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❳ Legal regime applicable to foreign satellites currently being designed.

❳ Sudden but non-substantial modification of the National Chapter for Frequency Bands Allocation.

❳ Concessions for services and works: the financial and economic balance guarantee is the key for success in this course of action for private investment.

Public consultation on the regime for satellite use

The Venezuelan Organic Telecommunications Act insufficiently addresses the regulation of satellite use. Consequently, the regime applicable to foreign satellites whose footprint touches Venezuelan territory is not clear with respect to their offering of satellite capacity to telecommunication operators established in Venezuela. The subject matter is the regulation applicable to the business of many foreign companies providing satellite capacity and not intending to provide telecommunication services per se in Venezuela, but to facilitate their satellite capacity to operators established in Venezuela and make it possible for the latter to rebound their signal on the foreign satellite when providing their own services. From a regulatory perspective, the legal nature of such capacity offering raises many questions. Therefore, the National Telecommunications Commission opened a public consultation proceeding ending on July 19, 2002, so interested parties may express their opinions with respect to the viability and convenience of several regulatory approaches and legal interpretations. The document subjected to public consultation proposes 3 different approaches, but invites interested parties to propose other ones if they deem it convenient. The issues are whether foreign satellite companies shall obtain a Venezuelan administrative license or concession for the use of radio electric spectrum, and whether such companies shall be subjected to all related obligations (establishment of a legal entity in Venezuela, subjection to terms and conditions of telecom licenses, tax obligations, etc.). It all depends basically on the interpretation given to articles 122 and 125 of the Venezuelan Organic Telecommunications Act. Based on the results of the consultation, the regulatory entity shall elaborate a draft body of regulations for satellite communications in Venezuela.

The National Chapter for Frequency Bands Allocation (NCFBA) was modified

On last June 10, the new NCFBA published in Official Gazette #5,590 extraordinary was substituted for the one that had been approved on July 4, 2001 and published in Official Gazette # 5,540-A extraordinary. However, the modifications made to the previous NCFBA appear insignificant. The nomenclature of some references to ITU normative was corrected, the highest and lowest frequencies of some frequency bands were slightly modified and national allocations for some services were reorganized, like for example, mobile cellular telephony (942-960 MHz) and satellite fixed communications (7,550 – 7,750 MHz). Additionally, a new portion of spectrum of 12 MHz was included in the spectrum allocable via license by merging the 450-500 MHz and 512-824 MHz bands into the new 450-824 MHz band. Nevertheless, it calls our attention the silent and unexpected way by which this modifications were made. Not because the modifications are undesirable or inconvenient, but because they seem illegal given the method used to implement them. It is widely known that not only the Telecommunications Organic Act (TOA) mandates that all rules to be dictated by the National Telecommunications Commission be first subjected to public consultation (article 11 of the TOA), but also that the Public Administration Organic Act (PAOA) establishes that all norms dictated without prior public consultation are null and void. (Article 137 of the PAOA). Thus, this would be the case of the new NCFBA. It also calls our attention the unusual way by which the modifications were presented in Official Gazette. Normally, when laws are reformed, the reforming provisions start by expressing the purpose of the modifications, the reformed norms are identified and the extent of the modifications are stated; and then, the new normative body is presented as a whole. In this case the method was different. The NCFBA of June 10, 2002 does not look like a reform. The modifying resolution neither identifies the reformed norms nor derogates the prior NCFBA of July 4, 2001. However, such latter omission was fixed after a few days of the publication: the NCFBA currently in effect was published on June 27, 2002 in Official Gazette # 5,592 extraordinary, in order to correct the “non-substantial error committed by the issuing entity” when omitting the derogation provision.

Abogados & Consultores herein summarizes some of the most relevant Venezuelan and Andean legal events closely related to the telecommunications, energy, public utilities and services based on advanced technologies.

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Legal Certainty and the concessions regime

The Venezuelan Department of Production and Commerce currently studies the convenience of impelling a reform of the Organic Act on the Promotion of Private Investment under the Concessions Regime (the Concessions Act), approved by President Chávez in 1999 in exercise of the faculties conferred to him by the first "enabling act", as opposed to issuing regulations under the Concessions Act. From the Government's point of view, the motive for the initiative is the inadequacy of the Concessions Act to promote investment under the concessions regime by small and medium-sized companies. In fact, the work advanced emphasises the simplification of the concession granting procedures (implying also quicker procedures), as well as the implementation of flexible and creative courses of action for investment which assure the viability of the projects of small and medium-sized concessionaires. However, in our opinion, the major defect of the Concessions Act is that it does not provide stability to private investment. It should not be ignored that the concessions regime is designed, mainly, to allow the government to delegate on private parties the carrying out of economic activities being otherwise reserved for the public sector; and that such design implies that concessionaires shall have the right to obtain reasonable profits as consideration for undertaking such responsibilities. Therefore, the state's obligation to guarantee the financial and economic balance of the concession agreement is of the essence for the stability of investments made by concessionaires. Such guarantee shall not be illusory, and that is why the Concessions Act is highly defective: it does not establish a concrete method to accurately quantify concessionaires' rights. In our opinion, the Concessions Act should be sufficiently explicit in two aspects. First of all, it should require that every concession agreement contains provisions quantifying the elements integrating the financial and economic equation for the specific exploitation, those being, estimated income, cost structure and investment plan in function of the obligations assumed plus duration and rate of return; thus providing the concessionaire with sufficient knowledge regarding its obligations, and the evaluation of the eventual breaking of the financial and economic balance of the agreement would be based on objective criteria. Secondly, the guarantee of financial and economic balance of the agreement should not be limited to those cases in which the breaking of the same is due to (i) unilateral modifications by the granting entity, (ii) characteristics of the works and services hired (article 39 of the Concessions Act), or (iii) acts, abstentions, facts and omissions being imputable to the granting entity and causing damages to the concessionaire (article 44 of the Concessions Act), but should extend to all facts or causes generating unforeseeable and adverse financial and economic effects for the concessionaire. Accordingly, it should be required that every concession agreement provides for the following principle: the granting entity shall guarantee the financial and economic balance of the agreement in any event causing the breaking of such balance. In case such breaking is due to unilateral modifications of the agreement by the granting entity, or to acts or omissions imputable to it, the concessionaire shall always be entitled to indemnification. In case such breaking is due to facts or circumstances not imputable to the granting entity, it shall be liable only for substantial breaking of the balance, that is, for breaking due to unforeseeable facts and circumstances. Until these terms and conditions providing stability to investments and legal certainty are implemented, the Concessions Act will remain unfruitful. The electricity sector renders a good example of this. The crisis currently affecting the electricity sector could be ameliorated should private investments be made via concessions. However, which private company would be willing to invest in a concession whose financial and economic balance is not guaranteed?

Approved new Expropriation for Social and Public Use Act

On last July 1, the new Expropriation for Social and Public Use Act (ESPUA) was published in Official Gazette. The new ESPUA replaces the prior one enacted in 1947. Certainly, given the evolution of the legal framework since then, the reform was necessary. However, we are of the opinion that the new ESPUA suffers from serious defects and inaccuracies. In this note we list those which we deemed to be the most important ones: (i) regarding the entities entitled to start an expropriation proceeding, the treatment afforded to the entities of the capital city is mistaken because only the Capital District is mentioned and the Metropolitan District of Caracas is ignored; (ii) regarding the conditions precedent for expropriation, the constitutional requirement of prior judicial decision is not mentioned (article 115 of the Constitution); (iii) the exceptions to the requirement of declaration of public use obviates the recently enacted regulatory frameworks of the electricity, telecommunications, gaseous hydrocarbons and drinkable water supply services; and (iv) an amicable expropriation proceeding is established, thus deforming the expropriation institution which is compulsory in nature and requires judicial intervention.

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The right of communications media to have a line of opinion

"Should communications media decide to assume in Venezuela the role of political opposition they are allowed to do so". Such declaration, given to the press on last June 21 by the Executive Director for Latin America of Human Rights Watch, José Manuel Vivancos, who visited Venezuela with the purpose of evaluating the human rights situation in the country, could shock many people since such an assertion contradicts the values of objectivity and fairness which must guide the work of the social communicator. However, Mr. Vivancos is right: communications media are not legally obligated to be impartial or objective in the provision of information, because otherwise freedom of expression would be jeopardized. Principle number 7 of the Inter-American Declaration of Principles on Freedom of Expression clearly establishes that "Prior conditioning of expressions, such as truthfulness, timeliness or impartiality is incompatible with the right to freedom of expression recognized in international instruments". Confronted with such principle, article 58 of the Venezuelan Constitution appears mistaken because the information which every person is entitled to receive cannot be qualified as truthful, timely and impartial since such qualification would attempt against freedom of expression. We do not intend to ascertain the juridical value of article 58 of the Venezuelan Constitution – which would necessarily be darkened by article 23 of the same – but to briefly explain the right to have a line of opinion as a corollary of freedom of expression. Accordingly, the Inter-American Declaration of Principles on Freedom of Expression prohibits the use of State power, in any way whatsoever, (i.e. through custom duties and currency exchange policies, the granting of licenses for the importation of paper or journalistic equipment, the concession of radio and television broadcast frequencies, the discriminatory placement of official advertising, the arbitrary imposition of information, etc.), to punish or reward social communicators and communications media because of their opinions. That is, according to international law, communications media may have a line of opinion, such right being a fundamental and inviolable one. For those wondering about the values of objectivity, truthfulness, timeliness, fairness and accurateness of information, it is necessary to say that such values are not contrary to freedom of expression. However, from a legal point of view, the observation of such values is not mandatory because they belong solely to the field of the professional ethics of social communicators and media, not to the field of the law. In a free society, as indicated by principle 9 of the Chapultepec Declaration (reaffirmed by the Inter-American Declaration of Principles on Freedom of Expression), "it is public opinion that rewards or punishes"; or in other words, in a free society, the only judge of communications media is public opinion.

Colombia's PCS

The Colombian Communications Department, through Resolution # 857 of July 3, 2002, formally ordered the opening of a public auction for personal communication services ("PCS"). Consequently, three licenses for the eastern, western and Atlantic Cost regions shall be granted, such areas being the same as those previously allocated by the Act # 37 of 1993 for cellular mobile telephone services. The Act # 555 of year 2000 set forth the legal ground for the auction process and created the legal framework for the development of PCS services. It calls our attention that such Act provides for licensees' obligation to list their shares in any of the Colombian stock exchanges within a term not longer than three years following the entering into effect of their respective license agreements. Such obligation will force the new entrants with correct accounting and financial dealings from the very beginning. Therefore, such companies shall have to adapt themselves to the requirements of the securities market and its authorities within the above mentioned term; otherwise their licenses shall automatically expire.

The information contained in this newsletter does not constitute legal advice on the subjects addressed. Therefore, we recommend that the reader consults with its attorney before assuming any position on such matters.