be the one that shall meet the following conditions as defined under the term sheet:

- for the acquisition of goods, such a bid as may have the highest national added value; and
- for the contracting of works and services, such a bid as shall be submitted by a bidder whose principal place of business is in Venezuela, incorporates the largest proportion of national parts and input, and has the highest participation of national human resources.

Once the foregoing criteria have been applied, if two or more bids with similar characteristics were to result from the evaluation, the bidder to be preferred shall be the bidder with a capital stock that has the largest national share.

Pursuant to Article 29 of the law, in order to submit bids, companies must be previously registered with the National Contractors Registry, provided that the estimated amount of the bids shall exceed 4,000 tax units in the case of goods and services, and 5,000 tax units in the case of execution of works. Said registration shall not be necessary for those interested in participating in internationally announced open tenders; as well as those providing highly specialised services sporadically used, small producers of food products or basic products declared to be of first necessity.

B. Rendering of public services

i. General framework

Public services are regulated by the decree on Rank, Value and Force of Public Contract Law, published in the Official Gazette of the Bolivarian Republic of Venezuela Extraordinary No 6,154 of 13 November 2014 (the 'Public Contract Law'). The scope of the Public Contract Law is to regulate the activity of the state for the acquisition of goods, rendering of services and execution of works for the purpose of preserving public heritage.

In addition to the Public Contract Law, the Constitutional Law against Economic War for Rationality and Uniformity in the Acquisition of Goods, Services and Public Works establishes basic rules of conduct that the public administration must follow in the processes of acquisition and contracting of goods, services and public works.

ii. Governmental monopoly versus private initiative

Except for the areas that are reserved for commercial exploitation by the Venezuelan Government, a private initiative can participate in public works without major limitations whenever they comply with the Public Contract Law.

iii. Privatisation general rules

The Privatization Law, published in the Official Gazette of the Bolivarian Republic of Venezuela Extraordinary No 5,199 of 30 December 1997 (the 'Privatization Law'), regulates the privatisation of goods or services owned by the public sector by restructuring the entities for the purposes of privatisation, including the modification of regulatory frameworks, transfer of shares owned by the public sector to the private sector, concession of public services and any other mechanism that allows the objectives of that policy to be achieved.

vi. Limitations and/or prohibitions to private parties in the rendering of public services

Besides the areas that are reserved for commercial exploitation by the Venezuelan Government, private parties have limitations that derive from the prerogatives that the state has at the time of entering into the respective contracts with individuals, such as limitations of contractual liability, applicable jurisdiction and termination of the contract, among others.

C. Real estate

i. Rural properties

A. Limitations for private parties

Venezuelan Law regulates so-called security zones, which are areas of the country, which because of their strategic importance, features and elements that comprise them are subject to special regulation in terms of people, goods and activities in order to ensure the protection of these areas from internal hazards or external threats.

The security zones could be in rural zones, such as border security zones. Foreigners cannot acquire properties in security zones without the previous authorisation of the government (Ministry of Defence). Likewise, foreigners that are already owners of properties in said zones must inform the authorities.

The Coastal Law also regulates some protected areas, which are subject to concessions and administrative authorisations.

ii. Urban properties

A. Limitations for private parties

There are also some security zones located within the perimeters of cities. These zones are subject to the same regulations and limitation with respect to the property of foreigners.

iii. Expropriation events

A. Regulations in the Constitution

The Venezuelan Constitution regulates all private property rights and their limitations. Only for reasons of public utility or social interest, by final decision and prompt payment of just compensation, may the expropriation of any type of goods be declared.

B. Regulations in the Law

Expropriation for public utility or social utility regulates all relevant procedures regarding expropriations and how to determine a fair price to pay as compensation. Therefore, expropriation that does not follow this procedure is illegal and can be appealed by a writ of *amparo*.

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