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Bolivia



II. Bolivia

A. Foreign investment

i. Authorisations versus limitations or prohibitions

As part of a nationalistic trend, inaugurated in Bolivia in 2006 with the assumption into power of President Evo Morales Ayma's indigenous and popular movement, a Constitutional Assembly proposed and a national referendum approved a new Political Constitution enacted on 7 February 2009. This long and complex set of legal rules is contained in 411 Articles and ten interim provisions.

Two main general features constitute the distinctive mark of the Constitution: the pre-eminence of indigenous peoples' rights and the preeminence of the state as the responsible entity for the social and economic direction of the economy, within a framework of a democratic republic, with the traditional separation of the three powers (legislative, executive and judicial – ordinary and constitutional), plus an electoral power and special separate jurisdiction for agro environmental affairs.

Among numerous rights contained in different chapters of the Constitution, Article 56 recognises the right of every person to individual or collective private property provided this complies with a social function. Expropriation can occur for the reason of public need or use, determined pursuant to the law and with prior just compensation. Urban real estate property generally cannot be subject to reversion.

The Bolivian economic model is defined as plural. A plural economy is constituted by economic community organisations, state, private and social-cooperative forms, which are to interact between them under certain principles. Among the features of this economic system, the Constitution provides: (1) the state is to exercise the integral direction of economic development and its planning processes; (2) natural resources belong to the Bolivian people, to be managed by the state; (3) industrialisation of natural resources is a key element; (4) the state can participate in all of the productive chain of strategic sectors (such as oil and gas, mining and others); (5) entrepreneurial initiative and legal security are respected; and (6) the state is to promote the communitarian area of the economy as a solidarity alternative in rural and urban areas.

Under Article 308 of the Constitution, the state recognises, respects and protects private initiative, for it to contribute to economic and social development, and to fortify the economic independence of the country. Freedom of enterprise is guaranteed, as well as full exercise of entrepreneurial activity, to be regulated by law.

Bolivian investment is to have priority treatment as compared with foreign investment. Foreign investment is subject to Bolivian jurisdiction, laws and authorities. It cannot claim any exceptional treatment or appeal to diplomatic claim in order to obtain favourable treatment.

The relationship with foreign states and companies is to be conducted on grounds of independence, mutual respect and equitable treatment.

As required by the 2009 Constitution, on 4 April 2014, a new law (Law No 516) for the Promotion of Investments was enacted. Under this law:

1. General direction: The state, in its promotional and directional role of economic and social development, directs investments to activities promoting economic and social development, generating dignified employment and contributing to the eradication of poverty and the reduction of inequalities.
2. Destination: Investments can be made in any sector of the economic activity of the country, and are to be implemented by entrepreneurial and contractual forms as permitted by applicable law. There are a number of laws and regulations by sectors of the economy: mining, hydrocarbons, financial and banking, telecommunications, electricity, insurance, and so on. Rules by sectors do and may contain specific and diverse rules dealing with authorisations, limitations or prohibitions, which cannot be generalised for all investments.
3. Means: Investments are made through private commercial companies, public companies, mixed economy companies (*sociedad anónima mixta* (SAMs)) with state participation and other agreements or instruments of joint investments. Commercial entities (companies of different structures) can freely be organised to operate in the diverse areas of the economy. Requirements for specific sectors of economic activity are to be met pursuant to applicable regulations (see 1.3 to 1.7 below).

The basic incorporation of commercial companies is governed by the Commercial Code, and by Law No 466 of 26 December 2013, the Law of the Public Enterprise, in the case of state companies or companies in which the state or state entities have majority participation.

All commercial companies, local, mixed or foreign, depending on their specific structure (stock company, limited liability, etc) need to be registered with the Commercial Registry, independently from the specific authorisations or requirements to be accomplished or met depending on their economic activity and purpose. No specific general authorisation to invest is required. The Investment Law requires that all foreign investments and international transactions be registered with the Bolivian Central Bank. Registration with the Bolivian Internal Revenue Service and the municipality where the company is to have activity is compulsory. Registration with the private entrepreneurial association corresponding to the company's purpose and activity is also compulsory.

4. General limitations or prohibitions include: (1) no foreign individual or company can hold title or possession on property within 50 kilometres of international borders (security zone) whether directly or indirectly; and (2) neither can it receive direct adjudication of rural land from the state.

ii. Treatment of foreign investment in infrastructure initiatives

Foreign companies can be established and registered as any other local company wishing to concur with the infrastructure initiatives' market. While there are no restrictions to operate in the private market to the extent allowed by applicable rules, as it concerns the more relevant market of state and public initiative, and projects, the state would commonly use one of the following methods to hire

companies (local and/or foreign) as part of its procurement for infrastructure projects, depending on the characteristics, scope and cost/price of each specific project: international public bidding, national public bidding, direct national and/or international invitations.

A project could be of national importance, in which case it is the central government that applies the corresponding procurement laws and regulations; if it is a departmental or municipal project, then the procurement laws and regulations corresponding to these jurisdictions apply. Specialised agencies of the state may be involved. For example, the so-called national Autoridad Boliviana de Carreteras (ABC) is actively, constantly and regularly applying procurement procedures for the construction of national roads. State companies entrusted with specific areas would call for procurement of infrastructure projects. For example, the Empresa Nacional de Electricidad (ENDE) would procure services for state infrastructure projects in the electricity sector that it controls. The state oil and gas company Yacimientos Petroliferos Fiscales Bolivianos (YPFB) would proceed similarly in respect of infrastructure projects.

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

With respect to oil and gas, the state company YPFB exercises a monopoly of most of the activities in the hydrocarbons sector. Under the Constitution, however, it is authorised to contract with private investors, whether national or foreign, for the implementation of any, a part or all of the activities of the productive oil and gas chain (exploration, development and exploitation). Those contracts take the form of service agreements. Industrialisation, transportation and trading (internally or externally) are to be carried out by YPFB, which, however, can constitute mixed economy companies for conducting these and other activities of the chain. YPFB is to hold at least 51 per cent of the paid in capital of said companies. All contracts and mixed companies require approval by law of the Legislative Plurinational Assembly (Congress). A new Law of Hydrocarbons is pending approval in Congress for the implementation of the general rules of the Constitution.

On mining, the 1997 Mining Code, which regulated mining activities, has been substituted by a new Mining and Metallurgical Law No 535 of 28 May 2014. All pre-existing mining concessions are to be transformed into administrative mining contracts with the Jurisdictional Administrative Mining Authority. Under a separate law, a number of concessions have been reverted to state control due to inactivity. Exploration or exploitation rights in free areas can be obtained from such authority complying with a number of requirements, including the presentation of a working and investment plan. A licence can be issued by the authority for a maximum period of five years. A preferential right to enter into an administrative mining contract for development and exploitation is recognised; such a contract applies for direct recognition of rights for exploration, exploitation, and so on. Any such contract (other than a contract for transforming current rights, yet pending implementation during 2015) requires approval by the Bolivian Congress. State mining companies can enter into association agreements or with respect to their mining rights, upon the condition of holding a participation in net profits of 55 per cent. Recognition of mining rights generally, does not create ownership rights or title on the mining areas. Title is obtained only on production.

Development of lithium resources has been conducted for many years now under the control of the state. More recently, a new state company by the name of Yacimientos de Litio Bolivianos has

been created. Two main projects are being undertaken. The construction of a lithium carbonate plant to be operated by the state, and a project for a chain of production that will conclude in the manufacturing of lithium batteries for electric cars by means of a mixed company consisting of a German company and a Bolivian lithium company, the latter to have majority participation and control.

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

There are very distinct and specific laws and regulations regarding rural and urban properties. For rural properties there are numerous sets of rules (constitutional and others) that have resulted from the Agrarian Reform of 1953. As they relate to private holdings and investments, agro livestock and agro commercial – industrial activities are recognised and protected, provided they meet requirements of maximum extension and working obligations to avoid reversion of title to the state. A general condition and obligation to hold and retain title on rural land is conducting work compliance, for which the obligation is subject to supervision and verification by a specialised administrative state entity.

The specialised jurisdiction for agro-environmental cases and controversies is also in place. Urban properties are subject to standard private civil and commercial law rules. Investments can be made to acquire and trade urban properties. Municipal requirements are to be met and respected. Private construction projects, condominiums and similar are extensively implemented.

B. Rendering of public services; treatment of foreign investment

i. General framework

Besides other systems, Law No 1178, of 20 July 1990 on Governmental Administration and Control creates the state System of Goods and Services Administration, which establish the procedures for procurement, handling and disposition of state goods and services.

It is an attribution of the Minister of Economy and Public Finance to act as the fiscal authority and governing body of the public governance and procurement rules, with faculties of updating the systems of governmental administration and the regulations of the state System of Goods and Services Administration.

Supreme Decree No 181 of 28 June 2009 (as amended) approves the regulations currently in place for the state System of Goods and Services Administration, as a technical and administrative set of rules that regulates the procurement of goods and services, and the handling and disposition of goods belonging to public/state entities.

The purposes of the regulations are: (1) to establish the principles, rules and conditions applicable to the administration of state goods and services, and the obligations and rights related thereto; and (2) to establish the fundamental elements of organisation, operation and internal control related to the administration of state goods and services.

Fundamental principles set by the regulations are:

1. solidarity: public resources must benefit all Bolivian citizens;
2. participation: Bolivian citizens have the right to participate in the procurement of goods and services;
3. social control: Bolivian citizens have the right to look after the proper implementation of public resources, results, impacts and quality of goods and public services;
4. good faith: there is a presumption of the righteous and ethical behaviour of public officers;
5. economy: procurement procedures must be developed with celerity and saving resources;
6. effectiveness: procurement procedures must allow the achievement of the programmed objectives and results;
7. efficiency: procurement procedures must be developed in a timely manner and with the lowest possible costs;
8. equality: proponents may participate in equal conditions, restrictions and in accordance with their capacity to produce goods and offer services;
9. free participation: state contracting must allow free participation, that is, the broadest attendance of proponents through publicity mechanisms, in order to obtain the best conditions regarding price and quality;
10. responsibility: public officers must comply with current regulations on procurement, handling and disposal of goods and services and assume the consequences of their actions and omissions during office; and
11. transparency: activities, documents and information on procurement procedures, handling and disposal of goods and services are public.

Public entities must prepare their own internal regulations for the System of Goods and Services Administration using the model prepared by the governing body, which revises and approves the document.

The regulations of the system, approved by Supreme Decree No 181 of 28 June 2009 have been amended several times by means of the following main instruments: Supreme Decree No 843 of 13 April 2011; Supreme Decree No 956 of 10 August 2011; Supreme Decree No 1,200 of 18 April 2012; Supreme Decree No 1,497 of 20 February 2013; Supreme Decree No 1,999 of 14 May 2014, Supreme Decree No 2,728 of 13 April 2016; Supreme Decree No 2,753 of 1 May 2016; and Supreme Decree No 3,548 of 2 May 2018.

The regulations must be applied in all public entities, with no exceptions, comprising the state's presidency and vice-presidency, ministries, administrative units of the General Comptroller and electoral courts; the Central Bank of Bolivia, Authorities of Supervision and Social Control, Development Corporations; public financial intermediation entities; the military and police; departmental and municipal governments; and all other entities for which the state owns the majority of the patrimony.

Legislative and judicial branches must also apply the regulations to their administrative units in accordance with their purposes, plans and policies.

The regulations apply to contracts with private participants (mostly of an administrative and not of a commercial nature) for the procurement of goods, construction works, and rendering of general and consulting services.

There are several procedures to be followed for the procurement processes, which vary depending on the amount/value of the contract to be awarded and other factors. This will also determine whether a public bidding process is needed or not, and the possibility of direct contracting. Certain state companies are treated as a strategic interest, and authorised to directly procure and acquire goods and services, whether in Bolivia or abroad. A contract with a foreign supplier that is not domiciled in Bolivia (rules may require that it be domiciled) can be subject to foreign laws and clauses freely negotiated on applicable law, jurisdiction and resolution of controversies (including arbitration, which is not allowed in Bolivian contracts).

There can be public bidding procedures in which foreign entities may participate. The Basic Document of Procurement, depending on the scope and nature of the required goods or services, would determine whether the foreign entity is required to set up a local branch or subsidiary. So there is no general rule, and both methods have been used in bidding procedures. Typically, for example, if a bid is for the construction of public works the foreign beneficiary would be required to set up a local branch or subsidiary, both for tax purposes and for purposes of compliance with other laws, like labour and social security laws.

ii. Governmental monopoly vs private initiative

In Bolivia, there are currently two forms of public–private partnerships (PPPs), as mentioned above, one is association agreements in the mining sector under Law No 535. However, the additional Law No 849 allows the state mining company Corporación Minera de Bolivia ('COMIBOL') to negotiate and sign mining production agreements with private parties in mining areas belonging to it. Under this form, the private party would be the operator and COMIBOL would receive perceptual royalty participation on production. One of the requirements for such new association agreements is that the state mining company holds at least 55 per cent participation on net profits, which does not apply under mining production agreements. Only under the former, the state mining company should also have control of management of the contract.

The associative second form is by way of a so-called SAM, mixed state company (empresa estatal mixta (EEM)) or mixed company (empresa mixta (EM)), which are stock companies with the participation of a state company or entity and a private participant, either national or foreign. In EEMs, the state has a participation of more than 70 per cent and in the case of EM the state has a participation between 51 per cent to 70 per cent.

These companies are governed by the Commercial Code and Law No 466 of 26 December 2013, and the Law of the Public Enterprise in the case of EEM or EM. A SAM should not be subject to estate procurement regulations. In the case of EEM or EM, there are several rules of procurement contained in Law No 466, and in some cases, the said companies have special procurement rules.

These types of companies may apply to state participation in various economic sectors as needed (hydrocarbons, telecommunications, energy, electricity and others, depending on rules by sector). In the case of hydrocarbons, the Political Constitution of the States determines that for this type of company, the state shall have at least 51 per cent of the capital.

Public entities may directly purchase goods or procure services provided by other Public Entities as explained above. There are no regulations on public–public JVs as such. Mixed intergovernmental companies are foreseen as a specific tool under the so-called Law of Public Companies.

iii. Privatisation general rules

Since the beginning of the first term of the current Bolivian Government, in 2006, state policy has been ‘contrary’ and adverse to privatisation. Most of the assets, companies and ventures that were privatised before by various methods, especially during the 1990s, have been partly or totally nationalised or rights have reverted to the state. Prior privatisation rules have been totally derogated and a ‘nationalisation’ policy implemented.

At present, the Bolivian Government is fostering a policy of attracting private investment (both foreign and national) under new rules in which the state and state entities and enterprises are and will be the key players.

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

As mentioned above, the new Political Constitution of 7 February 2009, with a strong nationalistic orientation, provides that economic policies are declared to be based on the plurality of participants (state, private and community sectors). Private investment is guaranteed in order for it to contribute to social and economic development. Numerous rules govern the various sectors of economic activity.

Regarding specific public services, the Constitution determines that:

- The development of the productive chain in generation, transportation and distribution of electricity is the private faculty of the state. This could be achieved through public companies, SAMS, non-for-profit organisations, cooperatives, private companies and communal enterprises. It also determines that the energy productive chain cannot be subject solely to private interests and cannot be granted under concession. The law must regulate private participation, and the new electricity law to implement this constitutional provision is still pending enactment.
- The provision/supply of basic services is the state’s responsibility through public entities, SAMS, cooperatives and communal companies. In the cases of electricity (as explained above), gas to domiciles and telecommunications, said services may be rendered through contracts with private companies.
- Access to water and sewerage systems cannot be subject to privatisation and concession, and are subject to a licence regime in accordance with the law. The new water law to implement this constitutional provision is still pending enactment.

More generally, procurement of goods must be aimed towards national production. For goods not produced in the country, the entity may purchase imported goods. Public entities are prohibited

from incorporating technical requirements in the Basic Document of Procurement focused only on the external appearance of the good, and must guarantee its functionality and usefulness.

Special preferential margins and adjustment ratios apply to the purchase of goods in certain cases.

Micro and small enterprises, associations of minor suppliers and peasant organisations also benefit from preferential treatment.

C. Real estate

i. General overview

The legal system in effect in Bolivia focuses the property phenomenon, from a dual perspective. First of all, under the chapter corresponding to the economic and social rights, the Political Constitution of the State of Bolivia (Constitución Política del Estado (CPE)) consecrates the right of property as a fundamental human right. Second of all, the aspects inherent to the creation, exercise, modification and extinction of the right to property, are found regulated in a detailed manner within the norms of the Civil Code of Bolivia (CCB), as well as within the laws and special norms, related mainly to agrarian, registration and expropriation matters.

In this sense, the protection provided within the juridical system in effect in Bolivia to those who acquire property rights over urban or agrarian properties is found to be adequately developed from a normative point of view, allowing the effective exercise and enjoyment of the attributions inherent to the condition of the owner.

On the other hand, the value of equality constitutes one of the essential foundations of the Bolivian state. Discrimination based on reasons of nationality, among others, is found to be prohibited and sanctioned in an express manner. Consequently, within the exercise of the attributions inherent to the right of property, both nationals and foreigners are found to be legally situated on an equal footing.

Notwithstanding the foregoing, the CPE establishes a subjective limitation regarding the acquisition of the right of property. Attending to reasons of security of the state, the CPE establishes a frontier security zone of 50 kilometres, starting from the border line. Within this zone, no foreign person, individually or in a partnership, can be the title-holder of property rights, directly or indirectly, or, due to any title rights, possess water, soil or subsoil. In all cases, the CPE reduces the aforementioned limitation in cases of state necessity duly declared by an express law approved by two-thirds of the Plurinational Legislative Assembly. Finally, the CPE states that the property or possession affected in cases of non-compliance with this limitation will pass to the benefit of the state, without any class of indemnification.

From an objective point of view, the CPE contains an additional limitation that links both nationals as well as foreigners. No person can be the title-holder of, or possess, surfaces of land greater than 5,000 hectares.

Finally, the CPE establishes that the expropriation of urban or agrarian properties proceeds only with the prior declaration of public need and interest, and with the payment of a just indemnification.

ii. Holding title to real estate

Within the subject of immovable properties located in the urban area, the registration of real estate rights is found to be at the charge of the Office of Registration of Real Rights (Oficina de Registro de Derechos Reales (ORDR)). Under this framework, and in accordance with the provisions of the CCB, the condition of owner or title-holder of any other real estate right subject to registration, acquires publicity, opposability and is definitively perfected in front of third persons, from the moment of its registration in the ORDR.

On the other hand, the ownership of immovable properties located in rural areas is perfected through the granting of the respective title by the National Institute for Agrarian Reform (Instituto Nacional de Reforma Agraria (INRA)). Subsequently, once the INRA issues the ownership title over rural immovable properties, the same is registered at the ORDR. However, the determining and central aspect within matters of property rights over agrarian immovable properties centres on the issuance of titles and the registration of land in the charge of the INRA.

iii. Transferring real estate

From a legal viewpoint, the right of property is a right of a strictly patrimonial content. In virtue thereof, its title-holder possesses the attribution to freely dispose and alienate (*ius abutendi*) the property over which the right is constituted. The purchase and sale is the main operation through which the ownership right is transferred.

The forms or manners used to acquire the right of property are found normed mainly in the CCB, as well as within the legislation regulating the activities of the INRA.

Regarding the agrarian subject, some classes of properties are found to be excluded from acts of transfer by reason of their scarce surface extension or due to their collective ownership in favour of determined groups. This is why, for example, the CPE prohibits the transfer (purchase and sale, exchange or donation) of rural land that would have been given freely in favour of native indigenous farmers, native intercultural communities, Afro-Bolivians and farmer communities.

Concerning urban immovable properties, the transfers are registered in the ORDR in a direct manner. In cases of rural immovable properties, the transfers must be previously registered before the INRA and subsequently before the ORDR.

The onerous transfer of urban or rural immovable properties generates tax effects. The rate of applicable tax is three per cent of the price of the transfer. The law states that the seller is the taxable person that is found to be obligated to pay the tax; notwithstanding, in practice, the tax burden for an act of disposition is usually negotiated among the parties participating therein. In all cases, it is convenient to clarify that no private agreement entered into among individuals has enforceable results or renders effects before the Tax Administration.

iv. Financing real estate acquisitions

The financial markets in Bolivia are scarcely developed and are less profound. The ways of financing real estate projects and acquisitions concentrate mainly on the loans granted by banking entities authorised to operate within the local financial system.

Likewise, the Bolivian state has tried norms that tend to promote access to credit for social interest housing projects. Since 2013, maximum active interest rates have been set for housing loans, and the percentages or minimum portfolio levels that must be maintained within this class of loans have been established. The impact has been quick; local banks have created new products, which include financing options without the need to contribute an initial fee.

v. Leasing real estate

The urban real estate leasing market is extensively developed and regulated in Bolivia. The CCB distinguishes between the leasing of properties destined for commercial use and those used for housing purposes.

Currently the judicial proceedings for the eviction of leased immovable properties are processed at a relatively slow pace; however, from 6 August 2015, a new Civil Procedure Code will enter into effect, for which verbal bases seek to speed up the processing of the generality of the civil proceedings, among which are found precisely the eviction of properties subject to the leasing regime.

On the other hand, regarding the leasing of rural land, the CPE of 2009 prohibits all types of land income generated by the speculative use of the land. In accordance with local norms, which date back to 1953, the leasing of land represents a form or type of land income. Consequently, it could be interpreted that from 2009, the leasing of rural land remained at the margin of the juridical acts allowed by the Agrarian Law.

Notwithstanding the foregoing, at present, there are no case law precedents pronouncing on this regard, so we have to wait to know the manner in which the constitutional provisions will be implemented that will prohibit the leasing of rural land, with regard to the function of the prevalence of the principle of ‘the land belongs to its workers’.

vi. Construction

The economy of Bolivia has grown in an accelerated manner since the mid-2000s. This growth brought about the extraordinary dynamisation of the construction sector. Currently, Bolivia continues to go through a real estate boom, which found a certain stability between 2011 and 2012.¹

Likewise, the recently approved norms regarding the maximum interest rates and minimum portfolio levels applicable to housing loans constitute a factor that tends to consolidate the favourable environment for the construction sector, of which expansion has been notorious, mainly in the most important capital cities of Bolivia, La Paz, Cochabamba and Santa Cruz.

¹ Cerezo Aguirre, Sergio, Central Bank of Bolivia, Boom within the Real Estate Sector in Bolivia: Bubble or economic fundamentals? www.bcb.gob.bo/eeb/sites/default/files/6eeb/docs/sesiones%20paralelas/6EEB%20SP-08-3.pdf accessed 22 August 2018.

vii. Expropriation events

The juridical institute of expropriation is regulated by the CPE, as well as the CCB and other special laws.

Among the latter, special laws can be highlighted that are applicable within matters of rural land, mining, hydrocarbons and, particularly, the Law of 30 December 1884 regarding the expropriation of urban immovable properties for conducting and executing works declared of public interest.

A. EXPROPRIATION FROM A CONSTITUTIONAL PERSPECTIVE

The CPE establishes that expropriation will be imposed due to a cause of public necessity or interest, qualified in accordance with the law and with a prior just indemnification.

In this sense, the only cause that would allow the expropriation pursuant to the CPE is the public need or interest. Likewise, the constitutional conditions to allow expropriation are: (1) that the public need or interest would have been qualified in accordance with the law; and (2) the existence of a prior and just indemnification.

B. REVERSION OF RURAL LAND

Rural land, as well as immovable properties located in the urban area are subject to expropriation. However, this is not the only mechanism legally recognised that can be employed by the State of Bolivia to extinguish the right of property of private persons over rural land. The reversion to the domain of the state, without the payment of any compensation, also constitutes a legal way through which the property may be extinguished.

The causes that motivate the reversion of rural land are set forth in the CPE and within law. The CPE foresees that the non-compliance of the economic social function and the holding of land with surfaces greater than 5,000 hectares (*latifundium*), constitute causes for reversion. On its part, the law states that the abandonment of land or the holding of land in a manner that is contrary to the collective interest would give rise to reversion. The absence of payment of taxes for the property would allow the presumption that the land has also been abandoned.

Finally, it is important to highlight that the CPE expressly excludes urban properties from any type of reversion.



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