

Venezuela or the short of cash Legislator that did not take himself seriously.

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What goods are public property and who owns them? Once upon a time, the answer was easy, all mines and the king. The notion of royalties emerged as payments due to the king for the right of exploiting its assets. In the story of our lifetimes the king was replaced by the State and by the idea that all citizens own the State although only a few control it and profit from it. In some countries, kings have been replaced by “new kings” who do not receive this name but behave as if they owned their homeland, its resources and most importantly are above the law.¹ Thus, what are the public goods and who profits from their exploitation is still a relevant question. For purposes of the oil and gas industry, should such public goods include only oil and gas reservoirs in place and main productive assets, or extend to tools, boats and notebooks and pencils on the managers desk, and the manager? The recurring question regards who receives the benefits of certain economic activities, whether few members on the boards of companies such as Exxon-Mobil or “new kings” such as Hugo Chavez and his close friends. Further, who cares about the interests of ordinary people?

The White Collar nationalization to effectively control any asset by those in power.

On May 7, 2009 the Venezuelan Congress² issued an Organic Law that reserved to the State Goods and Services related to Primary Hydrocarbon Activities. The new law is the most recent trend in the recurring topic of nationalizations. This time however, the State acted like a white collar thief, through congress and even the judiciary, and through legislation that while transferring assets to the State does not characterize such measure as an expropriation.

Most nationalizations have been ordered by the Executive branch of government and as political responses to specific developments regarding the price of crude oil. The May 7, 2009 example is unique in many ways:

- it is a nationalization that hides its true nature.³
- it involves the concerted action by the Legislative, the Judiciary, the Executive and the National Oil Company.⁴

¹ In Venezuela after Hugo Chavez took power, the Asamblea Nacional or national Congress enacted a law that essentially transferred the legislative power to the Executive during a period of time. While such “enabling law” was in force Hugo Chavez was not only President but dictated what is the law in Venezuela.

² *Asamblea Nacional*, which is Venezuela’s Legislative power. In the Venezuelan legal system an Organic Law must be approved by 2/3s of the Legislature and must be found adjusted to the Constitution by the country’s highest court (*Tribunal Supremo de Justicia*)

³ While the practical effects of the Reserving Law and the Resolution issued by the Ministry of Energy and Petroleum is to deprive private companies of assets without compensation and to transfer such assets to PDVSA, the Venezuelan State National Oil Company, the documents are drafted to exclude the notion of expropriation.

- it is opposed to previous legislation issued by the same Legislative branch.
- it is discriminatory and essentially subjective.⁵
- it orders the State National Oil Company to perform an illegal act, i.e. to take possession of assets that belong to someone else.⁶
- it compels private parties owners of assets and operations to cooperate in the transfer of possession under the threat of criminal prosecution by the state.⁷
- any asset may be deemed of public policy interest.⁸
- the law allows expropriations pursuant to the Law on Expropriations but amending its contents.⁹

The king is back. However, now he wants to own not only the public goods but anything he may desire. Further, since lower oil prices have reduced its income, he may act in any manner to force companies to accept lower payments than those to which they are entitled to. More than five hundred years of legal debate about rights, due process and entitlements suddenly went down the drain.

The substance of this legislation is not new. The Venezuelan Constitution enacted ten years ago¹⁰ already included a provision reserving to the State the petroleum industry and other business, services and goods having a public interest and strategic character.¹¹ It makes no sense that a legislature that only ten years ago enacted a new Constitution and less than four years ago issued the main Hydrocarbon Law, does not take its own precedents seriously. The new legislation is opposed to many provisions of the Venezuelan Constitution. It disregards article 6 of the Constitution pursuant to which, Constitutional provisions are the supreme law of the land. The new law is opposed to Constitutional article 55 pursuant to which the Venezuelan State agrees to protect private

⁴ The Reserving law was approved by the Venezuelan Congress after it was reviewed and approved by the Constitutional Court. The Reserving Law and the Resolution that implements its provisions establish that the Ministry of Energy and Petroleum determines what services and assets will be taken. And lastly, all assets and services become the property of PDVSA and its subsidiaries.

⁵ As opposed to applying to everyone who may meet certain conditions, the Reserving Law essentially authorizes the Executive to determine what assets and services will be transferred from private ownership to the ownership and control of PDVSA. See article 3 of the Reserving Law.

⁶ As a matter of law possession is a fact. Someone is or is not in possession of a good or asset. Venezuelan Civil Code Article 771 defines possession as holding a thing or enjoying a right over a thing that we or someone else holds on our behalf. By ordering PDVSA to take possession of assets the decree is implicitly confiscating the property over such assets. Under Venezuelan law possession is in good faith only when the possessor possesses as owner having fair title. Clearly PDVSA cannot be a good faith possessor knowing that someone else holds a valid title over the property. Lastly, it is so clear that what PDVSA is doing is wrong that the law requires that the time during which PDVSA is in possession should be taken into account for purposes of determining fair compensation for expropriation purposes.

⁷ The threat of criminal sanctions is a clear extortion.

⁸ Article 5 of the Reserving Law declares that any works, assets and services that are related to primary oil and gas activities are deemed a matter of public interest.

⁹ Pursuant to article 6 of the Reserving Law the Executive may order an expropriation pursuant to the Law on Expropriations. However article 6 provides that fair compensation means book value when the Law on Expropriations refers to market value

¹⁰ The Venezuelan Constitution was published in the country's official Gazzette on December 30, 1999

¹¹ Article 302 of the Venezuelan Constitution provides: The State reserves for itself, through the corresponding organic law, and for national convenience reasons, the petroleum business and other industries, exploitations, services and goods of public interest and strategic character.

property. It is also against Constitutional article 115 which guarantees property rights and provides how an expropriation may be ordered. Under this provision an expropriation may only occur for public policy purposes, if ordered by a court of law and paying fair compensation. The new law violates constitutional due process provisions and provisions against discrimination. Under Venezuelan law, the new law, and its resolution are null and void as they violate Constitutionally protected rights.¹²

A law like the Organic Law that Reserved to the State Goods and Services Related to Primary Hydrocarbon Activities, that grabs legitimate possession away from property owners and places such property under the effective control of the National Oil and Gas Company without a valid public purpose¹³, with no previous judicial order and without paying compensation not only is unconstitutional, it is outright theft.

In May 2006, the same Congress had enacted the Hydrocarbons Organic Law. Interestingly, at that time the legislator provided that all matters related to the exploration, exploitation, refining, industrialization, carriage, storage, marketing and conservation of hydrocarbons, including works required by such activities, would be governed by the law. Article 9 of the 2006 Hydrocarbons Organic Law defined the expression “Primary Hydrocarbon Activities”¹⁴, which included transportation or carriage, and citing Constitutional article 302 reserved to the state such activities as well as any works required for their management.

The 2006 Hydrocarbons Organic Law provided that the “primary activities” would be performed by the State, either directly by the Executive Branch or through state owned companies.¹⁵ The law also contemplated that the expropriation of private owned property could be necessary and required that the special law on expropriation be observed¹⁶ being thus consistent with the Constitutional provision on the same subject matter.

Reviewing the 2006 Hydrocarbons Organic Law is important for several reasons. The law was enacted after the 1999 Constitution. The legislation has the nature of an “Organic Law” for the Hydrocarbon industry, meaning that the law was supposed to

¹² Under Constitutional article 25 any act by a public power that is against a Constitutional provision is as a matter of law null and void. (Todo acto dictado en ejercicio del Poder Público que viole o menoscabe los derechos garantizados por esta Constitución y la ley es nulo, y los funcionarios públicos que lo ordenen o ejecuten incurrir en responsabilidad penal civil y administrativa, sin que les sirvan de excusa órdenes superiores.”)

¹³ What was a valid public purpose and what were public policy issues had been reviewed by the same Venezuelan Legislator when enacting the Hydrocarbons Organic Law. Thus, disregarding a conclusion adopted less than four years ago questions whether any rule of law is possible.

¹⁴ The Hydrocarbons Organic Law defines as “Primary Activities” the exploration, exploitation, collection, carriage and storage of hydrocarbons.

¹⁵ Article 22 of the Hydrocarbons Organic Law provides that primary petroleum activities may be performed by companies in which the state owns

¹⁶ See Hydrocarbons Organic Law, article 39. The Organic Law has a higher standing if compared to ordinary laws. In this case the Organic Law that was supposed to regulate the entire hydrocarbon industry made specific reference to a special law, i.e. the Law on Expropriation.

include all basic legal provisions to govern the industry.¹⁷ The law was approved by a Chavez controlled legislature and copied the wording of Executive Decree 1510 of 2001.¹⁸ Further, the nature, scope and effects of the law were critical for a country like Venezuela where oil and gas activities dominate the local economy and constitute the basis of the State's revenue.¹⁹

The purpose of the 2006 Hydrocarbons Organic Law was clear: reserve for the State all primary hydrocarbon activities; confirm State ownership of all hydrocarbon reservoirs and declare, as a matter of law, that primary hydrocarbon activities are matters of public policy and social interest.²⁰ In other words, the law defined that upstream oil and gas activities are reserved to the State while downstream activities could be performed by the State and/or private parties.

The fundamental question is whether it was possible under the provisions of the Hydrocarbons Organic Law to expropriate the property of companies engaged in exploration and/or exploitation related activities. I believe the answer is affirmative. However, in theory, and if one would take Venezuelan law seriously, this would mean observing the Law on Expropriation.²¹ The same legislator had provided that the following rules control all expropriations:

- a. The governing and applicable law was the special law on Expropriations.
- b. A formal declaration of the public purpose of the work by Congress is required.
- c. A mandatory amicable effort to reach an agreement to purchase the property by the expropriating entity²² is necessary.
- d. An Expropriation Decree issued by the executive authority is required.²³
- e. The adequate and timely payment of fair compensation is indispensable.
- f. Expropriation required a judgment by a court of law.

In 2002, a Chavez controlled Congress approved that expropriation requires a court order and payment of fair compensation. This notion, the legislator thought in 2002, should include compensation for the loss of use²⁴, and timely payment of compensation

¹⁷ See Hydrocarbons Organic Law, Article 1. This provision establishes that "all matters related to the industry and carriage of hydrocarbons would be regulated by the law." (*Todo lo relativo a exploración, explotación, refinación, industrialización, transporte, almacenamiento ...y a las obras que la realización de estas actividades requieran, se rige por esta Ley.*)

¹⁸ One would expect that a Congress controlled by Chávez that had the opportunity to issue the petroleum sector governing law, would rule on all critical issues. The Hydrocarbons Organic Law copied verbatim the contents of Decree 1510 issued by president Chávez pursuant to the legislative powers granted to him by Congress. Thus, the Hydrocarbons Organic Law had the same contents as the Chavez decree, the only difference was that now the provisions were issued by the Legislative body.

¹⁹ According to the CIA fact-book, 50% of the federal revenues depend on oil revenues. See CIA. The World Fact Book. Available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ve.html> last consulted on August 11, 2009.

²⁰ See Hydrocarbons Organic Law, Article 4.

²¹ On July 1, 2002 the Venezuelan Congress enacted the Law on Expropriation

²² See article 22 of the Law on Expropriation.

²³ The expropriation decree may be issued by the President, a Governor or a mayor.

²⁴ See article 41 of the Venezuelan Law on Expropriation.

before the owner could be deprived of his property.²⁵ Further, in 2002, the Venezuelan legislator thought that the notion of fair compensation included an analysis of loss of production and the average market price of similar property.²⁶ Now in 2009 the legislature changed its mind, loss of income and consequential damages are out of the question and book value will control.²⁷ If it issued inconsistent provisions sometime the legislature must have been wrong.

When in May 2009 the Venezuelan Congress approved a new law, now reserving to the State other goods and services deemed ancillary to primary oil and gas operations, it violated the Venezuelan Constitution, and did not take seriously legal provisions enacted by the same legislative body a few years ago.

Extending to State control and ownership any activity that may be related to primary oil and gas activities at the discretion of the Ministry of Energy and Petroleum, may cover any service and any asset. Thus, the step back is not just to the eighteenth century but to the middle ages and feudalism.²⁸

Chavez and PDVSA are short of cash. Instead of dealing with these issues commercially or even legally, they do so through the legislature. They decide that whatever they decide is essential for the well being of the state and must be transferred to the estate of the national oil company. They order that the estate oil company take possession of assets that clearly belong to someone else, and threaten the owner with criminal sanctions. They realize that what they are doing is wrong since they must remember that seven years ago they legislated on the issue of expropriation. However, since the bottom line is that they do not want to pay they disregard their own Law on Expropriation. The recent developments violate international law and disregard Venezuelan law. However, what could be expected from a legislature that does not take itself seriously?

When the Legislature is the first one to violate the law, the seeds of the true revolution have been effectively planted.

²⁵ See articles 7 and 45 of the Venezuelan Law on Expropriation.

²⁶ See article 36 of the Venezuelan Law on Expropriation.

²⁷ See article 6 of the Reserving Law.

²⁸ The Ministry of Energy and Petroleum is empowered to determine what personnel that used to work for oil and gas service providers will now become PDVSA employees. So much for the freedom of contract.